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Individual Rights and Governmental Powers

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INDIVIDUAL RIGHTS AND THE POWERS OF GOVERNMENT

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INTRODUCTION

Constitutional rights, we are accustomed to believe, limit the power of government. Government may, and should, provide for the common defense, care for the needy, promote a thriving economy, and protect the environment. In a familiar understanding, however, goals such as these are subordinate to rights.[1] For the very point of constitutional rights is to define independent,

* Professor of Law, Harvard Law School. A version of this paper was given as the Fall 1992 Sibley Lecture at the University of Georgia School of Law. I am grateful to Alisa Klein, Dan Meltzer, Frank Michelman, and Lloyd Weinreb for their comments on early drafts. My own understanding was deepened by criticisms offered when I presented a draft at the New York University Colloquium for the Study of Law, Philosophy and Political Theory, but I have not been able to revise the paper in response to the comments given there.

[1] In Rawls's terms, "the right" has priority over "the good," JOHN RAWLS, A THEORY OF JUSTICE 31 (1971), and one basic liberty can be restricted, if at all, only for the sake of another basic liberty. In Nozick's terminology, rights are "side constraints" on the powers of government. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28-35 (1974).

enforceable limits on government powers.[2] A recurrent objection to utilitarian and other consequentialist theories holds that, in their aspiration to maximize utility or to achieve the best possible states of affairs, they fail to take rights seriously.[3]

My basic thesis is that, in American constitutional law, rights typically do not operate, as we often assume, as conceptually independent constraints on the powers of government. We have no way of thinking about constitutional rights independent of what powers it would be prudent or desirable for government to have. Balancing tests offer an obvious, banal example: the interests supporting claims of right are balanced against interests in upholding governmental power to determine what rights we actually have. But there are other, deeper interconnections as well. Throughout our structure of constitutional discourse, I shall argue, rights are conceptually interconnected with, and occasionally even subordinate to, governmental powers.[4]

It is only fair, I think, to share at the outset a question that has haunted me in developing the argument I am about to present. To many, the claim that individual rights are too conceptually interconnected with government powers to function as independent constraints may seem so obvious as to be unilluminating. Balancing is too obvious and pervasive a constitutional methodology,[5]

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[2] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 36 (1980) (asserting that "rights and powers are not simply the absence of one another but that rights can cut across or 'trump' powers").

[3] *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY ix-xv (1977); T.M. Scanlon, *Rights, Goals, and Fairness*, *in* PUBLIC AND PRIVATE MORALITY 93 (Stuart Hampshire ed., 1978).

[4] In this Article, I am concerned solely with rights against the government within our constitutional system—constitutional rights. Rights in this sense could be characterized as what Hohfeld regarded as rights in the technical sense—that is, rights that are the correlatives of a duty of government not to act in certain ways that would limit rights. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). It seems plausible, however, to think that probably the most typical relation, reflected in so-called negative rather than positive rights, could equally be expressed in Hohfeldian terms as involving a "privilege" of citizens correlated with a "no right" on the part of the government to interfere. The relation between negative and positive rights is further discussed below. *See infra* text accompanying notes 135-141. I shall not, however, discuss the rights, privileges, or powers of non-governmental actors with respect to other non-governmental actors.

[5] *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

some may think, for the relationship of individual rights and governmental power to be other than one of interconnectedness. Moreover, it will be part of my argument that even a constitutional theory as self-consciously rights-based as Ronald Dworkin's is, in its main lines at least, compatible with my thesis that individual rights and governmental powers are conceptually interdependent within the assumptions of prevailing constitutional discourse.[6] So, the question might be asked, is there sufficient confrontation with prominent theories or currently widespread beliefs to make the thesis worth developing?

For two reasons, I think the answer is yes. First, many of us who think and argue about constitutional law tend to be of two minds about the relationship of individual rights and governmental powers. Sometimes we are realist balancers: we recognize that, of course, constitutional law necessarily involves the balancing of competing interests and that the interests associated with individual rights must sometimes lose out to the interests supporting government powers. But sometimes too, as I suggested at the outset, many of us make arguments that appear to depart from different assumptions. We assert that rights are trumps, whatever that means, and we denounce consequentialist theories that explicitly call for balancing for failing to take rights seriously. I think it worthwhile trying to clarify how these aspects of our thought cohere or fail to cohere.

Second, we are missing something of potential importance if we fail to notice the disjunction between our post-New Deal constitutional practice,[7] in which individual rights and governmental powers are conceptually interdependent, and elements of our political and intellectual heritage that convey a quite different view of rights. Constitutional rights would often be conceptually independent of considerations supporting broader or narrower governmental powers in some natural law theories[8] and

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[6] *See infra* notes 103-114 and accompanying text.

[7] According to Aleinikoff, balancing "[a]s an explicit method of constitutional interpretation" first appears in Supreme Court majority opinions in the late 1930s and early 1940s. Aleinikoff, *supra* note 5, at 948.

[8] *See* NOZICK, *supra* note 1; *cf.* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (developing theory of restraints on government's power that builds on Lockean natural law conceptions).

historically-based understandings of constitutional guarantees,[9] and possibly in theories based on Kantian conceptions of personhood[10] or autonomy.[11] Indeed, constitutional rights would much more often be conceptually independent of government powers in virtually any theory that did not call for a balancing of the interests supporting a claim of right against the interests supporting recognition of a power of government to promote some competing good.[12]

My argument, then, is about the pervasiveness and nature of interest balancing,[13] especially by the Supreme Court, in our

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[9] *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (endorsing originalist theory of constitutional interpretation); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 360 (1981) (arguing that "original intent is the proper mode of ascertaining constitutional meaning, although important concessions must now be made to the claims of stare decisis").

[10] As one prominent defender of balancing has noted, *see* STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 110-32, 230-31 nn.13-14 (1990), the Kantian influence seems strong in the generally non-balancing theories of DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986) and BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

[11] *Cf.* Thomas M. Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972) (developing autonomy-based theory of freedom of expression); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991) (also developing autonomy-based theory).

[12] For a catalogue of non-balancing methodologies available for use and indeed historically used in constitutional analysis, see Aleinikoff, *supra* note 5 at 948-52. *See also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 3-31 (1992) (describing categorical, rather than balancing, analysis that characterized "classical legal thought" of late nineteenth century).

[13] The term "balancing" is, unfortunately, notoriously vague, and I agree with the number of perceptive commentators who have characterized it as a "metaphor." *See, e.g.*, SHIFFRIN, *supra* note 10, at 132; Aleinikoff, *supra* note 5, at 945; Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 3 (1987). For my purposes, the metaphor refers to methods of constitutional interpretation that prescribe the resolution of constitutional questions by rules or decisions that "explicitly or implicitly" reflect, at least in part, "the identification, valuation, and comparison of competing interests," Aleinikoff, *supra* note 5, at 945, and that also permit inquiries into the closeness of fit between an interest and legislation seeking to promote that interest and the availability of less restrictive alternatives, *see* SHIFFRIN, *supra* note 10, at 132-34. This conception of balancing neither entails nor precludes the view that the "applications" of rules and tests arrived at through a balancing process necessarily reflect separate and independent acts of balancing, *cf. id.* at 17, 32-34, and it is similarly agnostic about the question much mooted during the 1950s and 1960s whether First Amendment rights, once identified by a balancing process, should be treated as absolutes, *see, e.g.*, Konigsberg v. State Bar of Cal., 366 U.S. 36, 56-80 (1961) (Black, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 140-44 (1959) (Black, J., dissenting), or subjected to a further balancing process, *see, e.g.*,

constitutional practice and about some issues concerning the judicial role that become urgent in a balancing age. The first parts of this Article elaborate my thesis about the conceptual connectedness of individual rights and governmental powers and consider the thesis's compatibility with some prominent approaches to constitutional law and theory. I shall then attempt to show how my thesis throws light on some familiar aspects of our constitutional practice. Finally, I discuss some implications for reform.

I. RIGHTS AND THE POWERS OF GOVERNMENT

Within our constitutional culture, individual rights and government powers are conceptually interconnected, with the crucial linkage occurring through the concept of "interests."[14] It is

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Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 90-91 (1961) (majority opinion of Frankfurter, J.); Dennis v. United States, 341 U.S. 494, 517-46 (1951) (Frankfurter, J., concurring). I do argue, however, that definitions of rights and rules—including First Amendment rights—reflect a balancing process at least in the first instance. To be slightly more concrete, it is balancing that puts some expressive acts within, and others such as some threats and libels without, the protection of the First Amendment, regardless of whether some speech within the Constitution's protective ambit can sometimes be punished based on a more ad hoc weighing of competing interests. For reasons that I have discussed elsewhere, *see* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987), a balancing of interests can occur within a constitutional calculus that includes such elements as constitutional language, the framers' intent, constitutional structure, and precedent, because these factors have built-in elements of interdependence and flexibility that typically allow accommodation of perceived, underlying values.

I do not, for the most part, attempt to deal in this Article with practical and conceptual difficulties that, as critics have argued, would attend the development of a fully worked out and coherent balancing theory. *See, e.g.*, Aleinikoff, *supra* note 5, at 982; Kahn, *supra* note 13. *But cf.* SHIFFRIN, *supra* note 10, at 132-39 (defending "eclecticism"). My reason for not addressing these challenges is not that they are unimportant. On the contrary, they are large and daunting. Nonetheless, the validity of my thesis, which is principally descriptive or exegetical, does not depend on my furnishing a fully elaborated prescriptive theory with balancing at its center.

[14] The term "interests" can be used in a variety of senses to refer, among other things, to (1) what people want and what will help them get what they want, whatever that might be, *see* Brian Barry, *The Public Interest*, *in* POLITICAL PHILOSOPHY 112, 115 (Anthony Quinton ed., 1967); (2) what people display active concern about or take an interest in; (3) the underlying needs, wants, and values that support the establishment of rule-like systems of rights or entitlements; and (4) the needs, wants, and values that are recognized as being entitled to weight or respect within a particular rule-like system, *see* Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 756-57 (1963) (distinguishing "between wants, that is, bare demands for

impossible to understand either government powers or individual rights other than in terms of the interests they are designed to promote. For expositional reasons, I shall talk first about government powers and then about individual rights.

A. GOVERNMENTAL POWERS AND INTERESTS

Modern constitutional discourse tends to blur analysis of the scope of governmental power with assessment of practical necessity or the weight of governmental interests.[15] The framers intended the federal government to enjoy only limited powers.[16] In their initial view, federal powers were narrowly enough defined to pose little threat to what, at the time, apparently would have been

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satisfaction, which are the raw stuff of social conflict, and interests—with which they are frequently confused—which represent appeals to some existing or proposed scheme of justification, some system for satisfying wants"). For the most part, I shall use the term in Professor Fried's sense, to refer to needs, wants, or values that are or ought to be recognized as entitled to weight or respect under various circumstances within the justificatory scheme of American constitutional law. *Cf.* MICHAEL FREEDEN, RIGHTS 50 (1991) (" 'Interest' is . . . a more useful term than 'needs' or 'wants' because it can contain both, while not resolving the tensions between them."). I assume, however, that a scheme crediting those interests but not others needs moral and political justification by reference to interests in the third sense noted above and the scheme's capacity to give adequate protection to the most important interests in that sense of the term. In this lecture, I do not, however, consider the question of what interests deserve protection at this level of justification. There seems to be a sufficient overlap on this question between the interests accorded respect in liberal theories, such as Rawls's, and at least some theories rooted in more substantive conceptions of human flourishing, *see, e.g.*, Martha Nussbaum, *Aristotelian Social Democracy*, *in* LIBERALISM AND THE GOOD 203 (R. Douglass et al. eds., 1990), so that either could plausibly support the American constitutional regime.

[15] There has been a partial exception in recent separation-of-powers cases. *See, e.g.*, Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 951-59 (1983). In this area, however, a "functionalist" line of cases, which openly weighs the government interests at stake, stands beside those taking a more "formalist" or historical line. *See, e.g.*, Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) (developing the distinction). The most recent decisions generally sound in functionalist terms. *See* Mistretta v. United States, 488 U.S. 361, 380-411 (1989); Morrison v. Olson, 487 U.S. 654, 685-96 (1988). *But cf.* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298, 2309-12 (1991) (invalidating federal statute providing for nine members of Congress to serve on board of review authorized to veto decisions of airports authority).

[16] *See, e.g.*, THE FEDERALIST No. 84, at 627 (Alexander Hamilton) (John C. Hamilton ed., 1875) (arguing that a bill of rights is unnecessary because it would contain exceptions to powers not granted to government).

viewed as "natural rights."[17] Gradually, however, internal limits on most important federal powers have eroded. Roughly speaking, the process began with the broad constructionist approach of John Marshall,[18] but the largest expansion of the powers of government came with the New Deal.[19] As Bruce Ackerman[20] and Cass Sunstein[21] have argued, the basic presuppositions of American constitutionalism shifted dramatically during the 1930s. Among other things, the constitutional revolution surrounding the New Deal reflected a rejection of previous assumptions that common law liberty and property rights defined a just and neutral background for private transactions and generally modest government.[22] New Deal constitutionalism recognized government's deep implication in the definition of rights and acknowledged redistribution as an often permissible policy goal.

Today, historical limits on the scope of federal powers are generally viewed as anachronisms.[23] Among liberals and conservatives alike,[24] the prevailing understanding holds that government power must be understood purposively and that the relevant purposes must be capaciously conceived.[25] To put the point only slightly more concretely, government power exists to promote

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[17] *See* MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION 25-33, 175-90 (1987) (asserting that authors of *The Federalist* accepted moral doctrine of natural rights).

[18] *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional."). According to Judge Frank Easterbrook, after Chief Justice Marshall had set the course, the subsequent history expanding federal power was essentially "a matter of details." Frank Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 352 (1992).

[19] *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987) (criticizing expansive construction of Commerce Clause by New Deal Supreme Court).

[20] *See* 1 BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS 105-30 (1991).

[21] *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

[22] *Id.* at 430-52.

[23] *See, e.g.*, Easterbrook, *supra* note 18, at 350 ("It is difficult to name anything that falls outside legislative power.").

[24] *See* Bruce A. Ackerman, *Liberating Abstractions*, 59 U. CHI L. REV. 317, 317-19 (1992) (arguing that conservative Supreme Court Justices who seek narrow construction of rights typically join liberals in favoring broad interpretations of government's powers).

[25] There are prominent exceptions to this generalization. *See, e.g.*, EPSTEIN, *supra* note 8.

values or interests, and that power should be broad enough to be effective. Moreover, the derivation of government interests from the Constitution is notoriously loose and easy.[26] Controversy surrounds the identification of unenumerated rights, but until recently at least,[27] there has been little similar worry about government interests. Liberals prefer broad construction of government's powers to license the promotion of diverse social, environmental, and economic values, including economic redistribution. Liberals generally are content with the idea of rights—not economic rights, but what are sometimes classed as "preferred" freedoms—as restraints.[28] Conservatives, on the other hand, want government to be powerful enough to deal with a variety of threats, and they profess discomfort with judicially enforced restraints on the political process.[29] To the extent that restraints are needed, conservatives, like liberals, generally locate them in the rights-protective portions of the Constitution.[30]

Limits on the powers of the states have met a similar fate. In the "classical legal thought"[31] that characterized the late nineteenth century and endured in increasingly battered form throughout the *Lochner*[32] era, the states' authority to tax and regulate pursuant to the "police power" was viewed as limited by the purposes for which the police power was given.[33] Within this structure of thought, redistributive legislation was often viewed as

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[26] *See, e.g.*, Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 937 (1988); Ackerman, *supra* note 24, at 318.

[27] Professor Gottlieb's article, cited *supra* note 26, has awakened interest in the general subject of governmental interests. *See, e.g.*, Symposium, *Conference on Compelling Government Interests: The Mystery of Constitutional Analysis*, 55 ALB. L. REV. 535 (1992).

[28] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 769-84 (2d ed. 1988) (citing liberties that are indispensable to open democratic society).

[29] *See* Ackerman, *supra* note 24 (describing asymmetrical approach to constitutional adjudication of conservatives who take expansive view of government powers but argue that it is illegitimate to take similarly expansive view of individual liberties).

[30] A partial exception involves a conservative disposition to read the Tenth Amendment or the structural logic of the Constitution as dictating judicial protection of state sovereignty interests. *See, e.g.*, New York v. United States, 112 S. Ct. 2408, 2419 (1992) (holding that Constitution forbids federal legislation compelling state governments to adopt legislative program of particular type).

[31] *See* HORWITZ, *supra* note 12, at 3-31.

[32] Lochner v. New York, 198 U.S. 45 (1905).

[33] *See* HORWITZ, *supra* note 12, at 20-24, 28-31 (1914).

impermissibly partisan and thus as beyond the scope of governmental power. With state as with federal power, however, limiting conceptions such as these generally collapsed during the New Deal judicial revolution.

B. WHAT ARE RIGHTS?

Within our constitutional tradition, analysis of rights begins with the text of the Constitution. Nonetheless, the rights listed there are not self-interpreting. In addition, there is an entrenched though limited practice of recognizing "unenumerated rights."[34] To understand how rights function within the constitutional tradition, we need a theory that explains the nature of rights and the relationship of rights to other concepts and values.

Many theories of rights begin with a metaphysical conception of the person. Tracing to Kant, theories of this kind posit that human agents are "ends in themselves" and thus bearers of rights that cannot be violated for the sake of any other end.[35] In practice, however, metaphysical theories tend to work most plausibly to explain why persons should have rights—or at least why persons' interests should count in a moral calculus—and much less successfully to explain what rights people do or ought to have.[36] Operating at a high level of abstraction, Rawls, for example, identifies personhood with a capacity for the exercise of "moral powers" and argues that rights necessary to the exercise and development of

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[34] *But cf.* Ronald M. Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. CHI. L. REV. 381, 386-91 (1992) (arguing that distinction between "enumerated" and "unenumerated" rights is misleading, since all constitutional rights are equally a product of constitutional interpretation).

[35] Rawls initially appeared to offer a theory of this type, *see* RAWLS, *supra* note 1, at 179, 256, but his stance appears to have become increasingly complex and equivocal. For example, he has retained his commitment to "Kantian constructivism" in imagining the subjects of justice, *see* John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515 (1980) [hereinafter Rawls, *Kantian Constructivism*], but he now maintains that his conception, unlike Kant's, is "political, not metaphysical," *see* John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985). The Kantian influence also seems strong in DWORKIN, *supra* note 3; RICHARDS, *supra* note 10; ACKERMAN, *supra* note 10.

[36] *See* SHIFFRIN, *supra* note 10, at 119-20; Lloyd L. Weinreb, Oedipus at Fenway Park (1993) (unpublished manuscript on file with author).

those moral powers should be recognized.[37] But the basic rights that he derives—including rights to freedom of speech and religious autonomy—are so abstract as to settle few practical questions.[38] Does freedom of speech encompass hate-speech directed at racial or religious minorities? Does freedom of religion immunize religious observers from sanctions for engaging in otherwise prohibitable conduct under the criminal law? To answer questions such as these, a fuller set of considerations must be brought to bear.[39]

Perhaps more implicitly than explicitly, our constitutional practice, and I think much of our ordinary reasoning as well, presupposes that rights reflect interests[40] that sometimes compete with each other.[41] The relevant interests can be identified at a high level of abstraction. But the specification of rights, which aims at protecting and promoting interests and effecting necessary trade-offs in cases of conflict, has a strongly empirical dimension. As Professor Scanlon has argued, claims of right are "generally backed" by (1) a "claim about how individuals would behave or how institutions would work in the absence of this particular assignment of rights," (2) a value-based claim that "this result would be unacceptable," and (3) a "further empirical claim about how the envisaged assignment of rights will produce a different" and normatively preferable outcome.[42] To put the point slightly differently, rights reflect interests and which interests will be protected in which ways by recognition of which rights depends as

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[37] *See, e.g.*, RAWLS, *supra* note 1, at 505; Rawls, *Kantian Constructivism*, *supra* note 35.

[38] *See* Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 50 (1982).

[39] Rawls recognizes this and, in response, contemplates a number of stages of reasoning that would be necessary to implement the principles of justice he contemplates as emerging from the "original position." *See* RAWLS, *supra* note 1, at 195-201.

[40] *See, e.g.*, Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 94-95 (1992) (recognizing that constitutional liberties are recognized to protect corresponding interests); Thomas M. Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 535-36 (1979) (noting that what rights are recognized depends on necessity and feasibility of protecting particular interests); Judith J. Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45, 55-56 (1977) (recognizing that rights reflect interests).

[41] The idea of the plurality and conflict of values as a feature of moral life is repeatedly emphasized by ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969) and as a source of constitutional perplexities by SHIFFRIN, *supra* note 10.

[42] *See* Scanlon, *supra* note 3, at 103.

much on historically contingent, instrumental reasoning as on timeless principles.

Within our constitutional scheme, it is not always obvious how to identify the interests that underlie particular constitutional rights. Among other things, it is implausible that rights would correspond to interests in a one-to-one relationship. The right of free speech, for example, undoubtedly reflects diverse interests of both would-be speakers and their potential audiences: interests in self-expression, in effective participation in self-government, in receiving useful or stimulating information, and so forth.[43] By similar token, property rights reflect interests in, among other things, material security, privacy, and individual control or self-determination.[44]

It would probably be foolhardy to attempt to sort out all the *kinds* of interests that rights serve in our constitutional culture.[45] Nonetheless, a partial list may help to bring out some interesting distinctions.

First are interests in individual well-being and in being able to achieve individual well-being: in health, material goods, and opportunities to exercise our physical and intellectual capacities in satisfying ways, for example.[46] Interests in well-being have an important "objective" component.[47] We regard people as having an interest in preserving their health, for example, even if they are unconcerned in the psychological sense. But all people need not have all the same interests. Though an objective standard may limit what can count as interests and occasionally identify particular interests as universally shared, the range and ordering of interests may be as wide as the range of conceptions of the good.

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[43] *See, e.g.*, Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 125 (1989) (identifying a plurality of values underlying free speech doctrines); Scanlon, *supra* note 40, at 520 (noting different interests of participants and audiences affected by freedom of expression).

[44] *See generally* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165 (1967) (discussing values underlying protection of property).

[45] For an earlier classificatory effort, see Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943) (distinguishing individual, public, and social interests).

[46] *See* Amartya Sen, *Well-being, Agency and Freedom: The Dewey Lectures 1984*, 82 J. PHIL. 169, 185-203 (1985).

[47] *See* Thomas M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655 (1975).

Second are interests in agency or autonomy. As beings who are capable of self-direction, we have an interest in being able to make decisions for ourselves and to act on those decisions that is sometimes independent of the interest in having the decision made that will be best for us in the sense of producing the greatest after-the-fact well-being.[48]

A third set of interests can be classified as "dignitary." Consider, for example, the constitutional value of equality.[49] In large part, equality is an instrumental value, reflecting the interests of the less-well-off in being made better off.[50] Beyond this instrumental concern, however, there may be a residual notion that equality is sometimes desirable for its own sake.[51] Imagine a situation in which one person or group has more goods than another and some obstacle makes redistribution impracticable. It is impossible to "level up" the disadvantaged group to a position of equality with the better-off class, but the better-off can be "leveled down." Sometimes, in a situation such as this, it may be a better state of

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[48] *See* Scanlon, *supra* note 3, at 95; Sen, *supra* note 46.

[49] Treating equality as one of several constitutional interests is not incompatible with the view that, at a more fundamental level, it is respect for the moral equality of persons that causes liberal regimes to weigh everyone's interests equally. *See* Ronald M. Dworkin, *The Original Position*, *in* READING RAWLS 16, 48-53 (Norman Daniels ed., 2d ed. 1989) (discussing concept of equality in Rawls's "original position" theory); *cf.* H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955) (arguing that if there are any natural rights, among them is the equal right of all people to be free). But "equality" in this sense may simply be "impartiality" under another name. *See* James Griffin, *Towards a Substantive Theory of Rights*, *in* UTILITY AND RIGHTS 137, 151 (R.G. Frey ed., 1985); *see also* THOMAS NAGEL, THE VIEW FROM NOWHERE 170-71 (1986) (from as impartial a view as we can achieve, no one is more important than anyone else); *cf.* Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1879 (1987) ("The equality registered by rights discourse is an equality of attention.").

[50] On a purely instrumental or psychological view, it might be possible to treat the dignitary interest in equality as a kind of well-being interest: for example, as an interest in avoiding the dissatisfaction accompanying envy or in attaining a psychological sense of equal worth or status. Among other things, this suggestion raises a nest of difficult issues about the psychological and informational restrictions appropriate to a partly consequentialist assessment of welfare or well-being. *See, e.g.*, Sen, *supra* note 46. These issues are extremely complex, and discussion would take me far afield. Suffice it to say that, in treating equality as a dignitary interest separate from well-being interests, I assume a pluralist view of the kinds of interests and information relevant to constitutional law and accept at least the possibility that equality is a constitutional value independent of its implications for individual well-being in a welfarist sense.

[51] *See, e.g.*, THOMAS NAGEL, EQUALITY AND PARTIALITY 107 (1991) (discussing such a view).

affairs for everyone to have equal benefits than for a few to have a larger share.[52] If so, any equality-based rights that are assigned to the less-well-off may not promote either well-being or agency interests in the sense that I have defined them.[53] Rather, the interest of the less-well-off in achieving a condition of equality would be a dignitary interest. Fairness, as a property of procedural schemes, may also be a value that generates rights that do not necessarily promote the interests of particular right-holders in either a well-being or an agency sense.[54]

Although disparate in many respects, well-being, agency, and dignitary interests all tend to enter constitutional discourse in the same way: the constitutional interest typically is implicated only when the corresponding well-being, agency, or dignitary interest of some specific individual or group is also implicated. By contrast, a final category of interests supporting constitutional rights is much less distinctively linked to the well-being and autonomy interests of particular right-bearers and is often only vaguely and indeterminately related to individual dignitary interests. These are what might be termed "systemic" interests in avoiding abuse of government power or the collection of excessive power in the hands of government—interests that are shared by nearly everyone and that are nearly universally infringed whenever they are infringed at all.

Power conferred is obviously susceptible of abuse. In situations involving the conferral of authority by one private party on another, the law explicitly recognizes limits on delegated power through a

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[52] Rawls's insistence on equal distribution of the basic liberties may reflect this view. *See* RAWLS, *supra* note 1. So may cases under the Equal Protection Clause that allow one party to challenge the lawfulness of preferential treatment to another party, even in cases in which the only available remedy would be to "reduce" the better-treated party to the same, lower level as the less-well-treated party. *See, e.g.*, Heckler v. Mathews, 465 U.S. 728, 734 (1984) (discussing equal protection issues in Social Security pension offsets against spousal benefits); Orr v. Orr, 440 U.S. 268, 272 (1979) (invalidating gender-based Alabama alimony statute); Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (1931) (striking down Iowa statute that taxed stock in national and state banks at higher rate than domestic corporations).

[53] *See supra* note 14.

[54] *See* Scanlon, *supra* note 3, at 99.

variety of agency[55] and ultra vires doctrines.[56] In the context of constitutional government, the risk that power might be abused also marks a continuing concern.[57] Indeed, the framers of the Constitution were so worried that they pursued at least two strategies of restraint: delegation of only limited powers and enactment of a bill of rights.[58] Although internal limits on government's delegated powers have withered, many of the underlying concerns about possible abuse have found expression within a framework denominated as one of individual rights.

Consider the doctrine holding that government, although it need not provide a forum for speech at all, generally may not both establish a forum and limit its availability on the basis of what anyone wishes to say.[59] An obvious purpose of the doctrine is to

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[55] *See, e.g.*, HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 2-72, 123-39, 161-73 (2d ed. 1990) (providing overview and discussing limits of general agency principles).

[56] *See, e.g.*, HARRY G. HENN & JOHN ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 477-84 (3d ed. 1983) (discussing ultra vires doctrine). In corporate law, the ultra vires doctrine "is no longer as important as it once was," *id.*, due to changed understandings of the purposes for which corporations are organized, but is not without continuing significance. The concept of ultra vires action is also prominent in international law and has played a role in the development of sovereign immunity, *see* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-94 (1949) (discussing ultra vires doctrine in connection with government officials' liability for illegal acts), and Eleventh Amendment doctrines, *see* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 106-17 (1984) (discussing relevance of ultra vires doctrine to suits seeking injunctive relief from state officials under Eleventh Amendment).

[57] *See* Frederick Schauer, *The Calculus of Distrust*, 77 VA. L. REV. 653, 653 (1991) ("The distrust of governmental power has become almost a uniquely American form of argument.").

[58] *See, e.g.*, Leonard W. Levy, *The Original Constitution as a Bill of Rights*, 9 CONST. COMM. 163 (1992). *But cf.* Akhil R. Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131 (1991) (arguing that framers did not understand rights included in Bill of Rights in modern, individualistic terms so much as in terms of rights of the people collectively and that Bill of Rights carried on basic strategy of original Constitution in attempting to protect populism and federalism against threats from powerful central government).

[59] *See, e.g.*, Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 (1992); Widmar v. Vincent, 454 U.S. 263, 267 (1981) (striking down University of Missouri policy that prohibited registered student religious groups from using facilities available to other registered student groups). The doctrine contains a number of internal divisions. In so-called public forums and voluntary or limited public forums, government generally may not discriminate on the basis of content unless discrimination is "necessary to serve a compelling state interest." *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983). In other public facilities, government can generally impose "reasonable" limitations on permissible speech, including content-based prohibitions, but even then generally may not discriminate on the basis of a speaker's point of view. *See id.* at 46. For a helpful, general

prohibit governmental abuse of power—use of governmental power to favor one side in political debate and thereby skew the outcome of the political process.[60] From one perspective, it seems odd to think of anyone as having a "right" to speak in this context, since it is recognized that government could deny speech opportunities to everyone by eliminating the forum altogether. Clearly the right in question cannot be traced directly to constitutionally protected well-being or agency interests. A dignitary interest in equality may of course be implicated, and it might be argued that this is a relatively typical case in which equality functions as an instrumental value concerned with getting those whom government would exclude leveled up to the position of those whom government would admit. But when government engages in content discrimination, it does not necessarily or directly infringe anyone's most fundamental equality interest—that in being treated as an equal or in being accorded a degree of concern and respect equal to that accorded anyone else.[61] Government, instead, determines that certain speech is more dangerous or less valuable than other speech. This is of course a contestable judgment, but it is a judgment on which the abstract value of equality can shed little light. Equality demands similar treatment only of those who are similarly situated; and two would-be speakers are not similarly situated if what they have to say is of unequal worth. In fact, within our constitutional regime, the requirement that government be content-neutral substantially debars government from making substantive judgments about the worth of what people have to say. But this is not because a constitutional interest in being treated as an equal requires that everyone's ideas should be treated equally; rather, the content-neutrality rule exists because it would generally be dangerous to let government judge which ideas deserve to be heard and because there is a systemic interest in precluding government

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discussion, see Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

[60] *See* Stone, *supra* note 59, at 221-23.

[61] *See* DWORKIN, *supra* note 3, at 227 (arguing that moral value of equality cannot be one that requires equal treatment but must instead call for everyone to be treated as an equal).

from acquiring this dangerous power.[62]

To put the point somewhat more stridently, rights to content neutrality—in common with other rights reflecting systemic interests and in contrast with rights reflecting other kinds of interests—do not always map onto any constitutionally protected interest of the right holder other than the interest of all or nearly all citizens in keeping government generally within the bounds of law. Indeed, the doctrine could easily be conceptualized not as protecting rights but as enforcing an internal limit on governmental power: government may not use its power to favor partisan ends in this way. For a variety of reasons, however, we are not used to reasoning in these terms. Rather than saying that government is acting outside the bounds of its proper powers, we say instead that it infringes a right. To express the relationship in the terms that I have urged, a right comes into being that cannot be grounded in constitutionally protected well-being or agency interests of the right-bearers and that is only loosely and indeterminately connected to individual dignitary interests. The right stems instead from

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[62] It would be possible to resist this conclusion by arguing that a person's thoughts and words are so intimately bound up with the person's identity that a dignitary interest is directly implicated whenever the worth of the person's thoughts or words is assessed by government. But a bare equality interest, by itself, will typically be too abstract and unfocused to ground a persuasive claim of right. As Steven Shiffrin has pointed out, the government frequently can discriminate based on the content of what people have said or intend to say and must be allowed to do so. *See* SHIFFRIN, *supra* note 10; Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980) (discussing government support of certain types of speech and need for limits on government's ability to support or limit speech); *see also* Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987) (noting importance of government's managerial interests in defining limits on public forum doctrine). Government agencies can promote capitalism as preferable to communism, disseminate information discouraging but not encouraging smoking, and dismiss teachers who refuse to follow a prescribed curriculum. It would still be possible to say that the actual content of non-discrimination *rights* depends on a direct trade-off of equality interests against government interests in being able to discriminate. But this way of framing the issue would omit a factor that should weigh heavily in the constitutional calculus: the interest of all of us, which I have labeled a systemic interest, in avoiding the collection of a potentially dangerous power, such as the power to take sides in and even determine the outcome of political debates, in the hands of government. In short, even if it could be established that constitutional rules such as that requiring content neutrality do indeed reflect equality interests, it would remain true that they also and often more powerfully reflect the systemic interest in avoiding abuses of government power.

a systemic worry about the abuse of government power.[63]

Doctrines requiring that government regulation be content-neutral are by no means peculiar in this respect. The Supreme Court has explicitly recognized the existence of systemic interests in cases involving allegedly unconstitutional delegations of authority under the separation of powers.[64] Many First Amendment cases in which the inquiry turns on government's purposes fit the paradigm: although government would have the power to act in a particular way if its purposes were legitimate, government has no delegated power to act for illegitimate purposes. Government can, for example, provide subsidies to sexual counseling agencies operated by religious organizations, provided those agencies do not engage in religious proselytization;[65] but government could not grant subsidies to the same agencies if its purpose were to promote an establishment of religion.[66]

A number of cases decided under the so-called unconstitutional conditions doctrine[67] also involve systemic interests. In *FCC v. League of Women Voters*,[68] for example, Congress had provided that federal funds should be given to noncommercial radio and television stations only if they agreed to refrain from political editorializing.[69] The statute did not infringe on affected stations' constitutionally protected well-being or agency interests. Stations that agreed to accept the subsidy on Congress' terms were presumably made better off. If no coercion was involved, the stations' agency interests were not implicated and there was no more infringement on the stations' dignitary interests than in any other case of voluntary contract. Nonetheless, the statute was held invalid,[70] and rightly so. Systemic interests were involved.

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[63] *See generally* Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 SOC. PHIL. & POL'Y 196, 214-22 (1992) (arguing that separation-of-powers principles should and to some extent do influence interpretation of Bill of Rights).

[64] *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848, 850-51 (1986) (noting that Article III guarantee of independent federal judiciary protects "structural" interests as well as interests of individual litigants).

[65] *See* Bowen v. Kendrick, 487 U.S. 589, 602-04 (1988).

[66] *See id.*

[67] For a further discussion, see *infra* text accompanying notes 176-188.

[68] 468 U.S. 364 (1984).

[69] *See id.* at 366.

[70] *See id.* at 373.

Absent stronger evidence of practical necessity, it would be too dangerous to allow government to buy up rights to engage in political speech in this and analogous ways.[71]

II. THE RELATIONSHIP OF RIGHTS AND POWERS

So far I have argued that rights and powers both reflect interests. But, aside from noting that rights sometimes derive from the interest in preventing abuses of government power, I have not probed the ways in which rights and powers tend to be conceptually dependent on one another. It is time to remedy that deficiency.

A. BALANCING

The most obvious but ultimately least interesting case demonstrating the conceptual interdependence of individual rights and governmental powers—an interdependence mediated by the concept of interests—involves balancing. In cases involving balancing, governmental interests, which are used to measure the outer limits of governmental power, are balanced against the interests that underlie definitions of constitutional rights.

Conceptual interdependence is exhibited most clearly in cases involving the amorphous balancing tests that Justice Scalia likes to deride.[72] But interdependence is present too in those doctrines we tend to regard as most rights-protective. Government can regulate even political speech, for example, to serve a compelling governmental interest.[73] Government can also use racial classifications if the need is perceived as sufficiently urgent.[74] The crucial conceptual point is that practical necessity limits the right. The right is not defined by some process independent of and

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[71] It is arguable that the well-being or agency interests of potential listeners, and not merely of the affected public television stations, were involved. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (holding that it is right of viewers and listeners, not of broadcasters, that is paramount). Even if so, a clear and probably more significant weight should be attached to the systemic interest that I have identified.

[72] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[73] *See, e.g.*, Burson v. Freeman, 112 S. Ct. 1846, 1851 (1992) (upholding prohibition of solicitation of votes within 100 feet of entrance to polling place).

[74] *See* Korematsu v. United States, 323 U.S. 214, 223-24 (1944).

external to consideration of the sensible scope of government powers.[75]

Again, this may seem banal—the necessary compromise of a body of law committed to individual rights with an unhappy and recalcitrant reality. But the picture may appear somewhat different when focus shifts to cases in which the interests underlying a claim of government power are identical to those that, in other contexts, support claims of constitutional rights. For example, the interests reflected in the Equal Protection Clause support broad government power to discourage or ban invidious discrimination by private groups, and the Supreme Court, in cases such as *Roberts v. United States Jaycees*,[76] has held that rights not to associate are limited accordingly.[77]

It is important to be clear about what happens in cases such as *Roberts*. What is involved is not a trade-off of one constitutional right against another; there is no constitutional right to be free from private discrimination. What we see instead is one right—the right not to associate—shrinking to accommodate a recognition of government power. But the right and the power are not conceptually independent. Each is specified in terms of the other, and the balance is struck by reference to underlying interests.

B. DEFINITIONS OF RIGHTS

So far I have been talking about explicit judicial balancing of asserted private rights against the claimed practical necessity of upholding government power. Some more interesting cases of conceptual interdependence between individual rights and governmental powers involve the definition of presumptively protected rights in the first instance. The definition of protected rights

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[75] As Charles Fried has pointed out, it is crucial how the interests to be balanced are framed. *See* Fried, *supra* note 14, at 768-77. The government's interest in any particular case always reaches beyond the individual claiming a right there to all others who could claim the benefit of the rule of decision. But a similarly general focus is appropriate in determining the strength and sweep of the interests that underlie a claim of right. *See id.* at 773-74.

[76] 468 U.S. 609 (1984); *see also* New York State Club Ass'n v. New York, 487 U.S. 1, 10-14 (1988) (upholding New York City ordinance prohibiting discrimination by private clubs).

[77] *See Roberts*, 468 U.S. at 623.

depends pervasively on a balancing of the interests underlying the rights against the interests supporting the recognition of governmental powers.[78]

Under the First Amendment, the domain of protected speech is defined largely by balancing the interests underlying the Free Speech Clause against the interests calling for recognition of governmental powers to protect citizens from damage to reputation, from invasions of privacy, from harms incident to the production and distribution of child pornography, and so forth.[79] In some cases, it may be possible to say there is no speech value whatsoever extending beyond the point at which the line defining a right is drawn. More commonly, however, the judgment is that a line must be drawn where speech values begin to be outweighed by other values[80]—or, perhaps more precisely, that a right so defined as to preclude government from protecting non-speech interests would produce unacceptable consequences. Seldom if ever does the Supreme Court say that one constitutional right—such as speech—must leave off because another constitutional right—such as privacy—begins. Rather, the Court says that the constitutional speech *right* leaves off because the government's *power* to define and protect a non-constitutional right—such as a privacy right—should begin. The conceptual limit of the constitutional right is not, in other words, another right, but a power of government, supported and identified by reference to underlying interests.

It is easy to cite instances in which interest analysis, with the interests supporting goverment power weighed against the interests underlying a constitutional guarantee, determines the precise definition of a constitutional right. In the domain of freedom of religion, free exercise rights leave off where governmental power to regulate begins; and in drawing the line between a protected right and that which government may regulate, the Supreme Court has

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[78] For a similar descriptive claim, coupled with a forceful critique, see David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521 (1992).

[79] *See* Scanlon, *supra* note 40, at 520-37 (identifying kinds of interests underlying free speech rights); SHIFFRIN, *supra* note 10, at 9-45 (defending an interest-balancing approach to First Amendment issues).

[80] *See* R.A.V. v. St. Paul, 112 S. Ct. 2538, 2543-44 (1992) (noting that proscribable categories of speech are not necessarily worthless or "entirely invisible to the Constitution").

recently been acutely attentive to what it considers the practical need for government to be able to regulate evenhandedly, without recognizing exceptions to generally prevailing duties for those with religious reasons for non-compliance.[81]

In determining what constitutes a "taking" of property for public use, the Court has recognized that the concept of property requires definition, sometimes on an ad hoc basis.[82] Property is "a bundle of sticks," and it is a judgmental matter when the withdrawal of one or more amounts to a taking. In reaching this determination, the Court has regularly relied on a balancing of the affected private interests against the interests underlying government's assertion of regulatory power.[83] Once again, right and power are conceptually interdependent.

The list could be expanded,[84] but the point should be clear: within our constitutional practice, rights depend pervasively on judicial assessment of the appropriate scope of government power. To think of rights as conceptually independent constraints on

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[81] *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 878-80, 889-91 (1990) (holding that Free Exercise Clause does not preclude enforcement of state statute proscribing ingestion of peyote against persons using peyote as part of religious ritual). For a forceful critique of *Smith*, see Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

[82] *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2892-93 (1992).

[83] A dramatic example of this type of balancing is presented in Miller v. Schoene, 276 U.S. 272 (1928). There, in order to prevent the infection of apple trees by cedar rust, the state ordered that certain cedar trees be destroyed, and the owners claimed a violation of their property rights. *Id.* at 273-76. The Supreme Court rejected the claim. *Id.* at 279-80. Government action, the Court reasoned, was necessary to protect the interests of the apple tree owners, and the property rights asserted by the owners of cedars, which of course were rooted in identical interests, must be limited accordingly. *Id.*

[84] *See* Faigman, *supra* note 78, at 1547-63. Among the conspicuous examples, the Fourth Amendment's prohibition against unreasonable searches and seizures obviously calls for an assessment of the government's interests in fixing the scope of the right. *See, e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 449-54 (1990) (finding it necessary to balance governmental interests against individuals' privacy expectations to determine scope of Fourth Amendment); Tennessee v. Garner, 471 U.S. 1, 8 (1985) (stating that " 'the balancing of competing interests [is] the key principle of the Fourth Amendment' " (quoting Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981))). In citing these cases, I certainly do not mean to approve everything that the Supreme Court has done in the name of balancing. For a useful conceptual critique, see John M. Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1181-83 (1989) (arguing that balancing is appropriate in determining reasonableness of search or seizure but not in determining whether search or seizure has occurred).

government power is generally mistaken.

C. RIGHTS DERIVING FROM CONCERNS ABOUT POWERS

Within our constitutional practice, concerns about the way the powers of government must be limited to prevent possible abuse furnish a common foundation for rights. Consider some cases discussed already. It is dangerous for government to be allowed to promote its preferred political views; there is no good reason to think that promotion of all its views through all available mechanisms lies within the power given to government. When government tries to make facilities available to adherents of one view but not another, it might therefore be thought to act outside the scope of any delegated power, and its efforts to enforce exclusionary principles might be treated as legal nullities. Within our constitutional practice, however, we tend to express the conclusion not in terms of a limit on powers but through the vocabulary of individual rights. Under current doctrine, those who wish to express disfavored views have a "right" not to be excluded on the basis of viewpoint.[85]

There is no constitutional right to welfare.[86] But it would be incompatible with the constitutional plan for state governments to be allowed to discourage interstate mobility by withholding welfare payments from otherwise eligible persons who have failed to satisfy a length-of-residence test. Within a plausible scheme of analytical concepts, state regulations adopted for this purpose would be regarded as ultra vires.[87] Constitutional doctrine instead, but to the same effect, recognizes a right based on a confusing mixture of equal protection and right to travel analysis.[88]

School children have no right to the inclusion of any particular

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[85] *See generally* Stone, *supra* note 59 (exploring foundations of First Amendment prohibitions against content- and viewpoint-based regulations).

[86] *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).

[87] *Cf.* Louis Loss, *The Assault on Securities Act Section 12(2)*, 105 HARV. L. REV. 908, 909 (1992) (observing that rule exceeding delegated rulemaking power of agency would be ultra vires and thus invalid).

[88] *See* Shapiro v. Thompson, 394 U.S. 618, 627-38 (1969) (holding that statutory prohibition of benefits to residents of less than one year creates classification that denies equal protection).

books in the school library. But if government selectively removes books to squelch a disfavored viewpoint, it abuses its power, and a "right" not to have books removed from the school library for unacceptable reasons is found.[89]

In no case do I mean to be critical. We are correct to worry about abuse of governmental power. My point is only that our current constitutional practice commonly invokes the conceptual apparatus of rights as its means of identifying governmental action that is ultra vires in the classic sense—action beyond the scope of delegated power because it is unconnected to the purposes for which power was delegated.[90] The rights generated in this way are no less real than other rights. In cases involving such rights, however, it should be clear that rights do not form an independent limit on government power. Rather, anxiety about abuse of power generates rights.

D. INTERDEPENDENCE IN ACTION: THE LAW OF CONSTITUTIONAL REMEDIES

So far I have argued that government powers and individual rights are conceptually interdependent. I now want to make a different, slightly stronger, empirical claim: within our constitutional order, the well-being, agency, and dignitary interests that underlie rights frequently are treated as being of lesser weight than the interests that support assertions of governmental power. The law of constitutional remedies illustrates the frequently subsidiary place of individual rights in comparison with governmental powers and the interests that lie behind those powers.

Despite the celebrated dictum of *Marbury v. Madison*,[91] there

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[89] *See* Board of Educ. v. Pico, 457 U.S. 853, 863-72 (1982).

[90] Another striking example comes from the Supreme Court's recent conclusion in Dennis v. Higgins, 111 S. Ct. 865, 872 (1991), that state legislation forbidden by the Commerce Clause—a constitutional provision empowering Congress to regulate and thereby implicitly disempowering the states to some extent—violates individual "rights" and that a cause of action is therefore available under 42 U.S.C. § 1983. For an illuminating discussion of rights, remedies, and enforceability in this context, see Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 223 (1991).

[91] 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

has never been a right to individual remediation for every constitutional violation.[92] Sovereign immunity often bars suit against the government, and official immunity commonly precludes recovery of damages from government officials.[93] The significance of these doctrines should not be overstated. Individual redress often is available, and sometimes the Constitution requires that it must be.[94] But the pattern is complex.

The best rationalizing explanation of the law of constitutional remedies relies on the necessity of balancing underlying interests. Individual remediation of constitutional violations is a goal, supported by a number of interests, but one that frequently has been made to yield to claims that judicial remedies would intrude too far on government interests in avoiding costly and vexatious litigation, maintaining fiscal stability, and encouraging officials to act fearlessly, undeterred by threats of personal liability.[95] On the other side of the ledger, the interests calling for effective remedies are diverse, but the most powerful is clearly systemic: the interest, asserted by the individual claiming a remedy, but shared equally by the citizenry at large, in achieving reasonably effective deterrence of abuse of government power.[96] This is why, even though individually effective remediation is often unavailable, the Supreme Court has recurrently suggested that the withdrawal of all judicial review of allegedly unconstitutional action would raise serious

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[92] *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1777-87 (1991).

[93] *See id.* at 1784-85.

[94] *See, e.g.*, McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 36-41 (1990) (finding that Due Process Clause requires effective remedy for unlawful tax exactions); First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304, 314-22 (1987) (finding that Just Compensation Clause of Fifth Amendment requires compensation for interference with property rights amounting to taking); Ward v. Board of County Comm'rs, 253 U.S. 17, 24 (1920) (holding that Fourteenth Amendment requires county to refund tax revenues obtained without authority and under coercion); General Oil Co. v. Crain, 209 U.S. 211, 226-27 (1908) (holding that state courts cannot circumvent protections of Fourteenth Amendment by recognizing sovereign immunity barrier to suit against state officials); *Ex parte* Young, 209 U.S. 123, 145-48 (1908) (finding right to injunctive relief implicit in Due Process Clause).

[95] *See* Fallon & Meltzer, *supra* note 92, at 1787-91 (discussing general principles underlying law of constitutional remedies).

[96] *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 337-39 (1993).

constitutional questions.[97] The Constitution requires an adequate system of remedies to keep the government, in general and on average, tolerably within the bounds of law. One person's interest in remediation can be sacrificed; the systemic interest in making sure that officials do not too often behave too lawlessly cannot.[98]

Measured against a familiar ideal of the rule of law, the notion that there might be rights without remedies provokes uneasiness. But recognition that a systemic interest undergirds the law of constitutional remedies helps to illuminate a symmetrical anomaly: something approaching remedies without rights. Where necessary to keep government tolerably within the limits of its constitutional powers, prophylactic remedies are often available. Under the First Amendment overbreadth doctrine, people engaging in constitutionally unprotected conduct can sometimes argue that a statute should be held unenforceable because it sweeps more broadly than the Constitution allows.[99] The Fourth Amendment exclusionary rule is exceedingly crudely crafted if justified as a tool of corrective justice, aimed at compensating victims for harms done. This objection, however, is beside the point. As my colleague Daniel Meltzer has argued, the true purpose of the exclusionary rule is deterrent.[100] Leading exceptions to standing doctrine, under which one person can sometimes assert the rights of another,[101] have a similar purpose and effect: litigation is permitted and remedies are awarded, not to protect the well-being, agency, or even dignitary interests of a litigant, but to ensure systemically adequate deterrence of abuse of official power and to protect others' interests of constitutional magnitude.

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[97] *See, e.g.*, Webster v. Doe , 486 U.S. 592, 603 (1988) (requiring heightened showing of congressional intent to preclude judicial review of constitutional claims to avoid "serious constitutional question" that preclusion would raise); Johnson v. Robison, 415 U.S. 361, 366 (1974).

[98] *See* Fallon, *supra* note 96, at 337-39, 369-72.

[99] *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991) (discussing and analyzing First Amendment doctrine).

[100] *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 253-78 (1988).

[101] For an overview of third-party standing doctrine, see PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 166-96 (3d ed. 1988).

In short, rights may not always be "trumps,"[102] but sometimes they are wildcards, eligible to be played when governmental power exceeds its sensible outer bounds.

III. CONSTITUTIONAL THEORY AND THE ROLE OF THE SUPREME COURT

It is now time to say a few words about how my claims about the relationship of rights, governmental powers, and underlying interests fit into some existing debates in constitutional theory. I could not possibly attempt to be comprehensive. It may be useful, however, to discuss how my claims relate to the rights-based theory of Ronald Dworkin on the one hand and, on the other, to some theories that attempt to identify stringent limits on the power of courts arising from the plain language of the Constitution or a theory of the separation of powers.

A. DWORKIN AND THE INTERRELATIONSHIP OF RIGHTS AND POWERS

Without plumbing the intricacies either of Dworkin's theory or the literature that has grown around it,[103] I want to make two main points. First, notwithstanding his rights thesis and his claim that rights are trumps,[104] at a deep level, the main lines of Dworkin's theory are generally consistent with my claims about the relationship of rights, powers, and interests. This, in itself, is a measure of the extent to which mainstream, post-New Deal constitutional theory has departed from older strands of liberal thought that would have viewed rights as conceptually independent limits on governmental power. Second, despite the deep-level compatibility between Dworkin's theory and my claims, much of Dworkin's rhetoric about rights as trumps and adjudication necessarily being a matter of principle, not policy,[105] can be read acontextually to convey a sharply contrary view. That Dworkin has

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[102] *See* DWORKIN, *supra* note 3, at xi (describing rights as "trumps").

[103] For my contribution to that literature, if such it be, see Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law*, 67 NOTRE DAME L. REV. 553 (1992).

[104] *See* DWORKIN, *supra* note 3, at xi.

[105] *See id.* at 84 (describing judicial decisions in civil cases as products of principle, not policy).

sometimes been read as endorsing that contrary view suggests, I think, how easy it is to assume that rights are conceptually independent limits on the powers of government and that any strong and coherent theory of rights must identify them as such.

1. The Rights Thesis. Dworkin's theory is rights-based in several senses. First, it incorporates a political theory founded on the proposition that all citizens have a right to equal concern and respect.[106] Second, it assumes that individuals have a variety of particular rights that cannot be sacrificed on an ad hoc basis to maximize society's utility or promote other collective goals.[107] Rights, in this sense, are indeed trumps. Third, Dworkin's theory asserts that courts must decide civil cases on the assumption that one party or the other has a right to win; courts cannot decide based on an independent judgment of sound policy.[108]

Dworkin's vocabulary, and especially his insistence that rights are trumps, might appear to rule out either interest balancing or any functional analogue. Yet something closely analogous to interest balancing does occur within Dworkin's theory. Except for the foundational right to equal concern and respect, Dworkin posits that rights have weights.[109] There may be a few rights that are absolute, but most can be balanced against each other, and even against goals and policies—such as welfare maximization—that compete with them. Indeed, Dworkin says that the weight of a right is measured by "its power to withstand such competition" within the framework of a particular political theory.[110]

It thus seems clear that Dworkin's theory poses no obstacle to a court's taking competing considerations or values into account in adjudicating claims of constitutional right. For Dworkin, courts must define the weights of competing rights, principles, and policies by locating them in a coherent political theory, not by rendering ad hoc judgments of what would do most to promote social welfare in

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[106] *See id.* at 272-73 (discussing and distinguishing right to equal treatment and right to treatment as an equal).

[107] *See id.* at 99-100.

[108] *See id.* at 82-84 (distinguishing between arguments of principle and arguments of policy and theorizing that judicial decisions in civil cases typically are and should be products of principle).

[109] *See id.* at 92.

[110] *Id.*

a particular case. But the reigning political theory hardly needs to be oblivious to social welfare and can assign to some social goals a higher value than it assigns to some rights.[111] In short, it is perfectly "competent" for a Dworkinian court to weigh competing considerations in determining whether a "concrete"[112] right should be recognized in a particular case; the most powerful constraint is that the balancing must be structured by a theory that is internally consistent and even-handedly applied from one case to the next.

An example may illuminate the point. Within Dworkin's terminology, the "abstract" right of citizens to engage in free speech in a public forum does not necessarily entail a "concrete" right to conduct a disruptive demonstration at rush hour. Depending on its weight in a particular political theory, the abstract right may yield to other citizens "rights" to traverse the streets free of unwanted disturbances or a policy of preventing disruptions in the flow of traffic. Indeed, Dworkin suggests that the "principles" by which rights are defined may be framed in the language of utility, tradeoffs, or balancing.[113] Expressed in these terms, one person's "right" to demonstrate in a public forum may be a right only insofar as the demonstration would not interfere unduly with the rights or interests of others.

Dworkin does not, to be sure, generally talk about "interests," as I have, as the mediating concept that allows rights and goals, principles and policies to be balanced against each other.[114] Nor do I wish to suggest that there is no difference between his approach and mine. I only wish to claim that Dworkin does, because he must, make room in his conceptual scheme for what I have described, in a different vocabulary, as a tradeoff of the interests underlying individual rights against the interests underlying claims of government power. In his theory, as in my analysis, the rights that are at stake in constitutional litigation cannot be defined independently of an inquiry into the powers of

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[111] *See id.* (concluding that some, but not all, social goals can outweigh a right).

[112] *See id.* at 93 (distinguishing between "concrete" rights that reflect outcome of balance of relevant considerations and "abstract" rights that are factor in balance).

[113] *See id.* at 98-100 (reasoning that economic analysis and arguments of principle are not mutually exclusive).

[114] *But cf. id.* at 85, 89 (suggesting that claims of rights are appeals to "interests").

government.

2. Dworkin's Relevance. I have labored through this discussion of Dworkin for several reasons. First, the reading of Dworkin that I have offered provides corroboration of a sort for my thesis that individual rights and governmental powers are conceptually interconnected within our constitutional regime; even the most staunchly rights-based of contemporary constitutional theories accepts this as a fact that must be explained and rationalized. Second, notwithstanding its deep consistency with my thesis, Dworkin's characterization of rights as trumps achieves its rhetorical force, I think, precisely because it resonates with deeply ingrained, possibly recessive, but hard-dying assumptions about rights as independent checks on government power, not capable of being put into a balance in which they might be outweighed. Finally, although I cannot prove it, I think Dworkin is misread by many to symbolize the view that rights are prior to and independent of government powers and the interests that underlie them. As I have suggested already, I believe that many of us tend to be somewhat two-minded about the issues that I have been discussing—acknowledging the interdependence of individual rights and government interests when we are thoughtful about it, but presupposing in less deliberative moments that rights are independent limits on government, not the product of any balance at all. Anyone who is two-minded in this way has an obvious interest in being able to cite an articulate and respected symbol of the latter view, and Dworkin, whose rhetoric seems so supportive on the surface, may appear the best candidate to fill the role. On the best reading, however, Dworkin will not fill the role for which he is cast, and if we were clearer about what goes on in our constitutional practice, we would recognize that the search for a descriptively plausible theory of constitutional rights that is disjoined from a theory of government powers is now anachronistic.

B. INCOMPATIBLE THEORIES

My discussion of Dworkin may have given the impression that my thesis about the relationship of rights, interests, and governmental powers has little practical bite—that it is, at best, a systematic statement of what everyone has implicitly accepted

already. But I do not believe this to be the case. My thesis does preclude some familiar positions in constitutional law and theory, and it may be useful to examine a couple of them.

If I am correct that both individual rights and governmental powers must be defined by reference to interests, and that these interests are often conflicting and must be balanced against each other with a view to practical consequences, the outer boundaries of judicial authority, and especially the power and responsibility of the Supreme Court, are necessarily broad. Critics sometimes claim that constitutional argumentation in terms of interests or values, not limited to enumerated rights, wrongly invites judges to substitute their personal values for those of the Constitution.[115] On the model of rights that I have offered, this criticism collapses. Consider the flag-burning cases.[116] In holding that burning a flag is protected "speech," the Supreme Court necessarily referred to the interests underlying the First Amendment—interests, among others, in being able to communicate ideas and emotional attitudes, in being able to receive such communications from others, and in precluding the government from influencing the political process by barring communications on the basis of content. On a narrowly textualist approach, burning a flag would not be speech, but conduct.[117]

Admission of interests into the constitutional calculus sometimes cuts against, as well as for, expansive definitions of constitutional rights. Reference to underlying interests or values was no more illicit in *New York v. Ferber*,[118] in which the Supreme Court concluded that "child pornography" is sufficiently removed from the central purposes of the First Amendment to be constitutionally prohibitable, than it was in the flag-burning cases. The identification of underlying values is undoubtedly a contestable enterprise, but no less unavoidable for being so.

Yet identification of underlying values, however necessary, is only one component of the interpretive enterprise. Rights reflect

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[115] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 511-12 (1965) (Black, J., dissenting); ROBERT H. BORK, THE TEMPTING OF AMERICA 98 (1990).

[116] *E.g.*, Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990).

[117] *See* Street v. New York, 394 U.S. 576, 610 (1969) (Black, J., dissenting).

[118] 458 U.S. 747, 756-64 (1982).

trade-offs of interests, and to determine where a balance should be struck requires assessment of consequences. How much speech of how much value is lost under one or another definition of prohibitable child pornography? What harms would occur to which interests if no category of prohibitable child pornography were recognized? How effectively could those competing interests be protected under possible alternative definitions of child pornography?

Critics have sometimes attacked the Supreme Court for laying down "prophylactic" rules that extend beyond what, in the critics' view, the Constitution mandates.[119] It has been said, for example, that the Supreme Court ruling that effectively requires the reading of *Miranda*[120] warnings to criminal suspects is not "real" constitutional law.[121] The Constitution, on this view, prohibits coercion of confessions, and the Court has no business framing a broader rule to achieve effective judicial enforceability. This claim misunderstands the relation of rights to interests. We sometimes speak of rights as if they were things, like objects, which courts either do or do not protect. But rights do not function that way. Rights exist to serve interests and should be defined accordingly. If the right must be broadly defined in order to protect the interests underlying a constitutional provision, broad definition is appropriate—unless, of course, a broad definition would entail too large a sacrifice of competing interests.[122]

As Professor David Strauss has pointed out,[123] what the Supreme Court did in *Miranda* did not differ in kind from what the Court does in many, largely unchallenged First Amendment cases. In *New York Times Co. v. Sullivan*,[124] for example, the Court

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[119] *See, e.g.*, Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985) (asserting that prophylactic rules cannot be justified as within federal courts' constitutional authority); *cf.* Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978) (questioning legitimacy of judge-made constitutional common law).

[120] *See* Miranda v. Arizona, 384 U.S. 436 (1966) (delineating now-familiar rights for custodial interrogation).

[121] *See* Grano, *supra* note 119, at 106-11.

[122] This is why property interests are not more broadly defined.

[123] *See* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195-204 (1988).

[124] 376 U.S. 254 (1964).

defined a First Amendment privilege broad enough to encompass false statements of fact.[125] False statements are presumably worthless in themselves,[126] but the Court decided that a narrower privilege would not give adequate protection to First Amendment values because too much chill would occur. In *Miranda*, as in *Sullivan*, the quarrel, if any, should not be with the judicial power to take consequences into account and to frame a right broad enough to protect constitutional interests effectively. The only proper grounds of objection would be substantive: that the Court misapprehended the interests at stake, weighed them incorrectly, or missed its guess about the practical effects of alternative rules.

IV. SOME ISSUES OF JUDICIAL ROLE

Having suggested that my thesis implies a broad judicial role, and thereby helps to explain the breadth of judicial power to which we have increasingly grown accustomed, I should introduce an important qualification. That qualification, in turn, may help to shed light on some now familiar aspects of Supreme Court practice.

A. RIGHTS, RULES, AND COMPETENCES

To assert that the Supreme Court has the power to appeal directly to constitutional interests and to balance those interests against each other is not to suggest that the Court's authority is unbounded, or that it should freely weigh and reweigh interests in every case.

Let me mention several, somewhat overlapping reasons. First, law is largely a matter of convention,[127] and the prevailing rules and conventions of constitutional adjudication establish limits on the balances of interests that even the Supreme Court can lawfully strike. Second, the job of the Supreme Court, as of all courts, is not to render ad hoc judgments but to maintain a workable body of law.

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[125] *See id.* at 279-80 (holding that false and defamatory criticisms of public officials are constitutionally protected unless uttered with knowledge of falsehood or reckless disregard for the truth).

[126] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (citing false statements as valueless).

[127] *See* Fallon, *supra* note 103.

Supreme Court decisions produce rules of law binding on lower courts and government officials throughout the nation. It is possible—though surprisingly difficult for me—to imagine a judicial tribunal that did not function in this way, a tribunal that in each case conducted an all-things-considered balance of all relevant considerations and left it to other tribunals in other cases to pursue similarly ad hoc processes of decision. Among its peculiarities, such a system would not, I think, include rights in the sense that we typically understand them. For the very point of a right is to block all-things-considered assessments.[128] To put the claim slightly differently, rights and rules in our constitutional scheme resemble the rights and rules that would exist under a system of rule utilitarianism.[129] Rules result from a balance of interests, but, once in place, exert an independent claim to obedience.

From the perspective of the Supreme Court, of course, the strength of an existing rule's claim to obedience is not equally strong in all cases. The Court can always reconsider whether it correctly balanced the implicated constitutional interests in developing a particular rule. Nevertheless, a variety of rule-of-law values support what Frederick Schauer has termed "presumptive positivism": the idea, roughly, that courts typically do and should accept the dictates of existing rules and conventions, unless doing so would conflict rather seriously with values or interests of supervening importance.[130] At a minimum, rejection of old rules is likely to upset settled expectations. In addition, the promulgation of bold new rules, or the abandonment of old ones, can have ripple effects that the Supreme Court may not be well situated to anticipate.

A further reason counsels hesitation in cases in which the Supreme Court is asked to expand the domain of recognized rights. It is an entailment of the relationship of interests, rights, and rules that I have sketched that rules and rights allocate decision-making

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[128] *See* Scanlon, *supra* note 3, at 104 (declaring that rights limit discretion); *cf.* FREDERICK SCHAUER, PLAYING BY THE RULES 107-74 (1991) (arguing that rules of all sorts typically have similar blocking function and rest on distrust of those bound by rules to make ad hoc decisions).

[129] *See* Scanlon, *supra* note 3, at 94.

[130] *See* Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 674-79 (1991).

competence.[131] Where a right exists, the capacity of legislative and executive decision makers to make all-things-considered decisions is thereby diminished. The courts assume the ultimate interest-balancing capacity.[132] But on what basis does the courts' superior interest-weighing capacity rest? Courts can make a plausible claim of special sensitivity to the interests underlying constitutional rights, but surely they have no comparable general expertise in assessing the weight of the interests that underlie assertions of government power.[133] Indeed, courts often will be much less well situated than legislative and especially executive officials to appreciate government's practical needs.

Among the tensions besetting judicial review, none may be more important than the comparative competence difficulty[134] that urgently presents itself when the conceptual interdependence of individual rights and governmental powers is fully appreciated. How do judges and Justices know, better than officials who may be far more expert in the matrix of practical constraints in which government must function, how the competing interests underlying claims of individual rights and claims of governmental power ought to be balanced?

B. THE COMPARATIVE COMPETENCE DIFFICULTY

Within the theory I have sketched, an ongoing encounter with the comparative competence difficulty—both as a general matter and in a stream of diverse contexts—is a defining feature of the Supreme Court's role. Indeed, an impulse to resolve questions of comparative competence in categorical ways underlies two sets of distinctions that currently dominate constitutional law: the

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[131] *See* SCHAUER, *supra* note 128; Fried, *supra* note 14, at 763-70.

[132] *See* Fried, *supra* note 14, at 763-70.

[133] The weighing of government interests is irreducibly bound up with a form of fact-finding involving what Professor Faigman calls either "constitutional rule" facts or "constitutional review" facts. *See* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 552-56 (1991). Faigman argues persuasively that constitutional fact-finding has not been an area of distinction for the Court. *See id.*

[134] *Cf.* Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 757 (1992) ("Judicial review inevitably raises issues of comparative competence.").

distinctions between positive and negative rights and between preferred rights and other, less preferred, liberty interests. Confronted with the awkward obligation of defining rights by reweighing interests that have already been weighed by officials who often may have plausible claims of relevant expertise, the Supreme Court has developed these distinctions to define areas of judicial deference to legislative and administrative officials. Indeed, the Court has identified some doctrinal enclaves in which the "professional" judgment of executive officials presumptively defines constitutional entitlements. The strategy is understandable, and in some cases appropriate, but it is unstable and provisional nonetheless and clearly can be carried too far. There are no bright lines marking the areas where non-judicial officials should be trusted with broad competence to weigh and balance interests of constitutional magnitude. Although the comparative competence difficulty furnishes reasons for judicial modesty, the concept of rights as it functions in our constitutional tradition presupposes that, in the absence of judicial oversight, political decision makers will undervalue the interests that rights are supposed to protect.

1. Distinguishing Positive and Negative Rights. Perhaps the most pervasive strategy in constitutional law is for courts to distinguish between negative and positive freedoms: to insist that constitutional rights stand as barriers against government coercion and discrimination, but do not require the government affirmatively to come to anyone's aid.[135] On the surface, recognition that rights reflect interests makes the sharp distinction between negative and positive liberties problematic. For example, the interests that support recognition of property rights against the government would also call for government enforcement of those rights against

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[135] *See, e.g.*, DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195-96 (1989) (finding Due Process Clause does not impose affirmative duty on State to provide protection against private action); *see also* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (noting that constitutional doctrine recognizes vastly more "negative" rights to freedom from government action than "positive" rights to governmental aid); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (criticizing judicial failure to recognize more positive constitutional rights).

invasion by private citizens.[136] Similarly, the interests underlying the constitutional guarantee of religious freedom would support a right to government protection against private violence aimed at preventing religious observance. Against this background, the distinction between negative and positive constitutional rights can be seen for what it is: not a categorical first principle of the constitutional order, but a rebuttable presumption concerning the appropriate resolution of the comparative competence difficulty. Among other things, definitions of rights represent an assignment of institutional competences to make particular decisions,[137] and a variety of considerations supports a broad discretion in explicitly policy-making officials to resolve questions of resource allocation.[138]

As a doctrinal matter, however, the distinction between negative and positive rights is not absolute. As Professor Currie has shown, limited, relatively isolated positive rights exist in a number of areas of constitutional law.[139] A theory that identifies the foundation of rights in interests not only helps to explain why this should be so but also illuminates more generally the provisional, historically contingent, and partially ad hoc nature of the "positive" and "negative" categories.[140] Whether classified as positive or negative, what rights should be recognized at any particular time

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[136] *See, e.g.*, NAGEL, *supra* note 51, at 141 (stating that if rights are based on requirements of legitimacy "equal importance must be assigned to rights against the coercive power of the state itself and to state enforcement of rights against interference by other people"); *cf.* Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1301 (1982) (stating that "since any private action acquiesced in by the state can be seen to derive its power from the state . . . positivism potentially implicates the state in every 'private' action not prohibited by law").

[137] *See* Fried, *supra* note 14, at 763-70.

[138] Notable among these is the multi-faceted character of resource allocation decisions. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985) (holding discretionary enforcement decisions of FDA nonreviewable). It is crucial to my argument, however, that there often will be competing considerations. For a balanced discussion of some of the factors that make an across-the-board solution unattractive in the context of administrative law, see Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985).

[139] *See* Currie, *supra* note 135, at 872-86 (delineating positive rights arising from Due Process and Equal Protection Clauses).

[140] In philosophical as much as in constitutional discourse, the distinction between "positive" and "negative" freedom is often oversimplified and therefore misleading. *See, e.g.*, JOEL FEINBERG, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 4-7 (1980) (noting inadequacies of the traditional distinction).

depends on an assessment of competing interests and likely empirical consequences and, at the second order, on a judgment of the courts' comparative competence to make those primary determinations.[141]

2. Distinguishing Economic Rights from Preferred Freedoms. Another judicial strategy for helping to resolve the comparative competence difficulty involves the division of negative rights into two further categories. One consists of preferred rights.[142] In cases involving preferred rights, judicial review is aggressive and unapologetic. The second category encompasses lesser rights, sometimes derisively referred to as "interests,"[143] that are largely entrusted to legislative balancing. First Amendment rights epitomize the preferred category; economic liberties are representative of the second. It is disputed whether the disparity makes sense.[144]

In general, I believe that it does, but only in a provisional way.[145] Not all interests are equally important or fundamental.[146] Moreover, the framework I have advanced expressly contemplates that the definition and categorization of rights should depend on assessments of likely consequences, including the consequences of allocating responsibility for the protection of particular interests to courts rather than to more democratically accountable decision makers. During the *Lochner*[147] era, allocation of power to courts to define economic rights in a non-deferential way produced unacceptable results. By contrast, the post-New Deal experience, marked by enormous judicial deference, has not

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[141] Because values matter to both the first- and second-order assessments, judgments of comparative competence have an irreducibly political component. For a further discussion of this issue, see *infra* notes 142-152 and accompanying text.

[142] *See, e.g.*, TRIBE, *supra* note 28, at 769-84 (discussing preferred rights).

[143] *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2867 (1992) (Rehnquist, C.J., dissenting) (referring to "woman's interest in having an abortion"); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

[144] *See, e.g.*, Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41 (1992) (arguing that property rights should be as aggressively enforced as speech rights).

[145] For another, similarly provisional defense, see Michelman, *supra* note 40.

[146] *See, e.g.*, FEINBERG, *supra* note 140, at 32.

[147] Lochner v. New York, 198 U.S. 45 (1905).

generally yielded outcomes that deserve to be deemed intolerable.[148] When the likelihood of unacceptable consequences is small if broad decisional competence is left to political decision makers, the case for aggressive, independent judicial balancing of interests is weak.

Another factor is also at work. Insofar as economic liberties are at stake, I agree with Ackerman[149] and Sunstein,[150] as I have suggested already, that the New Deal triggered a constitutional revolution reflecting the central idea that questions of economic distribution should, within broad limits, be left to the legislature.[151] Questions of judicial role do not lend themselves to analysis in terms of a few clear principles, but I think Ackerman is also correct in his further claim that the New Deal revolution should be regarded as having effected a de facto constitutional amendment that courts ought to respect.[152]

In any event, not all non-preferred liberties owe their disfavored status to foundational principles of New Deal constitutionalism. In many of its dimensions, the prevailing categorical scheme is as arbitrary and historically contingent as it is useful.

3. Deference to Professional Norms. A third, notable strategy for managing the comparative competence difficulty is exhibited in judge-made doctrines prescribing deference to other officials' professional judgment concerning the contours even of preferred

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[148] This is obviously a value judgment, but one that has parallels in many judgments about comparative institutional competence to weigh competing interests. *See supra* notes 19-22 and accompanying text.

[149] *See* ACKERMAN, *supra* note 10.

[150] *See* Sunstein, *supra* note 21.

[151] The revolution also reflected acceptance of the idea, which in some ways is logically prior, that economic and especially property rights are not "natural" or "neutral" but socially constructed and that government intervention to secure redistribution is not necessarily partisan legislation, impermissibly aimed at helping some at the expense of others. *See* Sunstein, *supra* note 21, at 423. Just because the private sphere is itself socially constituted, government is implicated willy-nilly. To recognize a property right in one party is to restrict the freedom of other parties, whose agency and well-being interests are therefore also at stake. As a result, questions of private right can never be divorced from what the government ought to do or be allowed to do. *Id.*

[152] *See* ACKERMAN, *supra* note 20, at 44-50, 101-04.

constitutional rights.[153] This phenomenon is perhaps most striking in areas where the Supreme Court has explicitly accepted professional standards as the measure of constitutional rights.[154] The Court has said, for example, that substantive due process in an academic setting demands only that officials' judgments not be "beyond the pale" of professional judgment;[155] that the liberty interests of persons in mental institutions may be defined by executive officials exercising reasonable "professional" judgment;[156] and that pre-trial detainees who have not been convicted of any crime have no right to "contact visits" with friends and family if "responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the [detention] facility."[157] Similar kinds of deference extend further. In the substantive due process area, the Supreme Court generally maintains that government must not be arbitrary,[158] but seldom finds arbitrariness; it typically refuses to second-guess the judgment of on-the-scene officials about what was reasonable under the circumstances.[159] In the domain of procedural due process, the government, under *Mathews v. Eldridge*,[160] gets to decide in the first instance what process is due; following a reweighing of the affected interests, the Supreme Court will upset

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[153] For a broader discussion of this phenomenon, see Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (arguing that "the contours of federal judicial doctrine regarding [underenforced constitutional norms] mark only the boundaries of the federal courts' role of enforcement" rather than the "full conceptual boundaries" of a provision of the Constitution).

[154] For a critical survey, see Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639 (1992).

[155] *See* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 227-28 (1985).

[156] *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 321 (1982); *see also* Washington v. Harper, 494 U.S. 210, 235 (1990) (stating that "[i]t is only by permitting persons connected with the institution to make these decisions that courts are able to avoid 'unnecessary intrusion into either medical or correctional judgments.' ").

[157] Block v. Rutherford, 468 U.S. 576, 589 (1984).

[158] *See* Fallon, *supra* note 96, at 315-27.

[159] *See, e.g.*, Collins v. City of Harker Heights, 112 S. Ct. 1061, 1069-70 (1992) (emphasizing strong presumption that officials had made reasonable judgments and suggesting that government action would be deemed "arbitrary in the constitutional sense" and therefore in violation of Due Process Clause only if it "shocked the conscience"). For a critical discussion of this standard, see Fallon, *supra* note 96, at 325-27, 360-65.

[160] 424 U.S. 319 (1976).

the balance only in cases of demonstrable error.

The allure of this strategy is obvious on the surface: the Supreme Court picks out areas where it supposes that competent officials would know more than it does, and it uses the judgment of competent officials as at least a presumptive measure of constitutional rights. The difficulty is equally obvious, however: though experts on the scene may know more than courts about the interests supporting claims of government power and discretion, those officials may be less sensitive to the interests underlying claims of constitutional rights.[161] Human nature being as it is, officials are likely to prefer that things be done in a way that promotes order and preserves routines that the officials find comfortable because a central function of rights is to preserve spheres of privacy and autonomy against the order-imposing impulses of officialdom.[162] Regardless of the nature of the right at issue, whether to defer to officials' claims of relevant expertise is itself a substantive choice for which a judge or Justice cannot escape responsibility.

V. SOME IMPLICATIONS

My thesis that individual rights and governmental powers are conceptually interconnected is analytical, not normative, and it has few if any prescriptive entailments. In a less formal sense, however, I believe that the thesis lends support to some specific arguments for reform. In particular, I think the thesis has some implications for (1) judicial appointments, (2) constitutional doctrines dealing with standing and the problem of so-called unconstitutional conditions, and (3) the responsibility of officials other than judges to promote constitutional values.

A. SUPREME COURT APPOINTMENTS

If the identification of rights requires courts to engage in interest

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[161] *See* Stefan, *supra* note 154.

[162] *See, e.g.*, Louis M. Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1007 (1987) (explaining why, "a half century after the interment of *Lochner*, the Supreme Court continues to bound separate public and private spheres").

balancing of the kind that I have described, we need judges, and especially Justices of the Supreme Court, who possess practical wisdom[163]—people who are sensitive to the interests that underlie constitutional rights, but schooled also in the workings of government, and possessed of experience in making difficult choices under circumstances of imperfect information. Practical wisdom is not, of course, a "neutral" virtue.[164] On the contrary, wisdom, in the practical sense, is bound up with values, and values are notoriously diverse and contestable. Moreover, many judicial decisions necessarily reflect empirical presuppositions, and what a judge or Justice takes to be the relevant facts about human nature and social reality are likely to vary in relatively systematic ways with his or her ideological outlook.[165] Clearly, however, good judging requires more than laudable principles; it demands an aptitude for sizing up situations and assessing which principles ought to control under particular circumstances.

There was a time, not long ago, when Supreme Court Justices tended to be people of national reputation and broad experience who had demonstrated their qualities of practical judgment before ascending the bench.[166] Without favoring any exclusive indicator of fitness for service on the Supreme Court, I think that at least some considerable number of Supreme Court Justices should be men and women whose judgment has matured and manifested itself in dealing with problems of interest balancing in a variety of practical contexts. This, again, is not to deny the appropriateness

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[163] *See* Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735, 1752-53 (1988) (stating that a "practically wise judge has developed excellence in knowing what goals to pursue in a particular case and excellence in choosing the means to accomplish those goals"). For an illuminating exploration of some related issues and concepts and their intellectual history, see RONALD BEINER, POLITICAL JUDGEMENT (1983).

[164] *Cf. supra* notes 141, 148 (arguing that assessments of comparative competence reflect value judgments).

[165] *Cf.* Faigman, *supra* note 78, at 1522-25 (identifying and criticizing the characteristic judicial practice of "normative" fact-finding).

[166] *See* Sanford Levinson, *Contempt of Court: The Most Important "Contemporary Challenge to Judging"*, 49 WASH. & LEE L. REV. 339, 342 (1992); Tushnet, *supra* note 134.

of concern about a judicial nominee's substantive values.[167] On the contrary, by their fruits we may know them.[168]

B. CONSTITUTIONAL DOCTRINE

Although judicial deference is both familiar and sometimes appropriate, my thesis that constitutional rights reflect interests, when conjoined with my catalogue of the kinds of interests that rights properly protect, implies that there are some doctrinal areas in which courts should adopt a more aggressive role. In sorting constitutional interests into classes, I paid special attention to a general interest in averting abuses of government power or keeping government generally within the bounds of law. Acknowledgement of the constitutional status of this interest should have implications for the law of standing and for the diverse set of issues discussed under the rubric of "unconstitutional conditions."

1. The Law of Standing. Much of modern standing law purports to deny that rights to sue can exist apart from harms to the agency or well-being interests of particular claimants.[169] This restrictive view arises partly from the untenable assumption that common-law definitions of legal rights and legally protected interests were objectively grounded and not properly subject to legislative or judicial adjustment;[170] it rests, too, on a more understandable impulse to cabin the awkward judicial role of reweighing interests that legislative or executive officials have presumably taken into

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[167] There are limits, of course, on how far Presidents or Congress ought to go in seeking to revolutionize constitutional law through what Bruce Ackerman has called "transformative appointments." ACKERMAN, *supra* note 20, at 52-53; *see* Richard H. Fallon, Jr., *Common Law Court or Council of Revision?*, 101 YALE L.J. 949, 964-65 (1992) (book review).

[168] *See* Tushnet, *supra* note 134, at 762-63.

[169] *See, e.g.*, Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2143-46 (1992) (stating that generalized grievances do not satisfy standing requirements and that "in suits against the government . . . the concrete injury requirement must remain"). Asserted harms to what I would classify as dignitary interests are not infrequently disparaged. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 755-56 (1984) (holding that "stigmatic injury" is insufficient to support standing unless "suffered as a direct result of [someone's] having personally been denied equal treatment").

[170] *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988).

account already.[171]

Whatever its rationale, standing doctrine that is rooted in the requirement of injury-in-fact lacks intellectual coherence.[172] Endless perplexity and doctrinal confusion have surrounded asserted injuries to dignitary and related interests. Sometimes the Court appears to treat psychological affront or sense of grievance as constituting injury-in-fact;[173] sometimes it does not.[174] If rights appropriately exist to protect dignitary and systemic interests—as clearly they do—it would be better to look past injury-in-fact to underlying constitutional interests and to ask directly who, if anyone, should be able to assert particular interests under particular circumstances.[175]

To say this is not to imply that all barriers to standing ought to fall. Allocations of power are at stake. Given comparative institutional competences and the government's interest in being able to function free from vexatious litigation, more judicial power is by no means necessarily better. Nonetheless, the current analytical framework, with injury-in-fact as its centerpiece, is pervasively misguided. Likelihoods of harm to constitutional interests if standing to sue is not recognized and judicial competence to conduct the interest balancing that would be relevant to a decision on the merits should matter at least as much as whether the plaintiff has suffered injury-in-fact.

2. Unconstitutional Conditions. The implications of recognizing that systemic interests frequently underlie rights are by no means limited to standing law. Among systemic interests, perhaps the most important is that in keeping government generally within the bounds of law. Threats to this interest grow increasingly acute as government becomes more pervasive. Government cannot lawfully forbid pro-abortion speech by the doctors, nurses, and other

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[171] Recent decisions have attempted to link standing doctrine to separation-of-powers considerations. *See, e.g., Lujan*, 112 S. Ct. at 2135-37 (1992); *Allen*, 468 U.S. at 750-52.

[172] *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229-34 (1988).

[173] *See, e.g.*, Powers v. Ohio, 111 S. Ct. 1364, 1371 (1991) (holding that perception of unfairness counts as injury-in-fact, allowing criminal defendant to challenge race-based exclusion of potential jurors).

[174] *See, e.g., Allen*, 468 U.S. at 755-56.

[175] *See* Fletcher, *supra* note 172. Although Professor Fletcher does not explicitly employ the vocabulary of "interests," his analysis appears wholly consistent with mine.

professionals to whom pregnant women may turn for advice. But what if government buys up the speech of such professionals by putting them on the government payroll and dictating the messages that they can communicate in their capacities as employees?[176] Proceeding in this way, government may achieve a dominance of influence that is nearly as effective as if it had imposed censorship of private speech that the First Amendment clearly would prohibit.

Government similarly cannot forbid parents to send their children to private schools.[177] But what if government were to create a subsidy for public education that is irresistibly attractive to the overwhelming majority of parents and then use the public schools to inculcate views that marginalize or demean women or minorities?

These are hard questions. Once again, to recognize rights is to assign judicial competence to make decisions for which the courts may be ill-equipped. Yet not to recognize rights may be for the courts to abandon their role as balancer of constitutional interests in many of the areas in which those interests are most vitally implicated in the modern age. And, as I have argued already, it is values or interests with which constitutional adjudication is necessarily most concerned.

Constitutional scholars have increasingly turned their attention to problems such as those that I have raised. The rubrics of analysis vary. But concern for systemic interests, even if individual agency and well-being or even dignitary interests are not directly involved in a particular case, underlies a good deal of recent writing about the law of standing,[178] Vincent Blasi's exposition of what he calls the checking function in First Amendment law,[179] Steven Shiffrin's work on government speech[180] and his championing of the importance of sustaining a culture of dissent,[181] and the writing of Kathleen Sullivan[182] and

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[176] *Cf.* Rust v. Sullivan, 111 S. Ct. 1759, 1764-66 (1991).

[177] *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); *cf.* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (upholding rights to teach and learn German).

[178] *See, e.g.*, Fletcher, *supra* note 172; Sunstein, *supra* note 138.

[179] *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1988 AM. B. FOUND. RES. J. 521.

[180] *See* Shiffrin, *supra* note 62.

[181] *See* SHIFFRIN, *supra* note 10.

others[183] on unconstitutional conditions.

I cannot go into detail here, but I do wish to reiterate a point made earlier: which rights ought to be recognized depends substantially on an assessment of consequences. Consider some questions arising under the First Amendment. Viewed in general terms, the First Amendment is the provision of the Constitution most directly concerned with governmental efforts to control the flow of information and ideas. At the time of the First Amendment's drafting and ratification, I assume that government characteristically would have attempted to affect the flow of ideas, if at all, through traditional forms of regulation and prohibition of private speech. Today, however, government performs other functions through which it might plausibly achieve nearly equal impact on many if not all of the underlying interests. Government can, for example, attempt to shape what people hear and think through its control of the public school curriculum, through its conditioning of grants on a surrender of speech rights, and through restrictions on what its employees may say and requirements as to what they must say as a condition of employment.[184] Although all of these activities implicate First Amendment values, what rights should be recognized depends on multiple variables.

Imagine, for example, a student asserting a right not to be subject to a politically slanted school curriculum designed to communicate demeaning views of particular minorities. For a school board or a teacher to use public school classrooms for this purpose would be an egregious abuse of governmental power, but for the Supreme Court to lay down a legal standard inviting challenges to school curricula would have unwanted consequences of its own. In addition, choices about what to teach and how to teach it implicate managerial interests that courts may be ill-

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[182] *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

[183] *See, e.g.*, Richard A. Epstein, *Foreword: Unconstitutional Conditions: State Power and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Michael M. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism*, 70 B.U. L. REV. 593 (1990).

[184] *See* Shiffrin, *supra* note 62.

equipped to understand.[185] Whether a right should be recognized in this context—and, if so, how that right ought to be defined—thus depends on an assessment, among other things, of how pervasive "the problem" is in fact (if indeed it exists at all), how much harm and how much good would come from judicial intrusion in this traditional area of broad but not unbounded[186] political and administrative discretion, and whether a standard could be framed to deal with the most serious abuses of power without inviting litigation aimed at identifying and correcting too many non-existent abuses. My own, tentative view would be that a right should be recognized in this context if an appropriate case arose, but that it should be narrowly defined to guard only against what I take to be the most flagrant abuses of government power: a right not to be subject to a school curriculum deliberately structured to deny the equal worth and citizenship of any class of citizens, regardless of race, gender, or religion, or to promote a particular view on issues generally viewed as partisan or political within the society.

My principal concern, however, is more theoretical than substantive. At the level of constitutional methodology, I agree wholeheartedly with a point made in different ways by Steven Shiffrin[187] and Cass Sunstein:[188] the threat of government achieving a dominance that allows it to subvert constitutional interests through mechanisms other than traditional regulation is diverse, and it would be a mistake to expect a unitary solution. Underlying constitutional interests are threatened in varying degrees, and competing government interests may be more or less powerful. Also, the practical competence of the courts may be greater in some cases than in others. Only about my critical claim would I be dogmatic: courts should get over any lingering notion that legislatures necessarily have a free reign as long as they do not prohibit traditionally private conduct.

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[185] For a useful discussion of government's "managerial interests" and some First Amendment problems, see Post, *supra* note 62.

[186] *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 103 (1968) (recognizing limit flowing from Establishment Clause); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (recognizing free speech rights of public school students that limit administrative discretion).

[187] *See* SHIFFRIN, *supra* note 10; Shiffrin, *supra* note 62.

[188] *See* Sunstein, *supra* note 183.

C. NONJUDICIAL PROTECTION OF CONSTITUTIONAL INTERESTS

If constitutional rights reflect constitutional interests, it should be clear that judicial identification of rights represents only one medium through which constitutional interests are, and indeed must be, protected. This point emerges clearly in considering the interests that underlie government powers. Interests can be constitutionally cognizable, even compelling, yet the choice whether and how to protect those interests may lie with legislative or executive officials.[189]

Some commentators have puzzled over this phenomenon.[190] If government has a compelling interest in educating children, then how, it is wondered, can that interest fail to give rise to a fundamental right of children and parents to have education provided? The answer, implicit in what I have said already, is that recognition of rights reflects allocations of decision-making competence. For reasons comprising what I have called the comparative competence difficulty, courts may rightly hesitate to translate every interest of constitutional magnitude into a constitutional right or may even defer to the judgments of non-judicial officers concerning what the Constitution requires. Along with the constitutional discretion thus accorded to non-judicial officials, however, goes a responsibility. As Paul Brest and Lawrence Sager argued some years ago, the enforcement of constitutional norms, and indeed the translation of constitutional interests into rights, is as much a legislative and executive function as it is a judicial function.[191] Especially in light of the current composition of the Supreme Court, it is urgent that this responsibility should be acknowledged.

CONCLUSION

Interests, powers, consequences, rights. These four concepts are connected inextricably in contemporary constitutional law. Often

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[189] *See, e.g.*, Stephen E. Gottlieb, *Compelling Governmental Interests and Constitutional Discourse*, 55 ALB. L. REV. 549, 554 (1992).

[190] *See id.*; Kate Stith, *Government Interests in Criminal Law*, 55 ALB. L. REV. 679, 682-87 (1992).

[191] *See* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Sager, *supra* note 153.

we assume that rights are independent of governmental powers and bound them; that rights are independent of consequences—to assume otherwise is what is wrong with utilitarian morality; and that rights are independent of interests—that interest balancing belongs in the legislature, not in a judicial forum of principle. But these assumptions, I have argued, are all mistaken. Having so argued, I have also tried to give a provisional sketch of some alternative assumptions on which constitutional analysis might better proceed. I have not, however, argued in favor of any systematic approach to constitutional issues.

Ronald Dworkin has forcefully and elegantly maintained that the Supreme Court should have as its regulating ideal the production of a body of law that is pervasively consistent in principle.[192] At a deep level, I do not disagree.[193] Increasingly, however, that ideal seems to me too lofty and remote to offer much useful regulation. I have argued that courts must pervasively engage in the balancing of interests, including the interests that underlie government powers, and that they must do so in such a way as to create practically workable allocations of decisional competence among institutions of government. If this view is correct, identification of rights cannot be a detached, principally philosophical affair. Although philosophical analysis can often help, courts are pulled irresistibly into the flux, urgency, and practicalities of government and administration. What is needed is not just principle but prudence, not just analytical power but practical wisdom, not just judicial craftsmanship but statecraft. That is a tall order, and it is not surprising that we are often disappointed in the way it gets filled.

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[192] *See* RONALD DWORKIN, LAW'S EMPIRE 400-10 (1986).

[193] I do disagree, however, with Dworkin's apparent belief that the concept of law can best be explicated through analysis of the judicial role and with the extent to which he elevates morals over convention in defining that role. *See* Fallon, *supra* note 103.