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The Prospects for Individual Freedom: Toward Greater Fairness for All

J. Ralph Beaird
University of Georgia School of Law

C. Ronald Ellington
University of Georgia School of Law, cre@uga.edu

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*J. Ralph Beaird***
*C. Ronald Ellington****

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means.†

IMAGINE that on June 1, 2001, the latest issue of *United States Law Week* listed the following cases as docketed for oral argument at the next October term of the United States Supreme Court:

No. 751

Jones v. Smith, Secretary of the United States Department of Health, Education and Welfare. In this action the plaintiff challenges the constitutionality of Public Law 2511 enacted June 10, 2000. Broadly stated, this law provides for mandatory contraception or abortion following the birth of two children to any family unit. The enactment of this statute was predicated, according to its statutory history, on the following legislative findings of fact:
(1) The earth's population is approximately six billion and will increase at the rate of one billion every eight years; and
(2) Unless population is controlled and restricted, starvation and famine will result.

No. 516

Brown v. Black, Secretary of the United States Department of Labor. The plaintiff in this action is challenging the constitutionality of Public Law 542 enacted May 1, 1999. Broadly stated this law provides for the compulsory relocation of persons between the ages of twenty-one and sixty-five who are found by the Secretary of Labor to meet the following conditions:

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* This Article was originally delivered as an address at the Alumni Seminar of the University of Georgia by one of the co-authors on February 10, 1973. The Article's title was prompted by a recent piece in a popular news magazine. *Toward Greater Fairness for ALL*, TIME, February 26, 1973, at 95.

** Acting Dean and Professor of Law, University of Georgia School of Law. A.B., LL.B., University of Alabama, 1949, 1951; LL.M., George Washington University, 1953.

*** Assistant Dean and Associate Professor of Law, University of Georgia School of Law. A.B., Emory University, 1963; LL.B., University of Virginia, 1966.

† Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

(1) To have been unemployed for more than one year;
(2) To have received welfare benefits for two of the preceding three years, and
(3) To live in a central city with a population density of 50,000 to one square mile.
The legislative history of this act indicates that it was based upon the following legislative facts: that high population density produces antisocial behavior, disintegration of the social order, and environmental pollution injurious to health. More specifically, the legislative fact-findings revealed that long-term unemployed persons in high density areas tend to resort to such antisocial behavior as violent crime and drug addiction.

Are these laws offensive and surprising? Perhaps so, but in considering them, one must keep in mind that the world of the twenty-first century will be altogether different from that of the present.

I. INTRODUCTION: THE TWENTY-FIRST CENTURY: THE PROBLEMS OF GROWTH IN A FINITE SYSTEM

The hypothetical cases posed above are suggested in part by an excellent article by Professors Miller and Davidson entitled *Observations on Population Policy-Making and the Constitution.*[1] They conclude that while it is of course *not* presently constitutional doctrine, draconian population control measures such as Public Law 2511 might be upheld in the future if Congress were to find that the size of the populace presented "a major national problem so great as to create a 'compelling' need."[2] Similarly, a compulsory relocation measure such

1 Miller & Davidson, *Observations on Population Policy-Making and the Constitution*, 40 GEO. WASH. L. REV. 618 (1972) [hereinafter cited as Miller & Davidson].

2 Miller & Davidson at 649. Professors Miller and Davidson rely on a combination of constitutional provisions as a source of authority for affirmative regulatory action:

> [B]ases for the exercise of power by Congress in population matters may be formed principally in the spending and commerce powers of article I of the Constitution and, to some limited extent, in section 5 of the 14th amendment. The ill-defined emergency powers of the national government may also be employed, particularly in connection with density and distribution problems. The treaty power would not likely be regarded as a substantial source of constitutional authority if Congress's power to regulate population were seriously questioned.

Id. at 632. The authors infer that the clearest basis for affirmative action to control population growth would result from a finding that such action was required to avoid catastrophe, *see id.* at 622, 631, 641. Even in the absence of such a finding, the trend away from "judicial lawmaking" may achieve a similar result: "If one may extract from the past thirty-five years of judicial decision-making any principle along those lines

as Public Law 542 might be sustained assuming a sufficient factual basis.[3] While we agree generally with the conclusions reached by Professors Miller and Davidson, it seems appropriate to observe further that the emerging law of procedural due process and equal protection would tend to insure that such legislative *ends*, even if eventually required by societal needs, would be accomplished through rational, fair means.[4]

Recently an increased awareness of the perils of the future and the distinct possibility of a remarkably changed human condition have been prompted by serious scientific studies such as *The Limits to Growth*,[5] a major computer study sponsored by the Club of Rome and carried out at the Massachusetts Institute of Technology. While some economists regard the effort as "irresponsible nonsense,"[6] the study's ominous predictions cannot be dismissed too lightly since it forecasts a precipitous drop in population combined with an uncontrollable and disastrous collapse of society within 100 years unless mankind moves speedily to establish a "global equilibrium" in which the growth of population and industrial output are halted.[7] Assuming there are no

it is that the Court will defer to the political branches of the national government." *Id.* at 677.

3 *See* Miller & Davidson at 670-71.

4 *See* notes 137-39 and accompanying text *infra*.

5 D. H. MEADOWS, D. L. MEADOWS, J. RANDORS & W. BEHRENS, THE LIMITS TO GROWTH (1972) [hereinafter cited as LIMITS]. The study is an example of an application of the science of demography, which has been defined as the science that is concerned with ascertaining (1) the size, composition, and distribution of the population in any given area of human habitation; (2) changes that have occurred or are occurring in these three major demographic variables; and (3) the processes—or the trends with regard to fertility, mortality, and migration—by means of which such changes have been or are being achieved. E. STOCKWELL, POPULATION & PEOPLE 18 (1968). Mr. Stockwell states that the above definition should be confined to what he calls "formal demography," which has been expanded from mere quantitative analysis to a more subjective review of the consequences of demographic characteristics. He classifies this broad review as "general population study," an interdisciplinary activity based upon input from other theoretical sciences such as geography, medicine, economics, biology, sociology, anthropology and political science. *See id.* at 17-19. This Article attempts to analyze several of the interdisciplinary inputs in terms of their potential inpact upon jurisprudential thought in the twenty-first century.

6 Wallich, *More on Growth*, NEWSWEEK, March 13, 1972, at 86. *See generally* Anderson, *A Careful Look at Growth as Suicide*, The Wall Street Journal, March 17, 1972, at 6, col. 3; Baker, *The Machine, the Doom and the Fool*, N.Y. Times, March 5, 1972, § E (Magazine), at 13, col. 2; N.Y. Times, Feb. 27, 1972, at 1, col. 7.

7 *See* LIMITS at 129-34, 163-88. *See also* E. STOCKWELL, *supra* note 7, at 184-207. Mr. Stockwell discusses the influences of demography in terms of three variables. First, size and rate of population growth affect military strength and national policy, as illustrated by such concepts as "manifest destiny" and *lebensraum*. Similarly, size and rate of growth

great changes in human values in the future,[8] other scholars have agreed that a policy of "letting nature take its course" is unsatisfactory in terms of meeting future demographic challenges.[9]

The Club of Rome researchers utilized the interdisciplinary technique of general population study to construct a world model of exponential growth.[10] The researchers developed a series of mathematical positive and negative "feedback loops"[11] to test their theories by

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have a direct effect on societal needs, including schooling, housing, recreation and public and professional services. Secondly, composition of the population, including age and educational factors, directly relates to technological skills, productive capacity, economic dependency, and the prevailing philosophy of life. Finally, distribution of the population, particularly increased urbanization, has a direct effect on individual freedom, a decline in community solidarity, and development of more liberal philosophy. *Id.* at 19-21. *See generally* N. CHAMBERLAIN, BEYOND MALTHUS—POPULATION & POWER (1970); W. THOMPSON & D. LEWIS, POPULATION PROBLEMS 501-25 (1965) [hereinafter cited as PROBLEMS].

8 LIMITS at 130. *See* note 14 *infra.*

9 Contrast the approach and conclusions of Professors Thompson and Lewis. Their treatise traces the history of population policy from its traditional pattern of encouraging a high birth rate, stemming from various religious ethics such as "be fruitful and multiply," *Genesis* 1:28, to its modern corollary of death rate reduction. *See* PROBLEMS at 27-68. These policies have culminated in three current approaches: (1) A policy of voluntary control implemented by more developed countries constituting approximately one-third of the world's population; (2) a policy of affirmative regulation implemented by less developed countries containing one-third of the world's population; and (3) a policy of no control by the remaining one-third. *Id.* at 562. While the first two policies seem partially effective, especially among the more educated and wealthier classes, the last represents the unsatisfactory result of "'letting nature take its course,' . . . [while] doing everything possible . . . to prevent nature taking its course in determining the death rate." *Id.* Professors Thompson and Lewis discuss the consequences of these policies in terms of the "adjustment of man's numbers to the production of the goods and services essential to a *decent living.*" *Id.* at 569. Although a "decent living" approach is far from the doomsday approach of the Rome study, "decent living" is defined in terms of two alternatives: (1) insuring continued development of human potentialities, or (2) providing minimal support to insure an adequate lifespan. As a result, one of the authors concludes that ". . . I still have very serious doubts that we shall be able to assure all the people born into the world in the next generation a *decent living* even as defined in concept 2." *Id.* at 570.

10 The researchers describe their model as follows:

> The model we have constructed is, like every other model, imperfect, oversimplified and unfinished. We are well aware of its shortcomings, but we believe that it is the most useful model now available for dealing with problems far out on the space-time graph. To our knowledge it is the only formal model in existence that is truly global in scope, that has a time horizon longer than thirty years, and that includes important variables such as population, food production, and pollution, not as independent entities, but as dynamically interacting elements, as they are in the real world.

LIMITS at 27.

11 A positive feedback loop is described as a "vicious circle" similar to the familiar wage-price spiral. Positive loops generate exponential growth when operating without any

means of a computerized "standard world model run."[12] The following predictions resulted:

> The behavior mode of the system . . . is clearly that of overshoot and collapse. In this run the collapse occurs because of nonrenewable resource depletion. The industrial capital stock grows to a level that requires an enormous input of resources. In the very process of that growth it depletes a large fraction of the resource reserves available. As resource prices rise and mines are depleted, more and more capital must be used for obtaining resources, leaving less to be invested for future growth. Finally investment cannot keep up with depreciation, and the industrial base collapses, taking with it the service and agricultural systems. . . . Population finally decreases when the death rate is driven upward by lack of food and health services.[13]

Subsequent model runs utilizing different figures reached the same result[14] which led to the conclusion that the present policy of allowing population and capital growth to "seek their own levels" invariably leads to "the collapse mode of behavior."[15] To avoid a "collapse" the researchers recommend the implementation of certain affirmative

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constraints. *Id.* at 39, 163. The positive loops consist of world population and economic growth. *Id.* at 38-51. The negative feedback loops are described as constraints which stop exponential growth. *Id.* at 163. They consist of famine, depletion of nonrenewable resources and pollution. *Id.* at 55-94. In any finite system, the negative loops become stronger as growth approaches the "carrying capacity" of the system's environment, finally overpowering the positive loops to end growth. Delays inherent in the system allow the positive loops of population and capital "to overshoot their ultimately sustainable levels," thus intensifying their eventual decline. *Id.* at 163.

12 The standard run was based on an assumption of a continued laissez-faire policy, *see* text accompanying note 9 *supra*, and note 14 *infra*, and consisted of inputs from the following eight variables: population, industrial output per capita, food per capita, pollution, nonrenewable resources, crude birth rate, crude death rate, and services per capita. LIMITS at 130-31.

13 *Id.* at 131-32.

14 The underlying basis for the various runs is the "natural limit" theory of exponential growth, which the researchers conclude is "a basic part of the human value system currently operational in the real world." *Id.* at 149. The researchers summarize the results of their computerized analysis as follows:

> Whenever we incorporate this value into the model, the result is that the growing system rises above its ultimate limit and then collapses. When we introduce technological developments that successfully lift some restraint to growth or avoid some collapse, the system simply grows to another limit, temporarily surpasses it, and falls back.

Id. at 149-50.

15 *Id.* at 150.

policies to establish a state of "global equilibrium."[16] Although the researchers realize that immediate implementation of policies designed to produce ideal stabilization is an unrealistic goal,[17] they set forth the following minimum requirements for a state of acceptable equilibrium:

> 1. *The capital plant and the population are constant in size.* The birth rate equals the death rate and the capital investment rate equals the depreciation rate.
> 2. *All input and output rates—birth, deaths, investment, and depreciation—are kept to a minimum.*
> 3. *The levels of capital and population and the ratio of the two are set in accordance with the values of the society.* They may be deliberately revised and slowly adjusted as the advance of technology creates new options.[18]

In his novel *Future Shock*,[19] Alvin Toffler touched the public consciousness with his picture of the future. Describing the world of tomorrow with phrases such as "death of permanence," "transcience," and "novelty,"[20] Toffler seems to have caught the essence of our rap-

16 Global equilibrium is defined as follows: "*[P]opulation and capital are essentially stable, with the forces tending to increase or decrease them in a carefully controlled balance.*" Id. at 177 (emphasis in original).

17 *See id.* at 165-76. The researchers state that the following policies required to establish ideal stabilization should be implemented by 1975:

> 1. Population is stabilized by setting the birth rate equal to the death rate in 1975. Industrial capital . . . is stabilized by setting the investment rate equal to the depreciation rate [in 1990].
> 2. . . . [R]esource consumption . . . is reduced to one-fourth of its 1970 value.
> 3. . . . [E]conomic preferences . . . are shifted more toward services such as education and health facilities and less toward . . . material goods.
> 4. Pollution generation . . . is reduced to one-fourth of its 1970 value.
> 5. . . . [H]igh value is placed on producing sufficient food for *all* people. Capital is therefore diverted to food production . . . .
> 6. . . . [A]gricultural capital [is used] . . . to make soil enrichment and preservation a high priority . . . .
> 7. . . . [T]he average lifetime of industrial capital is increased, implying better design for durability and repair and less discarding because of obsolescence . . . .

Id. at 169-71.

18 *Id.* at 178-79 (emphasis in original).

19 A. TOFFLER, FUTURE SHOCK (Bantam ed. 1971).

20 These descriptive terms constitute subtitles of Mr. Toffler's work. The two remaining subdivisions are entitled: "the limits of adaptability" and "strategies for survival." The origin of the title of the book itself is described as follows: "Future shock is a time phenomenon, a product of the greatly accelerated rate of change in society. It arises from the superimposition of a new culture on an old one. It is culture shock in one's own society." *Id.* at 11.

idly changing world. Already one witnesses the fast moving pace with which man is reaching into the next century. It seems almost as if man has stood still until our lifetime and is now suddenly bolting ahead to recover lost time. Toffler describes the continuum of man's existence as follows:

> . . . [I]f the last 50,000 years of man's existence were divided into lifetimes of approximately sixty-two years each, there have been about 800 such lifetimes. Of these 800, fully 650 were spent in caves.
>
> Only during the last seventy lifetimes has it been possible to communicate effectively from one lifetime to another. . . . Only during the last six lifetimes did masses of men ever see a printed word. Only during the last four has it been possible to measure time with any precision. Only in the last two has anyone anywhere used an electric motor.[21]

Toffler concludes that the 800*th* lifetime marks a sharp break with man's past "because during this lifetime man's relationship to resources has reversed itself."[22] This reversal is most noticeable in the field of economic development where the shift to industrialization is reflected by the fact that the output of goods is doubling every fifteen years.[23] Toffler attributes much of what he calls this "accelerative thrust" to a vast increase in the use of knowledge and technology.[24]

Similarly, the impact of "future shock" is reflected by the migratory nature of modern man.[25] The people in the twenty-first century will

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21 *Id.* at 14.

22 *Id.*

23 *Id.* at 14-15, 24.

24 *Id.* at 25-35. This increased tempo can be illustrated by the rate of publication. The number of titles produced in Europe in a century in 1500 was printed in ten months in 1950, in seven and one-half months in 1960, and by 1965, in only one day. *Id.* at 30-31. As with industrial output, the number of scientific journals published in advanced countries is doubling every fifteen years. *Id.* at 31. Although technological development is generally viewed more as a consequence rather than a cause of demographic policy, *see, e.g.*, PROBLEMS, *supra* note 7, at 208, the Club of Rome researchers conclude that "technological optimism" is one of the most dangerous by-products of the study of world growth:

> Technology can relieve the symptoms of a problem without affecting the underlying causes. Faith in technology as the ultimate solution to all problems can thus divert our attention from the most fundamental problem—the problem of growth in a finite system—and prevent us from taking effective action to solve it.

LIMITS, *supra* note 5, at 159. *See also* note 14 *supra*.

25 Analysis of population migration is generally recognized as one of the essential demographic processes. *See, e.g.*, E. STOCKWELL, *supra* note 5, at 125-68; PROBLEMS at 474-99.

be more transient than ever before. In 1914 an average person traveled 88,500 miles in a lifetime, whereas today many modern travelers have covered three million miles or more.[26] In the year 2000 that figure will be much higher. In addition, families are changing their places of residence more often. In a recent year some thirty-six million Americans made such a move.[27] Thus, Americans in the future will participate in more short-term relationships, perhaps leading to radical changes in such institutions as marriage and the family.[28]

By the beginning of the next century, technical advances in medicine will be phenomenal.[29] It surely will be possible to make contraception one hundred percent effective and abortions clinically safe. The available knowledge in the fields of organ transplants, creating life, and pushing back the frontier of death will require major policy decisions. One can hope that this new technological age will find solutions commensurate with its problems. In any event, it seems clear that the world of the twenty-first century will hardly be recognizable to a modern Rip Van Winkle who began his long slumber in 1973.

II. THE DEVELOPMENT OF TWENTIETH CENTURY JURISPRUDENCE: LAW AS REASON AND EXPERIENCE

Is the law capable of responding to the changes the future will present? In attempting to gauge the prospects for individual freedom in the twenty-first century, it is appropriate first to mark the major stages in the process of the law's maturation and to seek unifying prin-

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Careful analysis of population mobility involves certain unique characteristics: "Migration is neither inevitable (as is mortality), nor necessary for the continued survival of the species (as is fertility); hence, individual motivation plays a much greater role in determining migration." E. STOCKWELL, *supra* note 5, at 125.

26 A. TOFFLER, *supra* note 19, at 76.

27 *Id.* at 78. Toffler describes these modern transients as "the new nomads." *See generally id.* at 74-94.

28 Problems relating to population mobility may be described in terms of their administrative and societal impact. The former relates to the effectiveness of local, state, regional and national governmental planning; the latter relates to individual and community disruption, including social disorganization, mental disorder, and the growth of slums. *See* E. STOCKWELL, *supra* note 5, at 162-68. Not all migratory effects are negative: "On the more positive side, migration has historically served as a major mechanism bringing people from diverse cultures . . . into contact with one another . . . . [T]his intermingling and interstimulation of diversity has generally exerted a positive influence on the growth and development of human civilization." *Id.* at 126.

29 Advancements in medical science relating to control of disease and providing improved health services have a direct impact on both the fertility and mortality inputs of demographic analysis. *See* PROBLEMS, *supra* note 7, at 320, 334-35, 432-36.

ciples to guide future development. Relying on Roscoe Pound's seminal essays on the stages of legal evolution,[30] it is possible, borrowing Karl Llewellyn's apt metaphor, to sweep across the centuries on horseback.[31]

In its earliest development, the primitive law of tribes and kin-oriented society was seen as God-given.[32] The chief or elders settled disputes by consulting the sacred text or by resorting to wise men steeped in tribal custom. At this early stage, the purpose of law was simply to keep the peace and to prevent blood feuds and private wars. To achieve a "peaceable ordering of society,"[33] early laws, while sporadic and incomplete, prescribed definite penalties for definite injuries: an eye for an eye and a tooth for a tooth; or so much money for striking a commoner, and so much (more) for striking a nobleman whose vengeance had to be assuaged at a higher price.[34] The social

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30 R. POUND, THE SPIRIT OF THE COMMON LAW (1921).

31 This metaphor is suggested by the title of Professor Llewellyn's introductory lectures in "sales" given at Columbia University. *See* Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939).

32 *See* D. LLOYD, THE IDEA OF LAW 46-48 (1964). Not all ancient societies were kin or religiously oriented; yet even in a "politically-organized" society such as Greece, the law "spoke from an older tribal society." R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 29 (1953). Dean Pound views Greek society as a transition from a "kin-organized" or "religious-organized" society to a "politically-organized" society. Comparison of Greek legal thought with that of the Hebrews, a more religious-organized society, is instructive:

> The Hebrew view . . . insists that human law is to be obeyed only when it corresponds with divine law; the Greek view, on the other hand, is that human law may conflict with moral law but the citizen must still obey the law of his state though he may and indeed should labour to persuade the state to change its law to conform with morality.

D. LLOYD, *supra* at 55. *See also* R. POUND, *supra* note 32, at 130.

33 Dean Pound describes the "first stage of legal evolution" as follows:

> Thus in its beginnings law is a means towards the peaceful ordering of society. It stands beside religion and mortality as one of the regulative agencies by which men are restrained and the social interest in general security is protected . . . . In this first stage of legal evolution men acquire the conception of a peaceable adjustment of controversies.

R. POUND, *supra* note 32, at 130.

34 The system of compensation or composition developed under Anglo-Saxon law as an alternative to the blood-feud. Under the composition system, a *bot* or *wergild* (the value set on a man's life according to his rank) was paid to his kindred; and a *wite* (based upon the offender's own *wergild*) was paid to the king. 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 46-48 (2d ed. 1968); 2 *id.* at 450-51. Lesser offenses involved payment of "amercements." *Id.* at 513-14. *See generally* 1 R. POUND, JURISPRUDENCE § 31 (1959) [hereinafter cited at 1 R. POUND].

interest in the general security was limited to promoting the "peaceable adjustment of controversies."[35]

In its next stage of evolution, which occurred in England during the thirteenth to the sixteenth centuries, the law rigidified. By this period, law had come to be accepted as the regulative agency of society and the state was acknowledged as the established organ of social control. This development has been labeled by Pound as the stage of "strict law" in which the dominant end or purpose of the law was to secure certainty and uniformity in the legal ordering of society.[36] Men feared arbitrary exercises of power and thus made law inflexible and inelastic.[37]

By the seventeenth and eighteenth centuries the mood of strict law in England had been relaxed by the infusion of moral ideas such as honesty and good faith. In this stage of "equity and natural law," the goal of the law was justice and morality. This age relied on reason rather than arbitrary rule to eliminate personal caprice in the administration of justice.[38]

In the larger world of political philosophy, the seventeenth and eighteenth centuries were the age of natural law. The idea of natural law owes a great deal to the stoic philosophy which arose after Aristotle.[39] Stoicism stressed the universality of human nature, reason, and

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35 R. POUND, *supra* note 30 & 33, at 130. Dean Pound summarizes the characteristics of this primitive stage as follows:

> (1) The measure of what an injured person may recover is not the injury done him but the desire for vengeance . . . . The idea is not reparation but composition.
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> . . .
>
> (2) The modes of trial are not rational but mechanical.
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> (3) The scope of the law is very limited.
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> . . .
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> (4) [T]he unit is not so much the individual human being as a group of kindred.

1 R. POUND, *supra* note 34, § 31, at 377-80.

36 R. POUND, *supra* note 30, at 140.

37 Dean Pound lists the five characteristics of this stage as follows:

> (1) Formalism—the law refuses to look beyond or behind the form; (2) rigidity and immutability; (3) . . . extreme individualism; (4) refusal to take account of the moral aspects of situations or transactions—. . . the strict law is not immoral but unmoral; (5) rights and duties are restricted to legal persons—all . . . natural persons are not legal persons and legal capacity is restricted arbitrarily.

1 R. POUND, *supra* note 34, § 32, at 384-85.

38 R. POUND, *supra* note 30, at 141; 1 R. POUND § 33.

39 D. LLOYD, *supra* note 32, at 77. Even though the Greek system developed a basis of "social control," the "general science of law" did not develop until contact between Roman lawyers and Greek philosophers resulted in the "philosophical theory of the *ius gentium*."

the brotherhood of man as the essential characteristics of humanity.[40] From the Stoics, Western Civilization acquired the idea that there existed an independent and universal law of nature which could be ascertained by man's reason and which could accordingly provide a higher standard for determining the justice of man-made laws.[41]

By the end of the seventeenth century, the philosophers (if not the kings) viewed man as possessing certain fundamental rights in a state of nature. When man entered into civil society, he took with him these fundamental rights and these rights remained protected by natural law.[42] John Locke gave this idea added currency in England by arguing that by the terms of a mythical social contract the power of government was conceded only on trust by the people to the rulers, and that whenever the rulers breached this trust by abusing the "lives, liberties, and estates of the people," the people had a "right to resume their original liberty" and to "provide for their own safety and security, which is the end for which they are in society."[43]

This theory was designed to govern "the relations between citizens and aliens, and between aliens themselves." 1 R. POUND § 1, at 27, § 4, at 34-35. "Progress of juristic thinking and more intimate acquaintance with Greek philosophy led to . . . development of . . . the *ius naturale*, a speculative body of ideal universal principles, serving as the basis of philosophical development of legal materials and of criticism." *Id.* § 4, at 37. Professor Lloyd states that Roman lawyers made no direct use of the idea of natural law, although he concludes that their writings "provided the vehicle by which the natural-law speculation of antiquity was passed on to later ages." D. LLOYD, *supra* at 78. *See also* 2 R. POUND, JURISPRUDENCE §§ 49-52 (1959) [hereinafter cited as 2 R. POUND].

40 D. LLOYD, *supra* note 32, at 77.

41 *Id.* at 78. *See also* 1 R. POUND § 7.

42 D. LLOYD, *supra* note 32, at 83-84. Before this period, the philosophical theory of *ius naturale*, *see* note 39 *supra*, had evolved into the theological precepts of a *lex aeterna*, or universal divine law, and a *lex naturalis*, "proceeding ultimately from God, but immediately from human nature, and governing the actions of men only." 2 R. POUND § 51, at 40. In contrast, the natural law of the seventeenth and eighteenth centuries was deemed to be founded on reason, emanating from "the exigencies of human constitution and of human society," rather than divine authority. *Id.* § 52, at 45. A by-product of this development was a movement for codification, since jurists believed that natural law principles "might be discovered as a complete whole by human reason and reduced to rules." *Id.* § 52, at 48. Dean Pound described the development of law in the seventeenth and eighteenth centuries:

> (1) A juristic movement, proceeding upon the notion that law is reason, in which the ideas of right and justice are made paramount; and (2) a legislative movement in which law is thought of as emanating from the will of a sovereign, and in consequence the idea of command comes to be paramount.

Id. § 52, at 54.

43 J. Locke, *An Essay Concerning the True Original, Extent and End of Civil Government* [commonly cited as *Second Treatise on Civil Government*] § 222, in SOCIAL CONTRACT 127 (E. Barker ed. 1960).

The American Revolution and Thomas Jefferson's Declaration of Independence were strongly influenced by Locke's philosophy.[44] The United States Constitution is also a product of this age. It is essentially "a natural-law document setting out the fundamental authority of the people under natural law and guaranteeing the natural rights of the citizens."[45] The Constitution converted natural rights into legal guarantees; these in turn could be adjudicated as any other rights and duties conferred by law. Since these rights were embodied in a written Constitution, and this Constitution was regarded as a paramount, superior law,[46] American courts came to regard certain rights as fundamental and superior to any ordinary piece of legislation which might conflict with them. "Thus was created for the first time an actual machinery whereby natural rights might be brought into the fabric of the law and enjoy recognition and enforcement as legal rights."[47]

In the nineteenth century, under the influence of Immanuel Kant's philosophy, the purpose of law came to be the securing of the widest possible liberty to each individual.[48] Natural law had always been thoroughly individualistic. Now, harnessed between Kant and the laissez-faire doctrines of classical economics, nineteenth century law sought to maximize individual self-assertion.[49] America as a land of open spaces, frontier, and nascent industrialization was an ideal

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44 D. LLOYD, *supra* note 32, at 84.

45 *Id. See also* Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365 (1928); Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617 (1961).

46 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (since the Constitution is the supreme law of the land, a law repugnant to the Constitution is void). Although the supremacy of the Constitution itself has not been seriously questioned, the legitimacy of Supreme Court review of that document has been the subject of considerable debate. *Compare* L. HAND, THE BILL OF RIGHTS 1-30 (1958), *with* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See also, e.g.*, Deutsch, *Neutrality, Legitimacy and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). In an opinion individually signed by all nine justices, the Supreme Court has emphatically stated that its interpretation of the Constitution is the supreme law of the land. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

47 D. LLOYD, *supra* note 32, at 84.

48 R. POUND, *supra* note 30, at 147. Kant faced the problem of reconciling individual freedom of action with the forces of politically organized society. His solution "looked on restraint as a means and freedom as an end, so that there should be complete freedom of individual action except so far as restraint was needed to insure harmonious free coexistence of the individual with his fellows according to a universal rule." 2 R. POUND § 53, at 57.

49 R. POUND, *supra* note 32, at 147.

environment for a philosophy of law which combined elements of security, certainty, and equality of opportunity. Law protected the security of acquisitions and the security of transactions. The watchwords of this stage of legal evolution were "property" and "contract." Both were conceived to be fundamental individual rights. American courts employing the Constitution, put these rights above "state and society as permanent absolute realities which state and society existed only to protect."[50] During this period, under the banner of protecting an individual's "liberty of contract,"[51] the Supreme Court invalidated state and federal legislative attempts to establish minimum wages[52] and ceilings on hours of employment,[53] as well as labor standards for the employment of children.[54]

Twentieth century law, on the other hand, has emphasized the social interest—the demands and claims involved in social life—rather than the qualities of man in the abstract or the free will of the isolated individual.[55] Whereas the eighteenth century conceived of

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50 R. POUND, *supra* note 30, at 150.

51 The phrase, "liberty of contract" probably resulted from Justice Peckham's expansive definition of liberty, as guaranteed by the due process clause of the fourteenth amendment in Allgeyer v. Louisiana, 165 U.S. 578 (1897):

> The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, . . . but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

Id. at 589.

52 Adkins v. Children's Hospital, 261 U.S. 525 (1923) (minimum wage for women unconstitutional), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

53 Lochner v. New York, 198 U.S. 45 (1905) (daily and weekly hour limitations on bakery workers unconstitutional). *But see* Bunting v. Oregon, 243 U.S. 426 (1917) (maximum hour limitation with overtime provision for factory workers upheld); Muller v. Oregon, 208 U.S. 412 (1908) (Oregon law which provided "no female" shall be employed in any factory or laundry "more than ten hours during any one day" upheld).

54 Hammer v. Dagenhart, 247 U.S. 251 (1918) (prohibition of interstate shipment of goods manufactured by child labor invalid), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

55 R. POUND, *supra* note 30, at 203. According to Dean Pound, nineteenth century jurisprudence culminated in three divisions of modern legal thought. The first, "social-philosophical jurisprudence," has its origins in the revival of philosophy of law and considers the state as the ultimate source of law. The second, "realist jurisprudence," has its origins in the economic interpretation of legal history and defines law in terms of the judicial process. The third, "sociological jurisprudence," has its origins in the functional study of legal systems in light of the social sciences and considers the legal order in terms of social institutions. 1 R. POUND § 13, at 124; 2 *id.* § 55.

law as something which the individual invoked against society, twentieth century legal philosophers such as Pound and Rudolf von Jhering taught that law "was something created by society, through which the individual found a means of securing his interests, *so far as society recognized them.*"[56] In the eighteenth century, equity sought to prevent the unconscionable exercise of legal rights; twentieth century law sought to prevent the anti-social exercise of them. Equity imposed moral limitations; today the law is imposing social limitations. In sum, law in the twentieth century has sought to delimit an individual's interest in light of the social interest of his neighbors and society generally. This new mood can be seen in a 1937 decision of the Supreme Court upholding a minimum wage law against the claim that the state statute deprived the employer and his employee of freedom of contract.[57] In this decision the Court said:

> The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. . . . [T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.[58]

Modern limitations on the use of property are another example of how twentieth century law has come to protect interests far different from those the law recognized one hundred years ago. If an owner chose to put an aesthetically unpleasant sign or clothesline in the front yard of his home in an otherwise scenic and pleasant residential neighborhood,[59] a nineteenth century lawgiver or judge would un-

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56 R. POUND, *supra* note 30, at 204 (emphasis supplied).

57 *See* notes 51-54 and accompanying text *supra*.

58 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

59 *See* People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963) (lack of federal question). In *Stover*, the appellants had been convicted of violating a municipal ordinance prohibiting erection of clotheslines without a permit. Despite overwhelming authority to the contrary, *see* 50 VA. L. REV. 1462, 1466 n.16 (1964), the court considered aesthetics alone a proper subject of legislative concern, and that under the expansive definition of the public welfare in Berman v. Parker, 348 U.S. 26 (1954), *see* note 61 *infra*, the ordinance was a valid exercise of the community

doubtedly think of the question in terms of the right of the owner and the right of his neighbors in this way: Within their physical boundaries, the dominion of each was complete. So long as our owner kept within his boundaries and what he did within them was consistent with the equally absolute dominion of his neighbor within his boundaries, the law was to keep its hands off. "For the end of law was taken to be a maximum of self-assertion by each, limited only by the possibility of a like self-assertion by all."[60]

Today, municipal zoning boards and judges are likely to take a different approach. The law would recognize the social interest in the security of acquisitions and the individual's interest in exerting his will and exercising his creative faculties by erecting a hideous sign on his front lawn as he thinks proper. Against these interests however are arrayed the community's interest in aesthetically pleasant neighborhoods, and twentieth century law would tend to respond by saying that property may be used to satisfy only those wants of the owner which are consistent with the welfare of the community.[61]

To take another example, consider the compulsory seat belt bill that was introduced but failed to pass in the last session of the Georgia General Assembly.[62] This law would have made Georgia the first state in the nation to require drivers and passengers of motor vehicles operated on its highways to wear seat belts.[63] Although studies show

police power. *Id.* at 467-69, 191 N.E.2d at 275-76, 240 N.Y.S.2d at 738-39. *See* Comment, *Zoning, Aesthetics, and the First Amendment*, 64 COLUM. L. REV. 81 (1964).

60 R. POUND, *supra* note 30, at 197.

61 *See* Berman v. Parker, 348 U.S. 26 (1954). In upholding the condemnation provisions of the District of Columbia urban redevelopment plan, the Court stated the following:

> Subject to *specific constitutional limitations*, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs . . . .
>
> . . . .
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> . . . The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled . . . .
>
> . . . [T]he power of eminent domain is merely the means to the end . . . . *Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine.*

Id. at 32-33 (emphasis added).

62 H.B. 22 (1973) (recommitted to House Motor Vehicle Committee, Feb. 19, 1973).

63 Atlanta Constitution, Feb. 8, 1973, § A, at 11, col. 2. Most courts have failed to imply a mandatory use requirement from the mandatory installation requirement found in present statutory law. *See, e.g.*, Brown v. Kendrick, 192 So. 2d 49 (Fla. App. 1966); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968); Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967). However, some courts have been willing to reduce damages because seat

that wearing a seat belt usually reduces the extent of injuries and lives lost in automobile accidents,[64] no one has established that a driver's failure to wear a seat belt is likely to hurt anyone but himself. To the nineteenth century way of thinking, then, the enactment of a compulsory seat belt law would not promote a maximum of free individual self-assertion. Such a restraint is not necessary to protect the freedom of others, and therefore the law is an unjustifiable interference with the natural right of liberty secured by the Constitution.

However, given a sufficient factual basis establishing that wearing seat belts will save lives and lessen serious injuries (thereby reducing costs for hospital care and losses during recuperation), such a compulsory law could be upheld just as laws requiring motorcyclists to wear protective headgear have overcome constitutional challenges that they unduly restrict the individual freedom of a motorcyclist to choose to wear or not to wear a helmet.[65]

In lectures delivered as part of the Centennial Celebration of the founding of the University of Georgia School of Law, Dean Pound, then in his ninetieth year, concluded that "[l]aw is experience developed by reason. . . ."[66] Holmes expressed the same thought in another way: "The life of the law has not been logic: it has been experience."[67]

In light of the historical evolution of law and the general precept of "experience," what are the prospects for individual freedom in the

belts were not worn. *See, e.g.*, Mount v. McClellan, 91 Ill. App. 2d 1, 234 N.E.2d 329 (1968); Bentzler v. Braun, *supra*. *See generally Symposium: The Seat Belt Defense in Practice*, 53 MARQ. L. REV. 172 (1970); Comment, *The Unbuckled Seat Belt: A Defense in Kansas?*, 20 U. KAN. L. REV. 486 (1972).

64 Some studies indicate the belts themselves cause injuries. *See* Snyder, *The Seat Belt as a Cause of Injury*, 53 MARQ. L. REV. 211 (1970). Dr. Snyder collects and summarizes the various reports and studies concerning seat belt effectiveness. He concludes that this effectiveness depends on the type of belt used, and that "[t]he few cases where seat belts have resulted in injuries are far outweighed by their protective advantages." *Id.* at 223.

65 *See* Everhardt v. City of New Orleans, 253 La. 285, 217 So. 2d 400 (1968) (helmet requirement bears a reasonable relationship to promotion of public welfare and is within police power), *appeal dismissed*, 395 U.S. 212 (1969); *accord*, Commonwealth v. Howie, 354 Mass. 769, 238 N.E.2d 373, *cert. denied*, 393 U.S. 999 (1968); State *ex rel.* Colvin v. Lombardi, 104 R.I. 28, 241 A.2d 625 (1968). *But see* People v. Fries, 42 Ill. 2d 446, 250 N.E.2d 149 (1969) (personal safety not a matter of public welfare). One commentator criticizes the strained public welfare reasoning in cases upholding helmet legislation as "a rote recital of the litany on the presumption of constitutionality." Note, *Motorcycle Helmets and the Constitutionality of Self-Protective Legislation*, 30 OHIO ST. L.J. 355, 376 (1969). According to the author of this note, such legislation should only be upheld on a finding of facts "sufficient to characterize the problem as a 'public disaster' of 'grave dimensions.'" *Id.* at 377.

66 R. POUND, LAW FINDING THROUGH EXPERIENCE AND REASON 1 (U. Ga. Press 1960).

67 O. HOLMES, THE COMMON LAW 1 (1881).

twenty-first century? The term "individual freedom" is used in this context to describe the extent to which one may claim immunity from the demands imposed by organized society.[68] The development of twentieth century jurisprudence has been based on the concept of law as a social institution existing for social ends and responding to the felt needs of society.[69] Does the modern emphasis on collective rights and the recognition of societal interests in an individual's life mean an end to individual freedom as we know it today?

Almost assuredly the state is going to play an increasingly pervasive role in adjusting the relations of human beings and ordering their conduct in society. Just as assuredly men will perceive the need to limit the exercise of arbitrary power. In the period of "strict law," men sought to do this by making law inflexible and inelastic.[70] In the seventeenth and eighteenth centuries men trusted reason to safeguard their liberties,[71] and in the nineteenth century they sought to make the rights of property and contract absolute and beyond the power of the state to abridge.[72] Today we know that no freedom represents an absolute right except perhaps the right to believe and think what we will.[73]

III. The Individual in the Twenty-First Century: Do Limits to Growth Require Limits on Freedom?

A. The Constitutional Framework

The extent to which an individual will be allowed to claim immunity from the demands of organized society in the twenty-first century will

68 This same definition is used by Professor Kenneth Karst. *See* Karst, *Individual Rights and Duties in the Year 2000: The Institutional Framework*, in The Future of the United States Government Toward the Year 2000, at 39 (H. Perloff ed. 1971).

69 *See* Part II *supra*. *See also* R. Pound, *supra* note 30, at 193-216.

70 *See* notes 36-37 and accompanying text *supra*.

71 *See* notes 38-47 and accompanying text *supra*.

72 *See* notes 48-54 and accompanying text *supra*.

73 Justice Brandeis expressed his view concerning constitutional liberty, as vindicated by freedom of expression, as follows:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that *freedom to think as you will and to speak as you think* are means indispensable to the discovery and spread of political truth; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (emphasis added). *See also* Doe v. Bolton, 41 U.S.L.W. 4233, 4242-46 (U.S. Jan. 22, 1973) (Douglas, J., concurring).

depend on that society's need for collective well-being. This is nothing new. Our constitutional experience supports the notion that the ambiguities and silences of the Constitution take on that meaning which reflects the felt needs of each generation. In the words of Justice Frankfurter,

> Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.[74]

In our present society and that of the future, claims of immunity will largely be based upon some provision of the American Constitution. Generally speaking, the Constitution protects individual rights first by allocating power among the various branches of the national government[75] and between the nation and the states[76] and, second, by imposing general restraints on the acts of government at all levels.[77]

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74 National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

75 After citing the basic tenet of political science that "[p]ower tends to corrupt, and absolute power corrupts absolutely," one commentator states that "[a] tendency to corruption, then, is a characteristic of politics . . . . [a] [c]ontainment of that tendency is one end of government . . . ." Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755 (1959). He concludes that the separation of powers is the basic means to achieve that containment:

> Because the legislative branches are co-ordinate, American constitutionalism takes on unique turns. Because the judicial and executive branches are coordinate, administration in America is under the rule of law. Because the executive and legislative branches are coordinate, American party politics has grown into a wondrously resourceful art.

Id. at 755-56. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A.L. REV. 1044 (1965); Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957).

76 The continuous existence of the states as governmental entities and their strategic role in the selection of the Congress and the President are so immutable a feature of the system that their importance tends to be ignored. Of the framers' mechanisms, however, they have had and have today the larger influence upon the working balance of our federalism. The actual extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence of the states and their political posture to influence the action of the national authority.

H. WECHSLER, *The Political Safeguards of Federalism—The Role of the States in the Composition and Selection of the National Government*, in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 51 (1961).

77 Of course the basic limitation on governmental authority is the Bill of Rights. Al-

The first protection is ultimately only political; the second historically has varied in degrees of absoluteness.

Quite apart from these political restrictions two of the most important restraints imposed by the Constitution on government to protect individual freedom are expressed in the amorphous concepts of "due process of law"[78] and "the equal protection of the laws."[79] What, however, is the extent of these protections? To Learned Hand, these guarantees were only "moral adjurations, the more imperious because inscrutable, but with only that content which each generation must pour into them anew in the light of its own experience."[80] Just as one generation had added to and subtracted from these concepts, so, of necessity, will future generations. The Constitution after all is only a starting point for constitutional decision-making. Chief Justice Marshall made just this point as early as 1819 in *McCulloch v. Maryland*,[81] where he reminded his fellow justices and the American public that "we must never forget that it is a *constitution* we are expounding"[82] and not a prolix legal code. He observed that "[i]ts nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[83] If constitutional decisions involve more (as they surely do) than a mechanical application of the fundamental law to particular facts,[84]

though the provisions of the Bill of Rights have not been deemed to apply directly to the states, *see, e.g.*, Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. (1937); Barron v. Mayor and City Council, 32 U.S. (7 Pet.) 243 (1833), certain rights have been accorded individuals and corresponding limitations placed on state authority by the doctrine of "selective incorporation" or the concepts of fundamental fairness implicit in the fourteenth amendment. For an exhaustive analysis of selective incorporation and a prediction of its demise at the hands of the Burger Court see Rogge, *Williams v. Florida: End of a Theory* (pts. 1 & 2), 16 VILL. L. REV. 411, 607 (1971). For the fundamental fairness approach, see, *e.g.*, Rochin v. California, 342 U.S. 165 (1952); Powell v. Alabama, 287 U.S. 45 (1932).

78 U.S. CONST. amends. V and XIV, § 1. These provisions prohibit the federal government and the states from depriving any person of "life, liberty, or property without due process of law."

79 U.S. CONST. amend. XIV, § 1. The relevant portions provide as follows: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Equal protection concepts apply to the federal government through the fifth amendment due process clause. Bolling v. Sharpe, 347 U.S. 497 (1954).

80 L. HAND, *The Contribution of an Independent Judiciary*, in THE SPIRIT OF LIBERTY 163 (2d ed. 1954).

81 17 U.S. (4 Wheat.) 316 (1819).

82 *Id.* at 407.

83 *Id.*

84 For an explanation of mechanical jurisprudence, see Mr. Justice Roberts' opinion in

and, indeed, if general phrases such as "due process of law" and "equal protection" have no fixed meaning, are courts and legislatures allowed to do whatever seems sensible at the time to a passing majority? The Supreme Court's answer has been that the Constitution embodies our people's fundamental norms and precepts, a system of ultimate values with respect to personal liberties.[85] As Judge Charles E. Wyzanski, Jr. has so eloquently stated:

> What the Court has sought are standards of value which are expressed or implied by the Constitution, which the Court believes are supported by a preponderant, current, and relatively durable public opinion, and which are susceptible of more than a purely subjective assessment.[86]

Such an assessment should not be discounted as a claim for judicial capriciousness or dismissed lightly by the waggish response that "the Supreme Court follows the election returns."[87] Our constitutional hierarchy of values is predicated on respect for individual rights and a deep-seated belief that the end of government is to enhance the opportunity for the cultivation of spiritual, political, and creative values.[88]

United States v. Butler, 297 U.S. 1 (1936). He summed up the judicial function in these words:

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

Id. at 62.

85 For one recent example, see Mr. Justice Harlan's separate opinion in Oregon v. Mitchell, 400 U.S. 112 (1970) in which he described his view of the role of the judiciary as one

> limited to elaboration and application of the precepts ordained in the Constitution by the political representatives of the people . . . .
>
> As the Court is not justified in substituting its own views of wise policy for the commands of the Constitution, still less is it justified in allowing Congress to disregard those commands as the Court understands them.

Id. at 203-04.

86 C. WYZANSKI, *The Bill of Rights*, in THE NEW MEANING OF JUSTICE 92 (Bantam ed. 1966).

87 The correct quote is: "[N]o matther th' constitution follows th' flag or not, th' supreme court follows th' iliction returns." F. DUNNE, MR. DOOLEY ON THE CHOICE OF LAW 52 (E. Bander ed. 1963).

88 C. WYZANSKI, *Constitutionalism: Limitation and Affirmation*, *supra* note 86, at 83. Judge Wyzanski defines "constitutionalism" as "the institutionalization of the principle that the state's goal is the increase in opportunities for the development of the individual as the seat of ultimate spiritual, political, and creative authority . . . ." *Id.* at 85. This goal is achieved by four essential means: "first, a division of power upon pluralistic principles; second, an expanding rule of law; third, political devices allowing peaceful

At the same time, however, the seasoned judgment must admit that "no matter how hospitable to these freedoms a constitutional state may be, no one of them represents an absolute right."[89]

B. Procedural Fairness Through Due Process

One trend that seems to be emerging now is toward an increased emphasis on fair procedure. Judge Wyzanski has observed that "[t]he constitutional state has a progressive tendency to enlarge the jurisdiction of independent courts before which an individual can challenge the fairness of the procedure underlying official action."[90] This trend is reflected by the recently evolved concept of procedural due process. To comprehend this development, it is important to understand that its roots are in the constitutional provisions prohibiting a governmental deprivation of "life, liberty or property without due process of law."[91]

For many years the Supreme Court gave the term "property" a literal meaning. In several recent cases, however, the Supreme Court has given further validity to Justice Frankfurter's observation[92] by reading new content into the term "property." In *Sniadach v. Family Finance Corp.*,[93] the Court held that the due process clause of the fourteenth amendment forbade the garnishment of a debtor's wages without giving the debtor notice and an opportunity of some court hearing prior to the garnishment. The right protected in *Sniadach* was the debtor's use of his wages, and the Court took note of the hardship that a deprivation of wages could cause. Due process of law thus required some procedural safeguards against mistake, i.e., notice and a hearing, before a debtor could be deprived of his right to the use of his wages. The following year in *Goldberg v. Kelly*,[94] the Court ruled that a welfare recipient was entitled to a hearing before the state could terminate his benefits. At one time the Court might have avoided the decision in *Goldberg* by terming welfare payments "privileges" un-

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revolutions . . . responsive to alterations in the . . . interests and ideas of society; and fourth, continued emphasis upon practical measures for achieving the liberties of movement, belief, communication and association . . . ." *Id.*

89 *Id.* at 83. *See also* Justice Douglas' concurring opinion in Doe v. Bolton, 41 U.S.L.W. 4233, 4242-46 (U.S. Jan. 22, 1973).

90 C. WYZANSKI, *Constitutionalism: Limitation and Affirmation*, *supra* note 86, at 81.

91 *See* note 78 *supra.*

92 *See* text accompanying note 74 *supra.*

93 395 U.S. 337 (1969).

94 397 U.S. 254 (1970).

protected by due process of law.[95] The Court, however, has realistically acknowledged that much of the wealth of citizens today is dependent on their relationships with government. Such things as unemployment insurance, social security, patents, government contracts, veterans benefits, agricultural subsidies and welfare have become as important as many of the traditional forms of property.[96]

This expanded notion of due process restraints on governmental action has also affected the contractual relationships of private parties. In *Fuentes v. Shevin*,[97] the Supreme Court held that a creditor could not have a court official repossess property sold to a debtor under an installment sales contract unless the debtor first had notice and an opportunity for a prior hearing to establish his right to continued use of the property. The Court in *Fuentes* thus protected the debtor's right to possession of property even though the creditor retained legal title to the property until paid in full.

Sniadach, Goldberg, and *Fuentes* illustrate that societal concepts of property interests change and that judges do not shut their eyes to such changes. This is not to say that the concept of "property" is boundless or that every claimed characterization of an interest will receive constitutional protection. For example, just this past Term in *Board of Regents v. Roth*,[98] the Court refused to find that a nontenured teacher at a state university with a one-year employment contract had a *property* interest in re-employment the following year which could be denied him only after notice and a hearing.[99]

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95 *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439-45, 1451-54 (1968).

96 This is what Professor Reich calls "the new property":

> One of the most important developments in the United States . . . has been the emergence of government as a major source of wealth . . . .
>
> The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth—forms which are held as private property.

Reich, *The New Property*, 73 YALE L.J. 733 (1964). Justice Douglas has echoed this theme: "Property has assumed a different form. To the average man it is no longer cows, horses, chickens, and a plot of land. It is government largesse . . . ." W. DOUGLAS, POINTS OF REBELLION 78 (1970). *Goldberg* indicates that this largesse may not be withheld without procedural fairness.

97 407 U.S. 67 (1972).

98 408 U.S. 564 (1972).

99 Moreover, the Supreme Court has agreed to hear arguments on the issue of whether the renewal of beer and liquor licenses due to expire at the end of the licensing year constitutes protected "liberty" or "property" within the meaning of the fourteenth amendment. City of Kenosha v. Bruno, *appeal docketed*, 41 U.S.L.W. 3539 (U.S. April 10, 1973) (No. 72-658).

New concepts of "liberty" also seem to be evolving. Last year, for example, the Court held that parole could not be revoked without a hearing since, as Chief Justice Burger observed, a parolee's "conditional liberty" was sufficiently valuable to warrant due process protection.[100] A similar rationale was recently employed to require hearings with "an impartial fact finder" before incarcerated prisoners could be denied the privilege of living in the general population of the prison and placed in punitive confinement.[101]

These cases mark the contours of an emerging concept of procedural due process. They stand for the broad proposition that no one's liberty or property may be infringed by the state unless it utilizes fair procedure: notice and an opportunity to be heard before a deprivation of property or liberty takes effect.[102] While the formality and procedural requisites for a hearing can vary depending on the importance of the interests involved, once it is determined that an interest is within the compass of the fourteenth amendment's protection of "liberty" and "property," then the due process requirement for some form of prior hearing becomes paramount.[103]

C. *Rational Means and Equal Protection*

Equal protection, which Justice Holmes once dismissed as "the usual last resort of constitutional arguments,"[104] has today come to occupy a central place in constitutional adjudication. Moreover, recent developments in the law of equal protection are analogous to the emerging law of procedural due process since the judicial inquiry in both cases is directed primarily at the *means* chosen by the legislature

100 Morrissey v. Brewer, 408 U.S. 471 (1972).

101 Sands v. Wainwright, 12 CRIM. L. RPTR. 2376 (M.D. Fla., Jan. 5, 1973).

102 Just what other requirements, beyond notice and hearing, procedural due process will impose is not at this moment clear. A divided United States Supreme Court in 1971 seems to have held that certain informal administrative hearings need not include the right of cross-examination. Richardson v. Perales, 402 U.S. 389 (1971) (denial of social security disability benefits); *cf.* California Dep't of Human Resources Div. v. Java, 402 U.S. 121, 134 (1971) (eligibility for unemployment compensation, constitutional issues not considered). However, in a case involving the hearing procedure by which the state of Georgia suspended the driver's license of an uninsured motorist involved in an accident, the Court held that the hearing would not meet procedural due process standards unless it included consideration of whether the uninsured motorist was at fault. Bell v. Burson, 402 U.S. 535 (1971). Recently the Supreme Court held that a right to discretionary assignment of counsel applies to probation revocation hearings. Gagnon v. Scarpelli, 41 U.S.L.W. 4647 (U.S. May 14, 1973).

103 Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

104 Buck v. Bell, 274 U.S. 200, 208 (1927).

to carry out its objective rather than at the purpose or end sought to be achieved through the legislation.

The idea that all those similarly situated in relation to the purpose of a law be similarly treated is the basic precept of traditional equal protection.[105] Such equality of treatment seems dictated by elementary notions of fairness and, indeed, is supportive of good government. As Justice Jackson noted:

> I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[106]

For many years, however, courts were extremely deferential to legislative judgments and were easily persuaded that the means chosen by the legislature *might* rationally relate to plausible ends. Judicial scrutiny was almost nil under the rational basis test,[107] and in only one case

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105 *See generally* Tussman & tenBroek, *The Equal Protection of the Law*, 37 CALIF. L. REV. 341, 344 (1949):

> The essence of that doctrine can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.

106 Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

107 The rational basis test may be summarized as follows:

> 1. The equal protection clause . . . does not take from the State the power to classify . . . and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend . . . merely . . . because in practice it results in some inequality. 3. When the classification . . . is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts . . . must be assumed.

did economic regulations fail to satisfy the demands of traditional equal protection.[108]

During the 1960's, however, the Supreme Court began to take a more penetrating look at legislative classifications which impinged on individual liberties. Under this so-called "new equal protection" approach, a statutory classification based upon certain "suspect" criteria or which affected "fundamental rights" would be held to deny equal protection unless justified by a "compelling state interest." Thus, statutes using race,[109] wealth,[110] status[111] or political allegiance[112] as bases for classification were struck down. Moreover, a compelling state interest was required to uphold any classification which affected a fundamental right such as the right to vote,[113] the right to travel[114] or the right of procreation.[115] Judicial scrutiny under a new equal protection analysis thus requires more than that the classification be merely rational. To be upheld, the classification has to meet a far heavier burden, and in none of the challenged cases was the government able to demonstrate that a compelling interest justified the classification. New equal

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (statute subjecting opticians to regulation while exempting all sellers of ready-to-wear glasses upheld); Goesaert v. Cleary, 335 U.S. 464 (1948) (statute prohibiting women from obtaining bartender's license unless the woman was "the wife or daughter of the male owner" upheld).

108 Morey v. Doud, 354 U.S. 457 (1957) (statute exempting American Express Company by name from regulations applied to other private, profit-making sellers of money orders violative of equal protection).

109 *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

110 *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) (alternative holding); Douglas v. California, 372 U.S. 353, 357-58 (1963); Griffin v. Illinois, 351 U.S. 12, 18-19 (1956). A "wealth" classification, standing alone, has never been held to require a new equal protection analysis.

111 *See, e.g.*, Gomez v. Perez, 409 U.S. 818 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

In *Weber*, for example, the Court invalidated a provision of a state workmen's compensation law which denied illegitimate children equal recovery rights. As Justice Powell explained, "the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise." 406 U.S. at 176.

112 *See, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1968).

113 *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89, 96 (1965); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

114 Shapiro v. Thompson, 394 U.S. 618 (1969) (one-year residency requirement to obtain welfare benefits creates invidious discrimination between those who have exercised their right to travel interstate and those who have not).

115 Skinner v. Oklahoma, 316 U.S. 535 (1942) (statute providing for compulsory sterilization of certain habitual criminals subjected to strict scrutiny because it affected the fundamental right to have children).

protection, as legal commentators quickly noted,[116] actually involved the courts in reviewing the substantive purpose of the legislation and in foreclosing certain legislative ends just as courts had done earlier in the heyday of substantive due process.[117]

Recently, the Burger Court has indicated that while it will not abandon the suspect criteria or fundamental rights formulated in prior decisions,[118] it will go slow in adding to the list of suspect classifications or fundamental rights that will trigger a "new equal protection" analysis.[119] Instead, it seems inclined, to borrow Professor Gunther's

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116 *See* Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39; Karst, *Invidious Discrimination: Justice Douglas and the Return of the Natural Law—Due Process Formula*, 16 U.C.L.A.L. REV. 716 (1969); Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

117 In the late nineteenth and early twentieth century, the Court repeatedly struck down laws in the area of social and economic regulation. At the time, the Court asserted its right to examine the substantive reasonableness of such legislation. As Justice Harlan explained, the Court would not be "misled by mere pretenses" and would "look at the substance of things." Mugler v. Kansas, 123 U.S. 623 (1887). Accordingly, in Lochner v. New York, 198 U.S. 45 (1905), the Court invalidated, on due process grounds, a statute fixing the maximum hours of work for bakers because the regulation was not a "fair, reasonable and appropriate exercise of the police power of the State . . . ." *Id.* at 56.

In the post-New Deal Supreme Court, justices criticized and shrank from this type of substantive due process analysis which they described as invalidating laws because the Court found them "unwise, improvident, or out of harmony with a particular school of thought." Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955). *See* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

118 *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (Tennessee durational residency requirement for voters violates equal protection; strict scrutiny required since fundamental rights to vote and to travel burdened).

119 For instance, in Dandridge v. Williams, 397 U.S. 471 (1970), the Court refused to find that the receipt of food, shelter and the necessities of life in the form of welfare benefits was a fundamental right and accordingly held that a maximum grant limitation based on family size was rational and need not be justified by a compelling state interest. Similarly, in Reed v. Reed, 404 U.S. 71 (1971), the Court refused to add "sex" to the list of suspect criteria. However, applying the rational basis test it held that a statute giving preference to men over women when persons of the same priority applied for appointment as the administrator of a decedent's estate denied equal protection since the arbitrary preference of males did not bear a rational relationship to the state objective sought to be advanced by the statute.

However, in Frontiero v. Richardson, 41 U.S.L.W. 4609 (U.S. May 14, 1973), a plurality of the Court appears to have added "sex" to the list of suspect criteria in employing strict scrutiny to invalidate a statute allowing quarters allowances and other benefits to the spouses of male Air Force officers automatically but not to the spouses of female officers unless totally dependent. As Justice Brennan, joined by Justices Douglas, White and Marshall, explained it:

> we can only conclude that classifications based upon sex, like classification based upon

phrase, to put new bite in old equal protection.[120] This so-called "invigorated equal protection" would, like old equal protection, concern itself with the legislative means rather than the substantive wisdom of the legislature's goals. However, unlike the virtual abdication of judicial scrutiny associated with old equal protection, courts employing the standard of "invigorated equal protection" would insist that the legislative means chosen actually be rationally related to the articulated purpose.[121]

The model[122] of "invigorated equal protection" now plainly dis-

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race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.

Id. at 4613. Applying this stricter standard, the plurality concluded that the statute could not be justified by the claims of administrative convenience.

Chief Justice Burger, Justices Powell, Blackmun, and Stewart concurred following the rationale of *Reed v. Reed* without agreeing that "sex" was a suspect criteria. Justice Rehnquist dissented.

In San Antonio Independent School Dist. v. Rodriguez, 41 U.S.L.W. 4407 (U.S. March 21, 1973), the Court upheld the Texas system of financing public education in part through local property taxes even though it resulted in disparities of per-pupil expenditures among the school districts. The Court refused to find the wealth of *school districts* a suspect basis of classification or the right to education fundamental. Accordingly, the Court inquired only whether the plan bore some rational relationship to legitimate state purposes and concluded that it did. *Id.* at 4423-24.

In Graham v. Richardson, 403 U.S. 365 (1971), on the other hand, the Court added "alienage" to the list of suspect classification criteria by employing close judicial scrutiny to strike down a law denying welfare benefits to resident aliens.

120 Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 22 (1972).

121 *See* McGinnis v. Royster, 41 U.S.L.W. 4259 (U.S. Feb. 21, 1973); Reed v. Reed, 404 U.S. 71 (1971). In *McGinnis* the Court upheld a system of denying good time credit toward parole eligibility for prisoners incarcerated in county jails pending sentence while awarding such credit to those released on bail against an equal protection challenge that it involved a suspect classification based on wealth. Although the Court concluded that the statutory scheme rationally furthered the legitimate state purpose of awarding such credit only where there had been an opportunity for rehabilitation, Justice Powell signalled the "invigorated equal protection" approach by adding significantly that "we have supplied no imaginary basis or purpose for this statutory scheme . . . ." This is obviously far removed from the deferential approach of old equal protection represented by Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911), that "when the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."

122 As Professor Gunther describes the recent pattern of equal protection decisions, there emerges a model of analysis which "would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends." Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection,* 86 HARV. L. REV. 1, 20 (1972).

> [The model] . . . , moreover, would concern itself solely with means, not with ends.

cernible in Burger Court opinions is closely akin to the approach followed under a procedural due process analysis with its emphasis on notice and hearing requirements. Both involve judicial scrutiny directed at assuring the rationality of means without unduly interfering with the legislative prerogatives regarding ends.

D. Constitutionality of Population Control Laws

How then would the Supreme Court likely decide the two cases posed at the outset if the predictions contained in *The Limits to Growth* appear to be increasingly confirmed by everyday experience? Constitutional decision-making has been and will continue to be based as much on a consideration of the social impact of different results as on the application of previously determined precepts. There have been a number of Supreme Court decisions in which during perceived emergencies *raison d'état* appeared clearly as a basis of constitutional construction.[123] This principle has been described by Professor Friedrich as follows:

> The "substantive equal protection" of the Warren era repeatedly asked whether legislative ends were "compelling" and repeatedly found legislative purposes inadequate to justify impingements on fundamental interests. An invigorated old equal protection scrutiny would not involve adjudication on the basis of fundamental interests with shaky constitutional roots. Nor would it require a critical evaluation of the relative weights of asserted state purposes. Rather, it would permit the state to achieve a wide range of objectives. The yardstick for the acceptability of the means would be the purposes chosen by the legislatures, not "constitutional" interests drawn from the value perceptions of the Justices.

Id. at 21.

[123] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 219-20 (1944); Home Bldg. and Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). In *Blaisdell*, a state statute, enacted during the emergency of the Great Depression, was attacked as an unconstitutional impairment of contract. In determining whether the statute exceeded state legislative authority the Court stated the following:

> While emergency does not create power, emergency may furnish the occasion for the exercise of power. "Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." *Wilson v. New*, 243 U.S. 332, 348. The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions.

Id. at 425-26. The Court found a sufficient emergency to justify "exercise of the reserved power of the State to protect the vital interests of the community." The legislation was deemed to be addressed to a legitimate end: "the protection of a basic interest of society." The relief afforded was considered to be "appropriate" and "reasonable," and the legislation was "limited to the exigency which called it forth." *Id.* at 444-47. The outcome of this case is significant in that the emergency conditions forming the basis for the enactment were deemed sufficient to justify an abrupt departure from the "liberty of contract" approach generally applied during this period to invalidate many economic regulation efforts. *See* notes 51-54 and accompanying text *supra*.

> [W]hen there is a clash between the commands of an individual ethic of high normativity and the needs and requirements of organizations whose security and survival is at stake . . . the issue of reason of state become[s] real. For reason of state is nothing but the doctrine that whatever is required to insure the survival of the state must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral man.[124]

It would be fair to say, however, that as of today an individual could claim a constitutional immunity from the type of compulsory population control specified in Public Law 2511. In *Skinner v. Oklahoma*,[125] a challenge to a law providing for the sterilization of certain criminals, the Court suggested that the right to procreate is a fundamental right of man.

In the majority opinion, Justice Douglas observed:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.[126]

The barrier to mandatory population controls raised in *Skinner* has been further buttressed by a broad recognition in *Griswold v. Connecticut*,[127] of a fundamental human right to marital privacy which

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124 C. FRIEDRICH, CONSTITUTIONAL REASON OF STATE 4-5 (1957).

125 316 U.S. 535 (1942).

126 *Id.* at 541. Of course this statement represents a judicial response to the "be fruitful and multiply" ethic cited as a basic tenet of traditional population control (or non-control). *See* note 10 *supra*. Whether the future judicial response will change if moral values change is a speculative and interesting question.

127 381 U.S. 479 (1965). Justice Douglas' plurality opinion that the marital right to privacy is implicit in the "penumbras" of the Bill of Rights was severely criticized by Justice Black: "I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that the government has a right to invade it unless prohibited by some specific constitutional provision." *Id.* at 509-10 (Black, J., dissenting). He also opposed the alternative of invalidating the statute on broader due process grounds:

> The due process argument . . . is based . . . on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive . . . . If these formulas based on "natural justice" . . . are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary.

Id. at 511-12. Justice Black concluded that such an approach represents a return to a "natural law due process philospy [sic] . . . long discredited" by subsequent Supreme Court decisions. *Id.* at 515.

bars a state from forbidding married couples the use of contraceptive devices. Moreover, since the tenets of some religions condemn all forms of artificial contraception or abortion, compulsory population control measures might be deemed to violate the first amendment's prohibition of governmental interference with the free exercise of religion.[128]

Nevertheless, fundamental as the rights of procreation, privacy and religion are, it is clear that current doctrine would permit the infringement of these rights upon the showing of a compelling state interest.[129] For example, the religious scruples and practices of various sects were overborne in upholding anti-polygamy laws,[130] child labor laws,[131] and Sunday closing statutes.[132] In upholding a compulsory smallpox vaccination statute in *Jacobson v. Massachusetts*,[133] the Court said:

> There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety in its members.[134]

In a more recent decision, the Court achieved a similar result, by extending the "fundamental right" recognized in *Griswold* to single as well as married persons by utilizing an equal protection technique. Eisenstadt v. Baird, 405 U.S. 438 (1972). Although the result was deemed mandated by the equal protection clause, the analysis was sufficiently analogous to a due process approach to elicit Chief Justice Burger's statement that "these opinions seriously invade the constitutional prerogatives of the States and regrettably hark back to the heyday of substantive due process." *Id.* at 467 (Burger, C.J., dissenting).

128 U.S. CONST. amend. I provides in relevant part: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Invalidation of state statutes under the first amendment often involves analysis of whether the regulation creates an "undue burden" not offset by a "compelling state interest." *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). This approach is analogous to that used in the "new equal protection" cases. *See* pp. 434-35 *supra*.

129 The "compelling state interest" test has been used to invalidate statutes on several constitutional grounds. *See* notes 109-15 *supra*. Of course, this does not mean that there are not certain state interests sufficiently compelling to justify restrictive legislation; however, as Chief Justice Burger indicates, employment of the "compelling interest" litany in the Court's opinion may be more of a *ratio decidendi* than a test for reaching the final result: "To challenge [state laws] by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection." Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting).

130 Reynolds v. United States, 98 U.S. 145 (1878).

131 Prince v. Massachusetts, 321 U.S. 158 (1944).

132 Braunfeld v. Brown, 366 U.S. 599 (1961).

133 197 U.S. 11 (1905).

134 *Id.* at 26. Although the rationale of this case was based on broad police power-public welfare concepts, *see* notes 59-61 and accompanying text *supra*, it was later cited as a basis for upholding a eugenic sterilization statute in the face of an equal protection attack:

> It is better for all the world, if instead of waiting to execute degenerate offspring from

Only this term in *Roe v. Wade*,[135] the Supreme Court balanced the right of personal privacy which includes the right to choose whether to have an abortion against societal interests in regulating that choice. It concluded that during the first trimester of pregnancy state interests in protecting the health of a pregnant woman and in protecting the potentiality of human life were not sufficient to overcome a woman's right of privacy. However, these interests were sufficient to allow certain state regulations of abortions during the last six months of pregnancy.[136]

Hence, given facts establishing that the size of the population posed a clear and compelling danger to society, a compulsory population control law limiting family size could be sustained.[137] Similarly, while a series of cases have posited a constitutional right to travel,[138] forced travel through a compulsory relocation law such as Public Law 542 might be sustainable assuming a requisite showing of necessity, as *Korematsu v. United States*[139] so frightfully demonstrates. Although

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crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. *The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.*

Buck v. Bell, 274 U.S. 200, 207 (1927) (emphasis added). Could a similar rationale be applied if the crime resulted from competition for scarce resources instead of from mental aberration? Would a compulsory sterilization statute be justified if starvation resulted from overcrowding instead of imbecility? Although *Buck* utilized an "old equal protection" rationale, *see* notes 107-08 and accompanying text *supra*, and was decided before procreation was recognized as a fundamental right, *see* text accompanying note 115 *supra*, the case has never been overruled.

135 41 U.S.L.W. 4213 (U.S. Jan. 22, 1973).

136 *Id.* at 4228.

137 For an excellent discussion of the problem reaching a similar conclusion, see Gray, *Compulsory Sterilization in a Free Society: Choices and Dilemmas*, 41 U. CIN. L. REV. 529 (1972).

138 *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 338 (1972); Shapiro v. Thompson, 394 U.S. 618, 629-31, 634 (1969); United States v. Guest, 383 U.S. 745, 758 (1966).

139 323 U.S. 214 (1944). This case upheld the wartime exclusion of Japanese-Americans from the West Coast based on "the gravest imminent danger to the public safety" and because "exclusion . . . has a definite and close relationship to the prevention of espionage and sabotage." *Id.* at 218. *See also* Hirabayashi v. United States, 320 U.S. 81 (1943) (validating Japanese-American curfew order). *But see Ex parte* Endo, 323 U.S. 283 (1944) (invalidating unjustified detention of Japanese-Americans at relocation center). Although these decisions were based on wartime emergency powers, *see* notes 123-24 and accompanying text *supra*, the Court noted:

> The Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government . . . . This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution. We have likewise favored that interpretation of legislation which

the felt needs of society for preservation may someday necessitate the enactment of such laws, and courts will probably defer to such legislative decisions, the evolving concepts of procedural due process and equal protection will tend to assure that the implementation of such laws will be fairly applied and that the means utilized to carry them out will be rationally related to furthering the legitimate ends.

Two recent cases show how the law of the twenty-first century will tend to harmonize the needs of society and individual freedom. In *Wisconsin v. Constantineau,*[140] a state law established a procedure whereby a spouse or certain state officials could block the furnishing of alcoholic beverages to one who "by excessive drinking" exposed his family "to want" or became "dangerous to the peace" of the community. The statute provided for posting the name of such a person in all liquor outlets and forbade the sale or gift of liquor to him for one year after his name was posted. Although the statute might be deemed to have served desirable social ends, the Court found that such "posting" without notice or hearing denied due process. Justice Douglas observed: "[w]here a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[141]

In *Stanley v. Illinois,*[142] the Court ruled unconstitutional on both procedural due process and equal protection grounds a statute that provided that children of unmarried fathers, upon the death of the mother, would be declared wards of the state without any hearing on parental fitness. The denial of a hearing violated due process and, moreover, denying a hearing to unwed fathers while providing a hearing for all mothers and married fathers violated equal protection as well. Thus, while the state's legitimate interest in protecting helpless children was obvious, was it not just as obvious that the government must act in an even-handed way and by fair procedures?

IV. CONCLUSION

Today we see that law is a mechanism of reason and experience by which men seek consciously to meet new problems. We know today

> gives it the greater chance of surviving the test of constitutionality . . . . We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen . . . [and will] allow for the greatest possible accommodation between those liberties and the exigencies of war.

Id. at 299-300.

140 400 U.S. 433 (1971).

141 *Id.* at 437.

142 405 U.S. 645 (1972).

that legal systems do and must grow and that legal ideals, principles and precepts are not absolute but are relative to time and place. While primitive law was limited to the peaceful ordering of society, law today seeks affirmatively to promote the social interests in the dignity and value of individual life. While the strict law sought to avoid arbitrary exercises of power by making law inflexible, today we seek certainty and uniformity by insisting that discretion be exercised within canalized bounds, that law be generally applicable to all similarly situated, that rule and regulation be specific and definite and be narrowly drawn to prevent the supposed evil,[143] and that fundamental personal rights and liberties not be dealt with in an unlimited and indiscriminate manner.

143 *See* Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).