Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights

Richard E. Levy

ESCAPING *LOCHNER*'S SHADOW: TOWARD A COHERENT JURISPRUDENCE OF ECONOMIC RIGHTS

RICHARD E. LEVY†

During the Lochner *era of the early twentieth century, the United States Supreme Court emphasized the importance of economic rights by overturning legislation that restricted the right of contract or of individual economic autonomy. However, with the fall of economic rights jurisprudence in the late 1930s, the Court increasingly upheld legislation restricting economic rights. At the same time, the Court developed a strong and comprehensive jurisprudence protecting non-economic individual rights. This dichotomy of jurisprudential analysis not only continued, but strengthened throughout the Warren Court era. However, over the last twenty years, the United States Supreme Court has become increasingly more conservative. The new justices look more favorably upon economic rights and thus, have attempted to strengthen these rights.*

In this Article, Professor Levy examines the Supreme Court's economic rights jurisprudence over the last two decades. He traces the Court's "pattern of reinvigoration and retreat," a series of cases in which the Court has attempted to strengthen the protection of economic rights. He finds that although the Court has succeeded in promoting economic rights in individual decisions, it has failed to outline a coherent constitutional position of economic rights jurisprudence. He argues that the two conflicting goals of conservative theory, protection of economic rights and judicial restraint, have restricted the Court from integrating economic rights with other constitutionally protected interests. Though the Court has attempted to support economic rights

---

† Professor of Law, University of Kansas School of Law. B.A. 1978, M.A. 1980, University of Kansas; J.D. 1984, University of Chicago. I would like to thank Henry Butler, Mike Davis, Rob Glicksman, Francis Heller, Peter Schanck, Sid Shapiro, Tom Stacy, and Geoffrey Stone for helpful comments on earlier versions of this Article. I would also like to thank Elizabeth Cateforis, Patrick H. Henderson, and Lucy Higgins Sinkular for valuable research assistance. The research for this Article was supported in part by the University of Kansas General Research Fund.

protections under a number of constitutional doctrines, it has been forced to retreat from this effort, thereby leaving the jurisprudence in disarray. Finally, Professor Levy proposes a new approach to economic rights jurisprudence grounded in the Due Process and Equal Protection Clauses that applies fundamental rights proportionality principles and political process theory.

It is time to rethink the jurisprudence of "economic rights."[1] For nearly twenty years, the United States Supreme Court has revisited economic rights doctrines that had lain dormant since the end of the Lochner era in the late 1930s.[2] The Court's renewed concern for in economic rights has come at a time when various political and jurisprudential forces are conducive to a reconsideration of the appropriate role of economic interests in a jurisprudence of constitutional rights. Public distrust of and dissatisfaction with government has run high for a number of years, and tough economic times have focused public attention on the costs of government regulation. Likewise, prominent conservative scholars have argued on behalf of economic rights at the theoretical level,[3] and even liberal scholars have begun to recognize that the total rejection of economic rights is difficult to square with constitutional text and history or with the jurisprudential underpinnings of individual rights doctrine.[4] Against the background of these developments, and to some degree

---

1. I use the term "economic rights" to describe rights pertaining to the acquisition, ownership, and disposition of property, which may receive protection under various constitutional provisions. In contrast, I use the term "individual rights" to describe other constitutional rights, including freedom of expression, criminal procedure safeguards, rights to equal treatment, and the right of privacy. While this distinction is a convenient means of describing current doctrine, it is artificial because economic rights are a type of individual right. *See infra* note 121 and accompanying text.

2. *See infra* part I.A.

3. *See infra* part I.B.1.

4. This "neoliberal" scholarship includes SUSAN-ROSE ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE (1992) (applying tools of economic analysis and social choice to reform of the regulatory state); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990) [hereinafter RIGHTS REVOLUTION] (arguing for various cannons of statutory construction to protect economic interests in the modern regulatory state); *see also* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 319-54 (1993) [hereinafter PARTIAL CONSTITUTION] (implying that economic rights should be treated as judicially unenforceable constitutional norms); Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 594 (1990) ("Just as we have had to move beyond an 'anything goes' approach for landowners, so we now must move beyond 'anything goes' for land regulation.").

propelled by them, Republican presidents (particularly Presidents Reagan and Bush) have sought to reshape the Court through a series of conservative appointments.[5]

Although the rhetoric surrounding these appointments emphasized "judicial restraint" more than economic rights, some conservative justices appear to look more favorably upon economic interests than their liberal predecessors epitomized by the Warren Court.[6] In a series of striking decisions, the reconfigured Court appeared to endorse enhanced protection of economic interests under a number of constitutional doctrines, including the Contract and Takings Clauses, separation of powers and federalism, and even the Equal Protection Clause.[7] Despite the favorable climate, however, the Court was soon forced to retreat from the implications of these decisions.[8] As a result, the Court has not only failed in its apparent effort to enhance the protection of economic rights, but also has left various economic rights doctrines in a state of total disarray.

I believe that the Court has failed because it has been unwilling to address the constitutional position of economic rights in a straightforward and coherent manner. Resolution of the complex problems associated with balancing constitutional protection for economic interests against the legitimate demands of government requires a solid doctrinal foundation for analyzing specific cases. In the absence of such a foundation, we are left only with ad hoc, value-laden, and at times intellectually dishonest opinions that undermine the legitimacy of judicial review. Restoring coherence to this area of

---

5. I use the terms "conservative" and "liberal" in their modern, popular sense to describe opposing attitudes regarding the importance of economic and individual rights. *See supra* note 1. Liberals tend to favor broad protection of individual rights while according the government significant latitude with respect to economic rights. Conversely, conservatives tend to value economic rights, while favoring more governmental discretion respecting other individual rights. Naturally, there are those who either favor the broadest protection of all types of rights (whom we might call libertarians) and those who advocate broad government power irrespective of the rights at issue (whom we might call statists). These terms are used for purposes of convenience only, with full recognition that neither term fully captures the range of views that it purportedly describes.

6. *See infra* part I.B.2.

7. *See infra* part I.A. For reasons that will be discussed *infra* part I.C., only the Due Process Clause, U.S. CONST. amend. XIV, § 1, has escaped serious attention. While I recognize that the dormant Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, can be viewed as a type of economic rights safeguard, I shall not attempt to analyze the Court's dormant Commerce Clause jurisprudence in this article. The federalism component of this doctrine gives it distinctive characteristics that warrant separate treatment, and thorough analysis of this complex area would overburden an already lengthy article.

8. *See infra* part I.A. Although the jury may still be out on takings law, there is every indication that the Court will retreat from this area as well. *See infra* part II.C.

the law is no easy task, however. The problems that beset economic rights doctrine cut across doctrinal lines and reflect deep-seated systemic difficulties, whose roots lie in the *Lochner* era and the constitutional sea change precipitated by the New Deal. Put simply, the *Lochner* era has been so thoroughly discredited as improper judicial activism that serious discussion of the appropriate role of economic rights in our constitutional jurisprudence is virtually precluded.[9] Reaction to *Lochner* distorted constitutional doctrine during the heyday of liberal constitutional jurisprudence, and the resulting doctrinal difficulties have been exacerbated by the political and legal context of recent appointments to the Supreme Court.

In this Article I argue that the problems plaguing the Court in this area can and should be resolved by emerging from *Lochner*'s shadow and integrating economic interests into a broader jurisprudence of constitutional rights. Part I of the Article explains the pattern of reinvigoration and retreat in economic rights decisions as the product of the tension between two strands of conservative theory: deregulation and judicial restraint. This tension has forced the Court into a misguided search for an "originalist escape"—i.e., an economic rights doctrine whose textual or historical foundations reconcile judicial intervention with principles of judicial restraint. Parts II and III then consider how the search for that escape has distorted the Court's recent efforts to develop a jurisprudence of economic rights. Part II argues that the search for an originalist escape prevented the Court from integrating economic rights into a comprehensive jurisprudence of individual rights, compelling it instead to maintain an unwarranted dichotomy between economic and other individual rights. Part III contends that the search for an originalist escape has also made it impossible for the Court to identify a constitutional baseline against which to measure economic rights, resulting in three inconsistent and unsuitable approaches to the baseline problem. Finally, part IV considers the contours of a coherent economic rights jurisprudence. It suggests that a modest, yet significant, reinvigoration of economic rights can and should be

9. This conventional wisdom prevails despite some recent efforts to rehabilitate *Lochner*. *See, e.g.*, James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 142 (1993) (arguing that, contrary to generally held views, *Lochner* was not a sharp break with the historical tradition, and concluding that clarification of historical misconceptions "undermines the historical foundations of attempts to limit debate about economic rights protection by invoking *Lochner*"); *see also id.* at 98-102 (discussing revisionist historical *Lochner* scholarship).

accomplished by developing the fundamental rights and political-process reasoning that underlies the liberal jurisprudence of the Due Process and Equal Protection Clauses, which can be used to fashion a coherent jurisprudence that encompasses both economic and other constitutionally protected interests. On the other hand, the Contract and Takings Clauses should be confined to their historical meanings because they do not present suitable foundations for a broad economic rights doctrine. Such a jurisprudence would increase protection for economic rights but need not portend a return to the extremes of the *Lochner* era.

I. THE MISGUIDED QUEST FOR AN ORIGINALIST ESCAPE

The pattern of reinvigoration and retreat in recent decisions suggests that the Court (or at least a majority of justices) is interested in enhancing the protection accorded economic rights but has been unable to find a suitable vehicle for accomplishing this objective. This problem stems from the tension between the deregulation and judicial restraint strands of conservative theory. To avoid an obvious conflict between protection of economic rights and professions of restraint, the Court has attempted to rest its economic rights decisions on constitutional provisions that provide some plausible textual and historical support for judicial intervention. It has sought an "originalist escape."

A. The Pattern: Reinvigoration and Retreat

The starting point for my analysis is the pattern of reinvigoration and retreat. From the demise of the *Lochner* era until recently, the Court employed an extremely deferential standard of review for economic regulation regardless of the constitutional provision invoked.[10] Over the past two decades, decisions under the Contract Clause,[11] structural doctrines,[12] the Equal Protection Clause,[13] and especially the Takings Clause[14] have reflected some dissatisfaction with such toothless review. But while notable decisions in each of these areas seemed to presage a fundamental shift toward enhanced economic rights protection, the Court has quickly retreated from the full implications of those decisions.

---

10. For discussion of these developments, see *infra* notes 62-68 and accompanying text.
11. *See infra* notes 15-22 and accompanying text.
12. *See infra* notes 23-38 and accompanying text.
13. *See infra* notes 39-46 and accompanying text.
14. *See infra* notes 47-56 and accompanying text.

Perhaps the first signs of a renewed interest in economic rights came under the Contract Clause.[15] The clause had figured prominently in the Court's early constitutional jurisprudence, but by the close of the *Lochner* era it had fallen into relative disuse.[16] In two late-1970s decisions, *United States Trust Co. v. New Jersey*[17] and *Allied Structural Steel v. Spannaus*,[18] the Court appeared to breathe

---

15. U.S. CONST. art. I, § 10, cl. 1. *See generally* Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. L. REV. 767 (1989) (arguing that the Contract Clause should be used to control state manipulation of corporations law); Leo Clarke, *The Contract Clause: A Basis for Limited Judicial Review of State Economic Regulation*, 39 U. MIAMI L. REV. 183 (1985) (arguing that the Contract Clause should be read to prohibit retroactive contractual changes unless they respond to changed circumstances and give due regard to private interests); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984) (arguing that the Contract Clause should be read to restrict sharply the power of states to regulate economic affairs); James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State*, 31 BUFF. L. REV. 381 (1982) (interpreting the evolution of Contract Clause jurisprudence as a reflection of the movement from vested rights to substantive rights analysis in constitutional law); Gale Norton, *Economic Rights Provisions of the Constitution*, 11 GEO. MASON U. L. REV. 43 (1988) (exploring the various constitutional instruments available for protection of economic liberties); Michael J. Phillips, *The Life and Times of the Contract Clause*, 20 AM. BUS. L.J. 139 (1982) (describing the evolution of Contract Clause jurisprudence); Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1 (1986) (interpreting 19th century application of the Contract Clause as reflecting underlying conceptions of social control of property); Stewart E. Sterk, *The Continuity of Legislatures: Of Contracts and the Contract Clause*, 88 COLUM. L. REV. 647 (1988) (examining legislative continuity as a basis for understanding Contract Clause doctrine relating to contracts to which the state is a party); Michael B. Rappaport, Note, *A Procedural Approach to the Contract Clause*, 93 YALE L.J. 918 (1984) (arguing that the Contract Clause prohibits all retroactive impairments of contracts made without just compensation); Note, *Rediscovering the Contract Clause*, 97 HARV. L. REV. 1414 (1984) [hereinafter *Rediscovering*] (interpreting Contract Clause constraints as related to the rule of law and separation of powers); Michael L. Zigler, Note, *Takings Law and the Contract Clause: A Takings Law Approach to Legislative Modifications of Public Contracts*, 36 STAN. L. REV. 1447 (1984) (arguing that the Takings Clause, not the Contract Clause, should be used to evaluate legislative modification of public contracts).

16. The Court effectively emptied the clause of content in Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 444-48 (1934) (holding that no contractual impairment occurs when the state has exercised its police powers), which collapsed the Contract Clause and substantive due process inquiries.

17. 431 U.S. 1, 32 (1977) (invalidating repeal of legislative covenant restricting ability of New York and New Jersey Port Authority to engage in deficit financing of mass transit because it impaired the state's obligation to Port Authority bondholders). For further discussion, see *infra* note 172 and accompanying text.

18. 438 U.S. 234, 250-51 (1978) (invalidating legislation requiring employers quitting business or leaving the state to fund pensions that had not vested pursuant to pension plan); *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 622 (2d ed. 1988) ("The *Allied [Structural] Steel* decision could eventually be seen as an early signal of a

new life into the Contract Clause by applying a form of heightened scrutiny[19] to state action impairing contracts. Any reinvigoration of the clause, however, was cut short in *Exxon Corp. v. Eagerton*[20] and *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*,[21] a pair of 1983 cases in which the Court rejected Contract Clause arguments and limited *United States Trust* and *Spannaus*. Decisions handed down after 1983 cursorily rejected Contract Clause arguments.[22]

A similar pattern of reinvigoration and retreat is evident with respect to structural doctrines, such as federalism and separation of

---

back-door return to the jurisprudence of *Lochner*, especially given the Court's exacting economic scrutiny, using 'tests' that could easily be turned into engines of destruction for many economic regulations."). For further discussion, see *infra* notes 173-76 and accompanying text.

19. The term "heightened scrutiny" refers to the relative lack of deference accorded to legislative judgments. In current constitutional jurisprudence, substantive review of legislation involves some form of rationality review in which the Court examines the purposes of the legislation and the fit between those purposes and the means chosen. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 573-90 (4th ed. 1991) (describing standards of rationality review). The most deferential form of review is the "rational basis test," which requires only that a law be reasonably related to some conceivable legitimate purpose, and which almost always results in a decision upholding the legislation. *Id.* at 574-75. This test applies unless there is some justification to employ a stricter form of rationality review, i.e., heightened scrutiny. *Id.* Under current law, there are two or perhaps three forms of heightened scrutiny. Strict scrutiny requires that a law be narrowly tailored, or necessary, to fulfill a compelling governmental purpose, and almost always requires the invalidation of the legislation in question. *Id.* at 575. Strict scrutiny applies to legislation burdening fundamental rights or employing classifications based on race and national origin. *Id.* at 575-76. Intermediate scrutiny requires that a law be substantially related to an important governmental purpose, and applies to legislation employing gender-based classifications, federal affirmative action programs, and probably classifications respecting alienage and nonmarital children. *Id.* at 576-77. A number of recent cases also appear to apply a kind of "rational basis with bite" to invalidate laws ostensibly subject to the rational basis test. *Id.* at 576-78.

20. 462 U.S. 176, 187-94 (1983) (rejecting a Contract Clause challenge to a statute that barred natural gas producers from using escalator clauses to pass costs of state severance tax on to consumers). For further discussion, see *infra* notes 179-81 and accompanying text.

21. 459 U.S. 400, 416-19 (1983) (rejecting a Contract Clause challenge to a statute that barred natural gas producers from using escalator clauses to pass costs of federal regulation on to consumers). For further discussion, see *infra* notes 177-78 and accompanying text.

22. *See, e.g.*, General Motors Corp. v. Romein, 112 S. Ct. 1105, 1111-12 (1992) (finding that no obligation of contract was impaired by state law reversing state supreme court interpretation of workers' compensation statute and retroactively requiring refund of workers' compensation payments withheld under that interpretation); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 502-06 (1987) (holding that a measure requiring mineral owner to prevent or compensate for surface subsidence substantially impaired contract but was nonetheless valid because reasonably related to purpose of preventing environmental damage).

powers, which may be invoked to protect economic rights.[23] These doctrines imposed significant barriers to federal economic regulation during the *Lochner* era, but the Court essentially abandoned them along with substantive due process in the late 1930s and early 1940s.[24] Beginning in 1976 with *National League of Cities v. Usery*,[25] the Court has struggled with a limited federalism-based restriction that prevents the federal government from treating the states themselves as subjects of regulation. Later cases consistently distinguished *Usery*,[26] and the Court finally overruled it in *Garcia v. San Antonio Metropolitan Transit Authority*,[27] apparently abandoning any judicially enforced federalism-based limits on federal power. Recently, however, the Court reasserted a somewhat different federalism-based limit in *New York v. United States*,[28] which prevents the federal government from directly compelling states to implement federal regulatory policy.[29]

---

23. Although my primary focus is on substantive rights, I will address separation of powers and federalism to some extent because they figured prominently in the Court's *Lochner*-era opposition to economic regulation and are part of the broader pattern of reinvigoration and retreat. In addition, they provide a useful illustration of some of the problems inherent in the search for an originalist escape. *See infra* part II.B.1.

24. *See infra* notes 62-68 and accompanying text.

25. 426 U.S. 833, 840-52 (1976) (holding that minimum wage and maximum hour requirements could not be applied to states as employers). This narrow limit applied only to regulation of states *as states*, with respect to matters that were indisputably attributes of state sovereignty, and thereby impaired the structuring of traditional government functions. *Id.* at 852. It did create potentially significant loopholes in federal regulatory regimes, however.

26. *See, e.g.*, EEOC v. Wyoming, 460 U.S. 226, 236-39 (1983) (finding that application of Age Discrimination in Employment Act did not significantly impair states' ability to structure operations); United Transp. Union v. Long Island R.R. Co., 455 U.S. 678, 683-86 (1982) (ruling that application of the Railway Labor Act to the railroad is not regulation of an integral part of traditional state activities generally immune from federal regulation).

27. 469 U.S. 528, 547-55 (1985) (holding that Fair Labor Standards Act can be applied to local mass transit authority).

28. 112 S. Ct. 2408 (1992). *See generally* Richard E. Levy, New York v. United States: *An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 KAN. L. REV. 493 (1993) (arguing that the opinion in *New York* distorted precedent, misread history, and invoked misplaced policy arguments to justify an unnecessarily broad per se rule, while ignoring more appropriate avenues to address the legitimate federalism concerns raised in the case).

29. *New York*, 112 S. Ct. at 2419-23. The resulting rule is narrower than *Usery*. It relates only to the form of federal regulation rather than the permissible scope of its application. *New York* places no limit on federal authority to regulate private actors or even states directly, and the federal government may even "encourage" states to implement federal policy by conditioning receipt of federal funds or threatening to preempt a field of law if the state does not comply. *See id.* at 2423-24.

A more pronounced pattern of reinvigoration and retreat is evident in the separation of powers field. In the first half of the 1980s,[30] the Court employed a restrictive, formalistic view of separation of powers to invalidate federal regulatory measures in cases such as *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,[31] *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[32] *INS v. Chadha*,[33] and *Bowsher v. Synar*.[34] Perhaps in view of the sweeping implications of this analysis,[35] however, the Court soon retreated. In *Morrison v. Olson*[36] and *United States v. Mistretta*,[37] it rejected separation of powers challenges under a generous functional analysis.[38]

In some recent cases the Court even appeared to suggest an enhanced scrutiny of economic rights under the Equal Protection Clause. Since the New Deal, equal protection challenges to economic regulation have been routinely rejected under the deferential rational basis test, but a few decisions in the 1980s applied a more aggressive rational basis scrutiny.[39] While some of these decisions might be

---

30. The beginnings of formalistic separation of powers analysis might actually be traced to Buckley v. Valeo, 424 U.S. 1 (1976), in which the Court employed a formalistic separation of powers analysis to invalidate provisions vesting executive authority in the Federal Elections Commission because members were not appointed pursuant to methods authorized by Article II, Section 2 of the Constitution. *Id.* at 109-43.

31. 448 U.S. 607, 658-59 (1980) (plurality opinion) (employing nondelegation doctrine to construe narrowly OSHA authority and invalidate regulation setting workplace exposure limits for the chemical benzene); *id.* at 671 (Rehnquist, J., concurring) (arguing that provision in question violates the nondelegation doctrine).

32. 458 U.S. 50, 57-87 (1982) (ruling that bankruptcy court jurisdiction over traditional common-law private actions violates Article III).

33. 462 U.S. 919, 951-59 (1983) (holding that legislative veto violates bicameralism and presentment requirements of Article I).

34. 478 U.S. 714, 721-27 (1986) (holding that vesting of executive power in an officer removable by Congress interferes with the President's exclusive authority over the execution of the laws).

35. *See, e.g.*, David P. Currie, *The Distribution of Powers after* Bowsher, 1986 S. CT. REV. 19, 21-40 (presenting an historical outline of separation of powers and examining *Bowsher*'s negative effects on the doctrine).

36. 487 U.S. 654, 670-77 (1988) (upholding independent counsel).

37. 488 U.S. 361, 371-412 (1989) (upholding Federal Sentencing Commission).

38. The Court also limited the reach of *Marathon* in cases such as Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985), and CFTC v. Schor, 478 U.S. 833 (1986), while in Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218-24 (1989), the Court rejected the argument that the taxing power is nondelegable because of its fundamental importance.

39. *See, e.g.*, Jill Handley Andersen, *Equal Protection During the 1984 Term: Revitalized Rational Basis Examination in the Economic Sphere*, 36 DRAKE L. REV. 25, 31-37 (1986-87). Application of the rational basis test is ordinarily so deferential that it leads almost automatically to the validation of challenged governmental action. *See, e.g.*,

explained more readily as limiting liberal fundamental rights decisions[40] or reflecting structural considerations,[41] *Allegheny Pittsburgh Coal Co. v. Webster County*[42] seemed to portend a more vigorous equal protection scrutiny of economic regulation because the Court, for no apparent reason, engaged in less deferential review of the measure in question.[43] But any broad suggestions of more

---

Railway Express Agency v. New York, 336 U.S. 106, 110-11 (1949). Professor Gerald Gunther, among others, has urged the Court to apply the rational basis test more seriously. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, The Supreme Court 1971 Term*, 86 HARV. L. REV. 1, 20-21 (1972). The recent economic rights cases employing aggressive rational basis scrutiny might be read to suggest that the Court is prepared to take this advice, especially when considered in conjunction with another case decided in 1985, Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), in which the Court applied the rational basis test to invalidate the denial of a zoning variance to accommodate a group living arrangement for adults with developmental disabilities. *Id.* at 447-50. Nonetheless, in the vast majority of cases the Court continues to uphold measures subject to rational basis scrutiny.

40. *See* Williams v. Vermont, 472 U.S. 14, 23 (1985) (holding that compensating use tax violates equal protection by arbitrarily exempting cars purchased out of state by current residents but not those brought into the state by new residents); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 622 (1985) (rejecting tax exemption for Vietnam veterans resident in the state before 1976 as not reasonably related to any legitimate state purpose). In both cases, by taking the relatively unusual step of invalidating the measures under the rational basis test, the Court avoided subjecting them to strict scrutiny as a burden on the right to travel. *See Williams*, 472 U.S. at 28 (Brennan, J., concurring); *Hooper*, 472 U.S. at 618. Insofar as the cases mark a retreat from cases such as Shapiro v. Thompson, 394 U.S. 618, 638 (1969), which treat the right to travel as fundamental, they do not suggest any broader invigoration of equal protection rational basis scrutiny.

41. *See* Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 878-79 (1985) (invalidating Alabama law imposing higher tax rates on foreign than on domestic insurance companies because discrimination against nonresidents is not a legitimate means of promoting domestic insurance industry). Although discrimination against out-of-state companies would ordinarily violate the Commerce Clause, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1988), "exempts the insurance industry from Commerce Clause restrictions." *Ward*, 470 U.S. at 880. The Court thus relied on the Equal Protection Clause to reach the same result. *Id.* Insofar as *Ward* uses equal protection as a substitute for dormant Commerce Clause analysis, it does not suggest any broad-based invigoration of rational basis scrutiny.

42. 488 U.S. 336, 343 (1989) (finding appraisal of real property based upon price at last sale not rationally related to state's goal of taxing real property according to its current value). For a critical discussion of the case, see William Cohen, *State Law in Equality Clothing: A Comment on* Allegheny Pittsburgh Coal Company v. County Commission, 38 UCLA L. REV. 87 (1990).

43. By holding that reliance on the last sale price was not reasonably related to the state's purpose of assessing property at its actual value and refusing to consider other possible justifications for the assessment method, *Allegheny*, 488 U.S. at 344-46, the Court apparently required the measure in question to be justified in terms of the "actual purposes" articulated by state law, while the usual rational basis test allows the government to assert any plausible purpose in support of regulatory action. *See infra* note 46.

aggressive review were soon squashed in *Nordlinger v. Hahn*,[44] and the unanimous 1993 decision in *FCC v. Beach Communications, Inc.*[45] confirmed the narrow reach of *Allegheny* by resoundingly embracing the most deferential form of rational basis review.[46]

The Court's most recent, sustained, and visible exploration of enhanced economic rights protections has come in the area of takings law.[47] The developments can generally be traced to a trilogy of 1987

---

44. 112 S. Ct. 2326, 2333 (1992) (holding tax appraisal based on last sale price to be rationally related to state's purposes of protecting long-time homeowners from taxation based on unrealized gains and promoting neighborhood stability). Since the Court in *Allegheny* did not explore other possible "legitimate purposes" for relying on the last sale price to determine value, *Allegheny*, 488 U.S. at 344-46, it expressly left open the possibility that California's similar method for assessing property values might be sustained. *Id.* at 344 n.4.

45. 113 S. Ct. 2096, 2103 (1993) (rejecting equal protection challenge to provisions of the Cable Communication Policy Act exempting from regulation systems serving residents of commonly owned apartment dwellings).

46. The Court expressly rejected any limitation of review to the actual purposes of legislation, stating instead that those attacking the rationality of the legislative classification have the burden "to negate every conceivable basis that might support it," and that because the Court never requires a legislature to "articulate its reasons for enacting a statute, *it is entirely irrelevant for constitutional purposes whether the legislature was actually motivated by the conceived reason for the challenged distinction.*" *Id.* at 2098 (emphasis added). This discussion is not directly at odds with *Allegheny*, insofar as that case did not involve a legislative act, but it certainly reflects quite a different attitude.

47. U.S. CONST. amend. V. Much of the development of takings jurisprudence seems to have been prompted by Richard A. Epstein's influential work, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). For additional scholarly discussion of takings law, see JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992); WILLIAM B. STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN (1977); Charles H. Clarke, *Constitutional Property Rights and the Taking of the Police Power: The Aftermath of* Nollan *and* First English, 20 SW. U. L. REV. 1 (1991); Michael J. Davis & Robert L. Glicksman, *To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Takings Clauses*, 68 ORE. L. REV. 393 (1989); John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1 (1993); Ann T. Kadlecek, *The Effect of* Lucas v. South Carolina Coastal Council *on the Law of Regulatory Takings*, 68 WASH. L. REV. 415 (1993); Jan G. Laitos, *The Public Use Paradox and the Takings Clause*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 9 (1993); Susan E. Looper-Friedman, *Constitutional Rights as Property?: The Supreme Court's Solution to the "Takings Issue,"* 15 COLUM. J. ENVTL. L. 31 (1990); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992); Norton, *supra* note 15; Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 CAL. L. REV. 1299 (1989); Rose, *supra* note 4; Siegel, *supra* note 15; William B. Stoebuck, *Police Power, Takings and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980); Richard G. Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 NOTRE DAME L. REV. 1 (1989); Robert A. Williams, Jr., *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in* First English Lutheran Church *and* Nollan, 59 U. COLO. L. REV. 427 (1988); Note, *The Origins and Original Significance of the Just Compensation Clause*

decisions, *Hodel v. Irving*,[48] *First English Evangelical Lutheran Church v. County of Los Angeles*,[49] and *Nollan v. California Coastal Commission*.[50] More recently, of course, *Lucas v. South Carolina Coastal Council*[51] has received considerable attention. These decisions, however, are counterbalanced by other recent decisions that found no taking despite fairly strong arguments to the contrary, including *Keystone Bituminous Coal Ass'n v. DeBenedictis*[52] and *FCC v. Florida Power Corp.*[53] in 1987 and *Yee v. City of Escondido* in 1992.[54] The long-term impact of these developments remains

---

of the Fifth Amendment, 94 YALE L.J. 694 (1985) [hereinafter Note, *Origins*]; Note, David H. SaFavian, *Re-Taking the Fifth Amendment—Property Rights Revisited*, 2 DET. C.L. REV. 955 (1993); Note, *Taking Back Takings: A Coasean Approach to Regulation*, 106 HARV. L. REV. 914 (1993) [hereinafter Note, *Taking Back Takings*]; Comment, *Taking on a New Direction: The Rehnquist-Scalia Approach to Regulatory Takings*, 66 TEMP. L. REV. 197 (1993).

48. 481 U.S. 704, 716 (1987) (finding that law escheating highly fractionated shares of Native American land to tribes constituted a taking because it totally abrogated the right to pass property on death by descent or devise). For further discussion, see *infra* notes 200-03, 231-34 and accompanying text.

49. 482 U.S. 304, 318 (1987) (requiring compensation for temporary taking caused by flood control ordinance prior to invalidation by state court).

50. 483 U.S. 825, 841 (1987) (holding that administrative order conditioning rebuilding permit for beachfront property on cession of lateral access easement was a taking because order was not sufficiently related to regulatory purpose of preserving public access from the interior to the shore). For further discussion, see *infra* notes 204-27 and accompanying text.

51. 112 S. Ct. 2886, 2896 (1992) (finding administrative order precluding owner from developing beachfront property to be a per se taking because it completely destroyed all economically viable uses). For further discussion, see *infra* notes 235-50 and accompanying text. Justice Scalia, who wrote for the Court in *Nollan* and *Lucas*, is perhaps the Court's leading advocate of an aggressive takings jurisprudence. He is joined by the Chief Justice, whose dissent in Penn Central Transp. Co. v. New York City, 438 U.S. 104, 138 (1978), was the first sign of a renewed interest in takings law, and by Justice O'Connor, who wrote for the Court in *Hodel* and Yee v. Escondido, 112 S. Ct. 1522 (1992). Despite *Yee*'s negative outcome for the property owner, the opinion contains dicta that might support heightened scrutiny of regulations imposing a substantial burden on property owners. *See infra* notes 222-27 and accompanying text.

52. 480 U.S. 470, 485 (1987) (upholding a law requiring owners of coal interests to leave coal in place to provide surface support). For further discussion, see *infra* notes 197-99 and accompanying text.

53. 480 U.S. 245, 253 (1987) (unanimously rejecting takings challenge to FCC order setting rates utilities could charge for carrying television cables on poles).

54. 112 S. Ct. 1522, 1531 (1992) (sustaining local rent-control ordinance and state regulatory regime effectively transferring premium on the sale of mobile homes from mobile home park owners to mobile home owners against takings challenge); *see also* Pennell v. City of San Jose, 485 U.S. 1, 10 (1988) (refusing on ripeness grounds to consider takings challenge to rent-control ordinance allowing reduction of rent below otherwise reasonable rate on grounds of tenant hardship). Although *Yee* rejected the per se taking argument advanced by the owners in that case, it dropped numerous "hints" that the

unclear, and the future of takings law depends on how the Court answers a number of questions raised by the recent decisions.[55] If the Court's performance in other areas is any guide, we might expect that it will limit its most aggressive takings decisions because of their far-reaching implications. The Supreme Court's most recent decision in *Dolan v. City of Tigard*[56] does not alter this conclusion. While *Dolan* strengthened the *Nollan* principle, it did not expand its applicability.

The one economic rights doctrine left untouched is due process.[57] In this area, the Court continues to apply the deferential rational basis test that has prevailed since the New Deal,[58] as reflected in the cursory treatment of a due process claim in *General Motors Corp. v. Romein*[59] and the rejection of industry's claims that excessive punitive damages awards violate due process.[60] The Court

---

argument might have been more successful if couched in regulatory takings terms. For further discussion of *Yee*, see *infra* notes 222-23, 226-27 and accompanying text.

55. These questions include: (1) what interests may be considered discrete property interests for purposes of takings analysis; (2) how one measures total destruction; and (3) whether heightened scrutiny of purposes will apply beyond the narrow facts of *Nollan*. For discussion of these questions, see *infra* part II.C.

56. 114 S. Ct. 2309, 2319 (1994) (requiring "rough proportionality" in conditions extracted in order to obtain building permit). For further discussion of *Dolan*, see *infra* notes 208-09, 224 and accompanying text.

57. The decision to grant certiorari in PFZ Properties, Inc. v. Rodriguez, 112 S. Ct. 414 (1991), a run-of-the-mill zoning dispute that the circuit court disposed of with little difficulty, *see* PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28, 29-30 (1st Cir. 1991), seemed to reflect some interest in reinvigorating substantive due process, but the Court without explanation dismissed the writ of certiorari as improvidently granted. PFZ Properties, Inc. v. Rodriguez, 112 S. Ct. 1151 (1992).

58. *See infra* notes 67-68 and accompanying text.

59. 112 S. Ct. 1105, 1112 (1992) (holding that retroactive amendment to workers' compensation statute requiring employer to make higher payments did not violate due process); *accord* Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 731 (unanimous opinion) (upholding federal legislation retroactively subjecting employers to liability for withdrawing from pension funds during period immediately prior to enactment of the statute), *vacated*, Carpenters Pension Trust for S. Cal. v. Shelter Framing Corp., 467 U.S. 1257, *cert. denied*, G & R Roofing Co. v. Carpenters Pension Trust for S. Cal., 467 U.S. 1259 (1984).

60. *See* TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2722 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991); *see also* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989) (rejecting Eighth Amendment challenge to punitive damages award); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 76 (1988) (declining to consider, as not properly presented, a due process challenge to punitive damages award). While both cases recognized that at some point punitive damages might become so unreasonable as to violate due process, *TXO*, 113 S. Ct. at 2718; *Haslip*, 499 U.S. at 18-19, in both cases the Court upheld extremely large awards as sufficiently justified by "objective criteria" and left readers to wonder at what point punitive damages might violate due process. *See TXO*, 113 S. Ct. at 2722 (sustaining

has been particularly unfriendly to due process arguments seeking to impose affirmative duties on government.[61]

B. Tension in Conservative Theory: Economic Rights and Judicial Restraint

The pattern of reinvigoration and retreat described above raises a fundamental question. If the Court's conservative majority wants to enhance protection for traditional economic rights, as it seems to, why has it been unwilling to follow through on the implications of its exploratory cases? The answer lies in the connection between the Court's renewed interest in economic rights and the forces that fueled its reconfiguration over the past two decades. Whatever predilections individual justices may have toward economic rights, they are constrained from acting on them by the high profile rhetoric of judicial restraint that accompanied their appointments. In light of that rhetoric, any intervention on behalf of economic rights must be justifiable in terms of judicial restraint and its theoretical corollary, originalism.

1. Economic Rights and the Conservative Agenda

There can be little doubt that the pattern of Supreme Court decisions described above reflects a renewed interest in economic rights, which have received little or no protection since the end of the so-called *Lochner* era. During the *Lochner* era, of course, the Court stood in opposition to an ever-increasing tide of economic and social

---

punitive damages of $10,000,000 as reasonable even though actual damages limited to $19,000); *Haslip*, 499 U.S. at 23 (upholding punitive damages component of $1,000,000 even though it was four times the amount of compensatory damages, over 200 times the plaintiff's out-of-pocket expenses, and much greater than fine that could be imposed under state law).

The Court did invalidate an amendment to the Oregon Constitution that precluded judicial review of a jury's punitive damages award "unless the court can affirmatively say there is no evidence to support the verdict." Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2334 (1994). While *Honda* is an exception to the Court's otherwise uniform rejection of challenges to punitive damage awards, it does not represent any significant change in direction. The Oregon provision departed from the otherwise universal practice in other states of allowing judicial review of awards, a practice the Court had relied on in its previous decisions. Moreover, the Court treated this as a *procedural* due process claim, rather than a substantive challenge to the rationality of large awards. *Id.* at 2339. Thus, *Honda* may constrain the procedures under which punitive damages are awarded, but it provides no support for substantive due process arguments against large awards.

61. *See* Collins v. City of Harker Heights, 112 S. Ct. 1061, 1069 (1992); *infra* notes 312-18 and accompanying text.

legislation.[62] Relying on substantive economic due process,[63] as well as other substantive and structural doctrines to invalidate regulatory efforts at the state and federal levels,[64] the Court effec-

---

62. This historic conflict was caused by the divergent ideological trends that influenced the Court and political institutions, respectively. The Court was dominated by conservatives, a pattern that began in 1888 with the appointment of Chief Justice Fuller, followed in succession by a series of nominations by Presidents Cleveland and Harrison, "whose politics were conservative and largely indistinguishable." Owen M. Fiss, *The Fuller Court, in* AMERICAN CONSTITUTIONAL HISTORY: SELECTIONS FROM THE ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 184 (Leonard W. Levy *et al.* eds., 1989); *accord* ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 404 (6th ed. 1983). Although subsequent appointments brought less uniformly conservative justices and some strong liberal voices to the bench, the dominant theme of the Court from the 1890s until 1937 was conservative. *See generally* AMERICAN CONSTITUTIONAL HISTORY, *supra*, at 174-226 (discussing constitutional history during this period); CLINT BOLICK, UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY 68-76 (1990) (same); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY: 1888-1986 3-83 (1990) (analyzing Supreme Court decisions during this period). In contrast, the formation of economic and social policy in the political arena was driven by Progressivism and related reform movements that gained prominence during the latter part of the 19th and early part of the 20th centuries. *See generally* LOREN P. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION: 1877-1917 (1971) (discussing implications of social and political movements of the progressive era for constitutional evolution); ARTHUR A. EKIRCH, JR., PROGRESSIVISM IN AMERICA: A STUDY OF THE ERA FROM THEODORE ROOSEVELT TO WOODROW WILSON (1974) (reviewing history of the Progressive movement); JOHN B. GATES, THE SUPREME COURT AND PARTISAN REALIGNMENT: A MACRO- AND MICROLEVEL PERSPECTIVE 57-140 (1992) (exploring relationship between political realignment and the Supreme Court policymaking during the 1890s and from 1911-1945); Alexander M. Bickel, *The Judiciary and Responsible Government: 1910-21: Part One*, IX THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 3-718 (1984) (describing in detail the political history of the Supreme Court during important segment of early twentieth century).

63. Substantive economic due process was typified by the notorious decision in Lochner v. New York, 198 U.S. 45, 57 (1905) (finding maximum hour law for bakers not related to valid health or safety purpose), from which the era derives its name. Most of the additional substantive due process cases are discussed in CURRIE, *supra* note 62..

64. Substantive doctrines included the Takings Clause, *see, e.g.*, Pennsylvania Coal v. Mahon, 260 U.S. 393, 414-15 (1922) (holding requirement that coal be left in place to support surface to be a taking because it totally destroyed mineral owner's interest), the Contract Clause, *see, e.g.*, Central of Ga. Ry. Co. v. Wright, 248 U.S. 525, 527 (1919) (rejecting revocation of tax exemption granted by state charter as a violation of the Contract Clause), and the Equal Protection Clause, *see, e.g.*, Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 402 (1928) (holding limitation of tax on taxicab receipts to those operated by corporations violated equal protection). Structural doctrines included a narrow reading of the commerce power, *see, e.g.*, Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330, 362 (1935); Hammer v. Dagenhart, 247 U.S. 251, 272-73 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941); Adair v. United States, 208 U.S. 161, 179 (1908); Hopkins v. United States, 171 U.S. 578, 588 (1898); United States v. E.C. Knight Co., 156 U.S. 1, 12-13 (1895), and of other bases of federal authority. *See, e.g.*, United States v. Butler, 297 U.S. 1, 64 (1936); Bailey v. Drexel Furniture Co., 259 U.S. 20,

tively constitutionalized the laissez-faire jurisprudence of the common law.[65]

The *Lochner* era ended abruptly in 1937 with the famous "switch in time that saved nine," which marked the beginning of an era of liberal constitutional jurisprudence.[66] Since that time, the Court has routinely rejected challenges to economic regulation regardless of the substantive or structural provisions invoked to protect economic rights, by applying the deferential rational basis test.[67] Under this

---

39 (1922) (the Child Labor Tax Case); *see also* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 583 (invalidating income tax as violation of apportionment clause, U.S. CONST. art. I, § 9, cl. 4), *modified on reh'g*, 158 U.S. 601 (1895), *overruled by* South Carolina v. Baker, 485 U.S. 505 (1988). *But see* Missouri v. Holland, 252 U.S. 416, 434 (1920) (upholding legislation implementing treaty although provisions exceeded scope of commerce power). Likewise, in several celebrated cases the Court also invoked separation of powers to invalidate federal legislation. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935); *see also* Carter v. Carter Coal Co., 298 U.S. 238, 289-312 (1936) (relying on federalism, separation of powers, and due process to invalidate federal regulation of coal mining).

65. *See infra* notes 253-58 and accompanying text.

66. In a story familiar to most students of constitutional law, in the mid-1930s the Court struck down major pieces of New Deal legislation. *See Carter*, 298 U.S. at 317; *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 551; *Panama Ref. Co.*, 293 U.S. at 433. These decisions provoked President Franklin Roosevelt to advance the infamous "Court packing plan" which would have provided for the appointment of an additional justice for each sitting justice over the age of 70. The plan, recognized even by Roosevelt's supporters as a blatant power grab, proved to be unnecessary when Justice Roberts apparently switched his position and provided the crucial fifth vote to uphold economic regulation. Whether Justice Roberts' change of heart was a response to the plan (as is frequently assumed) remains unclear. *Compare* NOWAK & ROTUNDA, *supra* note 19, § 2.6, at 33 & n.16 (noting that Justice Roberts changed vote before announcement of the court packing plan), *with* Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 625 (1994) (arguing that Justice Roberts' pre-Court packing plan conversion was an historical fiction created by Justice Frankfurter to preserve the Court's legitimacy). In any event, the new "liberal" majority was soon consolidated through a series of Roosevelt appointments to the Court, which included Justices Black (1937), Reed (1938), Frankfurter (1939), Douglas (1939), Murphy (1940), and Jackson (1941). By 1941, seven of the nine justices were Roosevelt nominees, and the remaining two justices, Roberts and Chief Justice Stone, could be expected to uphold economic regulation.

67. This test has been applied to due process and equal protection challenges to economic regulation, *see, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937), was incorporated into the Court's Takings and Contract Clause analysis, *see, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (regulatory taking); *West Coast Hotel*, 300 U.S. at 391 (Contract Clause), and was also used to determine the scope of federal power, *see, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964); Katzenbach v. McClung, 379 U.S. 294, 304 (1964).

test, the government need only show that a measure is reasonably related to some conceivable legitimate purpose.[68]

Viewed against the background of the Court's longstanding disregard of economic rights, its recent decisions clearly demonstrate a renewed interest in the area. This development is not surprising in light of the conservative reconfiguration of the Court, which began during the presidency of Richard Nixon and took on an added urgency as part of the "Reagan Revolution" that transformed the political landscape during the 1980s.[69] Although these conservative justices did not expressly avow an aggressive jurisprudence of economic rights,[70] the deregulation of business and industry was an

---

68. *See, e.g., Carolene Products*, 304 U.S. at 152.

69. *See generally* LAWRENCE BAUM, THE SUPREME COURT 27-73 (4th ed. 1992) (describing politics surrounding the Supreme Court, including impact of Reagan and Bush appointments); CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 132-71 (1991) (memoir of Solicitor General under Reagan Administration); JOHN B. GATES, *supra* note 62, at 186-87 (describing implications of reconfiguration of the Supreme Court); DAVID M. O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 60-64 (1988) (analyzing and criticizing Reagan Administration judicial appointments); RICHARD L. PACELLE, JR., THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION 193-206 (1991) (discussing implications of Reagan-Bush appointments on the agenda of the Supreme Court); THE REAGAN LEGACY: PROMISE AND PERFORMANCE 60-101 (Charles O. Jones ed. 1988) (describing policies of the Reagan Administration, including judicial appointments); THE REAGAN PRESIDENCY: AN INCOMPLETE REVOLUTION? 68-93 (Dilys M. Hill *et al.* eds., 1990) (describing policies of the Reagan Administration, including judicial appointments); Colloquy, *Essays on the Supreme Court Appointment Process*, 101 HARV. L. REV. 1146 (1988) (collecting various views on the implications of Reagan Administration appointments and Bork controversy for the judicial selection process).

70. Since judicial restraint was emphasized as a criterion in the selection of these justices, *see infra* notes 84-92 and accompanying text, any public embrace of economic rights would have been problematic. Thus, for example, the slightest suggestion that Clarence Thomas believed in "natural law" or "natural rights" that might be invoked to protect economic interests provoked considerable outcry, *see, e.g.*, Linda Greenhouse, *The Thomas Hearings*, N.Y. TIMES, Sept. 11, 1991, at A1; David Margolick, *The Thomas Hearings—Sizing up the Talk of 'Natural Law': Many Ideologies Discover a Precept*, N.Y. TIMES, Sept. 12, 1991, at A22, although this feature of his confirmation has of course been largely forgotten in the wake of subsequent developments. Two Reagan nominees, Justice Scalia and Judge Robert Bork, were affiliated with the law and economics movement, and might therefore be expected to oppose economic regulation. In addition, a number of lower court judges nominated during this period were prominent conservative members of the law and economics movement, such as Judges Posner and Easterbrook on the United States Court of Appeals for the Seventh Circuit. More generally, Republicans are likely to oppose economic regulation, and Republican judicial appointments are likely to reflect that view.

important component of the conservative agenda.[71]

Conservative critics of the modern regulatory state attributed various domestic economic problems and the decline of the United States' economic power abroad to excessive government taxation and regulation that raised the costs of doing business and strangled the "entrepreneurial spirit" of American industry. The solution to this problem was, of course, to reduce taxes and remove unnecessary and intrusive regulation, relieving industry of significant burdens and enabling it to prosper again. Though this critique was leveled primarily against Congress and the regulatory agencies, when viewed in conjunction with the law and economics[72] and public choice movements[73] it also has significant implications for the courts.

---

71. *See generally* Joseph J. Hogan, *Reaganomics and Economic Policy*, in THE REAGAN PRESIDENCY, *supra* note 69, at 135-60 (describing Reagan Administration efforts to deregulate the economy); Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 CORNELL L. REV. 280 (1990) (arguing that the success of the deregulation movement demonstrates the limits of public choice theory).

72. The law and economics movement seeks to bring the insights of economics into the analysis of legal rules. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992) (applying law and economics theory to various areas of substantive law). While law and economics is not inherently conservative, *see, e.g.*, ROBIN P. MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 67-73 (1990), the most influential branch of the movement is premised on the superiority of market forces, which are generally reinforced by the common law, as a mechanism for maximizing aggregate social welfare by producing the optimal allocation of resources. Under this view, regulation is appropriate only where market defects, such as imperfect information or externalities, require correction. Insofar as law and economics is only a descriptive theory, it offers no normative critique of redistributive efforts. But implicit in the economic model is the conclusion that redistribution reduces total societal welfare by skewing incentives and thereby diverting resources from their most productive uses. *See, e.g.*, SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, REGULATORY LAW AND POLICY 55 (1993). Moreover, conservative adherents to the law and economics movement view the situations in which market imperfections justify regulation as relatively rare, emphasizing that government intervention is both imperfect and creates costs of its own. This opposition to regulation rests on the premise that the redistributive effects of regulation produce inappropriate incentives that divert resources from their most socially desirable uses and thus reduce aggregate social welfare.

73. The public choice movement applies the tools of economics to the legislative process. *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962) (advancing public choice theory and describing its implications for political theory); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991) (describing and critiquing public choice theory); WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS (1962) (describing public choice theory); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 44 (1991) (arguing that, even if correct, public choice theory does not provide a basis for heightened judicial scrutiny of regulatory measures); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 288 (1992) (using public choice theory to analyze takings issues); Daniel A. Farber & Philip

While not all proponents of economic analysis and public choice theory agree regarding the implications of these insights for the constitutional jurisprudence of economic rights,[74] it should be clear

---

P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 879 (1987) (describing public choice theory and considering its implications for legal theory); Herbert Hovenkamp, *Legislation, Well-being, and Public Choice*, 57 U. CHI. L. REV. 63, 85 (1990) (criticizing public choice theory and defending traditional welfare economics); Kahn, *supra* note 71, at 286 (arguing that success of deregulation demonstrates flaws in public choice theory); Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227 (1986) (arguing that interpreting statutes to effectuate their purported public interest goals is an effective means of limiting the influence of special interests); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 5 (1991) (arguing that public choice theory does not adequately describe legislative process and products, and offering comprehensive rationality model as a superior alternative theory of the legislative process); Symposium, *Positive Political Theory and Public Law—Part II*, 80 GEO. L.J. 1737 (1992) (collecting papers on implications of public choice theory for legal analysis); *Symposium on Public Choice and the Judiciary*, 1990 B.Y.U. L. REV. 729 (collecting papers analyzing the implications of public choice theory for judicial behavior); *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988) (collecting papers on implications of public choice theory for legal analysis).

In the view of public choice theorists, political actors (whether in Congress or the bureaucracy) are not motivated in their regulatory decisions, by some overarching view of the public good, but rather by personal incentives such as securing reelection, advancing within the bureaucracy, and developing post-government career opportunities. From this perspective, the regulation that emerges from the legislative and administrative process is directed towards helping particular constituencies that in turn advance the interests of the decisionmaker through campaign contributions, promotions, or the infamous revolving door between industry and government. In the view of public choice theorists, Arrow's theorem and other problems of group action prevent the electoral process from reflecting and enforcing the "public" interest, assuming the concept of the public interest is meaningful at all. *See generally* TOWARD A THEORY OF THE RENT SEEKING SOCIETY (James M. Buchanon et al. eds., 1980) (collecting papers analyzing this phenomenon). Under this view, regulation purportedly in the public interest is in fact preferential treatment of powerful interests, and the resources spent on favorable regulation (rent seeking) constitute a dead-weight loss. *Id.* Resources spent pursuing monopoly rents or other redistributive regulation are diverted from productive activities and thus are wasted. This view assumes that redistribution cannot increase aggregate social welfare, but that assumption is not invariably correct. Even accepting the assumptions of economics, redistribution may increase aggregate social welfare because of the decreasing marginal utility of money, *see* BUCHANAN & TULLOCK, *supra*, at 192-94 (explaining unemployment insurance in these terms), and when it addresses public goods problems, *see infra* notes 462-64 and accompanying text.

74. *Compare, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (arguing that courts should construe regulatory measures to enforce the interest group bargains they reflect), *with, e.g.*, Macey, *supra* note 73, at 227 (arguing that courts should construe regulatory measures in light of the public interest they purport to serve), *and, e.g.*, Epstein, *supra* note 15, at 747 (arguing for activist judicial review of economic regulation); *see also* Elhauge, *supra* note 73, at 48 (arguing that even if accurate, interest group theory does not justify aggressive judicial review); Bernard Grofman, *Public Choice, Civil Republicanism, and American Politics: Perspectives of a "Reasonable Choice"*

that these views challenge the post-New Deal deference to economic regulation.[75] They posit the laissez-faire common-law system as economically superior to extensive government regulation and are highly skeptical of the supposedly "public" purposes advanced to support economic regulation. Thus, many proponents of economic analysis and public choice theory advocate a more aggressive judicial posture respecting regulatory measures that burden economic rights.[76]

2. The Problem of Judicial Restraint

Although the deregulation strand of conservative thought supports a reinvigoration of economic rights, the Court could not openly pursue such a goal because of the second strand of conservative theory—judicial restraint.[77] At the same time that conservatives criticized the modern regulatory state made possible by the repudiation of economic rights, they also criticized judicial activism on behalf of individual rights.[78] Although the liberal Court rejected the

---

Modeler, 71 TEX. L. REV. 1541, 1571 (1993) (same). This entire debate reflects an internal inconsistency on the part of public choice theorists—to the extent that political actors, including judges, are motivated by material benefits, "there is no point in addressing scholarly arguments to them at all." Edward L. Rubin, *Public Choice in Practice and Theory*, 81 CAL. L. REV. 1657, 1670 (1993).

75. *See* FARBER & FRICKEY, *supra* note 73, at 63-87.

76. *See, e.g.*, ECONOMIC LIBERTIES AND THE JUDICIARY (James A. Dorn & Henry G. Manne eds., 1987) (collecting papers in support of strong protection of property and contract rights); PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 181-205 (Jones D. Gwartney & Richard E. Wagner eds., 1988); Bernard H. Siegan, ECONOMIC LIBERTIES AND THE CONSTITUTION 248-331 (1980).

77. This term, while frequently used, is at best poorly defined. In its most general sense, it means respect for the limits of the judicial function, but what that respect implies for constitutional decisionmaking is the subject of considerable disagreement. At the very least, judicial restraint has policy and institutional components. The policy component requires that judges refrain from imposing their policy preferences in the name of law, and (implicitly) that judges must ground their decisions on some external source. Most conservative proponents of judicial restraint emphasize the text or history of the Constitution, and perhaps precedent, as the proper sources of judicial decisions. Implicit in the policy component of judicial restraint is the institutional component, which requires that judges respect their institutional limitations and the prerogatives of more democratically accountable political institutions. It is frequently assumed, but not necessarily true, that these two components of restraint coincide. *See* Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 348 (1989). For purposes of this article, it is not necessary to define the concept of judicial restraint with precision.

78. Not all conservatives subscribe to both views. *See supra* note 5. Indeed, one might attribute the great political success of Ronald Reagan to his unique ability to bring these two views together, and the ultimate failure of George Bush's reelection bid to his failure to do so.

Lochner-era jurisprudence of economic rights as improper judicial activism, it eventually engaged in judicial activism of its own on behalf of various individual rights.[79] Culminating in the 1960s under the Warren Court, the liberal jurisprudence of individual rights established constitutional safeguards in areas such as freedom of expression and religion,[80] criminal procedure,[81] equal protection,[82] and the unenumerated right of privacy.[83]

---

79. These developments began in 1938 with the suggestion in the famous footnote four of *Carolene Products* that the presumption of rationality afforded economic regulation might not apply in certain classes of cases involving individual rights. *See* United States v. Carolene Prods., 304 U.S. 144, 152-53 n.4 (1938). The World War II period and the Eisenhower presidency can hardly be described as a time of liberalism in society generally, but the Court handed down some highly significant liberal decisions, such as Brown v. Board of Educ., 347 U.S. 483 (1954), and Skinner v. Oklahoma, 316 U.S. 535 (1942), during that time. Moreover, Eisenhower was responsible for the appointment of both Earl Warren and William Brennan, who proved to be strong liberal voices.

80. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (per curiam) (holding that a state could not punish advocacy of illegal conduct absent showing that speech was intended to incite imminent unlawful conduct and likely to cause such conduct); New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (holding that a state could not allow public figure to recover for libel absent showing of "actual malice"); Engel v. Vitale, 370 U.S. 421, 425 (1962) (holding that voluntary nondenominational prayer in public schools violates requirement of separation of church and state).

81. The most prominent feature of this development was the Court's *Miranda* decision requiring police to advise suspects of the right to remain silent and the right to have counsel present during questioning. *See* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966). Other areas included aggressive application of the Fourth Amendment's protection against unreasonable searches and seizures, *see, e.g.*, Mapp v. Ohio, 367 U.S. 643, 660 (1961), the Sixth Amendment's right to counsel, *see, e.g.*, United States v. Wade, 388 U.S. 218, 236-37 (1967); Gideon v. Wainwright, 372 U.S. 335, 344 (1963), and the application of the Eighth Amendment's prohibition of cruel and unusual punishment to limit the death penalty, *see* Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam), and to require minimum standards for prison conditions, *see* Hutto v. Finney, 437 U.S. 678, 685-88 (1978).

82. The Court became dissatisfied with the pace of desegregation in the public schools after *Brown*, cracking down on delaying tactics employed to avoid desegregation, *see, e.g.*, Griffin v. County Sch. Bd., 377 U.S. 218, 233-34 (1964); Cooper v. Aaron, 358 U.S. 1, 14-17 (1958), and approving broad remedial powers for the federal courts, including the power to order busing, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29-31 (1971) (upholding busing as remedy for past segregation in public schools). The Court also began to treat classifications other than race, including gender and illegitimacy, as subject to higher forms of scrutiny. *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion) (gender); Levy v. Louisiana, 391 U.S. 68, 72 (1968) (illegitimacy). Finally, the Court used the Equal Protection Clause to protect substantive rights, such as the right to travel, Shapiro v. Thompson, 394 U.S. 618, 629-33 (1969), the right of access to courts, Griffin v. Illinois, 351 U.S. 12, 16-19 (1956) (plurality opinion), and the right to vote, Reynolds v. Sims, 377 U.S. 533, 556 (1964).

83. Griswold v. Connecticut, 381 U.S. 479, 482-86 (1965). It was, of course, the right of privacy that formed the basis of Roe v. Wade, 410 U.S. 113, 153 (1973).

This judicial activism became a target for conservative critics who charged the Court with improperly substituting its view of sound social policy for that of politically accountable institutions.[84] The judicial restraint critique, which tied into a broader emphasis on traditional values,[85] figured prominently in the Reagan revolution. Relying on this critique to further their political goals, Presidents Reagan and Bush tried to appoint judges and justices committed to judicial restraint and who would not "legislate from the bench."[86]

The theoretical corollary of this judicial restraint critique is the originalist school of constitutional interpretation.[87] This view, propounded most publicly by then Attorney General Edwin Meese and Judge Robert Bork,[88] argues that the courts may invalidate

---

84. *See generally* Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 640-43 (1990) (describing association of judicial restraint with conservative ideology as a response to liberal judicial decisions).

85. Many conservatives attributed social ills such as the rise in single parent households, crime and drug abuse, political and racial unrest, and the proliferation of pornography and promiscuity to the breakdown of traditional institutions and values, such as the family, religion, patriotism, and respect for law. These critics placed responsibility for these social problems on the "liberal establishment," which undermined these traditional values and promoted "moral relativism." While this critique was directed primarily at social and political institutions, it also encompassed Supreme Court decisions that invoked constitutional rights to limit society's ability to enforce these values through law. *See generally* Robert H. Bork, Tradition and Morality in Constitutional Law, Francis Boyer Lecture on Public Policy, delivered before the American Enterprise Institute for Public Policy Research 2-6 (1984) (arguing that communities should be entitled to suppress moral harms as well as economic and physical ones); Kenneth L. Karst, *Faiths, Flags, and Family Values: The Constitution of the Theater State*, 41 UCLA L. REV. 1 (1993) (arguing that judges should fight the use of government power to exclude certain groups). An excellent example of this critique is George Wallace's contention that the Supreme Court's school prayer decisions had caused the rise in drug abuse and other crimes. *See* BAUM, *supra* note 69, at 227.

86. *See* authorities cited *supra* note 69.

87. The literature advancing and critiquing various forms of originalism is far too extensive to detail here. For illustrative works supportive of originalism, see RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Earl Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811 (1983); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); *see also* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988) (defending originalism against commonly advanced criticisms). *See generally The Federalist Society Sixth Annual Symposium on Law and Public Policy: The Crisis in Legal Theory and the Revival of Classical Jurisprudence*, 73 CORNELL L. REV. 281 (1988) (collecting papers discussing originalism).

88. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5 (1988). For critical reviews of Judge Bork's book, see Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419 (1990); Lyle Denniston,

action by politically accountable institutions only when the text and history of the Constitution clearly reveal that the action is contrary to the framers' original intentions. In its most extreme form, this school of thought rejects any extension of constitutional rights beyond those clearly articulated in the text of the Constitution or otherwise shown to have been specifically contemplated by the framers. To be sure, few argued for such an extreme brand of originalism, but the absence of an originalist foundation provided the basis for a conservative challenge to the liberal jurisprudence of individual rights.

The conservative Court followed this lead, relying on judicial restraint to restrict individual rights,[89] although the outright reversal of Warren Court precedents foreseen by many has not occurred.[90] The Court has emphasized both its institutional incompetence to dictate social policy or second-guess the outcome of the political process and the need to identify a clear constitutional mandate before the judiciary intervenes.

This highly public political and judicial commitment to judicial restraint made any attempt to reinvigorate economic rights problematic. It does not take a particularly astute observer to recognize the tension between the emphasis on judicial restraint that accompanied the appointment of conservative justices and any systematic reinvigo-

---

The Tempting of America: The Political Seduction of the Law, 88 MICH. L. REV. 1291 (1990); Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657 (1990).

89. The secondary literature describing this retreat has been largely critical. *See, e.g.*, RUSSELL W. GALLOWAY, JUSTICE FOR ALL? THE RICH AND POOR IN SUPREME COURT HISTORY, 1790-1990 168-79 (1991); DAVID O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 51-64 (3d ed. 1993); David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790 (1991); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 282-318 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1991); Suzanna Sherry, *Issue Manipulation by the Burger Court: Saving the Community from Itself*, 70 MINN. L. REV. 611 (1986); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369 (1991); Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 43-60, 79-106 (1990).

90. Most obviously, although *Roe* was a prime target of Presidents Reagan and Bush, and its life expectancy seemed quite short after Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), the Court ultimately reaffirmed *Roe* in greatly narrowed form in Planned Parenthood v. Casey, 112 S. Ct. 2791, 2803-16 (1992). The Court has followed a similar pattern in other areas as well, narrowing but not directly overruling leading Warren Court precedents. *See, e.g.*, Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1441-48 (1987). In addition, the Court has consistently refused to recognize new fundamental rights or expand previously recognized ones. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 190-96 (1986) (refusing to recognize fundamental right of consenting adults to engage in private homosexual activity).

ration of economic rights.[91] To avoid charges of hypocrisy, the Court had to differentiate enhanced economic rights protections both from the substantive due process of the discredited *Lochner* era and from the liberal jurisprudence of individual rights.[92]

Conservatives might argue that, although there is no strictly originalist justification for a broad economic rights doctrine, the textual and historical foundation for economic rights is stronger than for other types of individual rights. Such an approach, however, is problematic for several reasons. First, such a "relative" justification for intervention would not be sufficient to overcome the conservatives' high-profile political condemnation of judicial activism in the 1980s, particularly in the eyes of the general public. Second, the *Lochner* era has been so thoroughly discredited and so closely associated with "improper" activism that it would be impossible to characterize invalidation of economic legislation—in the absence of a strict textual or historical justification—as restrained. Finally, such a justification for economic rights effectively concedes the legitimacy of the liberal individual rights methodology, and therefore would reduce the conservative critique of individual rights decisions to a mere quibble over how that methodology was applied in a given case.

C. *An Originalist Escape?*

The conservative Court therefore sought to rest economic rights

---

91. *See, e.g.*, ELY, *supra* note 47, at 154 ("Although the current justices are far more concerned with property rights than their liberal predecessors, [federalism and judicial restraint] components of their judicial outlook will constrain the Court's review of economic legislation."); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 829-32 (1986) (arguing that economic rights activism on the basis of political or economic theory is inconsistent with proper judicial role of determining original intent); Stephen Macedo, *Majority Power, Moral Skepticism, and the New Right's Constitution*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY, *supra* note 76, at 111-36 (criticizing the original intent jurisprudence of the "new right" and proposing "principled judicial activism" respecting economic rights). *See generally* Maltz, *supra* note 84, at 650-67 (arguing for a revival of conservative judicial activism).

92. Other aspects of the Court's recent jurisprudence, particularly its treatment of affirmative action, have evoked strong criticism as inconsistent with the Court's confessed commitment to judicial restraint. *See, e.g.*, Chang, *supra* note 89, at 794; Klarman, *supra* note 89, at 315; Sherry, *supra* note 89, at 611-12. Of course, it is unclear whether such criticism actually constrains judicial decisions, and I do not mean to suggest that judges respond directly to academic criticism, particularly if it reflects underlying ideological differences. Nonetheless, judges are concerned with their reputations among legal circles both present and future, and criticism—especially concerning intellectual honesty and craft—has a significant impact on that reputation. *See generally* POSNER, *supra* note 72, at 534 (citing "professional criticism" as an example of the "mild" penalties for unsound judicial decisionmaking).

on an originalist foundation.[93] The pattern of the last two decades is just what one might expect from a Court seeking to enhance economic rights without creating an obvious inconsistency with its reliance on judicial restraint to narrow individual rights decisions. The Court has experimented with various doctrines that provide a plausible originalist basis for judicial intervention, but has scrupulously avoided substantive due process. Because text and history support only a narrow range of economic rights under these doctrines, however, the Court was forced to retreat.

The most obvious consequence of the conservative commitment to judicial restraint is that the Court cannot resurrect substantive economic due process or anything that too closely resembles it. Because the *Lochner* era reliance on due process has come to epitomize improper activism, any use of due process as a source of economic rights would reveal the Court's ostensible commitment to judicial restraint as self-serving rhetoric. Likewise, reliance on the Due Process Clause is foreclosed by the conservative critique of unenumerated individual rights, such as the right of privacy. Thus, it is unsurprising that the Court has broadly rejected economic rights claims based on due process.[94]

A good example of the Court's desire to avoid reliance on substantive economic due process is *Industrial Union Department, AFL-CIO v. American Petroleum Institute (Benzene)*.[95] The *Benzene* plurality construed the Occupational Safety and Health Act to require that OSHA demonstrate a "significant risk" to health or safety before imposing regulations limiting worker exposure to chemicals.[96] The plurality reasoned in part that a grant of administrative authority to impose tremendous costs on industry with little or no discernable benefit might be unconstitutional under the nondelegation doctrine.[97] This cost-benefit analysis is more consistent with substantive economic due process than the nondelegation doctrine, which is concerned with whether Congress has provided an "intelligible principle" to guide and

93. Justice Scalia, for example, has advocated originalism and criticized broad-based economic rights activism, *see* Antonin Scalia, *Economic Affairs as Human Affairs*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY, *supra* note 76, at 33-37, but he has taken an aggressive position with respect to application of the Takings Clause, *see supra* note 51.

94. *See supra* notes 57-61 and accompanying text.

95. 448 U.S. 607 (1980) (plurality opinion).

96. *Id.* at 653.

97. *Id.* at 646.

control agency discretion.[98] Thus, the Court distorted the nondelegation doctrine to effectuate substantive economic due process principles, apparently because it could not embrace those principles directly.

The Court's exploration of other economic rights doctrines also can be readily understood as the search for a doctrinal basis to safeguard economic rights that would not create an obvious conflict with its commitment to judicial restraint. First, it is not surprising that of the possible doctrinal alternatives to substantive economic due process, the Equal Protection Clause would receive the least attention. Although equal protection escaped some of the ignominy associated with substantive due process, the Court's post-New Deal jurisprudence treated due process and equal protection challenges to economic regulation identically.[99] More importantly, perhaps, the Equal Protection Clause has been a centerpiece of the liberal individual rights jurisprudence that conservatives characterize as improper judicial activism.[100] Heavy reliance on the Equal Protection Clause to protect economic rights would thus be impossible to reconcile with the conservative critique of individual rights.[101]

Second, the use of structural constraints, especially separation of powers, makes sense in terms of this analysis. Although separation of powers constraints had been relaxed in the wake of the New Deal, unlike substantive due process, they were never expressly repudiated.[102] Moreover, the Court could claim a textual or originalist

---

98. For example, a clear legislative directive to impose great costs with no discernible benefits would present no nondelegation issue, even if it were unconstitutional on other grounds. For further discussion of this criticism of *Benzene*, see Levy & Glicksman, *supra* note 77, at 379-82.

99. Both doctrines employed an extremely deferential rational basis test. *See supra* note 67 and accompanying text. Until recently, only one post-New Deal case had invalidated economic regulation on equal protection grounds (absent a suspect classification or fundamental right), *see* Morey v. Doud, 354 U.S. 457, 465-69 (1957), and the Court later expressly overruled that case, City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (per curiam).

100. *See supra* note 82.

101. There is no apparent textual or historical basis for distinguishing economic from other individual rights for purposes of equal protection scrutiny. While it has been argued that the historical meaning of the Fourteenth Amendment was limited to the protection of rights listed in the Civil Rights Act of 1866, which included the economic rights to own property, make and enforce contracts, and sue or be sued, *see, e.g.*, BERGER, *supra* note 87, at 20-36, a strict historical reading would logically confine the clause to protecting racial minorities, thus preventing its use as a broad-based tool for protecting economic rights.

102. The post-New Deal Court continued to recognize the nondelegation doctrine, for example, but consistently distinguished *Panama Refining* and *Schechter Poultry* and upheld legislation against nondelegation challenges. *See, e.g.*, Yakus v. United States, 321 U.S.

foundation for separation of powers limitations in at least some cases.[103] Separation of powers constraints may also have been an attractive means for protecting economic rights precisely because they do not involve a "rights"-based analysis at all, a fact that deflects comparisons between the two types of decisions.[104]

While structural constraints presented an attractive originalist escape, they did not provide an adequate foundation for a jurisprudence of economic rights, and the Court was forced to retreat. Separation of powers and federalism are clearly part of the intended structure of the Constitution, but there is little textual or historical justification for a strict application of either structural doctrine to impose dramatic constraints on federal regulatory authority.[105] The textual provisions regarding separation of powers are relatively scant, and hardly permit extrapolation to the implementation of economic regulation by administrative agencies, given that none existed in 1787.[106] Thus, although a few constraints on administrative structures can be readily justified in originalist terms,[107] there is no historical foundation to require strict separation of powers in all

---

414, 423-27 (1944). Cases imposing limits on federal authority, however, were expressly repudiated. *See, e.g.*, United States v. Darby, 312 U.S. 100, 116 (1941). It is thus unsurprising that the Court's activity in the federalism area has been cautious and quite limited. *See supra* notes 25-29 and accompanying text.

103. The concern for textual or historical justifications for judicial constraints on government action may also explain the Court's emphasis on the intent of the framers in New York v. United States, 112 S. Ct. 2408, 2421-23 (1992), which invoked federalism to invalidate provisions of a federal statute requiring states to comply with its mandate to create low-level radioactive waste-disposal facilities or "take title" to the waste at the request of those who produce it. This historical justification is seriously flawed, however. *See* Levy, *supra* note 28, at 515-22.

104. Of course, this feature also may render separation of powers constraints less desirable to conservatives as a means of protecting economic rights, for at least two reasons. First, in some circumstances imposition of structural constraints might adversely affect economic rights by limiting agency discretion not to regulate or to deregulate. *Cf.* Levy & Glicksman, *supra* note 77, at 422 n.419 (criticizing Judge Bork's use of *Benzene* analogy to expand agency discretion not to regulate in NRDC v. EPA, 824 F.2d 1146 (D.C. Cir. 1987) (en banc)). Second, insofar as structural constraints do not depend on traditional common-law baselines, they would also protect welfare and other affirmative rights. *See infra* part III.B.1.

105. Alternatively, if structural constraints were read absolutely, they would require the complete dismantling of modern government. *See infra* part II.B.1.

106. *See generally* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578-80, 667-69 (1984) (arguing against strict, formalistic application of separation of powers).

107. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 944-59 (1983) (relying on text and framers' intent to invalidate the legislative veto).

cases.[108] Federalism limits are also difficult to justify in strictly originalist terms. While the framers clearly contemplated that the scope of federal power would be limited by the enumeration of powers and the reservation of other powers to the states, this understanding was not codified in the form of any express reservation of a certain "core" of sovereign powers to the state.[109]

Third, we may understand the Court's exploration of the Contract Clause as part of the search for an originalist escape. The clause offers a plausible textual basis for judicial intervention that apparently reconciles economic rights with principles of judicial restraint. Because it is separate from the Due Process and Equal Protection Clauses, moreover, the use of the Contract Clause to enhance protection of economic rights does not conflict directly with the conservative critique of the liberal individual rights jurisprudence.[110]

But the Contract Clause provides neither adequate textual nor strong historical support for a broad restriction on state regulatory authority.[111] Although it expressly prohibits any law "impairing the obligation of contract," that phrase is not self-defining. The Court must decide what constitutes an impairment and what is meant by the obligation of contract.[112] Given this ambiguity, an originalist would

---

108. Thus, for example, Justice Scalia's dissenting opinions in both Morrison v. Olson, 487 U.S. 654, 697-734 (1988), and Mistretta v. United States, 488 U.S. 361, 413-27 (1984), required him to go beyond a strictly historical view of separation of powers and rely on his own interpretation of the constitutional structure of government. In *Morrison*, for example, Justice Scalia emphasized the "unitary" executive and argued that (outside of impeachment) the President must have absolute control over the decision to prosecute members of the executive branch. *Morrison*, 487 U.S. at 727-32 (Scalia, J., dissenting). He offers little support for this view, whose originalist foundations have been strongly challenged. *See* Laurence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 12-85 (1994).

109. *See generally* Levy, *supra* note 28, at 515. The Court's effort in New York v. United States, 112 S. Ct. 2408 (1992), to justify in historical terms a Tenth Amendment restriction on federal power to compel states to implement federal policy was seriously flawed. *See* Levy, *supra* note 28, at 515-22.

110. To the extent that previous law had essentially conflated due process, equal protection, Contract Clause, and takings analyses by incorporating the rational basis test into the inquiry under each provision, *see supra* note 67, it would be necessary for the Court to separate the analysis under the Contract Clause. *See infra* note 176 and accompanying text.

111. It is also worth noting that the Contract Clause does not apply to federal regulation, which would leave a gaping loophole in any jurisprudence based on the Contract Clause.

112. For example, one could plausibly argue that only laws rendering contracts unenforceable "impair the obligations of contracts." *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1550 (2d ed. 1991) ("In a number of early cases the Court

turn to evidence of the framers' understanding to determine the meaning of the clause. The search would reveal that the framers wanted to prevent states from enacting debtor-relief laws, but would unearth little definitive evidence of any expectation that the clause would broadly prevent economic regulation adversely affecting contractual interests.[113] Thus, as in the case of the structural constraints, aggressive application of the Contract Clause in a broad range of cases would require the Court to intervene in situations not compelled by either text or clear evidence of original intent.[114]

The Court's current fascination with the Takings Clause represents its latest and most far reaching effort to construct an economic rights jurisprudence on originalist foundations. Like the Contract Clause, the Takings Clause provides a textual basis for economic rights decisions that separates it from both Lochnerian substantive due process and modern individual rights decisions. But like the Contract Clause, this originalist foundation will, I believe, ultimately prove to be inadequate for a coherent jurisprudence of economic rights.[115]

---

struggled with the issue of whether particular measures were 'regulations' interfering with remedies, or genuine impairments of contractual obligations."); *see also* Epstein, *supra* note 15, at 708 (listing six interpretive issues).

113. Even Professor Epstein, for example, concedes that "the detailed history of the drafting and ratifying conventions is of little use in resolving the specific interpretive questions that have subsequently arisen." Epstein, *supra* note 15, at 708. Indeed, Professor Epstein comes to differing conclusions about the implications of this history for the scope of the Contract Clause than did the author on whom he relies for historical information. *See id.* at 707 ("There is of course no guarantee that this brief sketch captures the mood of the framers any better than its rival, which treats the clause as a provision of minor importance.") (citing BENJAMIN F. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 243 (1938); Note, *A Process-Oriented Approach to the Contract Clause*, 89 YALE L.J. 1623, 1626-27 (1980)).

114. *See supra* notes 105-09 and accompanying text.

115. One seldom remarked-upon originalist difficulty is that the clause does not itself apply to the states, but rather was the first provision incorporated into the Due Process Clause of the Fourteenth Amendment. *See* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 233-41 (1897) (holding that just compensation requirement applies to the states through the Due Process Clause). Some originalists conveniently ignore the fact that the Fifth Amendment's Takings Clause is inapplicable to the states and the Fourteenth Amendment's Due Process Clause does not contain a takings provision, and the logical inference that the Fourteenth Amendment does not require states to compensate for takings. *See, e.g.*, Bork, *supra* note 91, at 829 ("The fifth and fourteenth amendments prevent either the federal or any state government from taking private property for public use without paying just compensation." (citing U.S. CONST. amends. V, XIV, § 1.)). Not all originalists agree with Raoul Berger's rejection of the incorporation of Bill of Rights provisions via the Due Process Clause of the Fourteenth Amendment, *see* BERGER, *supra* note 87, at 134-65, but incorporation recognizes that due process has a substantive component. This conclusion is difficult to reconcile with the language of the

This is particularly true for regulatory takings. While the term "taking" can easily include physical invasions (perhaps even those in which the government itself does not acquire possession), its ordinary meaning would not seem to encompass use restrictions that merely diminish value.[116] Nor have advocates of an aggressive regulatory takings jurisprudence advanced any clear evidence that the framers intended to construct an elaborate regime of regulatory takings,[117] as opposed to requiring compensation when the government exercised its eminent domain or equivalent powers to condemn property. The lack of an originalist foundation may explain the inconsistent results in the takings cases. The Court cannot move quickly and aggressively in the takings area because the entire regulatory takings jurisprudence is, in a sense, precisely the kind of reasoning based upon broad inferences of constitutional intent divorced from express language or explicit history that is anathema to originalists.[118] Thus, the leading decisions, such as *Lucas* and *Nollan*, employ potentially limited

---

Due Process Clause, *but see* Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 983-1005 (arguing that due process was understood to have a substantive component at the time the Fifth Amendment was adopted), and is the foundation for liberal individual rights jurisprudence.

116. While Justice Scalia argued in *Lucas* that, contrary to earlier versions of the Takings Clause, its text "can be read to encompass regulatory as well as physical deprivations," Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 n.15 (1992), this is a difficult stretch. The first definition of "to take" in my office dictionary is "[t]o get into one's possession by force, skill, or artifice." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1239 (2d ed. 1982). Not all definitions of "take" necessarily include the acquisition of possession, but in its ordinary usage "take" implies acquisition of possession, something that does not typically occur (except in a metaphysical sense) in "regulatory takings" cases involving use restrictions. More importantly, even if the text of the clause can include regulatory takings, originalism would require specific historical evidence of the framers' intent to justify judicial intervention in the face of ambiguous language.

117. Indeed, what historical evidence there is suggests that the framers did not expect regulatory measures to come within the purview of the Takings Clause. *See, e.g.*, *Lucas*, 112 S. Ct. at 2915 (Blackmun J. dissenting); Note, *Origins*, *supra* note 47, at 708-15; Note, *Taking Back Takings*, *supra* note 47, at 917-18. Even Justice Scalia conceded in *Lucas* that "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." *Lucas*, 112 S. Ct. at 2900 n.15. Thus, Professor Epstein must rely on a purpose-oriented constitutional defense of his theories, *see* EPSTEIN, *supra* note 47, at 19-31, an approach that would be unacceptable to a strict originalist.

118. The ultimate question is the level of generality at which one finds evidence of original intent sufficient to justify judicial intervention. When criticizing liberal activist judicial decisions, originalists typically demand evidence that the framers understood that a specific type of measure would be unconstitutional; but they often do not demand the same sort of specificity when discussing decisions with which they agree. *See, e.g.*, Dworkin, *supra* note 88, at 668-69; Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1341-43 (1992) (citing penumbral reasoning in the Eleventh Amendment context).

rationales that can be tied to a more originalist understanding of the Takings Clause.[119]

The foregoing discussion is, of course, not a definitive treatment of original intent with respect to structural constraints, the Contract Clause, or takings analysis, and I do not mean to argue that activism under these doctrines is fundamentally opposed to the framers' expectations or that it is impossible to find a textual or historical justification for economic rights activism. Rather, the discussion is meant to suggest that one cannot simplistically conclude that, because there is some textual and historical support for judicial intervention under these doctrines, economic rights activism is more justified than individual rights activism, which also has some textual and historical support.[120]

In short, the effort to find an originalist escape has failed. None of the doctrines explored by the Court provide a solid originalist foundation for a broad reinvigoration of economic rights. Unable to construct an originalist jurisprudence of economic rights, the Court has largely retreated from the implications of its initial decisions in each doctrinal area. The search for originalist escapes not only has failed on its own terms, however, but also has prevented the Court from developing an alternative analysis that can bring coherence to the area of economic rights. Because the Court's commitment to judicial restraint required it to seek an originalist escape, the Court was prevented from confronting two underlying problems that transcend specific doctrinal areas to produce confusion throughout the jurisprudence of economic rights. First, as will be developed in part II, the Court could not dismantle the dichotomy between economic and other individual rights by integrating economic interests into a comprehensive theory of rights. Second, as will be discussed in part III, the Court has been unable to find a satisfactory solution to the

---

119. The use in *Lucas* of a per se rule that attaches when there is a complete destruction of economic value is much easier to square with the language of the Takings Clause than would be a holding that broadly embraces heightened scrutiny of regulatory purposes in every regulatory takings case. *See infra* part II.C.2. Such complete destruction of use is closely analogous to physical interference with possession, and the recognition of physical interference as a taking has a long jurisprudential pedigree, *see* Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 179-80 (1871), which has been referred to approvingly by even such a formalist as Professor Currie, *see* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, 353 (1985). Similarly, *Nollan* emphasizes the affinity to a physical invasion as a partial justification for applying aggressive scrutiny to the government action in question. *See infra* note 207 and accompanying text.

120. *See, e.g.*, Riggs, *supra* note 115.

problem of defining the baseline against which economic and other individual rights are measured.

II. ORIGINALIST ESCAPES AND THE DICHOTOMY OF RIGHTS

Although the value of economic rights lies in their contribution to individual and societal well-being,[121] the jurisprudence of constitutional rights since the New Deal has been characterized by the dichotomous treatment of economic and other individual rights. Although this dichotomy originated with the liberal jurisprudence of an earlier era, the search for an originalist escape has prevented the conservative Court from dismantling the dichotomy and placing economic rights into a broader jurisprudence of constitutional rights. In the absence of an underlying theory of economic rights, the reinvigoration of economic rights was impossible to control in a coherent fashion. Unwilling to accept the far-reaching implications of its initial decisions in these doctrinal areas, the Court has been forced to retreat. The result has been doctrinal confusion and little additional protection for economic rights.

A. The Economic/Individual Rights Dichotomy in Constitutional Jurisprudence

While the economic rights central to the substantive due process of the *Lochner* era were accorded almost no protection under liberal jurisprudence, certain other rights received special consideration. This special protection was usually based on some combination of text, political-process theory, and fundamental rights analysis, but these rationales are equally powerful justifications for aggressive scrutiny of economic rights.[122] Applied to economic rights, they could draw considerable strength from the economic analysis and public choice movements within conservative theory. But while the conservative Court might have embraced political process and fundamental rights analysis to integrate economic rights into the jurisprudential edifice erected by its liberal predecessor,[123] the rhetorical commitment to

---

121. *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (Stewart, J.) ("Property does not have rights. People have rights.")

122. *See, e.g.*, TRIBE, *supra* note 18, at 1373-74 n.3.

123. When necessary to avoid confusion throughout the remainder of this Article, I will use the term "conservative Court" when referring to the Supreme Court after the reconfiguration of the Court through the appointment of conservative justices began to take hold, and "liberal Court" when referring to the Supreme Court from about 1937 until its recent reconfiguration. This terminology is used for convenience and in full recognition that the Court has never been, and is not now, either uniformly conservative or uniformly

judicial restraint and the desire to limit individual rights precedents prevented it from doing so.

1. The Rights Dichotomy and Liberal Jurisprudence

Even as the liberal Court rejected the substantive economic due process of the *Lochner* era by adopting the deferential rational basis test for economic rights, it indicated in the famous footnote four of *United States v. Carolene Products*[124] that the judicial deference accorded economic regulation might not apply where government action engages the explicit protections of the Bill of Rights, distorts the political process, or burdens discrete and insular minorities. Building on this analysis, the Court not only incorporated many Bill of Rights provisions into the Due Process Clause of the Fourteenth Amendment, but also recognized certain nontextual rights as "fundamental" for purposes of equal protection and due process scrutiny.[125]

The dichotomous treatment of economic and other individual rights is well illustrated by comparing the Court's decisions in *Village of Belle Terre v. Boraas*[126] and *Moore v. City of East Cleveland*,[127] both of which involved zoning restrictions that prevented more than a specified number of unrelated persons from living together in a single family dwelling. The Court upheld the restriction in *Belle Terre*, in which the tenants were in fact unrelated individuals and the restriction burdened principally the landlord's right to use the property.[128] But the Court invalidated the regulation in *Moore* because it defined unrelated persons so as to prevent a grandmother from living with her son, his child, and the child of her other son, thus

---

liberal.

124. 304 U.S. 144, 152-53 n.4 (1938).

125. *See supra* notes 79-84 and accompanying text. Perhaps to avoid unfavorable association with *Lochner*, the Court initially focused its fundamental rights analysis on the Equal Protection Clause. *See* Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (concerning the right of procreation). For purposes of equal protection analysis, the Court also recognized a fundamental right to vote, *see, e.g.*, Reynolds v. Sims, 377 U.S. 533, 554-55 (1964), to travel, *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969), and to equal access to courts, *see, e.g.*, Griffin v. Illinois, 351 U.S. 12, 16-18 (1956). The Court, however, also employed fundamental rights analysis in the due process context, in which it recognized a fundamental right to privacy that encompasses important decisions about marriage, procreation, and the family. *See supra* note 85.

126. 416 U.S. 1 (1974).

127. 431 U.S. 494 (1977).

128. *Belle Terre*, 416 U.S. at 9. The Court in *Belle Terre* also rejected a freedom of association argument for strict scrutiny advanced by the tenants, who were unrelated individuals. *Id.* at 8-9.

burdening the fundamental right to privacy, of which the family is a central component.[129]

The liberal Court never fully explained why some rights are entitled to special protection. *Carolene Products* suggests both a textual and political-process rationale, but neither rationale provides a complete justification for individual rights jurisprudence. Most obviously, while there is a textual basis for according special status to the explicit provisions of the Bill of Rights,[130] it is hard to stretch this reasoning to encompass nontextual rights. Justice Douglas's attempt to do so in *Griswold v. Connecticut*, by advancing a penumbral theory of the right of privacy,[131] neither persuaded conservative critics nor provided direction as to what "penumbral" rights ought to be treated as fundamental. In any event, penumbras provide little basis for distinguishing between economic rights and the right of privacy, insofar as the explicit textual provisions respecting economic rights may also have penumbras.

Political-process theory, which has been the more influential justification for liberal jurisprudence, postulates that aggressive judicial scrutiny is warranted to prevent the distortion of the political process or to overturn government action that is the product of a flawed political process.[132] Thus, government action is suspect when it adversely affects substantive interests necessary to the proper functioning of the political process, such as voting rights or free speech, or when it is directed against unpopular groups that are unable to protect themselves through the political process.[133] Judicial intervention on political-process grounds avoids the restraint-

129. *Moore*, 431 U.S. at 498-99. Because a fundamental right was involved, the Court employed strict scrutiny, requiring that the government's purpose be compelling and the measure be narrowly tailored to further that purpose. The latter requirement includes evaluation of whether the measure is over- or underinclusive and whether there are less restrictive alternatives.

130. Provided, of course, that one overlooks (as did the Court in *Carolene Products*) the originalist objections that might be raised to the entire incorporation doctrine. *See supra* note 115.

131. Griswold v. Connecticut, 381 U.S. 479, 484 (1964).

132. The antecedents of the "political process" conception of the Court's role lie in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). This sort of reasoning was advanced by Justice Stone in other contexts as well. *See* South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938) (regarding the dormant Commerce Clause); Southern Pac. v. Arizona, 325 U.S. 761, 767 n.2 (1945) (same). The leading scholarly exposition of the theory is JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

133. These ideas match the remaining two *Carolene Products* categories.

based critique of judicial review as "countermajoritarian,"[134] because the decisions of a distorted or flawed political process are no more "democratic" than those of the unelected judiciary. Political-process theory not only explains many liberal individual rights doctrines,[135] but also the general disregard for economic rights. Liberals assumed that judicial intervention was unnecessary to protect economic rights because the powerful business interests typically burdened by liberal economic regulation are fully capable of defending themselves through the political process.[136]

Nevertheless, political-process theory is a problematic justification for the rights dichotomy. First, blanket deference to economic regulation is difficult to square with the recognition that the political process may fail.[137] Even if some economic interests are adequately protected by the political process, others will not be.[138] Political-process theory thus does not explain the complete failure to accord any protection to economic rights. Second, while political-process theory explains some liberal doctrines, such as suspect classifications and the protection given to speech and voting rights, it is difficult to justify the special status of other substantive rights in process terms.[139] We may suspect that any burden on fundamental rights has been "externalized" so that it falls on unpopular minorities or individuals because majoritarian forces would be unwilling to burden their own fundamental rights, but this idea does not explain why the suspicion should be greater for privacy rights than important economic interests.

The *Carolene Products* rationales therefore must be supplemented by some additional explanation of why some interests are entitled

---

134. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-19 (1986).

135. These include heightened scrutiny respecting voting rights (necessary to counter distortion of the political process) and suspect classifications (because the political process does not adequately protect certain groups).

136. Of course, not all economic regulation adversely affects powerful economic interests. Indeed, one important insight of public choice theory has been the recognition that much economic regulation involves rent seeking by powerful political constituencies. *See supra* note 73 and accompanying text.

137. *See, e.g.*, Julian N. Eule, *Process Protection and the Economic Rights Provisions of the Constitution*, 11 GEO. MASON U. L. REV. 73, 73 (1988); *see also supra* note 73 (discussing public choice view of economic regulation).

138. *See* TRIBE, *supra* note 18, at 1374. Indeed, liberals did seek to protect some kinds of economic interests, such as government benefits, but the Court was uncomfortable with the full implications of such cases. *See infra* notes 270-96 and accompanying text.

139. Professor Ely, for example, opposed the Court's decision in *Roe* on political-process grounds. *See* John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 926 (1973).

to greater protection than others. Generally, the Court has employed a fundamental rights analysis based on historical tradition and its own intuitive sense of what rights are essential.[140] But this approach does not explain the dichotomy of rights either, insofar as the same sort of analysis arguably justifies treating economic rights as fundamental.[141] Aside from pejorative references to *Lochner* and conclusory statements that economic regulation is subject to deferential rational basis review, however, the Court has not offered any explanation for its refusal to treat economic rights as fundamental.

Ultimately, then, while penumbral reasoning, political-process theory, or even fundamental rights analysis might justify intervention on behalf of the kinds of individual rights promoted by liberals, these rationales also could justify intervention on behalf of economic rights. Because liberal jurisprudence left the dichotomous treatment of rights largely unexplained, it was open to attack as simply another form of Lochnerian activism on behalf of a different set of preferred rights. Of course, it was precisely this sort of attack that figured prominently in the conservative reconfiguration of the Court.

2. The Rights Dichotomy and Conservative Jurisprudence

The need for an originalist escape prevented the conservative Court from addressing the dichotomy of rights, and this failure in turn prevented it from developing a coherent jurisprudence of economic rights. Although conservative theory provides a basis to use liberal political-process and fundamental rights arguments for enhanced protection of economic rights, the conservative critique of individual rights activism made it impossible to integrate economic interests into a broader theory of rights. Judicial restraint forced the Court to pursue other doctrinal bases for economic rights, such as structural constraints, the Contract Clause, and takings analysis.

Because the affinity between political-process reasoning and public choice theory is fairly obvious,[142] one might expect conserva-

---

140. Specifically, the Court has recognized as fundamental those rights that are "implicit in the concept of ordered liberty" or those that are "deeply rooted in our traditions and collective conscience." *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986) (analyzing question of fundamental right to consensual homosexual activity under these standards).

141. *See infra* notes 367-77 and accompanying text.

142. *See, e.g.*, Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry Into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1790-93 (1992). Proponents of both approaches are skeptical that the political process will necessarily produce results that further the public interest, and assume that officials may be motivated

tive advocates of economic rights to embrace a public choice version of process theory to argue that economic rights ought to be protected in the same way that other fundamental rights are. Just as political-process theory justifies heightened scrutiny of some government action on the ground that legislation burdening historically disenfranchised groups is likely to be prompted by improper motivations, public choice challenges the deference accorded government action in the economic arena by demonstrating that special interests control the legislative process to the detriment of the broader, more diffuse general public.[143] From this perspective, if heightened scrutiny is justified to "smoke out" bad motives, it ought to be applied, at least to some degree, in economic cases as well.[144]

Thus, public choice theory could be used to integrate economic rights into a broader theory of rights, but such an option would be difficult to square with the Court's denigration of nontextual and nonhistorical reasoning in other contexts.[145] This conclusion further clarifies the Court's reluctance to rely on the Due Process and Equal Protection Clauses, under which the political-process view has flourished.[146] Although there are hints of political-process reasoning in some of the Court's recent structural,[147] Contract Clause,[148] and

---

to pursue the private interest of some at the expense of others. In a sense, then, public choice advocates advance one particular version of political-process theory that emphasizes economic motivations.

143. This view, however, also stands the *Carolene Products* view of process failure on its head. While *Carolene Products* expresses special concern for discrete and insular minorities, public choice would suggest that most legislation is designed to benefit special interests (who have comparative advantages in organizing group action) and that the majority is in need of judicial protection. *See* Christopher T. Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CONST. L.Q. 91, 92 (1983) (arguing that, while *Lochner* protected "vested interests from popular control," it also "protected popular control from the possibility that concentrated interests might use the state as a tool to secure monopoly privileges for themselves"); *cf.* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 726 (1985) (arguing that heightened scrutiny of measures adversely affecting "discrete and insular minorities" cannot be justified in terms of political-process theory because such groups have comparative organizational advantages). I suspect that the imperfect legislative process produces both types of legislation, as well as legislation intended by its supporters to benefit the general public.

144. *See infra* part IV.B.2.

145. Since public choice theory can be used to justify liberal individual rights safeguards, *see, e.g.*, Stout, *supra* note 142, at 1793-1821, it would be problematic for the Court to embrace public choice reasoning with respect to economic rights while rejecting it with respect to individual rights.

146. *See supra* notes 94-101 and accompanying text.

147. For example, there is a political-process component to the Court's recent Tenth Amendment decision in New York v. United States, 112 S. Ct. 2408, 2417-19 (1992). *See*

takings decisions,[149] they are sporadic and undeveloped. The Court has made no explicit effort to justify the reinvigoration of economic rights in political-process terms.

Economic rights advocates might also justify enhanced protection for property and contract rights by engaging in penumbral reasoning and fundamental rights analysis. The treatment of economic rights as fundamental finds some support in text, framers' intent, and tradition. A number of constitutional provisions are clearly designed to protect economic interests; the Contract and Takings Clauses are obvious examples.[150] Moreover, there is some support for the view that the Constitution was intended in part to be a charter of economic liberties,[151] which arguably justifies treating economic rights as fundamental.[152] In addition, there is a longstanding legal tradition

---

Levy, *supra* note 28, at 528-30.

148. The *United States Trust* principle that elevated scrutiny of measures impairing obligations of contracts to which the state is a party partakes of political-process reasoning because in such cases the state is more likely to be motivated by "self" interest than some objective view of sound public policy. In addition, there is a hint of political-process reasoning in the Court's efforts in *Exxon Corp. v. Eagerton* to distinguish *Spannaus* and other cases as ones involving rules "limited in effect to contractual obligations or remedies," as opposed to "a generally applicable rule of conduct." Exxon Corp. v. Eagerton, 462 U.S. 176, 191 (1983). The premise of this distinction, though not fully articulated, appears to be that limited purpose legislation is more likely to be prompted by special interests than the public interest. *See* Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 418 n.25 (1983) (characterizing *Spannaus* as special interest legislation).

149. Requiring compensation is thought to prevent the state from externalizing the costs of regulation by imposing those costs on a few property owners, *see* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 46-48, 63 (1964), and thereby holding public officials accountable for the costs. The Court's dicta regarding regulatory takings analysis in *Yee* seem to reflect this idea. *See infra* note 227.

150. In addition, the Constitution limits the taxing power, *see* U.S. CONST. art. I, § 8, cl. 1; *id.* art. I, § 9, cls. 4-5, and requires uniform bankruptcy laws, *id.* art. I, § 8, cl. 4. Likewise, the Due Process and Equal Protection Clauses were also intended to protect at least some economic interests. Even under the narrowest view of the Fourteenth Amendment, it was intended at least to ensure the rights of newly freed slaves to make and enforce contracts, to own property, and to sue and be sued. *See* BERGER, *supra* note 87, at 18-20.

151. Although the specifics of Charles Beard's account of the Constitution, *see* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913), have been largely discredited, *see* ROBERT E. BROWN, CHARLES BEARD AND THE AMERICAN CONSTITUTION 195-200 (1956), his underlying premise that the framers were concerned with the protection of economic interests has stood the test of time. *See* FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION 4-7 (1958).

152. This historical justification is too general to satisfy the demands of strict originalism, however. *See supra* notes 112-20 and accompanying text.

of protecting property and contract rights.[153] This sort of fundamental rights analysis, however, requires the same nontextual reasoning that conservatives have criticized in the individual rights sphere.[154]

Put simply, the Court could not openly embrace the theoretical construct of liberal individual rights jurisprudence without compromising its efforts to limit that jurisprudence. However, because the doctrinal alternatives it pursued could not be sustained on purely originalist grounds, the efforts to reinvigorate economic rights lacked a solid theoretical foundation. As a result, those efforts were doomed to failure.

B. The Rights Dichotomy and the Failure of Economic Rights Jurisprudence

The lack of a theoretical foundation created insurmountable difficulties regardless of the conservative Court's approach to economic rights. When it attempted to ground economic rights in originalism by employing formalistic, categorical reasoning based on an expansive interpretation of text, the sweeping implications of its logic were untenable, and the Court had to qualify its decisions in ways that limited them sharply and that often created doctrinal confusion. But when the Court used a more flexible approach that incorporated heightened scrutiny of some economic regulations, its reasoning was irreconcilable with the treatment of identical issues in the due process and equal protection context. In this section, I demonstrate these basic points by analyzing the Court's separation of powers cases as examples of categorical reasoning and its Contract Clause cases as examples of the heightened scrutiny approach. The following section analyzes the takings area, in which the full implications of the decisions are unclear, but the cases nonetheless show evidence of both problems.

1. Categorical Reasoning and Structural Constraints

Categorical reasoning is attractive from the judicial restraint perspective because it gives the appearance that judges do not have discretion.[155] Instead, a given result is "required" by deductive

---

153. *See, e.g.*, Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823).

154. *See* Reynolds, *supra* note 118, at 1341-43 (arguing that penumbral reasoning in the Eleventh Amendment context demonstrates the hypocrisy of conservative calls for judicial restraint).

155. I say "appearance" because formal categories are usually manipulable, and therefore mask, rather than constrain, discretion. *See infra* part IV.C.2. At the same time,

reasoning from textual provisions—despite the obvious problem of interpreting text. But categorical reasoning is not without costs. In its initial phases, categorical reasoning tends to rest on absolute rules that have far-reaching implications and cannot be easily tailored to fit the unique circumstances of individual cases. The consequences of such broad rules force the Court either to distort precedent or to create exceptions, especially in problem cases. Ultimately, the doctrine becomes hopelessly confused and the Court may find it necessary to limit the rule substantially or to abandon the categorical approach altogether.

The problems associated with categorical reasoning are evident in the conservative Court's separation of powers decisions. Formalistic decisions such as *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[156] *INS v. Chadha*,[157] and *Bowsher v. Synar*[158] engaged in categorical analysis based on a strict reading of separation of powers. In each case, the Court began with the premise that the framers' intentions concerning the structure of government established certain categories of permissible and impermissible action. In each case, the government action in question was invalid because the Court characterized it as falling outside the category of permissible action.[159] While this kind of formalistic reasoning aided in the Court's effort to claim originalist justifications for invalidating government action, its implications are profound. Modern government involves regulatory programs administered by agencies exercising various types of government authority and subject to some controls by all three branches of government.[160] Despite lingering questions regarding the constitutional legitimacy of the modern administrative state, there is little support for dismantling it complete-

---

categories are not infinitely manipulable and the categorical approach is therefore less flexible than more open-ended approaches. In addition, categorical reasoning often diverts attention from important considerations by focusing on definitional issues.

156. 458 U.S. 50 (1982).

157. 462 U.S. 919 (1983).

158. 478 U.S. 714 (1986).

159. *See Marathon*, 458 U.S. at 63-76, (describing categories of permissible non-Article III tribunals); *Chadha*, 462 U.S. at 956-59 (holding that legislative veto is unconstitutional because it is legislation that does not follow the prescribed method of enactment); *Bowsher*, 478 U.S. at 726 (refusing to recognize power of Congress to control dismissal of officers performing executive functions except by impeachment).

160. *See, e.g.*, Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 440.

ly.[161] But given the nature of modern government, formalistic application of a rigid separation of powers theory would lead to just such a result.[162]

Thus, the Court in effect was forced to choose between narrowly confining its formalistic decisions or setting off a chain reaction that would dramatically alter the structure of government. From the beginning, it was clear that the latter alternative was unacceptable to the Court, which made every effort to limit the scope of even its most aggressive separation of powers cases.[163] More significantly, later cases upholding structural arrangements against separation of powers challenges, including *CFTC v. Schor*,[164] *Morrison v. Olson*,[165] and *Mistretta v. United States*,[166] rejected the strict, formalistic approach to separation of powers in favor of an open-ended, pragmatic analysis that imposes few restrictions on the structure of government.[167] These cases confined the prior separation of powers decisions to a narrow realm that did not seriously threaten the administrative state.

2. Heightened Scrutiny and the Contract Clause

A different problem arose in the Contract Clause context, in which the conservative Court attempted to incorporate a form of heightened scrutiny into its analysis. This approach, as developed by the liberal Court in the context of individual rights, is generally more flexible than categorical reasoning because the Court weighs various

---

161. *See id.* at 392 & n.13 (citing authorities).

162. *See* Currie, *supra* note 35, at 40 ("It would be unnecessary to point out that the Constitution vests legislative, executive, and judicial powers in separate and deliberately constituted branches, if it were not that today's Government bears so little resemblance to the constitutional model.").

163. In *Chadha*, for example, the Court observed that its formalistic analysis of the legislative veto issue would not invalidate measures delegating significant policy discretion to agencies. *Chadha*, 462 U.S. at 953 n.16. Likewise, in *Bowsher*, the Court qualified its holding that Congress may not control the dismissal of officials exercising executive powers, distinguishing provisions that limit presidential removal of officers to certain specified causes so as to preserve the independent agencies. *Bowsher*, 478 U.S. at 725 n.4.

164. 478 U.S. 833, 834 (1986).

165. 487 U.S. 654, 655 (1988).

166. 488 U.S. 361, 361 (1989).

167. A similar evolution is present in the Tenth Amendment area. *See supra* notes 23-29 and accompanying text. League of Cities v. Usery, 426 U.S. 833, 845 (1976), established a categorical rule against regulation of states as states, which subsequent cases replaced with a kind of balancing—EEOC v. Wyoming, 460 U.S. 226, 226-27 (1983), for example, distinguished *Usery* because the ADEA had a lesser impact on states—that was eventually discarded altogether. New York v. United States, 112 S. Ct. 2408, 2423 (1992), then introduced a more limited categorical rule that imposes few constraints on federal regulatory power.

pragmatic factors to determine the level of scrutiny and to analyze the purposes of a particular government action.[168] In the absence of an originalist foundation or some other theory, however, heightened Contract Clause scrutiny could not be reconciled with the refusal to heighten scrutiny in other economic rights contexts. More generally, this approach openly acknowledges a degree of judicial policy discretion that is incompatible with professions of judicial restraint.

Rationality review is part of Contract Clause analysis, but its role has never been entirely clear.[169] Traditionally, the Court has refused to invalidate every measure adversely affecting preexisting contracts[170] because such a result would allow private parties to estop states from exercising their police powers.[171] Thus, a police power measure that incidently disrupts contractual arrangements does not violate the Contract Clause, an exception that virtually swallowed the rule when the post-New Deal Court broadly defined the police power and used the same rational basis test to evaluate measures under the Contract Clause as under the Due Process and Equal Protection Clauses.[172]

In *Allied Structural Steel v. Spannaus*, however, the Court suggested that heightened scrutiny of asserted police power justifications is warranted whenever a state regulation imposes a particularly severe burden on some contracting parties.[173] This approach would

---

168. The current tiers of scrutiny also have categorical elements, however. *See infra* note 385.

169. The Court has generally described the Contract Clause analysis as involving a threshold inquiry into the existence of a substantial contractual impairment; if there is an impairment, rationality review is then applied to determine whether the measure in question may nonetheless be sustained. *See, e.g.*, Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-13 (1993). Although it is over 100 years old, *see* Stone v. Mississippi, 101 U.S. 814, 821 (1880), this analysis is nearly impossible to square with the language of the clause because an admitted impairment is sustained because of the government's purpose. *See, e.g.*, Richard A. Epstein, *supra* note 15, at 750 ("Even if we were unable to settle on a correct reading of the clause, we can be certain that the Supreme Court's present interpretation is both wrong and indefensible."). I advance an alternative formulation consistent with the text of the clause *infra* at notes 429-40 and accompanying text.

170. In *Ogden v. Saunders*, the Court, speaking through Chief Justice Marshall, held that the Contract Clause only applies to retrospective legislation. 25 U.S. (12 Wheat.) 213, 233 (1827). Prospective legislation cannot impair contractual obligations because no obligation ever arises if a contractual provision is barred by pre-existing law.

171. *See, e.g.*, Manigault v. Springs, 199 U.S. 473, 480 (1905).

172. *See, e.g.*, NOWAK & ROTUNDA, *supra* note 19, at 400-01.

173. 438 U.S. 234 (1978). The Court stated the principle as follows:

> The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its

be a powerful tool for protecting economic rights and is more nuanced than the categorical reasoning of the Court's separation of powers cases, but balancing the burdens a regulation imposes on contractual relationships against the benefits produced by the regulation is neither compelled by the language of the Contract Clause[174] nor supported by clear evidence of the framers' intent.[175] Nor did the Court in *Spannaus* offer any other theoretical basis for the approach, leaving it without any articulated doctrinal foundation.

The *Spannaus* reasoning is thus essentially indistinguishable from *Lochner*-era activism or heightened scrutiny of individual rights. Doctrinally, insofar as Contract Clause analysis is premised on the notion that police power measures imposing an incidental burden on contractual obligations are permissible, the same rationality inquiry should apply in both the Contract Clause and substantive due process contexts because the function of the inquiry in both contexts is to determine whether a measure is a valid exercise of the police power.[176] From the broader judicial restraint perspective, the more open-ended the Court's balancing of competing interests, the more difficult it is for the Court to defend its analysis as the product of

---

first stage. Severe impairment, on the other hand, will push the inquiry into a careful examination of the nature and purposes of the state legislation.

Id. at 245 (footnote omitted). It is interesting to note that while the Court cited precedent for the proposition that minimal impairments do not engage the Contract Clause, it offered no authority for the proposition that severe impairments require greater scrutiny.

174. As argued *supra* at note 169, the text of the clause would seem to preclude any reliance on state purposes to uphold a contractual impairment. *A fortiori*, it does not provide a foundation for this sort of sliding-scale balancing.

175. *See supra* notes 111-14 and accompanying text. The Court in *Spannaus* did suggest that "[t]he severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the framers placed on the protection of private contracts," *Spannaus*, 438 U.S.. at 245, but this is a far cry from strong historical justification for elevated scrutiny based upon severity of impairments.

176. The best explanation for the consideration of purposes (in terms of the text of the clause) is that every contract is implicitly conditioned by the state's reserved police power. Thus, if a particular measure falls within that power, there has been no impairment. *See, e.g., Spannaus*, 438 U.S. at 241-42. But under this analysis, the scope of the police power should not depend on which constitutional provision is at issue. When the Court elevates scrutiny, it does so not because the meaning of the police power has changed, but because the exercise of that power comes into conflict with a constitutional right, and an otherwise valid police power measure requires greater justification to withstand constitutional scrutiny (or because there are reasons to suspect that a particular measure was improperly motivated). This analysis cannot explain *Spannaus*, however, which did not characterize contractual obligations as fundamental. Because fundamental rights analysis requires heightened scrutiny whenever a fundamental right is burdened, moreover, it cannot explain the use of a sliding scale in *Spannaus*.

original intent and the greater the affinity between Contract Clause analysis and liberal activism on behalf of nontextual rights.

Thus, it is not surprising that the Court quickly backed away from its suggestions in *Spannaus* of sliding scale balancing. In *Energy Reserves Group, Inc. v. Kansas Power and Light*, the Court used a notably weak, passive-voice phraseology to distance itself from the idea of elevated scrutiny for severe impairments.[177] Later in the same discussion, the Court conspicuously omitted any reference to heightened scrutiny for severe impairments, stating that deferential review is required "[u]nless the state itself is a contracting party."[178] *Exxon Corp. v. Eagerton*,[179] decided the same year as *Energy Reserves Group*, cast even more doubt on the status of *Spannaus*'s severe impairment rationale. The *Exxon* Court's review of Contract Clause doctrine made no mention of severity of impairment,[180] and the Court did not mention that factor in distinguishing *Spannaus*, but emphasized instead that the challenged action in *Spannaus* operated directly and exclusively to impair contractual obligations.[181]

This distinction shifted the analysis from the heightened scrutiny approach of *Spannaus* toward a more formalistic, categorical approach.[182] While the categorical approach in the separation of powers area was expansive, however, *Exxon* created a very narrow category, virtually defining *Spannaus* out of existence.[183] The Court in *Exxon* characterized a provision that expressly prohibited producers from passing costs on to the consumer as a generally applicable rule because it "applied to all oil and gas producers, regardless of whether

177. 459 U.S. 400, 411 (1983) ("The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected.").

178. *Id.* at 412-13.

179. 462 U.S. 176 (1983).

180. *See id.* at 190-91.

181. *See id.* at 191-92. For further discussion of this distinction, see *infra* notes 434-37 and accompanying text.

182. That the legislation in question was directed at altering the pension obligations of particular employers was relevant in *Spannaus* to determine whether a sufficiently important police power purpose could be identified to sustain the measure. *See* Allied Structural Steel v. Spannaus, 438 U.S. 234, 247-49 (1978). In contrast, the Court used this argument in *Exxon* to distinguish between ordinary police power measures and those that are directed toward altering contractual obligations. *See Exxon*, 462 U.S. at 190-92.

183. If the Court attempts to expand this category to provide broad protection for economic interests, it will be difficult to control the implications of the analysis, and the result is likely to be doctrinal confusion along the order of that created by recent takings decisions. *See infra* part 2.C. A more constrained and purpose-oriented application of the Contract clause could provide an appropriate role for the clause in a more coherent jurisprudence of economic rights. *See infra* part IV.B.3.a.

they happened to be parties to sale contracts that contained a provision permitting them to pass tax increases through to their purchasers."[184] This definition of generally applicable rules can apply to virtually any government action, even a measure that is intended exclusively to abrogate contractual obligations.[185]

In sum, then, the reinvigoration of the Contract clause could not be sustained because there was no foundation for heightened scrutiny. Neither text nor history provides an originalist explanation, and the Court could not explicitly invoke liberal-style fundamental rights analysis. Although *Spannaus* came close to doing so, later decisions disavowed that analysis.

C. *Whither Takings?*

The future of the conservative Court's more recent exploration of the Takings Clause as a possible vehicle for enhanced economic rights protections remains in doubt, but even the most aggressive decisions of the past few years apply only in limited circumstances. The same problems that confronted the Court in the separation of powers and Contract clause cases are likely to prevent any significant expansion of these doctrines, and may well result in a substantial retreat. Notwithstanding *Dolan v. City of Tigard*,[186] the Court has limited *Nollan*'s suggestions of heightened scrutiny in much the same way that it limited *Spannaus*'s sliding-scale heightened scrutiny analysis before ultimately abandoning that analysis in favor of a restrictive categorical approach. Conversely, there is every indication

---

184. *Exxon*, 462 U.S. at 191.

185. The pension funding provisions invalidated in *Spannaus* applied to all employers, regardless of whether they had a pension plan or were quitting business in the state. *Spannaus*, 438 U.S. at 238. Some employers were not required to provide additional funds (if they were too small, did not leave the state, or already met the act's requirements) and the only practical effect of the statute was to invalidate existing or future plan provisions that did not meet the vesting requirements of the act in question. *Id.* But this was no different from the *Exxon* pass-through prohibition, which "applied" to all producers, but only affected them through the contracts they entered into for purposes of selling gas and only altered their behavior if these contracts contained prices or escalator clauses that passed the costs on to consumers. *Exxon*, 462 U.S. at 178-79. Thus, the Court's statement in *Exxon* that the "effect of the pass-through prohibition on existing contracts that did contain such a provision was incidental to its main effect of shielding consumers from the burden of the tax increase," *id.* at 191-92, could just as easily apply to the statute invalidated in *Spannaus*: Its effect on existing plans was only incidental to the main effect of shielding employees from the burden of plant relocation. In both cases the state legislature believed that certain types of contractual provisions were contrary to the public interest and imposed statutory requirements that effectively invalidated those provisions.

186. 114 S. Ct. 2309 (1994).

that the Court will restrict the potentially sweeping categorical approach of the *Lucas* rule, which, like formalistic separation of powers reasoning, is impossible to control if unleashed beyond the narrow confines of *Lucas* itself.

Traditionally, the Court has analyzed takings challenges to government action under one of two distinct lines of cases.[187] First, interference with certain core property interests, most prominently physical invasion, is a taking per se (i.e., without regard to the extent to which the property's value is diminished or the purposes that support the government's action). While the occurrence of a physical invasion is not always clear, once a physical invasion is found the Court has treated the Takings Clause categorically, consistently requiring compensation, even at the height of liberal deference to economic regulation.[188] Second, since *Pennsylvania Coal Co. v. Mahon*,[189] which held that a local ordinance requiring coal to be left in place to support the surface estate was a taking, the Court has also recognized that a regulation preventing the owner from engaging in some uses of property may be a "regulatory taking." Whether there has been a regulatory taking depends on the application of an admittedly "ad hoc, factual inquir[y]"[190] that generally involves consideration of (1) the underlying purposes of the regulatory

187. Doctrinally, there are three issues that might arise in takings cases: (1) whether there is a taking; (2) whether it is for a public use; and (3) whether the state has provided just compensation. The most difficult of these issues under the Court's current jurisprudence is whether a taking has occurred. The public use requirement was essentially rendered moot in Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (upholding state statute allowing housing authority to purchase rental property and to sell to tenants because it served valid public purpose of reducing land oligopoly), and the determination of just compensation generally presents few difficult problems, *see, e.g.*, NOWAK & ROTUNDA, *supra*, note 19, § 11.14.

188. *See, e.g.*, United States v. Causby, 328 U.S. 256, 261 (1946) (holding that frequent low flights over plaintiff's property which prevented all use constituted a taking because it was "as if the United States had entered upon the land and taken exclusive possession of it"); *accord* Griggs v. Allegheny County, 369 U.S. 84, 90 (1962) (same). The Takings Clause obviously requires compensation whenever the government formally exercises its eminent domain power to acquire property. By extension and in light of the ordinary meaning of the word "take," *see supra* note 116, when the government acquires or transfers possession, or otherwise interferes with possessory rights, there has been a taking per se. *E.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (holding that New York law requiring landlords to permit cable television companies to install cable facilities on their property constituted a permanent physical occupation and hence a taking); Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (invalidating as a taking Army Corps of Engineers' effort to require public access to a private marina under a federal navigational servitude).

189. 260 U.S. 393 (1922).

190. Penn Cent. Transp. Co v. New York City, 438 U.S. 104, 124 (1978).

measure and its relation to those purposes and (2) the extent to which the measure diminishes the value of the property.[191] Because most use restrictions diminish the value of property and effectively transfer wealth,[192] the regulatory taking question has proven far more difficult for the Court.[193]

To expand economic rights under the Takings Clause, then, the Court might engage in heightened scrutiny under regulatory takings analysis or expand the kinds of property interests entitled to per se protection. Recent takings decisions reflect both approaches to some degree, but the trend appears to be away from heightened scrutiny and toward the categorical approach of the per se takings line of cases. Moreover, while the interests subject to per se protection have expanded somewhat, the Court has avoided the most expansive per se approach and given every indication that it will confine the categories of interests entitled to per se treatment.

1. Heightened Scrutiny and Regulatory Takings

From the New Deal until 1987, the Court routinely rejected regulatory takings arguments.[194] The purpose strand of the regula-

---

191. The precise relationship between these factors and their connection to the underlying takings question remains unclear. *See infra* notes 209-23 and accompanying text.

192. It is this premise that forms the basis for Professor Epstein's efforts to enhance the protection of property rights by expanding the Takings Clause. *See* EPSTEIN, *supra* note 47, at 57 ("Let the government remove any of the incidents of ownership, let it diminish the rights of the owner in any fashion, then it has prima facie brought itself within the scope of the eminent domain clause, no matter how small the alteration and no matter how general its application.").

193. The Court has struggled to develop a consistent means of determining when a regulatory taking has occurred. Although Justice Holmes, who authored the *Mahon* opinion, supplied the oft-repeated idea that a use regulation which "goes too far" is a taking, *Mahon*, 260 U.S. at 415, he offered little guidance as to how the Court should determine when that is the case. Since *Mahon* the Court has struggled with standards but not results; until recently it uniformly rejected regulatory takings claims. *See generally* Davis & Glicksman, *supra* note 47, at 395-439 (reviewing history of regulatory takings jurisprudence in terms of various possible models of the relationship between substantive due process and takings law). Even during the *Lochner* era, the Court rejected many regulatory takings challenges. *See, e.g.*, Miller v. Schoene, 276 U.S. 272, 279 (1928); Euclid v. Ambler Realty, 272 U.S. 365, 397 (1926). Indeed, Justice Holmes's expansive treatment of the Takings Clause in *Mahon* is rather puzzling in light of his famous dissent in *Lochner*. For the suggestion that Holmes sought, at the time of the "Red Scare," to blunt efforts to characterize him as a socialist, see Davis & Glicksman, *supra* note 47, at 417-19.

194. An excellent illustration is Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978), in which the Court rejected a takings challenge to the city's landmark zoning law, which prevented the construction of a multistory office building and thereby deprived the property owner of millions of dollars in profits. After describing the purposes underlying

tory takings inquiry has been subsumed into the most deferential form of the rational basis test,[195] making virtually any purpose both legitimate and sufficient to withstand scrutiny. Nor has the "extent of diminution" strand proven significantly more restrictive, as the Court has little difficulty upholding measures that impose substantial costs on owners so long as the owner retains some value.[196] As recently as 1987, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[197] the Court appeared to employ this deferential approach, rejecting a takings challenge to a measure requiring mineral-rights owners to leave some coal in place to prevent surface subsidence. Despite the obvious affinity between provisions at issue in *Keystone* and *Mahon*, the *Keystone* Court concluded that the statute furthered legitimate government purposes,[198] and that the challenged provisions did not

---

the landmark zoning law and concluding that the law was an appropriate means of accomplishing these purposes, *id.* at 107-08, the Court found that, although the value of the plaintiff's property may have been greatly diminished, the plaintiff had not been singled out in any way to bear the burden of historic preservation, a burden that was shared by a large number of property owners within the city, *id.* at 131-35. Nor did the measure "go too far" in diminishing the value of the plaintiff's property: No discrete parcel of property rights subject to the Takings Clause had been destroyed and the owner retained profitable uses of the property, especially since the owner received "transferable development rights" of considerable value. *Id.* at 135-37.

195. This proposition was generally accepted until Justice Scalia challenged it in *Nollan*. *See infra* notes 204-07 and accompanying text.

196. This reluctance to find regulatory takings contrasts sharply with the Court's treatment of physical invasions, creating anomalous results. *See infra* notes 346-49 and accompanying text.

197. 480 U.S. 470 (1987). Although *Keystone* is generally consistent with deferential rational basis scrutiny of economic regulation, it does contain a puzzling reference to the absence of less restrictive alternatives. After noting that the *Mahon* Court had rejected the state's safety justification because a less restrictive notice alternative was available, the Court in *Keystone* distinguished the act in question, which was "designed to accomplish a number of widely varying interests, *with reference to which petitioners have not suggested alternative methods through which the Commonwealth could proceed.*" *Id.* at 486 (emphasis added). Although it is only one part of a broader effort to distinguish *Mahon*, the statement seems to imply that less restrictive alternatives would be an appropriate part of the purpose inquiry. Since less restrictive alternative analysis is ordinarily reserved for heightened scrutiny, the approving reference to such arguments would seem to support the application of heightened scrutiny in regulatory takings cases.

198. The Court emphasized Justice Holmes's conclusion that the statute in *Mahon* was adopted for "private benefit," and pointed to statutory differences as evidence that the provision in *Keystone* reflected a public purpose. *Id.* at 486. The *Keystone* Court also noted that the act in question was "a prime example that 'circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern.' " *Id.* at 488 (quoting Block v. Hirsh, 256 U.S. 135, 155 (1921) (alterations original)). The *Keystone* dissenters argued that the act's purpose was irrelevant under *Mahon*, 480 U.S. at 509-10 (Rehnquist, C.J., joined by Powell, O'Connor, and Scalia, J.J., dissenting) (rejecting majority's interpretation of *Mahon*), because the act

render coal mining of the property in question commercially impracticable.[199]

Close on the heels of *Keystone*, however, both *Hodel v. Irving*[200] and *Nollan v. California Coastal Commission*[201] cast doubt on this deferential approach by employing a form of heightened scrutiny to conclude that the measures in question constituted takings. In *Hodel* the Court concluded that a measure mandating escheat of highly fractionated shares of Native American land might be constitutional under ordinary regulatory takings analysis, but went on to reason that the "character of the Government regulation here is extraordinary" because the right to pass property is one of the essential "sticks" in the "bundle" of property rights.[202] Thus, while there was a legitimate and important government purpose behind the measure, the Court required that purpose to be accomplished by means short of total abrogation of the right to pass property.[203]

More clearly, the *Nollan* Court employed heightened scrutiny when it held, in an opinion authored by Justice Scalia, that the California Coastal Commission had "taken" a lateral access easement when it conditioned approval of a rebuilding permit requested by the

---

destroyed an identifiable segment of property, *id.* at 517-18. It is interesting to note that the analysis of the *Keystone* dissenters is virtually indistinguishable from that of the majority in *Lucas*. *See infra* notes 235-44 and accompanying text.

199. *Keystone*, 480 U.S. at 485, 493-97. The Court in *Mahon* accepted as given that the measure totally prevented the mining of coal. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (stating that "the statute [was] admitted to destroy previously existing rights" as applied to the particular plaintiff); *id.* at 414-15 (concluding that the Court was "warranted in assuming" that the more general effect of the statute was to make it "commercially impracticable" to mine certain coal, which was "very nearly the same . . . for constitutional purposes as appropriating it or destroying it"). The *Keystone* Court also rejected the contention that a per se taking had occurred because the government had completely destroyed a separate interest, the "support estate," recognized under state law. *Keystone*, 480 U.S. at 500-02. For further discussion of this aspect of *Keystone*, see *infra* note 243 and accompanying text.

200. 481 U.S. 704 (1987).

201. 483 U.S. 825 (1987).

202. *Hodel*, 481 U.S. at 712-16.

203. *Id.* at 712, 716-18. This analysis leaves unclear whether *Hodel* is a regulatory takings case involving heightened scrutiny or opens a new category of per se takings cases. The Court employed a traditional regulatory takings analysis, and its suggestion that other, less restrictive means might be used to accomplish the government's purposes seems to reflect heightened scrutiny of an alleged regulatory taking. *See supra* note 198 (discussing similar analysis in *Keystone*). But the Court's effort to characterize the right to pass property as an interest on the order of the right of possession (which brings the case under the physical invasion line of cases) suggests that the right to pass property is subject to per se treatment. For discussion of *Hodel*'s implications as a per se case, see *infra* notes 231-34 and accompanying text.

property owner on the owner's granting the easement.[204] Justice Scalia reasoned that the easement was not sufficiently related to the permit requirement's stated purposes of promoting visual and physical access to the coastline from noncoastal areas.[205] While he purported to apply the usual test for government purposes under the Takings Clause,[206] Justice Scalia also pointed to the affinity between the extraction of the easement in *Nollan* and a physical invasion as a reason to treat with particular care the requirement of a "substantial" relationship between the government action and the public purpose it supposedly furthers.[207] The Court, per Chief Justice Rehnquist, recently expanded upon the heightened scrutiny approach of *Nollan* in *Dolan v. Tigard*,[208] in which it held that even when an easement extracted as a condition of a building permit is substantially related to public harms caused by the development of the property, the government must prove that the scope of the easement extracted is "rough[ly] proportional[]" to the harm caused.

Thus, just as *Spannaus* had apparently signaled heightened Contract Clause scrutiny when an "impairment" was particularly substantial, *Hodel*, *Nollan*, and *Dolan* might be read as supporting heightened regulatory takings scrutiny whenever a particularly important property interest is affected. This approach could draw support from Justice Holmes's reasoning in *Mahon*, which suggested

---

204. *Nollan*, 483 U.S. at 837-39. It is striking that, despite his commitment to judicial restraint, Justice Scalia authored both *Nollan* and *Lucas*, two of the most aggressive takings decisions since *Mahon*.

205. *Id.*

206. *Id.* at 837. Recognizing that the analysis was inconsistent with the usual rational basis test, Justice Scalia argued that the test for regulatory takings was different from that employed under the Due Process or Equal Protection Clauses. *Id.* at 834 n.3. Most commentators disagree with this claim, *see, e.g.*, Davis & Glicksman, *supra* note 47, at 439-46, as did the *Nollan* dissenters, *see Nollan*, 483 U.S. at 843 n.1 (Brennan, J., dissenting). While Justice Scalia was undoubtedly correct in noting a slightly different verbal formulation in the takings area, he conveniently ignored the fact that this formulation had been used consistently since the end of the *Lochner* era to reject regulatory takings challenges.

207. Since the state had no obligation to grant the permit in the first instance, it had not directly appropriated the lateral access easement, and there was no physical invasion that would create a taking per se. *See Nollan*, 483 U.S. at 835-36. Justice Scalia reasoned, however, that the effort to extract the easement as a condition of receiving the permit required that the Court be especially attentive to whether the relationship between the purposes of the permit requirement and the lateral access easement was in fact "substantial." *Id.* at 841. Thus, as recognized in Dolan v. Tigard, 114 S. Ct. 2309 (1994), *Nollan* involved an unconstitutional condition. *Id.* at 2316-17. For further discussion of the problem of unconstitutional conditions, see *infra* notes 357-64 and accompanying text.

208. 114 S. Ct. 2309, 2319 (1994).

that the greater the extent of diminution, the greater the police power justification necessary to sustain it.[209] But just as *Spannaus*'s suggestion of heightened Contract Clause scrutiny based on substantial impairments lacked an originalist or theoretical foundation, this kind of regulatory takings scrutiny lacks any firm basis that could reconcile it with the Court's commitment to judicial restraint.

There is no historical foundation for the concept of regulatory takings, much less for heightened scrutiny of regulations that interfere with particularly important property interests.[210] Indeed, from a textual standpoint, it is hard to see why the government's purpose should ever be relevant to whether a taking has occurred. Under the ordinary meaning of the word "take,"[211] how a regulation interferes with property rights would be relevant, but *why* the government chose to adopt the regulation is completely irrelevant to whether there has been a taking.[212] The language of the clause seems flatly inconsistent with the notion that, once a taking has occurred, compensation may be avoided by demonstrating an appropriate public purpose.[213] Thus, heightened scrutiny of regulatory measures that impose particularly significant burdens of property rights must find some justification other than originalism.

While various rationales have emerged since *Mahon*,[214] none provides a suitable foundation for heightened scrutiny in the regulatory taking context. First, the purpose inquiry may distinguish between the exercise of the police and eminent domain powers on the theory that the lack of a valid police power purpose means that

---

209. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) ("[T]he statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.").

210. *See supra* notes 115-19 and accompanying text.

211. *See supra* note 116.

212. Thus, in cases involving transfer of possession or physical invasion, the Court has not considered purposes to be relevant. *See supra* note 183 and accompanying text. *But cf.* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1078-81, 1143-49 (1993) (arguing that the "public use" of property distinguishes takings from other regulations).

213. The clause provides: "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. Since compensation is required when property is taken for "public use," the existence of a public purpose should not matter. *See, e.g.*, Laitos, *supra* note 47, at 13-14. Note that this problem is quite analogous to the questionable textual basis for examining purpose under the Contract Clause. *See supra* note 113 and accompanying text.

214. As a *Lochner*-era case, *Mahon* could treat aggressive scrutiny of economic regulation as a given, but the Court's analysis of purposes was confusing at best. For example, the *Keystone* majority and dissent disagreed as to whether purposes were even relevant in *Mahon*. *See supra* note 198.

government action must be sustained through the exercise of eminent domain,[215] but this rationale conflicts with the refusal to heighten scrutiny of economic rights under due process because the scope of the police power should be identical in both areas.[216] Second, the purpose inquiry may determine whether a particular use was ever within the rights included in property ownership under the principle that property ownership is implicitly conditioned by the right of the government to regulate in the public interest,[217] but this approach

---

215. This view assumes that the clause does not apply to valid police power regulations, an idea that seems to originate in early rate-setting cases, under which rate regulation is not a taking if it involves property subject to police power regulation because the property is affected with a public purpose. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 669 (1887) (holding that statute prohibiting the manufacture of intoxicating liquor for use as a beverage does not work a taking because its object is to promote the general welfare of the community); *see also* Nectow v. City of Cambridge, 277 U.S. 183, 188-89 (1928) (invalidating ordinance that precluded commercial development of property and led to dissolution of contract for sale as violation of Fourteenth Amendment because it bore no substantial relation to public health, safety, or morals). There is also some support for this rationale in *Mahon*, in which the Court stated that "the act cannot be sustained as an exercise of the police power," and distinguished a prior decision involving similar legislation on the ground that there was a valid safety purpose behind that statute. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-15 (1922). More recently, *Nollan*'s holding reflects this rationale insofar as the absence of a police power justification for the extraction of a lateral access easement converted the government action into a taking. *See Nollan*, 483 U.S. at 838-39.

216. *See supra* note 176 and accompanying text (discussing analogous argument under the Contract Clause). Justice Scalia argued in *Nollan* that application of a more stringent purpose inquiry in regulatory takings analysis than in the due process or equal protection contexts was perfectly reasonable because different constitutional provisions are engaged. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 n.3 (1987). This argument is unpersuasive if the function of the purpose inquiry is to determine whether a particular measure falls within the state's police power. The police power does not derive from the federal Constitution, and its scope as a source of authority does not depend upon the federal constitutional provision invoked to challenge its exercise. *See id.* at 843 n.1 (Brennan, J., dissenting). Different constitutional provisions do place different external limits on the exercise of the state police power, but those limits depend on what interest is affected, not the state power exercised. Thus, Justice Scalia's argument tacitly incorporates a kind of fundamental rights analysis.

217. While the first rationale focuses on identifying the governmental power exercised, this view is concerned with defining "property" on the theory that nothing is taken if the owner never had a property right in the first place. This implied police power limitation is analogous to the implicit conditioning of contract rights under the Contract Clause. *See supra* note 176. In *Mahon*, Justice Holmes recognized that "some values are enjoyed under an implied limitation and must yield to the police power," but argued further that "obviously the implied limitation must have its limits, or the contract and due process clauses are gone." *Mahon*, 260 U.S. at 413. The obvious question then becomes the scope of that reserved power, and narrowing its scope is the functional equivalent of heightened scrutiny because both limit the purposes that can sustain government action. A particularly troublesome issue over the years has been whether property ownership is conditioned only by implied prohibitions against common-law nuisances or nuisance-like

treats the takings issue as a matter of defining property and attaches automatic takings status to anything interfering with property, thus collapsing into the more categorical per se approach and confronting the problems inherent in that approach.[218] Third, the purpose inquiry may relate to the notion that no compensation is required when regulatory measures produce an "average reciprocity of benefit,"[219] but this rationale can be squared with the language of the Takings Clause only if the "benefit" actually compensates the owner for that which is taken,[220] a requirement that has never been

---

uses. *Compare id.* (concluding that preventing surface subsidence is not a public purpose because "[a] source of damage to such a [single private] house is not a public nuisance even if similar damage is inflicted on others in different places") *with* Miller v. Schoene, 276 U.S. 272, 280 (1928) ("We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law . . . ."). The Court appeared to reject definitively Justice Rehnquist's argument for a nuisance-type restriction on the implied conditioning rationale in *Penn Central*, 438 U.S. at 134 n.30; *id.* at 145 (Rehnquist, J., dissenting) ("The nuisance exception to the taking guarantee is not coterminous with the police power itself."). However, the question reemerged in *Lucas*. *See infra* note 245 and accompanying text.

218. As applied by Professor Epstein, the definitional approach to takings law would require compensation for every use restriction that diminishes value and does not reflect a preexisting common-law nuisance restriction unless the property owner receives implicit in-kind compensation equivalent to diminution in value. *See* EPSTEIN, *supra* note 47, *passim*. Moreover, the nuisance exception will almost never apply, since it is unclear how a measure can both reflect preexisting restrictions and substantially diminish value, except perhaps where the market inaccurately predicted whether certain uses were permitted. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (1992) (noting that the nuisance exception would be unlikely to apply on remand because neighboring property owners had engaged in similar uses). Although the activist nature of this approach is masked by the characterization of the inquiry as one based upon the traditional judicial function of defining property (which is similar to the definitional quality of most categorical approaches), it remains unclear why judicial determinations of the implicit conditions on property ownership should be controlling over legislative ones. Moreover, because this result would effectively grind government to a halt, it would be obviously activist and apparently unacceptable to the Court. *See infra* notes 246-50 and accompanying text.

219. This idea was suggested in *Mahon*, 260 U.S. at 415 (distinguishing prior decision upholding requirement that coal be left in place along property lines because that requirement "secured an average reciprocity of advantage that has been recognized as a justification of various laws"), and figured prominently a few years later in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In *Euclid*, the Court approved the use of zoning regulations to control land use on the ground that they secured an average reciprocity of benefits. *Id.* at 394-95.

220. *See* EPSTEIN, *supra* note 47, at 195-215 (discussing "implicit in-kind compensation"). In other situations, the benefits that accrue to the public generally might explain why the measure is within the scope of the police power, but not why a valid police power enactment that diminishes value is not a taking without just compensation.

imposed.[221] Finally, *Yee* suggests that the purpose inquiry is relevant to whether a property owner has been singled out to bear costs that in fairness should be born by society as a whole,[222] but such a fairness approach is precisely the kind of nontextual, open-ended, and value laden approach that conservatives criticized so forcefully in connection with liberal activism.[223]

Put simply, none of the rationales variously invoked to explain the purpose inquiry provides a satisfactory basis for heightened scrutiny in the regulatory taking context. Given the text of the clause, they barely justify any purpose inquiry, much less explain why scrutiny should be heightened in some cases or how such heightened scrutiny differs from liberal fundamental rights analysis or Lochnerian substantive due process. Thus, it is doubtful that the Court will expand the application of the heightened scrutiny approach. While *Dolan* confirmed that a form of heightened scrutiny applies to *Nollan*-type extraction of easements as an unconstitutional condition on the issuance of building permits,[224] it does not expand the situations in which such heightened scrutiny applies. In other decisions, the Court has been understandably reluctant to develop *Hodel* and *Nollan* into a broader doctrine of heightened scrutiny. *Lucas* pointedly opted for per se analysis based on the lower court's finding of total destruction,[225] and *Yee* refused to consider an argument for heightened

---

221. In other words, an individual owner's losses need not be offset by actual benefits accruing to the individual owner, even where new zoning regulations bar profitable prior uses. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.21 (1987).

222. *See* Yee v. City of Escondido, 112 S. Ct. 1522, 1526 (1992). This idea is similar, though not identical to, the notion of average reciprocity of benefit. Both are concerned with the underlying question of whether a particular owner has been so disproportionately burdened by a regulation that "fairness" requires compensation.

223. Insofar as the fairness idea connects the review of purpose with the inquiry into the extent of diminution of value, it resembles the analysis in *Spannaus*. *See supra* notes 173-75 and accompanying text. For the same reasons the Court distanced itself from *Spannaus*, *see supra* notes 176-81 and accompanying text, it is unlikely that the Court will pursue this rationale aggressively, despite dicta supporting it in *Yee*, *see infra* notes 226-27 and accompanying text. In the final analysis, I believe that such concerns are best addressed directly through a meaningful substantive due process analysis, rather than through regulatory takings doctrine. *See infra* part IV.B.1.

224. *See* Dolan v. City of Tigard, 114 S. Ct. 2300, 2317-20 (1994).

225. Heightened scrutiny was argued tangentially in the plaintiff's brief:

> [I]t is not enough for a state to show that a legitimate exercise of the police power supports the regulation. In addition the precise character of the regulation needs to be examined, and it must also be shown that the regulation did not severely prejudice the economic interests of the property-owner.

Petitioner's Brief on the Merits at 16, *Lucas* (No. 91-453). The Pacific Legal Foundation argued more directly in its amicus brief. *See* Brief Amicus Curiae of Pacific Legal

scrutiny of regulatory measures under the Takings Clause,[226] although the opinion is replete with dicta that might be read as supporting heightened scrutiny.[227]

2. Categorical Reasoning and Per Se Takings

Until recently, per se takings have been confined to cases involving physical invasions or interference with possession.[228]

Foundation in Support of Petitioner David H. Lucas at 13, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (No. 91-453) ("*Nollan* expressly requires courts to apply a *heightened level of scrutiny* in examining the purpose and impact of suspect regulations."). The per se rule of *Lucas* coupled with a common-law nuisance exception incorporates a form of heightened scrutiny, but it is confined to cases of complete destruction. While the *Lucas* Court did state in dicta that nearly total destruction remains "keenly relevant to takings analysis generally," *Lucas*, 112 S. Ct. at 2895 n.8, which might support heightened scrutiny of particularly burdensome regulations, this support is at best indirect and is buried in a footnote.

226. The Court concluded that although the regulatory taking argument was ripe, it was not fairly included in the question upon which the Court granted review. *Yee*, 112 S. Ct. at 1531-34. To justify this conclusion, the Court interpreted the question for review as stated in the petition for writ of certiorari as incorporating the rationale of two federal court of appeals cases cited by the petitioner, and erected a presumption (unsupported by citation to authority) against broadly construing the question presented for review. *Id.* Since the Court may request briefing of additional questions on its own motion, it could have considered the regulatory takings argument, as it did in *Lucas* when it brushed aside related concerns to hold that total destruction of economically viable uses constitutes a taking per se. *See id.* at 2890-92. The Court's reluctance to consider significant regulatory takings arguments is not confined to *Yee*. *See, e.g.*, Pennell v. City of San Jose, 485 U.S. 1 (1988). *See generally* Davis & Glicksman, *supra* note 47, at 430-31 (discussing avoidance techniques); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986); Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. v. City of San Diego, 450 U.S. 621 (1981).

227. *See Yee*, 112 S. Ct. at 1528 (noting that argument respecting the wealth-transferring effect of the provisions at issue, "while perhaps within the scope of our regulatory takings cases, cannot be squared easily with our cases on physical takings"); *id.* at 1530 (recognizing possibility that provisions effectively creating a premium reaped by mobile home owners at the expense of landlords "might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance"); *id.* (noting that provisions denying landlords the ability to choose their incoming tenants "may be relevant to a regulatory taking argument, as it may be one factor a reviewing court would wish to consider in determining whether the ordinance unjustly imposes a burden on petitioners"). Justices Blackmun and Souter found these statements sufficiently troubling to write separate concurrences expressly disavowing them. *See id.* at 1534-35 (Blackmun, J., concurring) ("I, unlike the Court, do not decide whether the regulatory taking claim is or is not ripe, or which of petitioners' arguments would or would not be relevant to such a claim."); *id.* at 1535 (Souter, J., concurring) ("I concur in the judgment and would join the Court's opinion except for its references to the relevance and significance of petitioners' allegations to a claim of regulatory taking.").

228. *See supra* note 188 and accompanying text. This special treatment was justified by reference to possession as one of the core interests of property ownership. Despite the

Property owners often attempt (without much success) to expand the category of per se takings, usually by identifying some separate property interest allegedly taken.[229] Though not entirely consistent, recent decisions seem to reflect a greater willingness to expand per se analysis. Like other categorical approaches, however, this approach is difficult if not impossible to limit coherently, and taken literally would require the dismantling of modern government.[230] Thus, the Court is likely to confine the scope of per se takings to narrow categories. Even if the Court is willing to accept the further confusion of takings doctrine that would result from proliferation of those categories, the per se approach cannot produce a coherent jurisprudence of economic rights.

Hodel's ambiguous reasoning expanded per se takings insofar as it elevated the right to dispose of property upon one's death to the same level as the right of possession.[231] But subsequent takings cases neither discuss *Hodel* nor cite it for any significant proposition, which cuts against such a reading. In *Yee*,[232] for example, there was a powerful argument that the challenged regulatory regime transferred a valuable premium from owners of a mobile home park to the mobile home owners,[233] but the Court's analysis seemed to assume

---

importance of possessory interests, the finding of a taking in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), underscores the anomalous results in per se and regulatory takings cases. It is difficult to see how the owners were harmed by the regulation in *Loretto* requiring cable access, since cable access is unlikely to decrease the rent that owners can collect. Although they might have been able to charge the cable company a fee for the access, this potential revenue is probably far less substantial than the losses often incurred in cases rejecting regulatory takings arguments. The only difference is the existence of a physical invasion. For further discussion of this anomaly, see *infra* notes 346-49 and accompanying text.

229. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 500-02 (1987) (rejecting argument that the measure in question transferred a discrete "support estate" from mineral owners to surface owners); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978) (rejecting argument that city had taken distinct property interest in "air rights" by prohibiting construction of multistory office building).

230. *See* EPSTEIN, *supra* note 47, at 263-329 (arguing that land use restrictions, rate, price, and wage regulation, much taxation, and most forms of government benefits, including unemployment insurance and welfare, generally require compensation under Takings Clause).

231. It is unclear whether *Hodel* reflects per se treatment or heightened scrutiny. *See supra* notes 200-03 and accompanying text.

232. In addition to *Yee*, see Nollan v. California Coastal Comm'n 483 U.S. 825, 831-42 (1987) (not citing *Hodel*); *infra* notes 235-37 and accompanying text (discussing *Lucas*).

233. The interaction of a rent control ordinance that allowed mobile home owners to occupy a rental space at below-market rates and a state law that prevented mobile home park owners from refusing to lease a space to the purchaser of a mobile home enabled a home owner to extract higher prices on the sale of a mobile home. *See* Yee v. City of

that the only way to bring the case under the per se rule was to demonstrate a physical invasion.[234]

Lucas, however, gave an unexpected boost to the per se approach by holding that total destruction of economically viable uses constitutes a taking per se.[235] In this aggressive takings decision, which like *Nollan* was authored by Justice Scalia, the Court rejected the state court's conclusion that a coastal preservation regulation depriving a landowner of all economically viable uses was not a taking because it served the important public purpose of preventing beachfront erosion and destruction of the dune ecosystem,[236] thus creating another category of per se taking.[237] Despite its dramatic

---

Escondido, 112 S. Ct. 1522, 1528 (1992) ("[A]ny reduction in the rent for a mobile home pad causes a corresponding increase in the value of a mobile home, because the mobile home owner now owns, in addition to a mobile home, the right to occupy a pad at a rent below the value that would be set by the free market."). The argument that this premium was a distinct property interest, complete with reliance on *Hodel*, was advanced emphatically in the Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners at *5-8, *Yee* (No. 90-1947), *available in* LEXIS, Genfed Library, Briefs file; *see also* Brief for Petitioner at *13, *Yee* (No. 90-1947) (authored by Robert Bork), *available in* LEXIS, Genfed Library, Briefs file ("The right to possession includes the right to exclude others, which is a fundamental property right."). But the Court never mentioned *Hodel* in refusing to find a per se taking. *See Yee*, 112 S. Ct. at 1528-31. Even if the premium is not sufficiently important to qualify for per se treatment, if the expansion of per se categories along these lines were a possibility, one would expect the Court to discuss *Hodel* and distinguish it. For example, the Court might have reasoned that the premium was not a property interest that had traditionally received recognition or protection, in contrast to the right to pass property, whose traditional significance was emphasized by the Court in *Hodel*.

234. The Court reasoned that "the existence of the transfer in itself does not convert regulation into physical invasion." *Yee*, 112 S. Ct. at 1529. In addition, the Court rejected the argument that requiring park owners to lease spaces to anyone who purchased a mobile home interferes with possessory rights on the ground that once the park owner opened the land for rental by mobile home owners, the landlord-tenant relationship was subject to regulation. *See id.* at 1528-29; *accord* FCC v. Florida Power Corp., 480 U.S. 245, 251-53 (1987).

235. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992). The plaintiff in *Lucas* had spent nearly $100,000 on residential beachfront property with the expectation of developing it, but the subsequent adoption of the South Carolina Beachfront Management Act effectively precluded him from building on the property. He would, however, be permitted to build a walkway or small deck. *Id.* at 2889 n.2.

236. The South Carolina court distinguished between measures preventing public harms, such as the Act in question, and those securing public benefits, which would require compensation if they totally destroyed economic uses. *Id.* at 2890.

237. The majority and dissent disagreed as to whether *Lucas* created a new rule or merely confirmed a preexisting one. *Compare Lucas*, 112 S. Ct. at 2893 n.6 (majority opinion) (stating that *Lucas* merely applies the existing rule) *with id.* at 2909 (Blackmun, J., dissenting) (arguing that *Lucas* creates the additional burden on the state of "showing the regulation is not a taking"). This disagreement is not surprising, given the ambiguity of previous decisions. Since *Mahon*, the Court has frequently stated that a regulation that

holding, *Lucas*'s scope will ultimately depend on a number of unresolved questions.

First, although total destruction appears to be a relatively straightforward concept, it may be very difficult to draw the line between complete and nearly complete destruction. *Lucas* offers little insight on this question because there was a lower court finding of total destruction.[238] A number of cases, some quite recent, have tolerated a considerable diminution in value without finding a complete destruction of economically viable uses.[239] If these cases are followed, the state can escape the per se rule by leaving some economically viable use intact, even if the value of the property is substantially reduced by the prohibition of other uses.

Second, and more important for purposes of this analysis, the scope of the per se rule depends on how the Court defines the property interest against which complete destruction is to be measured.[240] Justice Scalia suggested in a lengthy footnote that this question should be determined by reference to "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest."[241] Insofar as state law frequently breaks up the bundle of interests that constitutes property into relatively small pieces, this dictum might be applied to give the *Lucas* rule

---

destroys all economically viable uses of property constitutes a taking, *see* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495-96 (1992); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295 (1981); Agins v. Tiburon, 447 U.S. 255, 260 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 n.36 (1978), but until *Lucas* it was unclear whether this was true regardless of the regulation's purposes, *see Keystone*, 480 U.S. at 513 (Rehnquist, C.J., dissenting).

238. *See Lucas*, 112 S. Ct. at 2896 & n.9. Coincidentally, *Mahon* also took complete destruction as a given. *See supra* note 199.

239. *See, e.g., supra* notes 197-99 and accompanying text (discussing *Keystone*); *supra* note 194 (discussing *Penn Central*).

240. *See, e.g.*, Note, *The Effect of* Lucas v. South Carolina Coastal Council *on the Law of Regulatory Takings*, 68 WASH. L. REV. 415, 416 (1993).

241. *Lucas*, 112 S. Ct. at 2894 n.7. Justice Scalia began by acknowledging that the problem of defining the interest against which to measure a deprivation rendered the "rhetorical force" of the per se rule "greater than its precision," and illustrated the point by using the example of a large parcel of property, a portion of which can no longer be put to profitable use because of a government regulatory measure. *Id.* Such a measure can be characterized as either the partial diminution of the entire parcel, or the total destruction of a smaller parcel. The problem is not limited to geography but includes the possibility of separate types of legal interests within any parcel of property. The Court found it unnecessary to resolve the issue in *Lucas*, however, because the fee simple interest against which the total destruction of economically viable uses was measured "is an estate with a rich tradition of protection at common law." *Id.*

broad effect, but such an outcome is doubtful.[242] Prior to *Lucas*, the Court had consistently measured the destruction of property by reference to the largest possible interest and refused to consider subsidiary interests that had been completely destroyed.[243] This question, moreover, is no different from the *Hodel* issue of whether important sticks in the bundle of rights should receive per se treatment; the subsequent history of *Hodel*, therefore, also suggests that the Court will be unwilling to recognize additional subsidiary interests as distinct for purposes of *Lucas*'s per se rule.[244] The problem of identifying the underlying property interest is also reflected in the creation of an exception to the *Lucas* per se rule for regulations that reflect preexisting common-law nuisance restrictions.[245]

---

242. *See infra* notes 246-50 and accompanying text.

243. In *Keystone*, for example, the Court refused to treat the "support estate" recognized under state law as a separate interest that had been completely destroyed, stating flatly that "our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 500 (1987); *accord* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978) (refusing to treat "air rights" as a separate interest). Justice Scalia's suggestion that smaller interests recognized by state law be used to determine whether complete destruction has occurred is therefore plainly inconsistent with both *Keystone* and *Penn Central*.

244. *Lucas* phrases the issue as one of identifying which property interests have independent status for purposes of assessing complete destruction, while *Hodel* asks which sticks in the bundle of rights are particularly important, but these inquiries have the same practical effect and rely on the same considerations, such as a tradition of protection. Thus, were the expansion of separate property interests likely, one would expect the *Lucas* Court to use *Hodel* itself as an example of complete destruction of an interest (the right to pass property on death) that has been traditionally accorded separate status and protection under state law.

245. This exception rests on the theory that nothing can be taken that was not owned in the first instance, and overlaps with one possible rationale for heightened scrutiny. *See supra* notes 217-18 and accompanying text. Depending on how strictly this exception is applied, it may weaken the *Lucas* rule significantly. *Lucas* itself does apply the exception, but the opinion gave every indication that the exception is meant to be a narrow one. *See Lucas*, 112 S. Ct. at 2900 (stating that the regulation must "do no more than duplicate the result that could have been achieved in the courts"); *id.* at 2901 ("[T]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition."); *id.* (asserting that the state "must do more than proffer the legislature's declaration that the uses . . . are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim"); *see also id.* at 2901-02 (declaring that the state "must identify background principles of nuisance and property law that prohibit the uses [the owner] now intends in the circumstances in which the property is presently found"). This limited view of the nuisance exception is difficult to square with Justice Scalia's recognition in *Lucas* itself that the purpose inquiry in regulatory takings analysis began as a nuisance exception, but evolved into a broader recognition that nuisance law was a regulatory system that dealt with competing *beneficial*

It therefore seems likely that per se takings will be confined to physical invasions and complete destruction of economically viable uses, and that these per se categories will be defined narrowly.[246] Every use to which property might be put can be characterized as a separate interest, and smaller interests are more likely to be completely destroyed.[247] Once the Court begins to recognize additional

---

uses. *Id.* at 2897-901. Insistence upon the common-law resolution of conflicting uses is no more warranted in the case of complete destruction than partial destruction. Note also that if strictly followed, a Court ostensibly committed to judicial restraint "has reassigned a significant piece of the nation's ultimate land-use law authority from elected state legislatures to the judiciary." Humbach, *supra* note 47, at 3. These difficulties may cause the nuisance exception to expand over time.

246. Despite the attention given the decisions, both friends and foes of aggressive takings doctrine have predicted that *Lucas* will have limited effect. *See, e.g.*, Michael J. Davis, Lucas *and Takings: Private Property Redefined*, 2 KAN J.L. & PUB. POL'Y 83, 88 (1993) ("If past is prologue, *Lucas* will have a short run on the constitutional stage, soon to be replaced by a more sensible regulatory taking jurisprudence."); Richard A. Epstein, Yee v. City of Escondido: *The Supreme Court Strikes Out Again*, 26 LOY. L.A. L. REV. 3, 4 (1992) (arguing that *Lucas* gave some protection to landowners, "[b]ut its importance is limited because the Court appears to have adopted a powerful 'hands off' attitude to all forms of partial restrictions on land use"). Nor does an expanded concept of physical invasion appear likely. The Court resisted the invitation to characterize the provisions in *Yee* as effecting a physical invasion because they prevented park owners from excluding mobile home purchasers from their property, despite two federal courts of appeals decisions that had reached precisely that result. *See* Pinewood Estates of Mich. v. Barnegat Township Leveling Bd., 898 F.2d 347, 353 (3d Cir. 1990); Hall v. City of Santa Barbara, 833 F.2d 1270, 1276 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988); *see also* FCC v. Florida Power Corp., 480 U.S. 245, 251-54 (1987) (distinguishing *Loretto* and holding that federal Pole Attachments Act did not constitute a physical invasion). In addition, the Court in United States v. Sperry Corp., 493 U.S. 52 (1989), held that the deduction of a percentage of an award by the Iran-United States Claims Tribunal as a fee to reimburse costs to the federal government was not a physical invasion. *Id.* at 62 n.9.

247. *See, e.g.*, Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1614 (1988) ("[A]ny land use regulation can be characterized as the 'total' deprivation of an aptly defined entitlement."). If, for example, *Hodel* establishes the right to devise property as a distinct interest whose total destruction engages a per se rule, it would seem to require other interests to be similarly protected. This analysis would be particularly difficult to reconcile with the Court's earlier decision in Andrus v. Allard, 444 U.S. 51 (1979), which upheld a law banning sale of bald or golden eagle parts even though possession of these items was not illegal. *Id.* at 67-68. If the right to devise property is sufficiently traditional and important to justify treatment as a taking per se, it is hard to see how the right to alienate property by means of sale is not. Thus, although Justice Brennan, joined by Justices Marshall and Blackmun, wrote a brief concurring opinion in *Hodel* emphasizing that *Andrus* remained good law, Hodel v. Irving, 481 U.S. 704, 718 (1987) (Brennan, J., concurring), Justice Scalia, joined by Chief Justice Rehnquist and Justice Powell, wrote an equally brief concurring opinion arguing that *Hodel* is indistinguishable from *Andrus* and must be viewed as limiting that case to its facts, *id.* at 719 (Scalia, J., concurring). Similarly, it is difficult to see why the Court should not also have recognized the support estate as a separate interest in *Keystone* or air rights as a separate interest in *Penn Central*. It makes no difference whether the issue is approached as one of recognizing separate

property interests, the categorical approach, which is divorced from any direct tie to original intent and lacks any alternative theoretical foundation, offers little hope of limiting the per se rule in any coherent way.[248] Under an expanded per se analysis, therefore, the Court cannot stop short of dismantling modern government.[249] Even if this approach is workable and limited to explicitly recognized interests, it remains unclear why a state's treatment of property should be dispositive of the constitutional question.[250]

---

property interests, which seems to be the focus of the Court's analysis, or as one of according per se treatment to partial diminutions, as argued by Professor Epstein. These approaches are flip sides of the same coin, and the outcome in either case is effectively to require compensation for any regulation that diminishes the value of property.

248. *Lucas*'s suggestion that the issue be resolved by reference to how the owner's expectations have been shaped by the explicit recognition of property interests under state law would leave numerous interests entitled to per se treatment:

> The notion that any identifiable interest is entitled to separate protection under the fifth amendment is astonishing. Carried to a logical conclusion, the concept could virtually paralyze the economic regulation of land. The mind boggles at the consequences if air rights, incorporeal hereditaments, the rights to be free from trespass or nuisances, and all identifiable possessory rights are each entitled to individual protection under the fifth amendment.

Davis, *supra* note 246, at 87. *But see* Note, *"Property" in the Fifth Amendment: A Quest for Common Ground in the Maze of Regulatory Takings*, 46 VAND. L. REV. 1283, 1330-32 (1993) (arguing for the recognition of a limited set of "narrow" property interests as denominators for measuring diminution of value). The logic of this state law approach extends even further. Property interests are also protected indirectly by contract law; a property owner might contract with others to exchange virtually any use for consideration and that contract would receive protection under ordinary common-law contract principles. If, as Justice Scalia suggests, how an owner's expectations are shaped by state law determines whether an interest warrants per se treatment, there is no obvious reason why contractual protection should not also qualify property interests for per se treatment because the owner's expectations are unlikely to depend on whether the interest is reflected in property law or in a contract. *See* Kainen, *supra* note 15, at 478 (arguing that contract rights are property rights and that Contract Clause impairment occurs when a state retroactively interferes with contract rights and does not provide just compensation).

249. *See Lucas*, 112 S. Ct. at 2894 (stating that a per se rule for total destruction of beneficial use does not engage the functional concern that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law" (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922))); *see also supra* notes 160-67 and accompanying text (discussing analogous problem in separation of powers area).

250. *Lucas*'s expectations rationale logically gives states complete control over defining property, even to the point of emptying the Takings Clause of all meaning. *See infra* part III.B.3. If the state's recognition of an interest creates expectations, its refusal to recognize an interest should preclude them, and a state could qualify expectations by defining property as subject to government appropriation without compensation. Recognizing this problem, the *Lucas* Court indicated that there were constitutional limits on how the state may implicitly condition property rights. *See Lucas*, 112 S. Ct. at 2900 ("The notion . . . that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical

III. ORIGINALIST ESCAPES AND THE BASELINE PROBLEM

The search for an originalist escape prevented the conservative Court not only from integrating economic interests into a broader theory of constitutional rights, but also from developing a baseline or baselines against which to measure government action. Our conception of rights is predominantly negative; that is, government action is suspect if it "burdens" rights in some way, but the government is not required to take affirmative steps to enable the exercise of rights.[251] This conception of rights requires a baseline or baselines that distinguish burdens from the "mere" denial of benefits.[252] The erosion of common-law baselines in the post-New Deal period facilitated the development of liberal jurisprudence but left the liberal Court without any well-defined baselines. The conservative Court's recent efforts to reinvigorate economic rights have failed in part because its high-profile commitment to judicial restraint prevented the reassertion of common-law baselines or the development of a workable alternative.

A. *The Erosion of Common-law Baselines and Liberal Jurisprudence*

Lochner-era jurisprudence rested on the incorporation of common-law property and contract rights as a prepolitical, natural-law

---

compact recorded in the Takings Clause that has become part of our constitutional culture."). But if the Constitution determines what interests must be protected by the state for this purpose, it should also determine what interests are sufficiently important to require separate treatment. *Cf. infra* part IV.A.2. (discussing use of constitutionally derived baselines).

251. *See generally* David P. Currie, *Positive and Negative Rights*, 53 U. CHI. L. REV. 864, 687-80 (1986) (comparing treatment of affirmative rights in United States and German constitutional law). One important exception to this strictly negative view of rights is the equal protection principle, which may entail a significant affirmative component. *See infra* notes 342-45 and accompanying text.

252. For a general discussion of the role of baselines in constitutional reasoning, see Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 413 (1981); Jeremy Paul, *Searching for the Status Quo*, 7 CARDOZO L. REV. 743, 784 (1986) (reviewing EPSTEIN, *supra* note 47); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1418 (1989); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) [hereinafter Sunstein, *Lochner's Legacy*]; Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 594 (1990) [hereinafter Sunstein, *Unconstitutional Conditions*].

baseline.[253] Downward departures from this baseline (i.e., measures interfering with property and contract rights) required a substantial justification under a narrowly defined state police power, and the bare desire to alter the distributional outcome of private conduct under the common law was illegitimate.[254] Conversely, other economic interests, such as government benefits, were mere privileges beyond constitutional protection.[255] But even before the demise of the *Lochner* era, the Court also appeared to recognize that the common law itself was merely a regulatory regime in which the government chose to prefer some interests over others,[256] a view that undermines the notion of the common law as a constitutional baseline. When the liberal Court rejected *Lochner*, it implicitly rejected the view that property rights are natural rights that exist independently of government action in favor of the recognition that property rights are created by the common law, which is merely one of many possible regulatory system regimes. The resulting erosion of the common-law constitutional baseline was consistent with liberal ideology in two respects. First, the erosion made it constitutionally permissible for government, which had created the common-law order, to alter that regulatory system without the kind of health and safety reasons demanded under *Lochner*.[257] Second, because common-law rights

253. *See generally* Sunstein, *Lochner's Legacy*, *supra* note 252, at 883 (arguing that Lochnerian assumptions regarding common-law baselines continue to influence numerous modern constitutional decisions).

254. *Lochner* itself reflects these assumptions. In assessing whether the regulation of bakers' hours was a valid police power measure, the Court reasoned that the absence of colorable health or safety justifications exposed it as an illegitimate regulation of labor relations. Lochner v. New York, 198 U.S. 45, 60-61 (1905). Regulation of labor relations was illegitimate because it interfered with the common-law ordering, which allowed employers and employees to negotiate employment on whatever terms they desired. *Id.* at 62-64.

255. *See, e.g.*, TRIBE, *supra* note 18, at 680-81.

256. In Miller v. Schoene, 276 U.S. 272 (1928), for example, the Court held that the destruction of valuable cedar trees on the plaintiff's property to prevent the transmission of disease to the state's apple crop did not constitute a taking for which compensation was required. *Id.* at 279. The Court expressly indicated that this result did not turn on whether the trees would have constituted a nuisance at common law. *Id.* at 280. Instead, the Court reasoned that when property uses conflict, the state must inevitably choose between the owners—whether by action or inaction—and thereby harm one of them. *Id.* at 279.

257. Put simply, if property rights are created by society through the governmental establishment of a legal regime to protect them, there can be no natural right to any particular property regime. *See, e.g.*, Daniel W. Bromley, *Regulatory Takings: Coherent Concept or Logical Contradiction?*, 17 VT. L. REV. 647, 653 (1993) ("[T]o have a right is to have the ability to require some authority system to act on your behalf—that is, to act so as to protect your particular interest against the interests of others."); Siegel, *supra* note

became simply a type of government benefit, the traditional distinction between "rights" and "privileges" was no longer viable, and some constitutional protection could extend to some affirmative rights.[258]

1. Deference to Economic Regulation

The demise of common-law baselines facilitated the deferential approach to economic regulation by recognizing that all regulatory regimes, including the common law, involve choices between competing economic interests. From this perspective, there is no constitutional reason to prefer the common law over any other regulatory regime.[259] The erosion of common-law baselines was most complete under the Due Process Clause, where the liberal Court criticized the *Lochner*-era jurisprudence as improper activism,[260]

15, at 104-07 (describing how changing technology facilitated rise of natural monopolies, which changed the concept of property ownership by linking it to what had previously been only possible as a government privilege). *See generally* Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CAN. J.L. & JURIS. 217, 220-28 (1993) (arguing that natural rights conception of property underlying recent takings decisions is untenable in light of the social origins of property). In contrast, the central feature of Professor Epstein's restrictive vision of government authority to adversely affect property rights is his belief that property rights are natural rights that exist independently of government action, although "the value of these rights in a state of nature is low because some individuals continually try to take that which by right belongs to others." EPSTEIN, *supra* note 47, at 3.

258. In other words, there is no conceptual difference between the "benefit" of government protection of one's possession of goods or land and the benefit of, say, government payment of medical expenses for those who cannot afford it. In both cases, the government uses resources gained through taxation to do something that benefits some members of society particularly and purportedly serves the general public interest as well.

259. For example, it makes no sense to distinguish for purposes of regulatory takings analysis between regulations that prevent harms and those that confer benefits, because whether a regulation prevents a harm or confers a benefit merely reflects the baseline from which its impact is measured. *See generally* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2892-95 (1992) (discussing evolution of Court's conception of permissible purpose in regulatory takings analysis). Consider *Penn Central*, in which then-Justice Rehnquist assumed that the property owner began with the right to develop the property and that the public was not entitled to the preservation of historic buildings that were privately owned. *See Penn Central*, 438 U.S. at 142-46 (Rehnquist, J., dissenting). As a result of this starting point, Justice Rehnquist concluded that the ordinance conferred a public benefit rather than preventing a harmful use of the property. *Id.* One might as easily argue that because those who purchase historically significant buildings do so with an inherent obligation to preserve them, historic preservation ordinances prevent the public harm of destruction of historic treasures. This argument, of course, assumes that there is no clear evidence of the framers' intent to constitutionalize then-existing common-law definitions of property. *See supra* notes 111-20.

260. *See supra* note 9 and accompanying text.

accepted dissatisfaction with the outcome of common-law ordering as a legitimate basis for regulation,[261] and presumed that regulation bears a rational connection to whatever purposes plausibly support it.[262]

This analysis also provided a basis for limiting the scope of other provisions. If the state's regulatory system creates property and contract rights, then the state has substantial power to define these rights in ways that limit the Contract and Takings Clauses. Contract Clause and regulatory takings analyses thus qualified contract and property rights by the government's reserved power to alter the regulatory system in the public interest.[263] This reasoning effectively incorporated the rational basis test from the due process context into the Contract Clause and regulatory taking contexts.[264]

Even at the height of its deferential approach to economic regulation, however, the liberal Court was not entirely comfortable with the full implications of this reasoning. Logically, the state's power to define contract and property rights through its choice of regulatory systems would allow the state to condition contracts[265] and property rights[266] on the reserved power of the state to abrogate

---

261. *Compare, e.g.*, *Lochner*, 198 U.S. at 64 (assuming that labor regulation is invalid absent a public health or safety interest) *with, e.g.*, NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1, 33 (1937) (accepting labor regulation as a valid public purpose).

262. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938). An equally deferential rational basis test is applied under the Equal Protection Clause. *See supra* note 67 and accompanying text.

263. This point is fairly clear with respect to the Contract Clause, *see supra* notes 169-72 and accompanying text, but complicated in the regulatory takings context by the use of several possible rationales for the purpose inquiry in regulatory takings analysis, *see supra* notes 214-23 and accompanying text. Nonetheless, none of these rationales makes sense except as a kind of qualification of property ownership by the state's police power, whether on the theory that use restrictions are not takings if within the police power or on the related theory that property rights are implicitly limited by the state's reserved police power so that nothing is taken when police power measures restrict uses.

264. This appears to be true notwithstanding Justice Scalia's contrary reasoning in *Nollan*. *See supra* note 206.

265. For a contractual obligation to be impaired, it must be created, a point long recognized in the Court's treatment of prospective limits on contracts as entirely outside the scope of the Contract Clause. *See supra* note 170. If no common-law baseline of contractual freedom exists, this logic can be extended much further, and a state might condition all contracts on the state's reserved power to abrogate any provision. *See* General Motors Corp. v. Romein, 112 S. Ct. 1105, 1111-12 (1992) (using this scenario as a reductio ad absurdum to justify the Court's refusal automatically to incorporate all background law into contracts). For further discussion see *infra* notes 353-56 and accompanying text.

266. For property to be taken, it must first be owned or possessed, an idea that underlies the *Lucas* exception for common-law nuisances. *See supra* note 245 and

those interests. Since this reasoning empties both the Contract and Takings Clauses of all meaning, the Court could not fully embrace it. Thus, the per se treatment of physical invasions survived the repudiation of *Lochner* by the liberal Court,[267] and the liberal Court continued to pay lip service to the Contract Clause and to regulatory takings, although it uniformly rejected such challenges to economic regulation.

2. Affirmative Rights

The erosion of common-law baselines also laid the foundation for extending constitutional protection to interests previously regarded as mere privileges. Just as downward departures from the common-law baseline were inherently suspect under *Lochner*, any government benefit over and above the common-law baseline received no constitutional protection.[268] But whether government action deprives the individual of a right or merely refuses to grant the individual a privilege depends entirely on the baseline from which the impact on the individual is measured.[269] Thus, the rejection of common-law baselines made it possible to view government benefits as rights that engage constitutional safeguards.

Insofar as the liberal social programs of the New Deal and Great Society created the modern welfare state, it is not surprising that liberal jurisprudence has sought to accord these affirmative rights some measure of constitutional protection.[270] Liberal scholars such as Charles Reich argued that, because government benefits are so important to their recipients, they are a form of property entitled to constitutional protection.[271] Heeding this call, the liberal Court began to recognize affirmative rights to certain kinds of government benefits. This development was most pronounced in the procedural due process context, where *Goldberg v. Kelly*'s[272] treatment of

---

accompanying text. Following this analysis, if a state's law defined property ownership as inherently subject to a broadly defined state power, then complete destruction or even physical appropriation might be sustainable on the theory that the owner never had a "right" to be free from such action. *See infra* notes 353-56 and accompanying text.

267. *See supra* note 188 and accompanying text.

268. Of course, to the extent that these interests may have had a contractual element, they might receive protection, although doctrines such as sovereign immunity limited even this protection.

269. *See supra* note 258.

270. For an interesting comparative discussion of the extent to which constitutional doctrine recognizes affirmative duties, see Currie, *supra* note 251 at 872-86.

271. *See, e.g.*, Charles Reich, *The New Property*, 73 YALE L.J. 733, 785 (1964).

272. 397 U.S. 254, 262 n.8 (1970).

welfare benefits as "property" began a long line of cases recognizing certain government benefits as liberty or property interests.[273]

While these cases initially employed an expansive analysis, even the liberal Court was uncomfortable with the full implications of affirmative rights; and later decisions limited the protection of affirmative rights in various respects.[274] First, despite suggestions in *Goldberg* that constitutional protection of government benefits depends on the benefits' importance to individuals,[275] the Court adopted a statutory entitlement approach to affirmative rights[276] that left the creation of protected interests entirely to the discretion of the state.[277] Second, the Court did not insist that the full measure of common-law due process be extended to entitlements, adopting instead an open-ended balancing test to determine the process due.[278]

Moreover, the Court was reluctant to accord substantive protection to affirmative rights. Some cases did so in a limited fashion when the rights to travel[279] or freedom of speech were implicated,[280] to achieve equal treatment as required by the Equal Protection Clause,[281] or when the government had disabled in-

---

273. *See generally* TRIBE, *supra* note 18, §§ 10-9 to 10-18 (discussing cases); NOWAK & ROTUNDA, *supra* note 19, at 508-48 (same).

274. In these areas, doctrines introduced by the liberal Court provided the basis for a nearly full-scale retrenchment by the conservative Court. *See infra* notes 290-98 and accompanying text.

275. *Goldberg*, 397 U.S. at 261.

276. This approach was also suggested in *Goldberg*, which relied in part on statutory language that seemed to create an entitlement to benefits. *Id.* at 262. Later cases relied on statutory entitlement to the exclusion of other factors. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 578 (1972).

277. This approach, which is quite similar to the treatment of property and contract rights for purposes of economic regulation, *see supra* notes 263-67 and accompanying text, creates a variety of logical difficulties. Most prominently, the Court has had difficulty explaining why the state may freely choose not to create rights by avoiding statutory language suggesting an entitlement, but cannot create a right conditioned on the state's power to terminate it with minimal procedures. *See infra* notes 350-52 and accompanying text.

278. Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976). The net effect of this development was that while the "New Property" received some procedural protection, it never received the same degree of protection accorded traditional property rights.

279. *See* Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (holding that denial of welfare benefits to new residents for the purpose of deterring in-migration of indigents is unconstitutional).

280. Branti v. Finkle, 445 U.S. 507, 518-20 (1980) (ruling that nonpolicymaking government employee may not be fired on the basis of opposition to elected officials in previous election); Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion) (same).

281. *See supra* note 82.

dividuals from protecting themselves, as in the prison context.[282] But in cases such as *Dandridge v. Williams*, the Court definitively rejected direct substantive claims to government benefits.[283] Other doctrines, including the state action requirement[284] and the treatment of disparate impact cases,[285] also reflected the continued influence of common-law baselines. While this analysis is obviously defensible in terms of judicial restraint,[286] considering the important role of government benefits in liberal social policy, one might have expected a more aggressive pursuit of constitutional protection for these substantive interests.[287]

---

282. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (holding that deliberate indifference to prisoners' needs violates Eighth Amendment); *see also* Youngberg v. Romeo, 457 U.S. 307, 315 (1982) (indicating that state had affirmative duty to provide adequate food, shelter, clothing, and medical care to persons confined in mental institutions).

283. 397 U.S. 471, 487 (1970) (declining to recognize fundamental right to welfare benefits). By refusing to accord welfare benefits fundamental rights status, the Court subsumed the analysis of benefits into the analysis of ordinary economic regulation and applied the rational basis test. *Id.* at 485-86.

284. This requirement's treatment of private conduct as beyond the purview of the Constitution presumes that government bears no responsibility for that conduct, while a baselineless analysis recognizes that government creates the regulatory regime under which private conduct is permitted. In Moose Lodge v. Irvis, 407 U.S. 163 (1972), for example, the Court held that racial discrimination by a state-licensed private club did not engage equal protection because the state did not mandate or encourage discrimination. *Id.* at 176. This analysis starts with the baseline assumption that private actors are free to discriminate, as they were at common-law. But if this freedom is a regulatory choice (the common law could have started with the baseline assumption that individuals have a right to be free from discrimination), then the state could be held responsible for creating the conditions under which private discrimination flourishes.

285. Facially neutral government action that disproportionally affects minorities by reinforcing preexisting inequalities is not discriminatory absent improper motive. Washington v. Davis, 426 U.S. 229, 245 (1976). This analysis assumes that the government bears no responsibility for the social conditions responsible for the disparate impact, such as the history of discrimination that contributed to lower test scores for African-Americans in *Washington v. Davis*. If, on the other hand, the government bears some responsibility for the creation of the societal baseline in which African-Americans perform poorly on tests, then it arguably has an obligation to avoid apparently neutral measures that perpetuate the effects of past discrimination.

286. In *Dandridge*, the Court invoked judicial restraint and held up the *Lochner* era as a negative example of what would follow from the acceptance of welfare rights as fundamental. *Dandridge*, 397 U.S. at 484-85. The practical consequences of recognizing affirmative rights are also highly problematic, because they might require a massive expenditure of resources.

287. Consider also in this regard the Court's treatment of education. Although the Court emphasized the vital importance of education in *Brown*, it refused to elevate scrutiny of measures adversely affecting education. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).

Overall, then, the erosion of common-law baselines furthered the goals of liberal jurisprudence, but the Court was troubled with the full implications of a baselineless constitutional analysis. Thus, while the demise of common-law baselines was virtually complete in the context of economic regulation, the Court seemed to recognize that there must be limits to the states' ability to define away contract and property rights. More clearly, full recognition of affirmative rights in a baselineless world would entail a massive judicial restructuring of social institutions of such proportions that it gave even "activist" judges pause.

B. The Baseline Problem and Conservative Jurisprudence

The tension between judicial restraint and economic rights prevented the conservative Court from resolving the baseline problem. Conservative economic theory might favor reassertion of common-law baselines to protect traditional property and contract rights, but judicial restraint made it impossible to pursue this course outside the context of per se takings, and forced the Court to retain a fully baselineless analysis of economic regulation under the Due Process Clause. Judicial restraint also distorted the development of alternative baselines, because the construction of baselines is an activist endeavor. Thus, the Court sought to disclaim responsibility for baselines by locating them outside the Constitution, resulting in a poorly defined expectations approach based on the preexisting recognition of contract and property rights under state law. On the other hand, judicial restraint permitted the Court to reassert common-law baselines as a means of restricting affirmative rights, except in the area of procedural due process, in which an expectations model also reigned. Thus, the conservative Court's economic rights jurisprudence is characterized by three distinct approaches to the baseline problem.

1. Baselines in Conservative Economic Theory

Constitutional protection for traditional property and contract rights requires a baseline system of economic ordering that gives legal protection to the acquisition, possession, use, and disposition of land, chattels, and intangible interests. In a baselineless world in which the state creates property and contract rights by according them legal protection, it can freely limit or extinguish them.[288] Thus, as dis-

288. Whether property preexists government or is created by government is a central point of disagreement between conservative and liberal views of economic rights. *See infra*

cussed above, without a baseline against which to measure the impact of government action, property and contract rights can be defined away.[289]

Not surprisingly, common-law baselines generally correspond to the insights of the conservative law and economics and public choice movements.[290] The law and economics movement starts with the descriptive claim that the generally laissez-faire common-law rules promote "efficiency" in the sense that social utility is maximized because market forces ensure that resources are put to their most valued uses.[291] While most conservative economists recognize that there are many market failures left uncorrected by the common law, they are skeptical of the liberal assumption that government intervention is likely to correct these failures, since government is not perfect either. Insofar as public choice theory postulates that legislative and regulatory action is usually the product of self-interested official actions responding to rent-seeking interest groups, it reinforces this opposition to regulatory measures by implying that regulatory measures do not correct market failures but rather create dead-weight losses by encouraging competition for monopoly rents.[292]

These arguments, if accepted, support common-law baselines. To the extent that the market is generally efficient, common-law baselines would make sense as a means of promoting the general

---

notes 457-61 and accompanying text.

289. *See supra* notes 265-67 and accompanying text.

290. *Cf.* G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 436-38 (1993) (arguing that the Court's restriction of the public policy exception to contract enforcement goes beyond *Lochner*'s constitutionalization of the common law, reflecting "a sustained interest in reconstructing the American legal system to better reflect economists' ideal of strict contract enforcement").

291. *See generally* POSNER, *supra* note 72, at 23 (arguing that common law is best understood as a way of organizing society to maximize wealth). This claim rests on the premise that markets operate to maximize social utility unless there is a market failure, such as externalities or inadequate information. Insofar as common-law rules generally reflect a laissez-faire attitude toward the market, enforce market transactions, and intervene only in limited cases of clear market failure, conservative law and economics scholars view the common law as generally superior to alternative regulatory regimes. It follows that any departure from the common-law rules must be strictly justified in terms of market failure. Although law and economics scholars frequently disclaim any normative judgments about the relative priority of maximizing social utility and other values that society might choose, such as fairness in the distribution of wealth or moral and ethical judgments, that has not typically prevented them from criticizing legal rules that do not conform to economic principles.

292. *See supra* notes 72-73 and accompanying text.

welfare.[293] Likewise, regulatory departures from the common law would be suspect because they are most likely the product of rent-seeking by special interests rather than public-regarding legislative deliberations.[294] Moreover, since it is ordinarily assumed that Article III safeguards leave judges free of the kinds of self-interested motivations that distort the legislative and administrative process,[295] it would seem to follow that close judicial scrutiny of regulatory measures is appropriate.[296]

Common-law baselines are also consistent with the conservative perspective insofar as they preclude or limit the recognition of affirmative rights.[297] Affirmative rights are inconsistent with conservative economic theory because they create improper incentives for individual recipients; resources spent in pursuit of government entitlements, which merely transfer resources without producing anything of value, are a dead-weight loss in economic terms.[298]

---

293. Of course, many advocates of economic analysis would shrink from constitutionalizing economic theory, and I do not mean to suggest that the superiority of a particular regulatory regime is sufficient to justify treating it as constitutionally mandated. My point is simply that, given conservative economists' praise for the common law as a reflection of sound economic principles, the constitutionalization of the common law would generally accord with conservative economic theory. To the extent that the common law does not reflect economic theory, of course, economists might prefer other baselines. *See* Shell, *supra* note 290, at 482-86, 503-09 (arguing that Court's treatment of public policy defense of enforcement of contracts departs from common law in ways that reflect influence of law and economics).

294. Thus, for example, it is not surprising that Judge Frank Easterbrook supports a rule of statutory construction that tends to preserve the common law, arguing that, unless a statute expressly and clearly confers power on the courts to create a statutory common law, it should be restricted to matters expressly resolved by its framers. *See* Easterbrook, *supra* note 74, at 544-52. Although Judge Easterbrook defends this rule as the one that would most likely be chosen by the legislature, the rule coincidentally tends to preserve the common law in cases of statutory ambiguity. Judge Easterbrook also invokes both public choice theory and the preservation of private social ordering (i.e. markets) to support his argument that the legislature would prefer such a rule. *Id.*

295. *See, e.g.*, BICKEL, *supra* note 134, at 25-27 (arguing that the independence of judges and their training enable them to pursue enduring values). This notion can also be supported in public choice terms. *See, e.g.*, Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 B.Y.U. L. REV. 827, 855. *But see* William Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875, 879 (1975) (arguing that independence of judiciary functions to enforce legislative interest group bargains).

296. Of course, not all conservatives support this view. *See supra* note 74.

297. *See, e.g.*, Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 696; Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 775 (1990).

298. Moreover, providing constitutional protection for affirmative rights is a particularly stark form of judicial activism, because it is clear that the framers did not contemplate the existence of such rights and because their recognition implicates further judicial

Common-law baselines would enable the Court to safeguard property and contract rights without according similar protection to affirmative rights; without baselines, the legal recognition of property and contract rights is merely another type of government benefit that should receive the same doctrinal treatment as welfare benefits.

2. Common-Law Baselines and Judicial Restraint

Judicial restraint and the resulting search for an originalist escape have limited the reintroduction of common-law baselines. To avoid association with the *Lochner* era, the Court has left intact the baselineless liberal analysis of substantive economic due process claims. Also, because both the Contract Clause and the Takings Clause incorporate the substantive due process rational basis test,[299] the Court could not easily use common-law baselines under these provisions without creating an apparent conflict with its baselineless due process decisions. On the other hand, judicial restraint was generally consistent with the use of common-law baselines to limit affirmative rights, and the Court pursued this tactic rather aggressively, except in the procedural due process area.

The Court clearly could not enhance economic rights by incorporating common-law baselines into substantive economic due process analysis. Because of its association with *Lochner*-era activism and its affinity to liberal individual rights doctrine, substantive due process was "off limits."[300] Thus, the Court continues to analyze due process challenges to economic regulation without reference to any baseline of property and contract rights.[301] The same appears

---

involvement in matters of social policy.

299. *See supra* note 67.

300. *See supra* notes 57-61, 94-98 and accompanying text. Justice Scalia, later joined by Justice Thomas, has argued, however, that forms of regulation that were *permissible* at common law can pose no due process problems. *See* Pacific Mut. Life Ins. v. Haslip, 499 U.S. 1, 38 (1990) (Scalia, J., concurring); TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2726-28 (1993) (Scalia, J., concurring) (joined by Justice Thomas).

301. The Court not only has rejected common-law baselines in its economic due process analysis, but also has declined to introduce an alternative baseline founded on expectations. General Motors Corp. v. Romein recognized that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions," 112 S. Ct. 1105, 1112 (1992), but required only that the retroactive effect of the legislation be supported by a rational legislative purpose, *id.*; *accord* Pension Benefit Guar. Corp. v. Gray & Co., 467 U.S. 717, 730 (1984) (stating that to sustain retroactive legislation, legislature must show only that "the retroactive application of the legislation is itself justified by a rational legislative purpose"). The deferential analysis in the cases also shows no indication of "rational basis with bite" scrutiny. *See Romein*, 112 S. Ct. at 1112

to be true for equal protection challenges to economic regulation.[302]

The Court has not been much more successful at introducing common-law baselines in any of the originalist escapes it has explored. There were hints of a common-law baseline in the Court's separation of powers decisions. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[303] emphasized the distinction between private and public rights, seeming to elevate common-law actions to a categorically protected status for purposes of Article III analysis.[304] However, this analysis was soon abandoned.[305] Common-law baselines have also figured in some takings decisions.[306] The *Lucas* per se rule incorporates common-law baselines in cases of total destruction of economically viable uses by requiring compensation unless the regulatory measure in question merely replicates preexisting common-law nuisance restrictions.[307] The use of per se analysis made the

---

(cursorily disposing of due process challenge to workers' compensation amendment with retroactive effects); *Gray*, 467 U.S. at 730-31 (rejecting Fifth Amendment due process challenge to retroactive effect of Multiemployer Pension Plan Amendments Act). For a discussion of expectations baselines, see *infra* parts III.B.3. & III.C.2.

302. An expectation baseline is implicit in *Nordlinger v. Hahn*'s suggestion that protection of reliance interests is a legitimate basis for legislative classifications, 112 S. Ct. 2326, 2333-34 (1992), but this argument was used to expand legislative discretion. There is no suggestion in *Nordlinger* or other recent decisions that classifications retroactively burdening traditional property and contract rights ought to be scrutinized with particular care. The Court has incorporated common-law baselines into equal protection analysis to limit the scope of fundamental rights analysis, however, even though in theory equal protection does not require a constitutional baseline because it measures government action in terms of relative treatment. *See infra* notes 340-45 and accompanying text.

303. 458 U.S. 50, 69-70 (1982) (plurality opinion).

304. The Court reasoned that while Congress could freely allocate adjudication of disputes respecting public rights to non-Article III tribunals, courts must retain the essential attributes of judicial power with respect to traditional private rights such as common-law contract or tort actions. *Id.* at 84-85.

305. The Court eliminated the categorical treatment of common-law rights in CFTC v. Schor, 478 U.S. 833, 853 (1986). By redefining public rights to include any statutory right closely associated with a regulatory regime, Granfinanciera v. Nordberg, 492 U.S. 33, 54-55 (1989); Thomas v. Union Carbide, 473 U.S. 568, 588-89 (1985), the Court also allowed the legislature to avoid Article III by replacing common-law rights with statutory ones. Common-law baselines are retained under Article III, however, insofar as government benefits are always "public rights" entitled to no Article III protections. This overall situation closely approximates the result in the substantive due process arena, but seems inconsistent with the treatment of government benefits for procedural due process purposes. *See infra* notes 334, 350-52 and accompanying text.

306. Not surprisingly, Justice Scalia, who has taken a leading role in the Court's aggressive takings jurisprudence, is also a strong proponent of common-law baselines, even when these baselines might foreclose the economic rights arguments favored by conservative politicians. *See supra* note 300 (discussing Justice Scalia's concurrences in the punitive damage cases).

307. *See supra* note 245 and accompanying text.

incorporation of common-law baselines easier because per se analysis survived the repudiation of *Lochner* and did not incorporate the police power qualification found in regulatory takings.[308] This factor may also explain the implicit reliance on common-law baselines in *Nollan*, in which the Court emphasized the affinity between compelling a physical invasion and conditioning a rebuilding permit on the property owner's ceding a public easement.[309] However, neither the *Lucas* per se rule nor the *Nollan* logic applies broadly.[310]

Judicial restraint presented barriers, both in terms of specific doctrine and general principle, to the strict application of common-law baselines in Contract Clause and regulatory takings analysis. To the extent that rational basis scrutiny in the Contract Clause and regulatory takings context determines whether there has been a valid police power action, the reintroduction of common-law baselines into these areas would be doctrinally inconsistent with the rejection of common-law baselines for purposes of substantive economic due process analysis.[311] More generally, because the use of common-law baselines to block economic regulation is closely associated with *Lochner*-era activism, a significant move in that direction, even under different constitutional provisions, would be hard to square with judicial restraint.

On the other hand, the Court's aggressive use of common-law baselines to reject affirmative rights is consistent with judicial restraint because it limits the circumstances in which courts overturn political decisions. Thus, several recent decisions have refused to impose

---

308. *See supra* notes 187-94 and accompanying text.

309. *See supra* note 207 and accompanying text. Justice Scalia acknowledged in *Nollan* that the state could constitutionally deny the rebuilding permit altogether, but elsewhere in the opinion he asserted that "the right to build on one's own property—even though its exercise may be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.' " Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987). This assertion clearly reflects the common-law assumption that ownership and use of property is a prepolitical right, rather than a creation of law. *See generally* Williams, *supra* note 47, at 462-74 (arguing that *Nollan* and *First English* mark the Supreme Court's return to the Lochnerian vision of property as an absolute right).

310. *See supra* part II.C.

311. As noted previously, the scope of the police power does not depend on what constitutional provision is involved, and the test to determine whether a particular measure is within that power should be the same regardless of the constitutional provision at issue. *See supra* notes 176, 216 and accompanying text. *Spannaus* and *Nollan* seemed to disassociate due process analysis from the Contract Clause and regulatory takings inquiries, but in the absence of a broader theory to explain such a development, the Court was forced to retreat. *See supra* notes 176-85, 214-27 and accompanying text.

affirmative duties on government with respect to bodily integrity,[312] education,[313] or public employment,[314] even though all of these interests are "recognized" for procedural due process purposes.[315] These decisions are particularly significant to the extent that they not only refuse to treat affirmative rights as fundamental, but also suggest that affirmative rights simply do not engage due process.[316] The strengthening of common-law baselines is also evident in the Court's retreat from the limited substantive safeguards it had previously recognized for affirmative rights.[317] Finally, even when acknowledged fundamental rights are involved, the Court has used common-law baselines to refuse strict scrutiny on the ground that the state has not imposed any burden on those rights.[318]

---

312. Deshaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 194-201 (1989) (refusing to recognize duty to prevent child abuse by custodial parent even when officials have notice that abuse has occurred).

313. Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 462-65 (1988) (denying existence of state duty to provide free school bus service to indigent students).

314. Collins v. City of Harker Heights, 112 S. Ct. 1061, 1069-70 (1992) (holding that state has no constitutional duty to provide a safe workplace for government employees). *Collins* may also be understood as involving the interest in bodily integrity. *See infra* note 316.

315. *See, e.g.*, Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 278-79 (1990) (bodily integrity); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542-44 (1985) (government employment); Goss v. Lopez, 419 U.S. 565, 572-74 (1975) (education).

316. The public employee in *Collins*, for example, had been injured on the job, which engaged the underlying liberty interest in bodily integrity. *See also Cruzan*, 497 U.S. 261, 279-84 (recognizing that a state may require clear and convincing proof of an incompetent's wishes regarding withdrawal of life-sustaining treatment). Even if the state's inaction (failure to train or provide a safe environment) did not "burden" this interest so as to require elevated scrutiny, the Court should still have applied the rational basis test. *Collins* held, however, that the state owed no duty under the Due Process Clause to provide a safe workplace and thus did not ask whether the state's failure to provide one was rational. Although the rational basis test is deferential, the refusal to apply even deferential review has practical consequences. *See* Stephen Loffredo, *Poverty, Democracy, and Constitutional Law*, 141 U. PA. L. REV. 1277, 1283-84 (1993) ("To appreciate how extraordinary this record [of rejecting affirmative rights] is, one need only juxtapose it with the Court's treatment of other social and economic measures, where the Court has routinely declared legislation unconstitutional even on a rationality standard.") (citations omitted).

317. For example, although earlier decisions had strictly scrutinized the denial of significant benefits to new residents as a burden on the fundamental right to travel, more recent decisions use the rational basis test to invalidate such measures. *See supra* notes 39-40 and accompanying text. While the Court has thus far continued to invalidate the denial of benefits to new residents, the use of the rational basis test is both more consistent with common-law baselines and more likely to relax the constitutional limits on denying benefits to new residents in the future.

318. The most obvious example of this tactic is in the abortion area. In Harris v. McRae, 448 U.S. 297 (1980), the Court held that the denial of Medicaid benefits for

Because judicial restraint requires respect for precedent,[319] however, some forms of new property were too firmly entrenched to be repudiated completely.[320] Thus, while the conservative Court could restrict the substantive protection accorded affirmative rights, procedural due process safeguards for affirmative rights were too well established for the Court to disavow completely its prior doctrine.[321] The Court did, however, limit procedural due process by relaxing the process due when "new" liberty or property interests are at stake.[322]

3. The Expectations Alternative

Although the conservative Court could not broadly reassert common-law baselines, some sort of baseline was necessary to give meaning to economic rights under the Contract and Takings Clauses and to provide a framework for analyzing procedural due process claims. Judicial restraint distorted the search for baselines, however,

---

abortions did not trigger strict scrutiny because the government had merely declined to remove a preexisting obstacle (poverty) from the path of poor women seeking an abortion. *Id.* at 308-11; *accord* Maher v. Roe, 432 U.S. 464, 469-71, 474 (1977). In recent decisions, the Court has expanded this analysis to uphold significant restrictions on the use of state or federal funds in connection with abortion services. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 192-203 (1991); Webster v. Reproductive Health Servs., 492 U.S. 490, 520-21 (1989).

319. Not all observers accept respect for precedent as a component of judicial restraint, *see* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 217 (1985) (arguing that respect for precedent has a "ratchet" effect insofar as conservative judges are expected to respect liberal precedents, but liberal judges do not respect conservative precedents); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 25-28 (1994) (arguing that *Marbury v. Madison*'s rationale for judicial review of legislation applies equally to judicial decisions and requires courts to apply the Constitution, not judicial decisions, as the superior law), but it is included in most definitions of judicial restraint, *see* Levy & Glicksman, *supra* note 77, at 349-50. More importantly, a substantial component of the Court's conservative wing emphasizes respect for precedent as an element of judicial restraint. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808-16 (1992) (O'Connor, J., plurality opinion) (Kennedy, Souter, Blackmun, and Stevens, JJ., joining in part).

320. This was true with respect to procedural due process safeguards for entitlements and a few substantive areas, such as First Amendment restrictions on terminating government employment because of political affiliation. *See* Rutan v. Republican Party, 497 U.S. 62 (1990).

321. Although of relatively recent origins (Goldberg v. Kelly, 397 U.S. 254, was decided in 1970), affirmative rights to welfare benefits, government employment, licenses, and other new property interests have been recognized in numerous Supreme Court decisions. *See generally* TRIBE, *supra* note 18, §§ 10-9 to 10-18 (discussing cases); NOWAK & ROTUNDA, *supra* note 19, at 508-48 (same).

322. *See supra* note 278 and accompanying text. By 1985, the balancing approach for "process due" had been diluted to the point at which individuals are entitled only to an informal pretermination opportunity to present their version of the facts. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985).

because their construction is an essentially activist endeavor: Judges establish a standard against which to measure government action. The conservative Court attempted to avoid this dilemma through an expectations-based approach that emphasized the unfairness of frustrating justifiable reliance on the preexisting legal recognition of a given interest.[323] This approach is attractive from a judicial restraint perspective because it externalizes the creation of property or contract rights; the Court merely identifies rights created by another source, such as state law.[324] Coincidentally, this approach appears to bolster traditional property and contract rights while allowing the state to limit affirmative rights by declining to create entitlements.

The expectations approach grew out of preexisting doctrine in both the traditional economic rights and procedural due process context. Contract Clause doctrine has long singled out retroactive legislation for special concern,[325] a principle that emphasizes the expectations of the contracting parties. Regulatory takings analysis also explicitly incorporates an inquiry into the extent to which a regulation interferes with legitimate, investment-backed expectations.[326] Likewise, the use of statutory "entitlement" to determine the existence of a property or liberty interest in government benefits reflects an expectations approach.[327]

---

323. This preexisting law need not correspond with the common law. Under the expectations approach, a state might choose a wide variety of possible property and contract regimes ex ante, but changes in those regimes would require special justification.

324. This appeal is similar to the appeal of originalism, which argues that open-ended construction of broad language and the recognition of nontextual rights involve law-making, while strict construction of text confines judges to application of law made elsewhere.

325. *See supra* note 170.

326. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) (rejecting claim that measure was a regulatory taking, because there was no "undue interference with [owners'] investment-backed expectations"); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (indicating that regulatory taking analysis includes consideration of "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations"). The Court also explicitly tied expectations to the definition of property in *Penn Central*, characterizing prior decisions as holding that "while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Id.* at 124-25. Measuring the extent of diminution of property values also involves an expectations-based analysis by comparing value before and after a regulation takes effect.

327. *See infra* note 334 and accompanying text.

This approach can bolster economic rights if interference with expectations is the basis for heightening scrutiny.[328] In *Spannaus*, for example, the Court emphasized the severe retroactive effect of state law pension funding requirements to justify application of heightened scrutiny.[329] A similar analysis might be applied in the regulatory takings context to justify heightened scrutiny of measures causing a severe diminution of value.[330] *Hodel* hints of such analysis,[331] and *Nollan* partakes of it to some degree.[332] The expectations approach also provided the basis for treating government benefits as property or liberty interests for purposes of procedural due process on the theory that statutory entitlements created constitutionally protected expectations.[333]

But the expectations-based approach is a two-edged sword. Just as prior law can create expectations through legal recognition and protection, it may also prevent expectations from arising by limiting

---

328. *See, e.g.*, Robert A. Graham, Note, *The Constitution, The Legislature, and Unfair Surprise: Toward a Reliance-Based Approach to the Contracts Clause*, 92 MICH. L. REV. 398 (1993) (advocating use of expectations-based approach for modest reinvigoration of Contract Clause).

329. *See* Allied Structural Steel v. Spannaus, 438 U.S. 234, 246-47, 249-50 (1978).

330. *See supra* note 209 and accompanying text.

331. Although the Court's opinion in *Hodel* concluded that the expectation interests at issue were "dubious," Hodel v. Irving, 481 U.S. 704, 715 (1987), five justices joined concurring opinions in which frustration of expectations played an important role. Justice Brennan's brief concurrence, joined by Justices Marshall and Blackmun, remarked on the continued viability of Andrus v. Allard, 444 U.S. 51 (1979), and stated simply that "the unique negotiations *giving rise to the property rights and expectations* at issue here make this case the unusual one," *Hodel*, 481 U.S. at 718 (Brennan, J., concurring) (emphasis added). Likewise, Justice Stevens's lengthier concurrence, joined by Justice White, emphasized the importance of "giving a property owner fair notice of a major change in the rules governing the disposition of his property" and the "unwarned impact" of the measure, *id.* at 727 (Stevens, J., concurring), as well as the inability of the owner to avoid escheat by taking appropriate steps, *see id.* at 728-33 (Stevens, J., concurring).

332. The *Nollan* Court used common-law baselines in its discussion of the conditioning of the rebuilding permit, *see supra* note 309 and accompanying text, but the analysis also reflects an expectations-based approach. Justice Scalia indicated that the commission's public announcement of its policy on rebuilding permits prior to the owner's acquisition of property did not limit the owner's property rights because "[s]o long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Nollan*, 483 U.S. at 833 n.2. Thus, the preexisting legal regime defined the scope of rights acquired by the owner. This analysis also reveals the flaw in the expectations approach—it has no meaning without some other baseline that limits the state's ability to define away expectations. *See infra* part III.C.2.

333. Although some early cases premised "new" property rights on their importance to individuals, later cases adopted an entitlement approach. *See supra* notes 275-76 and accompanying text. At one level, this approach provided the basis for treating government benefits as rights, but at another, it facilitated the erosion of affirmative rights.

that recognition and protection. This point is most obvious with respect to procedural due process, for which the Court requires a legal "entitlement" as a condition of according government benefits status as a property or liberty interest and has repeatedly stated that mere unilateral expectations are insufficient to create a constitutionally protected interest.[334] Similarly, the expectations-based approach may limit the creation of contract and property rights. Prospective legislation has long been considered completely beyond the purview of the Contract Clause,[335] and the permissibility of police power regulations that incidentally burden contractual obligations has been justified as a qualification implicitly incorporated in all contracts.[336] This kind of expectations-based approach also limits the scope of the Takings Clause, insofar as property is acquired with the implicit condition that its uses are subject to police power restrictions.[337]

---

334. For example, some decisions recognized that termination of public employment may deprive employees of a reputational liberty interest, but more recent cases have used expectations and entitlements reasoning to limit that interest. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976). *See generally* TRIBE, *supra* note 18, § 10-11 (discussing relevant decisions). More generally, the expectations approach gives practical control over the creation of protected interests to the government, which might be expected to limit those interests in order to limit the administrative costs associated with termination of benefits or other government action.

335. *See supra* note 170. The premise that unlawful contractual provisions give rise to no obligation measures the parties' rights from the baseline of their legitimate expectations ex ante.

336. *See supra* note 176 and accompanying text. The Court has even indicated that retrospective regulation in a heavily regulated field does not substantially impair contractual obligations because parties who contract in such a field must expect that the regulatory environment will change. *See, e.g.*, Exxon Corp. v. Eagerton, 462 U.S. 176, 194 n.14 (1983); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 416 (1983); Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 38 (1940).

337. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491-92 (1987); *see also supra* notes 217-18 and accompanying text. This problem may explain Justice Scalia's inconsistent treatment of the baseline question in responding to the dissent's argument in *Nollan* that the property owner had no legitimate expectation of gaining a rebuilding permit without granting public access because the state constitution precluded individuals from excluding a public right of way to navigable waters, *see* Nollan v. California Coastal Comm'n, 483 U.S. 825, 832-33 (1987), and because the state commission had previously announced a policy of acquiring public-access easements as a condition of granting rebuilding permits, *see id.* at 833 n.2. Justice Scalia accepted the expectations-based premise that the state constitution prevented ownership from including a right to exclude the public from access to navigable waters, but argued that the easement in question did not fall within the scope of the provision. *Id.* at 832-33. With respect to the commission policy, however, Justice Scalia used the Takings Clause to argue that the commission's policy could not affect the expectations created by property ownership, an argument that uses a constitutional baseline to limit the state's ability to define away expectations. *See supra* note 332.

These difficulties with the expectations-based approach will be discussed further below.

C. *The Baseline Problem and the Failure of Economic Rights Jurisprudence*

The Court's inability to resolve the baseline problem has contributed to its failure to develop a coherent jurisprudence of economic rights. As the foregoing discussion suggests, the current treatment of the baseline issue is beset by two fundamental flaws. First, and most obviously, the use of divergent baselines in different contexts causes inconsistent and confusing results. Second, while the Court is understandably reluctant to employ either extreme of common-law baselines or none at all, the expectations model it has chosen by default is circular, and it requires some independent constitutional baseline to give it content.

1. Inconsistent Approaches

The Court currently employs: (1) a baselineless analysis for substantive due process challenges to regulation adversely affecting traditional economic interests; (2) common-law baselines for substantive challenges based on affirmative rights and for regulatory measures that completely destroy all economically viable uses of property; and (3) an expectations baseline for Contract Clause, regulatory taking, and procedural due process analysis. The use of these divergent models creates doctrinal confusion.

The most direct conflict arises under substantive due process, where the baselineless and common-law models are directly juxtaposed. When government action burdens traditional economic rights, as in *General Motors Corp. v. Romein*,[338] the Court employs a baselineless approach under which neither common law nor expectations baselines affects the level of scrutiny.[339] This analysis logically implies that affirmative rights should receive identical treatment, but the Court in *Collins v. City of Harker Heights*[340] regarded the state's failure to provide a safe workplace, which implicated the liberty interest in bodily integrity, as entirely beyond the purview of the Constitution in the absence of an independent constitutional duty to

338. 112 S. Ct. 1105 (1992).

339. This is the corollary of the Court's refusal to heighten scrutiny under the Due Process Clause based on retroactive effect. *See supra* note 301 and accompanying text.

340. 112 S. Ct. 1061 (1992).

act.[341] If, as *Romein* and other cases hold, the property and liberty interests protected by due process are not tied to a constitutional baseline, no independent duty is needed. The *Collins* regulatory decision not to further protect worker safety is no different from the *Romein* regulatory decision to require employers to make retroactive contributions, and both should be subject to rational basis scrutiny.

Reliance on common-law baselines to restrict affirmative rights is also problematic in the equal protection context. The Equal Protection Clause is one constitutional provision whose text seems fully reconcilable with a baselineless analysis that creates affirmative rights.[342] The very notion of "equal protection" implies that government treatment of individuals is measured not against some external baseline, but rather against the treatment of other individuals similarly situated within society.[343] The Court's refusal in *Harris v. McRae* to scrutinize carefully Medicaid's different treatment of women who choose to have an abortion and those who choose childbirth is hard to reconcile with this relative notion of equal protection,[344] even if it might make some sense from a due process perspective.[345]

---

341. *See supra* note 316 and accompanying text.

342. Although the clause is phrased negatively ("nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, § 1), this negative language affirmatively requires the state to provide the same protection to all that it provides to some.

343. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 18-20 (1956) (holding that requiring indigent defendants to pay for transcript of trial in order to appeal denies equal protection even though there is no absolute right to appeal); Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (applying strict scrutiny to durational residency requirements for government benefits even though there is no substantive right to benefits). The implications of this approach for a jurisprudence of economic rights is developed in part IV.B.2. of this Article.

344. *See supra* note 318. It is also hard to square with the treatment of roughly analogous First Amendment issues surrounding patronage practices in government employment. Such claims also involve differing treatment with respect to a government benefit (employment) on the basis of an individual's exercise of a constitutionally protected right. In contrast to *Harris*, however, such a discriminatory denial of employment benefits is unconstitutional, even if those benefits are not property for purposes of due process. *See* Rutan v. Republican Party, 497 U.S. 62, 75-76 (1990); Branti v. Finkel, 445 U.S. 507, 519-20 (1980); Elrod v. Burns, 427 U.S. 347, 372-73 (1976).

345. This is true only if one starts with a baseline of no entitlement to medical benefits. *See* Sullivan, *supra* note 252, at 1497-99. In the absence of baselines, there is no difference between denying a benefit and imposing a burden. *See supra* note 258 and accompanying text. Even when it starts with an expectations baseline, the Court's treatment of these issues in the economic and individual rights context has not been consistent. *See infra* notes 357-64 and accompanying text (comparing *Rust* and *Nollan*).

The inconsistent results that stem from inconsistent baselines are not limited to the affirmative rights arena; the two strands of takings analysis also conflict. The Court used common-law baselines in *Lucas*, but a loose expectations baseline coupled with a (usually) deferential rational basis test governs the analysis of regulatory measures that diminish, but do not destroy, economically viable uses.[346] Given these divergent approaches, total destruction will almost always be a taking, but nearly complete destruction will almost never be.[347] While Justice Scalia may have been correct in *Lucas* that "[t]akings law is full of these 'all-or-nothing' situations,"[348] sharply divergent results should be tolerated only if there is an underlying theoretical or doctrinal justification that explains them, a justification that is sorely lacking in *Lucas*.[349]

2. The Failure of the Expectations Alternative

As if the doctrinal conundrums created by the use of inconsistent approaches were not enough, the expectations model itself is incapable of producing a coherent baseline because it is circular.

---

346. *See supra* notes 323-27 and accompanying text.

347. *Compare* Pennsylvania Coal v. Mahon, 260 U.S. 393, 414-16 (1922) (holding that total destruction of mineral interest constituted a taking) *with* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493-97 (1987) (concluding that nearly complete destruction of mineral interest was not a taking).

348. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 n.8 (1992). Justice Scalia also tried in *Lucas* to minimize the anomalous results by emphasizing that the extent of diminution is "keenly relevant" in cases falling short of complete destruction, *id.*, but it is unclear how nearly complete destruction matters to regulatory takings analysis if the Court continues to employ the rational basis test regardless of the extent of diminution. Even if the Court were to elevate scrutiny based on extent of diminution, it would merely create a different inconsistency—between the treatment of the police power in the regulatory takings and substantive due process contexts. *See supra* note 215.

349. While Justice Scalia's "all-or-nothing" example of an owner whose land is physically appropriated for a highway and the neighboring owner who incurs a loss of value from the construction of the highway, *Lucas*, 112 S. Ct. at 2895 n.8, is readily explainable by reference to the text of the Takings Clause and the traditional treatment of exclusive possession as central to the concept of ownership, no similar justification exists for the broad per se rule of *Lucas*. Justice Scalia's reference to "the historical compact recorded in the Takings Clause that has become part of our constitutional culture," *id.* at 2900, is unpersuasive as an originalist argument for the per se rule because the best historical evidence suggests that the framers did not expect the Takings Clause to apply to regulatory measures, *see supra* notes 115-16 and accompanying text. Justice Scalia's argument concerning the preconstitutional treatment of land regulation and his observation that "text of the Clause can be read to encompass regulatory as well as physical deprivations (in contrast to the text originally proposed by Madison)," *Lucas*, 112 S. Ct. at 2900 n.15, only dispose of textual objections to the per se rule. They do not provide the direct affirmative support for the rule normally required by originalism.

"Expectations" are determined by reference to the background law that confers an "entitlement" so as to make the expectations "legitimate." But if the creation of an entitlement is a function of the government's decision to accord a particular interest such status by virtue of positive law, the government could freely decide not to create any entitlements. Moreover, the government could condition every apparent entitlement by reserving the power to terminate it, effectively defining away all property, contract, and affirmative rights. Thus, an expectations model ultimately collapses into a baselineless world unless there is some external referent that limits the government's ability to structure the background law so as to define away rights.

The circular nature of the expectations model is reflected in what we might call the "bitter-with-the-sweet" problem, after (then) Justice Rehnquist's characterization of the argument for procedural due process purposes in *Arnett v. Kennedy*.[350] This argument treats procedural safeguards that apply to the deprivation of an interest as part of the total "bundle" of rights that we call property. Since the government creates a property interest by conferring benefits in the form of an entitlement to government employment, welfare benefits, or licenses, it would seem to follow that the government could simultaneously limit the procedural safeguards that attach to that interest. If property rights are defined in terms of the expectations created by positive law, the logic of the bitter-with-the-sweet argument is inescapable.[351] To avoid this problem, the Court separated the question of whether a property interest exists from the question of what procedures must be followed to terminate it, then identified an independent constitutional baseline to govern procedural requirements.[352]

---

350. 416 U.S. 134, 152-54 (1974).

351. Although the majority of justices rejected the argument in *Arnett* and *Loudermill*, the cases offer little explanation other than the emphatic statement that while state law controls the creation of a property interest, the Constitution controls the minimum procedural safeguards attached to that interest. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985); *Arnett*, 416 U.S. at 166-67 (Powell, J., concurring in part). The Court did not explain, however, why this should be so. Logically, it would seem that either both property and the procedural safeguards that attach to it may be determined by the government, or that both should be determined by reference to some constitutional minimum. As will be discussed more fully below, I prefer the latter alternative.

352. Bitter-with-the-sweet reasoning has been fully accepted in Article III cases, insofar as Congress may freely vest adjudication of "public" rights in non-Article III tribunals, *see* Granfinanciera v. Nordberg, 492 U.S. 33, 54-65 (1989), on the theory that it need not provide any access to court respecting public rights and that administrative adjudication

Precisely the same problem confronts the Court with respect to its Contract and Takings Clause jurisprudence. If the background contract law of the state limits contract rights such that prospective regulation can never violate the Contract Clause and all contracts are qualified by the implied reservation of the state's police power, the state could logically avoid the clause by reserving the right to abrogate any contractual provision for whatever reason it chooses.[353] Likewise, the Takings Clause collapses under a purely expectations-based model, because the state would be able to define property as inherently subject to appropriation without compensation.[354] Indeed, even absent an explicit reservation of power, one can effectively argue that contracting parties and property owners can never rely on a given regulatory regime as static, but rather must "expect" regulatory changes.[355] Obviously, the Court would be reluctant to countenance such an extreme result, but it can avoid this logic only by supplementing the expectations model with some independent constitutional baseline.[356]

The circular nature of the expectations model also produces conflicting results with respect to unconstitutional conditions, an area in which the Court's analysis has been notoriously inconsistent.[357]

---

is better than none at all. Given the fact that both Article III and due process involve constitutional restrictions on the means used to terminate public rights, these inconsistent approaches are striking.

353. *See supra* notes 263-67 and accompanying text. The Court recognized this problem in *Romein*, in which it used the possibility to justify its conclusion that not all state law is automatically incorporated into a contract. *See* General Motors Corp. v. Romein, 112 S. Ct. 1105, 1111-12 (1992). Ironically, in *Romein* the argument supported the Court's conclusion that no contractual obligation ever arose because the state's workers' compensation law had not become part of the employment contract between the company and its workers. *Id.* at 1110-12.

354. *See supra* notes 263-67 and accompanying text.

355. This idea has been recognized in the Contract Clause context, in which the fact that a contract was concluded respecting a heavily regulated activity diminishes the likelihood that subsequent retroactive changes constitute a substantial impairment of contract. *See supra* note 336. Professor Sax has advanced a similar argument to critique *Lucas*, suggesting that the landowner had no legitimate investment-backed expectations because he purchased coastal property against the background of increasing regulation. Joseph L. Sax, *The Constitutional Dimensions of Property: A Debate*, 26 LOY. L.A. L. REV. 23, 27 (1992); *see also* Note, *Taking Back Takings*, *supra* note 47, at 914, 915-21 (arguing that *Lucas* "confers a publicly-funded windfall on owners who cannot reasonably expect to use their property in ways the state deems harmful").

356. Justice Scalia did just that in *Lucas*. *See supra* note 250.

357. An unconstitutional condition arises when the government has no constitutional duty to act, but its refusal to act unless some condition is met nonetheless violates the Constitution. Despite the force of Justice Holmes's notion that the greater power to deny includes the lesser power to impose conditions, it has long been recognized that some

This point is well illustrated by contrasting two recent decisions: *Nollan* and *Rust v. Sullivan*.[358] In *Nollan* the Court invalidated a state agency's decision to condition the grant of a rebuilding permit on the property owner's cession of a lateral access easement to the public,[359] but in *Rust* it upheld administrative regulations that conditioned federal grants to family planning clinics on an agreement not to provide any abortion counseling or referral services.[360]

These cases cannot be reconciled under an expectations model. In both cases the government offered something it was not required to give: a rebuilding permit in *Nollan* and federal grant money in *Rust*.[361] In both cases the government extracted in return the relinquishment of a constitutional right: compensation for a public access easement in *Nollan*, and free speech regarding abortion issues in *Rust*. Yet in *Nollan* the Court reasoned that the "affinity" to a physical invasion required the Court to be especially conscious of the fit between the condition and the underlying purposes of the permit regime,[362] while *Rust* demonstrated no similar concern for the fit between the challenged regulations and the underlying statutory regime.[363] These results can only be reconciled by reference to the unspoken incorporation of an external baseline—apparently the common law.[364]

---

conditions may independently violate the Constitution. Most obviously, even if there is no constitutional obligation to provide a given benefit, it is unconstitutional to confer that benefit only on the condition that the individual is a member of particular racial group (unless the condition withstands strict scrutiny). On the other hand, some conditions that would be unconstitutional if directly imposed can be attached to the grant of government benefits. For scholarly discussion of the Court's unconstitutional condition jurisprudence, see RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 105-235 (1993); Sullivan, *supra* note 252, at 1421-42; Sunstein, *Unconstitutional Conditions*, *supra* note 252, at 596-608; Symposium, *Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 175 (1989).

358. 500 U.S. 173 (1991).

359. Nollan v. California Coastal Comm'n, 483 U.S. 825, 837-39 (1987).

360. *Rust*, 500 U.S. at 203.

361. *See id.* at 177-78; *Nollan*, 483 U.S. at 828.

362. *Nollan*, 483 U.S. at 834-37. As discussed previously, the application of the purpose inquiry in *Nollan* is widely regarded as much stricter than ordinary rational basis scrutiny. *See supra* note 206 and accompanying text.

363. *See Rust*, 500 U.S. at 184-87 (emphasizing deference to agency interpretations of ambiguous statutes). Like the lateral access easement in *Nollan*, the regulations at issue in *Rust* were not directly connected to legislative purpose. Congress's desire not to fund abortions as a method of family planning does not necessarily imply that clinics using other funds for abortion counseling and referral should be ineligible to receive family planning grants. The particular regulations at issue in *Rust* thus went beyond the immediate legislative purpose, just as the lateral access easement did in *Nollan*.

364. The only differences between the two cases are the benefits at stake—a rebuilding permit versus federal grant money—and the underlying right at issue—exclusive possession

IV. CONSTRUCTING A JURISPRUDENCE OF ECONOMIC RIGHTS

As the foregoing analysis demonstrates, the high-profile commitment to judicial restraint has distorted the Court's effort to enhance constitutional protection for economic rights. The resulting quest for an originalist escape not only failed on its own terms, but also prevented the Court from either integrating economic interests into a broader theory of rights or developing a constitutional baseline for evaluating economic rights. A sustainable jurisprudence of economic rights requires the Court to correct these flaws. The Court must make the case for economic rights directly as part of an integrated theory of constitutional rights that employs a workable approach to the baseline problem.[365] In this part of the Article, I will present the foundations for such a jurisprudence, describe its basic contours, and discuss some possible objections that might be raised from both the liberal and conservative perspectives.

A. The Foundations for a Jurisprudence of Economic Rights

A coherent jurisprudence of economic rights must rest on a solid doctrinal foundation that both justifies and limits judicial intervention.[366] The prevailing fundamental rights and political-process

---

of property versus freedom of speech. Since there is no basis for treating the right of exclusive possession as more important for constitutional purposes than freedom of speech, the different treatment apparently rests on the assumption that the ability to rebuild is more significant than the receipt of grant money. Thus, for example, Justice Scalia reasoned that the owner's right to use property could not be characterized as a mere benefit such that the owner had voluntarily exchanged the right to exclude the public for the rebuilding permit, *Nollan*, 483 U.S. at 833 n.2, but this is true only if the owner's right to use property exists independently of the state law recognizing that right.

365. The composition of the Court may at the present time be more favorable for such a development than at any time since the New Deal. President Clinton's two appointments to the Court are clearly more liberal than the justices appointed by Presidents Reagan and Bush, but at the same time they are not totally opposed to the recognition of economic rights. *See* Paul M. Barrett, *Supreme Court Nominee Wins Business's Approval*, WALL ST. J., May 16, 1994, at B1 (discussing Justice Breyer); Paul M. Barrett, *Ginsburg Business Rulings Show Balance*, WALL ST. J., June 16, 1993, at B1 (discussing Justice Ginsburg). These justices might join Justice Stevens and the more moderate Reagan and Bush appointees (Justices Kennedy, O'Connor, and Souter), who have refused to reject outright the liberal jurisprudence of individual rights, to forge a majority in favor of an integrated approach to constitutional rights.

366. In this respect, I would differentiate the kind of coherence that supports a political or economic theory from the kind of coherence that is integral to the judicial function. *See* Bruce Chapman, *The Rational and the Reasonable: Social Choice Theory and Adjudication*, 61 U. CHI. L. REV. 41, 44-46 (1994).

methodology can provide such a foundation, but only if the Court is prepared to dismantle the longstanding dichotomy between economic and other individual rights. To avoid the excesses of *Lochner*, however, the Court must also reject the categorical elements of current fundamental rights doctrine and engage in a more forthright evaluation of the relevant considerations underlying constitutional protection for both kinds of rights. This explicit jurisprudence of constitutional rights also facilitates the development of constitutionally derived solutions to the baseline problem.

1. The Case for Economic Rights

As suggested earlier, the same fundamental rights and political-process analysis used to justify other individual rights applies to economic rights.[367] Thus, there is good reason to provide constitutional protection for economic rights.[368]

First, economic rights are fundamental in terms of the importance attached to them by the framers, their role in the traditions and collective conscience that underly our conceptions of ordered liberty, and their contribution to individual and societal well-being.[369] The framers' concern for the protection of economic interests is clear from the text and history of the Constitution. Thus, even if neither the language of the Contract and Takings Clauses nor the framers' expectations justifies the broad role sometimes ascribed to the clauses by economic rights advocates, those provisions (and others) reflect the importance attached to economic interests by the framers.[370] Just as the nontextual right of individual privacy might be seen as underlying various specific constitutional safeguards,[371] so too a

---

367. *See supra* part II.A.

368. This conclusion is activist, but that should not foreclose a more realistic and coherent approach to economic rights. *See infra* part IV.C.2.

369. While the Court's fundamental rights analysis remains somewhat vague, in general terms it requires analysis of these three factors.

370. *See supra* notes 150-54 and accompanying text.

371. Although the notion of constitutional "penumbras," taken literally, may be an unconvincing justification for nontextual constitutional rights, it captures figuratively a more compelling justification. To the extent that the Constitution reflects the framers' belief in a fundamental principle, it is appropriate for the Court to apply that principle in the context of modern society. While strict originalists would criticize this conclusion as inconsistent with a properly limited judicial role, even advocates of originalism recognize that the Court must occasionally go beyond text and specific historical expectations in construing the Constitution. Judge Bork has defended *Brown v. Board of Education* despite the absence of clear historical evidence that the framers of the Equal Protection Clause intended to prevent segregated schools, *see* BORK, *supra* note 88, at 81-83, and Justice Scalia could not justify the *Lucas* rule in originalist terms, *see supra* note 349 and

nontextual right to be free of arbitrary governmental interference with economic interests might be said to underlie the specific safeguards incorporated into the Constitution.[372]

There is also a longstanding tradition of legal protection for economic arrangements that is clearly part of our conception of ordered liberty. The common-law tradition of protection for individual economic interests is indicative of their fundamental role in the social order.[373] In this respect, the complete abandonment of economic rights in the post-New Deal period is the exception in terms of constitutional history.[374] Indeed, despite the extensive regulation of economic activity, security in economic matters continues to play a prominent role in the legal system.[375]

Finally, economic interests are also fundamental in terms of their importance to individual and societal well-being.[376] Satisfaction of basic economic needs is a prerequisite to the exercise of other rights, a factor that has sometimes been advanced to explain why certain rights, such as voting or speech, are fundamental.[377] The fun-

---

accompanying text.

372. In using this phrase, I have purposefully avoided any reference to particular economic interests, such as property and contract rights, because economic rights protection should not be so limited. *See infra* part IV.A.2. Once the analysis moves beyond strict originalism, the appropriate inquiry is into the general principle embraced by the framers rather than their specific understanding of the scope of that principle.

373. This does not mean, however, that the common law should be solely determinative of what economic rights are recognized. *See infra* part IV.A.2.

374. Even before the *Lochner* era, the Court protected economic interests, relying primarily on the Contract Clause and dormant Commerce Clause analysis. *See generally* CURRIE, *supra* note 119, at 127-59, 203-36, 330-41, 403-15 (discussing relevant decisions).

375. Recognition and enforcement of property and contract rights are the underlying premises of the common law in every state and are important issues in the legislative and administrative process. The evolution of legal entitlements in the procedural due process context also reflects the legal recognition accorded to nontraditional economic interests under federal and state legal systems despite the absence of any constitutional obligation to provide the entitlement in the first instance.

376. Advocates of judicial restraint are, of course, particularly critical of the notion that an interest's importance to individual or societal well-being is relevant to the existence of a constitutional right, because that analysis incorporates judicial values into constitutional doctrine. But it is neither possible nor desirable for judges to separate completely their deeply felt values from constitutional analysis. In my view, it is better for judges to advance openly their values to defend their reading of the Constitution, rather than to mask the role of values behind a formalistic analysis that purports to avoid judicial discretion. *See infra* text following note 477.

377. *See, e.g.*, Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1014-15 (1982). Most brutally, one who dies of starvation, disease, or exposure cannot vote, speak freely, or exercise religious beliefs. More generally, economic security is the foundation upon which individuals make basic choices concerning their personal development and upon which families build for the future.

damental nature of economic rights is also reflected in the widespread recognition that protection of economic interests must play a central role in the constitutional culture of the newly emerging democracies of the east bloc.

Second, political-process reasoning supports protection of economic rights. While the relaxation of the *Lochner* era's opposition to economic regulation paved the way for many important and desirable programs,[378] the assumption that the political process always affords adequate protection to economic interests has proven to be unfounded. One need not completely deny the influence of public interests in shaping social policy to recognize the corrupting effect of special interests on the political process in the United States. Judicial invalidation of special interest legislation is neither counter-majoritarian nor contrary to the spirit of the Constitution.[379] Indeed, given the widespread loss of faith in the integrity of public officials reflected in such developments as the term-limit movement or the potential emergence of a quasi-populist third party, meaningful judicial review of government action would tend to reinforce democratic institutions. If the *Lochner* era demonstrated the need for flexibility in the area of economic regulation, the end of the twentieth century has demonstrated that unbridled government discretion respecting economic matters is equally inappropriate.

Consider, for example, *Central States, S.E. and S.W. Areas Pension Fund v. Lady Baltimore Foods*,[380] in which the Seventh Circuit Court of Appeals upheld a provision exempting one and only one employer, Lady Baltimore Foods, from liability under ERISA for withdrawal from a multiemployer pension plan.[381] The provision was apparently the work of Senator Robert Dole, the powerful

---

378. Even most supporters of economic rights stop short of advocating a return to the *Lochner* era. *See supra* notes 160-61 and accompanying text.

379. Indeed, according to James Madison, the problem of faction is a principal justification for separation of powers, of which judicial review is one component. *See* THE FEDERALIST Nos. 10, 51 (James Madison). *See generally* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (discussing implications of Madisonian republicanism).

380. 960 F.2d 1339 (7th Cir.) (Posner, J.), *cert. denied*, 113 S. Ct. 179 (1992).

381. 29 U.S.C. § 1461(h) (1988 & Supp. 1992). As is often the case with this sort of individualized exemption (which is common in the tax context), the provision did not mention Lady Baltimore by name. Instead, the exemption applied when withdrawal was the result of a collective bargaining agreement and occurred before January 12, 1982. Ironically, this language did not actually apply to any employer because Lady Baltimore had withdrawn on January 12, not before. Undaunted, the court read the language "before January 12, 1982" to include withdrawals occurring on that date. *Lady Baltimore Foods*, 960 F.2d at 1342.

Kansas Senator, providing "constituent service" to Lady Baltimore, a Kansas corporation. Neither Senator Dole nor anyone else advanced a public purpose at the time of the provision's adoption, which suggests that the measure was a "naked preference" (to use Professor Sunstein's term[382]). The court nonetheless applied the most deferential version of the rational basis test,[383] offered a plausible public purpose for the exemption (that imposing liability on Lady Baltimore under the circumstances would have been unfair), and concluded that this justification was sufficient.[384] This reasoning, which is almost certainly a correct application of current law, illustrates the need for more realistic scrutiny of economic regulation.

Economic interests should not be elevated to the status of fundamental rights so as to engage strict scrutiny, however. Once unleashed in the economic rights context, strict scrutiny (like other categorical approaches) would be nearly impossible to control.[385] More fundamentally, the strict scrutiny approach is an unnecessary and undesirable artifact of the rights dichotomy. Under an integrated jurisprudence of constitutional rights, a more nuanced analysis of all constitutionally protected interests can be derived from the underlying rationales for judicial intervention. This analysis should focus on two factors: (1) the extent to which government action burdens funda-

---

382. *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

383. Judge Posner concluded that neither the individualized character of the legislation nor the apparent political explanation for it altered the basic standard of review. *Lady Baltimore Foods*, 960 F.2d at 1342-43.

384. *Id.* at 1343-44.

385. Traditionally, the outcome of a case depended on the category in which the Court placed regulatory measures. If the rational basis test applied, a regulation would be upheld, while strict scrutiny was the equivalent of per se invalidity. This all-or-nothing approach placed tremendous pressure on the categorization process, which is far too crude to capture the difficult range of issues presented in constitutional cases. Thus, the categories have eroded and levels of scrutiny have proliferated. What began as two levels—rational basis and strict scrutiny—soon expanded to include an "intermediate" level of scrutiny in gender cases. *See* Craig v. Boren, 429 U.S. 190, 197-99 (1976) (holding that gender classifications must serve important governmental objectives and be substantially related to their achievement). More recently, a number of cases seem to employ a more aggressive form of the rational basis test, commonly known as "rational basis with bite." *See supra* note 39 and accompanying text. In the affirmative action context, the Court appears to have moderated the otherwise fatal strict scrutiny test. *See* Fullilove v. Klutznick, 448 U.S. 448, 480-89 (1990) (plurality opinion) (finding it unnecessary to decide level of scrutiny for affirmative action because minority set-aside requirement for federal contracts survives strict scrutiny); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509-11 (1989) (suggesting circumstances under which affirmative action will survive strict scrutiny).

mental economic or other constitutionally protected interests; and (2) the extent to which particular actions are the result of political-process failures. Before turning to a more detailed exposition of these principles, however, I will consider the baseline problem that has plagued the Court since the post-*Lochner*-era rejection of common-law baselines.

2. Resolving the Baseline Problem

As described above, the rhetoric of judicial restraint forced the Court to "externalize" baselines, which failed because none of the current approaches is workable in all contexts.[386] More fundamentally, it makes no sense to say that the Constitution protects a right, but that the creation and definition of that right should come from some other source.[387] On the contrary, it seems self-evident that the meaning of a constitutional right should be determined by reference to the Constitution. A better approach to the baseline problem is to recognize that it is an interpretive question; i.e., the identification of baselines should be part of the judicial function of giving meaning to a constitutional provision in the context of a particular case.[388] The interpretive approach to the baseline problem addresses both of the foregoing difficulties. If the baseline is derived from the constitutional right at issue, it need not be the same in every constitutional context, but rather can be given content according to the particular provision involved. The interpretive approach also directs the baseline inquiry into appropriate considerations, such as assessing the impact of government action on the constitutional interests at issue.[389]

---

386. Across-the-board application of common-law baselines would entail a return to the *Lochner* era; the logic of a fully baselineless analysis potentially both undermines the notion of economic rights altogether and justifies unlimited judicial intervention on behalf of affirmative rights; and the expectations alternative is essentially circular. *See supra* part II.B. & C.

387. The logical inconsistency revealed by the "bitter-with-the-sweet" argument underscores this point. *See supra* notes 350-56 and accompanying text.

388. This approach is activist insofar as courts assume responsibility for determining the baseline, but that does not warrant its rejection. *See infra* part IV.C.2.

389. The analysis in Harris v. McRae, 448 U.S. 297 (1980), for example, disposes of the constitutional challenge to the denial of Medicaid funding for abortions by assuming that poverty is a state of nature and that the poor therefore cannot make affirmative claims on government. *See supra* note 318 and accompanying text. This assumption not only ignores the role of government policies in producing the distribution of wealth, but also directs the inquiry away from the application of constitutional principles. The analysis should focus on whether the government's denial of funding for abortions is consistent with the due process right to make decisions on whether to beget or bear children and whether it

In considering the constitutional baseline for particular interests, the Court should not attach dispositive significance to conceptual distinctions between "negative" and "affirmative" rights. This distinction employs common law or expectations baselines that reinforce the status quo as if it were an inherently just state of nature.[390] Given the acknowledged social injustices that have contributed to the status quo and the government's role in reinforcing them, this view is both unrealistic and pernicious.[391] Attaching constitutional significance to the status quo protects the advantages of those with wealth and power in our society, even if that wealth is the product of social injustice.

Indeed, the Court's effort to develop the Contract and Takings Clauses as originalist escapes has distinctly class-based implications.[392] Whether using a common law or expectations baseline, these clauses elevate traditional property and contract rights to preferred status, and thereby reinforce the existing distribution of wealth.[393] Enhancing the constitutional status of property rights protects the accumulation of wealth and enhancing the status of contractual obligations protects the superior bargaining power that wealth brings,[394] while allowing the Court simultaneously to down-

---

discriminates in violation of the Equal Protection Clause. Different people might come to different conclusions on these issues, but the debate would at least address the right questions.

390. In this sense, both the common-law and expectations-based approaches to the baseline problem are similar. Both treat the state of affairs prior to government action as presumptively valid and require changes to be justified.

391. For further discussion of this issue in connection with the problem of redistributive purposes, see *infra* part IV.C.2.

392. This effect is so pronounced that the case law may reflect the conscious or unconscious pursuit of doctrinal positions that furthered the interests of conservative justices' political constituencies. In other words, despite the supposed insulation of the Court from political pressures, its behavior can be explained in public choice terms. The preference for a particular set of rights, whether the "liberal" panoply of individual rights or the "conservative" emphasis on property and contract rights, is little different from the adoption of regulatory policies that favor some interests over others. *But see* POSNER, *supra* note 72, at 534 (arguing that the utility from the pursuit of ideological positions that further a judge's personal interests is so remote and diffuse as to be easily outweighed by other factors).

393. Of course, this theory assumes a static distribution of wealth, and proponents of traditional economic rights will be quick to point out that individuals move between socioeconomic levels. While I do not mean to suggest that government intervention is the only means through which the distribution of wealth in our society is altered, few would deny that it is easier for those with wealth to retain that wealth than for those born into poverty to acquire it.

394. Taken to a logical conclusion, protection of traditional property and contract rights produces the Lochnerian result that redistributive purposes are constitutionally invalid.

grade the limited protection accorded affirmative rights under the Due Process and Equal Protection Clauses.[395] This logic even produces class-based differences in the ability to exercise noneconomic rights, insofar as many rights are of no use without the economic means to exercise them.[396]

This is not meant to suggest that the status quo is irrelevant or that the Court should be oblivious to the consequences of imposing affirmative duties on government. These considerations are relevant to the process of giving meaning to constitutional provisions in the context of a particular case. Thus, the Court might legitimately consider reliance interests in assessing the impact of government decisions on individuals, or recognize the consequences of imposing an affirmative duty on government in assessing the scope of constitutional protection afforded particular interests. But the Court should not follow its current pattern of dismissing constitutional claims on the bare assertion that they seek recognition of affirmative rights.[397]

B. The Contours of an Economic Rights Jurisprudence

Although I shall not attempt to describe an appropriate economic rights jurisprudence in detail, its general contours follow logically from the foregoing analysis. Economic rights safeguards should rest on an explicit consideration of the justifications for judicial intervention as applied to the circumstances of a given case in the context of the constitutional provision at issue. This approach has significant implications for all of the substantive doctrines discussed in this article.[398] First, the Court's substantive due process analysis should incorporate a "proportionality principle" requiring governmental decisions to be sustained by public purposes proportional to their adverse impact on constitutionally protected interests. Second, equal protection analysis of nonsuspect classifications should employ a form

---

For further discussion of this issue, see *infra* part IV.C.1.

395. *See supra* notes 297-98 and accompanying text.

396. *See supra* notes 312-18 and accompanying text (discussing the use of common-law baselines to deny individual rights claims); Sullivan, *supra* note 252, at 1497-99. The same argument is also powerful in the context of speech, where it can be said (only partially in jest) that the right of "free" speech is expensive to exercise.

397. In this respect, I believe cases like Collins v. City of Harker Heights, 112 S. Ct. 1061 (1991), Kadrmas v. Dickerson, 487 U.S. 450 (1988), DeShaney v. Winnebago Cty. Dep't of Social Servs., 489 U.S. 189 (1989), and Harris v. McRae, 448 U.S. 297 (1980) are based on faulty reasoning and were probably wrongly decided.

398. Although my analysis also has significant implications for structural constraints, which are part of the broader pattern, these doctrines involve additional considerations that require separate treatment and I will not address them here.

of rational-basis-with-bite review that is designed to protect against political-process failures. Third, the Contract and Takings Clauses should be limited in light of their historical purposes; only measures directed toward relieving contractual obligations should violate the Contract Clause, and the concept of regulatory takings should be abandoned altogether.

1. Proportionality as a Requirement of Due Process

To the extent that scrutiny of regulation rests on the notion that economic rights are fundamental in a constitutional sense, the analysis of those rights is appropriately grounded in due process.[399] These considerations are best expressed through a unified proportionality principle that applies to both economic and other individual rights interests. This principle might be expressed as follows: "Due process requires that government decisions be sustained by legitimate public purposes of sufficient weight to justify their impact on constitutionally protected interests."[400] Such an approach requires the Court to assess the impact of government decisions in constitutional terms and then to scrutinize the public purposes offered in support of those decisions. The precise outcomes that this analysis would or should produce must await judicial development, but its essential features and certain basic points are reasonably clear.[401]

---

399. The use of fundamental rights analysis in the equal protection context is another distortion produced by the dichotomous treatment of rights and should be replaced by a straightforward due process analysis. To avoid association with *Lochner*, the liberal Court's early individual rights decisions often relied on the Equal Protection Clause. *E.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942). For further discussion of this approach, see GERALD GUNTHER, CONSTITUTIONAL LAW 819-20 (12th ed. 1991). Equal protection theory can be stretched to encompass concern for fundamental rights, but they are much more logically analyzed under the Due Process Clause.

400. The idea of a constitutional proportionality requirement is not novel; it is implicit in the multitiered analysis currently employed by the Court. *Cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (arguing that a "principled reading" of equal protection cases reveals a "spectrum of standards . . . depending [on] . . . the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of . . . [the] classification" involved). A similar principle is a common feature of other countries' constitutional jurisprudence. *See, e.g.*, David P. Currie, Lochner *Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333, 343 (discussing proportionality principle in German constitutional law).

401. The proportionality principle, even with the additional elaboration offered in this section, leaves considerable room for judicial discretion, and may be criticized as overly optimistic about the desire or capacity of judges to refrain from indulging their personal ideological preferences. Judicial discretion, however, is neither entirely avoidable nor entirely undesirable. *See infra* notes 472-73 and accompanying text.

The "impact" side of the proportionality principle requires an assessment of the constitutional importance of a particular interest and the effect of a government decision on that interest. The importance of an interest should be determined in light of the factors currently used to determine whether rights are fundamental, including constitutional text and history, whether an interest enjoys a tradition of legal protection or is implicit in the concept of ordered liberty, and whether it is foundational in a personal, social, or political sense. Under this analysis, traditional property and contract rights would clearly receive some measure of protection, but other economic interests, such as government benefits and public employment, would be protected as well.[402]

The question of how to measure the impact of government action engages the baseline problem. As described above, the baseline against which to measure the impact of government action should be derived from the same considerations that drive the assessment of constitutional importance attributed to particular interests.[403] The greater the constitutional importance attached to a particular interest, the greater constitutional protection it should receive, and consequently the "higher" the constitutional baseline. In some instances, this baseline may include an affirmative duty to make the exercise of a particular right possible.[404]

Because the significance of economic rights lies in their contribution to individual well-being, moreover, it would be inappropriate to measure the impact of government decisions on economic interests strictly in terms of monetary value.[405] A sizeable financial impact

---

402. This conclusion is supported by the framers' broad concern for economic interests, the large body of precedent recognizing "new property," and the importance of these interests to the individuals affected.

403. *See supra* part IV.A.2.

404. Thus, for example, although the framers may not have emphasized education as a constitutional right, it is of great importance in light of both a longstanding social and legal tradition of recognition and its foundational character as a prerequisite to effective exercise of other individual rights and freedoms. Given the importance of education and the impact of denying access to education, Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450 (1988), arguably was decided wrongly. On the other hand, because affirmative duties impose significant costs on government, the other side of the balance may weigh against the recognition of affirmative duties, even in *Kadrmas*. At the very least, by rejecting the claim on the assumption that due process never imposes affirmative duties, the Court failed to come to grips with the essential issues raised by the denial of free transportation to rural students who cannot afford to pay for bus service. *Cf. supra* note 389 (advancing similar argument respecting Harris v. McRae, 448 U.S. 297 (1980)).

405. While this point is obvious in terms of individual rights whose value cannot be quantified in monetary terms, it might be incorrectly assumed that the constitutional and

on large corporations should not necessarily engage greater scrutiny than a lesser aggregate impact on an individual whose personal circumstances are dramatically affected.[406] This point not only reflects the basic premise that economic rights are individual rights, but also makes some economic sense insofar as it reflects the decreasing marginal utility of money.[407]

On the other side of the proportionality principle, the Court must assess the public purposes supporting government decisions and the fit between those purposes and the action taken. Scrutiny of purpose ensures that the public benefits sought by government action are sufficiently weighty to counterbalance the adverse impact on constitutionally protected interests, and scrutiny of fit is a means of quantifying the actual benefit achieved that could not be achieved through alternative and less burdensome means.[408] Because the level of scrutiny should vary depending upon the impact of government decisions on constitutional interests, the Court should avoid developing categories of scrutiny to which particular levels of rationality review attach.[409]

---

market value of economic interests are necessarily the same. Market value may well be the best or only way to quantify the damages in the event of a constitutional violation, but constitutional considerations implicit in the proportionality requirement go beyond the strict monetary value of a particular economic interest. For example, government action that effectively deprives a person of her home engages considerations beyond the market value of the home.

406. The issue in the case of the corporation would be the impact on shareholders and employees of the corporation.

407. Judge Posner has argued against this sort of reasoning on the ground that it assumes individuals have the same utility function for money, when it is equally plausible that individuals who accumulate wealth do so because they value money more highly. *See* POSNER, *supra* note 72, at 458-61. Whatever the force of this argument in connection with the relative utility of having additional wealth to purchase nonessential goods and services, at the extreme ends of the spectrum it is reasonable to assume that the marginal utility of money is greater for those in poverty than for the wealthy.

408. This rationale intentionally avoids the notion that scrutiny of fit is a means of determining whether legitimate purposes offered in support of a measure are pretextual, because the due process proportionality principle is designed to balance the individual and government interests rather than detect flaws in the political process. Pretext and actual purposes are political-process questions that should be addressed under the equal protection analysis advanced in part IV.B.2.

409. Depending on the importance of the individual rights interest at stake, there will, of course, be a natural tendency to express the proportionality principle by using adjectives such as "important" or "compelling" to describe the government interest and "substantial relationship" or "narrowly tailored" to describe the fit between the purpose and the means chosen. So long as such descriptive approaches do not harden into discrete levels of scrutiny, the desired flexibility of analysis will be retained. The key point is that the analysis should remain focused on the importance of the interests at stake rather than shifting to categorization in ways that obscure the articulation of the underlying values that

A requirement that government decisions be sustained by public purposes proportional to their adverse effect on constitutionally protected interests is a reasonable construction of due process.[410] The notion of "substantive due process" may be an oxymoron difficult to reconcile with the text of the Constitution, but substantive review under the Due Process Clause has been present in one form or another for at least a century.[411] Moreover, while the proportionality principle replaces the existing multi-tiered doctrine with a more flexible analysis, current doctrine actually incorporates a crude proportionality principle by raising the level of scrutiny for government decisions affecting fundamental rights.[412]

2. Equal Protection and "Rational-Basis-with-Bite"

Just as concern for the importance of a particular interest is best expressed through due process analysis, political-process concerns are best expressed under the Equal Protection Clause. Absent a suspect classification, the Court should address these concerns by modifying the rational basis test to require that the government identify a public purpose actually furthered by its decisions, regardless of the substantive interest at issue.[413] Because equal protection addresses relative treatment rather than protection of substantive interests per se, this test should be applied without reference to a constitutional or external baseline.

The equal protection premise that government may not single out disfavored groups for adverse treatment is reinforced by political-process theory, so it makes sense to scrutinize government decisions

---

support the decision.

410. This is not to say that the principle is justified on strictly originalist grounds. But originalism is not, and should not be, the sole touchstone of constitutional interpretation. *See infra* notes 472-78 and accompanying text.

411. Even the deferential rational basis test assumes that the Due Process Clause affords substantive as well as procedural protection.

412. *See supra* note 400. Unlike the "rough proportionality" requirement for unconstitutional condition takings cases articulated in Dolan v. City of Tigard, 114 S. Ct. 2309, 2320-21 (1994), however, I would not place the burden of proving proportionality on the government.

413. That some substantive interests may be regarded as more important than others is generally irrelevant to the level of equal protection scrutiny, although it may be of some relevance to the fit inquiry. *See infra* note 427. Thus, fundamental rights equal protection analysis should be folded into the due process proportionality requirement. On the other hand, the suspect classification analysis currently employed makes some sense in political-process terms, although a less categorical approach to suspect classifications might be desirable (especially with respect to disparate impact analysis). A thorough treatment of suspect classification doctrine is beyond the scope of this Article.

for political-process failure under the Equal Protection Clause. Thus, equal protection scrutiny is generally understood in political-process terms as an evidentiary inquiry designed to distinguish government action in the public interest from government action that serves the particular interests of its immediate beneficiaries at the expense of those who are politically powerless.[414] The purpose strand of the inquiry requires the government to identify the public interest to be achieved, and the fit inquiry determines whether this ostensibly public purpose is merely pretextual. Under current doctrine, however, the rational basis test ordinarily is so deferential as to be meaningless.[415] The insights of public choice theory and the realities of modern politics suggest that this abdication of judicial review is wrong because even measures that do not allocate burdens and benefits according to suspect classifications may be the product of political-process failure.[416] Thus, it is appropriate to subject them to meaningful rationality review informed by the insights of political-process theory.

The first requirement of a meaningful rational basis test is that government action should be reviewed in light of its actual purposes.[417] The current acceptance of any conceivable purpose, whether or not it actually motivated the legislature,[418] is inadequate to ensure that government decisions further some public purpose. It is generally not too difficult to devise the kind of post-hoc rationalization invited by this rule, even for obvious special interest legisla-

414. This view obviously assumes that there is such a thing as the public interest, as opposed to the mere accumulation of private interests. Even recognizing the difficulties implicit in the concept, it is a cornerstone of our political system and an essential premise of constitutional analysis that government should act in the public interest. While a comprehensive theory of what government purposes are permissible is probably impossible to develop despite the best efforts of many scholars who have addressed the issue, from a more pragmatic perspective it is possible to construct a workable conception of permissible government ends. *See infra* notes 457-68 and accompanying text.

415. This assumes that recent cases employing a form of rational basis with bite are aberrational.

416. *See supra* notes 137-39 and accompanying text. I have omitted reference to fundamental rights because fundamental rights scrutiny is inappropriate in the equal protection context. Although the jurisprudence advanced in this Article does not explicitly address the suspect classification strand of equal protection doctrine, it suggests a less categorical approach to those issues. *See supra* note 413.

417. This actual purpose review is part of the modified rational basis test advanced by Gerald Gunther. *See* GUNTHER, *supra* note 399, at 620-22.

418. Although Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336 (1989) seemed to cast doubt on this component of the equal protection rational basis test, it was reconfirmed in FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2098 (1993). *See supra* notes 45-46 and accompanying text.

tion.[419] Actual purpose review would require the government, including the legislature, to articulate its purposes at the time it acts.[420] In addition, courts should consider evidence that the legislature was in fact motivated by purposes other than those articulated,[421] as well as other circumstances that suggest a process failure.[422]

A political-process approach to rationality review also clarifies the function of the fit inquiry as a means of determining whether proffered public purposes are pretextual.[423] When a measure is substantially overinclusive or underinclusive in terms of a given purpose, it suggests that some other purpose is truly at work. Likewise, if the stated purpose can easily be accomplished through some other means that involve less extreme differences in treatment,

---

419. *See, e.g., supra* note 383 and accompanying text (discussing *Lady Baltimore Foods*).

420. This requirement imposes a burden on state legislatures that, in contrast to Congress, often produce no explicit statement of purpose, either in a statutory preamble or committee reports. But this burden is no objection to actual purpose review. If the purpose of legislation is not clear to the legislature or is not a "public" one, then the legislation should not be adopted. Thus, judicial scrutiny that requires the articulation of reasons furthers the rationality of policymaking without substituting judicial policy choices for those of the political branches. *See* Shapiro & Levy, *supra* note 160, at 436-38. Such a judicial role is consistent with political-process reasoning and reinforces the framers' expectation that the legislative process would be deliberative. Requiring state legislatures to articulate statutory purposes might also provide incidental advantages, such as facilitating the interpretation of statutes.

421. If the plaintiff can establish that the legislature attempted to mask its real motivation in light of some ostensible public purpose, that is almost a sure sign of process failure. This inquiry presents some difficult evidentiary and conceptual issues, such as the treatment of legislation reflecting mixed motives, some of which are illegitimate, but these problems do not justify total disregard of evidence that legislation was adopted for improper reasons. Under current law, the Court has at times refused to consider "real" motives. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 384 (1968) (refusing to consider whether criminal penalties for destruction of draft cards were motivated by opposition to the message expressed). This refusal is inconsistent with disparate impact analysis, which explicitly requires litigants to demonstrate that invidious discrimination, rather than articulated public purposes, has motivated particular government acts. *See supra* note 285. Such inconsistencies are resolved by clarifying the evidentiary function of rationality review.

422. Thus, while Judge Posner's refusal to treat such evidence as relevant in *Lady Baltimore Foods*, *see supra* note 384 and accompanying text, was correct as a matter of current law, it would be incorrect under the modified rationality review advanced in this Article.

423. For this reason, the Court's disparate impact analysis has always seemed to me deeply flawed. If the key issue in disparate impact cases is whether facially neutral measures are actually prompted by improper motivations, then it seems both illogical and unfair to require proof of bad motive in order to engage meaningful scrutiny of fit. The fit inquiry would seem redundant after bad motive is proved, and preventing consideration of fit at the proof-of-motive stage denies claimants a powerful evidentiary tool.

the failure to pursue alternatives suggests that the legislature has ignored the interests of those adversely affected (or even singled them out to bear the burdens of government action). This perspective suggests modifications of the current rational-basis-fit inquiry in the equal protection context. First, contrary to current law, substantial over- and underinclusiveness or obvious less discriminatory alternatives should not be ignored; they support an inference that stated purposes are pretextual. Second, the Court should also consider whether the government policy will in fact further its stated purpose.[424] This is not to say that a perfect or nearly perfect fit is necessary, but rather that the greater the problems of fit, the stronger the inference that ostensible public purposes are pretextual.

The evidentiary conception of rationality review also has important implications for the relationship between the purpose and fit strands of the inquiry. Since both parts of the inquiry go to the evidentiary question of whether government action is the product of a good-faith pursuit of the public interest, they should be considered together. The inference created by a bad fit may be bolstered by more direct evidence of bad motive or process failure presented at the purpose stage of the inquiry. Thus, in the absence of direct evidence of bad motive or process failure, all but the most extreme fit problems should be tolerated, but when there is evidence of bad motive or process failure, lesser problems of fit might tip the balance.

Finally, equal protection scrutiny should not be premised on any particular baseline, constitutional or otherwise. The essence of equal protection is an assessment of the relative treatment of some individuals in comparison to others, rather than the identification of particular substantive interests that warrant constitutional protection.[425] Even if the difference between imposing a burden and denying a benefit were coherent in other contexts, it is entirely

---

424. While the Court should not require the government to prove that its action (or inaction) will accomplish its purposes, a litigant's evidence that government purposes are not being furthered ought to be relevant to the fit inquiry. For discussion of the proof of legislative facts at trial, see John Frazier Jackson, *The Brandeis Brief—Too Little Too Late: The Trial Court as a Superior Forum for Presenting Legislative Facts*, 17 AM. J. TRIAL ADVOC. 1 (1993).

425. One can of course easily conceive of equal treatment as a substantive interest, but this would not alter the analysis. The "baseline" under this approach would be equal treatment, and it would remain unnecessary and inappropriate to analyze the treatment of individuals with respect to any conception of baseline rights to particular economic interests.

inappropriate for equal protection analysis.[426] No constitutional or external referent is necessary to measure differences in treatment.[427] Moreover, because the remedy for equal protection violations—equal treatment—leaves the government enormous discretion to set the level of total resources expended in furtherance of a particular policy, a baselineless equal protection analysis does not raise the specter of judge-made affirmative duties bankrupting government or distorting the allocation of limited resources.[428]

3. A Limited Role for the Contract and Takings Clauses

The Contract and Takings Clauses should play a limited role in a jurisprudence of economic rights. Broad application of these clauses has proven to be unworkable and would be unnecessary if due process and equal protection doctrines were modified as described above.[429] Each provision should nonetheless retain a meaning consistent with its text and history. The Contract Clause should prevent state laws whose purpose is to abrogate the obligations of a party or parties to a contract. The Takings Clause should require compensation for ap-

---

426. This further demonstrates the analytical flaws in Harris v. McRae, 448 U.S. 297 (1980). *See supra* notes 342-45 and accompanying text. Whether the denial of Medicare benefits imposed an obstacle or merely refused to remove one is irrelevant for equal protection purposes. *See Harris*, 448 U.S. at 315. The government treated women differently depending upon how they exercised their constitutionally protected right to choose between an abortion and carrying a child to term. *See id.* at 302. This disparity in treatment is indistinguishable from Shapiro v. Thompson, 394 U.S. 618 (1969), in which the state denied welfare benefits to those who exercised their constitutionally protected right to travel. The key question in *Harris*, as in *Shapiro*, was whether it is permissible for government to discourage individuals from exercising a constitutionally protected choice in a particular manner. *Compare* Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113, 1115-17 (1980) (arguing that Roe v. Wade, 410 U.S. 113 (1973), precluded government action premised on moral objections to abortion) *with* Peter Weston, *Regarding Perry, Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, *in Correspondence*, 33 STAN. L. REV. 1187, 1187-89 (1981) (rejecting this interpretation of *Roe* in defense of *Harris* result).

427. It does not follow, however, that the importance of the interests at stake or the degree of disparity are irrelevant to equal protection rationality review. Particularly stark disparities respecting important interests may raise the inference of process failure because one would otherwise expect strong political opposition (at least in the absence of an equivalent benefit). This idea is closely related to the inquiry into less discriminatory alternatives.

428. Since there is no minimum substantive requirement under equal protection, the government might remedy unequal treatment by "raising" the treatment of the relatively disadvantaged, "lowering" the treatment of the relatively advantaged, or both.

429. *See supra* parts IV.B.1-2. The text and history of these provisions, however, remain relevant to evaluating property and contract interests for purposes of due process analysis.

propriation of property or physical invasion, but the entire regulatory takings doctrine should be abandoned.

a. The Contract Clause

The current approach to the Contract Clause should be replaced by one more consistent with its text and history. The language of the clause, which bars any "impairment" of contractual obligations, is flatly inconsistent with the idea that some contractual impairments can be sustained because of a valid state purpose, even one that survives heightened scrutiny.[430] On the other hand, if every government measure that renders a contractual provision unenforceable constituted an "impairment" that is per se invalid, the clause would sweep too broadly.[431] This seemingly insurmountable dilemma can be avoided by developing an appropriate definition of "impairment" in light of the purposes of the Contract Clause.

In general terms, this approach would bar state "debtor-relief" laws and perhaps other measures whose immediate purpose and effect is to abrogate existing contracts. It is well understood that the original purpose of the Contract Clause was to prevent states from adopting debtor-relief laws, whose proliferation after the Revolutionary War had been a major source of friction and injustice under the Articles of Confederation.[432] Although the problem was described by the framers as an individual rights issue, there is also a federalism component that suggests a limited application of the clause.[433] The individual rights conception of the Contract Clause is hard to square with the absence of a similar provision constraining federal power,[434]

---

430. *See supra* note 169.

431. *See* Manigault v. Springs, 199 U.S. 473 (1905); *supra* notes 170-72 and accompanying text.

432. *See supra* notes 112-14 and accompanying text.

433. Compare the Commerce Clause, which implicitly limits state regulation of interstate commerce not because the framers opposed commercial regulation per se, but because states had adopted discriminatory and conflicting measures. On the other hand, there is no prohibition of state regulation of interstate commerce that corresponds to the Contract Clause, which may import a different principle underlying the two provisions. *See generally* CHARLES L. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 67-98 (1969) (arguing for an increased reliance on structural rather than textual reasoning in constitutional adjudication).

434. In U.S. CONST. art. I, § 10, the Contract Clause appears (after a semicolon) together with prohibitions against bills of attainder, ex post facto laws, and grants of titles of nobility. While equivalent prohibitions on federal action can be found for bills of attainder and ex post facto laws in U.S. CONST. art. I, § 9, cl. 3, and for titles of nobility in U.S. CONST. art. I, § 9, cl. 8, an analogous prohibition on federal laws impairing obligations of contracts is conspicuously absent. To the contrary, the Constitution expressly grants the federal government power to make uniform bankruptcy laws. U.S. CONST. art. I, § 8, cl. 4. This structure suggests that the framers did not inherently object

which is particularly striking considering the framers' general lack of concern for protecting rights against state, as opposed to federal, interference.[435]

All this is not to say that the Contract Clause has no individual rights component, but rather that the framers' concern for particular abuses caused by interstate rivalries and tensions does not easily translate into a broader doctrine of absolute protection of contractual obligations.[436] Indeed, given the need to mollify antifederalists by avoiding excessive interference with state sovereignty, it is highly unlikely that the framers meant to prevent completely any state laws that happened to abrogate some contractual provisions. Such a result would paralyze state government and would surely have been the source of strong opposition.

Thus, "impairment" as used in the Contract Clause prohibits only debtor-relief laws, or perhaps more broadly, laws whose purpose is to relieve some parties of their contractual obligations.[437] No broader role for the Contract Clause is required by its history; nor is it

---

to debtor-relief laws (the federal bankruptcy power is not constrained by any express requirement that laws be prospective only), but rather were particularly concerned that state laws would be discriminatory or excessive. Against this view it can be argued that the Contract Clause is located among the individual rights-based limits on state power in Article I, § 10, rather than among its federalism-based limits. *See* Clarke, *supra* note 15, at 188 (stating that placement of the Contract Clause in Article 1, § 10 supports both a narrow reading of the clause as applied to debtor-relief laws and a broad reading of the clause as applied to retroactive alteration of the legal consequences of one's acts).

435. The federalism perspective on the Contract Clause makes sense in political-process terms as well. State debtor-relief laws were often intended to benefit a state's citizens rather than to allocate the risks of insolvency among contracting parties or to further some other broad public purpose. This bias was the product of political-process failure because nonresidents were not represented in the state. Placing the bankruptcy power at the federal level corrected this defect. This kind of reasoning also underlies dormant Commerce Clause analysis. See authorities cited *supra* note 132; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 425-37 (1819) (using similar reasoning to conclude that states do not have the power to tax federal institutions).

436. On the other hand, the framers' concern for the impact of these abuses on individuals and commercial activity does reflect the high value they placed on contractual interests, which is relevant to the treatment of such interests in the due process context. *See supra* notes 370-73 and accompanying text.

437. Under this view, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), probably was decided incorrectly, because the Court upheld a state debtor-relief law. *See id.* at 409-15. Conversely, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), is arguably wrong because the pension funding obligation was not a debtor-relief law. *See id.* at 252-55. On the other hand, the measure was intended to relieve the employees' contractual obligation to work for a specified number of years to gain vested benefits, which might justify invalidation under the Contract Clause. Overall, however, *Spannaus* is better handled under the due process and equal protection analysis advanced in this Article.

necessary to protect economic interests if due process and equal protection analysis is developed along the lines described above.[438] On the other hand, this definition of impairment preserves the central meaning of the clause and affords it an appropriate role in the overall jurisprudence of economic rights.

Recent decisions are on the right track in distinguishing between measures whose principal function is to alter contractual obligations and those that do so only as an incidental effect.[439] This approach clarifies the role of the purpose and fit inquiries in Contract Clause cases as an evidentiary device that may assist the Court in determining whether legitimate public purposes offered to support legislation are merely pretextual.[440] The development of this test and other devices for applying the historical understanding of impairment would improve the application of the Contract Clause.

b. Takings

Takings doctrine also should be restructured to reflect the text and history of the Takings Clause. In particular, the entire regulatory takings doctrine should be rejected as unfounded, unworkable, and unnecessary.[441] The concept of a regulatory taking is neither inherent in the language of the Takings Clause nor supported by the original understanding of the framers.[442] Since regulatory takings

---

438. *But see* Note, *Rediscovering*, *supra* note 15, at 1420-23 (arguing against the "economic nationalism" approach to the clause "because it does not frame principles at a level of abstraction that rises above historical context").

439. *See supra* notes 181-85 and accompanying text. Problems in applying this distinction are produced in part by the incoherent doctrinal background against which it has been developed. In addition, because the distinction has been incorporated in an effort to recharacterize prior decisions that did not employ it in the first instance, this approach has not been well developed or carefully considered. Once the distortion created by the misguided quest for an originalist escape is removed, however, this view of the Contract Clause can be developed further.

440. This understanding, in turn, would support the application of a form of rational basis with bite similar to that advanced for equal protection analysis. *See supra* part IV.B.2. The principal difference would be that the evidentiary inquiry is directed toward uncovering a particular state purpose rendered illegitimate by the Contract Clause.

441. I am not the only observer to suggest this resolution of the doctrinal morass created by the recent takings decisions. *See* John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 716-18 (1993) (arguing that the Takings Clause "should be interpreted to apply only to outright appropriations or physical invasions of property, and to regulatory activities that are the functional equivalent of appropriations or occupations"). Such a solution makes no sense, however, unless it is part of a broader restructuring of the jurisprudence of economic rights.

442. *See supra* notes 115-19 and accompanying text. Just as the text of the Contract Clause is incompatible with upholding an impairment because it serves a police-power purpose, the language of the Takings Clause is difficult to reconcile with the notion that

law can be abandoned without compromising the text or original understanding of the clause, the key question is whether it is necessary or desirable in light of broader principles that animate the clause.

Although the basis for regulatory takings law has never been entirely clear, three principal rationales seem to underlie various expressions of the doctrine.[443] First, there is the conceptual view that property is a bundle of rights and that any diminution of that bundle takes property.[444] Second, the Takings Clause is said to reflect the unfairness of singling out a few property owners to bear the costs of government action that benefits society as a whole.[445] Finally, regulation that "goes too far" may be seen as analogous to physical appropriations, at least in terms of its effects on property owners.[446] In a coherent jurisprudence of economic rights, however, none of these rationales provides a persuasive foundation for current regulatory takings doctrine.

The "bundle of rights" rationale is flawed for several reasons, many of which were touched upon earlier in this Article. Most importantly, it would convert every regulatory measure into a taking, and cripple the government.[447] Such an extravagant reading of the clause is neither required by text and history[448] nor necessary to

---

the "purposes" of a regulation are relevant to whether it has "taken" something. The Fifth Amendment's use of both the term "take" and "deprive" also argues against the conclusion that destruction of uses constitutes a taking. "Take" connotes acquisition of possession, while "deprive" does not. Thus, regulatory restrictions that destroy certain sticks in the bundle of rights may be deprivations, but they are not takings.

443. These rationales overlap with, but are not identical to, the rationales for the purpose inquiry that were discussed *supra* notes 214-23 and accompanying text. It is indicative of the incoherence of regulatory takings doctrine that the relationship between the concept of regulatory takings and the elements of the regulatory takings inquiry is poorly defined.

444. The most complete articulation of this view, of course, has been undertaken by Professor Epstein. *See* EPSTEIN, *supra* note 47.

445. This conception of the clause was advanced in Yee v. City of Escondido, 112 S. Ct. 1522, 1526 (1992). *See supra* notes 215-16 and accompanying text. A related point is that the Takings Clause produces more economically rational decisions by forcing government to internalize the costs of its regulatory programs.

446. This rationale was suggested in *Lucas*. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 (1992).

447. *See supra* notes 240-48 and accompanying text. Because only regulations that merely restate preexisting common-law restrictions would be permitted, this view freezes the status quo in place, or at least requires compensation for every change in the status quo that cannot be justified in very narrow terms.

448. As noted above, the evidence of framers' intent does not support any regulatory takings doctrine, much less the extreme view implicit in the bundle of rights approach. *See supra* notes 115-19 and accompanying text.

protect essential economic interests,[449] a goal that is better accomplished through the due process analysis advanced above. The effort to force these concerns into a form of takings analysis has only served to obscure the essential considerations in balancing individual economic interests against the legitimate needs of government.[450]

Likewise, the unfairness of requiring a few to bear the costs of public benefits for the many is not a sufficient justification for continuing regulatory takings analysis under an improved economic rights jurisprudence. This rationale reflects political-process concerns[451] that are poorly addressed in modern regulatory takings doctrine. The equal protection analysis advanced in this Article would be a preferable means of identifying such cases.[452] Because there is no way to determine objectively whether a given distribution of costs and benefits is "fair,"[453] the crucial question is whether

---

449. Professor Epstein's contentions notwithstanding, the Lochnerization of takings law is not politically feasible, nor in my view socially desirable. Professor Epstein's theories rest on assumptions about individual autonomy and the inherent justice of preserving the status quo from governmental interference that omit central considerations. *See infra* notes 460, 464.

450. Despite the poor textual fit and the ambiguous state of current doctrine, one might adopt the substantive due process analysis advanced in this article under the Takings Clause. *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2319 (1994) (adopting rough proportionality requirement for the extraction of easements as a condition on granting building permits). Justice Holmes's analysis in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1992), for example, is suggestive of a proportionality requirement. *See id.* at 414; *supra* note 209 and accompanying text. But locating the analysis under the Takings Clause would be a poor second best.

451. That only a few individuals are made to bear the costs may be suggestive of a process failure, insofar as their small number deprives them of significant clout. In other words, when a few individuals bear all the costs there is an externality: Government officials can get the political benefit of addressing public concerns or satisfying special interests without bearing the political costs of finding the money to do so. *See* Sax, *supra* note 149, at 76 (arguing that the Takings Clause was designed to deal with cases "of essentially individualized cost-bearing of some public improvement").

452. Indeed, the connection between this rationale and the Equal Protection Clause was implicitly acknowledged by Justice Scalia in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). *See id.* at 835 n.4 ("If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause.").

453. In some instances, it is not unfair to impose costs on a few. Most obviously, if some people create harms that are imposed on society as a whole, then it is fair that they, rather than society, should bear the costs of preventing or ameliorating those harms. Whether a particular segment of society ought to bear a particular set of costs is likely to depend upon one's ideological and economic perspectives. *See infra* notes 457-66 and accompanying text.

there is reason to believe that the political process has failed to afford reasonable protection to those who bear the costs.

While the first two rationales for regulatory takings are better captured through other constitutional provisions, the idea that excessive regulation is analogous to a physical invasion evokes the specific content of the Takings Clause. This reasoning would at most apply to *Lucas*-type cases of total destruction of economically viable uses, however, and could not justify current takings analysis of use restrictions that do not involve complete destruction.[454] Even this limited view of regulatory takings doctrine is unsound. Total destruction of property interests recognized at common law often may be inconsistent with constitutional principles, but there are some governmental or societal purposes of sufficient magnitude to warrant destruction of property interests without compensation.[455] While the *Lucas* rule might be qualified in some way to account for these cases, the task of distinguishing permissible from impermissible cases of total destruction is better accomplished through the due process and equal protection analysis advanced in this Article.[456]

---

454. The extension of the clause beyond government acquisition of possession or title to include physical destruction or its equivalent is generally well accepted. *See supra* note 188 and accompanying text. *But cf.* Rubenfeld, *supra* note 212 (arguing that no taking has occurred unless there is public use of the property). It is a small step from there to the *Lucas* rule for total destruction of economic use. *See supra* note 446 and accompanying text. This analogy to physical destruction, however, does not justify the more open-ended analysis of regulatory measures that do not entail total destruction of economically viable uses. Although the analogy to physical destruction can be combined with bundle of rights thinking to create a textual justification for Professor Epstein's view of regulatory takings, this view is undesirable for other reasons.

455. Taken literally, for example, the *Lucas* rule would require compensation for the Emancipation Proclamation, which destroyed ownership rights and prevented uses that were not "nuisances" at common law. *Cf.* Dred Scott v. Sandford, 60 U.S. 393, 406-27 (1856) (treating escaped slave as property for due process purposes). I would argue, however, that the total destruction of such ownership rights did not constitute a taking because the "rights" were not justly acquired and overarching moral concerns justified their abrogation. While the slavery example is hyperbolic, it illustrates the basic point: There are situations in which uses of property that are permitted at common law violate existing or emerging social values of such dimension that the total destruction of those uses need not be compensated. *See, e.g.*, Sax, *supra* note 355, at 30-31 (asserting that prohibition of construction on earthquake fault lines should not be a taking even if it completely destroys the value of land purchased before the prohibition and the prohibition does not restate a background principle of nuisance law).

456. That analysis explicitly incorporates the relevant considerations, while the manipulation of per se rules typically involves formalistic distinctions not necessarily reflective of those considerations.

C. *Objections*

While I shall not respond to every possible objection to the jurisprudence advanced in this Article, there are two central issues that must be addressed in order to complete the argument for a coherent jurisprudence of economic rights. First, when, if ever, are redistributive purposes legitimate? Second, once protection of economic rights is countenanced, how can improper judicial activism be prevented? Each of these questions presents a basis for criticizing, from both the liberal and conservative perspectives, the analysis proposed in this Article.

1. Redistribution

The question of redistribution, i.e., the permissibility of government action that alters the existing allocation of wealth, is perhaps the central substantive problem of any economic rights jurisprudence.[457] Much of the current debate on redistribution reflects two extreme positions that rest on fundamentally opposed conceptions of the source of property rights. To those who regard property as a natural right that exists independently of government action, redistribution is impermissible except when it is intended to redress the wrongful conduct of a property owner or when the owner is compensated in kind.[458] To those who regard property rights as created by government through the legal system, however, there is nothing inherently fair or just about the current definition of property rights, and reallocation of those rights through regulation is generally permissible.[459] The analysis in this article, which strikes a middle ground

---

457. The inability to produce a consistent answer to this issue may underlie many of the doctrinal difficulties in the Court's current analysis.

458. This view was central to *Lochner*-era jurisprudence. *See supra* notes 253-55 and accompanying text. It is also the premise of Professor Epstein's book. *See* EPSTEIN, *supra* note 47, at 3-6. One need not subscribe to the natural rights view to oppose redistributive legislation, however. Even if property rights are the creations of government, opposition to redistribution may be based on the notion that government action is itself flawed and is likely to produce dead-weight losses from rent-seeking behavior. *See supra* notes 72-73 and accompanying text. These utilitarian questions should not be resolved by a constitutional rule, however, as they involve empirical and policy judgments that are best left to the political process, provided that the constitutional interests sacrificed by regulation do not clearly outweigh the public benefit to be achieved (due process proportionality) and the political process operates appropriately (equal protection scrutiny).

459. *See* Singer & Beermann, *supra* note 257, at 228-30. This is the premise of the post-New Deal rejection of economic rights. *See supra* notes 257-62 and accompanying text.

between the two extremes, is likely to be criticized from either perspective.

While the extreme views of property are attractive because they provide simple answers to difficult questions, neither strikes an appropriate balance between individual and community in a complex society. The need to balance individual and community is reflected in our constitutional heritage, which partakes of both the classical liberal tradition invoked by natural rights theorists and the republican tradition that supports government action on behalf of the public interest. The natural rights view elevates the individual over community and fails to recognize that with individual rights comes responsibility.[460] The treatment of property as an empty concept entirely at the mercy of the state, on the other hand, ignores the fundamental importance some economic interests hold for individuals.[461] At a more practical level, the laissez-faire regime constitutionalized by the *Lochner* era proved unworkable in the industrial age, while the costs of unrestricted government power over economic interests have become all too apparent in modern society.

The challenge for a coherent jurisprudence of economic rights is to strike an appropriate balance between individual and community interests respecting economic rights and to define appropriate roles for the political and judicial processes in finding that balance in specific cases. While the jurisprudence outlined in this Article does not provide all the answers to these difficult questions, it does suggest that welfare and other government programs that provide for basic human needs, as well as transitional programs that ease economic dislocation such as unemployment compensation or retraining, are constitutionally permissible.

Even under a more natural rights-oriented view of property, such redistributive programs are justifiable responses to public goods and externality problems. The "social safety net" is a public good in the

460. In other words, Professor Epstein's natural rights theory, which rests on notions of individual autonomy, is incomplete. *See supra* note 47. Because we live in a society and are interdependent, autonomy alone cannot define our social relationships. With autonomy comes responsibility, and a system of rights that ignores the correlative duties is just as distorted as a system of duties that ignores rights. This argument is made in a general way by Professor Mary Ann Glendon in her book, RIGHTS TALK. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 136-44 (1991).

461. *See supra* notes 376-77 and accompanying text.

sense that we all benefit from the existence of such programs,[462] but no individual has the incentive or resources to provide them and problems such as free riders and transaction costs limit concerted action in the private sphere.[463] Conversely, while society as a whole may be better off with a system of property rights and contractual freedom that facilitates the accumulation of wealth, a cost of that system is economic dislocation and poverty. In economic terms, this cost is an externality that should be borne by those who benefit from the system.[464]

In addition to economic justifications for redistributive programs of this type, society can make a moral or ethical judgment to alleviate the impact of poverty. Thus, even if redistribution is economically unwise because it creates disincentives to productive activity or dead-weight losses from rent-seeking behavior, it would be untenable to read the Constitution as precluding the value judgment that extreme inequalities of wealth are morally unacceptable. It is highly unlikely that the framers categorically rejected this broadly shared value judgment, which is reflected in most major religions (and other

462. In the absence of a social safety net, large portions of the population have no stake in the social and economic order, which leads to a decline in the cultural norms that maintain it. *Cf.* JAMES M. BUCHANAN, FREEDOM IN CONSTITUTIONAL CONTRACT: PERSPECTIVES OF A POLITICAL ECONOMIST 207-11 (1977) (discussing fragility of the social order and its implications for egalitarian redistribution).

463. *See, e.g.*, POSNER, *supra* note 72, at 463-66; SHAPIRO & TOMAIN, *supra* note 72, at 603-04.

464. Professor Epstein argues that welfare programs, with few and very narrow exceptions, always violate the Takings Clause on the theory that those who are taxed to support them did not create the need by engaging in wrongful conduct and because the benefit in terms of social peace does not constitute a sufficient like-kind compensation. *See* EPSTEIN, *supra* note 47, at 306-23. But these conclusions do not inevitably follow from Professor Epstein's natural rights premise. He also recognizes that the system of property and contract rights upon which individual wealth is based is essentially a public good, at least when transaction costs would preclude its creation through voluntary exchanges. *See* EPSTEIN, *supra* note 47, at 202; *see also* EPSTEIN, *supra* note 357, at 26 (arguing that government is necessary to protect private property). Conversely, the unequal distribution of wealth, including poverty, is a cost of a capitalist economic system, and addressing those difficulties is defensible as necessary to sustain that system. Professor Epstein's refusal to treat these costs as externalities on the grounds that the conduct producing them is not wrongful is puzzling, given his earlier writing on torts in which he advanced a theory of strict liability based upon the responsibility of all actors for the consequences of their acts, regardless of whether those acts are wrongful. *See* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 189 (1973). Professor Epstein's view that welfare programs create incentives that increase demand for benefits (i.e., exacerbate the problems they are intended to solve), *see* EPSTEIN, *supra* note 47, at 321-22, raises empirical and policy questions that cannot be resolved by an absolute constitutional rule.

moral/ethical systems),[465] so as to prevent any governmental redistribution of wealth. This conclusion is reinforced by the recognition that the current distribution of wealth is in part the product of historical injustices.[466]

The problem thus becomes how to distinguish permissible redistributive purposes from "naked preferences" that are impermissible because they further private rather than public interests.[467] While this problem may present some difficult cases, the analysis outlined above is generally capable of resolving them. Meaningful equal protection rationality review would help to ensure that nonredistributive purposes are not pretextual, and would implicitly require the fairness of redistributive purposes to be discussed openly.[468] The due process proportionality principle would also provide a constitutional framework for weighing the government's purposes against their impact on individuals.

2. Judicial Activism

There can be little doubt that the jurisprudence advanced in this Article contemplates a kind of judicial activism. It envisions a more significant role for judges in reviewing the constitutionality of government decisions affecting economic interests, and it does so on the basis of an open-ended, nonoriginalist doctrine that invites judges to exercise discretion and weigh values. This activism is likely to provoke criticism from both the liberal and conservative perspectives. From the liberal perspective, the proportionality requirement and enhanced rationality review would vest great discretion to block economic regulation and social programs in the hands of a generally conservative judiciary.[469] From the conservative perspective, the

---

465. This principle can also be defended in Rawlsian terms as the choice that people would make if placed behind a "veil of ignorance" regarding their place in the economic system. SHAPIRO & TOMAIN, *supra* note 72, at 605. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971) (advancing theory of justice based on rules that would be adopted if people did not know their position in society).

466. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 4, at 4-7.

467. In Central States Pension Fund v. Lady Baltimore Foods, 960 F.2d 1339, 1343-44 (7th Cir.), *cert. denied*, 113 S. Ct. 179 (1992), for example, Judge Posner posited that the exemption from pension fund withdrawal liability might be justified on fairness grounds. *See supra* note 381 and accompanying text.

468. Under actual purpose review, the fairness justification for redistribution must be articulated contemporaneously with government action. It is unlikely that invoking fairness arguments would be politically feasible if the particular act of redistribution is a naked preference.

469. Although redistribution is not per se prohibited and property and contract rights are not given absolute protection, one might imagine that, placed in conservative hands

proposed analysis rejects originalism and reinforces liberal decisions by integrating economic and other individual rights into a single jurisprudence.[470] It would also lay the foundation for further liberal activism, particularly regarding affirmative rights, if the composition of the Court changes.[471]

My answer to both sets of criticisms is the same. First, the degree to which judicial activism is actually constrained under current doctrine is exaggerated. While the rhetoric of restraint is frequently invoked, that has not prevented activist decisions.[472] It is simply not possible to eliminate discretion from judicial decisionmaking; nor is it desirable. Language is too imprecise and the variety of circumstances too myriad for judges to act as machines whose sole function is to apply law made elsewhere to specific cases.[473] It is, after all, the function of judges to exercise judgment.

Second, these criticisms underestimate the degree to which activism under the proposed analysis would be controlled by institutional constraints. The Court as a whole is steeped in the culture of judging, and an activist justice (whether conservative or liberal) must persuade at least four others to join a decision.[474] Thus, an activist decision must be sufficiently defensible in doctrinal terms to gain acceptance.[475] Moreover, although the Court is not

---

and stripped of the rhetoric of restraint, this sort of analysis might result in excessive intervention.

470. To the extent that conservatives value judicial restraint over economic rights, this is likely to be too high a price to pay for enhanced economic rights protection.

471. For example, my analysis argues in favor of recognizing some affirmative rights and is critical of decisions such as Harris v. McRae, 448 U.S.297 (1980). Even Professor Sunstein, who has sharply criticized the continued dominance of status quo baselines, also suggests judicial restraint respecting affirmative rights. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 4, at 151-52.

472. Justice Scalia, for example, has been perhaps the Court's most outspoken proponent of judicial restraint, even in the economic rights context, but he has been its most activist justice in the takings area, authoring both *Nollan* and *Lucas*, and dissenting in other cases declining to find a taking. More generally, doctrines of judicial restraint can be manipulated to achieve desired policy results. *See* Levy & Glicksman, *supra* note 77, at 317-54.

473. One need not embrace the radical indeterminism advanced by some members of the critical legal studies movement, *see* Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 KAN. L. REV. 815, 820-26 (1990) (describing technique of "deconstruction" as applied by critical legal studies movement), to recognize that constitutional provisions and other legal rules are seldom absolutely clear, at least with respect to issues that come before the courts.

474. Appellate courts are also collegial, and subject to review as well.

475. Academic criticism reinforces this collegiality constraint insofar as most judges and justices are concerned with their broader reputations as jurists.

directly accountable in political terms, the appointment process does tend to moderate the Court when it takes a particularly activist stance.[476] For example, the reconfiguration of the Court has moderated the most activist application of *Roe v. Wade*, but collegiality and the cultural constraint of stare decisis has prevented the most extreme step of overruling it.[477]

Ultimately, then, the choice is not between restraint under the current system and unbridled activism under the analysis proposed in this Article, but rather between a distorted (and in some respects dishonest) doctrine in which activism is hidden behind the manipulation of formal categories and a jurisprudence in which the values that prompt judicial intervention are openly debated. In my view, the institutional mechanisms that constrain judicial behavior will operate more effectively,[478] and the doctrine will be more consistent and rational, if the Court abandons the search for an originalist escape and addresses the problem of economic rights directly.

CONCLUSION

Doctrinal coherence matters. It is more than an aesthetic preference; it is more than a chimera rendered empty by the indeterminacy of language. It is the essential character of the judicial art that distinguishes the judiciary from political institutions. In the absence of doctrinal coherence, constitutional jurisprudence is doomed to failure. This is the fate that has befallen the Court's recent efforts to reinvigorate economic rights, just as the doctrinal incoherence of liberal individual rights jurisprudence opened it to conservative criticism and facilitated its erosion. This is unfortunate, because both types of rights have an important role to play in constitutional jurisprudence.

To restore doctrinal coherence to the treatment of economic rights, as well as other individual rights, it is necessary to free constitutional analysis from the enduring spectre of *Lochner*. Only

476. Although this change may take some time, history suggests that it does occur, as evidenced by the reconfiguration of the Court after both the *Lochner* and Warren Court eras.

477. *See supra* notes 90, 318 and accompanying text.

478. Manipulation of formalistic categories, for example, neither instills in the public the constitutional values at stake nor provides a basis for public assessment of the Court's implementation of those values. Indeed, the more intellectually dishonest the Court's decisions seem to be, the more likely it is that the Court will be perceived as a purely political actor. Thus, open articulation of the values at stake would enhance the Court's institutional standing as well.

then can a frank and balanced approach to both types of rights be developed. This approach would rest on an integrated fundamental rights and political-process analysis that applies to both types of constitutional rights, and would recognize the baseline problem for what it is—a question of constitutional interpretation. The basic implications of this analysis are reasonably straightforward. They include the development of a due process proportionality principle, enhanced equal protection rational basis review derived from political-process considerations, and the limitation of both the Contract and Takings Clauses, including the outright rejection of regulatory takings law. While the analysis does not completely resolve all the difficult problems that might arise, it directs the Court to the right questions. The analysis contemplates a measure of judicial activism, but measured and intellectually honest activism is preferable to a false restraint grounded in manipulation of doctrine.