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Preserving Life by Ranking Rights

John William Draper

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PRESERVING LIFE BY RANKING RIGHTS

*John William Draper**

Border walls, abortion, and the death penalty are the current battlegrounds of the right to life.¹ Events pertaining to any of these areas tend to be newsworthy.² All three issues pertain to the protection of life from at least one viewpoint. We will visit each topic and more in this Article, as we consider ranking groups of constitutional rights.

The enumerated rights of the Due Process Clauses of the Fifth and Fourteenth Amendments—life, liberty, and property—merit special attention. As a catchall series of largely exclusive categories of basic rights,³ they can provide a systematic and just way to settle disputes involving conflicts between life and other rights. The result would prioritize and protect life, the most fundamental of rights.⁴

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¹ See Jennifer Bendery, ‘Pro-Life,’ *Pro- Family Groups Are MIA on Family Separations at the Border*, HUFFPOST (June 19, 2018), https://www.huffingtonpost.com/entry/family-separations-border-immigration-pro-life_us_5b2918e6e4b0a4dc9921090c; *Ethics Guide – Arguments Against Capital Punishment*, BBC, http://www.bbc.co.uk/ethics/capitalpunishment/against_1.shtml (last visited Oct. 3, 2018); *Introduction to the Abortion Debate*, BBC, http://www.bbc.co.uk/ethics/abortion/legal/introduction_1.shtml#h2 (last visited Oct. 3, 2018).

² See, e.g., Adam Liptak, *Supreme Court Won’t Hear Challenges to Arizona’s Death Penalty Law*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/us/supreme-court-death-penalty.html> (reporting that the Supreme Court turned down a request to consider whether death penalty is constitutional throughout the nation); Reuters, *In Quick Reversal, Trump Threatens Shutdown Over Border Wall*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/reuters/2018/09/05/us/politics/05reuters-usa-trump-shutdown.html> (reporting that President Trump threatened to shut down the U.S. government if Congress did not approve border wall funding); Sabrina Tavernise, *The Future of Abortion Under a New Supreme Court? Look to Arkansas*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/us/abortion-supreme-court-arkansas.html> (reporting that current abortion cases in Arkansas may define the new legal battle over abortion).

³ Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards”*, 57 UCLA L. REV. 365, 370 (2009).

⁴ “[F]undamental rights analysis is simply no more than the modern recognition of the natural law concepts first espoused by Justice Chase in *Calder v. Bull*.” JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.7, at 498 (8th ed. 2010) [hereinafter NOWAK

This would be akin to medicine's Hippocratic Oath⁵: first, do no harm.⁶ Like medicine, law should protect life, not take it.

Should interests in liberty outweigh the right to life? Should property interests do the same? American law and practice have arrived at varying answers to these questions. Each individual life merits more fairness, justice, and predictability than what our legal system currently provides. We need to change our laws and practices to help save lives.

Ranking life above liberty and property would constitute a new constitutional principle based on an ordered interpretation of current language.⁷ The principle has deep historical roots.⁸ Borrowing at least part of the historical interpretation would save innocent lives by focusing on cooperation rather than competition. Ranking life first would probably reduce both consumption and pollution, supporting a safer life for our descendants.

New global risks to life and health have rapidly developed,⁹ and every day, we Americans—and all humans—enhance or reduce those risks with our behavior. To save American lives, we must account for risks that extend beyond our borders and change behavior that contributes to these risks. Prioritizing the constitutional right to life first helps us to understand, and to commit to, behavior that reduces the creation of significant risk. The benefits of this mindset are potentially manifold. First, it emphasizes respect for life and thus helps to save lives. Secondly, reducing significant risks to life and health for Americans also reduces risks for the entire planet. By implementing this change in our laws, the United States could increase its stature as a global role model for protecting human rights.

Part I of this Article considers the interests that are the precondition of our rights. Those interests have a hierarchy. They

& ROTUNDA, CONSTITUTIONAL LAW (8th ed.)].

⁵ See Peter Tyson, *The Hippocratic Oath Today*, PBS (Mar. 27, 2001), <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html>.

⁶ This rendition of the Oath is derived from Latin: *primum non nocere*. *Primum Non Nocere*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/primum%20non%20nocere> (last visited Oct. 3, 2018). For more on the history and uses of this phrase, see Cedric M. Smith, *Origin and Uses of Primum Non Nocere – Above All, Do No Harm!*, 45 J. CLINICAL PHARMACOLOGY 371, 371 (2005).

⁷ See Daniel G. Bird, Note, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 1329, 1340–44 (2003) (arguing for a text-based right to life based on Due Process Clause).

⁸ See *id.* at 1340–46.

⁹ See Cf. John William Draper, *Why Law Now Needs to Control Rather than Follow Neo-Classical Economics*, 33 PACE ENVTL. L. REV. 157, 163, 165–79 (2016) [hereinafter Draper, *Neo-Classical Economics*] (evaluating the global risks to life and health of humanity).

are not all equal or fungible. Some of those interests are basic and cannot be substituted or traded for others. Interests can justify rights. They can even justify institutions that come with their own rights. Those rights, whether based with the individual or the institution, are grounded by the duty to honor and protect those interests and their hierarchy.

Part II narrows the focus to the right to life. It explores the interests that are protected. Then, based on the hierarchy of interests, it considers what should happen when rights to life conflict with other rights. The right to life is not infinite. Some circumstances may not qualify for protection by the right to life. Some interests may be too tenuous to protect. Other interests in life may conflict with other important interests or duties.

Part III explores a deeper and richer history of “life, liberty, and property” long predating the eighteenth century drafting of the U.S. Bill of Rights. Surprisingly, the earlier interpretation of these rights offers a more nuanced and helpful approach to resolving conflicts between different categories of rights. As we shall see, Juan de Lugo, one of the Late Scholastics, sixteenth- and seventeenth-century Hispanic economic moral theorists, hit upon ranking those rights.¹⁰ In part, ranking was designed to help the innocent save their lives.¹¹ Importantly, as a slight refinement of Thomistic legal thought, it is consistent with the roots of Western law that predate the Reformation.¹² Thus, placing life above liberty and property is consistent with our cultural foundation in Christian religion as well.¹³

Part IV looks at the origin of special protections for “life, liberty, and property” in U.S. law. The identity and order of Lugo’s interests matches the appearance of those same rights in the Due Process Clauses of the Fifth and Fourteenth Amendments.¹⁴ Lugo’s interpretation, ranking life first, enables a new, safer constitutional interpretation of John Locke’s and James Madison’s words.¹⁵ In

¹⁰ See ALEJANDRO A. CHAFUEN, *FAITH AND LIBERTY: THE ECONOMIC THOUGHT OF THE LATE SCHOLASTICS* 44–45 (Samuel Gregg ed., 2d ed. 2003).

¹¹ See *id.* at 45.

¹² See *id.* at 25.

¹³ See, e.g., Paul Babie, *Two Voices of the Morality of Private Property*, 23 *J.L. & RELIGION* 271, 295–96 (2007–08) (referring to Christian teachings that value the right to life above property).

¹⁴ See CHAFUEN, *supra* note 10, at 45 (understanding Lugo’s ranking of interests to be life, liberty, and property); see also U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”); *id.* amend. XIV, § 1 (“No State shall deprive any person of life, liberty, or property, without due process of law . . .”).

¹⁵ See CHAFUEN, *supra* note 10, at 45.

particular, we each have an interest in life, and we need to feel confident that our interest is actually a protected constitutional right—and that others will honor their duties. Our history of common law helps here, but substantive due process and regulatory law may be problematic.

Part V considers and rejects the positions of many proponents of neo-classical economic or utilitarian theory who advocate an equality or equal ranking of basic or fundamental rights.¹⁶ This position invites risk to human life by giving liberty and property rights the same moral and legal value as life.¹⁷ In the interest of justice, neither liberty nor property (including maximization of profit, income, or wealth) should be of prime importance. Other rights and interests should not be placed on par with life itself.

Part VI provides examples of inversions, which occur when lower-ranked rights, such as liberty or property, are permitted to outrank life,¹⁸ the most fundamental right. Unfortunately, inversions involving life turn out to be deadly.¹⁹ Through the implementation of the value of statistical life (VSL)²⁰ in governmental cost-benefit analysis,²¹ risks of statistical death and significant adverse health impacts turn out to be imposed to some degree on all of humanity.²²

¹⁶ See Draper, *Neo-Classical Economics*, *supra* note 9, at 159.

¹⁷ See, e.g., FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 62–63 (2004) (providing several historical examples in which a life was equated to property rights).

¹⁸ See, e.g., Kathryn A. Sabeth, *Zeal on Behalf of Vulnerable Clients*, 93 N.C.L. REV. 1475, 1501 (2015) (arguing that the current structure of the legal system often ranks the right of life below property rights).

¹⁹ See, e.g., ACKERMAN & HEINZERLING, *supra* note 17, at 62–63.

²⁰ “There is a substantial literature on the value of a statistical life.” Draper, *Neo-Classical Economics*, *supra* note 9, at 208 n.221. Even if we could overlook the possible illegality of statistical death, the implementation of VSL has a huge problem with valuation:

A future earnings standard is highly unequal; it makes some people appear more valuable than others, because they will earn more in the rest of their lifetimes. Is it then more “efficient” to spend more on protecting the health of those with higher expected earnings? A price list with different values for different lives is difficult to reconcile with ideals of democracy and equal treatment under the law, let alone the sacredness of every human being.

ACKERMAN & HEINZERLING, *supra* note 17, at 71–72.

²¹ See ACKERMAN & HEINZERLING, *supra* note 17, at 61 (using cost-benefit analysis, the Environmental Protection Agency estimated that one human life is worth \$6.1 million).

²² As bio-geographer Jared Diamond notes:

[T]he highest blood levels of toxic industrial chemicals and pesticides reported for any people in the world are for Eastern Greenland’s and Siberia’s Inuit people (Eskimos), who are also among the most remote from sites of chemical manufacture or heavy use. Their blood mercury levels are nevertheless in the range associated with acute mercury

Our activities and their consequences are part of a greater problem. Global risk to life is both foreseeable and significant.

This Article focuses only on ranking life first, over both liberty and property. It is a more modest and more easily defensible claim than the complications of ranking liberty interests over property interests. Ranking life first is also more important—and urgent.

Part VII discusses the implementation of the ranking with the protection of life as the ultimate, fundamental right in U.S. constitutional law. Not all risks to life require special treatment in the law; only those that impose significant risks to life require ranking. The emphasis here is on protection from inversions. Life needs to be protected first—from all significant risks to life and health. This way, life would be protected from the liberty and property interests of others, but only when those interests pose a significant risk to life or health. This ranking, implemented in U.S. law, would support human rights and promote safer lives for our descendants.

It may help for us to recognize that there is a global emergency with our planet's life support system²³ and that we need to rank life first as an appropriate and necessary measure to protect humanity. However, requiring an emergency to engage the ranking is unnecessary and places too many lives at risk.²⁴ Instead, we should focus not only on significant local and national risks, but on significant international risks to the lives and health of U.S. citizens, individually and collectively. Such significant risks largely represent a blind spot in our current system of risk regulation.²⁵

By using conceptual partitioning between life and other rights, we

poisoning, while the levels of toxic PCBs (polychlorinated biphenyls) in Inuit mothers' breast milk fall in a range high enough to classify the milk as "hazardous waste." Effects on the women's babies include hearing loss, altered brain development, and suppressed immune function, hence high rates of ear and respiratory infections.

JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* 518 (2005).

²³ See, e.g., William E. Rees, *Confronting Collapse: Human Cognition and the Challenge for Economics*, in *CONFRONTING ECOLOGICAL AND ECONOMIC COLLAPSE: ECOLOGICAL INTEGRITY FOR LAW, POLICY AND HUMAN RIGHTS* 288, 288–89 (Laura Westra et al. eds. 2013) (noting the inability of a highly-educated humanity to operate within the carrying capacity of the planet); Draper, *Neo-Classical Economics*, *supra* note 9, at 164–80 (noting a variety of risks to Earth's life support system).

²⁴ See John William Draper, *Human Survival, Risk, and Law: Considering Risk Filters to Replace Cost-Benefit Analysis*, 33 *FORDHAM ENVTL. L. REV.* 301, 310 (2016) [hereinafter Draper, *Risk Filters*]; Simon Hales et al., *Quantitative Risk Assessment of the Effects of Climate Change on Selected Causes of Death, 2030s and 2050s*, *WORLD HEALTH ORGANIZATION [WHO]* 2 (2014), http://apps.who.int/iris/bitstream/handle/10665/134014/9789241507691_eng.pdf?sequence=1&isAllowed=y.

²⁵ See, Draper, *Risk Filters*, *supra* note 24, at 319.

can solve difficult problems of incommensurability,²⁶ provide a more-just legal system, and more effectively support a safer world for ourselves and our descendants. Conceptual partitioning for persistence is part of a decision procedure that uses ordered sequencing.²⁷ The procedure provides a systematic approach to dealing with certain categories of problems in the law—such as incommensurability of rights.²⁸ Operationally, ranking rights would be an ordered sequencing analysis that would employ conceptual partitioning between differently-ranked rights.²⁹

This ranking would create an ordered substantive due process interpretation of basic rights, causing our legal system to protect lives in being from significant risks originating with rights or interests in liberty or property. If we can employ the principle of ranking life first, all Americans—and ultimately all of humanity—would be better protected from the seemingly random risks³⁰ to statistical lives³¹ produced by current American legal and regulatory systems.

We do need a way for the theory to deal with extreme cases. For instance, when facing questions of extending a life, we cannot place an infinite value on that life and have it override all property rights. Consider a trillion dollars. No one can afford such a large amount of money. The expenditure becomes extremely questionable when it

²⁶ “Incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized.” Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796 (1994) [hereinafter Sunstein, *Incommensurability*].

²⁷ Shyamkrishna Balganesh & Leo Katz, *The in Rem/in Personam Distinction and Conceptual Partitioning for Persistence*, in THE LEGACY OF WESLEY HOHFELD: MAJOR WORKS, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES (Shyamkrishna Balganesh et al. eds. forthcoming 2018) (manuscript at 3–4).

²⁸ *Id.*

²⁹ *See id.*

³⁰ That which seems random, is sometimes not. Historian Peter Turchin addresses this: “[N]onlinear interactions between various processes can produce internally driven irregular behavior—mathematical chaos. Mathematicians have proven that a dynamical system affected by two sources of cyclic behaviors will, under certain conditions, behave chaotically—in an erratic manner that looks random, but in reality is completely internally generated.” PETER TURCHIN, *WAR AND PEACE AND WAR: THE RISE AND FALL OF EMPIRES* 286 (2007). Turchin’s work in cliodynamics, “the study of processes that change with time,” *id.* at 10, is important for providing a new lens on history—and for warning us about the effects of processes generated by humanity. *Id.* at 10–11.

³¹ Statistical lives, for the purposes of this Article, are lives (who have not consented to risk) taken or significantly harmed by those risks permitted through use of the value of statistical life (VSL) in performing cost-benefit analysis to permit risk-bearing activities. Through use of VSL, effectively, someone buys the right to pollute and impose random statistical death, a death which occurs years later with no traceable cause. *See Draper, Neo-Classical Economics, supra* note 9, at 201.

prolongs one life only briefly. In extreme cases like this, whether one life or a thousand, whether extending life for five minutes or five years, we will need to draw the line at what is both technologically and economically feasible. We can make these decisions using feasible risk reduction analysis.³²

Should interests in liberty outweigh the right to life? Should property interests do the same? Life, liberty, and property are all “rights.” How can one right count any differently from others? Let us begin by exploring the connection between interests and rights and the importance of those rights, especially when it comes to the duties they impose.

I. INTERESTS AND RIGHTS

Naturally, we each have an interest in sustaining our lives. To properly discuss how the modern American legal framework considers this interest, we will need to graduate from considering interests to examining rights and duties. Joseph Raz’s work in *The Morality of Freedom*³³ will help us make this transition.

Early in his classic statement of the interest theory of rights,³⁴ Raz proposes a definition of rights:

Definition: ‘X has a right’ if and only if X can have rights, and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.

Capacity for possessing rights: An individual is capable of having rights if and only if either his well-being is of ultimate value or he is an ‘artificial person’ (e.g. a corporation).³⁵

I agree to Raz’s definition of rights, with one modification: life, liberty and property are *human* interests. Under natural law theory³⁶ and international law³⁷ these are also human rights. I

³² See Draper, *Risk Filters*, *supra* note 24, at 389–91 (discussing the liberty-saving benefits of feasible risk reduction).

³³ See JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

³⁴ See *id.* at 166.

³⁵ *Id.*

³⁶ Human rights are “precepts for proper human behavior.” See CHAFUEN, *supra* note 10, at 20. Such precepts are part of normative natural law. *Id.* at 20–21.

³⁷ The Universal Declaration of Human Rights also protects the rights to life and liberty. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 72 (Dec. 10, 1948) [hereinafter Universal Declaration]. The Protections of the Universal Declaration on Human Rights apply

diverge from Professor Raz, however, on the following: *human rights do not accrue to artificial persons*, whether artificial intelligence or artificial creations of law.³⁸ I do not rely solely upon Joseph Raz; Ronald Dworkin provides additional support in *Life's Dominion*.³⁹

If we are clear about our interests, we will have a clearer view of our essential rights, we need to recognize a hierarchy of human interests.

A. A Hierarchy of Interests

All humans have interests in life, liberty, and property. If we prioritize these interests, the corresponding rights will make more sense. Considering lexical priority would create a hierarchy where interests in life come first.

Why rank our interests in life first, ahead of liberty and property? Many liberty rights such as speech, religion, privacy, and press are currently considered fundamental rights.⁴⁰ And, unlimited property rights are of great appeal to libertarians.⁴¹ However, without life, the individual has nothing. Extended to the group, the group has nothing. Extended to the largest group, there can be no liberty or property, as there would be no one to have a liberty interest, property interest, or any interest whatsoever. What is more, loss of life is irreversible. Life must be our first and greatest interest,⁴² above liberty, property, or any other interest.

If we rank interests in life first, both individual and group life

to all of us. There is a "litany of universal terms reflect[ing] the drafters' conviction that there are no exceptions to the possession of human rights. All members of the human family possess them simply by virtue of that membership." JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT* 129 (1999). We are one, legally.

³⁸ Rights of life and liberty should not accrue to property interests or instruments, individually or in groups, no matter the size. This is an example of masquerading rights. See *infra* Part II.B, for a discussion of masquerading rights. But see ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 255 (2018).

³⁹ See RONALD DWORIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 16 (1993).

⁴⁰ Fundamental rights in U.S. constitutional law are currently considered a sub-class of liberty rights. 2 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 15.5, at 848 (5th ed. 2012). Fundamental rights are subject to the special protection of heightened scrutiny by the courts. *Id.*

⁴¹ See Stephen O'Hanlon, *Justice Kennedy's Short-Lived Libertarian Revolution: A Brief History of the Supreme Court Libertarian Ideology*, 7 *CARDOZO PUB. L. POL'Y & ETHICS J.* 1, 17 (2008).

⁴² "[T]he life of a human organism has intrinsic value in any form it takes, even in the extremely undeveloped form of a very early, just-implanted embryo." DWORIN, *supra* note 39, at 69.

considerations (e.g., health) would be of ultimate value. When conflicts between life interests arise, then, we are weighing life against life (or health)—commensurable variables. The decisions may not be easy, but they are possible because they consider similar or like variables. If the question is a ninety-percent chance of the loss of ten lives versus a fifty-percent chance of the loss of a thousand, these comparable risks may be weighed to arrive at a justifiable decision. At the greatest level, all humans are in the risk pool and have an interest in this inquiry.

We all have a mutuality of interest in reducing risks to life. The mutuality of those interests justifies the creation of systems to analyze significant risks⁴³ to life and health and to prescribe and implement adjustments to address them. The most important interests deserve the best systems. We need law to protect our collective interest in life and health first, or we will fail in our greatest individual, collective, and mutual interests.

Our interests in life must include matters of health. The quality, and even existence, of our lives is premised on our health.⁴⁴ Our interests in health and life align with our duties. We do not have a duty to provide good health to people, but we do have a duty not to risk significant harm to peoples' health.⁴⁵

Although we have an interest in our health, we often do not want to compromise our liberty. Some of us have bad habits, like smoking, that might be banned. Must we give up all bungee-jumping liberties to protect our health? When the law substantially reduces liberties, life becomes oppressive.⁴⁶ There are unintended consequences.⁴⁷

However, in the ranking, relevant liberties are not individual activities such as those performed on a high wire, with a cigarette, or with a shot glass. They are broad categories writ large, e.g., association, voting, travel, speech, religion, press, privacy, and fairness in criminal procedures and due process claims—our fundamental liberty interests.⁴⁸

⁴³ See *infra* Part VII.A.

⁴⁴ We should favor respect (protection) over repair after the fact. See Gregory C. Keating, *The Priority of Respect Over Repair*, 18 *LEGAL THEORY* 293, 318 (2012).

⁴⁵ See *id.* at 313.

⁴⁶ See Tom Stacy, *Controversial Decisions of the 1994-95 Supreme Court Term: Does Federalism Promote Liberty?*, 5 *KAN. J.L. & PUB. POL'Y* 15, 18 (1996).

⁴⁷ Consider, for example, the oppression of alcohol prohibition and the consequent rise of Italian organized crime. See JOHN J. BINDER, *AL CAPONE'S BEER WARS: A COMPLETE HISTORY OF ORGANIZED CRIME IN CHICAGO DURING PROHIBITION* 65–66 (2017); Nora V. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 *WHITTIER L. REV.* 613, 622–23 (1994).

⁴⁸ See NOWAK & ROTUNDA, *CONSTITUTIONAL LAW* (8th ed.), *supra* note 4, § 11.8, at 502–03.

Our property interests are in things: physical things, electronic credits,⁴⁹ or, if one considers intellectual property interests, mere expressions or embodiments of ideas in which we claim an ownership or control interest.⁵⁰ Property interests can be subject to significant risk, but can also bear significant risk to life, health, or liberty interests.⁵¹ We will look at conflicting situations shortly.⁵²

First, however, we need to move from interests to the justification of rights, and then on to the relationship of rights and duties. Once we have established rights, at the intersection of our interests and duties, we will turn to the matter of conflicting rights.

B. Interests Warrant Rights

Interests provide the normative foundations for rights.⁵³ Our interests can be many. Our liberty supports a wide array of interests. Some of those interests have created well-developed norms,⁵⁴ many of them reciprocal, in our socio-politico-economic system.⁵⁵ Some interests have proven to be so important in human history and in natural law that they are considered both basic and salient enough to require special protection from governmental action.⁵⁶ Those interests not only warrant rights, they merit special constitutional protection, as expressed in our Bill of Rights, bestowed on each living person in the United States.⁵⁷

1. Interests Can Justify Rights

Although interests can justify rights, interests do not necessarily create rights. The interest⁵⁸ is merely a necessary condition or pre-

⁴⁹ Consider Bitcoin, electronic shares of stock, or other electronic assets. See Peter Chawaga, *Making the Case for Bitcoin as Legal Property*, BITCOIN MAG. (Apr. 21, 2017), <https://bitcoinmagazine.com/articles/making-case-bitcoin-legal-property/>.

⁵⁰ See Gene Quinn, *Protecting Ideas: Can Ideas Be Protected or Patented?*, IPWATCHDOG (Feb. 15, 2014), <http://www.ipwatchdog.com/2014/02/15/protecting-ideas-can-ideas-be-protected-or-patented/id=48009/>.

⁵¹ See Draper, *Risk Filters*, *supra* note 24, at 390–91.

⁵² See *infra* Part II.B.

⁵³ See Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467, 468–69 (2003).

⁵⁴ See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 347 (1997).

⁵⁵ See *id.* at 345, 383.

⁵⁶ See RAZ, *supra* note 33, at 256–57.

⁵⁷ See, e.g., U.S. CONST. amend. I (protecting fundamental rights, such as the freedom of religion, speech, and press from governmental action).

⁵⁸ See DWORKIN, *supra* note 39, at 15–19 (discussing interests).

qualification.⁵⁹

If our interests are sufficient, coextensive, and reciprocal, by recognizing those interests, you and I could together create rights with duties to each other. To qualify as sufficient, the interest needs to figure essentially in the right. According to Joseph Raz, “[a] right is based on the interest which figures essentially in the justification of the statement that the right exists.”⁶⁰

Now consider the role of duties: a right is not created until a duty is imposed.⁶¹ Duties protect corresponding rights.⁶² Rights require more than interests and duties:⁶³ one must also have a capacity to have rights.⁶⁴ The definition of rights requires “that right-holders are creatures who have interests.”⁶⁵ Humanity is required.⁶⁶

What are the conditions for the capacity to have these human rights? The “reciprocity thesis” applies to members of the same moral community.⁶⁷ One gets the benefit of the rights if one accepts the duties.⁶⁸ A moral community should extend to any human subject to its duties.

Rights can go a long way, but some interests may be unprotected. Why are some of people’s interests not protected by rights? Joseph Raz responds:

Rights protect not their interests generally but only their interest in freedom. The capacity to be free, to decide freely the course of their own lives, is what makes a person. Respecting people as people consists in giving due weight to their interest in having and exercising that capacity. On this view respect for people consists in respecting their interest to enjoy personal autonomy.⁶⁹

⁵⁹ See *id.* 16, 17 (describing how interests can be a condition or pre-qualification).

⁶⁰ See RAZ, *supra* note 33, at 169.

⁶¹ See *id.* at 166.

⁶² See *id.*

⁶³ See *id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 176. Even Raz himself nearly dismisses “‘artificial’ persons” from the having the capacity to have rights until he seems to catch himself. See *id.*

⁶⁶ The ape who took a photo of himself did not have the capacity to have ownership rights in that photo. See Camila Domonoske, *Monkey Can’t Own Copyright to His Selfie*, *Federal Judge Says*, NPR (Jan. 7, 2016), <https://www.npr.org/sections/thetwo-way/2016/01/07/462245189/federal-judge-says-monkey-cant-own-copyright-to-his-selfie>.

⁶⁷ RAZ, *supra* note 33, at 176.

⁶⁸ See *id.*

⁶⁹ *Id.* at 190.

Although important, that autonomy has limits that come as duties.⁷⁰ We will consider the limits of duties and rights, and the mechanisms to protect liberty and property interests.

If we consider duties imposed and rights granted by the U.S. Constitution, they can apply individually or collectively to any group in our community of interest, the United States of America, at least most any group with standing to sue. Most of those duties to others are already in place in our law.⁷¹

Everyone is entitled to respect,⁷² especially when right-holders possess the power and the opportunity to inflict harm to our vital interests. Professor Raz explains respect: “[r]especting a person consists in giving appropriate weight to his interest. The interest in being respected is but an element of the interest one has in one’s interest. If respecting people is giving proper weight to their interests, then clearly we respect people by respecting their rights.”⁷³ The contour of their interests exceeds that of their rights.⁷⁴ At a minimum, under the law, we respect others and their interests by recognizing their rights and our duties pertaining thereto.

2. Interests Can Justify Institutions

Sometimes the recognition of interests requires systemic change.⁷⁵ And, sometimes that change requires the creation of a new system or new institution.⁷⁶ Interests can justify sufficient duties to support the creation of institutions or systems in support of the rights they ground or create.⁷⁷

Groups of duties can result in the building of institutions.⁷⁸ In governmental institutions “it may be proper to say that rights are grounds not so much for judging that certain duties exist as for imposing them.”⁷⁹ Thus, the interests that support institutions such as Medicare (which supports life and health) can support and create

⁷⁰ See *id.* at 176 (explaining that people exercising rights derived from a community are still subject to obligations to other members of that community).

⁷¹ See, e.g., *id.* at 256 (mentioning several fundamental duties to others enforced by the law).

⁷² In a sense, I equate respect with equal protection under the law.

⁷³ RAZ, *supra* note 33, at 188.

⁷⁴ Some interests may not be rights (imposed as claims on others) but instead are privileges (discretion or liberty), a Hohfeldian distinction. See Leif Wenar, *The Nature of Rights*, 33 PHIL. & PUB. AFF. 223, 226, 229 (2005).

⁷⁵ See RAZ, *supra* note 33, at 171.

⁷⁶ See *id.*

⁷⁷ See *id.* at 172.

⁷⁸ See *id.* (discussing how the grounds for new duties can result in the building of appropriate institutions).

⁷⁹ *Id.*

new duties and their corresponding rights.⁸⁰

3. A Hierarchy of Interests Justifies a Hierarchy of Rights

If some of our interests must rise above others in order to protect the ones we deem most important, the same hierarchy would apply to rights as a logical extension. A hierarchy of rights is called for. If we do not protect with superior rights and duties our most important interests, those interests will receive inadequate protection in encounters with other rights.⁸¹

Consistent with our prime interest in not having our lives taken individually or collectively,⁸² the right to life is, and should be, our prime right. The value of ranking rights is that it protects best the interests we hold most dear, our interests in life and health.⁸³ Ranking would also help our legal system function in a more logical, approachable (understandable to the layman), and just manner.

C. Rights and Duties

Rights are valuable not only for how they help rights holders, but for the duties those rights impose on all.⁸⁴ Rights are meaningless without appropriate recognition and response. As Joseph Raz puts it, “[r]ights ground requirements for action in the interest of other beings,”⁸⁵ even if having those rights happens to be against an individual’s own interests.⁸⁶

When the drafters of the U.S. Restatements of the common law at the American Law Institute described rights, the rights, excepting

⁸⁰ *See id.*

⁸¹ *See id.* at 256–57.

⁸² Professor Dworkin addresses the greatest collective aspect:

Our concern for the preservation of animal species reaches its most dramatic and intense form, of course, in the case of one particular species: our own. It is an inarticulate, unchallenged, almost unnoticed, but nevertheless absolute premise of our political and economic planning that the human race must survive and prosper.

DWORKIN, *supra* note 39, at 76.

⁸³ *See RAZ, supra* note 33, at 262 (asserting that fundamental rights deserve special protection and recognition).

⁸⁴ *See RAZ, supra* note 33, at 180.

⁸⁵ *Id.*

⁸⁶ *See, e.g., id.* (“A person may have property which is more trouble than it is worth.”).

the law of torts,⁸⁷ were correlative with duties.⁸⁸ According to the Restatement (First) of Property, every right carries with it a corresponding, reciprocal, or correlative duty:

The relation indicated by the word “right” may also be stated from the point of view of the person against whom that right exists. This person has a duty, that is, is under a legally enforceable obligation to do or not to do an act. The word “duty” is used in this Restatement with this meaning.⁸⁹

The Restatement (First) of Property was created in 1936, and a substantial amount of legal and philosophical theory has been explored since then.⁹⁰ Whether one creates a duty or a right first, American law has long taken the position that rights, such as those provided by our Bill of Rights, create correlative duties.⁹¹

Conflicting interests and their resulting duties may intervene to limit those rights. “[Rights] justify . . . a view [that others have duties] only to the extent that there are no conflicting considerations of greater weight.”⁹² Others’ lives present a potentially conflicting consideration of the greatest weight. Thus, duties may not seem straightforward.

Rights and the duties they ground cannot be infinite. Duties may not provide sufficient support to achieve the aim of the corresponding rights.⁹³ Hence, the limits of others’ duties can be problematic for rights holders.

⁸⁷ See RESTATEMENT (FIRST) OF PROP.: RIGHT § 1 cmt. a, illus. 1 (AM. LAW INST. 1936) (“In restating the law of Torts, it has been found necessary to use the word ‘duty’ as a word denoting the fact that an actor is required to conduct himself in a particular manner at the risk that if he does not do so he may become liable to another to whom the duty is owed . . .”).

⁸⁸ *Id.* § 1 cmt. a.

⁸⁹ *Id.* The coupling of rights and duties developed from Kant’s notion of universal law that applies to all. Edward J. Eberle, *The German Idea of Freedom*, 10 OR. REV. INT’L L. 1, 35–36 (2008).

⁹⁰ See, e.g., Rex Martin & James W. Nickel, *Recent Work on the Concept of Rights*, 17 AM. PHIL. Q. 165, 165–67 (1980) (surveying the debate over whether rights are always correlated with obligations).

⁹¹ See *id.* at 167.

⁹² RAZ, *supra* note 33, at 172.

⁹³ Raz explains:

Many rights ground duties which fall short of securing their object, and they may ground many duties not one. A right to personal security does not require others to protect a person from all accident or injury. The right is, however, the foundation of several duties, such as the duty not to assault, rape or imprison the right-holder.

Duties are not rigid and immutable. As Raz observes, “[t]he duties grounded in a right may be conditional.”⁹⁴ Even duties pertaining to the right to life may be conditional.⁹⁵

Lives may not be taken except to save other lives—e.g. self-defense is permitted.⁹⁶ Otherwise, not risking the lives and health of others is, and should be, a common duty for the common good.

The duty not to kill is grounded by the right to life.⁹⁷ That right is held by individuals and by groups of individuals; the duties extend correspondingly to individuals and groups.⁹⁸ No one should be exempt from the duties or the rights.⁹⁹

We need new duties in American law to better protect life. More effective judicial protection of the right to life, or through the creation of institutions (e.g. regulatory) with the purpose of protecting this right could achieve this goal.¹⁰⁰ Because the right to life depends on the existence of a habitable environment,¹⁰¹ protecting this right must also include protection of the life support system of Planet Earth.

This analysis and the resulting proposals center on the right to life: if you have a right to survive, I then have a duty not to interfere. Whether you look at it from the perspective of the right or the duty, the right should be recognized as a “prime directive”¹⁰² individually and collectively. Our Constitution should treat life as such.

However, this Due Process right is already limited by the duties it imposes.¹⁰³ The rights—that life, liberty, and property shall not be taken without due process of law—are already spelled out twice in the U.S. Constitution.¹⁰⁴ But the duties that arise from those rights are limited to federal, state, and local governmental entities.¹⁰⁵

⁹⁴ *Id.* at 167.

⁹⁵ See Douglas Husak, *Comparative Fault in Criminal Law: Conceptual and Normative Perplexities*, 8 BUFF. CRIM. L. REV. 523, 527 (2005).

⁹⁶ See RESTATEMENT (SECOND) OF TORTS § 65(1) (AM. LAW INST. 1965).

⁹⁷ RAZ, *supra* note 33, at 183.

⁹⁸ See Martin & Nickel, *supra* note 90, at 177–78.

⁹⁹ Human rights apply to everyone. See MORSINK, *supra* note 37, at 129.

¹⁰⁰ See, e.g., Gregory C. Keating, *Pressing Precaution Beyond the Point of Cost-Justification*, 56 VAND. L. REV. 653, 686–87 (2003).

¹⁰¹ See Eva H. Hanks & John L. Hanks, *The Right to a Habitable Environment*, in THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE 158 (Norman Dorsen ed., 1971).

¹⁰² The term “Prime Directive,” as spoken by Starship Captain Jean Luc Picard in the television series *Star Trek: Next Generation*, pertained to not disturbing the cultural development of less-developed cultures encountered on other planets. It would be beneficial to first explicitly redefine that term—in favor of the protection of life.

¹⁰³ See, e.g., RAZ, *supra* note 33, at 183.

¹⁰⁴ See U.S. CONST. amends. V, XIV.

¹⁰⁵ See *United States v. Stanley* (The Civil Rights Cases), 109 U.S. 3, 10–11 (1883); The

Otherwise, our duties are grounded by other sources of rights.¹⁰⁶

At the extreme ends of the spectrum (e.g., extreme amounts of money or extreme loss of liberty), lines blur and rights may conflict. Duties cannot be infinite. In such cases, significant risks to life, first, and liberty or property, second, should be reduced to the extent technologically and economically feasible.

1. Other Justifications for Rights

Joseph Raz provides only one of the many justifications for rights.¹⁰⁷ By requiring a duty, Raz seems to provide a narrow justification of what counts as a right.¹⁰⁸ The rights to life, liberty, and property are so important that there is no doubt that they fit Raz's definition of rights.¹⁰⁹ Each of these rights ground many duties. Analysis based on duties may be more useful for the protection of life and liberty than theories of right based on will,¹¹⁰ any-incident,¹¹¹ or several functions.¹¹² According to the U.S. Constitution, no matter the philosophical theory, these rights are entitled to due process of law.¹¹³

Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80–81 (1873).

¹⁰⁶ See JAMES K. FEIBLEMAN, *JUSTICE, LAW AND CULTURE* 72 (1985). Examples of other sources of rights are: homicide laws, laws against theft, and tort laws. See ROBERT STEVENS, *TORTS AND RIGHTS* 2–3 (2007); see, e.g., N.Y. PENAL LAW § 1.05 (McKinney 2018) (describing the purpose of New York's penal code as proscribing conduct—i.e. imposing a duty to act in permissible ways—to ensure public safety).

¹⁰⁷ See RAZ, *supra* note 33, at 172.

¹⁰⁸ See *id.* at 172, 180.

¹⁰⁹ See *id.* at 166, 180; Marshall J. Ray, *What Does the Natural Rights Clause Mean to New Mexico?*, 39 N.M. L. REV. 375, 399 n.156 (2009).

¹¹⁰ “The will theory of rights asserts that the single function of a right is to give the rightholder discretion over the duty of another.” Wenar, *supra* note 74, at 238. The protection of life is not about discretion. We protect the sacred with duties. There should be very little discretion over those duties. Even the rightholder's discretion may be limited.

¹¹¹ “The any-incident theory simply says that any Hohfeldian incident [(1) privilege, (2) claim, (3) power, and (4) immunity] or complex of incidents is a right.” *Id.* at 225, 244. It is important that we properly categorize and differentiate rights. The protection of life will focus largely on the claim. We don't need to rely on Hohfeldian incidents, especially the third and fourth incidents (power and immunity), to establish sufficient interests and duties to support a right to life. See *id.* at 244. Some Hohfeldian analysis may be unnecessary here. We will, however, find that Hohfeldian differentiation is essential to the operation of ranking rights. See, e.g., Max Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141, 1163 (1938).

¹¹² “The several functions theory holds that any incident or combination of incidents is a right, but only . . . so long as they mark exemption, discretion, or authorization, or entitle their holders to protection, provision, or performance.” Wenar, *supra* note 74, at 246. Certainly, protection of life and health is the issue here. The theory says that “there is no one function that all rights have.” *Id.* at 248. I would respond by claiming that all rights should function to support (not interfere with) life.

¹¹³ See U.S. CONST. amend. V.

2. The Duties for a Right to Life

“[T]he duty to give due weight to the interests of persons . . . is grounded on the intrinsic desirability of the well-being of persons.”¹¹⁴ Since life and health are crucial elements of a person’s well-being, it follows that the weight given to life and health interests should be the greatest.¹¹⁵ Our norms,¹¹⁶ our morality,¹¹⁷ and our laws¹¹⁸ all place greatest weight on protecting life.¹¹⁹ Where our laws and regulations soften on the position of protecting rights is with property interests.¹²⁰

Imbuing rights with special significance, especially through governmental protection, bolsters their salience, even in private transactions.¹²¹ Protecting these rights through due process of law ensures their importance in everyday life and allows us to effectively protect that most fundamental right—the right to life.

¹¹⁴ RAZ, *supra* note 33, at 190.

¹¹⁵ See, e.g., Melissa Moschella, *Natural Law, Parental Rights and Education Policy*, 59 AM. J. JURIS. 197, 198 (2014).

¹¹⁶ Consider the wonderful, and often dangerous, life-saving work of first responders. See Chau Lam, *9/11 First Responders Face Illness, Uncertain Future*, NEWSDAY (Sept. 10, 2017), <https://www.newsday.com/news/health/9-11-first-responders-face-illness-uncertain-future-1.14126397>.

¹¹⁷ Judeo-Christian morality is reflected in the moral law of the Ten Commandments. The Fifth Commandment states: “Thou shalt not kill.” *Deuteronomy* 5:17; *Exodus* 20:13. Other religions have similar prohibitions. “In Jainism, and among some Buddhists, Hindus, and Taoists, the concept of absolute nonviolence (ahimsa) encompasses all animals and living beings.” *Murder*, WORLD SCRIPTURE, <https://www.unification.net/ws/theme060.htm> (last visited Oct. 13, 2018).

¹¹⁸ Statutes and case law ban homicide. See, e.g., 18 U.S.C. §§ 1111–1112 (2012); N.Y. PENAL LAW § 125.00 (McKinney 2018); 18 PA. CONS. STAT. §§ 2501–2504 (2018); *People v. Boutin*, 555 N.E.2d 253, 254–55 (N.Y. 1990) (quoting *People v. Haney*, 284 N.E.2d 564, 567 (N.Y. 1972)); *Commonwealth v. Rose*, 127 A.3d 794, 796–97 (Pa. 2015).

¹¹⁹ “[O]ur rights against harm depend on what we can reasonably demand of others.” Jonathan Quong & Helen Frowe, *The Morality of Defensive Harm* (pt. I), 89 PROC. ARISTOTELIAN SOC’Y 249, 249 (Supp. 2015). Moral rights may be different from legal rights. Quong’s article is about moral rights. See *id.* But the harm under consideration in this article is the ultimate harm, loss of life, which invokes law. Under the law, we have rights against harm, especially significant risk of loss of life. See 18 U.S.C. §§ 1111–1112; N.Y. PENAL § 125.00; tit. 18, §§ 2501–2504; *Boutin*, 555 N.E.2d at 254–55 (quoting *Haney*, 284 N.E.2d at 567). The law demands of others that they may not take a life or lives (especially of the innocent or unconsenting). See 18 U.S.C. § 1111(a); PA. tit. 18, § 2504(b); *Boutin*, 555 N.E.2d at 245–55 (quoting *Haney*, 284 N.E.2d at 567). Therefore, our law should protect both the innocent and the unconsenting. These duties align with both law and morality.

¹²⁰ See Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 555 (1997) (“There nonetheless remains a significant area of contemporary constitutional law in which property interests have not enjoyed equal treatment with liberty interests.”).

¹²¹ See RAZ, *supra* note at 256–57.

II. SHAPING AND DEFINING A RIGHT TO LIFE

Where is life in the hierarchy of interests? Is it of value in achieving other goals? Or is it an end in itself? Western religion¹²² and law¹²³ treat life as being of ultimate value, sacred value, and an end, in and of itself.¹²⁴ Raz discusses ultimate value:

Being of ultimate, i.e. non-derivative, value is being intrinsically valuable, i.e. being valuable independently of one's instrumental value. Something is instrumentally valuable to the extent that it derives its value from the value of its consequences, or from the value of the consequences it is likely to have, or from the value of the consequences it can be used to produce. Having intrinsic value is being valuable even apart from one's instrumental value. But not everything which is intrinsically valuable is also of ultimate value.¹²⁵

Life is both intrinsically valuable and sacred.¹²⁶ Because life has no substitute, and the loss of life is irreversible, life is the most precious right.¹²⁷ When ranking rights, life is of ultimate value.

Although duties that save lives are beneficial,¹²⁸ Raz recognizes that the duty only goes so far: “[t]he right to life may impose a duty not to kill or endanger the life of another without imposing a duty to take whatever action is necessary to keep him alive.”¹²⁹ Without a system (like Medicare) in place to support the interests and their rights, and to create duties relating thereto, there is no right to medical care.

What counts as life? All human lives in being qualify.¹³⁰ If you are living and breathing, your interest in continuing is presumed. You

¹²² See, e.g., *Deuteronomy*, *supra* note 117; *Exodus*, *supra* note 117.

¹²³ Statutes in all 50 states ban murder. See *U.S. v. Marrero*, 677 F.3d 155, 166 n.2 (3d Cir. 2012) (“All fifty states and the District of Columbia recognize intentional or premeditated murder, and forty-four states and the District of Columbia define a felony murder offense.”).

¹²⁴ See DWORKIN, *supra* note 39, at 85, 92.

¹²⁵ RAZ, *supra* note 33, at 177.

¹²⁶ See DWORKIN, *supra* note 39, at 73–74. Life is not valuable as in “money” but, instead, life is valuable as in “precious.” See *id.* at 71.

¹²⁷ See *id.* at 82.

¹²⁸ Cf. Brian McCall, *Why It Is Good to Stop at a Red Light: The Basis of Authority and Obligation*, 55 J. CATH. LEGAL STUD. 83, 125 (2016) (“[L]aws are needed both to urge people to virtue by directing to the good they can will themselves and to compel others, ‘for most people obey necessity rather than argument.’”).

¹²⁹ RAZ, *supra* note 33, at 183.

¹³⁰ See Universal Declaration, *supra* note 37, at art. 3.

have a right to that life. I would want you to do the same for me. That is the reciprocal nature of our rights.

Our inquiry into the shape and definition of the right to life continues as we explore what qualifies as the right to life. Then, we examine conflicts with other rights.

A. *Qualifying the Right to Life*

Life should be construed broadly enough that each of us does not find ourselves unprotected by this basic right. Internationally, the right to life is a human right applying to all human lives in being.¹³¹

As this article pertains to the U.S. Constitution, the lives that are subject to protection here are American lives.¹³² Therefore, we must narrow our inquiry to consider the protection of American lives, but in doing so, we must honor the rights of all lives in being worldwide or we risk violation of international law.¹³³

To protect life, we must separate life from potential life.¹³⁴ Potential life should not be allowed to displace or harm lives in being. The rights of the unborn must not displace the rights of the living.¹³⁵ The issue of abortion is often viewed as constituting a conflict between the liberty right of the mother and the life right of the fetus.¹³⁶ If the matter were so simple, *Roe v. Wade* would have been overturned.¹³⁷ However, the issue of abortion is much more complicated with considerations of the physical and mental health of the mother as well as the well-being of the fetus, should it come into the (sometimes very unstable or dangerous) world of its mother.¹³⁸ We must recognize that the qualitative aspects of life can be defeated by the quantitative aspect. We must also recognize that the decision

¹³¹ *See id.*

¹³² *See generally* Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499, 528 (2014) (the U.S. government typically values foreign lives at zero).

¹³³ *See id.* at 509.

¹³⁴ *See, e.g.,* *Roe v. Wade*, 410 U.S. 113, 162 (1973).

¹³⁵ *See id.* at 162, 164.

¹³⁶ *See id.* at 153.

¹³⁷ *Cf. Planned Parenthood v. Casey*, 505 U.S. 833, 845–46 (1992) (“After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”).

¹³⁸ *See Roe*, 410 U.S. at 164–65; *Doe v. Bolton*, 410 U.S. 179, 192 (1973); *cf. Jennifer M. Granholm, Republicans: What About Children Outside the Womb?*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/jennifer-m-granholm/republicans-what-about-ch_b_1835134.html (“I think in many cases, your morality is deeply lacking if all you want is a child born but not a child fed, not a child educated, not a child housed.”).

to abort is difficult enough without the need to do so illegally.¹³⁹ Abortion is traumatic.¹⁴⁰ It should be rare but legal.

Our rights are not frozen. Each of us can contract away our property and some limited liberty,¹⁴¹ but we cannot contract away our lives.¹⁴² Prior consent to known and fully disclosed risk represents an exception.¹⁴³ Each of us has the autonomy to contract to accept certain additional risks to our lives in return for additional compensation.¹⁴⁴

What else qualifies for protection? Does one's health qualify for protection? What about statistical lives? Does the protection of the right to life mean the end of the death penalty?

Significant risks to health require protection.¹⁴⁵ Health is different and distinct from life itself,¹⁴⁶ but both should be protected for the sake of bodily integrity.¹⁴⁷ Foreseeable health risks should be included with life, provided: (1) that risks to health are significant; (2) to add significant quality or length of life; and (3) that prevention is both technologically and economically feasible.

Statistical lives come in at least two categories: lives in being and future lives.¹⁴⁸ Statistical lives in being should be protected, as those lives are individuals with rights currently in this country and on this planet.¹⁴⁹ The protection of future statistical lives seems more

¹³⁹ See *Planned Parenthood*, 505 U.S. at 916 (Stevens, J., dissenting).

¹⁴⁰ See *id.*

¹⁴¹ See, e.g., RAZ, *supra* note 33, at 180. An example of a liberty that could be contracted away would be privacy, an inverse liberty. See, e.g., Jacob Morgan, *Privacy Is Completely and Utterly Dead, and We Killed It*, FORBES (Aug. 19, 2014, 12:04 AM), <https://www.forbes.com/sites/jacobmorgan/2014/08/19/privacy-is-completely-and-utterly-dead-and-we-killed-it/#3a4c66f631a7>.

¹⁴² See Universal Declaration, *supra* note 37, at art. 3.

¹⁴³ See, e.g., Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 226 (2009).

¹⁴⁴ See, e.g., *id.*

¹⁴⁵ See, e.g., *Act Against AIDS*, U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/actagainststids/basics/prevention.html> (last visited Nov. 12, 2018) ("If you are living with HIV, there are many actions you can take to prevent passing it to others.").

¹⁴⁶ *Compare Health*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The state of being alive as a human; an individual person's existence."); *with Life*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The relative quality, state, or condition of one's physical or mental well-being, whether good or bad.").

¹⁴⁷ See, e.g., *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 810 (S.D. Ohio 1995).

¹⁴⁸ See, e.g., James K. Hammit & Nicolas Treich, *Statistical vs. Identified Lives in Benefit-Cost Analysis*, 35 J. RISK & UNCERTAINTY 45, 46 (2007) ("The economic literature on the 'value of life' has, from the beginning, clearly distinguished between identified and statistical lives The focus on statistical rather than identified lives is consistent with the traditional marginal approach to the valuation of public goods and lessens the scope for psychological concerns in the usual case where the effects of a policy on individual mortality risks are small.") (citations omitted).

¹⁴⁹ See U.S. CONST. amend XIV; Universal Declaration, *supra* note 37, at art. 3.

difficult. No one wants to give up present benefits for an unknown future—until it comes to protecting one’s own descendants.¹⁵⁰ But, if we look at the issue of statistical lives as including the future of all known life, and the health of the life support system of this planet, the duties become clearer. We have a duty to the species (including our own)¹⁵¹ that got us here to reciprocate and allow them a future.

What about the death penalty? Who has the right to kill people? Certainly not murderers. However, under the common law, those who engage in self-defense have a valid defense as do those in some jurisdictions who attempt to save a life under the doctrine of necessity.¹⁵²

The death penalty is the taking of life by the State.¹⁵³ The Due Process Clauses require that there be no such taking without due process of law.¹⁵⁴ What process is due? We have an array of case law on the process due for the administration of the death penalty.¹⁵⁵ The revelations of The Innocence Project¹⁵⁶ are troubling here. Errors occur with surprising frequency.¹⁵⁷ And one error is too many. At some point, we should outgrow the death penalty.

If we do not protect all incipient human life, how can we protect

¹⁵⁰ Cf. *Vaccines for Your Children: Protect Your Child at Every Age*, CDC (Apr. 15, 2016), <https://www.cdc.gov/vaccines/parents/protecting-children/index.html> (“Vaccination is one of the best ways parents can protect infants, children, and teens from 16 potentially harmful diseases.”).

¹⁵¹ See DWORKIN, *supra* note 39, at 76. “Our concern for future generations is not a matter of justice at all but of our instinctive sense that human flourishing as well as human survival is of sacred importance.” *Id.* at 78.

¹⁵² See Fern L. Kletter, Annotation, *Application of Defense of Necessity to Murder*, 23 A.L.R. 7th Art. 1 (2018); A. M. Swarthout, Annotation, *Danger or Apparent Danger of Death or Great Bodily Harm as Condition of Self-Defense in Prosecution for Assault as Distinguished from Prosecution for Homicide*, 114 A.L.R. 634 (1938).

¹⁵³ See *Capital Punishment*, BLACK’S LAW DICTIONARY (10th ed. 2014); *Death Penalty*, *id.*

¹⁵⁴ U.S. CONST. amends. V, XIV, § 1.

¹⁵⁵ See, e.g., *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016) (“The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough.”); *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1905 (“The Court now holds that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in [seeking the death penalty in] defendant’s case.”); *Ring v. Arizona*, 536 U.S. 584, 619 (2002) (“[T]he Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death.”); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (“[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”).

¹⁵⁶ See *About*, THE INNOCENCE PROJECT, <https://www.innocenceproject.org/about> (last visited Oct. 13, 2018).

¹⁵⁷ See Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PNAS 7230, 7231 (2014).

future statistical lives? Future lives cannot be our focus either, or we risk losing sight of a commitment to protect all (American, at least) lives in being.

Focusing on risks to the human species is different. The goal is to protect the health and lives in being of the entire species, including all Americans. Significant risks to the entire species put Americans at risk, and those risks to American rights to life merit treatment in American law.

B. Conflicts with Other Rights

Rights do not exist in a vacuum. With social change, active societies will see underlying norms, interests, and even duties change.¹⁵⁸ As a result, rights can change in relation to other rights and create conflicts. Such change can happen structurally, or even merely as result of profit maximization in everyday commerce.¹⁵⁹ There is no doubt that potential conflicts are plentiful and that the issues between liberty and property interests are of sufficient importance and complexity to merit and require resolution elsewhere.

Rights can conflict as a consequence of choice.¹⁶⁰ You live downstream from me. My decision to pollute may conflict with your rights to life, health, clean water, and a healthy environment. However, if the protection of your health means that all polluting activity must cease, massive loss of employment with resulting economic and social harm would result. Life and health interests cannot automatically trump all risks posed by liberty and property interests.¹⁶¹ We would lose our liberty and become unable to engage

¹⁵⁸ See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 383 (1997) (“[T]he more concrete the norm is, the more likely it will change as conditions change.”).

¹⁵⁹ For example, Gregory Keating shows that some commercial transactions (with extreme market power, self-interest, or maximization) can bring rights into conflict:

Consider liberty and property. On plenty of conceptions—e.g., Locke’s—people should be free to acquire property by exercising their labor and their liberty. But this can set up conflicts with other people’s rights to life (e.g., by permitting someone to acquire a monopoly over something necessary) and other people’s liberty (e.g., by accumulating so much that other people are destitute and their freedom is worth very little).

E-mail from Gregory C. Keating, William T. Dalessi Professor of Law and Philosophy, Univ. of S. Cal. Law Sch., to author (Aug. 14, 2017, 20:44 PDT) (on file with author).

¹⁶⁰ See Keating, *supra* note 100, at 677.

¹⁶¹ See *id.* at 676 (“If we cannot put others at peril[,] . . . we cannot act and so cannot pursue our ends and lead our lives. Maximal security extinguishes liberty . . .”).

in much everyday activity.

The right to life cannot be allowed to ban all risk-producing activity.¹⁶² Professor Raz recognizes that such duties must be limited:

[T]he fact that rights are sufficient to ground duties limits the rights one has. Only where one's interest is a reason for another to behave in a way which protects or promotes it, and only when this reason has the peremptory character of a duty, and, finally, only when the duty is for conduct which makes a significant difference for the promotion or protection of that interest does the interest give rise to a right.¹⁶³

We can apply Raz's rule or principle to conflicts between liberty and life or health. My liberty shall be undisturbed unless and until my actions represent a significant risk to your life or health. Now we have a way to maximize liberty without posing a significant risk to life or health. The same can be done when property rights might pose significant risks to life or health.

The rights and the duties they ground should apply only when there is a *significant risk* to life or health. These are the same risks we looked at in *A Hierarchy of Interests*¹⁶⁴ and will discuss in greater depth below.¹⁶⁵

Of all the activities that bear significant risk, some can be abandoned, while others we cannot live without.¹⁶⁶ These categories of activities fit within the safety and feasibility standards, respectively.¹⁶⁷ The significance requirement allows the protection of life and health without eradicating rights in liberty or property.¹⁶⁸ Thus, liberty and property rights exist and operate until they encounter the point of significant risk to life or health.¹⁶⁹ A conceptual partition between life (and health) and liberty or property enables the cooperation of multiple rights of different

¹⁶² *See id.*

¹⁶³ RAZ, *supra* note 33, at 183.

¹⁶⁴ *See supra* Part I(A); Draper, *Risk Filters*, *supra* note 24, at 391.

¹⁶⁵ *See infra* Part VII(A).

¹⁶⁶ *See Keating*, *supra* note 100, at 662.

¹⁶⁷ *See id.* at 657–58.

¹⁶⁸ *See Draper*, *Risk Filters*, *supra* note 24, at 340.

¹⁶⁹ *Cf. id.* (“Once risks to life and health are reduced to the point of insignificance, they may be replaced by considerations of liberty and possibly even by considerations of property—until the point where risk becomes significant again.”).

commensurabilities.¹⁷⁰

When do we decide to abandon certain risky activities? If the safe level of risk imposition is to be employed, the banned activity must be one that we all agree to live without. Otherwise, with feasible risk reduction, the activity is abandoned only where reduction of foreseeable significant risks is both technologically and economically feasible.¹⁷¹

The protection of some rights can affect the scope of conflicting rights.¹⁷² According to Raz, “[r]ights can conflict with other rights or with other duties, but if the conflicting considerations defeat the right they cannot be necessarily coextensive in their scope.”¹⁷³ Thus, my right to liberty is not coextensive with your right to life and health. My liberty right is bounded by the significant risks I pose to the life and health of others.

The same goes for my rights in property. My property rights must defer to others’ rights to life and health. To claim that liberty with property should be unlimited ignores any significant risks to the lives and health of others.

We need to be able to clearly classify rights if we are going to rank them. The unlimited liberty with property claimed by libertarians is an example of masquerading rights.¹⁷⁴ A right to property can be presented as the implication of a right to liberty or even a right to life.¹⁷⁵ If we can clearly see interests for what they are, and then separate the distinct rights, we can prioritize one ahead of another.

¹⁷⁰ Cf. *id.* at 339 (“Safety is considered exclusively. For significant risks, it is the only consideration because the costs on the other side are not at all commensurable with the life and health safety protects. Life and health are not fungible at some ratio of exchange with liberty or with property.”).

¹⁷¹ See Keating, *supra* note 100, at 692–93.

¹⁷² See RAZ, *supra* note 33, at 184.

¹⁷³ *Id.*

¹⁷⁴ See, e.g., Jeanne L. Schroeder, *The Midas Touch: The Lethal Effect of Wealth Maximization*, 1999 WIS. L. REV. 687, 708 n. 72 (1999).

¹⁷⁵ Two intersections of property and life come to mind. First, the value of statistical life in cost-benefit analysis places a dollar value on human lives and effectively turns those lives into property interests. See, e.g., ACKERMAN & HEINZERLING, *supra* note 17, at 61 (“How much is one human life worth? According to the Environmental Protection Agency, \$ 6.1 million.”). Secondly, corporations are collections of property interests with profit as the primary interest. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders.”); 12 OHIO JUR. 3d BUSINESS RELATIONSHIPS § 542 (2018) (“Shares of stock . . . constitute a property interest [in the corporation].”). For-profit enterprises are not worthy of human rights. For one thing, they no longer have lifespans. See N.Y. BUS. CORP. LAW § 202(a)(1) (McKinney 2018) (“Each corporation . . . shall have power . . . to have *perpetual duration*.”) (emphasis added). “[U]ntil 1875 . . . , the duration of corporate franchises was generally limited to a period of 20, 30, or 50 years.” *Liggett Co. v. Lee*, 288 U.S. 517, 555 (1933) (Brandeis, J., dissenting).

No amount of liberty with property should be allowed to change its classification into liberty or life.

Property is an enumerated right in the Constitution.¹⁷⁶ Its lexical priority follows and ranks below life.¹⁷⁷ Property rights must yield to life, health, and even some liberties.

Liberty needs to encounter and yield to life and health as well. Those with rights to life and health—all of us—need others to have duties to recognize and respect those rights. Those duties must limit liberty, otherwise life and health would suffer.

Under the Supreme Court's current definition, fundamental rights are considered merely a subset of liberty rights.¹⁷⁸ John Nowak and Ronald Rotunda identify this usage of the term as a misnomer, and instead suggest that "this concept would have been easier to understand if the Court called these rights 'fundamental constitutional liberties.'"¹⁷⁹ Life should be considered a fundamental right as well. But fundamental rights are not enough. The Due Process ranking also includes property.¹⁸⁰ Therefore, I will instead refer to life, liberty, and property as the ranking of basic rights.¹⁸¹ The importance of liberty in the ranking is that it comes after life, not before.¹⁸² We are not going to worry about protecting liberties until we assess and address risks to life and health. Liberties then, in the absence of feasible risk reduction, stop at the point at which risk becomes significant.¹⁸³

Life, liberty, and property are all basic rights. They ground the governmental duties embedded in Due Process of Law.¹⁸⁴ Life is a non-derivative human right.¹⁸⁵ Life is not grounded in other rights.¹⁸⁶

¹⁷⁶ See U.S. CONST. amends. V, XIV, § 1.

¹⁷⁷ See U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law."). See also JOHN RAWLS, A THEORY OF JUSTICE 43 (1971) (Rawls provides an example of the use of lexical priority, although it is merely with different types of liberty).

¹⁷⁸ See ROTUNDA & NOWAK, *supra* note 40, § 15.5, at 848.

¹⁷⁹ *Id.*

¹⁸⁰ See U.S. CONST. amends. V, XIV, § 1.

¹⁸¹ I have referred to this ranking elsewhere as the "ranking of fundamental rights." Draper, *Neo-Classical Economics*, *supra* note 9, at 237; Draper, *Risk Filters*, *supra* note 24, at 313 n.50, 380 n.280, 391. To reduce confusion with fundamental rights (the Court's name for fundamental liberties), I now refer to the ranking as the ranking of basic rights.

¹⁸² See U.S. CONST. amends. V, XIV, § 1.

¹⁸³ See Keating, *supra* note 100, at 676.

¹⁸⁴ See, e.g., RAZ, *supra* note 33, at 167.

¹⁸⁵ See, e.g., *id.* at 168.

¹⁸⁶ See *id.* ("Just as rights are grounds for duties and powers so they can be for other rights. . . . [A] right which is grounded in another right [is] a derivative right. Non-derivative rights are core rights.")

Without life, there can be no grounding of other rights.¹⁸⁷ Life is essential and sacred. The ultimate core right—life—is the most fundamental or basic right.

Life stands out as being different. As Joseph Raz points out, “[s]ome rights may be absolute.”¹⁸⁸ If any right could be absolute, it would be the right to life. Thus, in conflicts with rights to liberty or property, the presence of significant risks to life and health requires recognition of both the ranking of rights and the primacy of the right to life.

III. ORIGIN OF RANKING BASIC RIGHTS

Consistent with the above hierarchy of interests, rights, and duties, one moral theory—which I now refer to as *the ranking of basic rights*—is a structured principle found in Late Scholastic moral thought.¹⁸⁹ That principle has been affirmed in a recent papal encyclical.¹⁹⁰ To learn more about the Late Scholastics, we will look to *Faith and Liberty*, a work by Alejandro A. Chafuen.¹⁹¹ “Chafuen draws upon many texts largely unfamiliar to English-speaking audiences to illustrate that the origin of modern economics lies very much in natural law and scholastic moral theology.”¹⁹² In the process, he reveals the roots of what is now known in the law as the doctrine of necessity.¹⁹³ The principle—implemented as the ranking

¹⁸⁷ See *id.*

¹⁸⁸ *Id.* at 186.

¹⁸⁹ See CHAFUEN, *supra* note 10, at 13. The Late Scholastics were an economics school of prescient sixteenth- and seventeenth-century Hispanic moral theorists who employed many theories that were strikingly close to current economic theory. See, e.g., *id.* at 14.

¹⁹⁰ See Encyclical Letter from Pope Francis, *Laudato si'* of the Holy Father: On Care for our Common Home 68–69 (May 24, 2015), http://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si_en.pdf (“[E]very ecological approach needs to incorporate a social perspective which takes into account the fundamental rights of the poor and the underprivileged. The principle of the subordination of private property to the universal destination of goods, and thus the right of everyone to their use, is a golden rule of social conduct and ‘the first principle of the whole ethical and social order.’”). The benefits of life do not come without duties to the common good, including, for example, duties not to consume, pollute, or populate too much. How much is too much? To figure it out we would need to study the survival of the human species (with a goal of protecting human life first).

¹⁹¹ CHAFUEN, *supra* note 10. Chafuen is an Argentinian economist at George Mason University. *Id.* at 171.

¹⁹² Samuel Gregg, *Blurb* of CHAFUEN, *supra* note 10.

¹⁹³ CHAFUEN, *supra* note 10, at 43 (“It seems logical that, [after a plane crash], even when death is not imminent, one could take the fruits in order to prevent future extreme harm.”). The doctrine of necessity has definitions in criminal law and in tort law:

1. *Criminal law.* A justification defense for a person who acts in an emergency that he or

of life first—ties law, religion, and economics together in a mix of natural law, moral theology, and the limits of physical reality.¹⁹⁴

The Late Scholastics employed natural law theory¹⁹⁵ based on the work of Thomas Aquinas.¹⁹⁶ Chafuen shows that over the course of intellectual history, Thomistic theory—through the Late Scholastics, and then through the works of Hugo Grotius (1583–1645) and Samuel von Pufendorf (1632–1694)—influenced Adam Smith (c.1723–1790).¹⁹⁷ Smith’s work is largely credited as providing the foundation of modern economic theory.¹⁹⁸

However, the standard neo-classical interpretation of Smith has been too shallow. Economics provides methods of considering choices.¹⁹⁹ Economics cannot be value-free,²⁰⁰ because there are

she did not create and who commits a harm that is less severe than the harm that would have occurred but for the person’s actions.

2. *Torts*. A privilege that may relieve a person from liability for trespass or conversion if that person, having no alternative harms another’s property in an effort to protect life or health.

Necessity, BLACK’S LAW DICTIONARY (8th ed. 2004).

¹⁹⁴ See CHAFUEN, *supra* note 10, at 42, 45.

¹⁹⁵ Ethics supports natural law in the following manner:

[T]he human understanding is a proximate source of moral law. The intelligent use of human understanding to work out moral laws is called *right reasoning*. Since right reason[ing] is founded on man’s nature and the natures of other things in his environment, and since rational appraisal of the suitability or unsuitability of a given action occurs in the natural course of human life, judgments of right reason are also called natural laws.

V. J. Bourke, *Ethics*, in 5 NEW CATHOLIC ENCYCLOPEDIA 388, 391 (Berard L Marthaler et al. eds., 2d ed. 2003) (emphasis added).

¹⁹⁶ See CHAFUEN, *supra* note 10, at 19.

¹⁹⁷ See *id.* at 15–16. As Chafuen explains:

The ideas that gave birth to what has been called the free society were not the result of spontaneous generation. Adam Smith’s *Wealth of Nations*, for example, bears the imprint of earlier writings, and these were influenced by still earlier writings. . . . It is easy to see the road leading from some late-medieval thought to Classical Liberal ideas.

Id. at 129.

¹⁹⁸ Paul Krugman, *How Did Economists Get It So Wrong?*, N.Y. TIMES MAG. (Sept. 6, 2009), <http://www.nytimes.com/2009/09/06/magazine/06Economic-t.html>. According to Paul Krugman, “[t]he birth of economics as a discipline is usually credited to Adam Smith, who published ‘The Wealth of Nations’ in 1776. Over the next 160 years an extensive body of economic theory was developed, whose central message was: Trust the market.” *Id.* Krugman calls faith in the market “the basic presumption of ‘neoclassical’ economics.” *Id.*

¹⁹⁹ See CHAFUEN, *supra* note 10, at 23.

²⁰⁰ Neo-classical economics holds that economics is value-free. See Charles R. P. Pouncy, *The Rational Rouge: Neoclassical Economic Ideology in the Regulation of the Financial Professional*, 26 VT. L. REV. 263, 278 (2002). Economist Alejandro Chafuen explains, “economics is the study of the formal implications that can be deduced from the fact that human beings act purposively. It does not consider whether these actions are good or bad (an ethical

values implicit in those choices.²⁰¹ As Lionel Robbins suggests, “[a] theory of economic policy . . . must take its ultimate criterion from outside economics.”²⁰² Neo-classical economics is based largely on the assumption of self-interest in the name of income, profit, or wealth maximization.²⁰³ “The neoclassical model limits its theory of person to two and only two characteristics: (1) people are rational, and (2) people are self-interested.”²⁰⁴ There is nothing about lives, morality, or values.²⁰⁵

How did we get here? The English-speaking world believes that modern economic theory starts largely with Adam Smith.²⁰⁶ With Smith as its focus, modern economic theory overlooks the work of theoreticians who provided the foundation for Smith’s work, including the Late Scholastics.²⁰⁷ Unlike modern economists, the Scholastics have no problem making an exception for extreme need: “extreme need is the exception that confirms the rule: [a]nd this rule is that private property is in conformance with human nature and that it promotes and facilitates the conservation of life and human liberty.”²⁰⁸ This view of the Scholastics is based on the writings of

question), as such [neo-classical] economic science is value-free.” See CHAFUEN, *supra* note 10, at 22–23.

²⁰¹ See CHAFUEN, *supra* note 10, at 23.

²⁰² LIONEL ROBBINS, *THE THEORY OF ECONOMIC POLICY IN ENGLISH CLASSICAL POLITICAL ECONOMY 177* (1965).

²⁰³ See Pouncy, *supra* note 200, at 297. Self-interest has been translated by economics into maximization:

[W]hy does the entrepreneur have to maximize profits? Two typical answers run as follows. First, an evolutionary one: Only those entrepreneurs who maximize profits survive in a competitive market. Second, an institutional one: Being entrepreneur is a role institutionally determined that consists of running risks to gain benefits The preferences of the entrepreneur are ultimately determined by its social role within the market.

Ignacio Sánchez-Cuenca, *A Preference for Selfish Preferences: The Problem of Motivations in Rational Choice Political Science*, 38 PHIL. SOC. SCI. 361, 365 (2008). What is more, wealth maximization is the acknowledged purpose of the firm in the two dominant schools of corporate thought: shareholder primacy and the managerialist school that defends management discretion. See William W. Bratton & Michael L. Wachter, *Shareholder Primacy’s Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 145–46 (2008).

²⁰⁴ John Mixon, *Neoclassical Economics and the Erosion of Middle-Class Values: An Explanation for Economic Collapse*, 24 NOTRE DAME J.L. ETHICS & PUB. POL’Y 327, 328 (2011).

²⁰⁵ See *id.*

²⁰⁶ See Krugman, *supra* note 198; see, e.g., Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet’s Most Popular Price*, 61 UCLA L. REV. 606, 614 n.33 (2014) (citing Smith for the classical economic view that free enterprise works to the benefit of all).

²⁰⁷ See CHAFUEN, *supra* note 10, at 15–16. Chafuen provides and describes a tree of influences. See *id.*

²⁰⁸ *Id.* at 42.

Thomas Aquinas (1226–1274).²⁰⁹

Here, Aquinas provides the basis for what we now know in the law as the doctrine of necessity.²¹⁰ However, according to Chafuen, the Scholastics' interpretation of extreme need required to support Thomistic justification is quite limited: "taking goods, which one does not own can only be justified when there is no other way to avoid the death of the person."²¹¹ Chafuen notes that being "wounded or powerless" is sufficient to justify action: "[i]f one might be getting close to a life-threatening situation, one does not need to wait until that moment to act."²¹² However, this philosophical approach was expanded slightly by one of these economists.²¹³

The idea of ranking basic rights was conceived by one of the Late Scholastics, Jesuit economist and Cardinal Juan de Lugo (1583–1660), as a life-saving—or even liberty-saving—decision tool.²¹⁴ The theory was originally designed to be employed by innocent indigents in time of emergency to protect their basic interests by saving their lives and liberty.²¹⁵ Lugo's example justifying its use pertains to one who is both innocent and indigent.²¹⁶ According to Chafuen, ranking had limited application: "[t]his theory applies when one sees an imminent danger to life or even liberty, but not when one only runs the risk of losing goods."²¹⁷

Chafuen's presentation of Lugo's example of justified use of another's property shows that both grave need and indigence are required:

²⁰⁹ See *id.* For example, consider this from Saint Thomas's famous work, *Summa Theologica*:

Since, however, there are many who are in need, while it is impossible for all to be succored by means of the same thing, each one is entrusted with the stewardship of his own things, so that out of them he may come to the aid of those who are in need. Nevertheless, if the need be so manifest and urgent that it is evident that the present need must be remedied by whatever means be at hand (for instance, when a person is in some imminent danger, and there is no other possible remedy), then it is lawful for a man to succor his own need by means of another's property, by taking it either openly or secretly: nor is this properly speaking theft or robbery.

THOMAS AQUINAS, *SUMMA THEOLOGICA* part II-II, q. 66 art. 7 1973, 1974 (Fathers of English Dominican Province trans., Benziger Bros. ed. 1947).

²¹⁰ See AQUINAS, *supra* note 209, at 1974; see, e.g., *Necessity*, BLACK'S LAW DICTIONARY (8th ed. 2004).

²¹¹ See CHAFUEN, *supra* note 10, at 42.

²¹² *Id.* at 43.

²¹³ See *id.* at 44.

²¹⁴ See *id.* at 15, 45, 64.

²¹⁵ See *id.* at 42.

²¹⁶ See *id.* at 44–45.

²¹⁷ *Id.* at 45.

[B]ecause if someone, to escape from enemies chasing him, fears captivity and losing his liberty, and needs a neighbor's horse, it seems too harsh and absolutely incredible that he would not be allowed to take it without the knowledge of the owner, even if he might not be able to retribute the horse nor the price for it. For what it seems that the same must be affirmed if the horse would be necessary for him to escape from positive grave infamy [like rape] as this can cause no less suffering than captivity. And for the same reasons, the same would be in cases of perpetual sickness or similar evils.²¹⁸

One must be at great risk and have no effective alternatives.²¹⁹ Only then can one justify placing their own liberty interest over the property interests of the owner of the horse necessary to secure that liberty.²²⁰

The activity (the taking) was a necessity, not a choice.²²¹ This is consistent with cases in the American common law of necessity.²²² The law gives some extra latitude to one who attempts to save a life.²²³

Lugo's example seems rather poor. Mere liberty was at stake, not life.²²⁴ However, the example only adds power and significance to the ranking. The idea of ranking rights and duties may seem new, but Greek and Roman law ranked legal rights based on a distinction

²¹⁸ *Id.*

²¹⁹ *See id.*

²²⁰ *See id.*

²²¹ *See id.*

²²² *See, e.g.,* Ploof v. Putnam, 71 A. 188, 189 (Vt. 1908) ("There are many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal property that would otherwise have been trespasses.").

²²³ Section 263 of the Restatement Second of Torts addresses privilege created by private necessity:

(1) One is privileged to commit an act which would otherwise be a trespass to the chattel of another or a conversion of it, if it is or is reasonably believed to be reasonable and necessary to protect the person or property of the actor, the other or a third person from serious harm, unless the actor knows that the person for whose benefit he acts is unwilling that he shall do so.

(2) Where the act is for the benefit of the actor or a third person, he is subject to liability for any harm caused by the exercise of the privilege.

RESTATEMENT (SECOND) OF TORTS: PRIVILEGE CREATED BY PRIVATE NECESSITY § 263 (AM. LAW INST. 1965).

²²⁴ *See, e.g.,* CHAFUEN, *supra* note 10, at 45.

between people and things (including animals and slaves).²²⁵ Lugo's ranking would apply both morally, as a ranking of basic interests, and legally, as a ranking of basic rights.²²⁶ Lugo ranks both basic interests and the basic rights that they support. The roots of the ranking, found in Aquinas's thirteenth-century natural law, predate the sixteenth-century reformation.²²⁷ Thus, the ranking of basic rights is based in the roots of Western law and religion.²²⁸ We have not only found a basis for the Due Process Clause, to the extent that our law and religion remain consistent with those roots,²²⁹ the ranking could serve as a fundamental constitutional principle of ultimate usefulness.

Chafuen describes the original ranking: “[r]ights to life and liberty are, in a sense, superior to property rights. These [property] rights evolved to preserve life and liberty. In extreme cases when these rights seem to be in contradiction, life and liberty should prevail.”²³⁰ The use of “extreme cases,” as well as the grave and extreme need in the example provided by Lugo, indicate that his ranking theory is of limited use, only in emergencies.²³¹

The principle put forth by Chafuen and Lugo raises liberty's importance nearly to equal that of life itself.²³² Rather than favor or disfavor the human right to private property, the principle is employed to protect the liberty of the human person.²³³ This can be done, so long as liberty does not harm life.

This theory need not resolve all conflicts between liberty and property. Slavery is banned nationally and internationally,²³⁴ but that does not necessarily mean that liberty interests should always prevail over conflicting property interests. If not, how does one distinguish circumstances when property rights should prevail and those where liberty should? As this is about constitutional principles,

²²⁵ See Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 492, 493 (1996).

²²⁶ See, e.g., CHAFUEN, *supra* note 10, at 45.

²²⁷ See, e.g., AQUINAS, *supra* note 209, at 1974.

²²⁸ See, e.g., Paul Babie, *Two Voices of the Morality of Private Property*, 23 J.L. & RELIGION 271, 272–73, 295–96 (2008).

²²⁹ See, e.g., John Witte, Jr., *Religious Sources and Dimensions of Human Rights* 14 (Emory Univ. Sch. of Law Legal Studies Research Paper Series, Working Paper No. 14-317, 2013) (“By 1650, Protestants had used this logic to develop and defend almost every one of the ‘fundamental rights and liberties’ that would appear, a century and a half later, in the United States Bill of Rights of 1791.”).

²³⁰ CHAFUEN, *supra* note 10, at 45.

²³¹ See *id.*

²³² See *id.*

²³³ See *id.* at 42, 45.

²³⁴ See U.S. CONST. amend. XIII, § 1; Universal Declaration, *supra* note 37, at art. 4.

the entire matter would best be thoroughly researched, argued, carefully resolved, and settled for the purpose of predictability.

It may turn out that we need to place limits on some liberties or certain kinds of activities in an effort to take into account certain kinds of property interests. However, it seems much more likely that liberties would be bent by life interests—e.g. by limiting certain behavior, activities, or liberties to keep the innocent alive—than by property interests.²³⁵ If we don't confuse our rights and interests, and we protect life first, there will likely be fewer issues between liberty and property.

Lugo developed the ranking of basic rights as a principle for use in emergencies.²³⁶ The significant risk requirement is the functional equivalent of Lugo's emergency requirement.²³⁷ When there is a significant risk to life or liberty of the innocent who have not consented to that risk, Lugo would invoke the ranking.²³⁸ We should do the same for significant risks to life and health. Shortly, we will take the principal apart to see how it can better help us reduce significant risks to life and health.

IV. LIFE, LIBERTY, AND PROPERTY IN U.S. LAW

Natural law theory, dating to Aquinas, not only supported the Late Scholastics of the sixteenth and seventeenth centuries, it provided the foundation for John Locke in the late seventeenth century, and the framers of the U.S. Constitution in the late eighteenth century.²³⁹ Thus, one should not be surprised to find parallels in word and thought between the works of the Scholastics and the language of the U.S. Constitution.²⁴⁰

In the late seventeenth century, John Locke's *Second Treatise on Government* supported the notion that governments may not violate rights to life, liberty, and property.²⁴¹ Unfortunately, Locke viewed life and liberty as one's own property,²⁴² but I believe his view was

²³⁵ See AQUINAS, *supra* note 209, at 1974.

²³⁶ See CHAFUEN, *supra* note 10, at 45.

²³⁷ See *id.*; Keating, *supra* note 100, at 658.

²³⁸ See CHAFUEN, *supra* note 10, at 45.

²³⁹ See *id.* at 14; Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1304, 1311 (2015).

²⁴⁰ See Calabresi & Vickery, *supra* note 239, at 1311.

²⁴¹ See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 87, 46 (C.B. Macpherson ed., 1980).

²⁴² See *id.*, § 27, at 19 (“[E]very man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly

erroneous.²⁴³ The moral Hispanic Scholars, like Juan de Lugo, had argued that interests in life and liberty outrank those in property.²⁴⁴ The same interpretation is possible using the language inspired by Locke that remains in our Constitution to this day.²⁴⁵ That language is open to a more nuanced, safer, and stronger lexical interpretation in line with late Scholastic moral philosophy; it needs to be reinterpreted and updated in this time of global emergency.

The U.S. Declaration of Independence sought to protect the colonists' "certain unalienable [r]ights" including "[l]ife, [l]iberty and the pursuit of [h]appiness."²⁴⁶ But on June 8, 1789, James Madison, credited with authoring the Bill of Rights, presented to Congress modified language²⁴⁷ so that the due process clause of the Fifth Amendment protected "life, liberty, or property."²⁴⁸ This language is important as these three rights may not be deprived without due process of law.²⁴⁹ At that time, and in the eighteenth century, the substitution of *property* in lieu of the *pursuit of happiness* was seen as a substitution of two equivalents.²⁵⁰

This equivalence between the pursuit of happiness and property may or may not reflect a change from Locke's earlier view that life

his.").

²⁴³ Without life, we can have no property. Without liberty, we have virtually no basis upon which to have rights in property. *But see id.*

²⁴⁴ See CHAFUEN, *supra* note 10, at 45.

²⁴⁵ See John T. Scott, *The Sovereignless State and Locke's Language of Obligation*, 94 AM. POL. SCI. REV. 547, 547 (2000).

²⁴⁶ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²⁴⁷ See 1 ANNALS OF CONG. 441, 468 (1789) (Gales & Seaton eds., 1824); JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 94 (Oscar Handlin ed., 2d ed. 2002). Madison's use of the current language (i.e. life, liberty, and property) had been proposed in 1788 by the State of New York, the only state that asked Congress to add due process language. See *Ratification of the Constitution by the State of New York; July 26, 1788*, YALE L. SCH., http://avalon.law.yale.edu/18th_century/ratny.asp (last visited Oct. 15, 2018).

²⁴⁸ U.S. CONST. amend. V. The Amendment reads in full:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except for cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V (emphasis added).

²⁴⁹ *See id.*

²⁵⁰ See JOHN PHILLIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 119 (1988). A century later, Justice Bradley equated "property" with "pursuit of happiness," noting that "[r]ights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property." See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 116 (1873) (Bradley, J., dissenting).

and liberty are property.²⁵¹ In a sense, the rationale does not matter. The identity and order of Lugo's interests matches the appearance of those same rights in the due process clauses of the Fifth and Fourteenth Amendments and enables a new, safer constitutional interpretation of current language.²⁵²

Ronald Dworkin talks about the guidance provided by the language of the due process clauses:

Both the Fifth and the Fourteenth [Amendments] forbid government to take life or liberty or property without "due process of law." The Supreme Court early decided that this clause was not to be understood as simply procedural, but that it imposed substantive limits on what government could do no matter what procedures it followed. But the amendments say nothing to help judges decide whether due process means that people have a right to a lawyer before the police can interrogate them, for example, or that states may not make contraception or abortion a crime.²⁵³

The language of the amendments themselves is open to interpretation.²⁵⁴ The substantive limits of what the government can and cannot do are subject to judicial interpretation.²⁵⁵

A. *These Rights in the Common Law*

Here is the strongest statement in favor of the protection of life: homicide law—state and federal, statutory, and common law—exists to protect life.²⁵⁶ We all tend to agree that innocent lives should be spared.²⁵⁷ Homicide laws back that up.²⁵⁸

In American common law, the right to life is generally superior to property rights.²⁵⁹ Let us consider examples from the doctrines of

²⁵¹ See LOCKE, *supra* note 241, at § 27.

²⁵² See CHAFUEN, *supra* note 10, at 45; see also U.S. CONST. amends. V, XIV, § 1 (identifying the order in which the three rights appear in the Fifth and Fourteenth Amendments of the Constitution).

²⁵³ DWORKIN, *supra* note 39, at 127.

²⁵⁴ See *id.* at 127–28.

²⁵⁵ See *id.* at 128.

²⁵⁶ See, e.g., Kristi Ayala, Note, *The Application of Traditional Criminal Law to Misappropriation of Gametic Materials*, 24 AM. J. CRIM. L. 503, 514 (1997).

²⁵⁷ See Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, And What They Ought To Be*, 78 ST. JOHN'S L. REV. 725, 805 (2004).

²⁵⁸ See *id.* at 806.

²⁵⁹ See, e.g., *Katko v. Briney*, 183 N.W.2d 657, 660 (Iowa 1971).

self-defense and necessity.

The use of deadly force in self-defense places the life of another at risk. In *Katko v. Briney*, the Iowa Supreme Court held that the property owner is not justified in the use of deadly force if no life has been placed at risk.²⁶⁰ This is the notorious *spring gun* case.²⁶¹ For many, it has been the subject of at least one law school class session.²⁶² The case is used to demonstrate that the common law includes a rule that one cannot defend mere unoccupied property with deadly force.²⁶³

The doctrine of necessity likewise protects interests in life and health ahead of property rights.²⁶⁴ We encounter another classic case from a typical property law course. In *Ploof v. Putnam*, the Vermont Supreme Court denied a trespass claim for dock damage against a boat owner who moored without permission during a sudden tempest.²⁶⁵ The court recognized that the need to save a life permits trespass.²⁶⁶ In the common law, this case stands for the proposition that an interest in saving life and limb prevails over exclusionary rights in property law.²⁶⁷ By ranking life over property,²⁶⁸ the decision protected lives with some loss to the right of exclusion.²⁶⁹ In the vast majority of cases these days, the right of exclusion would be upheld.²⁷⁰ It is a rare case that fits well with the doctrine of necessity.²⁷¹

The doctrine of necessity arises in criminal law as well.²⁷² It typically requires an “imminent threat” or otherwise be necessary in

²⁶⁰ See *id.*

²⁶¹ See Andrew J. McClurg, *Poetry in Commotion: Katko v. Briney and the Bards of First-Year Torts*, 74 OR. L. REV. 823, 823 (1995); Robert A. Prentice, *Of Tort Reform and Millionaire Muggers: Should an Obscure Equitable Doctrine Be Revived to Dent the Litigation Crisis?*, 32 SAN DIEGO L. REV. 53, 107–08 (1995).

²⁶² See McClurg, *supra* note 261, at 823.

²⁶³ See, e.g., *Katko*, 183 N.W.2d at 660.

²⁶⁴ See *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908).

²⁶⁵ See *id.* at 189.

²⁶⁶ See *id.*

²⁶⁷ See *id.*; George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975, 986–89 (1999).

²⁶⁸ See *Ploof*, 71 A. at 189. *Ploof* is at the intersection of property and torts. See Steven L. Nichols, *Hippocrates, The Patent-Holder: The Unenforceability of Medical Procedure Patents*, 5 GEO. MASON L. REV. 227, 260 (1997). In addition to tort law, the doctrine of necessity operates in criminal law. See AQUINAS, *supra* note 209, at 1974.

²⁶⁹ See *Ploof*, 71 A. at 189.

²⁷⁰ See, e.g., *City of Des Moines v. Webster*, 861 N.W.2d 878, 886 (Iowa Ct. App. 2014).

²⁷¹ See Ben Depoorter, *Fair Trespass*, 111 Colum. L. Rev. 1090, 1100 (2011).

²⁷² See PAUL H. ROBINSON, *CRIMINAL LAW: CASE STUDIES & CONTROVERSIES* 469–70 (Vicki Been et al. eds., 2nd ed. 2008).

time to prevent a minimum amount of harm.²⁷³ For example, necessity has been used to support the saving of lives in the face of an indictment for revolt against seamen who compelled the captain to return to port due to the unseaworthiness of the vessel.²⁷⁴ These cases show long-settled strands of the common law ranking the right to life over property rights.²⁷⁵

Combine the common law of criminal homicide with the doctrine of necessity and we can see that innocent life is subject to greater protection in the law than any liberty or property interests. The common law, at least part of it, already recognizes the most important part of the ranking, the primacy of life over other interests. While Western law has long recognized and supported the special protection of life over other interests, more recent philosophical thought has strayed.²⁷⁶ We currently find this kind of thinking in neo-classical economics, a utilitarian view of human existence.²⁷⁷

B. Substantive Due Process

Current interpretations of the due process clauses are based on a dichotomy: The due process of law protecting life, liberty, and property may be either procedural or substantive.²⁷⁸ However, a ranking of basic rights may more likely be invoked in a substantive conflict between two rights. Procedural due process claims may have fewer conflicts between competing basic rights, but they are not immune.²⁷⁹ Procedural due process rights might, for example, be used to favor liberty over life, but procedural favoritism is not the prime area of interest here.

This work is more concerned with substantive due process. Entire

²⁷³ *Id.* at 470.

²⁷⁴ See *United States v. Ashton*, 24 F. Cas. 873, 874 (C.C.D. Mass. 1834) (No. 14,470) (“The law deems the lives of all persons far more valuable than any property.”).

²⁷⁵ See Kletter, *supra* note 152, at §17; J.D. Perovich, Annotation, *Use of Set Gun, Trap, or Similar Device on Defendant’s Own Property*, 47 A.L.R.3d 646 § 7 (1973).

²⁷⁶ See CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 90 (15th ed. 2018); Jason Lloyd, Note, *Let There Be Justice: A Thomistic Assessment of Utilitarianism and Libertarianism*, 8 TEX. REV. L. & POL. 229, 245, 248 (2003).

²⁷⁷ See William A. Wines & Michael P. Fronmueller, *American Workers Increase Efforts to Establish a Legal Right to Privacy as Civility Declines in U.S. Society: Some Observations on the Effort and Its Social Context*, 78 NEB. L. REV. 606, 622 (1999); see also Draper, *Neo-Classical Economics*, *supra* note 9, at 160–61 (“But that’s what neo-classical economics does; it places a value on the lives of people and deems those lives expendable if that value is lower than any conflicting property right *before* they die.”).

²⁷⁸ See 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 17.1 (5th ed., 2017 update).

²⁷⁹ See Sabbath, *supra* note 18, at 1501–02.

books have been written on this subject.²⁸⁰ This Article briefly considers the same idea, a substantive judicial interpretation of the clauses. However, this work offers a new substantive interpretation of the original language by advocating a new substantive due process with the partitioning and ranking (in lexical priority) of the express categories of rights of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution.

Certainly, over time, interpretations of life, liberty, and property have changed. Ryan Williams has gone to considerable effort to show, among other things, that the understanding of due process language of the Fifth Amendment when it was ratified in 1791 was very different from the understanding of that same language in the Fourteenth Amendment when it was adopted in 1868.²⁸¹

Substantive due process²⁸² interpretations developed slowly before the Civil War and grew through the nineteenth century.²⁸³ The impetus was the protection of the vested rights of growing business interests from the encroachment of governmental control in the form of economic or social legislation.²⁸⁴ By the turn of the twentieth century, the Supreme Court had fully embraced the concept and was ready to use it as a rationale to strike legislation attempting to restrain the freedom of businesses to contract.²⁸⁵ However, the Court would not enforce those liberties where state legislation was a true health or safety measure.²⁸⁶

The now-infamous case *Lochner v. New York*,²⁸⁷ is an extreme example of the Supreme Court protecting the right to contract.²⁸⁸ New York had enacted a law limiting the hours that bakers could

²⁸⁰ See EDWARD KEYNES, *LIBERTY, PROPERTY, AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS* (1996); MICHAEL J. PHILLIPS, *THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S* (2001); FRANK R. STRONG, *SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE* (1986).

²⁸¹ See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408, 511–12 (2010). *But see* Malinski v. New York, 324 U.S. 401, 415 (1945), (Frankfurter, J., separate opinion) (“To suppose that ‘due process of law’ meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.”). To know that the interpretations have changed is useful. It would also be useful to recognize the possibility of multiple simultaneous meanings. See Ryan D. Doerfler, *Can a Statute Have More Than One Meaning?*, 104 *N.Y.U. L. REV.* (forthcoming 2019) (on file with author).

²⁸² Substantive due process is “[t]he doctrine that the Due Process Clauses of the 5th and 14th Amendments require legislation to be fair and reasonable in content and to further a legitimate governmental objective.” *Due Process*, BLACK’S LAW DICTIONARY (10th ed. 2014).

²⁸³ See ROTUNDA & NOWAK, *supra* note 40, at § 15.1(e), § 15.2.

²⁸⁴ See *id.* at § 15.2.

²⁸⁵ See *id.* at § 15.3(a).

²⁸⁶ See Holden v. Hardy, 169 U.S. 366, 391–92, 398 (1898).

²⁸⁷ See *Lochner v. New York*, 198 U.S. 45 (1905).

²⁸⁸ See *id.* at 64.

work to sixty hours a week or ten a day.²⁸⁹ Finding the law to be labor legislation rather than a true health or safety provision, the Court overturned that law as an unnecessary interference with liberty of contract between employer and employee.²⁹⁰ It considered such labor legislation an improper exercise of the state's police power to regulate.²⁹¹

This doctrine of vested rights morphed in the progressive era²⁹² as it increasingly confronted the concept of police power.²⁹³ The Court's protection of historic economic freedom (free enterprise) was in tension with a tradition of the Court sustaining legislation within the confines of constitutionality.²⁹⁴ Thus, from 1900 to 1936, the Court failed to follow a systematic or uniform approach with its implementation of substantive due process.²⁹⁵

The effect of the substantive due process era was the hindering of federal efforts to regulate commercial behavior during the Great Depression in the name of police power.²⁹⁶ Never had regulation been more needed, but for four years, the Supreme Court of the United States and its *subjective* natural law analysis stood in the way.²⁹⁷

In 1937, the Court embarked on a new era with the development of new standards of review.²⁹⁸ Substantive due process analysis of economic and social welfare legislation was largely displaced by equal protection analysis.²⁹⁹ Due process rulings have expanded fundamental rights to include the right to privacy which encompasses the right to be free from regulation affecting a person's sexual and reproductive rights.³⁰⁰ The right to life fits here.

The Court should create a new substantive due process to serve as a channel to protect the lives and health of the innocent and the non-

²⁸⁹ See *id.* at 52.

²⁹⁰ See *id.* at 58, 64.

²⁹¹ See *id.* at 58.

²⁹² See ROTUNDA & NOWAK, *supra* note 40, at § 15.1(c); cf. David E. Bernstein, *The History of "Substantive" Due Process: It's Complicated*, 95 TEX. L. REV. 1, 5–6 (2016) ("Arguably, the battle on the Court in the 1920s and early 1930s . . . involved moderate Progressives who sought to preserve some traditional limitations on government authority . . . while mostly acceding to the growth of progressive regulation on one side; their opponents were more radical progressives who denied that either the Constitution or anything else put any inherent, judicially enforceable constraints on the scope of government authority.").

²⁹³ See ROTUNDA & NOWAK, *supra* note 40, at § 15.1(c).

²⁹⁴ See *id.* at § 15.3(a).

²⁹⁵ See G. Sidney Buchanan, *A Very Rational Court*, 30 HOUS. L. REV. 1509, 1515–16 (1993).

²⁹⁶ See ROTUNDA & NOWAK, *supra* note 40, at § 15.3(a).

²⁹⁷ See *id.* at § 15.4(b).

²⁹⁸ See ROTUNDA & NOWAK, *supra* note 40, at § 15.4(a).

²⁹⁹ See *id.*

³⁰⁰ See *id.*

consenting from significant risks arising from conflicts that can develop over rights and interests in liberty or property. In large part, the current approach does not consider Due Process language from a substantive perspective.³⁰¹

Many of the problems we face are of a different nature than those handled in the 1930s by regulatory law.³⁰² Some of our basic rights are not being protected.³⁰³ For example, when governmental encouragement of the pursuit of corporate profits or mere property rights are allowed to kill, whether by legislation, by regulation, by adjudication, or by internal governmental function, we can see that current interpretations of the Due Process Clause are flawed.³⁰⁴

Ranking is likely to protect lives better if it is applied across the board as a broad principle supporting broad implementation. To better protect life, the ranking of basic rights should extend beyond strict scrutiny to all standards of review. The system needs to be able to identify and address current and new significant risks to life.

By changing how we think about and use these words—life, liberty, and property—we can make law—and everyday life—safer and more just. At the same time, the ranking of life over liberty and property would maximize liberty (including privacy) and would work to protect property rights to the extent that they do not cause significant risk of impairment of life, health, and at least some liberties.

Life, liberty, and property represent Juan de Lugo's ranking of interests, and those same three rights appeared expressly in the Due Process Clause of the Fifth Amendment to the Constitution of the United States when it was ratified in 1791.³⁰⁵ It is not a coincidence that these words appeared in these places in this order. Ranking has

³⁰¹ See KEYNES, *supra* note 280, at 29.

³⁰² See generally Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 LAW & CONTEMP. PROB. 129, 155–56 (2015) (“For the first sixty years of the twentieth century . . . the dominant administrative law model was one of neutral expertise, and administrative agencies were viewed as merely transmitting legislative policy choices Over the ensuing decades, this account was cast aside, replaced by a vision of agencies as fundamentally political, exercising broad discretion and formulating policies as compromises among competing interest groups.”).

³⁰³ See, e.g., Sabbeth, *supra* note 18, at 1501–02.

³⁰⁴ See *infra* Part VI.0; see also Richard Delgado, *Idea: You Are Living in a Gold Rush*, 35 HOFSTRA L. REV. 417, 419 (2006) (“Our times . . . are . . . accompanied by a rapid increase in social inequality, obscenely high corporate profits and executive salaries, official corruption, and a laissez-faire government averse to regulation or any form of social welfare or redistribution.”); Daniel W. Morton-Bentley, *Law, Economics, and Politics: The Untold History of the Due Process Limitation on Punitive Damages*, 17 ROGER WILLIAMS U. L. REV. 791, 792 (2012) (contending that the recent punitive damages due process cases were motivated by politics and a protection of corporate profits).

³⁰⁵ See CHAFUEN, *supra* note 10, at 45; U.S. CONST. amend V.

been an option all along. While ranking has long remained overlooked, it is now needed to save lives while maximizing liberty and property rights and interests.

Consider the hypothetical approach of a dangerous flood. As the water rises, extreme measures are required to protect lives. The emergency construction of a levee to protect life—e.g., to prevent the flooding of a subway—would represent a taking of the land under it. If a takings claim to prevent or delay construction of the levee³⁰⁶ was allowed to prevail over the protection of life, it would violate the ranking. Governments can use and even destroy³⁰⁷ what they need to protect lives from the flooding of the subway.

C. Regulatory Law in the Land of Liberty

Issues of life, liberty, and property also arise in the terrain of our regulatory law, and the treatment tends to be very different from that of common law or substantive due process.³⁰⁸ With at least one exception,³⁰⁹ the regulatory approach employed here in the United States tends to allow activity first and regulation later, only if government recognizes sufficient harm.³¹⁰ This approach, requiring harm prior to regulation, defies precaution. The result, especially in the realm of toxic substances, is seemingly random harm and death.³¹¹ The U.S. approach to risk regulation is exactly the opposite of that employed by the EU (with its emphasis on precaution).³¹²

³⁰⁶ Presumably this would be an emergency petition for an injunction or some other order to stop or suspend the work. See, e.g., *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d. 1030, 1033–34 (8th Cir. 2016).

³⁰⁷ The state can go so far as to destroy one class of property to save another. See *ROTUNDA & NOWAK*, *supra* note 40, at § 15.12(c).

³⁰⁸ See *Clark v. Sullivan*, No. 110,394, slip op. at 3 (Kan. Ct. App. 2014) (citing *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005); *Wilkinson v. Austin*, 545 U.S. 209, 221–22 (2005)).

³⁰⁹ The FDA takes a precautionary approach to the use of new pharmaceuticals by requiring administrative approval first. *New Drug Application (NDA)*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/drugs/developmentapprovalprocess/howdrugsaredevelopedandapproved/approvalapplications/newdrugapplicationnda/default.htm> (last visited Sept. 22, 2018).

³¹⁰ See James M. Andris, Jr., Note, *Adopting Proactive Standards to Protect Americans in Indoor Environments: Volatile Organic Compound Emissions Regulation*, 56 WM. & MARY L. REV. 1947, 1964 n.106 (2015).

³¹¹ Compare CARL F. CRANOR, *LEGALLY POISONED: HOW THE LAW PUTS US AT RISK FROM TOXICANTS* 47 (2011) (explaining that developing a random disease and sickness may in fact be caused by exposure to toxic industrial chemicals without being aware of such exposure), with FRANK B. GRAD, 7 *TREATISE ON ENVIRONMENTAL LAW*, EPA Terms of Environment (2018) (“Acute Exposure: A single exposure to a toxic substance which may result in severe biological harm or death.”).

³¹² See Noga Morag-Levine, *The History of Precaution*, 62 AM. J. COMP. L. 1095, 1095 (2014); see also DAVID VOGEL, *THE POLITICS OF PRECAUTION: REGULATING HEALTH, SAFETY, AND ENVIRONMENTAL RISKS IN EUROPE AND THE UNITED STATES* 4 (2012) (examining the shift in

Consider the internal workings of our federal regulatory system. From the Reagan administration,³¹³ at least through the Obama administration, major proposed administrative rulemaking has been subject to testing with cost-benefit analysis (CBA) in the Office of Information and Regulatory Affairs (OIRA).³¹⁴ By executive order, if the regulations are major or economically significant, through internal review at OIRA,³¹⁵ whether the enabling legislation requires use of CBA or some other standard,³¹⁶ administrative agencies must use CBA as an evaluation tool.³¹⁷ Not only do we typically need to prove harm to justify any regulation in the first place, we need to use CBA to prove that the regulation will not interfere too much with economic activity.³¹⁸ More on the implementation of CBA shortly.³¹⁹

Before we leave regulatory law for now, we should note that there are slender reeds of another kind of regulatory process at work within the U.S. system of regulatory law. We have administrative law that supports regulation using the safe level of risk imposition (e.g., clean air and clean water) and feasible risk reduction (e.g., occupational safety).³²⁰ We need safety regulation to protect life, and we need feasible risk reduction to protect liberty.

V. THE POSITION OF NEO-CLASSICAL ECONOMICS

In this part, I briefly review and reject the common utilitarian and neo-classical economic view of basic rights. Many proponents of neo-classical economic or utilitarian theory advocate an equality or equal ranking of rights.³²¹ By treating them as equal, the rights are

governmental approaches to regulating risk in the United States and European Union). *But see* THE REALITY OF PRECAUTION: COMPARING RISK REGULATION IN THE UNITED STATES AND EUROPE 521 (Jonathan Wiener et al. eds., 2011).

³¹³ See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981), *revoked by* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

³¹⁴ See Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (And Almost as Many Answers)*, 114 COLUM. L. REV. 167, 170 (2014) [hereinafter Sunstein, *Real World*].

³¹⁵ See *id.* at 175.

³¹⁶ See Keating, *supra* note 100, at 684–85 (describing the use of the safety standard and feasible risk reduction to control significant risk in legislation).

³¹⁷ See MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 69 (2006); Sunstein, *Real World*, *supra* note 314, at 170.

³¹⁸ See Sunstein, *Real World*, *supra* note 314, at 170; OFFICE OF MGMT. & BUDGET, REGULATORY IMPACT ANALYSIS: A PRIMER 5 (2011), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

³¹⁹ See *infra* text accompanying notes 417–33.

³²⁰ See Keating, *supra* note 100, at 685–87.

³²¹ Compare, David O. Brink, *A Conference Inspired by the Moral and Legal Theory of David Lyons: Mill's Ambivalence About Rights*, 90 B.U.L. REV. 1669, 1699 (2010) (“These

regarded as fungible or tradeable.³²² This allows those rights to be reduced to numerical values on a unitary metric, often the dollar.³²³ A life, not yet taken, is suddenly worth ten million dollars, soon to be decimated as that death will not occur for another twenty or thirty years.³²⁴ That statistical death is spread over the population in the name of a few million dollars of profit for a few.³²⁵ With environmental protections, the calculation is repeated anew by each polluter.³²⁶ Corporations and shareholders benefit often long before individuals die.³²⁷ But we see the growing death toll from cancers and neurological diseases, and we know something is wrong.³²⁸

The basis for these calculations starts here: many neo-classical economists argue that rights are equal or even fungible.³²⁹ For example, consider the “open-ended and humble” list of ten central human functional capabilities identified by law and philosophy professor Martha Nussbaum.³³⁰ Law & economics scholars Jonathan Masur and Eric Posner extract the following list from Nussbaum’s work: “life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation (including the goods of both friendship and self-respect); play; other species; and control over one’s environment (including both political rights and property

claims . . . imply that whether one possesses a right to particular interests or liberties in a particular case is not determined by the value of honoring or interfering with that interest or liberty but by the value of protecting it and/or punishing interference with it. This conception is a sanction-utilitarian theory of rights.”), *with* Keating, *supra* note 100, at 656 (“Cost-benefit analysis treats all human interests . . . as fungible at some ratio of exchange . . .”).

³²² See Keating, *supra* note 100, at 656, 660.

³²³ See Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1557 (2002).

³²⁴ See, e.g., W. Kip Viscusi, *Best Estimate Selection Bias of Estimates of the Value of a Statistical Life* 22 (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 17-7, 2017), <https://ssrn.com/abstract=2919555>.

³²⁵ See Keating, *supra* note 100, at 660; see also Matthew D. Adler, *Risk, Death and Harm: The Normative Foundations of Risk Regulation*, 87 MINN. L. REV. 1293, 1399 (2003) (“If there was one expected statistical death from this large audience of 10,000 participants, and if each of the participants is willing to pay \$500 to eliminate the risk, then it would be possible to raise \$ 5 million collectively from this audience to eliminate the one statistical death to the group, thus establishing the value of life.”).

³²⁶ See Draper, *Neo-Classical Economics*, *supra* note 9, at 195; Ackerman & Heinzerling, *supra* note 323, at 1557.

³²⁷ Cf. CRANOR, *supra* note 311, 47 (noting that the harm from industrial pollutants may not be discovered for years after exposure).

³²⁸ See WORLD HEALTH ORGANIZATION, NEUROLOGICAL DISORDERS: PUBLIC HEALTH CHALLENGES 35 tbl.2.7 (2006); CDC: *U.S. Deaths from Heart Disease, Cancer on the Rise*, AM. HEART ASS’N (Aug. 4, 2016), <http://www.heart.org/en/news/2018/05/01/cdc-us-deaths-from-heart-disease-cancer-on-the-rise>.

³²⁹ See Keating, *supra* note 100, at 656, 660.

³³⁰ See MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 77–80 (2000).

rights).”³³¹ They argue that the rights should be treated as being in the same class or category.³³² As I argue elsewhere, their grouping fails to recognize the prime value of life itself.³³³

The view that fundamental rights should be treated as of equal rank is taken by scholars and advocates from Germany,³³⁴ the Netherlands,³³⁵ Belgium,³³⁶ and even the U.N. High Commissioner for Human Rights.³³⁷ This approach places property and liberty rights on the same plane as life.³³⁸

The risks are imposed on individuals and larger groups, even the largest group—all of humanity.³³⁹ Individually, when the law says someone else’s property or liberty is just as important as your life, it stands to reason that you are more likely to find your life at risk. No one is safe. A legal and economic system focused on short-term profits, even just indirectly or partially derived at the expense of life, will *eventually* take lives, even though the taking may appear to be random.³⁴⁰

Risks to life also apply to groups.³⁴¹ The emphasis of neo-classical economics is on profit, welfare, or, more recently, happiness

³³¹ See Jonathan S. Masur & Eric A. Posner, *Against Feasibility Analysis*, 77 U. CHI. L. REV. 657, 708 (2010).

³³² See NUSSBAUM, *supra* note 330, at 81; Masur & Posner, *supra* note 331, at 707–08.

³³³ See Draper, *Risk Filters*, *supra* note 24, at 389–91.

³³⁴ See AJ VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES: A COMPARATIVE ANALYSIS 160 n.173, 162 n.188 (1999); Catherine Barnard, *The Protection of Fundamental Social Rights in Europe after Lisbon: A Question of Conflicts of Interests*, in THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EU AFTER LISBON 45, 48 (Sybe de Vries et al. eds., 2013).

³³⁵ See Jan Smits, *Private Law and Fundamental Rights: A Skeptical View*, in CONSTITUTIONALISATION OF PRIVATE LAW 9, 16–18 (Tom Barkhuysen & Siewert Lindenbergh eds., 2006) (concluding that fundamental rights do not offer enough guidance due to their “diffuse character”).

³³⁶ See Antoinette Rouvroy & Yves Poullet, *The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy*, in REINVENTING DATA PROTECTION? 45, 61 n.33 (Serge Gutwirth et al. eds., 2009) (“This is not an attempt to reconstruct a ranking of fundamental rights, an exercise that would only undermine the legitimacy of all fundamental rights including those, which might end up on a ‘higher’ rank.”).

³³⁷ See Derya Nur Kayacan, *How to Resolve Conflicts Between Fundamental Constitutional Rights*, SAAR BLUEPRINTS, Feb. 2016, at 8, <http://jean-monnet-saar.eu/wp-content/uploads/2013/12/Blueprint-0216.pdf> (“[D]ivisions and ranking of rights is artificial.”).

³³⁸ Cf. Barnard, *supra* note 334, at 49 (“[T]he Court implicitly accepted that the economic and social interests are of equal weight and need to be reconciled through the principle of proportionality.”).

³³⁹ See Draper, *Neo-Classical Economics*, *supra* note 9, at 158.

³⁴⁰ Cf. Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 338 (1996) (“Ford was denounced in a series of highly publicized exposés for callously choosing to boost profits at the expense of saving human lives [A] local Indiana prosecutor decided to prosecute Ford for manslaughter. Ford ultimately was acquitted.”).

³⁴¹ See Draper, *Neo-Classical Economics*, *supra* note 9, at 232.

maximization.³⁴² Typically in economics, the focus is on property rights and use.³⁴³ More use means more efficiency, and more profits.³⁴⁴ The focus is on resulting profits, not on resource use or impact.³⁴⁵ However, we live in a world with too much consumption, too much pollution, and too large a population.³⁴⁶ Maximization may work for us as individuals, but collectively, the implementation of that theory puts all of humanity at risk.³⁴⁷ When the theory of maximization helps the human population exceed our planetary limits, environmental overshoot and collapse become significant risks.³⁴⁸

As we have already seen, much like neo-classical economics, libertarianism,³⁴⁹ which focuses on liberty and property as the prime rights,³⁵⁰ fails to adequately protect life.³⁵¹ Such a position invites risk to life by giving it the same moral value as liberty, property, and other rights. In the interest of justice, property and profit should neither be of prime importance nor should they be placed on a par with life itself. The same holds true for liberty. Liberty is nothing without life; they should not be treated as equal. A proper and safe ranking of basic rights forces rejection of the libertarian position. Now let's consider some more-specific risks from failing to reject the fungibility of basic rights.

³⁴² See MATTHEW D. ADLER, *WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS* 33 (2012); Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 100 (1990); Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 67 (1993).

³⁴³ See David M. Morrison, *Bridgeport Redux: Digital Sampling and Audience Recording*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 75, 77 (2008).

³⁴⁴ See Claire Moore Dickerson, *How Do Norms and Empathy Affect Corporation Law and Corporate Behavior?: Human Rights: The Emerging Norm of Corporate Social Responsibility*, 76 TUL. L. REV. 1431, 1434–35 (2002); Geoffrey D. Korff, *Reviving the Forgotten American Dream*, 113 PENN ST. L. REV. 417, 430 (2008).

³⁴⁵ See Draper, *Neo-Classical Economics*, *supra* note 9, at 161; Susan L. Smith, *Ecologically Sustainable Development: Integrating Economics, Ecology, and Law*, 31 WILLAMETTE L. REV. 261, 293 (1995).

³⁴⁶ See EDWARD O. WILSON, *THE FUTURE OF LIFE*, at xxiii (2002); DIAMOND, *supra* note 22, at 487–88; DONELLA MEADOWS ET AL., *LIMITS TO GROWTH: THE 30-YEAR UPDATE* 166 (2004).

³⁴⁷ See Draper, *Neo-Classical Economics*, *supra* note 9, at 160.

³⁴⁸ See MEADOWS ET AL., *supra* note 346, at 164, 167.

³⁴⁹ Libertarians and neo-classical economists are not one and the same, although they probably have some overlap, and their interests in maximization often align. See Rena Mara Samole, Note, *Real Employees: Cognitive Psychology and the Adjudication of Non-Competition Agreements*, 4 WASH. U. J.L. & POL'Y 289, 317 n.139 (2000).

³⁵⁰ See Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 100–02 (2010).

³⁵¹ Cf. Lloyd, *supra* note 276, at 247 (“Because property rights are superior . . . [s]uch a theory allows a person to do virtually anything imaginable to himself - even commit suicide - because harm to oneself ‘must’ be allowed in a Libertarian regime.”).

VI. INVERSIONS

If basic rights are all of the same weight, the unpredictable jostling of everyday life will from time to time place one right above another. When life and health lose to other rights and interests, the position of the right to life has become inverted relative to those other rights. A liberty or property right or interest has been given a priority over that life. In this way, the concept of an inversion may be a useful tool for seeing and understanding conflicts between different types of rights.

A. Risks of Inversions

Western law has a history of running into trouble by failing to rank basic rights.³⁵² This phenomenon is easiest to see when we consider the risks of inversions.

To begin, let's contrast property and liberty. Property interests or property rights may be commodified or compensated, whereas our choices bind us, especially sets or groupings of choices.³⁵³ Many of us are born with some of those groupings, such as our culture, including our religion.³⁵⁴ This represents our liberty, which includes privacy, an aspect of liberty³⁵⁵ or an inverse liberty. Liberties also include such fundamental rights as speech, press, assembly, voting, and abortion.³⁵⁶ There are an infinite number of liberties, but our constitution provides special protection for such fundamental liberties.³⁵⁷

It is the risk to life stemming from conflicts between liberty or property rights and life (including health) that matters here. As we

³⁵² See DIAMOND, *supra* note 22, at 488–90.

³⁵³ See *Members of the Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005); Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes out of the Closet*, 15 COLUM. J. GENDER & L. 355, 376 (2006).

³⁵⁴ See Lauren Sudeall Lucas, *The Free Exercise of Religious Identity*, 64 UCLA L. REV. 54, 68 (2017).

³⁵⁵ See *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 69–71 (Ga. 1905); Anita L. Allen, *Race and Ethnicity: Race, Face, and Rawls*, 72 FORDHAM L. REV. 1677, 1680–81 (2004).

³⁵⁶ See U.S. CONST. amend. I; see also Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL'Y 143, 150 (2008) (“The Court first alluded to the right to vote as fundamental as far back as 1886 . . . [but] [i]n several key areas of election law jurisprudence, the Court has vacillated between analyzing the right to vote as a fundamental right and treating it as something other than fundamental.”); Chelsea M. Donaldson, Note, *Constitutional Law/Reproductive Justice - Breaking the TRAP: How Whole Woman's Health Protects Abortion Access, and the Substantive Due Process Clause's Rebuke of Anti-Abortion Regulations*, 40 W. NEW ENG. L. REV. 257, 297–98 (2018) (noting that abortion is still a fundamental right under current Supreme Court decisions).

³⁵⁷ See 16A AM. JUR. 2D *Constitutional Law* § 403 (2018).

shall see, if we fail to properly resolve those conflicts, we place ourselves, individually³⁵⁸ and collectively—even as a species—at significant risk of harm or demise.

Bad things tend to happen when property rights prevail over rights to life and health.³⁵⁹ Likewise, when liberty rights prevail over life and health.³⁶⁰ We will now examine the risks in failing to honor the ranking of the right to life ahead of liberty and property rights.

1. Property Over Life

Governmental action advancing property rights, in the interest of profit, over someone's right to life can be a symptom of the impact of neo-classical economics on the law.³⁶¹ Some of these actions likely predate this movement in economics.³⁶² Kathryn Sabbeth observes that some legislatures and courts have been placing interest in profit over life and health for decades:

It might seem intuitive that the higher the stakes for the individual, the more effort should be expended to protect those interests, but the current structure of the legal system suggests otherwise. Substantive and procedural rights often rank basic human needs below property rights. As just one example, many states expedite and streamline eviction proceedings; removing a tenant from her home is, procedurally, faster and easier than recovering a nominal sum of money. The defendant's potential deprivation of shelter receives relatively little attention in the design of the adjudication system.³⁶³

This inversion is an example of how legislatures smooth the procedural system to protect the property rights of landlords. Such property rights should be considered only after accounting for any

³⁵⁸ Concerns for individual rights and human survival are both rooted in the intersection of the natural and the human creation. We apply this sacredness to even the most immature embryo. See DWORKIN, *supra* note 39, at 83.

³⁵⁹ See Fischel & Sykes, *supra* note 340, at 337–38; Noga Morag-Levine, *The Problem of Pollution Hotspots: Pollution Markets, Coase, and Common Law*, 17 CORNELL J.L. & PUB. POL'Y 161, 188–89 (2007).

³⁶⁰ See, e.g., Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

³⁶¹ See Edward J. McCaffery & Jonathan Baron, *Tax Policy in an Era of Rising Inequality: The Political Psychology of Redistribution*, 52 UCLA L. REV. 1745, 1747–48 (2005).

³⁶² See Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L.J. 553, 595 (1994).

³⁶³ Sabbeth, *supra* note 18, at 1501–02.

possible significant risk to the lives and health of the tenants.

In regulatory law, the urgent problem is the protection of life. The internal workings of our regulatory system endanger the very people who should be protected by congressional legislation enabling the regulations, especially if that legislation requires implementation of the safety or feasibility standards.³⁶⁴ The protection of property interests through CBA's lower regulatory standards works to harm the health and lives of millions.³⁶⁵

Our cancer rates tell part of the story of this inversion.³⁶⁶ We are experiencing a molecular death by poisoning that is silent and invisible.³⁶⁷ The effect of that poisoning may manifest itself in diseases of the nervous system,³⁶⁸ dementia,³⁶⁹ and various cancers.³⁷⁰ At least some of it is happening as a result of CBA.³⁷¹

Before we proceed, let us note how basic due process rights are in law. Life and liberty rights are enshrined in international law,³⁷² and, as part of the U.S. Bill of Rights, they are not subject to

³⁶⁴ See Keating, *supra* note 100, at 685, 687, 747–48.

³⁶⁵ Compare ADLER & POSNER, *supra* 347, 178 (2006) (“It is now common practice for regulatory agencies conducting CBA to include lives lost or saved as a cost or benefit, often using a monetary value.”), and Keating, *supra* note 100, at 660–61 (“Cost-benefit analysis supposes that loss of life or health by some can always be offset by increase in wealth to others, no matter how trivial the effect of that increased wealth may be in the lives of those who benefit from it.”), with William J. Aceves, *Valuing Life: A Human Rights Perspective on the Calculus of Regulation*, 36 L. & INEQ. 1, 47 (2018) (“While regulatory decisions are often less visible than other forms of government action, they may still have a profound impact on mortality risks. . . . [U]sing cost-benefit analysis and VSL calculations to determine mortality risks in these regulatory fields can readily implicate the right to life norm.”).

³⁶⁶ See CRANOR, *supra* note 311, at 48; Keating, *supra* note 100, at 686; CDC: *U.S. Deaths from Heart Disease, Cancer on the Rise*, *supra* note 328.

³⁶⁷ See CRANOR, *supra* note 311, at 47.

³⁶⁸ See Hussien Ahmed et al., *Parkinson's Disease and Pesticides: A Meta-Analysis of Disease Connection and Genetic Alterations*, 90 BIOMEDICINE & PHARMACOTHERAPY 638, 640 (2017) (providing evidence that pesticide exposure is significantly associated with the risk of Parkinson's disease and alterations in genes involved in Parkinson's disease pathogenesis); see also Laurie H. Sanders et al., *Base Excision Repair Variants and Pesticide Exposure Increase Parkinson's Disease Risk*, 158 TOXICOLOGICAL SCI. 188, 189, 191 (2017) (finding that exposure to certain pesticides induces oxidative stress and increases the risk of Parkinson's disease).

³⁶⁹ See Lewis O. J. Killin et al., *Environmental Risk Factors for Dementia: A Systematic Review*, 16 BMC GERIATRICS 175, 5, 25 (2016) (finding that extensive review suggests that future research focus on a short list of environmental risk factors for dementia.).

³⁷⁰ See CARL F. CRANOR, TOXIC TORTS: SCIENCE, LAW, AND THE POSSIBILITY OF JUSTICE 25, 97, 131 (2d ed. 2016); CRANOR, *supra* note 311, at 2 n.6.

³⁷¹ Arguably, moral commitments need to be taken into account in CBA, or there is a possible violation of the Administrative Procedure Act. See Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 U. VA. L. REV. 1809, 1858–59 (2017). Unfortunately, our norms of chemical usage have not changed. This shows that our moral commitment to life has not been embedded in CBA. That is asking too much for a welfarist theory based on a unitary metric. See Draper, *Neo-Classical Economics*, *supra* note 9, at 231–32.

³⁷² See Universal Declaration, *supra* note 37, art. 3.

election.³⁷³ Why, then, should matters of economic activity be allowed to interfere with the protection of the lives of others? Our first responders do what they can to preserve lives, and some of those activities come at great cost.³⁷⁴ However, more to the point, our mutual rights in life help assure us that corresponding duties preclude a right (of government or anyone) to benefit from early deaths.³⁷⁵

Let us turn to the internal workings of our federal regulatory system, arguably not subject to review by any court.³⁷⁶ As already noted,³⁷⁷ OIRA is responsible for the internal review and approval of new regulations using CBA.³⁷⁸ For each proposed regulation coming under its scrutiny, OIRA distills and compares costs and benefits as part of conducting the CBA inquiry with a unitary metric (typically dollars).³⁷⁹ When a major new pollution standard would statistically

³⁷³ Remember this forceful statement of Justice Jackson in *Barnette*:

The very purpose of the *Bill of Rights* was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). An election could be held when there is an equality and commensurability of basic rights on both sides of an issue.

³⁷⁴ See *Emergency Preparedness and Response. Input: Occupational Safety and Health Risks*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 20, 2013), <https://www.cdc.gov/niosh/programs/epr/risks.html>.

³⁷⁵ See Ackerman & Heinzerling, *supra* note 323, at 1553–54 (2002); cf. Aceves, *supra* note 365, at 65 (“Partisan influence and bureaucratic bias must be removed from the calculus of regulation when human life is at stake. Greater care must be taken when monetizing human life. In the calculus of regulation, miscalculations carry great costs. Simply stated, “[u]ndervaluing life leads to death.”). Greater care is not enough. Human lives should not be monetized.

³⁷⁶ See Masur & Posner, *supra* note 331, at 667. Who could possibly have standing to bring an action against an internal review? If it is to be those at significant risk of death, and they are, say, one hundred, seemingly random statistical people, there can be no adequate legal proof of cause and effect at this point. Thus, even well-meaning bureaucrats can help kill. To solve the internal governmental problem, we might need *both* a constitutional ban on allowing the valuation and taking of statistical lives in return for liberty or property considerations *and* a lasting solution to the standing problem. Here, we are considering environmental crime. When crime will take a life, “[c]rime has a human face, and that face deserves standing and a say in the matter.” Stephanos Bibas, *Mercy and Clemency: Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 337 (2007).

³⁷⁷ See discussion *supra* Part IV.C.

³⁷⁸ See Sunstein, *Real World*, *supra* note 314, at 170.

³⁷⁹ See *id.* at 170, 171–72; see also John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 413 (2008) (“[A] common metric is crucial when comparing the consequences of different regulatory alternatives and when weighing the gains to beneficiaries against the losses realized by those made worse off.”).

foresee the loss of, say, 100 lives more than would a different standard, to help make the decision, each life is given a value. That amount is typically about \$10 million today.³⁸⁰ The cumulative difference would then be \$1 billion.³⁸¹ The benefits, the lives saved by the regulations, justify costs up to \$1 billion.³⁸² Activities with costs projected to exceed \$1 billion would be allowed to prevail over protective regulation.³⁸³

The first problem is the matter of pricing lives. Will you take \$10 million for your life? In 2000, the value of statistical life was about six million dollars.³⁸⁴ Does the additional four million dollars help you feel any better about giving up your life? Does it help you feel safer? What if you are one of the statistical people whose life is taken so that someone, usually but not always someone else, can make more than \$10 million? What does that do for your sense of justice?

CBA places a value on the statistical lives of people and deems those lives expendable if that value is lower than any conflicting property right *before* they die.³⁸⁵ These calculations are known as the value of a statistical life (VSL).³⁸⁶

VSL is commonly regarded by economists as essential to calculating the costs and benefits of environmental regulations.³⁸⁷ Avoided deaths are the basis (the benefit) for implementing many such regulations.³⁸⁸ Since the government uses VSL (in its internal regulatory review), Kip Viscusi advocates that corporations use VSL as a shield, even a safe harbor, in decision-making where risk involves the loss of lives.³⁸⁹ If VSL is safe and acceptable for

³⁸⁰ See Sunstein, *Real World*, *supra* note 314, at 182 n.66, 188.

³⁸¹ See *generally id.* at 181–82 (providing an example where the total benefits are calculated based on the VSL and the estimated number of people saved).

³⁸² See *id.* at 179 (discussing that benefits justify the costs when the monetized benefits exceed the monetized costs).

³⁸³ See *id.* (“If the monetized benefits are lower than the monetized costs, agencies may choose not to submit the draft rule at all, unless there are special considerations (such as a legal obligation or important nonquantifiable benefits).”).

³⁸⁴ See ACKERMAN & HEINZERLING, *supra* note 17, at 61.

³⁸⁵ See Ackerman & Heinzerling, *supra* note 323, at 1553–54.

³⁸⁶ See W. Kip Viscusi & Clayton J. Masterman, *Income Elasticities and Global Values of Statistical Life*, 8 J. BENEFIT COST ANALYSIS 226, 227 n.1 (2017) (“The VSL is the monetary value of small changes in mortality risks, scaled up to reflect the value associated with one expected fatality in a large population.”). See Draper, *Neo-Classical Economics*, *supra* note 9, at 208 (“Economists’ measurements of that value are often based on labor market data.”).

³⁸⁷ See Viscusi & Masterman, *supra* note 386, at 227; Draper, *Neo-Classical Economics*, *supra* note 9, at 201.

³⁸⁸ See Matthew D. Adler, *Against “Individual Risk”: A Sympathetic Critique of Risk Assessment*, 153 U. PA. L. REV. 1121, 1197–98 (2005).

³⁸⁹ See W. Kip Viscusi, *Pricing Lives for Corporate & Governmental Risk Decisions*, 6 J. BENEFIT COST ANALYSIS 227, 242 (2015). “[A] reasonable middle ground between infinity and

governmental use, it must be safe for the private sector.³⁹⁰ Unfortunately, as its use increases, in effect, VSL becomes a seemingly random, but increasing form of statistical death.³⁹¹ And that flies in the face of public preferences.³⁹²

In this context, let's examine discounting. As the proposed rule and the lives saved occur at different times, discounting is employed.³⁹³ Using "standard discount rate"³⁹⁴ of seven percent, in about ten years, those \$10 million dollar lives are only going to be worth about \$5 million in protection. Thus, if those \$10 million-lives will be lost in an average of ten years from today, they are only worth half as much. Here is the effect: with the reduction in value of those statistical lives, twice as much harm would be allowed. And if the average loss occurs after 40 years, those lives have vanishing little value.

By discounting, we get more consumption and more pollution.³⁹⁵ The pollution takes time to do its work.³⁹⁶ Those future deaths are worth less than deaths today.³⁹⁷ The lives are on sale. The deaths are foreseeable. And it's allowed.

The property right implicit in those millions of dollars is then

lifetime earning" produces a VSL of about \$9 million. *Id.* at 244. More precisely, your life is now worth between \$9.7 and \$11.5 million. See Viscusi, *supra* note 324, at 22. It is even possible to calculate VSLs for those in other countries. In lower income countries, life valuations range as low as \$107,000. See Viscusi & Masterman, *supra* note 386, at 229.

³⁹⁰ See James K. Hammitt, *On Balance: Review of "Pricing Lives: Guideposts for a Safer Society" by W. Kip Viscusi*, SOC'Y FOR BENEFIT-COST ANALYSIS (May 25, 2018), [https://benefitcostanalysis.org/balance-review-ricing-lives-guideposts-safer-society"-w-kip-viscusi](https://benefitcostanalysis.org/balance-review-ricing-lives-guideposts-safer-society).

³⁹¹ See Graham, *supra* note 379, at 497 ("When federal agencies estimate WTP for small risk reductions, they use a summary statistic called the 'value of statistical life' (VSL). If 100,000 people are each exposed to a mortality risk of 1 in 100,000, then one statistical death is expected. If the average WTP to prevent the risk is \$ 50 per person, then the VSL for the population is \$ 5 million.").

³⁹² We tend not to view deaths and dollars the same way, suggesting that public preferences may differ from CBA recommendations. See Emmanuel Kemel & Corina Paraschiv, *Deciding About Human Lives: An Experimental Measure of Risk Attitudes Under Prospect Theory*, 51 SOC. CHOICE & WELFARE 163, 183 (2018).

³⁹³ See Draper, *Neo-Classical Economics*, *supra* note 9, at 205–07.

³⁹⁴ In 2004, economists used "a standard 'discount rate' (about 7 percent annually) to convert future dollars into current equivalents." Cass R. Sunstein, *Your Money or Your Life*, NEW REPUBLIC (Mar. 15, 2004), <http://www.newrepublic.com/article/books-and-arts/your-money-or-your-life>. "With a 7 percent discount rate . . . \$1000 in twenty years is worth only \$260 today." *Id.* The U.S. Office of Management and Budget has also embraced a seven percent discount rate as part of its regulatory review. See **ERROR! MAIN DOCUMENT ONLY**, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-94, GUIDELINES AND DISCOUNT RATES FOR BENEFIT-COST ANALYSIS OF FEDERAL PROGRAMS (1992).

³⁹⁵ See WILSON, *supra* note 346, at xxiii; Draper, *Neo-Classical Economics*, *supra* note 9, at 206–07.

³⁹⁶ There is a clear linkage between pollution and mortality. See W. Walker Hanlon, *Pollution and Mortality in the 19th Century* 3, 34, 37 (Nat'l Bureau of Econ. Research, Working Paper No. 21647, 2015), <https://ssrn.com/abstract=2675920>.

³⁹⁷ See Ackerman & Heinzerling, *supra* note 323, at 1571.

allowed to outweigh lives, only because those lives are merely statistical. We do not protect unpredictable statistical lives as much as we do predictable ones.³⁹⁸ The anonymity of cause and effect for different risks for different people in this world (and even just in the United States) protects the killers of those who have not consented to the risk.³⁹⁹ The sick and dying cannot ever prove who caused their cancer.⁴⁰⁰ Instead, justice requires that all lives be protected first, using the safety or feasibility standards, to the point of insignificance of risk.⁴⁰¹

This example of an inversion serves as a better example of a possible benefit from employing ranking than that provided by Juan de Lugo in his presentation of the principle.⁴⁰² Such a placement of the property interests of those being regulated above the statistical lives that are valued, and then devalued using discounting, represents a massive inversion with enormous consequences in suffering and lives lost.⁴⁰³

Another example of an inversion of property and life is provided by Judge (now Mr. Justice) Neil Gorsuch's dissent in the "frozen trucker"⁴⁰⁴ case.⁴⁰⁵ Judge Gorsuch treated the life and health of a truck driver in a dangerous winter storm as less important than the property rights of the trucking company.⁴⁰⁶ Apparently Judge

³⁹⁸ See Marc Lipsitch et al., *Underprotection of Unpredictable Statistical Lives Compared to Predictable Ones*, 37 RISK ANALYSIS 893, 900 (2017).

³⁹⁹ Cf. *id.* ("[T]he legal literature suggests . . . corporations make decisions about their structure precisely to make the most hazardous subsidiaries the most asset-poor, and to use debt financing to further reduce the assets of corporations that risk unpredictable accidents.").

⁴⁰⁰ See *Why Is It Difficult to Pinpoint the Exact Cause of a Person's Cancer?*, DANA-FARBER (Jan. 23, 2017), <https://blog.dana-farber.org/insight/2017/01/why-is-it-difficult-to-pinpoint-the-exact-cause-of-a-persons-cancer/>.

⁴⁰¹ See Keating, *supra* note 100, at 700.

⁴⁰² See CHAFUEN, *supra* note 10, at 44–45.

⁴⁰³ See RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE 152 (2004); see also Lisa Heinzerling, *The Rights of Statistical People*, 24 HARV. ENVTL L. REV. 189, 204–05, 207 (2000) ("Describing human lives in statistical terms thus creates the conditions under which human suffering and loss can be conceived of in economic terms, and under which this suffering and loss can be allowed to continue simply because the monetary value we have attached to them is lower than the costs of avoiding them.").

⁴⁰⁴ Jed Handelsman Shugerman, *Neil Gorsuch and the "Frozen Trucker"*, SLATE (Mar. 21, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/neil_gorsuch_s_arrogant_frozen_trucker_opinion_shows_he_wants_to_be_like.html.

⁴⁰⁵ *Transam Trucking, Inc. v. Admin. Review Bd.*, No. 15-9504, 2016 WL 3909526, at *7 (10th Cir., July 15, 2016) (Gorsuch, J., dissenting).

⁴⁰⁶ See *id.* at *8. The driver's fuel was below the 'E' for empty, and he stopped his truck in an effort to locate his approved fuel source. *Id.* at *1. The trailer's brakes froze, and the driver could not unlock them. *Id.* When he called his dispatcher, he was told not to leave the trailer and that help was on the way. *Id.* After his heater failed, he continued to wait another two hours until he was awakened by a relative's phone call. *Id.* The driver's speech was slurred, and he could not feel his torso. *Id.* He called his dispatcher and was told to continue to wait

Gorsuch's concept of Due Process does not include the protection of life.⁴⁰⁷

Fortunately, the Tenth Circuit panel's majority saw otherwise and held that the trucking company erroneously dismissed the truck driver for leaving his disabled trailer for his own health and safety.⁴⁰⁸ Nevertheless, the Gorsuch dissent placed the employer's property rights over the freezing employee's health and safety rights.⁴⁰⁹ How close to death must an employee be to obtain legal protection from Judge Gorsuch? Whether state action is administrative, legislative, or judicial,⁴¹⁰ placing property rights above the life and health of the

for help. *Id.* Fifteen minutes after he unhitched and left the trailer to get fuel, roadside assistance arrived, and the driver returned. *Id.* He was discharged a week later for abandoning his load. *Id.* at *2. The trucker did not consent to freeze to death when he took his job. He consented to the risks of driving a load but not to being required to risk death to protect the load.

⁴⁰⁷ See *id.* at *8.

⁴⁰⁸ See *id.* at *3–4 (majority opinion).

⁴⁰⁹ According to Judge Gorsuch,

A trucker was stranded on the side of the road, late at night, in cold weather, and his trailer brakes were stuck. He called his company for help and someone there gave him two options. He could drag the trailer carrying the company's goods to its destination (an illegal and maybe sarcastically offered option). Or he could sit and wait for help to arrive (a legal if unpleasant option). The trucker chose None of the Above, deciding instead to unhook the trailer and drive his truck to a gas station. In response, his employer, TransAm, fired him for disobeying orders and abandoning its trailer and goods.

It might be fair to ask whether TransAm's decision was a wise or kind one. But it's not our job to answer questions like that. Our only task is to decide whether the decision was an illegal one. The Department of Labor says that TransAm violated federal law, in particular 49 U.S.C. § 31105(a)(1)(B). But that statute only forbids employers from firing employees who "refuse [] to operate a vehicle" out of safety concerns. And, of course, nothing like that happened here. The trucker in this case wasn't fired for *refusing* to operate his vehicle. Indeed, his employer gave him the very option the statute says it must: once he voiced safety concerns, TransAm expressly—and by everyone's admission—permitted him to sit and remain where he was and wait for help. The trucker was fired only after he declined the statutorily protected option (refuse to operate) and chose instead to operate his vehicle in a manner he thought wise but his employer did not. And there's simply no law anyone has pointed us to giving employees the right to operate their vehicles in ways their employers forbid. Maybe the Department would like such a law, maybe someday Congress will adorn our federal statute books with such a law. But it isn't there yet. And it isn't our job to write one—or to allow the Department to write one in Congress's place.

Id. at *7.

⁴¹⁰ Actions undertaken by the judicial branch, including court enforcement of private legal rights, should be considered state acts under the state action doctrine. See *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948), *abrogated* by *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). *Lugar* recognized that that "the party charged with the deprivation [of a federal right] must be a person who may fairly be said to be a state actor." *Id.* at 937, 940 n.21. The Court further rejected the notion "that a private party's mere invocation of state legal procedures" satisfies the state-actor requirement. *Id.* at 940 n.21, 951 (internal quotation marks omitted); see also *Firstenberg v. Monribo*, 350 P.3d 1205, 1217 (N.M. App. 2015) ("[W]e reject the notion that

innocent is unmerciful. “Justice without mercy is cruelty.”⁴¹¹

The Due Process Clauses are there to protect life first, ahead of other interests. This is a matter of protection based on the lexical priority of current Due Process language rather than a matter of liability based on other statutory or constitutional authority.

Money should not be weighed against lives in being. Even if the fiscal benefits accrue to you, the criminal law of homicide says that your life is worth more than anything I can pay you in advance to gain the right to take it.⁴¹² All too often the fiscal interests of management and their shareholders gain priority over significant risks to the lives of others.⁴¹³ When deaths result from such behavior, prosecutions should follow.

There are a million ways for lives to be placed at significant risk. What about when the government decides to repurpose land currently occupied by a hospital? Can the government close a hospital when statistical loss of life is certain to result? The government may close the hospital, but it should be obligated to provide feasible substitutes (e.g., a new health clinic, transportation to a different hospital, portable dialysis units) to extinguish or reduce foreseeable significant risks of loss of life.

2. Property Over Liberty

The details of sorting the intertwined rights of property and liberty might fill many books depending on how one wants to sort out the issue. At one extreme, the abolition of slavery⁴¹⁴ makes it clear that

Mr. Firstenberg’s lawsuit . . . was somehow transformed, by virtue of the district court’s adjudication of the matter, into an equal protection lawsuit under the ADA.”). Nevertheless, it is reasonable to expect that government, any branch of government, would protect our lives, if presented with significant risk. That is part of the basis for having government in the first place.

⁴¹¹ Luiz Sérgio Solimeo, *Mercy Without Justice Is the Mother of Dissolution; Justice Without Mercy Is Cruelty*, THE AM. SOC’Y FOR THE DEF. OF TRADITION, FAM. AND PROP. (June 2, 2011), <http://www.tfp.org/mercy-without-justice-is-the-mother-of-dissolution-justice-without-mercy-is-cruelty/#easy-footnote-bottom-3-27739>.

⁴¹² One cannot contract to die at the hands of others, a close parallel to physician-assisted suicide, which is against public policy. See *Myers v. Schneiderman*, 85 N.E.3d 57, 65 (N.Y. 2017). Most states recognize suicide as a crime. See Scott P. Johnson & Robert M. Alexander, *The Rehnquist Court and the Devolution of the Right to Privacy*, 105 W. VA. L. REV. 621, 642 (2003).

⁴¹³ See Martin L. Hirsch, *Side Effects of Corporate Greed: Pharmaceutical Companies Need A Dose of Corporate Social Responsibility*, 9 MINN. J.L. SCI. & TECH. 607, 608 (2008); Don Sapatkin, *Cherry Hill Mom: Daughter’s Opioid Death Was Caused by ‘Corporate Greed’*, PHILA. INQUIRER (Sept. 12, 2017), <http://www2.philly.com/philly/health/addiction/mccaskill-opioid-marketing-hearing-on-insys-fentanyl-brand-subsys-sarah-fuller-20170912.html>.

⁴¹⁴ U.S. CONST. amend. XIII, § 1.

at least some interests in liberty should prevail over interests in property.⁴¹⁵ Issues of slavery and serfdom continue.⁴¹⁶ However, the matter is not so simple. Here in the Land of Liberty, we can find numerous examples of our data—which may be part and parcel of our liberty and privacy—being “propertized.”⁴¹⁷ Our norms and our precedent place great value on property rights.⁴¹⁸ And with advances in technology, we find that liberty and property interests are increasingly entangled and in conflict.⁴¹⁹ Fortunately, it is unnecessary to attempt to resolve here the questions of whether or when property interests should prevail over fundamental and other liberties as the scope of this article is limited to protecting life as the foremost fundamental and basic right.

3. Liberty Over Life

There is an old saying to the effect that “[y]our right to swing your arms ends just where the other man’s nose begins.”⁴²⁰ Allowing my interests in liberty even to equal your health and well-being may allow me, at times, to claim special circumstances for a right to swing my fist past the point where your nose begins. Such a “right” would be both a moral and a legal wrong.

Rights to life and health should not be surpassed by the liberty

⁴¹⁵ See Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1408 (2018).

⁴¹⁶ See JOSHUA A.T. FAIRFIELD, OWNED: PROPERTY, PRIVACY, AND THE NEW DIGITAL SERFDOM 96 (2017); Ciara Torres-Spelliscy, *Slaves to the Bottom Line: The Corporate Role in Slavery from Nuremberg to Now*, 46 STETSON L. REV. 167, 168 (2016); Tiffany T.V. Duong, *The True Cost of “Cheap” Seafood: An Analysis of Environmental and Human Exploitation in the Seafood Industry*, 24 HASTINGS ENVTL L.J. 279, 285 (2018); Joshua A.T. Fairfield, *The ‘Internet of Things’ Is Sending Us Back to the Middle Ages*, THE CONVERSATION (Sept. 5, 2017), <https://theconversation.com/the-internet-of-things-is-sending-us-back-to-the-middle-ages-8143> 5.

⁴¹⁷ See Paul M. Schwartz, *Privacy Inalienability and the Regulation of Spyware*, 20 BERKELEY TECH. L.J. 1269, 1270 (2005).

⁴¹⁸ See John O. McGinnis & Michael B. Rappaport, *Original Ideas on Originalism: Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 815–16 (2009).

⁴¹⁹ See Vikas Shah, *How the Internet and Digital Culture Affect Rights and Liberties*, THOUGHT ECON. (Feb. 9, 2010), <https://thoughteconomics.com/how-the-internet-and-digital-culture-affect-rights-and-liberties/>.

⁴²⁰ This quote has been ascribed to Abraham Lincoln without attribution. A similar quotation, “The right to swing my fist ends where the other man’s nose begins,” has been ascribed to Oliver Wendell Holmes without current support. Matthew C. Kane & Ivan L. London, *The Pride of the Common Law: Oklahoma’s Struggle with the Prima Facie Tort Action*, 52 TULSA L. REV. 41, 43 (2016). “Your right to swing your arms ends just where the other man’s nose begins,” has support. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919). For more on the rich history of this saying, see *Your Liberty to Swing Your Fist Ends Just Where My Nose Begins*, QUOTE INVESTIGATOR, <http://quoteinvestigator.com/2011/10/15/liberty-fist-nose/> (last visited Oct. 2, 2018).

interests and rights of others without fully informed prior consent. Protection of life is the most important feature when ranking rights.⁴²¹ Without life, we can have no liberty or property. Activities that shorten individual lives should be nudged, limited, controlled, banned, or taxed as feasible.⁴²²

Consent is important. Let's say the government decides to raise the speed limit. Interests in convenience and lower time costs combine to outweigh the risks of additional loss of life. This appears to be an inversion.⁴²³ However, everyone who drives consents to the rules and the risks of motorcycles, Maseratis, and tanker trucks.⁴²⁴ If they don't know the rules and the risks, they don't get a license.⁴²⁵ Even as a passenger, if you get into a car, you are consenting to the risks of riding. Speed limits can be adjusted.⁴²⁶

There also should be a provision for facing risks to life that are greater in number or in gravity. By this approach, the protection against a high risk of the death of millions would win out over an equally great risk to the lives of thousands. We cannot protect all life at all costs.

To prove to secular skeptics that this work does not support an unlimited right to life, we return to the constitutional battleground of abortion. On its face, the abortion right would appear to place the liberty right of the woman over the life right of the fetus.⁴²⁷ However,

⁴²¹ "[D]ead people cannot exercise their rights." Amitai Etzioni, *Life: The Most Basic Right*, 9 J. HUM. RTS. 100, 105 (2010).

⁴²² See Robert F. Blomquist, *Models and Metaphors for Encouraging Responsible Private Management of Transboundary Toxic Substance Risk: Toward A Theory of International Incentive-Based Environmental Experimentation*, 18 U. PA. J. INT'L ECON. L. 507, 545-46 (1997); Harold C. Reeder, *The 'Law of Tobacco' Is A Major Contributing Factor that Hampers Effective Resolution to the Country's Tobacco Problem*, 6 FLA. COASTAL L. REV. 17, 133-34 (2004). The remedies need to be fair first and may need to be tailored to the situation. This is a prime area for additional research and publication. One can easily imagine age limits and high taxes for tobacco users.

⁴²³ See Philip A. Hamburger, *The Inversion of Rights and Power*, 63 BUFF. L. REV. 731, 733 (2015).

⁴²⁴ See *Driver's Manual*, N.Y. DEP'T OF MOTOR VEHICLE 10, <https://dmv.ny.gov/brochure/mv21.pdf> (last visited Oct. 16, 2018); *Implied Consent*, Black's Law Dictionary (10th ed. 2014).

⁴²⁵ See *Driver's Manual*, *supra* note 424, at 10; *Suspended License*, DEP'T MOTOR VEHICLE, <https://www.dmv.org/suspended-license.php> (last visited Oct. 16, 2018).

⁴²⁶ See *Speed Limit Basics*, FED. HIGHWAY ADMIN., https://www.safety.fhwa.dot.gov/speedmgtr/ref_mats/fhwasal6076 (last visited Sept. 21, 2018).

⁴²⁷ See DWORKIN, *supra* note 39, at 18. The right to life is subject to challenge. Possible sentience is consistent with viability, at some point after 26 weeks. See *id.* at 17. "[A] fetus does not have the neural substrate necessary for interests of any kind until some point relatively late in its gestation." *Id.* at 18. The fetus has no rights as it cannot have interests at the time the abortion is performed. See *id.* at 18, 19. In the Jewish law that undergirds our Western legal system, "a fetus is not a person, and no person is in existence until the infant emerges from the womb into the world." *Id.* at 37. Due to respect and love for both mother and fetus, there should not be an automatic priority for either party. See *id.* at 38. The decision to

in our overcrowded world this analysis is incomplete. On an overpopulated planet, bringing more human mouths to the table will effectively displace other lives in being – and, with environmental overshoot and the erosion of the life support system of the planet, an increasing population causes increasing risks to the lives of all.⁴²⁸ We may not yet be at a ratio of one-birth-to-one-death,⁴²⁹ but I believe we are well on our way.⁴³⁰

As Ronald Dworkin observes, “the real argument against abortion is that it is irresponsible to waste human life without a justification of appropriate importance.”⁴³¹ Protecting the planet from human overpopulation constitutes such a justification. Neither a fetus nor her parents have an unlimited right to displace human lives already on this planet.⁴³² This is particularly the case early in the pregnancy when the fetus has no sentience or interest.⁴³³ To allow unlimited reproductive rights to continue invites eventual mass death, even genocide.⁴³⁴ However, if humanity succeeds in reducing its

raise or abort is a deep personal choice.

⁴²⁸ See *Overpopulation: The Causes, Effects and Potential Solutions*, RENEWABLE RESOURCES COALITION (Dec. 6, 2016), <https://www.renewableresourcescoalition.org/overpopulation-causes-effects-solutions/>.

⁴²⁹ See WIRED STAFF, *Earth Hurtles Toward 6.5 Billion*, WIRED (Feb. 21, 2006, 02:00 AM), <https://www.wired.com/2006/02/earth-hurtles-toward-6-5-billion/>. Human population exceeds the planet’s optimal long-term population by about fifty percent. See *id.* One expert assessment by Joel Cohen, professor of demography at Rockefeller and Columbia Universities, “estimates that if we want to support individuals indefinitely—allotting each person 3,500 calories per day from wheat and 247,000 gallons per year of fresh water—the planet has room for only about 5 billion people.” *Id.* Although that may seem like quite a lot of water per person, one must remember that the greatest amount of water we use per person goes to food production. See JOEL E. COHEN, *HOW MANY PEOPLE CAN THE EARTH SUPPORT?* 308 (1995). Human population currently stands at about 7.5 billion, and at this rate, in the next 30 years, we will approach nine billion. See *World Clocks*, TRANQUILEYE, <https://www.tranquileye.com/clock/> (last visited Oct. 16, 2018). As Earth is of limited size with limited resources, additional births will eventually need some of the same resources now used by the living. See Rachel Becker, *World Population Expected to Reach 9.7 Billion by 2050*, NATIONAL GEOGRAPHIC (July 31, 2015), <https://www.news.nationalgeographic.com/2015/07/world-population-expected-to-reach-9-7-billion-by-2050/>. Granted, an American child may survive at the expense of an African child, which would indicate more of a problem with distribution than with scarcity. See Anne Roback Morse & Steven W. Mosher, *Debunking the Myth of Overpopulation*, POPULATION RES. INST. (Oct. 1, 2013), <https://www.pop.org/debunking-the-myth-of-overpopulation/>. However, we have a global population problem, and with rights to life and equity, we need global limits on reproduction. See Becker, *supra*. Those limits are likely to require more effective approaches to population control than are currently employed in some places.

⁴³⁰ Humanity is at increasing risk of doing irreversible damage to the life support system of the planet. See Draper, *Neo-Classical Economics*, *supra* note 9, at 167–68, 169, 178. As humanity began exceeding the planet’s limits before 1992, we are clearly deep in the process of finding the brink of collapse. See DONELLA H. MEADOWS ET AL., *BEYOND THE LIMITS* 2 (1992).

⁴³¹ DWORKIN, *supra* note 39, at 58.

⁴³² See *id.* at 22.

⁴³³ See *id.* at 17.

⁴³⁴ See DIAMOND, *supra* note 22, at 313.

population,⁴³⁵ the right to terminate early pregnancies may nevertheless be needed to help protect the rights of lives in being.⁴³⁶

No one should be driven from this Earth by the procreational liberties of others.⁴³⁷ Considerations include population control as well as the health of the mother, the prospective health of that future human, and the ability to feed, educate, and house her.⁴³⁸ Once we come into this world, we each have the right to be treated with respect.⁴³⁹

Collectively, humanity needs a “respect for the sanctity of life.”⁴⁴⁰ We need a way, deep in the law, to remember that life is sacred—and to protect it from significant risk.⁴⁴¹ Life has an intrinsic value.⁴⁴² We should not be protected while in the womb, and fair game once we come out.⁴⁴³ Life must consistently prevail over risks embedded in liberty. But, as the planet overpopulates, we increasingly face in

⁴³⁵ If humanity drops, from an estimated high of nine billion in 2050 to, say, a world population of five billion, then, assuming we have not eroded our environment too far, we should probably be able to take measures to make sure that we don't drop far below four billion. *See World Clocks, supra* note 429. Humanity needs to make sure that we do not crash our population. *See Becker, supra* note 429. Secondly, we need to reevaluate previous calculations to see if they remain sufficiently accurate to accommodate the full (within a margin of safety) functioning of the planet's life support system. *See id.*

⁴³⁶ *See DWORKIN, supra* note 39, at 57–58.

⁴³⁷ *See id.* at 170. Reproductive rights come with social responsibilities to limit behavior. *See id.* We have a duty not to overpopulate and thereby harm other people. *See also* DIAMOND, *supra* note 22, at 291, 294, 299 (describing the success of population limits in Japan and the Pacific island of Tikopia).

⁴³⁸ *See* Granholm, *supra* note 138.

⁴³⁹ *See* DWORKIN, *supra* note 39, at 84.

⁴⁴⁰ *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 350 (1990) (Stevens, J., dissenting) (quoting *Carey v. Population Serv.'s Int'l*, 431 U.S. 678, 715 (1977) (Stevens, J., concurring in part and concurring in judgment)).

⁴⁴¹ *See* DWORKIN, *supra* note 39, at 74, 75 (“Something is sacred or inviolable when its deliberate destruction would dishonor what ought to be honored.”).

⁴⁴² *See id.* at 70.

⁴⁴³ *See* Rosemary Radford Reuther, ‘Consistent Life Ethic’ Is Inconsistent, NAT'L CATH. REP. (Nov. 17, 2006), <https://www.thefreelibrary.com/%27Consistent+life+ethic%27+is+inconsistent.-a0155404604>. In support of her position, Professor Reuther elaborates:

Where is the bishop who would say that soldiers who massacre civilians are excommunicated? Where are bishops who would suggest that those who manufacture nuclear weapons are excommunicated and should repent by leaving such forms of employment? There were two Mexican bishops some years ago who declared that torturers were excommunicated, but they were maverick leftists whose views were unsupported by the rest of the bishops and by the Vatican. In short, Catholicism speaks softly and carries no stick when it comes to untimely and unjust death after birth.

Id. Instead, Professor Reuther says, “Catholic ethics needs to be somewhat more consequentialist about the decisions of women to reproduce or not reproduce children and more principled when it comes to defending life after birth and sanctioning those whose policies are causing untimely death.” *Id.*

the arena of abortion, a conflict between two rights to life, potential life versus lives in being.⁴⁴⁴

As Americans, we may feel secure that we are not overpopulating the Earth.⁴⁴⁵ However, Professor Edward O. Wilson sees reason for us to have an uneasy conscience: “for the rest of the world to reach United States level of consumption with existing technology would require four more planet Earths.”⁴⁴⁶ American per capita consumption is out of balance with the resources of the planet.⁴⁴⁷ Certainly, we could cut consumption, but it is foreseeable that we would also need to reduce our population.⁴⁴⁸ And as humanity’s corporations, many based in the United States, continue their efforts to maximize short-term profits, they drive us deeper into environmental overshoot.⁴⁴⁹ Global risk to billions only increases.⁴⁵⁰

Here we are considering the possibility of facing inversions on a massive scale. The death of billions through gross negligence should not hold higher moral ground than the systematic slaughter of six million individuals of the Jewish descent.⁴⁵¹ Certainly genocide is not to be condoned. However, gross negligence causing significant risk of loss of life for over a thousand times as many people should not be condoned either.⁴⁵² Each of us is at risk, and together in environmental overshoot, we are all at greater risk. We don’t know the risk well, as we have never seen it before. The risk is now global – on top of all the old local risks. Neither clumsiness nor delay are good ideas.

⁴⁴⁴ See DWORKIN, *supra* note 39, at 73.

⁴⁴⁵ Karen Kaplan, *Americans Keep Having Fewer Babies as U.S. Birthrates Hit Some Record Lows*, L.A. TIMES (June 30, 2017), <http://www.latimes.com/science/sciencenow/la-sci-sn-us-birth-rate-20170630-htlstory.html> (“In 2016, the total fertility rate for American women was 1,818 births per 1,000 women [far short of the 2,100 replacement rate] . . . The U.S. has been missing that mark since 1971 (though the country’s population has grown due to immigration).”).

⁴⁴⁶ See WILSON, *supra* note 346, at 150.

⁴⁴⁷ See *id.*

⁴⁴⁸ See *id.* at 30.

⁴⁴⁹ See *id.* at 166; see also James Rainey, *Earth Overshoot Day: Humans Are Using Earth’s Resources Faster than Ever, Group Warns*, NBC NEWS (July 21, 2018), <https://www.nbcnews.com/news/us-news/earth-overshoot-day-humans-are-using-earth-s-resources-faster-n892996> (“Created by the Global Footprint Network environmental nonprofit, Earth Overshoot Day estimates the point in the year when humanity has consumed more natural resources and created more waste than Earth can replace or safely absorb in a year.”).

⁴⁵⁰ See WILSON, *supra* note 346, at 189. Wilson’s concern about risk to 800 million poor people does not adequately reflect the risk to all of humanity.

⁴⁵¹ See Didier Pollefeyt, *Preface*, in HOLOCAUST AND NATURE 10, 11 (Didier Pollefeyt ed., 2003); Margaret M. DeGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT’L L.J. 1400, 1402 (2009).

⁴⁵² See Pollefeyt, *supra* note 451, at 11.

Let's test this idea out as a thought experiment on a global scale. If humanity were to make a concerted effort to survive, it would touch on every culture.⁴⁵³ As a result, some of the most basic rights in any culture could become a flashpoint for efforts to save lives.⁴⁵⁴ For example, the secular law of life-saving may come into conflict with religion.⁴⁵⁵ Indeed, although David Hodge sees ranking human rights as problematic, he concedes that "religious freedom has long been considered one of the most basic rights."⁴⁵⁶ Kevin Hasson sees religion as "the prototypical human right."⁴⁵⁷ Religion is a basic cultural right or liberty, a fundamental right.⁴⁵⁸ It deserves and gets great deference in many venues.⁴⁵⁹

Now, consider an inversion. Should religion be allowed to displace life itself? The premillennialist Christian aim is "the end" of life as we know it.⁴⁶⁰ If an aim for the end is implemented as environmental policy, the religious prophesy of the end can become self-fulfilling.

The direction to populate without limit could be another example of religion overriding the right to life, as such activity by millions of adherents stands a significant risk of contributing to local and even global collapse and mass death.⁴⁶¹ There are many ways in which

⁴⁵³ See DWORKIN, *supra* note 39, at 76–77 ("It is an inarticulate, unchallenged, almost unnoticed, but nevertheless absolute premise of our political and economic planning that the human race must survive and prosper.").

⁴⁵⁴ See *id.*

⁴⁵⁵ See *id.* at 92.

⁴⁵⁶ David R. Hodge, *Advocating for the Forgotten Human Right: Article 18 of the Universal Declaration of Human Rights – Religious Freedom*, 49 INT'L SOC. WORK 431, 432 (2006).

⁴⁵⁷ Kevin J. Hasson, *Religious Liberty and Human Dignity: A Tale of Two Declarations*, 27 HARV. J. L. PUB. POL'Y 81, 89 (2003) ("Religious freedom is not merely one of many rights, but the prototypical human right."); see generally Kendal Davis, Note, *The Veil That Covered France's Eye: The Right to Freedom of Religion and Equal Treatment in Immigration and Naturalization Proceedings*, 10 NEV. L.J. 732, 747 (2010) (discussing religious liberty in international law).

⁴⁵⁸ See *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

⁴⁵⁹ See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) (finding that qualified religious entities may not be denied a public benefit based on their religious character); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (holding that the Arkansas Department of Correction's grooming policy violated an inmate's right to grow facial hair in accordance with his religious beliefs); *Yoder*, 406 U.S. at 236 (denying state's attempts to punish religious families who refused to send their children to public or private school and chose instead a vocational faith-based education).

⁴⁶⁰ See Alan Wolfe, *The Grounds of Courage*, THE NEW REPUBLIC (Jan. 13, 2011), <https://newrepublic.com/article/81378/dietrich-bonhoeffer-pastor-martyr-spy> ("[A] premillennialist, or one who believe[s] that Christians should withdraw from efforts to improve the world around them and wait instead for the harsh cleansing that would come when Jesus returned to earth and discovered how unfaithful his presumptive followers had been to his teachings."). Among the problems here are: (1) support for the disregard of environmental law and policy; (2) a disregard of the rights to life of everyone else on the planet; and (3) a disregard for the rights of others to future procreation.

⁴⁶¹ See, e.g., DIAMOND, *supra* note 22, at 107, 169, 248, 320 (identifying Easter Island, Maya,

religion could encourage harmful behavior.⁴⁶² Fortunately, most religions mean well.⁴⁶³

Religions that seek “the end of times” or support the overpopulation of the planet constitute a significant risk, especially for the behavior they support.⁴⁶⁴ However, the Due Process Clauses impose duties on government, not on religion, especially since the passage of the Religious Freedom Restoration Act of 1993.⁴⁶⁵ Some duties may be misplaced.⁴⁶⁶

Whether liberty is speech, religion, the right to bear arms for a militia, or peaceable assembly, a new approach, prioritizing the protection of life, is called for. Such an approach would prioritize life over other rights.

Let’s not forget the border wall.⁴⁶⁷ Consider, those escaping violence in Central America; many families have been sent running for their lives.⁴⁶⁸ Since long before the Statue of Liberty was built, people have come to this country for a new life, and new chance.⁴⁶⁹

Norse Greenland, and Rwanda as cultures that overstressed local resources resulting in severe local human population contractions). Cultural behavior, related to religion, played a role in the decline of Norse Greenland. *See id.* at 248. Further, in the overpopulation of Rwanda, where as a culture, there is a “low demand” for family planning and “about [fifty] percent of the population is [pronatalist] Catholic.” John F. May et al., *Family Planning in Rwanda: Status and Prospects*, 21 *STUD. FAM. PLAN.* 20, 21 (1990). Another forty percent of Rwandans are Protestant or Adventist, with the former generating even less demand for family limitation. *See* Diudonné Muhoza Ndaruhuye et al., *Demand and Unmet Need for Means of Family Limitation in Rwanda*, 35 *INT’L PERSP. SEXUAL & REPROD. HEALTH* 122, 123 (2009).

⁴⁶² *See* Gary Gutting, *How Religion Can Lead to Violence*, *N.Y. TIMES* (Aug. 1, 2016), <https://www.nytimes.com/2016/08/01/opinion/how-religion-can-lead-to-violence.html>.

⁴⁶³ *See, e.g.*, Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, *PEW RES. CTR.* (Aug. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/08/09/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/> (finding that Muslims worldwide hold an overwhelming negative opinion of the terror organization the Islamic State of Iraq and the Levant); Andy McDonald, *The Inspiring Acts of These Religious Figures Will Restore Your Faith In . . . Faith*, *HUFFINGTON POST* (June 4, 2014, 11:08 AM), https://www.huffingtonpost.com/2014/06/04/inspiring-religious-acts_n_5360489.html (highlighting cases of religious tolerance and genericity across the globe).

⁴⁶⁴ *See* Glenn Scherer, *Christian-Right Views Are Swaying Politicians and Threatening the Environment*, *GRIST* (Oct. 28, 2004), <https://grist.org/article/scherer-christian/>.

⁴⁶⁵ *See* Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2018).

⁴⁶⁶ *See* Kara Loewentheil, *When Free Exercise Is A Burden: Protecting “Third Parties” in Religious Accommodation Law*, 62 *DRAKE L. REV.* 433, 491–92 (2014).

⁴⁶⁷ *See* Ron Nixon & Linda Qiu, *Trump’s Evolving Words on the Wall*, *N.Y. TIMES* (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html>.

⁴⁶⁸ *See id.*

⁴⁶⁹ *See U.S. Immigration Before 1965*, *HISTORY*, <https://www.history.com/topics/immigration/u-s-immigration-before-1965> (last visited Oct. 20, 2018). For legitimate asylum seekers, The Statue of Liberty is truly *The Statue of Life*, for without asylum, there is a reasonable fear of death. *See* Marisa Peñaloza, *Denied Asylum, But Terrified to Return Home*, *NAT’L PUB. RADIO* (Jul. 20, 2018), <https://www.npr.org/2018/07/20/630877498/denied-asylum-but-terrified-to-return-home>.

The United States was here for our forefathers.⁴⁷⁰ Has this country changed so much that we need to remove The Statue of Liberty?

Unfortunately, the flow of people cannot go on indefinitely. While some may fear culture clash, others have concerns with environmental impact of all of those additional Americans.⁴⁷¹ In the short run, the Constitution should require the protection of life over the governmental interest in stopping the liberty of (or protecting our country from) law-abiding legitimate asylum seekers. Governmental action should protect lives first.⁴⁷² We ought to have a liberal reading of the requirements for asylum or refugee status.⁴⁷³

B. *Why Inversions Occur*

Why do rights and interests in property and liberty sometimes seem to trump rights to life even though the interest in underlying rights to life is widely acknowledged to be more important? The answer appears to be self-interest.⁴⁷⁴ Each of us must have some minimal amount of self-interest or we do not eat and we do not stay alive.⁴⁷⁵ However, economists have refined self-interest and put it on

⁴⁷⁰ See *U.S. Immigration Before 1965*, *supra* note 469.

⁴⁷¹ See Howard F. Chang, *The Environment and Climate Change: Is International Migration Part of the Problem or Part of the Solution?*, 20 *FORDHAM ENVTL. L. REV.* 341, 348 (2010).

⁴⁷² See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 *DUKE L.J.* 507, 513 (1991). If humans over-populate Central America, the flow will continue. See *Estimated Number of Illegal Immigrants in the U.S. in 2012, by Country of Origin (in 1,000)*, STATISTA, <https://www.statista.com/statistics/269365/orig-in-of-illegal-immigrants-in-the-us/> (last visited Oct. 20, 2018) (demonstrating that the majority of illegal immigrants entering the U.S. are from Central America). In the longer term, it is in all our interests to reduce human population pressures and demands on the environment in much of Central America (and in many other parts of the world). In part, we need to do that by slowing reproduction with incentives for birth control. See Malcolm Potts & Martha Campbell, *Foreign Policy: Without Birth Control, Planet Doomed*, *NAT'L PUB. RADIO* (May 11, 2011), <https://www.npr.org/2011/05/11/136201025/foreign-policy-without-birth-control-planet-doomed>. Through population control, many of those currently migrating from Central America and Africa would be better able to experience the lives they want without having to leave their homes. See *Population and Wellbeing*, *POPULATION MATTERS*, https://www.populationmatters.org/documents/population_wellbeing.pdf 1 (last visited Oct. 20, 2018) (“[T]here is clear evidence that quality of life declines with population growth.”). Of course, this notion rests on the protection of human rights as a requirement for the Central American and human future.

⁴⁷³ See 8 U.S.C. § 1158 (2012); 22 U.S.C. § 6472 (2012).

⁴⁷⁴ See, e.g., *IND. CODE ANN.* § 35-41-3-2 (2013) (demonstrating that some states, such as Indiana, allow individuals to place their own interest in economic well-being above criminals underlying right to life even when there is no threat to their person, only their property); Debbie Schipp, *‘We Loot Or We Die of Hunger’: Starving Venezuelans Steal, Kill, to Eat*, *REUTERS* (Jan. 23, 2018), <https://www.news.com.au/finance/economy/world-economy/we-loot-or-we-die-of-hunger-starving-venezuelans-steal-kill-to-eat/news-story/30e1122ebd174c9b8f5b971f0801f2d5> (demonstrating that in extreme circumstances, individuals will violate the property rights of others to ensure their own interests in living).

⁴⁷⁵ See Schipp, *supra* note 474.

the steroids of maximization.⁴⁷⁶ And for liberty interests, conservative religious interpretations provide other examples of self-interest.⁴⁷⁷

We begin with property. Economists are trained in neo-classical economic theory to maximize profits, income, and wealth.⁴⁷⁸ And they have carried it too far.⁴⁷⁹ This is recognized in the literature of the field of criminal justice.⁴⁸⁰ Such maximization has become embedded in our culture and it has gone way beyond theory to include deviant actions.⁴⁸¹ Consider this definition of maximization from the book *Greed is Good*:

Maximization includes the simultaneous utilization of legitimate and illegitimate means in pursuit of the American Dream. That is, people engage in maximization when they violate the law (or engage in deviant behaviors) in the context of work (a form of conformity). Since most forms of fraud are committed in the context of work, it is a perfect example of maximization.⁴⁸²

Such maximization focuses on individual well-being at the expense of the group and the common good. Fraud itself may not kill, but other forms or systems of greed can have adverse impacts on health and can kill.⁴⁸³ Greed is self-interest that harms another.⁴⁸⁴ Greed is then the driving force when property interests take lives.⁴⁸⁵ And

⁴⁷⁶ See Draper, *Neo-Classical Economics*, *supra* note 9, at 223–25.

⁴⁷⁷ See Hasson, *supra* note 457, at 89 (demonstrating that individuals' self-interest in freedom of religion is often considered one of the most basic human rights similar to that of life and ownership of property).

⁴⁷⁸ See Herbert Hovenkamp, *Positivism in Law & Economics*, 78 CALIF. L. REV. 815, 816 (1990).

⁴⁷⁹ See Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982) (“[M]anagers not only may but also should violate the rules when it is profitable to do so.”).

⁴⁸⁰ See MATTHEW ROBINSON & DANIEL MURPHY, *GREED IS GOOD: MAXIMIZATION AND ELITE DEVIANCE IN AMERICA* 93, 126 (2009) (“[C]orporate capitalism has gone way too far as it is, and much of the profit that has been generated in our current economy is literally built on the property and lives of innocent Americans.”).

⁴⁸¹ See *id.* at 81.

⁴⁸² See *id.* at 81–82.

⁴⁸³ See *id.* at 94, 95, 107 (demonstrating that elite crimes involve dangerous and “defective” products that harm the public health, including unhealthy foods, dangerous cars, and unhealthy tobacco).

⁴⁸⁴ See Wesley Gant, *Greed Is Not Good (But Self-Interest Is)*, VALUES & CAPITALISM, <http://www.valuesandcapitalism.com/greed-is-not-good-but-self-interest-is/>; see also Draper, *Neo-Classical Economics*, *supra* note 9 at 225 (“[H]armful selfishness is greed[.]”).

⁴⁸⁵ See Ackerman & Heinzerling, *supra* note 323, at 1565; see also Draper, *Neo-Classical Economics*, *supra* note 9, at 225–26 (“Using unrestricted CBA to make life or death decisions

when law protects those property interests, a deadly inversion occurs.⁴⁸⁶

Liberty interests can also take lives.⁴⁸⁷ Whether the liberty interest at stake relates to cultural norm in religion (e.g., encouraging overpopulation or a desire for “the end”) or to some other activity (such as yelling “fire” in a crowded theater), an interest in liberty can be used as a justification for behavior that foreseeably increases risks to innocent lives and health of those who have not consented to that risk.⁴⁸⁸ The selfish desire to comply with religious doctrine (to get to Heaven) at the expense of other lives shows that self-interest can come in many forms.⁴⁸⁹ Whether religion or some other cultural force instructs you to engage in significantly risky behavior, you are still placing life at risk and you are committing a wrong.

VII. IMPLEMENTATION OF THE RANKING

If the order—life, liberty, and property—from the Due Process Clauses is treated in lexical priority, significant risks to life no longer come into conflict with other rights. We can more easily and effectively resolve difficult questions of significant risk of both local and global importance.⁴⁹⁰ If life and health are treated as related priorities, law can effectively protect life when rights to life or health come into conflict with liberty or property rights.⁴⁹¹

The ranking can be implemented in both Constitutional and

places greed-based efficiency on a par with life itself.”)

⁴⁸⁶ See Sabbeth, *supra* note 18, at 1501 (“Substantive and procedural rights often rank basic human needs below property rights.”); see also Draper, *Neo-Classical Economics*, *supra* note 9 at 225–26 (“Greed alone can kill.”).

⁴⁸⁷ See e.g., DWORKIN, *supra* note 39, at 170; Wolfe, *supra* note 460.

⁴⁸⁸ See Schenk v. United States, 249 U.S. 47, 52 (1919); DWORKIN, *supra* note 39, at 170; Wolfe, *supra* note 460.

⁴⁸⁹ See Wolfe, *supra* note 460 (“Christians should withdraw from efforts to improve the world around them and wait instead for the harsh cleansing that would come when Jesus returned to earth.”).

⁴⁹⁰ An example of an important local matter would be the availability of clean water. See Keating, *supra* note 100, at 685. Global examples include too much overall pollution (e.g., greenhouse gases), too much overall consumption (e.g., fossil fuels, causing those greenhouse gases), or too large a population (for the planet to feed and support without harming its life support system). See MEADOWS ET AL., *supra* note 346, at xiv; Joel Achenbach, *Scientists: Human Activity Has Pushed Earth Beyond Four of Nine “Planetary Boundaries”*, WASHINGTON POST (Jan. 15, 2015), https://www.washingtonpost.com/national/health-science/scientists-human-activity-has-pushed-earth-beyond-four-of-nine-planetary-boundaries/2015/01/15/f52b61b6-9b5e-11e4-a7ee-526210d665b4_story.html.

⁴⁹¹ The ranking’s implementation might even help our government stay in better compliance with international criminal law by aiming to avoid crimes against humanity.

regulatory contexts. It can not only provide order to Due Process, ranking can help organize and prioritize administrative rulemaking.

In litigation, the Due Process right could arise as a substantive claim or defense to an action by a governmental entity.⁴⁹² The Due Process Clauses apply to actions of federal, state, and local governmental entities.⁴⁹³ Strands of the ranking's principles already exist in many places throughout our law.⁴⁹⁴ Implementing the ranking merely pulls those principles together and solidifies them, giving government the duty to prevent significant risks to life and health in the face of liberty and property interests.

Implementation employs a decision process that begins with the threshold question of what counts as a *risk* to life.⁴⁹⁵ Only risks that are both foreseeable and significant qualify for treatment.⁴⁹⁶ Qualifying risks should be identified in a serial operation, looking first to risks to life and health.⁴⁹⁷ Next, would be risks to liberties and property. This is an identification and sorting process, with attempts to identify risks and channel protections for life.

The same analysis would apply in the regulatory rulemaking process. Risks to life, liberty, and property would be sorted by searching first for significant risks to life and health, those risks being special targets for regulation. Let us stick with life and health for now but also recognize that regulation could also be used to protect liberty and property rights.

Next, we attempt to decide whether the activity that is the potential subject of regulation is one that we can live without. If so, we would employ safety regulation, using the safe level of risk imposition as the standard, akin that standard in the Clean Air Act

⁴⁹² The matter of standing (to sue) would need revision to enable the law to address all significant risks to the life support system of the planet. See Bibas, *supra* note 376, at 337–38.

⁴⁹³ See *Fundamentals of Constitutional Law for Legal Services and Pro Bono Practitioners: Due Process and Equal Protection*, CTR. FOR HUM. RTS. & CONST. L. 1, 3 (Feb. 2014), https://www.centerforhumanrights.org/PDFs/3-6-14_2014ConLawDueProcessManual.pdf.

⁴⁹⁴ See *Katko v. Briney*, 183 N.W.2d 657, 660 (Iowa 1971) (holding that one cannot defend unoccupied property with deadly force); *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908) (recognizing the need to save a life permits trespass).

⁴⁹⁵ See Draper, *Risk Filters*, *supra* note 24, at 309; Sir Crispin Tickell, *Environment on the Edge*, 59 MERCER L. REV. 719, 728 (2008).

⁴⁹⁶ See Draper, *Risk Filters*, *supra* note 24, at 371 (“If the risks are significant and morally comparable to the risk of death in global climate change or environmental avalanche, then we would apply feasible risk reduction. If these activities are not morally comparable to the risk of death, then we should limit the activity to the point of comparability.”).

⁴⁹⁷ See *id.* at 347; *Serial Operation*, THE FREE DICTIONARY, <https://www.thefreedictionary.com/serial+operation> (“[T]he sequential execution of operations one after another.”) (last visited Oct. 10, 2018).

Amendments of 1990,⁴⁹⁸ to eradicate risk to life and health to the point of insignificance.⁴⁹⁹

If we could not live without the activity, if our lives or liberty demanded it, we would instead utilize feasible risk reduction, akin to the standard employed in the Occupational Safety and Health Act of 1970,⁵⁰⁰ to reduce the risk as much as possible either to the point of insignificance⁵⁰¹ or to the point of inelastic demand,⁵⁰² whichever comes first.

Of course, additional filters might be added, but the primary focus with ranking in the regulatory context is on filters for risks to life and health.

A. *Protection Against All Risks?*

What represents a risk to life? If we look for all risks, we cannot function. We would be overwhelmed by the chaos of endless costly and time-consuming chases. The need for human liberty requires that we accept some level of background risk. Therefore, qualifying risks must be both foreseeable and significant.

The foreseeability requirement is borrowed from tort law.⁵⁰³ In tort law, even when the defendant owes a duty of care to the plaintiff, the requirement that risks be foreseeable protects defendants from liability for risks that were not foreseeable at the time of injury.⁵⁰⁴ We must be able to foresee and discuss these risks in advance.⁵⁰⁵ The risks cannot be merely theoretical.⁵⁰⁶ There must be some practical aspect.⁵⁰⁷ Advances in science have opened new windows into the foreseeability of many risks.⁵⁰⁸

Significance is the other requirement.⁵⁰⁹ How does one define significance? Gregory Keating delves into this in discussing use of

⁴⁹⁸ See 42 U.S.C. § 7412(f)(2)(A) (2012).

⁴⁹⁹ See Keating, *supra* note 100 at 720–21.

⁵⁰⁰ See 29 U.S.C. § 651(b) (2012).

⁵⁰¹ See Keating, *supra* note 100, at 687.

⁵⁰² See Draper, *Risk Filters*, *supra* note 24, at 346.

⁵⁰³ See Thomas A. Diamond & Howard Foss, *Consequential Damages for Commercial Loss: An Alternative to Hadley v. Baxendale*, 63 *FORDHAM L. REV.* 665, 702 (1994).

⁵⁰⁴ See *id.*

⁵⁰⁵ See *id.* at 674–75.

⁵⁰⁶ See *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1220 (Cal. 1997).

⁵⁰⁷ See *Kesner v. Superior Court*, 384 P.3d 283, 291–92 (Cal. 2016) (quoting *Bigbee v. Pac. Tel. & Tel. Co.*, 665 P.2d 947, 952 (Cal. 1983)).

⁵⁰⁸ See Betsy J. Grey, *The Future of Emotional Harm*, 83 *FORDHAM L. REV.* 2605, 2646 (2015) (“As courts began to move away from the physical manifestation rule, they cited a number of factors in this shift . . . such as advances in science.”).

⁵⁰⁹ See Keating, *supra* note 100, at 661.

the safety and feasibility standards to press precaution beyond the point of cost-justification.⁵¹⁰ He sees the possibility of the determination being quantitative, qualitative, or a mix of both.⁵¹¹

Significance is more than just a theory. Keating notes two required aspects of significance: “First, the risk must be salient—it must be distinguishable from other risks associated either with the activity in question or with social life in general. It must stand out among its fellow risks.”⁵¹² However, the result must also be a concern: “Second, to be significant, when a risk ripens into harm it must inflict a severe injury, a devastating injury, the kind of injury that seriously impairs ordinary life.”⁵¹³ This analysis applied at the group level would involve foreseeable risk of significant harm to a sufficiently sizeable group or percentage of a population.⁵¹⁴

The principle should be applied only when there is significant risk to life or health. Risks to interests in life and health outrank liberty and property interests, but only to the point of insignificance of risk. Significance is a requirement for the operation of both risk filters, the safety standard and feasible risk reduction.⁵¹⁵

Relying on Professor Keating’s work, I point out elsewhere that humanity needs more precaution than that provided by cost

⁵¹⁰ *See id.* at 684.

⁵¹¹ *See id.* at 694.

⁵¹² *Id.* at 693.

⁵¹³ *Id.*

⁵¹⁴ *See* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in part) (“[A] government practice or statute which restricts ‘fundamental rights’ or which contains ‘suspect classifications’ is to be subjected to ‘strict scrutiny’ and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.”). If that group is limited by race, religion or other suspect classifications, actions by governmental entities are subjected to strict scrutiny under Equal Protection analysis. *See id.* And if a group is limited by nationality, ethnicity, race, or religion, governmental and private actors with specific intent to inflict harm risk the invocation of international criminal law through the genocide convention. *See* *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*]. Article II of the *Genocide Convention* defines the crime of genocide as follows:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Id. at 280.

⁵¹⁵ *See* *Draper, Risk Filters*, *supra* note 24, at 345, 346–47.

justification.⁵¹⁶ However, we cannot subject *all* risks to special precaution beyond the point of cost justification.⁵¹⁷ Keating suggests that it behooves us to “eliminate or feasibly reduce only *significant* risks of devastating injury[:] . . . a significance requirement is necessary to prevent both safe and feasible risk reduction from inflicting harms to our liberty greater than the harms that insignificant risks of devastating injury inflict on our security.”⁵¹⁸ All risks to life and health would not qualify for these restrictions. “The imposition of insignificant—but real—risks of devastating injury is so pervasive that the elimination of insignificant risks of devastating injury would cripple our freedom of action.”⁵¹⁹ One could respond that mass death is significant if anything is.⁵²⁰ Collapse is foreseeable.⁵²¹

The risks of human collapse are sufficiently foreseeable, even probable, and the United States is well advised to take them into account in policy discussion and design. We should attempt to protect not only the lives of individuals but also all lives in our community of interest.

We will encounter the inevitable risk-risk tradeoffs.⁵²² With the ranking in place, issues of life would be weighed only against other issues of life.⁵²³ We will inevitably encounter the weighing of the lives of the group against the life of an individual.⁵²⁴ This is known as the

⁵¹⁶ See Draper, *Neo-Classical Economics*, *supra* note 9, at 24445; Keating, *supra* note 100.

⁵¹⁷ See Keating, *supra* note 100, at 699.

⁵¹⁸ *Id.* at 661.

⁵¹⁹ Keating, *supra* note 100, at 661.

⁵²⁰ Significance is not a question of probability but a question of how bad it would be if it happened. See *id.* at 697. This then justifies an investigation into probability and arc, which can then lead to further investigations of causation and correction. See *id.*

⁵²¹ See EDWARD O. WILSON, *HALF-EARTH: OUR PLANET’S FIGHT FOR LIFE* 1, 65–66 (2016). Seeing “odds . . . no better than fifty-fifty that our present civilisation on Earth will survive to the end of the present century,” Professor Martin Rees wonders whether the planet will stabilize or die. MARTIN REES, *OUR FINAL HOUR: A SCIENTIST’S WARNING: HOW TERROR, ERROR, AND ENVIRONMENTAL DISASTER THREATEN HUMANKIND’S FUTURE IN THIS CENTURY—ON EARTH AND BEYOND* 8 (2003).

⁵²² See Daniel C. Esty, *What’s the Risk in Risk?*, 13 *YALE J. ON REG.* 603, 603 (1996).

⁵²³ See Draper, *Risk Filters*, *supra* note 24, at 391.

⁵²⁴ See, e.g., Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 *OXFORD REV.* 5–6, 9 (1967) (“[W]e could not spare the whole resources of a ward for one dangerously ill individual when ambulances arrive bringing in the victims of a multiple crash.”).

trolley problem.⁵²⁵ Although in the scenario someone will die,⁵²⁶ it is important to remember that constitutional rights apply to everyone.⁵²⁷

B. The Means: Rank the Basic Rights

What should we do to rectify inversions that place our interests in life at significant risk? We should recognize that those interests are rights—and that we each have a duty to actively protect the rights of individuals and the larger group. In the process, we face questions of qualification (emergency; significant risk),⁵²⁸ filtering (fungibility and incommensurability),⁵²⁹ and general operation (substantive partitioning, weighting, and substantive due process).⁵³⁰

What follows are some observations about this (not so) new means of protecting life, first, followed by safe liberty and property. The ranking of basic rights is an appropriate emergency measure for situations in which individuals, groups, and even the human species find themselves at significant risk. However, as a constitutional principle of interpretation for language long a part of our Constitution, a declaration of emergency is unnecessary to protect lives.⁵³¹ The significance requirement for risk serves as the functional equivalent of an emergency.⁵³²

Ranking is a form of conceptual partitioning.⁵³³ Ranking solves problems of incommensurability.⁵³⁴ It could operate as an entirely new substantive implementation of the Due Process Clause. As we will see, in necessary and appropriate cases, this administrative approach with the Constitution can be adjusted with feasible risk

⁵²⁵ See *id.* at 8. The trolley problem, an ethical brainteaser involving choice and death to others (whether to throw a switch to have a runaway trolley kill one person or not throw the switch and allow several others to die), was first posed by Philippa Foot in 1967. *Id.*; see Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395, 1395 (1985); Corey Doctorow, *The Problem With Self-Driving Cars: Who Controls the Code?*, THE GUARDIAN (Dec. 23, 2015, 7:00 PM), <https://www.theguardian.com/technology/2015/dec/23/the-problem-with-self-driving-cars-who-controls-the-code>.

⁵²⁶ See Foot, *supra* note 524, at 8; Thomson, *supra* note 525, at 1395; Doctorow, *supra* note 525.

⁵²⁷ See U.S. CONST. amend. V; U.S. CONST. amend. XIV.

⁵²⁸ See CHAFUEN, *supra* note 10, at 44–45; Keating, *supra* note 100, at 661, 697.

⁵²⁹ See Draper, *Neo-Classical Economics*, *supra* note 9, at 239.

⁵³⁰ See *id.* at 237; Balganesch & Katz, *supra* note 27, at 3–4, 7, 12.

⁵³¹ The Due Process Clauses of the Constitution broadly protect life. See U.S. CONST. amend. V; U.S. CONST. amend. XIV.

⁵³² See CHAFUEN, *supra* note 10, at 43; Keating, *supra* note 100, at 657–58, 697.

⁵³³ See Draper, *Risk Filters*, *supra* note 24, at 369–70; Keating, *supra* note 100, at 724.

⁵³⁴ See Draper, *Risk Filters*, *supra* note 24, at 333; Keating, *supra* note 100, at 709–10; Cass R. Sunstein, *Irreversibility*, 9 L., PROBABILITY & RISK 227, 237, 238 (2010).

reduction.⁵³⁵

Feasible risk reduction and the ranking of rights operate well together.⁵³⁶ Ranking recognizes the incommensurability of the three categories while protecting life (and health) first, ahead of liberty and property.⁵³⁷ Together, ranking and feasible risk reduction can better protect millions of innocent and vulnerable American men, women, and children. All of us. Our incommensurable lives would be protected to the extent both economically and technologically feasible.

C. *Should Ranking Require an Emergency?*

Although Juan de Lugo required an emergency for the implementation of his ranking scheme,⁵³⁸ I would argue that an emergency is no longer needed to justify the ranking of basic rights with the Due Process Clauses of the Constitution of the United States of America.

First, we don't need to declare an emergency to protect these rights. The rights expressed in the Due Process Clause, life, liberty, and property, are already broad categories subject to constitutional protection.⁵³⁹ Each of these rights is precious. Lexical ordering, or ranking, protects first that which is most precious.⁵⁴⁰

Secondly, if, as a nation, we can achieve the lifesaving benefits of ranking these rights while experiencing fewer emergency situations, we are better off.⁵⁴¹ Emergencies bear additional significant risk and

⁵³⁵ See Draper, *Risk Filters*, *supra* note 24, at 392.

⁵³⁶ See *id.* at 390–91.

⁵³⁷ See *id.* at 391.

⁵³⁸ See CHAFUEN, *supra* 39, at 45.

⁵³⁹ See U.S. CONST. amend. V; U.S. CONST. amend. XIV.

⁵⁴⁰ See CHAFUEN, *supra* 39, at 45 (stating that a person's life or liberty is ranked higher than another's risk of losing material goods).

⁵⁴¹ The 2017 Atlantic hurricane season (with massive hurricanes striking Texas, Florida, the Virgin Islands, and Puerto Rico) is rather convincing in its connections to global warming and man-made risk. See Cale Jaffe, *Melting the Polarization Around Climate Change Politics*, 30 GEO. ENVTL. L. REV. 455, 494–95 (2018); R.A. Pielke Jr. et al., *Hurricanes and Global Warming*, 86 BULL. AM. METEOROLOGICAL SOC'Y 1571, 1572, 1574 (Nov. 2005); Chris Dolce, *For First Time Since 2005, Four Hurricanes Make U.S. Landfalls in One Season*, THE WEATHER CHANNEL (Oct. 8, 2017), <https://weather.com/storms/hurricane/news/2017-10-07-four-us-hurricane-landfalls-nate-maria-irma-harvey>. With global warming, we have created our own emergency, one of many significant risks now faced by our species. See Martin J. LaLonde, *The Role of Risk Analysis in the 1992 Framework Convention on Climate Change*, 15 MICH. J. INT'L L. 215, 217 (1993) (stating the risks created by global warming). See Draper, *Neo-Classical Economics*, *supra* note 9, at 165, for the variety of significant risks to our species and its life support system.

hardship to innocent and un-consenting lives.⁵⁴²

Thirdly, technology may have changed the calculus. For Lugo, an emergency justified the uncompensated taking of another's private property for escape.⁵⁴³ However, in Lugo's time transportation did not have locks, punch-codes, and serial numbers.⁵⁴⁴ Property laws and protections are now much more robust and developed than they were in the seventeenth century.⁵⁴⁵ Having the benefit of these extra property rights carries with it a duty to assist those with personal emergencies.⁵⁴⁶ Such assistance is funded through a combination of taxation and charity.⁵⁴⁷ Tax laws and government aid should be used to effectuate the protection of life in a catastrophe.⁵⁴⁸ The interests of the needy are so great as to support the creation and maintenance of institutions to assist those with personal hardship.⁵⁴⁹

Finally, we are negligent to wait for an emergency to justify taking lifesaving measures. Lives count, and it is best if we protect them from significant risk before they are in emergency situations. Knowingly allowing individuals, groups, or even our nation to fall into a foreseeable emergency seems more like gross negligence, as this only increases risk and causes additional trauma.⁵⁵⁰

⁵⁴² See Draper, *Risk Filters*, *supra* note 24, at 333, 391.

⁵⁴³ See CHAFUEN, *supra* 39, at 45.

⁵⁴⁴ See *id.* at 44 (establishing Lugo was alive from 1593–1660).

⁵⁴⁵ See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 734 (2010) (Kennedy, J., concurring); Keith H. Hirokawa, *Property as Capture and Care*, 74 ALB. L. REV. 175, 182–83 (2010/11); see also G.E. Aylmer, *The Meaning and Definition of "Property" in Seventeenth-Century England*, 86 PAST & PRESENT 87, 91–92 (1980) (discussing the meaning of property in the seventeenth century).

⁵⁴⁶ See CHAFUEN, *supra* note 10, at 43.

⁵⁴⁷ See *id.*; see, e.g., Kristen Dale, Note, *The Red Cross and Red Crescent Movement: Power Players in International and Domestic Natural Disaster Law*, 25 CARDOZO J. INT'L & COMP. L. 111, 121–22 (2016).

⁵⁴⁸ See e.g., Veronique Bruggeman et al., *Insurance Against Catastrophe: Government Stimulation of Insurance Markets for Catastrophic Events*, 23 DUKE ENVTL. L. & POL'Y F. 185, 190, 191 (2012) (discussing catastrophe bonds and the Federal Emergency Management Agency (FEMA)).

⁵⁴⁹ See e.g., Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 558 (1999) (discussing the Temporary Assistance for Needy Families (TANF) program). These institutions could be public or private, secular or religious. As the 2017 hurricane season proved, there is often a need for lifesaving help. See U.S. DEP'T OF HOMELAND SEC., *2017 Hurricane Season FEMA After-Action Report*, FEMA, 1 (July 12, 2018), <https://www.fema.gov/media-library-data/1531743865541-d16794d43d3082544435e1471da07880/2017FEMAHurricaneAAR.pdf>.

⁵⁵⁰ See David Alexander, *Disaster and Recovery Planning for Preparedness, Response, and Recovery*, OXFORD RES. ENCYCLOPEDIA OF NAT. HAZARD SCI. 1, 8 (Sept. 2015), <http://naturalhazardscience.oxfordre.com/view/10.1093/acrefore/9780199389407.001.0001/acrefore-9780199389407-e-12?print=pdf>.

D. Employing Conceptual Partitioning for Persistence

Ranking basic rights, as a tool of conceptual partitioning, would assist in the continuation of human life. Ranking separates or partitions rights, Professors Shyamkrishna Balganesh and Leo Katz connect two concepts to show that the tool of conceptual partitioning will aid in the search for persistence.⁵⁵¹ Conceptual partitioning is a combination of “partitioning” and “conceptual sequencing” developed by Bruce Chapman.⁵⁵² Persistence as a goal is important as it provides unwavering support for some rights over others.⁵⁵³ “It is that the quality of persistence is an aspirational ideal that the law attempts to realize in different settings where there are competing claims/rights, causing it to prioritize among them in different ways.”⁵⁵⁴ Persistence can have different uses, depending upon human goals.⁵⁵⁵ We should use persistence to save lives.

Balganesh and Katz demonstrate a few different examples of conceptual partitioning in their article, part of a volume honoring Professor Wesley Hohfeld.⁵⁵⁶ In admiring his century-old theory that focused on the distinction between *in rem* and *in personam* rights,⁵⁵⁷ they show Hohfeld’s work to be an exercise in partitioning.⁵⁵⁸ Such partitioning keeps one kind of rights separate and distinct from another.⁵⁵⁹

Balganesh and Katz view partitioning as a choice.⁵⁶⁰ They point out that “the decision will be shaped by the way that the decision-maker ‘conceptually partitions’ his choices and prioritizes the criterion of decision-making,” an exercise that is qualitative yet prioritized.⁵⁶¹ Balganesh and Katz offer other examples of persistent and non-persistent partitioning beyond property law: the law of libel, products liability, and the case of intentional interference with

⁵⁵¹ See Balganesh & Katz, *supra* note 27, at 7.

⁵⁵² *Id.* at 3.

⁵⁵³ See *id.* at 12.

⁵⁵⁴ *Id.* at 3.

⁵⁵⁵ See *id.* at 3, 12.

⁵⁵⁶ See *id.* at 2.

⁵⁵⁷ See *id.* at 1. “[T]he antithetical pair of expressions, *in personam* and *in rem*, is constantly being employed as a basis for classifying at least four distinct matters.” Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 714 (1917). The meanings may vary, but the two expressions are always different from each other. They persist. See *id.*

⁵⁵⁸ See Balganesh & Katz, *supra* note 27, at 2.

⁵⁵⁹ See *id.* at 4.

⁵⁶⁰ See *id.*

⁵⁶¹ See *id.* at 3, 5.

contractual relations.⁵⁶² Each of these examples involves a tort with three parties.⁵⁶³ Their examples show that in some situations, persistent rules can lead to an unjust result, and in some they can help avoid one.⁵⁶⁴ Thus, we need to be careful about where we use persistent rules.

Here are the basic rights for which persistent rules and protection are required: life, liberty, and property. We must persistently rank life first, or we will risk the deaths that derive from inversions with liberty or property. If we want our lives to persist, we must protect them with rules that persist.⁵⁶⁵

This is akin to Professor Harold Berman's concept of using the law to create "channels of cooperation."⁵⁶⁶ We Americans—and we, humanity—need to cooperate to able to survive. This invokes the philosophy and psychology of survival, each a topic worthy of multi-volume sets.⁵⁶⁷

E. A Solution to Problems of Incommensurability

American law has enormous challenges with incommensurability.⁵⁶⁸ Consider, for example, use of the value of statistical life in cost-benefit analysis, which weighs a property right expressed in dollars against the dollar value of statistical life (VSL) expressed in lost lives.⁵⁶⁹ Those un-consenting random lives are lost, say, to neurological diseases, immune disorders, emphysema, or cancer, as they are unprotected by regulation.⁵⁷⁰ When most of us

⁵⁶² See *id.* at 7, 8, 9, 10.

⁵⁶³ See *id.* at 8, 10.

⁵⁶⁴ See *id.* at 9, 10, 11.

⁵⁶⁵ The protection must be legal, moral (e.g., religion), and scientific. If all three areas of human endeavor do not cooperate, humanity will be working against itself. See Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 872, 897, 898, 899 (2007).

⁵⁶⁶ See HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 3 (1993).

⁵⁶⁷ See Amy L. Wax, *Against Nature—On Robert Wright's the Moral Animal*, 63 U. CHI. L. REV. 307, 313–14 (1996); MARK JABLONOWSKI, *MANAGING HIGH-STAKES RISK: TOWARD A NEW ECONOMICS FOR SURVIVAL* 1, 2 (1st ed. 2009).

⁵⁶⁸ See Sunstein, *Incommensurability*, *supra* note 26, at 825. For example, the use of neo-classical economics in American law and regulation is the source of many instances of incommensurability. See Draper, *Neo-Classical Economics*, *supra* note 9, at 207–09. Pollution is a prime example. See *id.* at 207. The value of the additional profits on one side is incommensurable with the resulting injuries to life and health on the other. See *id.* In economic theory, such injuries may be seen as externalities. See *id.*

⁵⁶⁹ See Draper, *Neo-Classical Economics*, *supra* note 9, at 159, 160–61.

⁵⁷⁰ See *id.* at 197; see also Keating, *supra* note 100, at 694–95.

think of our own life, we do not think in dollars – or in terms of property. We are biological beings.

Two things are incommensurable when they are inherently different and not comparable.⁵⁷¹ For example, incommensurability occurs when an economic activity, a property interest, is weighed against harm to human health or life.⁵⁷² The two competing interests cannot align along the same unitary metric because some things cannot be counted.⁵⁷³

However, our law can accommodate a flexible pair of standards that vary in implementation based on elasticity of demand and significance of risk.⁵⁷⁴ These are the safety and feasible risk reduction standards.⁵⁷⁵ The standards work together to enable the cooperation of multiple rights of different commensurabilities.⁵⁷⁶ We recognize those commensurabilities by partitioning them and by working first to reduce significant risks to life and health.⁵⁷⁷

We do not pay much attention to incommensurability in our economic law right now.⁵⁷⁸ Many externalities, such as pollution, appear to be unsolvable.⁵⁷⁹ Solutions do not fit with the underlying economics, as neo-classical economics and utilitarianism require a unitary metric.⁵⁸⁰ Statistical lives are priced, pollution is permitted, and the stage is set.⁵⁸¹ Years or decades later, millions suffer with shortened lives.⁵⁸² Many of those millions may not even reside in the jurisdiction that allowed or benefitted from the harmful activity in the first place.⁵⁸³

To fail to protect life, especially on a grand scale, would be a crime

⁵⁷¹ See Sunstein, *Incommensurability*, *supra* note 26, at 796.

⁵⁷² See Keating, *supra* note 100, at 719. Life and health are immeasurable against property and money, because values of life, liberty, and property are immeasurable against each other. *See id.* These rights cannot be “fungible at some ratio of exchange,” given the risks to our life support system, if the species is to survive, humanity must reject what Gregory Keating calls the “idea of universal commensurability.” *See id.*

⁵⁷³ WILLIAM BRUCE CAMERON, *INFORMAL SOCIOLOGY: A CASUAL INTRODUCTION TO SOCIOLOGICAL THINKING* 13 (1963) (“[N]ot everything that can be counted counts, and not everything that counts can be counted.”).

⁵⁷⁴ See Draper, *Risk Filters*, *supra* note 24, at 346–47. Significance of risk is a qualitative rather than quantitative assessment. *See Keating, supra* note 100, at 697.

⁵⁷⁵ See Draper, *Risk Filters*, *supra* note 24, at 303.

⁵⁷⁶ *See id.* at 303, 331, 332.

⁵⁷⁷ *See id.* at 339, 340.

⁵⁷⁸ See Sunstein, *Incommensurability*, *supra* note 26, at 781.

⁵⁷⁹ *See id.* at 814.

⁵⁸⁰ *See id.* at 814, 815–16.

⁵⁸¹ *See id.* at 835–36.

⁵⁸² See Rowell & Wexler, *supra* note 132, at 501.

⁵⁸³ For example, the United States routinely values foreign lives at zero, by failing to consider them in decisions to regulate. *See id.* at 528.

against humanity.⁵⁸⁴ Fortunately, it is possible to solve problems of incommensurability.⁵⁸⁵ To solve those problems, we will benefit by restructuring the way we think about basic rights. Conveniently, that restructuring may be accomplished through a conservative judicial re-interpretation of current language based in Thomist and natural law theory.⁵⁸⁶

F. A New Substantive Due Process?

We need a new interpretation of the Due Process Clause to protect us from government action, but we should not return to the subjective natural law analysis that did not work out well between 1887 and 1937.⁵⁸⁷ We need a new, more objective, ordered, substantive analysis that protects life ahead of liberty and property.⁵⁸⁸

We need the new analysis to save lives and yet permit maximum liberty to allow all Americans to live creative and satisfying lives. We cannot live with a liberty that kills people, but we can succeed in having plenty of liberty even if we protect life first. We cannot protect all life all the time.⁵⁸⁹ The result would be total loss of liberty at the hands of an oppressive state.⁵⁹⁰ We need clear rules with stated limits designed to protect to a certain point.

⁵⁸⁴ The international criminal law invoked in the Nuremberg trials treated the violation of the basic human right to life as a crime against humanity, without the invocation of statute, treaty, or international declaration. See Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. LAW 415, 427–28 (1998). The war crime trials were held before the adoption of the Genocide Convention. See *id.* at 513. This same legal obligation, now a matter of precedent in international common law, requires each of us to avoid crimes against humanity. See *id.* at 442. We must protect life. However, if the protection of life is viewed as a *new* prohibition, beware: new criminal prohibitions tend to backfire. See, e.g., William J. Stuntz, *Law and Grace*, 98 VA. L. REV. 367, 378 (2012).

⁵⁸⁵ See Sunstein, *Incommensurability*, *supra* note 26, at 808.

⁵⁸⁶ See Michael P. Zuckert, *Do Natural Rights Derive From Natural Law?*, 20 HARV. J.L. & PUB. POLY 695, 715–16 (1997).

⁵⁸⁷ See generally ROTUNDA & NOWAK, *supra* note 40, at § 15.2 (“The economic, social, and intellectual thought of the late nineteenth century persuaded the Court that it must do more to protect business interests from encroaching governmental control. . . . By the turn of the century the Court embraced the concept [of substantive due process] fully and was ready to use it as a rationale for striking down legislation that attempted to restrain the freedom of businesses to contract.”). We already have a history of changing interpretations of this clause going back to the founding. See, e.g., Williams, *supra* note 281, at 428, 448, 452, 467.

⁵⁸⁸ See Walter Dellinger, *Textualism and the Civil War Amendment: Remarks on Jeffrey Rosen’s Paper*, 66 GEO. WASH. L. REV. 1293, 1293 (1998) (arguing that the text of the Due Process Clauses has an exclusively substantive composition rooted in the fact that an absence of substantive restrictions on government renders procedural restrictions futile).

⁵⁸⁹ See Philip G. Peters, *The State’s Interest in the Preservation of Life: From Quinlan to Cruzan*, 50 OHIO ST. L.J. 891, 920 (1989).

⁵⁹⁰ See *id.*

What is that point? For activities that we can live without (subject to the safety standard) and for activities that we cannot live without (subject to feasible risk reduction), that point occurs when risk is rendered insignificant.⁵⁹¹ Thus the constitutional protections of the Due Process Clause work to protect life, liberty, and property while tying in well with an administrative law that supports safety (e.g., clean air and clean water) and feasibility (e.g., occupational safety) regulation.⁵⁹²

G. *Extreme Cases*

Separating life, liberty, and property with a lexical ordering works relatively well until the theory encounters extreme cases at the overlapping ends of the spectra of life, liberty, and property.⁵⁹³ Consider the hypothetical case of saving a single life at a cost of \$10 trillion.⁵⁹⁴ For how long? Or consider the extreme expenses of end-of-life care.⁵⁹⁵ Given Medicare's well-known deficits,⁵⁹⁶ questions of feasibility are likely in both cases.⁵⁹⁷

Here we link with the administrative constitution.⁵⁹⁸ Feasible

⁵⁹¹ See Draper, *Risk Filters*, *supra* note 24, at 347–49, for more on the significance requirement.

⁵⁹² See Keating, *supra* note 100, at 686–88.

⁵⁹³ See, e.g., Thomson, *supra* note 525, at 1395–96.

⁵⁹⁴ Costs in that range would likely take other lives. If the marginal number of lives lost would likely exceed the number of lives saved, we are unlikely to have feasibility. See *id.*

⁵⁹⁵ Spending on medical care in the last year of a patient's life accounts for over one quarter of Medicare program outlays. See David H. Howard et al., *The Relationship Between Ex Ante Mortality Risk and End-of-Life Medical Costs*, 5 APPLIED HEALTH ECON. & HEALTH POL'Y 37, 37 (2006).

⁵⁹⁶ See Patricia A. Davis, *Medicare: Insolvency Projections*, CONG. RESEARCH SERV., RS20946, 8 (2018).

From its inception, the HI Trust Fund has faced a projected shortfall. The insolvency date has been postponed a number of times, primarily due to legislative changes that have had the effect of restraining growth in program spending. The 2018 Medicare trustees' report projects that, under intermediate assumptions, the HI Trust Fund will become insolvent in 2026, two years earlier than estimated in the prior year's report.

Id. at summary.

⁵⁹⁷ See Elliot S. Fisher et al., *Fostering Accountable Health Care: Moving Forward in Medicare*, 28 HEALTH AFF., W219, W223–24 (2009), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.28.2.W219>.

⁵⁹⁸ We need to reinvent a more complete and safe version of the “transsubstantive administrative law” noted by Jerry Mashaw. See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 312 (2012). That administrative law needs to integrate with the Constitution. It must slow the railroad of the majority: “Administration must respect rights, often through elaborate procedural protections—even if respecting rights can derail effective governance and inhibit political control of administration.” *Id.* at 315. This would hold true

reduction of significant risks can be implemented through public health regulation.⁵⁹⁹ In a way, such regulations are already in place with Medicare.⁶⁰⁰ Medicare regulations specify what is covered and for what cost.⁶⁰¹ HHS employees determine in advance the coverages that are feasible.⁶⁰² If they are not both technologically and economically feasible, they are not approved.⁶⁰³ We need these limits to protect our government, our collective enterprise, from the

especially for the express rights (especially life) of the Due Process Clause as well as rights of equality rooted in the Equal Protection Clause.

⁵⁹⁹ See *Int'l Rehab. Scis. Inc. v. Sebelius*, 688 F.3d 994, 997 (9th Cir. 2012).

⁶⁰⁰ See *id.*

⁶⁰¹ Medicare regulations for diagnostic related groups (DRGs) establish standards for approval and set payment limits for specific treatments for specific ailments:

HHS pays hospitals for acute inpatient care they provide to Medicare enrollees under the Prospective Payment System (“PPS”). . . . Rather than pay hospitals for the actual costs they incur in providing care to particular Medicare enrollees, PPS pays hospitals a fixed, predetermined amount based on each patient’s category of illness. . . . These categories are called Diagnostic Related Groups or DRGs. . . . Under PPS, HHS constructs a standard nationwide cost rate, the ‘federal rate,’ based on the average operating costs of inpatient hospital services, then assigns a weight to each DRG category of inpatient treatment. . . . HHS determines a hospital’s final reimbursement per patient by multiplying the patient’s DRG by the federal rate, after that rate has been ‘standardized’ by making adjustments based on a variety of factors.

Anna Jaques Hosp. v. Sebelius, 33 F. Supp. 3d 47, 50 (D.D.C. 2014) (internal citations omitted). Those “adjustments” are cost adjustments for the reimbursable costs of hospitals. See *id.* They do not expressly include considerations of technological and economic feasibility. See *id.* However, by announcing reimbursement amounts, Medicare’s system of payment functions as a kind of pre-determined feasibility analysis; that which will be reimbursed has been determined to be both technologically and economically feasible. See *Int'l Rehab. Scis. Inc.*, 688 F.3d at 997.

⁶⁰² See *Anna Jaques Hosp.*, 33 F. Supp. 3d at 50.

⁶⁰³ See *id.*; *Int'l Rehab. Scis. Inc.*, 688 F.3d at 997. Consider, e.g., medical devices:

A device is not “reasonable and necessary”—and thus is not eligible for Medicare coverage—if it is:

- Not “safe” and “effective”—that is, if the device has not “been proven safe and effective based on authoritative evidence” or is not “generally accepted in the medical community as safe and effective for the condition for which it is used”;
- “[E]xperimental”—that is, “investigational”;
- Not “[a]ppropriate” for the individual beneficiary’s needs; or
- “[S]ubstantially more costly than a medically appropriate and realistically feasible alternative pattern of care.”

Int'l Rehab. Scis. Inc., 688 F.3d at 997. See, for example, Criteria and Procedures for Making Medical Services Coverage Decisions That Relate to Health Care Technology, 54 Fed. Reg. 4302, 4303, 3404 (Jan. 30, 1989) (codified at 42 C.F.R. pt. 400, 405); Criteria and Procedures for Extending Coverage to Certain Devices and Related Services, 60 Fed. Reg. 48417, 48418 (Sept. 19, 1995) (codified as 42 C.F.R. pt. 405, 411), for additional information on the requirements of the Medicare program. Technological feasibility is represented by the safe and effective standard, and economic feasibility is express in the fourth listed requirement. *Int'l Rehab. Scis. Inc.*, 688 F.3d at 997.

hypothetical \$10 trillion patient—or merely dozens each costing a billion.

If we were to implement a constitutional ranking of basic rights, one could imagine cases where the cost of (an almost insignificant amount of) life-saving could be astronomical.⁶⁰⁴ For relatively small extensions to life or health, there could be enormous fiscal costs to government.⁶⁰⁵ And as we are equal and equally entitled, and we all use health services, we know that some costs will inevitably exceed the bounds of feasibility.⁶⁰⁶

Feasible risk reduction regulation has steps: 1) Is the risk to life both foreseeable and significant?; 2) If so, is the risk subject to safety regulation?; 3) If not so subject, is the risk an extreme case involving great loss of liberty or property that we, as a society, have decided to protect instead with feasible risk reduction?; a) If so, is risk reduction technologically feasible?; and then b) Is that risk reduction also economically feasible?⁶⁰⁷ Where a risk to life or health is significant, remaining significant risks would be reduced to the extent both technologically and economically feasible.⁶⁰⁸ We should apply feasible risk reduction analysis to cases of extreme financial cost to society (for relatively insignificant loss of life or liberty) or extreme loss of liberty as a cost for *de minimis* life-saving.⁶⁰⁹ Regulators should reduce significant risk to lives, but for certain essential activities they can only permit risk reduction (up to the point of insignificance) that is both technologically and economically feasible.⁶¹⁰

Feasibility analysis would help connect the law of our Constitution

⁶⁰⁴ See Masur & Posner, *supra* note 331, at 671–72; Draper, *Risk Filters*, *supra* note 24, at 382.

⁶⁰⁵ See JACK GINSBURG, CONTROLLING HEALTH CARE COSTS WHILE PROMOTING THE BEST POSSIBLE HEALTH OUTCOMES 14 (Amer. Coll. of Physicians ed. 2009), https://www.acponline.org/acp_policy/policies/controlling_healthcare_costs_2009.pdf; Neil McHugh et al., *Extending Life for People with a Terminal Illness: A Moral Right and an Expensive Death? Exploring Societal Perspectives*, BIOMED CENT. MED. ETHICS, Mar. 2015, at 2, 11, <http://doi.org/10.1186/s12910-015-0008-x>; Tomas Philipson, *Dying to Live: Why is Health Care So Valuable in the Face of Death?*, FORBES (Aug. 6, 2015), <https://www.forbes.com/sites/tomasphilipson/2015/08/06/dying-to-live-why-is-health-care-so-valuable-in-the-face-of-death/#2745ec175423>.

⁶⁰⁶ See GINSBURG, *supra* note 605, at 10, 38; McHugh et al., *supra* note 605, at 13.

⁶⁰⁷ See Draper, *Risk Filters*, *supra* note 24, at 344; Keating, *supra* note 100, at 687. The safe level of risk imposition protects life and health from activities (with significant risks) that can be eliminated. See Draper, *Risk Filters*, *supra* note 24, at 344. Here, we make a collective decision to live without those activities. See *id.* See Draper, *Risk Filters*, *supra* note 24, at 366, 367, for more on these steps and their implementation.

⁶⁰⁸ See Draper, *Risk Filters*, *supra* note 24, at 345–46.

⁶⁰⁹ See *id.* at 368.

⁶¹⁰ See *id.* at 347.

to the reality of our existence.⁶¹¹ The need for certain liberty or property at some measure conflicts with risks to life (or health).⁶¹² For those risk-bearing activities with highly inelastic demand, we must engage in those activities even though they may present some significant risk to life and health.⁶¹³ We should reduce those risks to the extent technologically and economically feasible. Risk reduction would save lives and health to the extent feasible.⁶¹⁴

The problem with extreme cases is that they represent an exception or override from the standard conceptual partitioning of Due Process rights.⁶¹⁵ Unless the exceptions are channeled, they cannot occur with much frequency or they will erode the persistent life-saving rule. As the protection of life and health are interests of ultimate value, we must work to assure that any flexibility in our rules and relevant behavior is not self-defeating. Exceptions must be predictable.

VIII. CONCLUSION

Although one might see the ranking of basic rights as a triumph of liberalism over libertarianism, there is something deeper at work here.⁶¹⁶ Many of us have a bad feeling that something is wrong with the current global system.⁶¹⁷ Either we cannot put our finger on it, or we recognize the human emergency but feel powerless to do something, anything, about it.⁶¹⁸ We want to do the right thing. We

⁶¹¹ See Gregory C. Keating, *Is Cost-Benefit Analysis the Only Game in Town?*, 91 S. CAL. L. REV. 195, 218 (2018).

⁶¹² See, e.g., *Rideout v. Hershey Med. Ctr.*, 30 Pa. D. & C.4th 57, 77, 80 (C.P. 1995) (citing *Cruzan v. Dir., Mo. Dep't of Health*, 487 U.S. 261, 282 n.10 (1990)) (demonstrating the conflict in "right to die" cases between the right to life and the right to liberty); Claire O. Finkelstein, *On the Obligation of the State to Extend a Right of Self-Defense to Its Citizens*, 147 U. PA. L. REV. 1361, 1395 (1999) (noting inherent conflict in right to life and liberty interest in self-defense).

⁶¹³ See Draper, *Risk Filters*, *supra* note 24, at 343.

⁶¹⁴ *Id.* at 343–44.

⁶¹⁵ See CHAFUEN, *supra* note 10, at 45 ("These rights evolved to preserve life and liberty. In extreme cases when these rights seem to be in contradiction, life and liberty should prevail.")

⁶¹⁶ Beware libertarianism which skews and limits the right to life by focusing primarily on liberty with property (at the expense of the lives and health of the disempowered), arguably in violation of international criminal law. See Stephen O'Hanlon, *Equality, Entitlement, and Efficiency: Dworkin, Nozick, Posner, and Implications for Legal Theory*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 31, 34–35 (2009). This work aims to help social-and life-scientific thought triumph over neo-classical utilitarianism and anti-intellectualism.

⁶¹⁷ See e.g., DIAMOND, *supra* note 22, at 8 ("We are much more conscious of environmental damage now than we were a mere few decades ago.")

⁶¹⁸ See DIAMOND, *supra* note 22, at 436 ("Finally, even after a society has anticipated, perceived, or tried to solve a problem, it may still fail for obvious possible reasons: the problem may be beyond our present capacities to solve, a solution may exist but be prohibitively

see cancer, and we see war; we see impoverishment, starvation, and thirst; and we believe there must be a better way. We need a meaningful way to express our concerns – and at the same time save lives and preserve liberty and property rights. By ranking our basic rights we can do both.

The object of this position is not to crush liberty or property rights under the burdens of life. The object is to protect life, not against all activities—but only those constituting significant risks. As I point out elsewhere, liberty should give way to life considerations in decision procedure only in the face of significant risk to life.⁶¹⁹ Without the significance requirement, we would lose our necessary liberty.⁶²⁰

This would be a step toward the transformation that humanity needs to make, should we as a species decide to survive. Humanity has lost its moral rudder, and if we do not find it in time, we will, scientifically speaking, self-destruct.⁶²¹ We don't know when the time is, but we do know this: if we do not protect life above liberty and property, we, as a species, are more likely to face more significant risks to our survival. We would be more negligent and self-destructive. And more children would more likely face futures of impoverishment, disease, and early death.

American law is positioned to help. By invoking the equivalent of the medical principle commonly referred to as the Hippocratic Oath, first do no harm, this constitutional interpretation can actively save

expensive, or our efforts may be too little and too late.”); *see, e.g.*, ACKERMAN & HEINZERLING, *supra* note 17, at 179–80; DIAMOND, *supra* note 22, at 498; RICHARD A. FALK, THIS ENDANGERED PLANET: PROSPECTS AND PROPOSALS FOR HUMAN SURVIVAL 4 (1972); Francis, *supra* note 190, at 4; GREGG EASTERBROOK, IT'S BETTER THAN IT LOOKS: REASONS FOR OPTIMISM IN AN AGE OF FEAR 203 (2018) (arguing that rather than teetering on the edge of a cliff, we are merely climbing higher than ever); GREGG EASTERBROOK, THE PROGRESS PARADOX: HOW LIFE GETS BETTER WHILE PEOPLE FEEL WORSE 34 (2003) (claiming Americans were too pessimistic in the face of increasing prosperity); JAMES HANSEN, STORMS OF MY GRANDCHILDREN: THE TRUTH ABOUT THE COMING CLIMATE CATASTROPHE AND OUR LAST CHANCE TO SAVE HUMANITY 274 (2009); NAOMI KLEIN, THIS CHANGES EVERYTHING: CAPITALISM VS. THE CLIMATE 15 (2014); ELIZABETH KOLBERT, THE SIXTH EXTINCTION: AN UNNATURAL HISTORY 268–69 (2014) (“Right now, in the amazing moment that to us counts as the present, we are deciding, without quite meaning to, which evolutionary pathways will remain open and which will forever be closed. No other creature has ever managed this, and it will, unfortunately, be our most enduring legacy.”); MEADOWS ET AL., *supra* note 346, at 3; REES, *supra* note 521, at 8; WILSON, *supra* note 521, at 19; WILSON, *supra* note 346, at xxiii (“We are inside a bottleneck of overpopulation and wasteful consumption. If the race is won, humanity can emerge in far better condition than when it entered, and with most of the diversity of life still intact.”).

⁶¹⁹ See Draper, *Risk Filters*, *supra* note 24, at 343, 347.

⁶²⁰ See *id.*

⁶²¹ See WILSON, *supra* note 521, at 19–20.

lives.⁶²² Further, and of great importance here in the Land of Liberty, ranking rights actively promotes safe liberty and property so that people can enjoy the beauty and the benefits of a life well lived. These due process principles would have an active meaning for all. We could express our interests and define our rights more clearly.

Let us use the ranking of basic rights in a positive way. We could be more just. By changing our interpretation of the Due Process Clauses, we can help Dr. King's dream come true.⁶²³

⁶²² See *The Hippocratic Oath*, U.S. NAT'L LIBR. OF MED., https://www.nlm.nih.gov/hmd/greek/greek_oath.html (last visited Oct. 22, 2018).

⁶²³ Rev. Dr. Martin Luther King, Jr., *I Have a Dream*, Address at the Lincoln Memorial (Aug. 28, 1963). Ranking the basic rights of Due Process would help us better see all men by the content of their character.