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> One belief, more than any other, is responsible for the slaughter of individuals on the altars of the great historical ideals—justice or progress or the happiness of future generations, or the sacred mission or emancipation of a nation or race or class, or even liberty itself, which demands the sacrifice of individuals for the freedom of society. This is the belief that somewhere, in the past or in the future, in divine revelation or in the mind of an individual thinker, in the pronouncements of history or science, or in the simple heart of an uncorrupted good man, there is a final solution.[1]

INTRODUCTION

When James Madison wrote his famous warning to Thomas Jefferson that bills of rights were no more than "parchment barriers,"[2] he may have had in mind a concern very similar to that of Isaiah Berlin about the dangers of "final solutions." Words on paper, Madison may have thought, will not restrain a democratically elected majority that knows the "truth." Madison may also have known that ultimately even the Supreme Court would be subject to democratic political forces.[3] He may also have known how intolerant and tyrannical those forces could be.[4]

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1. ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 167 (2d ed. 1970).

2. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 11 THE PAPERS OF JAMES MADISON, 1788-1789, at 295-300 (Robert A. Rutland & Charles F. Hobson eds., 1977).

3. THE FEDERALIST No. 39, at 242 (James Madison) (The New American Library ed. 1961).

4. 11 THE PAPERS OF JAMES MADISON, *supra* note 2, at 298-300. This remarkable letter to Jefferson includes, *inter alia*, the following insights:

> In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents . . . . Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party than by a powerful and interested prince. . . .
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> . . . The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public; and after repeated violations in extraordinary cases, they will lose even their ordinary efficacy.

Id. (emphasis in original).

Madison understood the conflicting values inherent in the Constitution.[5] Virtually the entire document is devoted to defining structure and process in an effort to ensure the government functions "democratically."[6] At the same time, the government created by the Constitution is one of limited and enumerated powers. Many of the framers believed that the inherent limitations of the central government were obvious from the text of the Constitution.[7] The people need not fear a government doing something which it manifestly has not been empowered to do. So important were the rights "retained by the people"[8] that the states refused to ratify the new Constitution without a promise that a Bill of Rights be appended to it.[9]

This Note argues that, some two hundred years after the adoption of the Bill of Rights, Madison's fears are being realized. The "parchment barrier" is being pierced by the forces of a "great historical ideal,"[10] the democratic political process.[11] Energized by the economic conditions of the 1930s, the political process, in the 1980s and 1990s, may be taking on

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5. *Id.*

6. The notion of just what "democratically" means has evolved over the years. Even today there is no universally adopted definition. Some would say that it means "equality"; some would say that it means "freedom"; others would say that it simply means representative of "the people." The governmental structure and process set forth in the Constitution is "democratic" in that ultimate power flows from those persons designated as electors; sometimes directly, as with the House of Representatives, and sometimes indirectly, as with the Supreme Court. Other than the direct election of senators and the election of the Vice President, the basic structure has not changed much. The definition of electors, on the other hand, has expanded dramatically from white, male, property owners to virtually universal adult suffrage. *See, e.g.*, Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1051-57 (1984) (using "democratic" to mean majoritarian and materially egalitarian); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 439 (1987) (describing "common law market ordering" as undemocratic and "collective control" as "necessary to achieve democracy").

7. ROBERT A. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS: 1776-1791, at 132-33 (1983); THE FEDERALIST No. 84, at 513 (Alexander Hamilton) (The New American Library ed. 1961).

8. U.S. CONST. amend. IX.

9. RUTLAND, *supra* note 7, at 126-28.

10. *See supra* text accompanying note 1.

11. The term "political process" is used in this Note to mean democratic majoritarian control of the coercive power of the state without constraints respecting the autonomy of disagreeing minorities. The political process ideal incorporates the belief that citizens in the political minority may legitimately be used as a means to achieve the ends of citizens in the political majority, with justification resting on nothing more than the fact of numerical superiority. *See infra* note 41 and accompanying text. To be sure, the rise of the political process ideal, almost by definition, is not an unhappy event for those who count themselves among the political majority. Some legal scholars see the fading of the Bill of Rights as the long awaited solution to the "countermajoritarian problem" that has always plagued the "democracy as material equality" school of political thought. *See, e.g.*, Ackerman, *supra* note 6; Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 715 (1985); Erwin Chemerinsky, *The Supreme Court 1988 Term—Forward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 61 (1989); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 876-83 (1987); Sunstein, *supra* note 6, at 422-25.

the status of a "final solution," that is, an ideal so revered that it is invoked to justify the violation of other highly valued ideals. "[A]fter repeated violations in extraordinary cases," the values of the Bill of Rights are losing "even their ordinary efficacy."[12]

The argument made in this Note, that the values of the Bill of Rights are being crowded out by political process values, rests on an analysis of several key decisions of the modern Supreme Court[13] in which the issue of individual autonomy versus state control is clearly drawn. This Note compares these decisions, and the values on which they are based, with several important and familiar decisions of the 1930s. The discussion of the New Deal cases may present a perspective not normally found in law school casebooks. The central thesis of this Note is that, contrary to the received wisdom, the "conservative"[14] decisions of the modern Court are the logical, even inevitable, extension of the New Deal Era decisions and the political process values on which those decisions were founded. To the extent that the Bill of Rights is vanishing, it began to fade in the 1930s.[15] Further, this Note demonstrates that the modern decisions may show the emergence of a majoritarian consensus that threatens to render the concepts of limited government and individual autonomy virtually meaningless "when opposed to the decided sense of the public,"[16] not only with respect to economic activities, but also concerning the most intimate aspects of our daily lives. Finally, this Note suggests that the conventional political labels "conservative" and "liberal" are no longer adequate and should be replaced by "majoritarian" and "libertarian," respectively, terms that more accurately reflect the fundamentally opposed values at work in American jurisprudence.

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12. 11 THE PAPERS OF JAMES MADISON, *supra* note 2, at 300.

13. For the purposes of this Note, the "modern" Court can be measured from the decision in Bowers v. Hardwick, 478 U.S. 186 (1986), where the Court halted the expansion of the right of privacy and signaled the second end of substantive due process. *See infra* part III.A. The analysis of these cases is not intended to represent an exhaustive review of "modern" Supreme Court decisions, but only to identify a line of reasoning which gives great weight to what is called here "political process values" at the expense of "Bill of Rights values." To the extent that these cases rest on political process values, they are the logical extension of the "liberal" decisions of the New Deal and not reflective of entrenched "conservatism."

14. *See, e.g.*, CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRST HAND ACCOUNT (1991); Chemerinsky, *supra* note 11, at 45; Christopher E. Smith, *The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution*, 79 KY. L.J. 317 (1991); Charles A. Reich, *The Individual Sector*, 100 YALE L.J. 1409 (1991); Richard Lacayo, *Confessions That Were Taboo Are Now Just a Technicality*, TIME, Apr. 8, 1991, at 26.

15. *See* Chemerinsky, *supra* note 11, at 62.

16. 11 THE PAPERS OF JAMES MADISON, *supra* note 2, at 300.

Part I discusses the conflicting ideals within the Constitution—individual autonomy and democratic political processes—and suggests that the belief in "natural rights," implicit in Bill of Rights values, has not really been rejected at all, even by legal scholars. Rather, it is alive and well in (almost) all of us.

Part II contains a brief overview of the New Deal revolution[17] on the Supreme Court. This is an oft-told tale and it is not retold here in its full richness.[18] However, some attention is given to background, including the *Lochner* Era, and the ideological motivations of the Roosevelt Administration.[19] Part II also briefly analyzes the arguments of "legal realism," which helped bring about the New Deal revolution on the Court, as well as these arguments' more modern extensions, which may be called "political choice" or "baseline analysis." The focus of Part II is, however, a somewhat contrarian discussion of several familiar Supreme Court decisions of the 1930s.[20] These New Deal Era cases are generally held out as representing the Court's "capitulation" to the Roosevelt Administration's political agenda,[21] as well as redefining the terms and values of modern constitutional jurisprudence in line with modern "liberal" interpretation.[22]

Part III discusses four key decisions of the modern Court which raise issues of individual autonomy versus state control: *Bowers v. Hardwick*,[23] *Barnes v. Glen Theatre, Inc.*,[24] *Employment Division,*

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17. This term has become generic. Recent examples of its use can be found in Edley Christopher, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 582 (1991), and Reich, *supra* note 14, at 1409 n.1.

18. *See generally* BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 6-22 (1984) [hereinafter ACKERMAN, RECONSTUCTING]; BRUCE A. ACKERMAN, WE THE PEOPLE (1991) [hereinafter ACKERMAN, WE THE PEOPLE]; JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 184-203 (1980); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-5 to -7, at 434-55 (2d ed. 1988); Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 216-18 (1987) (arguing that *Bowers* represented the end of a revival of substantive due process and finding parallels with the 1930s); Sunstein, *supra* note 11.

19. Sunstein, *supra* note 6, at 421, 422 (discussing the New Deal belief in energetic national government and the desire to protect public officials from partisan pressures).

20. United States v. Carolene Products Co., 304 U.S. 144 (1938); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Nebbia v. New York, 291 U.S. 502 (1934).

21. *See, e.g.*, ACKERMAN, RECONSTRUCTING, *supra* note 18; SIEGAN, *supra* note 18, at 184-90; TRIBE, *supra* note 18, § 8-7, at 450; Sunstein, *supra* note 6.

22. *See, e.g.*, TRIBE, *supra* note 18, §§ 8-5 to -7, at 442-55.

23. 478 U.S. 186 (1986).

24. 111 S. Ct. 2456 (1991).

Department of Human Resources v. Smith,[25] and *Rust v. Sullivan*.[26] Part III also documents the growth of the Positive State[27] since the New Deal and suggests that *Smith* and *Rust* may demonstrate the impossibility of maintaining the judicial double standard between economic and noneconomic legislation. Part III concludes that each case, in its own way, reflects the modern Court's adoption of political process values.

In Part IV, the New Deal cases from Part II are compared to the modern cases discussed in Part III. The comparison identifies important similarities and raises questions about the accuracy and utility of characterizing the decisions as "liberal" or "conservative." Part IV also emphasizes the distinction, which grew out of *Carolene Products*[28] and other New Deal decisions, between economic activities and noneconomic activities. Part IV concludes that the modern cases reflect the same political process values as the New Deal cases and that the modern cases may portend a disintegration of the celebrated economic/noneconomic distinction.

This Note concludes that Madison's fears of two hundred years ago were well founded. It suggests that Bill of Rights values will regain their leading position in the Supreme Court's jurisprudential hierarchy only when our prevailing notion of the "good society" incorporates the recognition of individual diversity and liberty and rejects the idea that there can be a political "final solution."

I. CONFLICTING CONSTITUTIONAL IDEALS

A. The Political Process and the Bill of Rights

The Constitution contains ambiguous provisions and reflects conflicting values.[29] Most of the original document is devoted to defining structure and process. These provisions do not address *what* the government will do, only *how* it will do it. The premise, as every schoolchild learns, is that separation of powers among competing units of variously representative

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25. 494 U.S. 872 (1990).

26. 111 S. Ct. 1759 (1991).

27. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984) (arguing that the New Deal inaugurated the emergence of the Positive State and that all rights are positive in a Positive State).

28. United States v. Carolene Products Co., 304 U.S. 144 (1938). The two important distinctions drawn by Justice Stone in the *Carolene Products* decision are discussed *infra* at Part II.E.

29. *See, e.g.*, HENRY S. COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 4-5 (1950); ELY, *supra* note 18, at 76-77; Ackerman, *supra* note 6, at 1043; Reich, *supra* note 14, at 1411.

bodies will ensure: first, that only those proposals obtaining broad approval will be enacted, and second, no single faction or interest group will gain domination over the entire governmental process.[30]

Other provisions of the Constitution, however, especially the Bill of Rights, address *what* the government may or may not do. They designate certain areas that are "off limits" to the central government, regardless of how "democratic" the process utilized and regardless of how large a majority believes that it knows the "correct" solution to a problem.[31] These provisions include:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[32]
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> . . . [T]he right of the people to keep and bear Arms, shall not be infringed.[33]
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> . . . .
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> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .[34]
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> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[35]
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> . . . .
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> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[36]

There may be reasoned disagreement about the exact definitions of some of these terms and, therefore, disagreement as to the exact contours and scope of these prohibitions. There cannot be, however, disagreement as to whether these words are intended to limit the reach of government power.

The constraints on what the government may constitutionally do are not limited to the Bill of Rights. Article I, sections 9 and 10, contains a

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30. *See* THE FEDERALIST No. 10 (James Madison).

31. Because this Note argues that a constitutional interpretation emphasizing political process values essentially rejects constitutional limits on the power of the political majority, it is important to identify the words in the Constitution that must be overcome by such an interpretation.

32. U.S. CONST. amend. I.

33. U.S. CONST. amend. II.

34. U.S. CONST. amend. IV.

35. U.S. CONST. amend. V.

36. U.S. CONST. amend. IX. *See also* TRIBE, *supra* note 18, § 11-3, at 569-70 (recalling the history of the Ninth Amendment and the framers' fear "that rights which were not singled out were intended to be assigned into the hands of the General Government, and were consequently insecure") (quoting 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1834)).

listing of other acts prohibited to the federal and state governments. These prohibitions include: suspension of the "Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion,"[37] passage of "Bill[s] of Attainder" or "ex post facto laws,"[38] and laying of taxes or duties "on articles exported from any state."[39] Also, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[40] Some of these limitations are absolute—"Congress shall make no law"—while others are conditional—"without due process of law."

It is important to recognize that there are constitutional limitations on the power of government even though ours is a "democratic" government. In its most fundamental sense, the Constitution is the set of rules according to which we determine when citizens may legitimately use force—to compel behavior or confiscate property through the use or threat of physical violence—against their fellow citizens. The Constitution authorizes and legitimizes the use of force by some citizens, acting through and as the state, against other citizens. The provisions of the Constitution that deal with *what* the state may do, therefore, comprise a division of power between the state and the individual. These provisions answer the question, "Who decides?" To the extent the state is authorized, the answer is that the majority of designated electors decides, acting through the democratic political process. To the extent the state is not authorized, the answer is that the individual may decide for herself.[41] The state is not authorized, for example, to establish a state religion, to restrict free travel among the states, or to limit career choices based on aptitude tests. The state is authorized, on the other hand, to establish safety and performance standards for automobiles and to extract taxes from earned income. The state is also authorized to use force to implement its decisions.[42]

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37. U.S. CONST. art. I, § 9.

38. *Id.*

39. *Id.*

40. U.S. CONST. art. I, § 10.

41. This Note does not address the extent to which the political process actually reflects the wishes of the arithmetic majority of designated electors. It is assumed that such majority has the power to effectuate its desires within those areas subject to majority control. To the extent the majority does not exercise that power, the resulting policies are established with the tacit approval and/or sufferance of the majority. This is not to say that corruption and rent seeking do not occur. The term "political majority" is used to distinguish that group or groups able to wield the power of the state through the political process from the numerical majority of electors.

42. If this seems elementary, that is good. It means that the idea of limits on the power of the state is taken for granted. In light of some recent Supreme Court decisions, however, it is very important to establish that such limits do, and *ought* to, exist. *See infra* part III.

Thus, the very scheme of the Constitution establishes a tension between two highly valued ideals. The first is the ideal of individual autonomy; that is, the belief that every person should have a certain sphere of activity free from the control of others; that every person has "certain unalienable rights";[43] that these rights are "pre-political" and are not the construct of any government, but that governments are established to protect such rights; that the Constitution establishes an island of enumerated state powers within a sea of individual rights, so that any residuum of power resides with the individual; that citizens have equal legal status so that some citizens may not be used by the state to benefit others; that rights are a function of a person's humanity so that no citizen can have rights that others do not. This Note refers to this ideal as Bill of Rights values.

The second ideal in the Constitution, an ideal in conflict with Bill of Rights values, is that of democratic self-government by "The People": the belief that matters affecting the whole of society should be decided "democratically" by rule of the political majority; that rights do not inhere in persons, but are the construct of the state; that burdens and benefits should be allocated in the interest of fairness and justice for all, as the political majority defines "fairness" and "justice"; that the Constitution establishes a sea of state power while carving out an island of enumerated individual rights, so that any residuum of power resides in the state. This Note refers to this ideal as political process values.

The fundamental distinction between Bill of Rights values and political process values goes beyond presumptions favoring the state or the individual. Use of political process values inevitably enlarges the field of state power by requiring textual support for exemptions from it.[44] Because the original constitutional scheme never contemplated such a presumption of state power,[45] such textual support is available only for those few ambiguously worded matters singled out as examples by the framers of the Bill of Rights. Even when textual support is available, the Supreme Court, when applying political process values, will often insist on weighing the individual's interest against that of the state. Such balancing occurs notwithstanding the unequivocal text of the constitutional

43. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

44. Reich, *supra* note 14, at 1415.

45. Randy E. Barnett, *James Madison's Ninth Amendment*, *in* THE RIGHTS RETAINED BY THE PEOPLE (Randy E. Barnett ed., 1989); RUTLAND, *supra* note 7, at 132-33; SIEGAN, *supra* note 18, at 29-30; TRIBE, *supra* note 18, § 11-3, at 570.

provision which strongly suggests that the framers have already engaged in a balancing of interests and decided in favor of the individual.[46]

B. Natural Rights

In claiming that the values of individual autonomy are represented by the Bill of Rights, it is necessary to address the contention that so-called "natural rights" theories have been uniformly rejected by legal scholars and the courts.[47] It seems to be a given among legal scholars today that the notion of "natural rights" is an anachronism. When Judge Clarence Thomas was nominated to be a Justice of the Supreme Court, for example, he was ridiculed for having expressed a belief in "natural rights" in some of his writings.[48] Such beliefs seem to label a person as "out of the mainstream" and "not to be taken seriously". To be sure, "natural rights" are easily confused with a version of "natural law" that advances the notion of some quasi-religious "natural order of things," handed down on stone tablets, or written in a holy book. To the extent that "natural rights" are derived from this conception of "natural law," they seldom claim serious consideration by legal or other scholars. Too many true evils, from slavery, military conquest, and sexism, to censorship and racial segregation, have been perpetrated in the name of such "natural law."[49]

There is another, secular, conception of "natural rights," however, in which virtually all Americans would affirm a belief. This is the belief that every person, just by virtue of his or her humanity, has a dignity, an integrity, a value, that commands respect. It is this humanist conception of "natural rights" that makes one deplore, for example, the very idea of slavery. The thought that at one time in this country some human beings could use other human beings against their will is both embarrassing and repugnant to us all. That we deplore the practice, even though it was perfectly legal, reflects our belief in some "higher value," some "natural right" of human beings, that is superior to the political process. It is a belief in this conception of "natural rights" that would make most Americans profess that there are some acts that persons *ought not* do to other persons and, therefore, governments *ought not* do to their citizens.

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46. *See infra* notes 78-84 and accompanying text.

47. *See, e.g.*, Chemerinsky, *supra* note 11, at 65-70.

48. *See, e.g.*, David Margolick, *Sizing Up the Talk of "Natural Law,"* N.Y. TIMES, Sept. 12, 1991, at A22; *Natural Law, Then and Now*, N.Y. TIMES, Sept. 12, 1991, at A24.

49. This is not to denigrate religious belief as a basis for personal morality, but only to recognize that such beliefs, for the reasons stated in the text, are not generally regarded today as an appropriate basis for political morality.

When legal scholars condemn the decisions of the Supreme Court, they often base their judgments on their belief in nontextual, "natural right" values that inform their interpretation of the constitutional text and limit the reach of the state. Those who reject the notion of "natural rights" have no difficulty appealing to their own versions of extra-textual standards and values. Rather than call these ideals "natural rights," they may be called "moral values," or "justice," or "fairness," or a "vision" of the "good society."

The exact definition of these "natural rights"—just exactly what limits they place on government—is, it seems to this observer, the central question of constitutional law. The essential point is, however, that almost everyone agrees that some limits exist outside of the constitutional text. The disagreement is about the extent and contours of those limits, and the values that determine them.

C. Majoritarianism

The conflicting ideals within the Constitution are also captured in the notion of majoritarianism. The concept, like democracy itself, has at least two dimensions. On the one hand, the term means that government should reflect the desires of the majority, that is, "majority rule." This "majority rule" aspect of majoritarianism might be called its vertical dimension because it describes the linkage that should convey the wishes of the people to their representatives in government. If one were to draw an organizational chart of political society, for example, the people would probably be spread across the bottom of the page and various levels of government arrayed above. In this sense, "majority rule" majoritarianism is vertical because it refers to communication from the bottom to the top.

The other dimension of majoritarianism concerns the subject matter with respect to which the majority should rule. In a debate as to whether a particular matter should be left to individual decision or decided for all by majority vote, those advocating a majority vote are called majoritarian. Because it concerns the scope or width of "majority rule" application, this aspect of majoritarianism might be called its horizontal dimension.

The dual dimensions of majoritarianism mirror the dual constitutional ideals of Bill of Rights values and political process values. Political process values emphasize the vertical aspect of majoritarianism. The government should represent the will of the people and democratic processes should be enforced to ensure that it does. Bill of Rights values emphasize limiting the scope of horizontal majoritarianism. The government should, indeed, represent the will of the people, but only with

respect to certain matters. The width of the majority's reach must be limited.[50]

D. Negative and Positive Rights

An example that illustrates the fault line between Bill of Rights values and political process values is our society's ambivalent conception of what we call "rights." The conception of rights that flows from Bill of Rights values is often referred to as "negative" rights.[51] "Negative" rights require nothing of the state or other citizens except forbearance. The familiar freedoms of speech, press, and religion, for example, are all "negative" rights, because no act by another is required to realize them.

Under the logic of Bill of Rights values, the state exists to protect these negative rights by providing "defense" mechanisms such as a criminal justice system, a civil judiciary, and a national defense. Philosopher Robert Nozick has expressed the conception of the state that is derived from Bill of Rights values:

> [A] minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; . . . any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified; [and] . . . the minimal state is inspiring as well as right. Two noteworthy implications are that the state may not use its coercive apparatus for the purpose of getting some citizens to aid others, or in order to prohibit activities to people for their *own* good or protection.[52]

The notion of "positive" rights, on the other hand, is a creature of political process values. To have a "positive" right is to have a claim against the state, that is, other citizens, for some good or service other than the "defense" mechanisms mentioned above. A "positive" right is an

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50. *But see* Akhil R. Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131 (1991). Amar argues that the main function of the Bill of Rights is "not to impede popular majorities, but to empower them" through structural interdependence with constitutional processes, and is, therefore, an essentially majoritarian document. *Id.* at 1132. Amar does not distinguish the two aspects of majoritarianism discussed in the text. To the extent that he is suggesting that the Bill of Rights furthers the notion of vertical majoritarianism, that is, that it helps to ensure whatever actions taken by the state are consistent with the majority's desires, his thesis is not controversial.

51. *See generally* BERLIN, *supra* note 1, 118-72; TIBOR R. MACHAN, INDIVIDUALS AND THEIR RIGHTS (1989); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); HENRY SHUE, BASIC RIGHTS (1980); Susan Bandes, *The Negative Constitution: A Critique,* 88 MICH. L. REV. 2271 (1990); David P. Currie, *Positive and Negative Constitutional Rights,* 53 U. CHI. L. REV. 864 (1986); Kreimer, *supra* note 27; Roger Pilon, *Ordering Rights Consistently: Or What We Do Or Do Not Have Rights To,* 13 GA. L. REV. 1171 (1979).

52. NOZICK, *supra* note 51, at ix (1974) (emphasis in original).

"entitlement." Such rights involve the affirmative obligation of others, enforceable by the state. If a person asserts a positive right to adequate health care, for example, she means that the state is obligated to provide such health care by purchasing or taking it from other citizens.[53]

The distinction between a "negative" right and a "positive" right can be seen in the difference between "having" a right and "exercising" that right. If a person's right to own an automobile, for example, is characterized as a "negative" right, their right is not violated if they cannot afford to exercise it because, for example, they cannot afford the price of an automobile. If the right to own an automobile is considered "positive," however, it does not matter if one cannot afford the price of an automobile; the state is obliged to provide it.[54] Similarly, if a person's right to be a medical doctor is characterized as "negative," we do not say that her right has been violated if her academic credentials preclude acceptance to a medical school. The right to acquire a good or service through free exchange in the market is considerably different from the right to have such goods or services provided by the state.

It is important to understand that "negative" rights and "positive" rights are mutually exclusive and irreconcilable conceptions.[55] The existence of a "positive" right necessarily negates the existence of a "negative" right. This is so because the provision of a "positive" right always requires the use of force by the state against other citizens, either by coercing the service or by confiscating property, both being violations of "negative" rights.[56] Further, recognition of the state's ability to create

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53. In the normal course, such entitlements are provided to those claiming them by taking money from others and giving it to the claimant in order to purchase the claimed good or service.

54. Pilon, *supra* note 51, at 1190.

55. BERLIN, *supra* note 1, at 166. This is not to say that nonpolitical positive rights, such as those arising from a consensual contract, may not coexist with negative political rights. Indeed, such consensual obligations depend on the existence of negative political rights.

56. Many commentators question the distinction between "negative" and "positive" rights. *See, e.g.*, Bandes, *supra* note 51; Currie, *supra* note 51; Kreimer, *supra* note 27. *But see* BERLIN, *supra* note 1; MACHAN, *supra* note 51; NOZICK, *supra* note 51. Questioning the existence of "negative" rights is analogous to questioning the existence of limitations on the power of the state. The questioning commentators often base their objections on their observation that whether a right is "negative" or "positive" depends on the choice of "baseline" from which one measures change. *See* Ackerman, *supra* note 6; Sunstein, *supra* note 6, at 503. Their unexpressed premise is that any "baseline" chosen by "society" is legitimate. Since "society," in this context, is the equivalent of the political majority, the premise is analogous to placing no limits on state power. If it is posited, for example, that private property is a construct of the state, that is, presumably, that property did not exist before governments, then the "defense" of private property is not a "negative" right but a "positive" one of resource allocation. Under this approach, the conventional descriptions of "negative" rights are misconceived because they adopt the "common law ordering of existing wealth and property" as the baseline from which to measure. *See* Sunstein, *supra* note 6, at 423. To the extent that one accepts the premise that

"positive" rights necessarily requires recognition of the state's ability to violate "negative" rights. If "negative" rights may be legitimately violated by the political process, they are not rights at all.

An interesting rivalry seems to be developing between advocates of "negative" rights and "positive" rights over their respective proprietary interests in the Ninth Amendment.[57] Advocates of Bill of Rights values see the amendment as justification for limiting state power. Advocates of political process values want to use the amendment as textual support to justify expansion of the state through the "discovery" of additional "positive" rights.[58]

There are, then, two distinct and conflicting ideals within the Constitution: The ideal of personal autonomy—Bill of Rights values—and the ideal of democratic self-government—political process values. The provisions of the Constitution that address *what* the state may do comprise a division of power between the two ideals. Although political process values necessarily reject nonprocedural, that is, substantive, limits on the power of the state, that there are, and ought to be, such limits is not controversial for most people. The exact nature and extent of those limits, however, are.

II. THE NEW DEAL CASES

A. Background

In order to properly understand the significance of the changes that occurred in constitutional jurisprudence during the New Deal Era, a brief review of pre-New Deal constitutional law is necessary. By the beginning of the twentieth century, Supreme Court jurisprudence had evolved into a recognition of distinct and mutually exclusive spheres of autonomy for the state governments, the federal government, and the individual.[59] In

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the legitimate power of the state is unlimited, the distinction between "negative" and "positive" rights is, indeed, meaningless. *See infra* notes 106-12 and accompanying text.

Advocates of "negative" rights and Bill of Rights values might suggest that Thomas Hobbes and John Locke were the original "baseline" theorists. Their state-of-nature baselines, however, attributed full humanity, including property, to pre-political mankind, even though their pre-political lives were thought by Hobbes to be "solitary, poore, nasty, brutish, and short." *See* THOMAS HOBBES, LEVIATHAN (MacMillan ed. 1989); JOHN LOCKE, SECOND TREATISE ON GOVERNMENT (Hackett ed. 1980).

57. *See, e.g.*, Barnett, *supra* note 45; TRIBE, *supra* note 18, § 11-3, at 569-72. The Ninth Amendment reads as follows: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

58. TRIBE, *supra* note 18, § 11-3, at 569-72.

59. *Id.* § 8-1, at 561-66.

spite of the decision in *The Slaughter-House Cases*[60] in 1873, the Court came to see itself as protector of individual rights against government interference, relying primarily on the Due Process Clause of the Fourteenth Amendment.[61] The period, roughly from 1905 to the New Deal cases of the 1930s, is known as the *Lochner* Era, taking its name from a case decided in 1905[62] in which the Court struck down New York state legislation limiting working hours for bakers. During an era of "progressive" politics and booming economic expansion, the Court had many opportunities to delineate the constitutional division of power between the state and the individual. Even though this period of Supreme Court history is known for striking down "social" legislation in the name of substantive due process, more challenged laws were upheld than were struck down.[63] The Supreme Court did recognize, however, that there were limits to government power under the Constitution and that one of the Court's functions was to enforce those limits.

When Franklin Delano Roosevelt was elected President in 1932, he came to office with a mandate to "do something" about the depressed state of the economy. The resulting New Deal of the Roosevelt Administration not only transformed the way Americans thought about the federal government, it transformed the role of government altogether. Even today, the New Deal is synonymous with an activist, socially reform-minded state, run by technically trained bureaucrats, with overwhelming popular support.

Part of the New Dealers' agenda upon coming to office was a reform of the country's fundamental constitutional scheme.[64] They understood that they could not complete their political program under the existing interpretation of the Constitution.[65] What occurred was nothing less than a de facto amendment of the Constitution by extra-Constitutional means, an amendment that shifted the line marking the division of power between the state and the individual dramatically in favor of the state.[66] The extent of the New Dealers' success is still visible in the modern Supreme Court's decisions.

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60. 83 U.S. (16 Wall.) 36 (1873) (declining to invoke the Privileges and Immunities Clause of the Fourteenth Amendment to invalidate Louisiana laws granting slaughter-house monopolies to local companies).

61. TRIBE, *supra* note 18, §§ 6-11 to -16, at 432-50.

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

63. TRIBE, *supra* note 18, § 8-2, at 567.

64. Sunstein, *supra* note 6, at 423.

65. *Id.*

66. ACKERMAN, RECONSTRUCTING, *supra* note 18; Ackerman, *supra* note 6, at 1051-56.

With massive popular and legislative support, the New Deal's only impediment to total victory was the Supreme Court.[67] As is now well known, the Court ultimately "capitulated" to the political pressure of the Roosevelt Administration, despite the failure of Roosevelt's infamous court-packing scheme.[68]

The purpose of this Note is not, however, to retell that story, but to examine some of the key "liberal" decisions that comprised the capitulation and to compare them to modern "conservative" decisions. The major decisions of the 1930s signaled a shift away from Bill of Rights values to political process values. At the time, the shift seemed to be limited to "legislation affecting ordinary commercial transactions."[69] The cases discussed in the following sections illustrate how the New Deal Court adopted political process values, at the expense of Bill of Rights values, as its basis for constitutional interpretation following Roosevelt's election.

B. Nebbia v. New York

The first example of the Court adopting a political process argument to expand the power of the state over individual rights, and surely one of the clearest, is its early New Deal decision in *Nebbia v. New York*.[70] The case was decided in 1934, well before the period of intense political pressure on the Court from the Roosevelt Administration. The majority opinion is notable for its broad language and abject deference to the New York state legislature's conception of the "public welfare."

In 1933, the New York state legislature adopted legislation to set *minimum* prices for the retail sale of milk. Mr. Nebbia, a small retail grocer, "was convicted of a crime for selling his own property—wholesome milk—in the ordinary course of business at a price satisfactory to himself and the customer."[71] Nebbia sued, claiming the law violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[72]

The Court, in a five to four decision, sustained the law as a "necessary and appropriate exertion of [the state's] police power."[73] Quickly

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67. *See generally* Ackerman, *supra* note 6, at 1052; Sunstein, *supra* note 6.
68. GERALD GUNTHER, CONSTITUTIONAL LAW 122-24 (12th ed. 1991).
69. United States v. Carolene Products, 304 U.S. 144, 152 (1937).
70. 291 U.S. 502 (1934).
71. *Id.* at 543-44 (McReynolds, J., dissenting).
72. *Id.* at 515.
73. *Id.* at 525.

disposing of Nebbia's Equal Protection claim,[74] the Court devoted most of its attention to justifying the New York legislature's action under the Due Process Clause:

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.[75]

According to the *Nebbia* Court, a state may lawfully deprive a citizen of life, liberty, or property by clearing this very small hurdle.[76]

The broad language used by the *Nebbia* Court shows the degree of deference at work:

> [I]n the absence of constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare . . . . The courts are without authority either to declare such policy, or . . . to override it. . . . [T]he legislature is primarily the judge of the necessity of such an enactment, [and] every possible presumption is in favor of its validity.[77]

Justice McReynolds' dissent emphasized Bill of Rights values in asserting that Mr. Nebbia's private interests should be given greater weight. By attacking the efficacy and utility of the price-fixing law and

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74. "There is . . . no showing that the order placed him at a disadvantage, or in fact affected him adversely, and this alone is fatal to the claim of denial of equal protection." *Id.* at 521. The Court does not explain how the higher required price for milk did not affect Nebbia "adversely," even though the higher price would inevitably result in less milk sold.

75. *Id.* at 525.

76. *Id.* at 524-25. Indeed, the means hurdle of this test became even less daunting over time, moving from "real and substantial" to "rational," and finally to "hypothetical." *See* GUNTHER, *supra* note 68, at 432-65. It is not one of the purposes of this Note to examine the mechanics of various Supreme Court balancing techniques, but to point out that any of these tests involve, either explicitly or implicitly, weighing the private interests of individual citizens against the "public" interests of the state. The significant variable this Note emphasizes is not the mechanism used, but the choice the Justices make to accord greater weight to the interests of some citizens—those in the political majority, expressing their interest through the political process—as opposed to the legitimate interests of other citizens—the minorities who happen to be losers in the political process—even when "harm to others" is admittedly not a consideration.

If "due process" is served by nothing more than a majority vote in a state legislature, as the *Nebbia* Court seems to say, the Due Process Clause is rendered meaningless. Such an interpretation of any language in the Constitution as ineffectual cannot be reconciled with Chief Justice John Marshall's admonition in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803), that "[i]t cannot be presumed that any clause in the Constitution is intended to be without effect." *Id.*

77. *Nebbia*, 291 U.S. at 537-38.

showing that the political majority does not always serve the "public interest," the dissent sought to lower the value accorded the state's action.[78] The law, if it benefited anyone for more than a very short time, aided approximately 130,000 milk producers in rural New York. The twelve million or so milk consumers in the state were certainly not benefited.[79]

C. Home Building & Loan Association v. Blaisdell

In 1934, the same year that *Nebbia* was decided, *Home Building & Loan Association v. Blaisdell*[80] offered the Court another opportunity to weigh the private interests of some citizens against the "public" interests of other citizens as reflected in the act of a state legislature. The Minnesota state legislature had passed a law establishing an "emergency" moratorium on home mortgage payments in response to the severe economic conditions of the Depression. The law was temporary, with a specific expiration date in 1935, and altered only some of the underlying obligations of the parties or the remedies available to them. It allowed borrowers to delay payments for a period of time without losing their homes through mortgage foreclosure. The law was challenged, not as a violation of due process under the Fourteenth Amendment, but as a violation of the Contracts Clause.[81] The challenge under the Contracts Clause is noteworthy because, unlike the deprivation of life, liberty, or property under the Fifth and Fourteenth Amendments, the Contracts Clause is not subject to the "due process" qualification. Notwithstanding the text of the Clause, a majority of the Court had no difficulty finding that the "public interest" outweighed the individual's interests. In fact, the majority opinion announced a test for the Contracts Clause that is even more deferential than the test for "due process": "The question is . . . whether the legislation is addressed to a legitimate end and the measures

78. *Id.* at 539 (McReynolds, J., dissenting).

79. *Nebbia*, like many other "economic regulation" cases *(Lochner*, for example) exposes the operation of "special interest groups" seeking to gain legislatively what they cannot gain in the marketplace, that is, to gain by coercion what they cannot gain by persuasion. These cases raise questions about the definition of "public interest" in the allocation of burdens and benefits.

80. 290 U.S. 398 (1934).

81. *Id.* "No State shall . . . pass any Law . . . impairing the Obligation of Contracts." U.S. CONST. art. I, § 10. As the Contracts Clause illustrates, not all Bill of Rights values are found in the first 10 amendments to the Constitution. *See supra* notes 31-40.

taken are reasonable and appropriate to that end."[82] A very low standard, it seems, for a provision that on its face is unequivocal.[83]

The *Blaisdell* majority recognized that it was balancing "public" and "private" interests: "It is manifest . . . that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare."[84] The *Blaisdell* decision shows that the changes in constitutional jurisprudence that occurred during the 1930s were not limited to a reinterpretation of the Due Process Clause. The "public interest" became a counterweight to even the most unequivocal constitutional prohibitions, at least where economic regulation was concerned.[85]

Although *Nebbia* and *Blaisdell* showed an increasing willingness on the part of the Supreme Court to accept and give substantial weight to political process values, there was still considerable resistance to much of the Roosevelt Administration's economic program. Only after intense political pressure, including Roosevelt's court-packing scheme, as well as some personnel changes,[86] did the Court "capitulate." Even then, it was only with regard to so-called "economic" regulation that the political process argument was given full force.[87]

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82. *Blaisdell*, 290 U.S. at 438.

83. Except for a brief quiver of life in the 1970s, the Contracts Clause has remained a dead letter. *See generally* GUNTHER, *supra* note 68, at 484-490; Richard A. Epstein, *Toward a Revitalization of the Contracts Clause*, 51 U. CHI. L. REV. 703 (1984) (arguing that the Contracts Clause extends substantial protection to economic liberties against legislative and judicial interference, and that current interpretation is wrong and indefensible).

84. *Blaisdell*, 290 U.S. at 442. As the Court speaks of "individual" and "public" interests, it is important to keep in mind that the competing interests involved are not of a different order or dimension. All interests are, at bottom, "individual," since they are all interests of human beings, either singularly or in groups. The interests that are labeled "public" are simply those interests that, due to the superior number of adherents, are expressed through the political process. The *Blaisdell* Court gave no consideration to the possibility that the unequivocal language of the Contracts Clause reflects a weighing of competing interests by the framers themselves, a process they believed favored the individual.

It is also helpful to keep in mind that when the "public" interest wins, the state is authorized to use force against the losing "private" interest—force necessary to coerce compliance with the will of the "public." In the end, the only difference between a street gang mugging and economic regulation in the "public interest" is the size of the body politic.

85. *Id.* at 398. The *Blaisdell* decision is especially noteworthy when one considers that the State of Minnesota could have achieved its purpose of relief in alternative ways not violative of the Contracts Clause. The state could have, for example, simply purchased the mortgages from the financial institutions.

86. President Roosevelt appointed Hugo Black, a Democratic senator from Alabama, to the Court in 1937, replacing Justice VanDevanter, who had retired.

87. *See infra* part II.E.

D. West Coast Hotel Co. v. Parrish

Two cases, one decided in 1937 and the other in 1938, illustrate the new perspective of the Court. In *West Coast Hotel Co. v. Parrish*,[88] the Court was required to decide the constitutionality of a minimum wage law for women in the state of Washington. The law was challenged under the Due Process Clause of the Fourteenth Amendment as a violation of the hotel owners' liberty interests. The Court reversed doctrine of prior cases[89] and upheld the Washington law. Again, the Court laid down a very deferential standard of due process: "[R]egulation that is reasonable in relation to its subject and is adopted in the interests of the community is due process."[90]

The manner in which Chief Justice Hughes characterized the state's interest in *West Coast Hotel* is particularly interesting in today's climate of race and gender sensitivity. The "interest of the community" went beyond the mere economic well-being of its female citizens. The Chief Justice stated that their "physical structure and the performance of maternal functions place [women] at a disadvantage in the struggle for subsistence" and they are legitimately "*an object of public interest* and care in order to preserve the strength and vigor of the race."[91]

One way of characterizing the Court's abandonment of substantive due process is to say that the Court abandoned the application of any meaningful scrutiny to legislative objectives. While the Court invoked rhetoric of "arbitrary and capricious," the reality, at least as far as "ordinary commercial" transactions were concerned, was "anything goes." The paternalistic, protection-for-your-own-good justification advanced in *West Coast Hotel* shows where a constitutional legislative blank check can lead during a period of extraordinary social pressures. Because of their "physical structure" and "maternal functions," said the Court, women are a legitimate "*object of public interest*" to be protected for the common

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88. 300 U.S. 379 (1937).

89. Adkins v. Children's Hosp., 261 U.S. 525 (1923) (holding invalid under the Due Process Clause of the Fifth Amendment a District of Columbia minimum wage law).

90. *West Coast Hotel Co.*, 300 U.S. at 391.

91. *Id.* at 394 (emphasis added) (quoting Muller v. Oregon, 208 U.S. 412 (1908)). Chief Justice Hughes' conception of the "interests of the community" as incorporating "the strength and vigor of the race" was being echoed during this same period in Europe where the rights of minorities were also being sacrificed in the "interests of the community." This is not to impugn the motives of Chief Justice Hughes, but only to point out how seemingly high-minded phrases and good intentions can be used in the interest of very unworthy objectives.

good of "the race." It is not a very great leap from Chief Justice Hughes' majority opinion to *The Handmaid's Tale.*[92]

E. United States v. Carolene Products

United States v. Carolene Products[93] is probably the most cited decision from the New Deal Era. Its popularity stems not from the facts or the holding of the case, but from the way Justice Stone sought to distinguish its "ordinary" circumstances from other, less mundane situations. Possibly anticipating the appeal of the political process argument in noncommercial settings, Justice Stone drew a distinction in his famous fourth footnote between "legislation affecting ordinary commercial transactions"[94] and "legislation [which] appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . ."[95] This was only the first of two distinctions Justice Stone would draw. The second distinction, entirely within footnote four, was one between "legislation which restricts . . . political processes" and "most other legislation."[96] It is this second, "political process," distinction that truly sets the decision apart, since the first, "ordinary commercial transaction," distinction only confirmed the Court's abandonment of scrutiny in the field of economic regulation. This distinction was already evident from earlier cases like *West Coast Hotel.* It is, of course, the "political process" distinction, combined with Justice Stone's emphasis on its application to "discrete and insular minorities,"[97] that is referred to by Professor Ely when he writes of "'participational' goals of broadened access to the processes and *bounty* of representative government . . . ."[98]

For all of its fame, footnote four of *Carolene Products* is very curious. Justice Stone implies, for example, that "legislation affecting ordinary

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92. MARGARET E. ATWOOD, THE HANDMAID'S TALE (1985) (involving a fictional future society where environmental damage has rendered most women unable to conceive, and those women that are able to conceive become "object[s] of the public interest").

93. 304 U.S. 144 (1938).

94. *Id.* at 152.

95. *Id.*

96. *Id.*

97. Although Justice Stone's opinion in *Carolene Products* referred to religious, racial, and ethnic minorities, the term "minority" is used in this Note in its generic sense of numerical inferiority, not in its political sense of biological category.

98. ELY, *supra* note 18, at 74 (footnote omitted) (emphasis added). Professor Ely may also be referring to the "ordinary commercial transaction" distinction when he uses the term "bounty" in describing the redistributional possibilities of representative government.

commercial transactions" is somehow exempt from the "specific prohibitions" of the Constitution. Critics claim there is no basis in text, logic, or history for such an exemption.[99] There is, in fact, quite a lot of support for the opposite claim, namely, the Property Clauses of the Fifth and Fourteenth Amendments, the Takings Clause of the Fifth Amendment, and the Contracts Clause of Article I.

In addition, Justice Stone wrote of "those political processes ordinarily to be relied upon to protect minorities."[100] Unless the Justice had countermajoritarian political processes in mind, his statement seems to belie the logic of a democratic system, at least in its vertical majoritarian dimension. Further, Justice Stone's conception of minorities seems to be limited to religious, ethnic, or racial groups.[101] Justice Stone offered no reason to explain why he believed the Constitution protected some minorities but not others.

The facts of *Carolene Products* expose another example of commercial interests utilizing the political process to protect themselves from the competition of the marketplace. Carolene Products Company had devised a way of extracting butterfat from milk and substituting an alternative form of vegetable oil. The resulting product was virtually indistinguishable from natural, whole milk. The "filled milk" could also be sold at a lower price due to the additional revenue generated by selling the butterfat separately. The "filled milk" product, then, was a lower-priced threat to the whole milk producers' share of the market, price-structure, and profits. The product's prospects might have been considered especially bright during the economic hardship of the mid-1930s.[102]

Unfortunately for Carolene Products Company, the dairy industry had succeeded in getting a federal law passed in 1923 banning "filled milk" products from the market. The "findings" of the legislation, swallowed whole by the "see-no-evil, hear-no-evil" Supreme Court,[103] were clearly the creation of the milk industry lobby. The law declared, for example, "that filled milk . . . is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public."[104] The law was a thinly disguised transfer of economic resources from one

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99. *See, e.g.*, SIEGAN, *supra* note 18, at 189; Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 25 (1987).

100. *Carolene Products*, 304 U.S. at 152 n.4.

101. *Id.*

102. Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397.

103. *Id.* at 428.

104. 21 U.S.C. § 62 (1923), *quoted in Carolene Products*, 304 U.S. at 145 n.1.

minority group, Carolene Products and other manufacturers of "filled milk," to another minority group, the whole milk industry.[105]

As Professor Geoffrey Miller suggests, the nature of the law upheld in the famous case sheds considerable light on the true impact of the distinctions drawn by Justice Stone's opinion. The nature of the interests upheld, of which the Court could not have been ignorant, demonstrated that the Court could no longer be expected to protect a minority—discrete, insular, or otherwise—against "utterly unprincipled . . . special interest legislation,"[106] and that the Court would turn a blind eye to any "public interest" economic regulation, even when it knew that the invocation of the "public interest" was patently false.[107] "*Carolene's* legacy is not only *Brown v. Board of Education*, it is also the unrivaled primacy of interest groups in American politics of the last half century."[108]

The *Carolene Products* decision fairly captures what the New Deal revolution meant to constitutional jurisprudence. The scope of majoritarianism (that is, its horizontal aspect) was vastly widened by a major shift of the constitutional power line in favor of the state. This is the meaning of *Carolene's* first, "ordinary commercial transactions," distinction. In addition, the case reflects a renewed political commitment to the representative, or vertical, aspect of majoritarianism— to ensure that all interests, especially "discrete and insular minorities," are able to participate fairly in the political process. This is the meaning of *Carolene's* second, "political process," distinction. The benefits realized from the strengthening of representational democracy may have been considerably offset by the costs of weakening individual autonomy.

F. Legal Realism

It is said that the de facto amendment[109] of the Constitution that occurred during the New Deal was due to the acceptance by the Court, at least in part, of a perspective on the law called "legal realism."[110] It is

105. The Filled Milk Act of 1923 was ultimately overturned in 1972 in Milnot Co. v. Richardson, 350 F. Supp. 222 (S.D. Ill. 1972). Thirty-four years after *Carolene Products,* the Milnot Company, ironically the corporate successor to Carolene Products Company, the manufacturer of Milnot filled milk products, won its case.

106. Miller, *supra* note 102, at 398.

107. *Id.* at 399.

108. *Id.*

109. ACKERMAN, WE THE PEOPLE, *supra* note 18, at 52, 195.

110. ACKERMAN, RECONSTRUCTING, *supra* note 18, at 6-22; TRIBE, *supra* note 18, § 6-16, at 447; Chemerinsky, *supra* note 1'1, at 66.

not a purpose of this Note to inquire into the full depth and meaning of "legal realism" or its intellectual descendants within modern legal scholarship. It is necessary, however, to discuss its central idea. Professor Tribe stated this central idea in the following way:

> [T]he central notion which contributed to [the New Deal revolution was] that even judicial enforcement of common-law rules of contract and property represents a governmental choice with discernable consequences for the social distribution of suffering, pleasure, and power, [and it is] hard to avoid the realization that a judicial choice between invalidating and upholding legislation altering the ground rules of contract and property is nonetheless a . . . political choice, one guided by constitutional language and history but almost never wholly determined by it.[111]

More recently, commentators have used the term "baseline" to convey a similar idea, namely, that there is nothing natural about using the "common law ordering of wealth and property" as a baseline or standard from which to evaluate the desirability of a particular legal result.[112] In Tribe's terms, these commentators are suggesting that the proper "baseline" is a "political choice."

Whether the idea is expressed as "legal realism," "political" or "governmental choice," or "baseline assumption," all of these concepts rest on a common premise. That premise is that any choice of legal rules, or any "ordering"[113] that is made according to democratic processes, is legitimate. Enforcing rights of contract and property is characterized as a "governmental choice," just one of many "orderings" that society may choose, any of them legitimate. In other words, the premise is that the horizontal reach of democratic majoritarianism is unlimited by any notion of individual autonomy. According to these values, the relevant moral unit is "society," not individual human beings.

It is important to keep in mind that the "government" or "society" making such choices of "ordering" is none other than our old friend the political majority. To claim that the political majority is free to choose whatever "ordering" it pleases is to claim that there are no limits on the power of the democratic state. Such claims assert the superiority of political process values over Bill of Rights values. Although many who advance such claims are called "liberals," their arguments have nothing to do with true liberalism. Such arguments were used to justify the

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111. TRIBE, *supra* note 18, § 6-17, at 453.
112. Sunstein, *supra* note 11, at 425.
113. *Id.*

political repression of minorities by democratic governments in Europe during the 1930s and in the southern United States in our own recent past. They are used today to justify repression of homosexuals and other minorities, often under the rubric of "traditional values."

The notion of "ordering" implies that, once chosen, a particular "ordering" becomes a static status quo. Whether the "ordering of wealth and property" would remain static in a legal system based wholly on the English common law remains a subject for historical speculation. To the extent that such "ordering" is related to economic well-being today, however, it is known that the distribution is quite volatile in the semi-capitalist United States.[114]

It is beyond question that the Constitution places constraints on what the state may do. It is also beyond question that virtually everyone, whether "liberal" or "conservative," acknowledges that there ought to be such constraints. To say that the constraints are no more than what the political majority chooses for them to be is simply to beg the question.[115]

The New Deal revolution in constitutional interpretation brought about a major shift of power in favor of the political majority. The revolution was, and is, justified by a political process argument which asserts that a democratically elected majority has only to choose what legal rules it wants to apply. The political majority found that its interests were served by changing the rules so that constitutional provisions protecting property and contract rights were "reinterpreted." A double standard was adopted by the Supreme Court for determining which constitutional protections would be honored and which would not. The central function of the state ceased to be the protection of individuals from the coercion of their neighbors, and became instead the allocation of burdens and benefits.

The Positive State[116] was born.

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114. Bruce Bartlett, *A Class Structure That Won't Stay Put*, WALL ST. J., Nov. 20, 1991, at A16. This article cites U.S. Census Bureau data from 1984 through 1988 which demonstrates substantial volatility in year-to-year movement into and out of income categories in the U.S. economy. It also cites a study done by the University of Michigan Institute for Social Research in which movement of families among income quintiles was tracked for the years 1971 through 1978. The study found that more than 50% of the families in the top quintile in the first year had fallen into lower quintiles seven years later, and almost half of the families in the lowest quintile had climbed to a higher quintile during that time. It would be interesting to investigate the relative volatility of the distribution of wealth and property over time between socialist economies and capitalist economies.

115. A profoundly pessimistic variation of the "political choice" argument may be that it really does not matter what "rights" we say we have because all acts of government, including protection of "rights," must inevitably be "political." This would be a sort of political "law of the jungle," where there is no distinction between *actual* state power and *legitimate* state power. In this form, the "political choice" perspective might be called a description of the way democracy does work, rather than a prescription for the way it ought to work.

116. Kreimer, *supra* note 27.

III. THE MODERN CASES

The modern Supreme Court has been characterized as "conservative" because many of its decisions have narrowed the area of individual autonomy previously believed to be free of state control.[117] The cases selected for discussion in this Part illustrate the Court's approach in such personal value-laden areas as sexual and religious practices and artistic, and not so artistic, expression. In three cases, a majority of the Court favored imposing the rule of a state legislature, reflecting the view of the political majority of that state, against the will of a protesting minority. In the other case, the Court upheld a federal administrative agency's interpretation of a federal statute and told Congress to change the statute if it did not like the agency's interpretation.

A. Bowers v. Hardwick

Bowers v. Hardwick,[118] decided in 1986, represents the ascendancy of the political process consensus on the Court. It has also been called the second end of substantive due process.[119] In addition, the case may mark the beginning of the end of the *Carolene Products* footnote four double standard, which calls for a higher level of judicial scrutiny to legislation affecting the political representation of minorities, but abandons any serious scrutiny for rights not protected by the "specific prohibitions" of the Constitution.[120]

Michael Hardwick was arrested under a Georgia law criminalizing acts of sodomy between consenting adults. Even though the Georgia prosecutor chose not to prosecute the case, Hardwick brought an action challenging the constitutionality of the law. Hardwick claimed that sodomy was protected activity under the right of privacy doctrine developed in the line of cases beginning with *Griswold v. Connecticut*[121] and running through *Roe v. Wade*.[122]

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117. *See, e.g.*, FRIED, *supra* note 14; Chemerinsky, *supra* note 11, at 45; Reich, *supra* note 14; Smith, *supra* note 14; Lacayo, *supra* note 14.

118. 478 U.S. 186 (1986).

119. Conkle, *supra* note 18.

120. United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

121. 381 U.S. 479 (1965) (holding that a Connecticut law criminalizing the use of birth control materials by married persons was a violation of the Constitutional right of privacy emanating from the penumbras of the Bill of Rights).

122. 410 U.S. 113 (1973) (striking down a Texas law criminalizing the procurement of an abortion as violating the right of privacy).

The Court, in a five to four decision, rejected Hardwick's claim, refusing to extend the right of privacy to cover sodomy between consenting adults. The rather short majority opinion, written by Justice White, is remarkable in two ways. First, the opinion relies on traditional moral norms of the political majority as reflected in state legislation as justification to uphold such legislation.[123] As the dissent, written by Justice Blackmun and joined by Justices Brennan, Marshall, and Stevens, easily pointed out, a large part of the Supreme Court's business has been striking down such legislative reflections of society's traditional values.[124] The majority opinion did not find it necessary to explain how it distinguished legislative proscription of sodomy from similar proscriptions of interracial marriage in *Loving v. Virginia*,[125] of racial integration in public schools in *Brown v. Board of Education*,[126] of or abortion in *Roe v. Wade*.[127]

From the perspective of this commentator, the distinction between the decisions invoked by the dissent and the majority opinion in *Bowers* is one of conflicting constitutional values—the earlier decisions cited by the dissent are based on Bill of Rights values, while the *Bowers* majority opinion is based on political process values. In *Loving*, the right of individuals to marry whomever they choose, including a member of a different race, was held judicially superior to the belief of the political majority of Virginia that miscegenation was wrong. Bill of Rights values dictated that individuals decide for themselves whom to marry. In *Brown*, the right of black children not to be segregated from white children in public schools was held judicially superior to the segregationist views of the political majority of Kansas. In *Roe*, the right of a woman to obtain an abortion was held superior to the beliefs of the political majority of Texas. Bill of Rights values dictated that a woman should decide for herself.

The second way in which the *Bowers* opinion is remarkable is its explicit renunciation of substantive due process.[128] In one striking

123. Chemerinsky, *supra* note 11, at 94 n.218.

124. Bowers v. Hardwick, 478 U.S. 186, 210 (1986) (Blackmun, J., dissenting).

125. 388 U.S. 1 (1967).

126. 347 U.S. 483 (1954).

127. 410 U.S. 113 (1973).

128. Conkle, *supra*, note 18, at 216. In this context, substantive due process may be considered a manifestation of Bill of Rights values. Professor Conkle stops short of calling *Bowers* an explicit renunciation of substantive due process. He does call the decision "deviant" compared to other privacy cases and says it may be a "first step" in the eventual repudiation of substantive due process. *Id.* at 237.

paragraph, the *Bowers* majority expressed how strongly it felt the pull of the political process logic from fifty years before:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's [sic], which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.[129]

This remarkable paragraph demonstrates that the threat of political power over the Court is much more than a dim echo of the 1930s. Just when a more principled and courageous stand by the Court is needed to resist the power of a political majority with a popular Executive, the logic of the political process argument becomes very persuasive. The paragraph captures a distinctive feature of the political process interpretation of the Constitution, namely, that individual rights must have a textual basis in the Constitution and, lacking such basis, the state is presumed to retain residual power. The right of an individual to decide for herself must be found on a textual island carved out by the framers. Those who would emphasize Bill of Rights values would say that the Court is asking the wrong question. Rather than seek textual justification for individual rights, the Court must find textual justification for the asserted governmental power. Under political process values, the presumption favors the state. Under Bill of Rights values, the presumption favors the citizen.

The last three sentences of the paragraph assert that when the Court recognizes limits on the power of the state—"redefining the category of rights deemed to be fundamental"—it usurps the "authority to govern" from the legislature. This phraseology equates the "authority to govern" with the authority to decide *what* is governed. The premise is that this "authority" to define *what* is governed properly belongs to the democratically elected legislature, even though such "authority to govern" is equivalent to the legislature deciding the limits of its own power. If this

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129. *Bowers*, 478 U.S. at 194-95.

is the correct reading of this paragraph, the modern Court effectively repudiates the very conception of constitutionally limited government, as well as a large part of its own role in that government. Political process values prevail.

The dissenters in *Bowers* still clung to Bill of Rights values, at least for noneconomic activities, and saw the case as "about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"[130]

The Supreme Court in *Bowers* declined to apply the same principles it had found persuasive in *Griswold* and *Roe*.[131] The only justification offered for declining to extend the right of privacy was that most people found the conduct in question "immoral." The same observation could have been made, of course, in all the other privacy cases. Birth control, nonmarital sexual relations, and abortion have all been considered "immoral" by a large segment of this society at one time or another. Many people still consider these acts "immoral," perhaps even a majority in the cases of nonmarital sex and abortion.

B. Barnes v. Glen Theatre

Barnes v. Glen Theatre,[132] decided in June, 1991, involved two entertainment establishments in South Bend, Indiana, that desired to present totally nude dancing performances. The Kitty Kat Lounge and the Glen Theatre, as well as individual dancers employed by them, brought suit in federal court to challenge the constitutionality of Indiana's public decency law.[133] The law prohibits total nudity in public places. The plaintiffs claimed the ban violated the First Amendment.

The Court issued four opinions in the case, with five Justices upholding the constitutionality of the law and four Justices dissenting. Chief Justice Rehnquist and Justices O'Connor and Kennedy concluded that the nude dancing in question was expressive activity and therefore implicated the First Amendment, but that it could be prohibited because of the "substantial government interest" in "protecting [societal] order and morality."[134] Justice Souter agreed that First Amendment analysis was

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130. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

131. Conkle, *supra* note 18, at 224.

132. 111 S. Ct. 2456 (1991).

133. IND. CODE § 35-45-4-1 (1988).

134. *Barnes*, 111 S. Ct. at 2462 (plurality opinion).

appropriate and that the dancing could be banned. His analysis determined that the state's "substantial interest" was in preventing such "secondary effects"[135] as "prostitution, sexual assaults, and other criminal activity."[136] Justice Scalia concurred in upholding the constitutionality of the statute but did not believe that the First Amendment was implicated. Applying a rule similar to that which he used for the majority in *Employment Division, Department of Human Resources v. Smith*,[137] Scalia concluded that the Indiana law was "a general law regulating conduct . . . not specifically directed at expression," and therefore "not subject to First Amendment scrutiny at all."[138]

Four of the five majority Justices based their conclusions on their belief that regulation of societal "morality" was an adequate justification for the law.[139] After observing that "[i]t is impossible to discern . . . exactly what governmental interests the Indiana legislators had in mind when they enacted this statute,"[140] Chief Justice Rehnquist, nevertheless, concluded that "the public indecency statute furthers a substantial government interest in protecting order and morality."[141] Similarly, Justice Scalia observed that "[o]ur society prohibits . . . certain activities *not because they harm others* but because they are considered . . . immoral."[142] Further, Scalia's opinion asserts "there is no basis for thinking that our society has ever shared that Thoreauvian 'you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else' beau ideal—much less for thinking that it was written into the Constitution."[143]

As in *Bowers*, the only real justification offered by the majority in *Barnes* was that most people supported the law. To the extent that the

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135. *Id.* at 2468 (Souter, J., concurring).

136. *Id.* at 2469 (Souter, J., concurring and quoting Brief for Petitioners at 37).

137. 494 U.S. 872 (1990); *see infra* notes 179-91 and accompanying text.

138. *Barnes*, 111 S. Ct. at 2463 (Scalia, J., concurring).

139. Chief Justice Rehnquist and Justices O'Connor and Kennedy weighed the state's interest in regulating "morality" against the citizen's free speech interests according to the analysis derived from United States v. O'Brien, 391 U.S. 367 (1968), and found "morality" heavier. Justice Scalia simply found that regulation of "morality" was a "rational basis" for the law.

140. *Barnes*, 111 S. Ct. at 2461 (plurality opinion).

141. *Id.* at 2462 (plurality opinion).

142. *Id.* at 2465 (Scalia, J., concurring) (emphasis added). Note the distinction Justice Scalia draws between activities which "harm others" and those which society considers "immoral". As we have seen, the Court has had no difficulty overturning other political proscriptions of "immoral" activities. *See supra* text accompanying note 124. If, as Justice Scalia says, harm to others is not the standard by which the Court should distinguish those political proscriptions of "immorality" that deserve constitutional protection from those that do not, just what should that standard be? Justice Scalia's adoption here of a political process majoritarian standard cannot be reconciled with *Loving*, *Brown*, or *Roe*.

143. *Barnes*, 111 S. Ct. at 2465 (plurality opinion).

state was required to show an "interest," whether compelling, substantial, important, or just rational, the assertion that most people believed the conduct "immoral" was good enough.

C. The Rise of the Positive State

Bowers and *Barnes* involved direct state proscription of personal conduct unrelated to protecting others from harm. The other two modern Court decisions discussed in this Note involved indirect state proscription through the mechanism of withholding monetary benefits. A full understanding of the power of the state to influence behavior through its allocation of burdens and benefits requires a brief review of the rise of the Positive State since the New Deal.

The Supreme Court's ratification of the New Deal's economic program, involving the Court's abdication of any responsibility for scrutinizing the regulation of "ordinary commercial transactions," was the decisive event enabling the enormous growth of government in the post-World War II period. The Second World War, coming as it did in the immediate wake of the Court's capitulation, provided yet another national crisis requiring collective decision making.[144] Before the New Deal, economic regulation had been the exception. After World War II, economic regulation had become the norm. For example, after the war, Congress passed the Employment Act of 1946,[145] officially recognizing the federal government's assumed responsibility for economic growth and full employment.

The first distinction drawn by Justice Stone in his *Carolene Products* opinion, between "legislation affecting ordinary commercial transactions" and legislation affecting the "specific prohibitions" of the Constitution,[146] may have had some degree of validity in the pre-New Deal world, where such economic regulation was relatively

144. Korematsu v. United States, 323 U.S. 214 (1944) (upholding detention without due process of American citizens of Japanese ancestry in relocation centers on the West Coast during the early days of World War II), offers further evidence of the ease with which a political majority, and the Supreme Court, will sacrifice the interests of a minority in times of perceived "crisis." It is interesting to note how many "crises" we are supposed to have today: the "health care crisis," the "education crisis," the "housing crisis," and the "AIDS crisis" are examples. Whenever an interest group seeks to use government power to achieve its political objectives, using the word "crisis" seems to help.

145. Pub. L. No. 79-304, 60 Stat. 23 (codified as amended at 15 U.S.C. §§ 1021-1024 (1988)).

146. *See supra* notes 93-109 and accompanying text.

exceptional.[147] In the modern world of the Positive State made possible by the Court's capitulation,[148] however, the distinction is becoming impossible to maintain. Confiscation and redistribution of economic resources, that is, the allocation of burdens and benefits, have become the central and dominating functions of governments at all levels—from local school boards to the federal leviathan.

1. Economic Domination of the Positive State

Charles Reich identified this essential problem in 1964 in his article *The New Property*.[149] From his vantage point, approximately halfway between the New Deal revolution and today, Reich observed that a citizen's economic well-being was becoming increasingly a function of her legal status as determined by her relationship to government.[150] In addition, and as a result, a citizen's economic well-being could easily be threatened by politically motivated governmental choices.[151] Inevitably, the state's control of the economy implicated other noneconomic considerations. Examples cited by Reich include withholding a license to drive a taxi, and denying a license to work as a longshoreman or to run a rooming house, all because of "immoral conduct" or "bad character."[152]

As evidence of the extent of government pervasiveness in the nation's economic affairs twenty-five years after the New Deal, Reich compares total government spending at all levels[153] in 1961 to total personal income[154] for the nation in the same year, as compiled by the U.S. Department of Commerce.[155] These two measurements approximate the total amount of economic resources taken out of the economy by the

147. "Validity," as used here, refers to the ability to rationally distinguish economic regulation from noneconomic regulation, not the constitutional validity of the double standard. *See supra* notes 93-109 and accompanying text.

148. Kreimer, *supra* note 27.

149. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

150. *Id.* at 734.

151. *Id.* at 746-51.

152. *Id.* at 747.

153. This measurement includes local, state, and federal government spending.

154. Personal income is the current income received by a person from all sources minus their personal contributions for social insurance. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 427 (1991).

155. Reich, *supra* note 149, at 737.

government through taxation or borrowing[156] and the total amount available to be taken. Total government spending in 1961 amounted to approximately $165 billion,[157] and total personal income was approximately $416.4 billion.[158] In other words, in 1961, less than thirty years after the judicial dam was broken, government at all levels had assumed direct decision-making power over more than 39% of the economic resources otherwise available to U.S. citizens that year.

The comparable figures for 1940, giving effect to the now seemingly modest New Deal programs but before the massive military buildup for World War II, were total government spending of approximately $20.4 billion[159] and personal income of $78.3 billion.[160] That was a governmental share amounting to 26%. In the quarter century between the New Deal and Reich's article, the government's share of the economy had grown from 26% to 39%, a 50% increase.

It should come as no surprise more than a half century after the New Deal, and more than a quarter century after Reich's article, that the political majority's control over the nation's economic resources continues to grow. The U.S. Department of Commerce figures for 1988, the most recent year for which all the necessary data is available,[161] reveal that governments at all levels in the United States spent $1,920.4 billion[162] in that year. Total personal income in 1988 amounted to $4,070.8 billion.[163] That amounts to direct governmental decision-making power over more than 47% of all the economic resources otherwise available to private citizens in 1988.

As sobering as these figures are, they understate the actual degree of government control over privately produced economic resources. Regulations on the use of private resources[164] and mandated spending

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156. Such economic resources are, of course, put back into the economy by the act of government spending. Exploring the relative economic benefit of political versus private spending, however, is beyond the scope of this Note.

157. Reich, *supra* note 149, at 737.

158. *Id.*

159. U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, Part 2, ser. Y 522-532, at 1119-20.

160. *Id.* Part 1, ser. F 6-9, at 224.

161. For some reason, the Department of Commerce chooses not to publish this calculation. It must be compiled from several different sources.

162. U.S. DEPARTMENT OF COMMERCE, *supra* note 154, table No. 466, at 280.

163. *Id.* table No. 702, at 434.

164. Examples of regulation on the use of private resources include zoning laws, various licensing requirements, and public indecency laws.

by businesses and individuals[165] effectively extend political control over virtually all economic activity in the country.[166]

2. Erosion of Private Property

One of the meanings of the Positive State's political domination of the economy is that the concept of private property has been severely eroded. As we have seen, the due process limitations on the deprivation of property contained in the Fifth and Fourteenth Amendments have been found to require no more than a majority vote in a state legislature.[167] Given that, the real "ownership" of all property, in the sense of being able to control access to it and disposition of it, resides in the political majority. Any amount of ownership that individuals are allowed to maintain within their own control is only by "governmental choice," to use Professor Tribe's term.[168]

It has long been recognized that private property is an essential prerequisite to human liberty as well as economic prosperity.[169] Although he was arguing for a different solution, Charles Reich perceived the same problem in 1964, when the economic domination of the Positive State had yet to begin in earnest.

> Political rights presuppose that individuals and private groups have the will and the means to act independently. . . . Civil liberties must have a basis in property, or bills of rights will not preserve them. . . . Indeed, in the final analysis the Bill of Rights depends upon the existence of private property.[170]

Unfortunately, Reich's solution to the problem was simply to offer the citizen another political promise that her "rights" to certain government benefits would be vested as "property." The problem with such political

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165. Examples of mandated spending by businesses and individuals include disability access, auto safety features, required health and pension benefits, maternity leave, and minimum wage laws.

166. It is interesting and ironic, as we witness the collapse of socialist systems in Europe and Asia, with corresponding calls for the benefits of "free market" economies, that we still think of the U.S. economy as "free."

167. *See supra* notes 70-108 and accompanying text.

168. TRIBE, *supra* note 18, § 8-7, at 453.

169. Advocates of political process values say that property is a construct of the state. *See, e.g.*, Sunstein, *supra* note 11, at 882. This conception confuses the function of the state in *protecting* and resolving conflicting claims to property with the altogether separate act of *creating* property. Indeed, the existence of property is a condition precedent for a state to come into being. Advocates of Bill of Rights values say the "ownership" that a person has in the product of her intellect or labor is one of the pre-political rights which the state is meant to defend. Legal systems that protect property do not create property any more than laws against murder create human beings.

170. Reich, *supra* note 149, at 771.

promises, that is, "allocations" of "rights" from the state, is that they confirm, rather than deny, the state's power to allocate and to revoke. Such "allocations" may be good only until the next committee meeting when some competing interest offers a higher price.

The necessary linkage between property rights and the Bill of Rights has been recognized by the Supreme Court in the post-New Deal Era.

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.[171]

As Justice Stewart's remarks show, the threat to Bill of Rights values created by the rise of the Positive State has not gone unrecognized by the Supreme Court. In fact, true to the second *Carolene Products* distinction calling for increased judicial scrutiny protecting political process participation of minorities,[172] the Court's recognition of many civil rights has been greatly expanded.[173] Unfortunately, the first distinction in *Carolene Products*, abdicating any scrutiny of economic regulation, has allowed the private property foundation of Bill of Rights values to be undermined by the political process.

Because the framers understood the vital role of private property in a free and prosperous society, they attempted to protect it with several "specific prohibitions" in the Constitution.[174] As Madison foresaw, however, those protections have not withstood "repeated violations in extraordinary cases."[175]

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171. Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (Stewart, J., for a majority including Justices Douglas, Brennan, and Marshall).

172. United States v. Carolene Products, 304 U.S. 144 (1938).

173. ELY, *supra* note 18, at 105-25. As examples of Supreme Court decisions expanding political process participation, Professor Ely mentions, inter alia, Dennis v. United States, 341 U.S. 494 (1951), Brandenburg v. Ohio, 395 U.S. 444 (1969), Cohen v. California, 403 U.S. 15 (1971) (all expanding the Court's understanding of freedom of speech); and Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), Carrington v. Rash, 380 U.S. 89 (1965), and Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (all expanding voting rights).

174. *See supra* notes 99-108 and accompanying text.

175. 11 THE PAPERS OF JAMES MADISON, *supra* note 2, at 209.

3. The Doctrine of Unconstitutional Conditions

One way the Court has attempted to deal with the threat posed by economic domination of the state has been the doctrine of unconstitutional conditions. This doctrine is well established in American constitutional law, having its roots in at least one pre-Civil War case.[176] Generally, the doctrine maintains that the government may not place conditions on the receipt of benefits that would require a citizen to waive a constitutionally protected right. In short, the state may not acquire by bargain that which it may not take directly.[177] Given the nature of the doctrine, it is natural that the courts would exercise it more frequently with the growth of the Positive State as taker of resources and grantor of benefits. Since the ability of the state to be a grantor of benefits is conditioned upon its power over economic resources, the doctrine of unconstitutional conditions has become a nexus of conflicting forces. Charles Reich's observation in 1964 that a citizen's economic well-being was increasingly determined by her legal status, or relationship to the state, became much more relevant in the succeeding twenty-eight years. In 1990, for example, more than 49% of federal government expenditures were transfer payments.[178] Very substantial amounts in other budget categories also serve essentially the same purpose.[179] It would be virtually impossible to identify anyone who is not affected to some extent, positively or negatively, by government taking and giving of economic resources.

In light of this Positive State environment, the efficacy of the doctrine of unconstitutional conditions has been hampered by the blurring of the distinction between restrictions placed on programs and conditions placed on recipients, and by the reluctance of the Court to recognize constitutionally mandated exemptions from "generally applicable laws."

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176. Lafayette Co. v. French, 59 U.S. 404 (1856) (upholding conditions set by Ohio for foreign corporations doing business within that state "provided they are not repugnant to the Constitution"). *Id.* at 407, *quoted in* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 1, 7 n.7 (1988).

177. Note that the doctrine necessarily assumes that there are some limits to what the state may take.

178. Transfer payments are direct payments by the government which are not in connection with the purchase of goods or services. The 49% figure in the text was derived by summing the percentage distributions of selected 1990 estimated federal budget categories. The selected budget categories were Income Security, Retirement and Disability (General and Federal Employee), Social Security and Medicare, Veterans' Benefits and Services, and Farm Income Stabilization. U.S. DEP'T OF COMMERCE, *supra* note 154, table 509, at 316.

179. When military base closings were announced in 1991, for example, no one complained that the nation would no longer be adequately defended. A great hue and cry arose, however, from those whose employment would be affected. It is tempting to conclude that a large portion of the military budget serves the same function as transfer payments.

When a program or benefit is just one of several options, which may be taken or left, the difference between program restrictions and recipient restrictions is meaningful. When the Positive State absorbs 47% of the nation's economic resources directly, and substantially more resources indirectly, and when large segments of society depend on the state for their economic existence, then restrictions on programs *are* restrictions on recipients. The recent cases of *Employment Division, Department of Human Resources v. Smith*[180] and *Rust v. Sullivan*[181] illustrate the problem. These cases show the difficulty in the age of the Positive State of maintaining *Carolene Products'* distinction between "ordinary commercial" and other specifically protected rights. Without that distinction, the threat posed by political process values is not limited to economic rights in property, but extends to matters involving our physical, sexual, and even our spiritual well-being.

D. Employment Division, Department of Human Resources v. Smith

Employment Division, Department of Human Resources v. Smith,[182] decided in 1990, concerned two members of the Native American Church, plaintiffs Smith and Black, who were fired from their jobs with a private drug rehabilitation program because they ingested peyote, an hallucinogenic drug, in the course of their religious ceremonies. The State of Oregon subsequently denied Smith and Black unemployment compensation because they were fired for "work-related 'misconduct.'"[183] Smith and Black challenged the State's denial of benefits as an unconstitutional violation of their rights under the Free Exercise Clause of the First Amendment.

The Court's majority opinion, delivered by Justice Scalia and joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy, rejected the claims of the Native Americans. In doing so, the Court effectively reversed established Free Exercise doctrine.[184] Prior to *Smith*,

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180. 494 U.S. 872 (1990).
181. 111 S. Ct. 1759 (1991).
182. 494 U.S. 872 (1990).
183. *Id.* at 874.
184. For other discussions of *Smith*, see GUNTHER, *supra* note 68, at 1573-86; Craig M. Cornish & Donald B. Louria, *Drug Testing in the Workplace: Employment Drug Testing, Preventive Searches, and the Future of Privacy*, 33 WM. & MARY L. REV. 95 (1991); Reich, *supra* note 14, at 1418-19; Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

the Court required a government "to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest."[185] In his majority opinion, however, Justice Scalia refused to apply that test, even to such a "paradigm free exercise" case.[186] Rather, the Court announced a new rule: "[I]f prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[187] In other words, unless the law in question singles out a religious practice, it is valid and does not even trigger a First Amendment question, regardless of what "incidental" effects it may have.

Justice Scalia's opinion makes no effort to conceal the dominance of political process values in the reasoning of the majority. Significantly, he quotes approvingly from a 1940 case written by Justice Felix Frankfurter, *Minersville School District v. Gobitis*:[188] "The mere possession of religious convictions which contradict the relevant concerns of a *political* society does not relieve the citizen from the discharge of *political responsibilities* . . . ."[189] Bypassing more recent cases that did not suit his purpose,[190] Justice Scalia reached back to the 1879 case of *Reynolds v. United States*[191] to extract a statement of the principal concern of those who worship at the altar of the political process: "[To] excuse [a citizen's] practices . . . because of his religious belief[s] . . . would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[192] A reading of the First Amendment that was motivated by Bill of Rights values would indeed conclude that "every citizen" should be "a law unto himself" where religious belief and exercise are concerned. To Justice Scalia and the majority in *Smith*, however, "to permit every

185. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring).

186. *Id.* at 902 (O'Connor, J., concurring). Significantly, the question of whether the Native American Church was a "religion" for First Amendment purposes was not argued in this case.

187. *Id.* at 878 (O'Connor, J., concurring).

188. 310 U.S. 586 (1940), *rev'd*, 319 U.S. 624 (1943). Justice Felix Frankfurter was appointed to the Court by President Franklin D. Roosevelt in 1939.

189. *Smith*, 494 U.S. 879 (emphasis added) (quoting Minersville School Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594-95 (1940)).

190. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (granting exemption from unemployment compensation regulations for Seventh Day Adventists); Wisconsin v. Yoder, 406 U.S. 205 (1972) (granting exemption from mandatory school attendance laws for the Amish).

191. 98 U.S. 145 (1878), *rev'd*, 450 U.S. 707 (1981).

192. *Smith*, 494 U.S. at 879 (quoting *Reynolds*, 98 U.S. at 166-67).

citizen to become a law unto himself" represents the worst of evils rather than a highly desirable object of civilized society.

The doctrine of unconstitutional conditions holds that a citizen may not be required to waive a constitutionally protected right as a condition for the receipt of a government benefit. Notwithstanding that doctrine, that is exactly what occurred in *Smith*. The Native Americans' exercise of their religious beliefs was labeled "misconduct" by a "generally applicable" law. As a result, the only way Smith and Black could have made themselves eligible for unemployment compensation in Oregon was to forego their religious practices.

It is not difficult to imagine a "generally applicable" law that would prohibit the serving of food and/or alcoholic beverages to groups of ten persons or more, outside of a private residence, or without a license or permit from a government public health agency. Laws already exist that prohibit the serving of alcohol to minors. According to the majority in *Smith*, enforcement of such laws, combined with state refusal to grant a license, could constitutionally shut down the Roman Catholic Church in this country, or at least limit its current worship practices. The substantial government interest in preventing disease, maintaining public health, and protecting the morality of our young people would clearly outweigh the limited and personal interests of a group of people who desired to engage in aberrant behavior contrary to the general welfare and in direct contravention of "generally applicable" laws. As Justice Scalia said in *Smith*, "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself . . . ."[193]

Most do not take the possibility of the Supreme Court shutting down the Catholic Church due to its "misconduct" very seriously because the Church has millions of adherents and substantial political influence. It is very capable of using the political process to protect itself. The Native Americans of Oregon are neither so numerous nor so influential. Notwithstanding Justice Stone's words in footnote four of *Carolene Products*, the political process cannot be relied on to protect the interests of minorities. That is what the Supreme Court is supposed to do.

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193. *Id.* at 890.

E. Rust v. Sullivan

The case of *Rust v. Sullivan*[194] arose in 1988 when the United States Department of Health and Human Services rewrote regulations governing the use of funds appropriated for family planning services under Title X of the Public Health Services Act.[195] Congress passed the Act originally in 1970. The language of the Act states that none of the funds appropriated "shall be used in programs where abortion is a method of family planning."[196] The newly rewritten regulations prohibit Title X recipients from counseling, referring, or advocating abortion in any way. They also require clinics receiving Title X funds to maintain strictly separate physical facilities and financial records, to ensure that abortion-related services are clearly distinct from Title X funded services. Several Title X grantees and doctors brought suit to challenge the new regulations under the First and Fifth Amendments as violating their freedom of speech and right of privacy.[197]

The Court, in a majority opinion delivered by Chief Justice Rehnquist and joined by Justices White, Kennedy, Scalia, and Souter, denied the petitioners' First Amendment claim that the new regulations impermissibly prohibited "all discussion about abortion as a lawful option . . . while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term."[198] "The Government can," said the Chief Justice, "without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way."[199] In addition, the Court said, "within far broader limits than petitioners are willing to concede, when the government appropriates public funds to establish a program it is entitled to define the limits of that program."[200] Moreover, the Court emphasized that such limits and restrictions on the program do not invoke the doctrine of unconstitutional conditions. Restrictions on the *program* are not the same as restrictions on the *recipient.*

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194. 111 S. Ct. 1759 (1991).

195. Pub. L. No. 91-5727, 84 Stat. 1506 (1970) (codified as amended at 42 U.S.C. § 300 to 300a-41 (1988)).

196. 42 U.S.C. § 300a-6 (1988).

197. *Rust*, 111 S. Ct. 1759. The suits also challenged the permissibility of the regulations under the statute, but this Note focuses on the constitutional issues.

198. *Id.* at 1771-72 (quoting Petitioners' Brief at 11, *Rust* (No. 89-1391)).

199. *Id.* at 1772.

200. *Id.* at 1773.

> [O]ur "unconstitutional conditions" cases involve situations in which the government has placed a condition on the *recipient* of the subsidy rather that [sic] on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.[201]
>
> . . . .
>
> . . . The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy.[202]

The petitioners' claim that the regulations violated a woman's Fifth Amendment right to choose an abortion was also rejected. "The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion."[203] Congress's refusal to fund abortions leaves "an indigent woman at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all."[204]

When the Court's reasoning is considered in light of the Positive State domination of the economy, its basic premises are drawn into question. According to the majority opinion, the program restrictions do not infringe the petitioners' First Amendment rights of free speech, or their pregnant clients' rights to choose an abortion, because they can always exercise their rights outside the scope of the program.

> Congress' refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the government had chosen not to fund family planning services at all. The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the government had not enacted Title X.[205]

Earlier in the opinion, the Court noted:

> The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.[206]

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201. *Id.* at 1774 (emphasis in original).
202. *Id.* at 1775 n.5.
203. *Id.* at 1776.
204. *Id.* at 1777 (quoting Harris v. McRae, 448 U.S. 297, 317 (1980)).
205. *Id.*
206. *Id.* at 1774 (emphasis in original).

The Court's reasoning rests on premises that ignore the economic impact of the Positive State. The Court assumes that both pregnant women and doctors who operate family planning clinics are unaffected by a political process that absorbs almost half of the economic resources available to the country. As Reich observed in 1964, however, the fact that the government has become the source of "largess"[207] to so many does make a difference. A pregnant woman is not left with the same choices she would have had in the absence of the Positive State when governments at all levels take 47% of the economy's personal income and then make "'value judgment[s]'"[208] that exclude the services she desires. The very magnitude of the governments' economic role crowds out free market actors who ordinarily might respond to demands, like the pregnant woman's, that are not large enough to command a political majority. This is not to suggest, necessarily, that more abortion counseling services would be available to indigent women within a totally free market environment.[209] It does suggest, however, that women's choices would be significantly different than they are presently. Among other things, the possibility of more privately funded programs would be enhanced enormously. Not only would there be many more resources in private hands, but also those private hands would not need to obtain a majority vote in a legislature before they could act.

The *Rust* decision places in stark relief the point not understood by the modern Court or the *Carolene Products* majority; that is, the Positive State necessarily constrains the freedom of action for all citizens who are unable to utilize the power of the political majority on their behalf. These constraints occur in two ways. First, the "independent means" necessary for action are taken away by the state through taxation and regulation. Second, the space available for independent action is constricted by the Positive State's crowding out effect, that is, its domination of the field through "generally applicable" laws and restrictions on programs crowds out private actors who would otherwise offer services. If doctors and nurses were not operating family planning clinics under Title X, for example, they could be offering *both* family planning and abortion counseling. The "largess" available under the program forces them to

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207. Reich, *supra* note 149.

208. *Rust*, 111 S. Ct. at 1772 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

209. To conclude, however, that no more abortion counseling services would be available in a completely free marketplace would require acceptance of the proposition that none of the funds freed from the government would be spent by private actors on abortion counseling. This seems highly unlikely.

choose to do it the political majority's way or, effectively, not to do it at all.

Maintaining the distinction between legislation affecting "ordinary commercial transactions"[210] and legislation affecting "specific prohibition[s]"[211] of the Constitution becomes impossible when the state absorbs and makes "value judgment[s]"[212] about the allocation of almost half the economic resources available to its citizens. Native Americans must either forego a benefit ordinarily available to all or give up their religious practices. Pregnant women seeking abortion counseling and doctors wanting to give such counseling are restricted because the government program they both rely on comes with strings attached.

Smith and *Rust* are also examples of the disappearance of the *Carolene Products* footnote four distinction for the modern Court. If there are any "specific prohibition[s]" in the Constitution, the Free Exercise Clause[213] of the First Amendment is surely one of them. Yet, Justice Scalia's opinion for the majority in *Smith* does for the Free Exercise Clause what Chief Justice Hughes' opinion in *Blaisdell* did for the Contracts Clause. Just as the Court ignored the words of the Contracts Clause in *Blaisdell*, so the majority in *Smith* ignored the words of the Free Exercise Clause. Notwithstanding the *Carolene Products* distinction, the "specific prohibition" in the First Amendment ultimately had no more deterrent effect than the "specific prohibition" in Article I.

The message of the *Smith* and *Rust* majorities is that the government can "allocate" the public's "resources" any way the political majority chooses to, and it may enforce "generally applicable" laws regardless of their "incidental" infringement on constitutionally protected conduct. When these decisions are combined with the message of the New Deal revolution that the political majority may take or regulate economic resources without any meaningful constitutional constraint, little, if any, room is left for individual nonconformity "opposed to the decided sense of the public."[214] Much more than property and contract rights have been infringed. As Charles Reich observed in 1964, "[p]olitical rights presuppose . . . the will and the means to act independently."[215] The will may still be there, but the means are controlled by the political majority.

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210. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

211. *Id.*

212. *Rust*, 111 S. Ct. at 1759, 1772.

213. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

214. 11 THE PAPERS OF JAMES MADISON, *supra* note 2, at 299.

215. Reich, *supra* note 149, at 771.

IV. THE CASES COMPARED

When the modern decisions discussed in Part III are compared to the New Deal decisions discussed in Part II, the similarities become clear. Most obviously, these are all cases in which the Court decides that the division of power established by the Constitution favors the political majority over a protesting minority.[216] All concern voluntary transactions involving two or more adults, except in *Smith*, where the "harm" was self-inflicted. In all of the cases, the Court allows the rule of uninvolved parties, other people called the "government," to control. When the Court is asked, "Who decides?," it answers, "The collective." In each of the cases, the individual or minority group desired to engage in conduct which it believed to be beyond the control of the state: Michael Hardwick wanted to engage in homosexual sodomy without fear of arrest; Mr. Smith and his co-religionists wanted to ingest peyote in the course of their religious ceremonies; the Glen Theatre, the Kitty Kat Lounge, and their employees wanted to offer entertainment by consenting adults for consenting adults; the family planning clinics wanted to provide abortion counseling; the grocer Nebbia wanted to offer his customers a lower price for milk; the Home Building and Loan Association wanted to enforce its valid contract; the West Coast Hotel wanted to deal directly with its employees to negotiate the terms of their employment; and Carolene Products wanted to offer a less expensive market alternative to natural whole milk. In each case, the Supreme Court determined that their private acts were not protected by the Constitution from interference by other citizens who happened to outnumber them.

The second way in which the decisions are similar is that each one, with the exception of *Rust*, departed from established Court doctrine to extend the reach of the political majority into a region it had not previously, or at least recently, occupied. Many commentators[217] believed that the right of privacy doctrine, established in the line of cases beginning with *Griswold v. Connecticut*,[218] running through *Eisenstadt v. Baird*,[219] and culminating in *Roe v. Wade*,[220] extended to cover all sexual conduct,

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216. Shortly after the *Rust* decision was handed down, a majority of both houses of Congress voted to amend Title X of the Public Health Services Act to allow for abortion counseling. President Bush vetoed the amendment and Congress failed to override it. When a badly drafted law is combined with a determined Executive, the "political majority," it seems, becomes 34 senators.

217. *See, e.g.*, Conkle, *supra* note 18, at 216.

218. 381 U.S. 479 (1965).

219. 405 U.S. 438 (1972).

220. 410 U.S. 113 (1973)

whether reproductive or not, between consenting adults.[221] Notwithstanding the clear doctrinal implications, the Court found that the Constitution did not protect Michael Hardwick from the "morality" of the political majority of Georgia.

In *Barnes*, only four Justices of the five Justice majority applied the established doctrinal analysis. Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, believed that the "police power" of the state extended to overseeing the "morality" of its citizens and that such interest outweighed the First Amendment interests of the nightclubs and their employees. Justice Souter chose to consider the state's interest in preventing so-called "secondary effects" of the proposed entertainment, even though no evidence of such effects was in the record. He found that the hypothetical "secondary effects" outweighed the First Amendment interests. That more-or-less conventional analysis, however, would not have decided the case. Four dissenting Justices, White, Marshall, Blackmun, and Stevens, conducted a similar ad hoc balancing exercise and found that the First Amendment interests of the clubs and employees outweighed the "police power" interest of the state. The case was effectively decided by the Justice who departed from established analytical doctrine. Justice Scalia chose to break new ground and apply an across-the-board rule similar to that which garnered a majority of the Court in *Smith*. A "general law" controlling conduct, said Justice Scalia, *must be obeyed*, so long as the law does not seek specifically to stifle expression. Justice Scalia's analysis never reached the First Amendment.

Similarly, Mr. Smith and his Native American co-religionists had good reason to believe that the Court would grant them an exemption from Oregon's anti-drug laws. Prior to *Smith*, established Free Exercise Clause doctrine required the state to show a "compelling interest" to justify applying a law in a way that would infringe the free exercise of a citizen's religion. Justice Scalia's majority opinion, however, reversed that doctrine and established a new rule granting no exemptions to generally applicable criminal statutes.

It cannot be fairly said that the *Rust* decision departed from established constitutional doctrine. As Chief Justice Rehnquist said in his opinion, the decision was consistent with other recent opinions upholding states' refusals to fund abortion-related services.[222] By illustrating the way the Positive State can influence constitutionally protected behavior through

221. Conkle, *supra* note 18, at 221-22.
222. *Rust*, 111 S. Ct. at 1759.

restrictions on programs, however, the decision does leave the doctrine of unconstitutional conditions with a very narrow field on which to play.

The New Deal cases also, of course, broke new ground for the state. *Nebbia* and *Blaisdell* signaled the end of the *Lochner* Era by upholding the state's violation of property and contract rights previously held to be protected by the Constitution.[223] *West Coast Hotel* overturned a contrary decision under similar facts,[224] and *Carolene Products* established a new standard of deference to a legislature's "findings," while creating a double standard for constitutional rights[225] that would guide the Court for a generation.

The third way in which these decisions are similar is that the power of the state is not invoked for the purpose of preventing harm to others. In each case, the conduct involved, namely, engaging in sodomy, chewing peyote, nude dancing, abortion counseling, selling milk at a low price, enforcing a valid contract, negotiating freely with an employee, or offering a cheaper alternative product, was outlawed either because the conduct supposedly harmed the person who wanted to engage in it, or because the conduct would withhold a benefit from a third party.[226] In no case was the decision justified as protecting a citizen from violence, theft, deceit, or fraud of another. Even in *Rust*, the interests considered by the Court did not include those of the fetus. In fact, no one would have been harmed had any of the decisions gone otherwise.[227]

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223. *See supra* part II.B.

224. *See supra* part II.C-D.

225. *See supra* part II.E.

226. *Rust v. Sullivan* is again somewhat different from the other modern cases. "Pro-life" advocates attribute full personhood to the unborn fetus so that regulations limiting abortion counseling can be said to prevent harm to someone. Whether and when a fetus is a person, with all the legal rights such status implies, is the central point of disagreement in the abortion controversy.

227. This statement is obviously measuring harm from a "baseline" of free market relationships among the parties. Using such a reference point, no voluntary transaction, whether commercial or sexual, can be considered harmful to any party. If a party believed the transaction harmful, she would not volunteer to participate in it. The outcome of a voluntary transaction may, of course, be negative for one or both of the parties, as in *Blaisdell*. *See supra* notes 80-87 and accompanying text. That possibility was anticipated, even bargained with, in the course of making the agreement. The realization of a negative result, the possibility of which was agreed to in advance, cannot be considered harm in the sense that term is used in the text. An offsetting benefit was bargained for in return for exposure to the potential harm. The transaction would never have occurred without that benefit.

Justice Souter's "secondary effects" rationale in *Barnes* is an attempt to show harm to others as justification. Even if some relationship to actual "secondary effects" could be demonstrated, how strong a relationship would be required to justify such a proscriptive law? 1/10,000? 1/1,000? 1/100? Must causation be proved, or only correlation?

In *Bowers*, "[t]he Court made no claim . . . that homosexual conduct causes physical harm either to the individuals in question or to the society at large." Conkle, *supra* note 18, at 233.

The rationales used by the Court to justify these decisions fall into two general categories: (1) Paternalism, that is, the belief that the political majority knows the best interests of an individual better than the individual does;[228] and (2) Unrestrained Majoritarianism, that is, the belief that there are no limits to the horizontal reach of the political majority, and that the majority may therefore use an individual against her will in the "public interest."[229] When Paternalism, as exercised by the political majority, is recognized as no more than imposing the views of the majority on a recalcitrant minority, both categories of justification are in their most fundamental senses asserting the same thing, namely, the political majority's "right" to *use* the minority; to make the minority a means to the achievement of the majority's end. In the New Deal cases, the end that the political majority purported[230] to have in mind was a more "just" distribution of burdens and benefits. In the modern cases, the end is more akin to social conformity, moral conformity, or both.

The common value shared by both the "liberal" decisions of the New Deal and the recent "conservative" decisions of the modern Court is the belief that a democratic political majority, in order to accomplish its objectives, may legitimately coerce those who disagree with it. By this analysis, Justice Scalia and the other "conservative" Justices on the modern Court are just as much social reformers as the New Dealers were. The "conservative" decisions of the modern Court rest, at bottom, on the same political process values as the "liberal" decisions of the New Deal. Whether their objective is a more "just" distribution of economic resources, or a less "sinful" way of living, both "liberals" and "conservatives" attempt to use the coercive power of the state to enforce their conception of the good society.

"Pro-life" advocates would disagree regarding *Rust*. To the extent that an unborn fetus is attributed legal status as a person, restrictions on abortion are justified as preventing harm to others.

228. *Bowers*, *Barnes*, *Smith*, and *Rust* all fall into this category. In each case, the personal behavior orthodoxy of the political majority is imposed on a minority.

229. *Nebbia*, *West Coast Hotel*, *Blaisdell*, and *Carolene Products* all fall into this category. In each case, the challenged law imposed an economic loss on some citizens and provided a direct monetary benefit to others.

230. "Purported" is used here because the actual interests served by the laws upheld were private "special interests." In this connection, it is interesting to consider the similarities and differences between *Nebbia* and *West Coast Hotel*. In both cases, the political majority intervened to fix the minimum price of a market commodity and the fixed price worked to harm the consuming public: higher costs for the hotel operator to pass on to his customers, and higher milk prices for the consumers of New York. Note the difference, however—the guilty party was the *seller* in *Nebbia*, and the *buyer* in *West Coast Hotel*. These cases illustrate the fallacy of using terms like the "public interest" to explain such legislation.

It is instructive to imagine how the rhetoric used by modern scholars to explain, justify, and even applaud the New Deal cases and the de facto constitutional amendment they represent might be utilized in support of the modern Court's decisions. One might say, for example, that those who criticize the *Bowers* or *Barnes* decisions base their views on an anachronistic, free market, live-and-let-live, baseline assumption. Use of just such a baseline was criticized by Justice Scalia when he said, "there is no basis for thinking that our society has ever shared that Thoreauvian 'you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else' beau ideal—much less for thinking that it was written into the Constitution."[231] Such beliefs rest on an "anachronistic understanding of 'limited government.'"[232] There is, of course, nothing "natural" about such a "Thoreauvian . . . beau ideal." Government may make a "political choice" of whatever baseline for personal behavior orthodoxy it chooses. To allow Mr. Bowers and the Kitty Kat Lounge to be "laws unto themselves"—to allow judicial enforcement of a free market "ordering" of behavior contrary to the public conception of "justice" or "morality"—would be "undemocratic" and "countermajoritarian."[233] Judicial enforcement of such a baseline "represents a governmental choice with discernable consequences" for the distribution of pleasure and personal fulfillment.[234] Surely, in our democratic society, we cannot allow such rigid formalisms as an anachronistic, free market, live-and-let-live, behavioral baseline to stand in the way of our "reconstruct[ing] . . . a legally cogent . . . higher law . . . to govern . . . in the name of We the People."[235]

With arguments like these, behavioral orthodoxy may become as "politically correct" as distributive orthodoxy.

When it is understood that the modern Court decisions and the New Deal Court decisions both reflect an interpretation of the Constitution that emphasizes political process values, one is forced to ask why the conventional labels place them at opposite ends of the political spectrum. Why do the New Deal decisions please "liberals," and the modern decisions please "conservatives," when an analysis of the cases in terms

231. Barnes v. Glen Theatre, 111 S. Ct. 2456, 2465 (1991).
232. Sunstein, *supra* note 6, at 429.
233. *Id.* at 439.
234. TRIBE, *supra* note 18, § 6-17, at 453.
235. Ackerman, *supra* note 11, at 744.

of conflicting constitutional values places them together on the majoritarian end of the constitutional spectrum?[236]

The answer may be that in the absence of a principled and consistent defense of Bill of Rights values by the Supreme Court since the New Deal revolution, the majoritarian premises of the Positive State have been uncritically accepted by our society's other institutions. Bill of Rights values have been submerged below the baseline of unexpressed majoritarian assumptions. All "interests" are to be pursued through the Positive State. Both liberals and conservatives attempt to reform society by using the coercive mechanisms of the state to achieve their political objectives. The distinction between them is in the nature of their objectives, not in their underlying political values. Both groups seek to broaden the horizontal reach of majoritarianism and are more than willing to use the state to impose their biases on those who disagree.

If there is a solution to the problem described in this Note, it is surely not to be found in the realm of politics. The solution must be found in defining just what the realm of politics really ought to be, that is, in defining the horizontal reach of democratic majoritarianism. Only the Supreme Court can effect such a solution. The way for the Court to begin is to impose a truly meaningful test to determine the constitutionality of government restrictions on human behavior, a test that would require justification by a significant showing of harm to others, with harm measured from a pre-political baseline. Such an approach would be a truly principled recognition of the proper role of Bill of Rights values in our constitutional jurisprudence.

CONCLUSION

It is fashionable these days for Americans to congratulate themselves for winning the Cold War. Some even assert that the emergence of "liberal democracy" as the only remaining legitimate form of government represents "the end of history."[237] This Note has attempted to

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236. A political dichotomy more accurately reflective of the value dichotomy in the Constitution is "libertarian" versus "majoritarian." A libertarian view challenges the assumptions of the Positive State and emphasizes Bill of Rights values. A majoritarian view, as we have seen, emphasizes political process values and considers "society" as the moral unit instead of the individual human being. As majoritarians of both liberal and conservative stripes realize that the political process threatens to draft them into wars not of their choosing, perhaps more will opt to pursue their own objectives by means of persuasion instead of political coercion.

237. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (The Free Press 1992). Fukuyama takes his title from the Hegelian dialectic view of history as driven by competing economic

demonstrate, however, that there remains a dialectic tension within the concept of "liberal democracy"—a tension between the autonomy of the individual human being and the majoritarian democratic principle. To the extent that majoritarianism is allowed to overwhelm the individual, we risk losing all that we think we won in the Cold War. To paraphrase Madison, wherever there is an interest and a power to impose orthodoxy, orthodoxy will generally be imposed, not less readily by a powerful and interested democratic political majority than by a powerful and interested authoritarian bureaucracy.[238]

Those who came to political power in the 1930s realized that, if only the Supreme Court would get out of the way, their version of economic orthodoxy could be imposed.[239] All they had to do was convince the Court that Bill of Rights values were "countermajoritarian," and that a democratically elected government should be able to choose whatever legal rules and economic "ordering" it wants. The subsequent judicial capitulation began a process that has produced a Supreme Court that either "balances" unequivocal constitutional prohibitions against "the public interest"[240] or ignores them altogether.[241] The Court still insists that the state may not require the waiver of constitutional rights in return for government benefits, but *Smith* and *Rust* teach that, in the era of the Positive State, enactment of "generally applicable" laws and restrictions on programs instead of people accomplish essentially the same thing. Even in the absence of government funding as an inducement to alter behavior, *Bowers* and *Barnes* show that the logic of the political process argument is irresistible to social reformers who would save us from ourselves.

As James Madison foresaw over two hundred years ago, political process values have come to dominate Supreme Court jurisprudence. In one application, the results please "liberals" because they advance the goal of material equality. In another application, the results please "conservatives" because they advance the goal of social conformity. The lesson, perhaps, is that so long as political process values are controlling, no one is secure from being drafted into someone else's war, be it a war on drugs, a war on poverty, or a war on sin.

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forces. In this view, the collapse of communist authoritarian states in 1989 and 1990 has left "liberal democracy" as the only remaining form of government with any legitimacy. The end of the Cold War competition between anti-democratic authoritarian states and "liberal democracies" is, in Hegelian terms, "the end of history."

238. *See* quotation *supra* note 4.

239. Sunstein, *supra* note 6.

240. *See, e.g., Barnes v. Glen Theatre*, discussed *supra* part III.B.

241. *See, e.g., Employment Div., Dept. of Human Res. v. Smith*, discussed *supra* part III.D.

The political process has become the icon of "liberal democracy" before which all other interests bow down. Anyone who would reform society according to her own conception appeals to the "public interest," the "common good," or the "Will of the People," as if such an appeal grants legitimacy to any means she may wish to use. Any solution may be imposed in the name of "The People!" The political process may be America's "Final Solution."

There is an argument based on utility which holds that collective, politically motivated, economic resource allocation is inefficient, that it creates too many externalities, and saps the dynamic spirit from any economy, ultimately lowering the standard of living for everyone. Ample evidence exists to support that argument.[242]

The more powerful argument favoring an interpretation of the Constitution emphasizing Bill of Rights values, however, is a moral one. It is an argument based on the recognition that the individual is the only moral entity; that the essence of being human is having control over one's own moral life; that paternalism, whether economic or behavioral, is fundamentally dehumanizing because it robs the individual of control over her own life; that authoritarianism, whether the result of democratic processes or otherwise, necessarily treats some citizens as less than fully human. This moral argument for individual autonomy has not been stated better than by Isaiah Berlin:

> [T]o manipulate men, to propel them towards goals which you—the social reformer—see, but they may not, is to deny their human essence, to treat them as objects without wills of their own, and therefore to degrade them. That is why to lie to men, or to deceive them, that is, to use them as means for my, not their own, independently conceived ends, even if it is for their own benefit, is, in effect, to treat them as sub-human, to behave as if their ends are less ultimate and sacred than my own. In the name of what can I ever be justified in forcing men to do what they have not willed or consented to? Only in the name of some value higher than themselves. But if, as Kant held, all values are made so by the free acts of men, and called values only so far as they are this, there is no value higher than the individual.[243]

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242. The experiment in reduction to absurdity that has taken place in Russia and the other nations that comprised the late Union of Soviet Socialist Republics may be the best argument yet devised to rebut the assumptions of collectivism. As high as the price was for them, it may not have been high enough for those of us on the outside looking in. With governments at all levels taking almost half of the economic resources produced by American citizens, we should not be surprised that economic growth and employment are lagging behind our expectations.

243. BERLIN, *supra* note 1, at 137.

The Constitution, as imperfect and ambiguous as it is, has provided us with a framework of government that has allowed the fullest realization of human liberty yet experienced. It should not be interpreted as allowing the political majority to treat the minority as "objects without wills of their own," or "to behave as if [the minority's] ends are less ultimate and sacred than [their] own."[244]

If we are to maintain and improve on our nation's achievements, and avoid a slow retreat into cultural and economic mediocrity, our institutions of government, like the Supreme Court, but especially The People, must redefine their conception of the good society from one of mandated conformity and material equality to one of protected individual diversity and liberty.

244. *Id.*