

February 2013

## A General Theory of Governance: Due Process and Lawmaking Power

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A GENERAL THEORY OF GOVERNANCE:  
DUE PROCESS AND LAWMAKING POWER

LOUISE WEINBERG\*

ABSTRACT

*This Article proposes a general theory describing the nature and sources of law in American courts. Erie Railroad Co. v. Tompkins is rejected for this purpose. Better, more general theory is available, flowing from the Due Process Clauses. At its narrowest, the proposed theory is consonant with Erie but generalizes it, embracing federal as well as state law and statutory as well as decisional law in both state and federal courts. More broadly, beyond this unification of systemic thinking, the interest-analytic methodology characteristic of due process extends to a range of substantive constitutional problems. These include problems concerning both the intrinsic sources of power and the individual rights that are power's extrinsic limits. This Article argues, further, that in rights-based constitutional litigation, substantial scrutiny should become, and as a practical*

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\* Copyright © 2013 by Louise Weinberg. Holder of the Bates Chair and Professor of Law, the University of Texas at Austin. Earlier drafts of parts of this Article were presented at the annual meeting of the Association of American Law Schools, Washington, D.C., January 7, 2012; the conference on "Federalism and its Future," University of Texas School of Law, February 11-12, 2012; and the Symposium on "Law Without a Lawmaker," William & Mary Law School, Williamsburg, VA, February 24, 2012. I am grateful to Michael Green, the *William & Mary Law Review*, the William & Mary Institute of Bill of Rights Law, and co-symposiasts Anthony Bellia, Lea Brilmayer, Bradford Clark, Abbe Gluck, Craig Green, Michael Green, Emily Kadens, Caleb Nelson, Kermit Roosevelt, Steven Walt, and Ernest Young. Thanks also for helpful comments to Sanford Levinson, Robert Schapiro, and Michael Greve.

This Article builds on Louise Weinberg, *Unlikely Beginnings of Modern Constitutional Thought*, 15 U. PA. J. CONST. L. 291 (2012); Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM. 523 (2004); Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 BYU L. REV. 731; Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743 (1992); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982).

*matter is, the general rule, and that certain economic rights should have the benefit of substantial scrutiny.*

*Among the current and recent cases briefly discussed are Sebelius, the “Obamacare” case; Morrison, the Virginia Tech rape case; Kiobel, the Nigerian torture case; Kelo, the failed redevelopment case; Astrue, the in vitro child Social Security case; and Arizona v. United States, the immigration case.*

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## I. A MISSED OPPORTUNITY

What are the lawmaking powers of state and nation in this federal union? How are these powers related to the powers of state and nation in their respective courts? How are these powers related to the litigation of rights? These questions are of obvious importance, but we do not seem to have very clear answers. We know what courts usually say they are doing, but we do not seem to have a coherent picture of what courts usually do in fact, or what it lies in their power to do.

*Erie Railroad Co. v. Tompkins*,<sup>1</sup> with its rich intellectual foundation—its Holmesian realist understanding of the nature of law and the role of courts in fashioning it;<sup>2</sup> its Holmesian positivist insistence that law is not law without some relevant lawgiver;<sup>3</sup> and its Austinian insistence on the deference due to judge-made law, when it applies<sup>4</sup>—should have, and could have, provided a unified theory of lawmaking power. But that did not happen. *Erie* failed to cover the intellectual ground laid.

For *Erie* to work as a general theory of American lawmaking power, the *Erie* Court would have had to find a way to embrace federal as well as state law, statutory as well as decisional law, and state as well as federal courts. The Court would have had to press *Erie*'s positivism further to identify the sources of lawmaking power. And it would have had to address the general problem of allocating lawmaking power, not only within a state, but among the states,

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1. 304 U.S. 64 (1938).

2. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate."); *see also* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

3. *Erie*, 304 U.S. at 79 (Brandeis, J.) ("The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is a transcendental body of law ... but law in the sense in which courts speak of it today does not exist without some definite authority behind it." (internal quotation marks omitted)); *Jensen*, 244 U.S. at 222 (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign ... that can be identified.").

4. *Erie*, 304 U.S. at 78 (Brandeis, J.) ("And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."). *See generally* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832) (arguing that all law, including decisional law, is the positive command of some sovereign).

and between state and nation. Ideally, a truly general theory would have seen the relation of power to rights. Having stopped short of any of this, *Erie* can offer only a useful point of departure.

Ironically, by 1938, when *Erie* was decided, the time was ripe for better theory. Cases in the Hughes Court on the conflict of laws, federalism, and constitutional analysis<sup>5</sup> were evolving in tandem to a point at which more comprehensive and powerful theory lay ready to hand.

This Article points to a simple but general way of understanding the sources and allocation of lawmaking power in the United States, one that takes hold, more completely and satisfyingly, of the massive positivistic transformation in American law that is *Erie*'s signal achievement. It argues that the teachings of *Erie* might well be reconceived, freeing them from *Erie*'s confines and recognizing *Erie* as a reflection of *due process*. As such, *Erie* can be read in a generalized way as holding that the law applied in all courts on any issue must be the law of a sovereign with a legitimate interest in governing the particular issue on the particular facts. The general unifying theory proposed here is best understood, then, as flowing from the Due Process Clauses, with their attendant interest-analytic, purposive methodology. Lawyers and judges are already substantially guided, consciously or not, by the systemic understandings of which *Erie* is a partial reflection.

Beyond this, the Supreme Court's more substantive constitutional cases are similarly informed by interest-analytic reasoning—not only on the scope of government power and its intrinsic limits but also on the scope of individual rights, which are the extrinsic limits of power. Just as the Fourteenth Amendment's Due Process Clause controls irrational state *choices* of law,<sup>6</sup> it controls irrational state

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5. The term "constitutional analysis" as used here is to be distinguished from "constitutional interpretation." Constitutional interpretation is concerned with the meaning of the Constitution. Constitutional analysis is concerned with the reason for the government law or act under challenge, and the reasonableness of the means employed.

6. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (Rehnquist, J.) (holding forum law inapplicable when the forum's contacts with a case were insubstantial); *id.* at 821-22 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (Brennan, J.) (requiring as a matter of due process that the forum have sufficient contacts with the controversy creating governmental interests such that a choice of forum law would not be arbitrary or unfair)); cf. *Home Ins. Co. v. Dick*, 281 U.S. 397, 405-07 (1930) (Brandeis, J.) (requiring relevance in choice of law under the Due Process Clause of the Fourteenth

law and arbitrary official state action.<sup>7</sup> The Fifth Amendment's Due Process Clause has substantially similar significance for constitutional control of federal laws and acts.<sup>8</sup>

## II. A GENERAL THEORY OF GOVERNMENTAL POWER

The presumptive authority of government to act, in any of its branches, should require only a showing of legitimate governmental interest. At least since the late 1930s, the sovereign's legitimate governmental interest—rational, important, or compelling—or, at least, its general sphere of interest,<sup>9</sup> is what sustains an exercise of governmental authority. The reader may recognize this sort of interest-analytic purposive reasoning as characteristic of modern due process theory.

### A. *The Curious Dawning of Modern Due Process Theory*<sup>10</sup>

As it happens, by 1938, when *Erie* was handed down, due process as grounding a general theory of governmental power was ripe for deployment. Justice Brandeis could easily have given us more general theory than he delivered in *Erie*. Brandeis was author of the opinion in the 1930 case of *Home Insurance Co. v. Dick*,<sup>11</sup> the first due process case to control a choice of law without reference to

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Amendment).

7. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting) (pointing out that the Due Process Clause "already prohibits irrational government action").

8. The Bill of Rights applies directly, of course, to the federal government, but where it is silent, the Fifth Amendment's Due Process Clause will be found by some mechanism to reverse—"incorporate" the unenumerated right. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (Warren, C.J.) (finding an equal protection component in the Fifth Amendment's Due Process Clause).

9. A choice rule that would simply identify a "sphere of interest" would be a rough "jurisdiction-selecting" rule, in the sense of the term as introduced in David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 194 (1933) (making the point that the identification of a sphere of interest takes place on a preliminary level of thought, and rarely, if ever, should determine an application of law without further analysis of the particular issue on the particular facts).

10. For further discussion of material in this Part, see Louise Weinberg, *Unlikely Beginnings of Modern Constitutional Thought*, 15 U. PA. J. CONST. L. 291 (2012).

11. 281 U.S. at 407 (striking down irrelevant law as depriving the defendants of property without due process).

*Lochner v. New York*'s "liberty of contract,"<sup>12</sup> without reference to full faith and credit, and without specific reference to the concept of extraterritoriality. *Dick* was perhaps the first case of constitutional magnitude requiring only that law be chosen *reasonably*—that is, that the law chosen have substantial relevance to the issue in dispute on the particular facts.

*Dick*, a workaday insurance case, utterly unfamiliar to constitutional commentators,<sup>13</sup> is considered the foundation of modern conflicts theory,<sup>14</sup> the *fons et origo* of governmental interest analysis in the conflict of laws.<sup>15</sup> *Dick* is read today as establishing that it is unconstitutional for a state without an interest in governing an issue to attempt to govern it. In *Dick*, Justice Brandeis took the unexceptionable but then novel position that it cannot be due process for a state without any connection with a case to govern it.<sup>16</sup>

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12. 198 U.S. 45, 56 (1905) (McReynolds, J.) ("Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor."); cf. *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161-62 (1914) (holding, under the Due Process Clause and its protection of the liberty of contract, that the forum could not constitutionally impair the rights of an out-of-state creditor on an out-of-state contract, notwithstanding that a policy of insurance would be forfeited as a result, contrary to forum state law); *Allgeyer v. Louisiana*, 165 U.S. 578, 589, 593 (1897) (holding, under the Due Process Clause, that a state may not interfere with the liberty of a sister-state contract).

13. E-mail from Sanford Levinson to Louise Weinberg (Sept. 27, 2011, 21:13 CST) (on file with author) ("I think you are on to something extremely interesting and important (and, as you suspect, unknown to most purported 'constitutional law' mavens who simply don't think about conflict of laws cases).") (by permission).

14. The intellectual history is complex. By the 1930s, California was employing governmental interest analysis in interstate conflicts cases without fanfare, decades before the important chief justiceship there of Roger Traynor. Cf. *Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal.*, 294 U.S. 532, 542 (1935) (observing that the California court below had discerned "a legitimate public interest" in applying its own law). The seminal article in the field, at one time reputed to be the greatest law review article ever written, is Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 244 (1958) (among other things, demonstrating that the law of the place of contracting, without other contact with a case, has only a general residual interest in having its law applied, and that this residual interest is generally creditor-favoring and validating). By extension, the place of injury, without other contact with a case, could have only a general residual interest in having its law applied, and this residual interest is generally plaintiff-favoring, remedial, and deterrent.

15. Brainerd Currie, whose *Married Women's Contracts*, *supra* note 14, revolutionized the field of conflict of laws, freely credited the Supreme Court for his interest-analytic thinking. Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 12-14 (1958).

16. 281 U.S. at 407.

After *Dick*, the law applied in courts on any issue must be the law of a relevant lawgiver with a significant interest in governing that issue on the facts<sup>17</sup> of the case.

This thinking is very similar to the thinking in *Erie*. In *Dick*, the Texas courts in a Mexican case disregarded the law of the only relevant sovereign, Mexico, to apply their own irrelevant law.<sup>18</sup> In *Erie*, federal judges in state-law cases were disregarding the law of the only relevant sovereign, the state, to apply their own irrelevant opinions.<sup>19</sup> Although in *Dick* Justice Brandeis deployed Fourteenth Amendment due process to strike down irrelevant law, in *Erie* he missed the opportunity to deploy Fifth Amendment due process to strike down irrelevant law.

### *B. Erie: A Circular and Unconvincing Rationale*

Commentators often ignore Justice Brandeis's constitutional argument in *Erie* because, as Professor Urofsky has remarked, they simply do not understand it.<sup>20</sup> Perhaps this is because Justice Brandeis's reasoning in *Erie* can seem circular to current readers—although it may not have been circular at the time.<sup>21</sup> To lawyers

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17. It should be noted that the actual facts of *Dick* were very different from what the Court thought them to be. See the admirable investigation in Jeffrey L. Rensberger, *Who Was Dick? Constitutional Limitations on State Choice of Law*, 1998 UTAH L. REV. 37. Of course, what counts is the Court's perception.

18. In *Dick*, the plaintiff did allege a permanent residence in Texas. 281 U.S. at 402. But Justice Brandeis shrugged this off, remarking that at all relevant times Dick resided in Mexico. *Id.* at 408 (“The fact that Dick’s permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico.”).

19. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 70, 79 (1938) (Brandeis, J.) (“The doctrine rests upon the assumption ... that federal courts have the power to use their judgment as to what the rules of common law are.”).

20. MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 746 (2009); see also, e.g., Donald Earl Childress III, *Redeeming Erie: A Response to Suzanna Sherry*, 39 PEPP. L. REV. 155, 156 (2011) (remarking that *Erie* is an “inkblot”).

21. Of course the nature of American federalism leaves open the possibility that a state can constitutionally regulate an activity over which the nation may lack power on the particular facts. But the phenomenon obviously was more common before much of the Bill of Rights became usable against the states as well as the nation. Even on questions of intrinsic power, answers to the constitutional question might vary. In the decades before the New Deal settlement, the Court might in one case strike down a state law attempting to regulate a local activity as an interference with Congress's power over interstate commerce, and in another case deny that an interstate activity was “commerce” within the power of Congress. For example, in *Welton v. Missouri*, 91 U.S. 275, 276 (1875), the Court held that a state tax on

in our time it is almost a truism to say that if Congress cannot do a thing it is unconstitutional. That is, if Congress cannot do it, it is beyond national power altogether. In *Erie*, Justice Brandeis explained that federal courts were displacing state law without any identifiable sovereign interest in doing so, a thing Congress “confessedly” could not do.<sup>22</sup> The “course pursued”<sup>23</sup>—what federal courts were doing before *Erie*—was unconstitutional because Congress could not do it. But to a modern reader, he can seem to be saying that the “course pursued” was unconstitutional because it was unconstitutional.

This confusion is compounded by the inexplicable but ineradicable conviction of some modern writers<sup>24</sup> that *Erie* stands, precisely, for its opposite. In their view, the “course pursued” by federal courts before *Erie* was unconstitutional because *only* Congress could displace state law without any identifiable sovereign interest in doing so. Of course, this conviction makes no sense. It is not generally supposed that Congress can do an unconstitutional thing. The position also seems to reflect a failure to have read the case. Brandeis was emphatic in *Erie* that “Congress has no power to

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goods sold locally but manufactured in other states was an unconstitutional interference with Congress’s power over interstate commerce; yet in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the Court held that Congress lacked interstate commerce power to regulate the products of local labor even if intended to be shipped interstate. *Hammer v. Dagenhart* also furnishes an example when the focus is on the police power of a state. Under the rule of *Hammer*, Congress lacked power to regulate the conditions of labor because labor is local to a state, while, under the rule of *Lochner v. New York*, 198 U.S. 45, 53-57 (1905), the states also lacked power to regulate the conditions of labor.

22. *Erie*, 304 U.S. at 72 (“The federal courts assumed, in the broad field of ‘general law,’ the power to declare rules of decision which Congress was confessedly without power to enact as statutes.”).

23. *Id.* at 77-78.

24. See, e.g., EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 172-80 (2000) (seeing *Erie* as having to do with the primacy of Congress as lawgiver); UROFSKY, *supra* note 20, at 346 (same). This sort of thinking traces back at least as far as Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1682-83 (1974). The most conspicuous current proponent of the separation-of-powers view of *Erie* is probably Professor Clark, who joins and has influenced many others in bringing *Erie*’s federalism concerns adroitly to bear on separation-of-powers theory. E.g., Bradford R. Clark, *Erie’s Constitutional Source*, 95 CALIF. L. REV. 1289, 1306-07 (2007); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1412-22 (2001); see also Henry Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 761 (2010) (“Separation of powers thus provides a federalism safeguard.”).

declare substantive rules of common law applicable in a state”<sup>25</sup>—as federal courts were doing before *Erie*. Brandeis repeated the point, explaining that “[t]he federal courts assumed, in the broad field of ‘general law,’ the power to declare rules of decision which Congress was confessedly without power to enact as statutes.”<sup>26</sup>

Nevertheless, there still exist separation-of-powers theorists who believe that Justice Brandeis must have been wrong about the powerlessness of Congress. For them, what was unconstitutional about the “course pursued” was that it produced federal case law, as though only federal legislation is legitimate federal law, and federal judicial decisions of common-law questions need not be consulted. They believe that if anything was declared unconstitutional in *Erie* it was federal common law. How, then, do we explain the universal compulsion among lawyers dealing with federal questions to read and argue relevant federal cases?

With an almost Orwellian capacity for doublethink, this school of scholars also believes that federal judicial decisionmaking can, and indeed must, be *authorized* by Congress. Federal common law becomes legitimate when Congress *authorizes* it.<sup>27</sup> But this position, on its face, also makes no sense. We do not generally suppose that

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25. *Erie*, 304 U.S. at 78.

26. *Id.* at 72.

27. See, e.g., Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 887 (1986) (exhaustively exploring solutions to the problem of finding authorization for federal common law and happily concluding that federal common law is authorized by the grants of federal jurisdiction to federal courts). This position can be helpful in some contexts. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004) (Souter, J.) (arguing that the jurisdictional grant in the Alien Tort Statute implies its exercise); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104-05, 110 (1938) (implying federal common-law power from the possibility of a similar case arising within the original jurisdiction of the Supreme Court); *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917) (implying federal legislative as well as federal judicial lawmaking power from the Article III grant of admiralty jurisdiction to the federal courts). But *Erie*, in effect, is a rejection of the view that lawmaking power can be implied from a jurisdictional grant. More fundamentally, lawmaking power is not determined by jurisdiction. It is not due process for a court with jurisdiction over a case to apply its own law to an issue in the case if it lacks a legitimate interest in governing that issue. See cases cited *supra* note 6; see also, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852-56 (1997) (linking *Erie*'s positivism with a supposed generally accepted view that federal judicial lawmaking must be authorized).

Congress can authorize an unconstitutional thing. Thus the separation-of-powers theorists reach a dead end.<sup>28</sup>

This position, too, suggests that its proponents have yet to read the case. The rest of us remember Justice Brandeis's repeated insistence that it makes no difference to the authority of state law, when it applies, whether it emanates from the state's legislature or its highest court.<sup>29</sup> This is a central teaching of the opinion. Brandeis insists here that case law must not be set at a discount. This is the positivist position for which *Erie*, rightly, is most celebrated. How, then, can *Erie* be read as delegitimizing common law of any kind?

There is one sort of separation-of-powers theorist who is a sophisticate and a realist. Whatever *Erie* says, and whatever Justice Brandeis meant, this realist has faced up to the indisputable fact that the Supreme Court, persistently and increasingly, has withheld federal justice on the astonishingly frank ground that the Justices do not like providing it, and the Justices may even cite *Erie* as if it supported this judicial stance.<sup>30</sup> It is fair to say that the Justices have succeeded in embedding in our jurisprudence the rule that federal courts have discretion to deny remedies within their power to allow, coupled with the understanding that federal judges should be reluctant to provide remedies for violations of federal law—and with the further understanding that *Erie* is somehow responsible for

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28. It is not surprising that some writers conclude that *Erie* lacks any coherent constitutional rationale. See, e.g., Craig Green, *Repressing Erie's Myth*, 96 CALIF. L. REV. 595 (2008) (arguing that *Erie* had nothing to do with the Constitution); Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 41-43 & n.158 (2011) (viewing *Erie* as a federal common-law policy choice, "not a constitutional command"); see also Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1956 (2011) (suggesting that *Erie* had to do with "federalism and related concerns about political accountability, institutional competence, and the risk that federal courts might make incorrect but unreviewable decisions about state law").

29. *Erie*, 304 U.S. at 79 (Brandeis, J.) ("And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.")

30. Cf. *Sosa*, 542 U.S. at 726, 729 (Souter, J.) (opining that "modern understandings" of *Erie* support withholding an existing federal common-law remedy). For an example of academic resignation to the sorts of "modern understandings" found in such remarks, see Monaghan, *supra* note 24, at 759 n.132 (stating that "current understandings" of *Erie* deny to federal courts lawmaking powers coextensive with the powers of Congress, after correctly noting that, under *Swift*, federal courts were exercising powers beyond the powers of Congress).

this reluctance. The Court itself declares that, with rare exceptions, courts should defer to Congress by not enforcing acts of Congress until Congress says in clear language that it really wants its legislation enforced.<sup>31</sup> The Court refuses, even in opinions by some of its less illiberal members,<sup>32</sup> to “extend” remedies that already exist and would have seemed, on any sensible view, to have been available.<sup>33</sup> But to suggest that federal courts lack or ever lacked decisional power over questions arising under law Congress could enact is to fly in the face of Article III, which explicitly extends the national judicial power to all cases arising under federal law,<sup>34</sup> a power that in our time the Supreme Court deploys in every case before it, and all federal courts—indeed, given federal supremacy, all courts—invoke in answer to every federal question.

*Erie* might have packed more explanatory punch for modern readers, and perhaps furnished a less handy weapon for defense-oriented judges, had Brandeis grounded *Erie* in due process, as he had grounded *Home Insurance Co. v. Dick*. Although Brandeis disliked due process—at least as used in the *Lochner* era to strike down progressive state legislation<sup>35</sup>—he joined the due process

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31. See, e.g., *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (declining to “extend” the federal common-law action for fraud in the purchase and sale of securities to actions against secondary actors participating in the deceptive conduct); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) (same, with respect to aiders and abettors). *Central Bank* is in tension with 18 U.S.C. § 2(a) (2006), extending criminal liability to aiders and abettors of every federal crime, a statute obviously relevant to the expectations of aiders and abettors. The Court reasons that, unlike joint tortfeasors and other primary actors, secondary actors such as aiders and abettors could not be held liable in an action for actual fraud in the purchase and sale of securities. But this reasoning is inattentive to the purposes of the statute that the federal common-law action enforces, purposes having to do with ensuring that confidence can be had in the integrity, safety, and fairness of transactions on the securities exchanges.

32. See, e.g., *Sosa*, 542 U.S. at 731 (Souter, J.).

33. See, e.g., *Wilkie v. Robbins*, 551 U.S. 537 (2007) (Souter, J.) (declining to “extend” the existing *Bivens* cause of action to a case against federal officials who engaged in a prolonged campaign of harassment and abuse of process intended to force a rancher to forego his Fifth Amendment right to just compensation for a taking of his land). Had these been state officials the plaintiff would have been permitted to sue. *Id.* at 581 (Ginsburg, J., concurring in part and dissenting in part).

34. U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”).

35. For recent debate over the significance of this history, see David N. Mayer, *The Myth of “Laissez-Faire Constitutionalism”: Liberty of Contract During the Lochner Era*, 36 HASTINGS

opinion based on *Lochner* in the 1923 case of *Meyer v. Nebraska*<sup>36</sup> and used due process in *Dick*.<sup>37</sup> But *Dick* was emphatically *not* based on *Lochner*. Although *Dick* was a contract case, there is nothing in the opinion about a Lochnerian liberty of contract. Rather, *Dick* was a start at coming to grips with the question a good many conflicts experts today would say is the only useful question: *What are the governmental interests at stake?*<sup>38</sup> The inquiry into governmental interest has to do with the purposes of law and is a necessary part of due process reasoning.

Ever since *Dick*, a sovereign without a significant interest in a case cannot constitutionally govern it. Later Supreme Court cases on due process in the conflict of laws elaborate on this thinking. Ever since the *Alaska Packers* case, it has been understood that more than one state can have an interest in governing an issue in a case.<sup>39</sup> Since *Allstate Insurance Co. v. Hague*, it has been understood that a legitimate governmental interest can arise even after the events in litigation.<sup>40</sup> But the *Shutts* case made clear that forum interests that are insubstantial may not be taken into account.<sup>41</sup>

### C. Erie and Due Process

Stated at its broadest level of generality, the explicit constitutional basis of *Erie* is the lack of national power over questions of state law.<sup>42</sup> Under *Erie*, law in courts requires identification of its

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CONST. L.Q. 217 (2009); Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881 (2005); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003).

36. 262 U.S. 390, 399-400 (1923) (McReynolds, J.) (holding, inter alia, that parents have a due process right to control the rearing of their children and a due process liberty of contract to provide their children with instruction in a foreign language).

37. *Home Ins. Co. v. Dick*, 281 U.S. 397, 407 (1930).

38. See generally ERIN A. O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* (2009); Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631 (2005).

39. *Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal.*, 294 U.S. 532, 547 (1935). For a similar insight in admiralty, as a matter of federal common law, see *Lauritzen v. Larsen*, 345 U.S. 571, 582-83 (1953) (Jackson, J.).

40. 449 U.S. 302, 319 (1981) (Brennan, J.).

41. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-20 (1985) (Rehnquist, J.) (holding that in a class action the forum state may not, consistent with due process, govern the rights of nonresident members of the class).

42. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938) (Brandeis, J.).

sovereign source.<sup>43</sup> The nation is powerless to act except as the nation. The national courts may not sit as so many little state supreme courts, nor may the Supreme Court sit as a super state supreme court.<sup>44</sup> Congress has no power to make state law. Congress can only make federal law.<sup>45</sup> Identification of a *national interest*, then, is prerequisite to the application of national law in courts, just as, under *Dick*, identification of a particular state's interest is prerequisite to the application of that state's law in courts.

Although due process did not figure in Justice Brandeis's opinion in *Erie*, it becomes apparent that *Erie* is satisfied if due process is satisfied.<sup>46</sup> The only way *Erie* could have been written broadly enough to comport with the actual everyday experience of lawyers and judges, and to begin to develop the general theory that adequately describes our two-law, two-court system, would have been in reliance on due process. Only this more general foundation for *Erie* could have enabled the Court to work its way toward a unified, systemic understanding. It would have empowered the Court to require that state law, statutory or decisional, apply, when it applies, in all courts. Under Article VI of the Constitution, federal law is supreme because "it says so."<sup>47</sup> But a due process rationale for *Erie* would have grounded the supremacy of federal law in *reason*. Due process would have required federal law, whether statutory or decisional, to apply, when it applies, in all courts.<sup>48</sup>

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43. *Id.* at 79.

44. *See infra* Part III.

45. *Erie*, 304 U.S. at 79 ("Congress has no power to declare substantive rules of common law applicable in a State."). Rather, Congress has power to declare substantive rules of common law applicable in the *nation*. *See, e.g.*, Federal Employers' Liability Act of 1908, 45 U.S.C. § 51 (2006) (codifying substantive rules governing defenses in cases of personal injury to employees of interstate railways).

46. *See* Kermit Roosevelt, *Valid Rule Due Process Challenges: Bond v. United States and Erie's Constitutional Source*, 54 WM. & MARY L. REV. 987, 988 (2013) (citing Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM. 523, 524 (2004)).

47. U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

48. *See* immediately following his opinion in *Erie*, Justice Brandeis's opinion in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, in which the Court held, in a case coming up from a state court, that federal common law must govern interstate water disputes. 304 U.S. 92, 110 (1938) ("For whether the water of an interstate stream must be apportioned

*D. Due Process, Interest Analysis, and the Source of Power*

Even more interesting than the *Erie-Dick* proposition—that a sovereign without an interest in governing an issue cannot govern that issue in any court—is its implicit corollary. If a noninterested<sup>49</sup> sovereign cannot govern, presumably an interested sovereign *can*.

Commentators do not appear to have considered the full implications of this. To see that courts must choose the law of a sovereign with a legitimate interest in an issue to govern that issue is to grasp that we already have the elements of a general theory of American lawmaking power. The proposition that due process requires nonarbitrary governance has as its necessary consequence that governmental interest is the measure and source of governmental power.

The relation of due process to its interest-analytic methodology is not mysterious. It is basic legal analysis to inquire into the reason for a rule. What is the purpose—the point—of an assertion of governmental power? Lawyers ask the question because they understand that the scope of the government’s purpose will determine the scope of its power. Law exceeding the scope of its purpose is law without reason, and law without reason is no law at all. Without reason, law is arbitrary and irrational and is not due process. And the political branches have no greater power than the courts to act beyond the sphere of the government’s legitimate interests.<sup>50</sup>

Due process, in other words, limits all governmental authority, not only when the existence of governmental authority is challenged directly, but also when a governmental interest is asserted in justification of some alleged abridgment of a constitutional right. It

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between the two States is a question of ‘federal common law’ upon which neither the statutes nor the decisions of either State can be conclusive.”).

49. Professor Currie used the phrase “the disinterested” state. *See, e.g.*, Brainerd Currie, *The Disinterested Third State*, 28 *LAW & CONTEMP. PROBS.* 754 (1963). I am using “noninterested” to clarify that I am not talking about neutrality but simply a want of meaningful connection.

50. For one among many prominent statements of this fundamental proposition, see *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 541 (2005) (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), terming that case “a historic decision holding that a [law] would survive a substantive due process challenge so long as it was not ‘clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare’” (emphasis omitted)).

follows that what *empowers* government is the government's reason for taking action. A sovereign's legitimate governmental interest will authorize that sovereign to act, but only within the scope of that interest—and, of course, only if within the extrinsic substantive requirements of the Constitution. This is the heart of the lesson Chief Justice Marshall taught two hundred years ago, when he declared, "Let the end be legitimate, let it be within the scope of the constitution, 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 constitution, are constitutional."<sup>51</sup>

Indeed, a sovereign's interest in applying its law on the particular issue in the particular case is the *only* presumptive source of its authority to do so. In other words, a legitimate interest must ground all exercises of governmental power, whether the sovereign makes law in its executive, legislative, or judicial departments; and it is the province and duty of the judicial department to choose, apply, and test law in light of these understandings.

In sum, governmental interest analysis—the chief characteristic of due process thinking—is the key to the source of governmental power.

### III. REACHING FOR MORE GENERAL THEORY

#### A. *The Bearing of Carolene Products*

In 1938 the Supreme Court, undertaking to reexamine its shifting stances on government power, arrived at the same interest-dependent conclusion we have just reached. Here I am not talking about *Erie*, although *Erie* is relevant, but rather about *Carolene Products*.<sup>52</sup>

Although *Carolene Products* was a case about the commerce power of Congress, the Court focused on the company's argument that an act of Congress regulating artificial milk was a deprivation of property without due process of law.<sup>53</sup> At root, Justice Stone's due

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51. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (building on the views of Alexander Hamilton, *THE FEDERALIST* NOS. 19, 33).

52. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (Stone, J.).

53. *Id.* at 147-48. The due process argument in *Carolene Products* was not about a

process argument in *Carolene Products* was the natural corollary of the due process argument that Justice Brandeis had made in *Dick*—that a government without a governmental interest in an issue, cannot, consistent with due process, govern that issue. In *Carolene Products*, the Court held it no violation of the Fifth Amendment’s Due Process Clause for Congress to regulate artificial milk.<sup>54</sup> The Court saw that there must be national power to deal with national problems. The Court identified the problem as national by first sustaining the legislation at issue under the Commerce Clause.<sup>55</sup> Justice Stone reasoned that when law is in furtherance of some legitimate governmental interest, it is presumptively constitutional. Due process requires of law only that it have “some rational basis”<sup>56</sup>—that is, that it be justified by some legitimate governmental interest.

By some odd coincidence, *Carolene Products* was handed down on the same day as *Erie*. But just as *Erie*, read broadly, teaches that relevant common law must be allowed to govern in all courts, when it applies, *Carolene Products*, read broadly, teaches that relevant *statutory* law must be allowed to govern in all courts, when it applies.

With Justice Stone’s opinion in *Carolene Products*, the Hughes Court crystallized its new deference to reasonable economic regulation. As long as government has some rational basis—a legitimate governmental interest—for its ordinary legislation, that legislation, if otherwise constitutional, will pass constitutional muster.

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*Lochner*-style deprivation of “liberty,” see *Lochner v. New York*, 198 U.S. 45, 53 (1905), but rather about a deprivation of property.

54. *Carolene Prods.*, 304 U.S. at 148.

55. *Id.* at 147-48. Interestingly, here the enumeration of the commerce power served as identification of a general sphere of interest, although in itself it could not help to identify the significant interest within that sphere.

56. *Id.* at 152 (“[L]egislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon *some rational basis*.” (emphasis added)); cf. *Alaska Packers Ass’n v. Indus. Accident Comm’n of Cal.*, 294 U.S. 532, 543 (1935) (Stone, J.) (“Indulging the presumption of constitutionality which attaches to every state statute, we cannot say that this one, as applied, lacks a rational basis or involved any arbitrary or unreasonable exercise of state power.”).

*B. The “Bite” of Minimal Scrutiny: Pretty Strict Scrutiny in Fact*

By referring to “legitimate governmental interest,” I do not mean to suggest that courts are, or should be, satisfied with a minimal showing of “some rational basis” for whatever government does. In the early decades following the New Deal settlement, as the Supreme Court began to defer to legislative will, the Court arguably might have been criticized as accepting a contrived argument too readily as furnishing a rational basis.<sup>57</sup> But rational-basis scrutiny today has, or should have, sufficient “bite”<sup>58</sup> to ensure that an actionable exercise of government power is not held justified by trumped-up, vague, abstract, speculative, or ill-assorted “reasons.” Scrutiny of every challenged government act or law needs to be rigorous enough to require answers to the questions that able counsel will raise in any event.

To be sure, today the Supreme Court generally does follow the regime of tiered scrutiny derived from *Carolene Products*’ Footnote Four<sup>59</sup>—surely the most famous footnote in the galaxy. The Court held that in cases involving fundamental rights, in cases involving inherently suspect classifications, or in cases in which the political process is likely to be unavailing, the interest shown must be more than rational—it must be “compelling.” In such cases the means must do more than merely “fit” the ends. Means must be narrowly tailored and proportional.<sup>60</sup> Less restrictive alternatives must be explored.

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57. Commonly cited as illustrative are *Ferguson v. Skrupa*, 372 U.S. 726, 729-32 (1963), and *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955).

58. See *Romer v. Evans*, 517 U.S. 620, 628-29 (1996) (applying heightened rational-basis scrutiny); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452-53 (1985) (Stevens, J., concurring) (describing heightened rational-basis scrutiny); *id.* at 458-60 (Marshall, J., concurring in part and dissenting in part) (pointing out the new stringency of the Court’s “rational basis” scrutiny); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972) (discussing tiered scrutiny and coining the terminology of rational basis with “bite”).

59. *Carolene Prods.*, 304 U.S. at 152 n.4 (seeing a possible need for heightened scrutiny of governmental action affecting “discrete and insular minorities,” abridging specific enumerated rights, or in cases in which the political process may be unavailing).

60. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (Rehnquist, C.J.) (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).

In theory, then, rational-basis scrutiny presumes constitutionality and strict scrutiny does not. But this notion defies common sense and experience. All laws, and most official acts, are presumed constitutional. Presumably the government acts for reasons. It is up to the challenger to show that there is too serious an abridgment of right or too unconvincing a governmental interest. The exceptions to this presumption of constitutionality generally arise in cases of alleged official misconduct rather than in challenges to legislation, although of course there is substantial overlap in constitutional litigation, given that the challenge is often to both law and the act of enforcing it.

I would suggest that in all cases, astute counsel will raise the same questions, without regard to the “tiers” of scrutiny. The initial question will be: what legitimate governmental interests are to be served by applying or sustaining the challenged law or validating the challenged act on the facts of the particular case? But the government act or law does not have a “rational” basis if the proffered reasons for it are not credible in light of the means the government has used. So counsel must ask the court to consider the fit of means to ends. And counsel will argue that there were more reasonable steps the government could have taken, if in fact there were. At any level of scrutiny, law is not due process when it sweeps within its orbit conduct beyond the scope of its asserted purposes, or is so constricted in scope or application as to appear targeted and discriminatory, or imposes burdens so heavy as to be disproportionate to the government’s interests.

By no means should objection be raised to these questions on the ground that rational-basis scrutiny does not require them. On the contrary, it invites them.

### *C. The Triumph of Interest Analysis*

After *Carolene Products* and Footnote Four, modern constitutional thought has become almost entirely interest-analytic, and not only in the jurisprudence of due process. When a constitutional challenge is to some government act or law allegedly abridging a fundamental right, or abridging the rights of minorities or others for whom the political process may be unavailing, substantive due

process thinking, as a practical matter, will control the case however it has been litigated, briefed, and argued,<sup>61</sup> in state as well as federal courts.

Today due process is also the underlying measure of the power of government, whether of nation or state—the latter, of course, always subject to federal supremacy. This direct application of due process to the bare question of government authority follows from *Erie* and *Dick* but is also a logical corollary of the role of interest-analysis in government defenses to rights-based litigation.

In thinking about government authority as an original matter, due process provides significant advantages over doctrinal commerce reasoning and other areas of formulaic black letter on government power. Due process can ground a general theory applicable to all lawmaking power, whether of nation or state, whether asserted in courts or legislatures, whether enumerated or inherent, and comes with a built-in framework for analysis in these varied contexts.

#### IV. ARTICLE I AND THE LIMITS OF ENUMERATION<sup>62</sup>

##### A. *Lists, Tests, Factors*

At the turn of last century, the era remembered as the Gilded Age, the powers of governance were thought to be capable of categorical enumeration. The powers of Congress were to be found in the enumerations of Article I, and the powers of the states were to be found in lists of “police powers” set out in cases. This confidence in lists as authoritative sources of power had become a serious obstacle to governance. Until the age of modernism, these two sets of enumerations were thought to be not only stringently limited but

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61. That substantive due process governs the constitutionality of state action has become, in large part, a literal fact. Most of the rights enumerated in the Bill of Rights, and unenumerated rights as well, are held “incorporated” into the “liberty” protected by the Due Process Clause of the Fourteenth Amendment. The notable exceptions are the Third Amendment right against involuntary quartering of soldiers, the Fifth Amendment right to indictment by grand jury, and the Seventh Amendment right to trial by jury in civil cases worth more than twenty dollars.

62. The titles of the following two Parts are cribbed from Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389, 1390 (2010).

also mutually exclusive. Some matters, falling under neither heading, could become ungovernable altogether.<sup>63</sup>

Yet a government must have power to govern. By the 1930s, in the struggle of the New Deal administration to pull the country out of the Great Depression, the old imagined categorical limits on governance had ceased to be convincing. Today, it is increasingly understood that categorical approaches to the “vertical” conflict of laws—that is, to the problems of federalism—do not work very well. Ironically, constitutional enumerations of the powers of the respective branches, the Tenth Amendment’s reservation of nondelegated powers to the states or the people, and the common-law lists of the states’ police powers, have all served, not to empower governance by nation or state but rather to obstruct it.

National power is continually contested despite the fact that the Constitution deletes the word “expressly” from the Delegation Clause of the Tenth Amendment. The failure of the Articles of Confederation of 1781 is thought to be in some part attributable to the inclusion of the word “expressly” in its delegation clause.<sup>64</sup> There is originalist support from the Founding Era for both sides of the debate on whether to take the Constitution’s omission of the word seriously.<sup>65</sup> Because we do not have a definitive answer, we may as well simply be guided by the text of the Tenth Amendment, which does not make express delegations exclusive.

Chief Justice Marshall’s Federalist reading of the Necessary and Proper Clause in *McCulloch v. Maryland*<sup>66</sup> was enraging to the slave states at the time, but we can put the Civil War behind us and allow ourselves a more nationalist understanding in harmony with his. The Framers understood that they could not anticipate every exigency of governance and therefore could not enumerate every power inherent in the nation’s sovereignty. Their insertion of a Necessary

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63. On this dysfunction see *supra* note 21.

64. ARTICLES OF CONFEDERATION OF 1781, art. II, available at <http://teachingamericanhistory.org/ratification/tansill/articles-of-confederation.html> (“Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”).

65. See, e.g., Kurt Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1891-92 (2008) (arguing that it is wrong to read the omission of the word “expressly” in the Tenth Amendment as an acknowledgment of unenumerated delegations of power).

66. 17 U.S. (4 Wheat.) 316, 421 (1819).

and Proper Clause, as Chief Justice Marshall explained in *McCulloch*, gives the nation all needful powers of national governance. Under the Necessary and Proper Clause, all needed power, whether enumerated or inherent, is delegated, and need be given only its rational scope. Marshall explained that if the purposes of the federal government are legitimate—in the sense that they are national or multistate or evoked by some need properly of national concern—and if they are otherwise constitutional,<sup>67</sup> the reasonable means the government employs to achieve them are constitutional as well.

The New Deal settlement was an attempt to reestablish these understandings. Nevertheless there are continuing efforts to fight the battle of the 1930s—indeed, to fight the Civil War—all over again. The favored method today seems to be a close, literalistic reading of the precise terms of the enumerated powers.<sup>68</sup> Yet enumerations are of very little help in thinking about the sources and limits of governmental power.

Take the states' "police powers." The Court long ago abandoned the supposition that a judge-made list of "police powers," however traditional, should limit needed governance by a state. The modern reader trying to fathom what the *Lochner* Court imagined it was accomplishing, comes up against a senseless controversy over whether a maximum work-hours law affecting bakeshops was an exercise of the police power over "health," in which case it would be constitutional, or over "labor," in which case it would not. The state could not be allowed to interfere with the "liberty" of employment contracts.<sup>69</sup> Obviously, work-hours laws interfere with employment

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67. Observe, incidentally, the Footnote Four sort of hedging that permeates Marshall's celebrated declaration of national empowerment. See *supra* note 51 and accompanying text. The author of *Marbury v. Madison* was careful to preserve the role of courts in the rule of law even while describing maximum authority in Congress to govern in the national interest. This is the power acknowledged in *Carolene Products* but hedged and made only presumptive by Footnote Four.

68. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587-88 (2012) (Roberts, C.J.) (reading Congress's power to "regulate," U.S. CONST. art. I, § 8, cl. 3, as necessarily implying that the power exercised be "regulatory" in the sense of restraining or prohibiting, as opposed to mandating); *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997) (Rehnquist, C.J.) (reading the Enforcement Clause of the Fourteenth Amendment, U.S. CONST. amend XIV, § 5, as confining Congress to acts that are purely "remedial" in the sense of nonsubstantive).

69. *Lochner v. New York*, 198 U.S. 45, 55-57 (1905).

contracts even if they *are* “health” measures. What possible difference could this sort of inquiry make to a state government with a legitimate interest in regulating the hours of work of the state’s bakers? Would it not have been better for courts to consider the apparent exigency that brought the disputed regulation forth,<sup>70</sup> and the suitability of the regulation enacted to meet that exigency?

The futility of relying upon enumeration on some approved list to answer questions of power can be appreciated at the national level as well. The essential national powers—Congress’s powers over interstate commerce,<sup>71</sup> taxation,<sup>72</sup> and spending,<sup>73</sup> as well as the federal judiciary’s power over all federal questions<sup>74</sup>—*are* enumerated.<sup>75</sup> Stare at the Commerce Clause as you will, you will gain no enlightenment about its application in a particular case. It is true that the existence of “enumeration presupposes something not enumerated,”<sup>76</sup> but it is also true that the Constitution affords the legitimate ends of government all the “necessary and proper” means to effectuate them.<sup>77</sup> The enumeration of powers in the Constitution does not resolve cases; it simply poses at a new level a host of begged questions.<sup>78</sup> At best the enumeration of a particular power

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70. See TENTH ANNUAL REPORT OF THE FACTORY INSPECTORS OF THE STATE OF NEW YORK 42-43 (1896); see also AARON BOBROW-STRAIN, *WHITE BREAD: A SOCIAL HISTORY OF THE STORE-BOUGHT LOAF* (2012); David E. Bernstein, *The Story of Lochner v. New York: Impediment to the Growth of the Regulatory State*, in CONSTITUTIONAL LAW STORIES 299 (Michael E. Dorf ed., 2009).

71. U.S. CONST. art. I, § 8, cl. 3.

72. *Id.* cl. 1.

73. *Id.*

74. *Id.* art. III, § 2, cl. 1; *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824) (Marshall, C.J.).

75. See the potentially damaging new restriction on the spending power in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) (denying Congress’s power, as “coercive,” to condition continued funding of state-administered Medicaid on the state’s consent to expansion of the program). For early criticism see Neal K. Katyal, Op-Ed., *A Pyrrhic Victory*, N.Y. TIMES, June 29, 2012, at A21.

76. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) (Marshall, C.J.).

77. U.S. CONST. art. I, § 8, cl. 18 (providing that Congress shall have power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.).

78. *Cf. McCulloch*, 17 U.S. (4 Wheat.) at 405 (“[T]he question respecting the extent of the powers actually granted [to the Federal Government] is perpetually arising, and will probably continue to arise, as long as our system shall exist.”).

is evidence that the universe of subjects to which the enumeration refers is within the sovereign's general sphere of interest. It cannot decide particular cases.

Yet divining the existence of national power can be, in a sense, too easy. The Supreme Court may too often have been content to end inquiry at what is a preliminary level of analysis, too easily satisfied by identifying a sphere of interest, announcing a jurisdiction-selecting rule<sup>79</sup> that the nation has inherent general power over some nationwide, multistate, or international class of questions.<sup>80</sup> Often this conclusion is based on a presumed need for uniformity,<sup>81</sup> a rationale which might just as well mandate what the law in question would prohibit.

Equally questionable is the Court's habit of overly obsequious deference to the states. It is questionable, for example, that federal courts should abnegate a jurisdiction conferred by turning away diversity cases raising questions of family law,<sup>82</sup> or that they should apply state law to govern a federal question touching some area of state concern, when the federal question rationally requires a federal answer.<sup>83</sup>

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79. See Cavers, *supra* note 9, at 194.

80. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-29 (1964) (Harlan, J.) (fashioning a federal common-law rule that courts may not adjudicate the validity of an act of a foreign state, reasoning that the risk that courts might trench on the executive branch in dealing with the foreign relations of the United States raised questions that are "intrinsically federal," so that state law could not be applied to them even though state law would come out the same way). Justice White dissented, pointing out that the Court was validating a "lawless" act. *Id.* at 439.

81. See, e.g., *Clearfield Trust v. United States*, 318 U.S. 363, 367 (1943) (Douglas, J.) (holding that federal law must govern the duties of the United States on its own commercial paper because of the "vast scale" of federal programs and the desirability of "a uniform rule"). However, the purpose of the Works Progress Administration check at issue, distributed during the Great Depression, would better have been served by assuring those asked to accept such a check that their rights under the usual rules of commercial law were preserved. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917) (McReynolds, J.) (holding that the uniformity of federal admiralty law would be disturbed by permitting the state in which a harbor worker resided to provide workers' compensation benefits to his widow). At the time, no federal admiralty remedy existed, and there was therefore no federal admiralty law the uniformity of which could have been disturbed. Justice McReynolds was able to defeat the widow's right to workers' compensation under state law by viewing the defendant railway company in its capacity as shipowner rather than railway, and the plaintiff's decedent as if he had been a seaman instead of a longshoreman. *Id.* at 212, 217.

82. *E.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

83. See, e.g., *California v. Arc-Am. Corp.*, 490 U.S. 93 (1989) (in an action for price-fixing

The reasons for an exercise of governmental power, on the particular facts of the particular issue in the particular case, will not only justify the exercise but also limit its scope. The government's *purposes* are the first of two rational intrinsic limits of its power and cannot be exceeded without a violation of due process. These purposes must be beneficent—that is, intended to further the general welfare. The law manifesting them is likely to have particularly intended beneficiaries and will have regulatory effects on those whose conduct it intends to constrain or prohibit.

The second intrinsic limit on governance is the requirement of a rational relation of means to ends. This relation is important because it tests the authenticity of the government's alleged purposes. The Justices sometimes appear to think of a law's overbreadth, underinclusiveness, or disproportionality as a secondary consideration—an afterthought, looked into to support or impugn a result. On the contrary, these inquiries are among the intrinsic limits of governmental power. The *extrinsic* limits of governmental power are, of course, the rights of individuals.

What is argued here, then, is that the source of governmental power lies within a sphere of legitimate governmental interest; that the scope of a government's authority to exercise its power in a given instance is determined by the scope of its interest in application of its law or other assertion of its power over a particular issue on the particular facts in a particular case; and that the relation of the government's means to its purposes determines the *legitimacy* of the exercise of power.

### *B. The Obamacare Case*

Of the various tests of governmental power devised by the Supreme Court over time, virtually none have proved workable in the long run. In former times courts might have considered whether

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under the Sherman Antitrust Act, applying state law to allow proportionate distribution of liquidated damages to indirect purchasers, in disregard of the direct purchasers' right to the whole under the federal rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)); cf. Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1760-62 (1992) (arguing that if the evident unfairness of *Illinois Brick* produced this result, the correct course would have been for the Court to overrule *Illinois Brick* rather than to blind itself to the conflict between *Illinois Brick* and the state law applied).

goods were in transit or had come to rest within a state.<sup>84</sup> All goods not actually in transit are at rest, and with rare exceptions all are entirely within some state. How can such facts matter to the regulation of nationwide markets or nationwide industries? Why should it matter whether an activity affecting interstate commerce takes place within a state?<sup>85</sup> Very few do not. How can anyone predict whether an effect on commerce will be perceived as direct or indirect?<sup>86</sup> And so on.

In the current state of the jurisprudence, under *United States v. Lopez*,<sup>87</sup> courts ask: Is this a person or thing in interstate commerce?<sup>88</sup> Is it a channel, agent, mode, or instrumentality of interstate commerce?<sup>89</sup> Is it an activity affecting interstate commerce?<sup>90</sup> If an “activity affecting,” is it an *economic, commercial* activity?<sup>91</sup> Is the link between the activity and its effect on commerce too attenuated to count, so that one must “pile inference upon inference” to suppose that Congress has power?<sup>92</sup>

These tests are an improvement over their predecessors, in that the government tends to win the argument when governance is prudent. But they seem problematic—not because an uncontrolled Congress is a good thing, but because valuable legislation should not be trashed without good reason. Recall that what was struck down in *Lopez* was an act of Congress criminalizing the possession of guns near schools.<sup>93</sup> We surely have a recurrent problem of school shootings,<sup>94</sup> and there is massive, long-exercised federal power over

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84. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 275-76 (1918) (holding Congress powerless to regulate products of child labor intended for interstate shipment).

85. E.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 309-10 (1936) (striking down the protections for labor in the Bituminous Coal Act as beyond Congress’s commerce power because coal mining is intrastate).

86. See, e.g., *Champion v. Ames*, 188 U.S. 321, 359 (1903).

87. 514 U.S. 549, 567 (1995) (striking down as beyond Congress’s power over interstate commerce a federal statute criminalizing the possession of guns near schools).

88. *Id.* at 551.

89. *Id.* at 558.

90. *Id.* at 558-59.

91. *Id.* at 559.

92. *Id.* at 567.

93. Gun Free School Zones Act of 1990, 18 U.S.C. § 922(q) (2006).

94. See generally NILS BÖCKLER ET AL., SCHOOL SHOOTINGS: INTERNATIONAL RESEARCH, CASE STUDIES, AND CONCEPTS FOR PREVENTION (2012); KATHERINE S. NEWMAN ET AL., RAMPAGE: THE SOCIAL ROOTS OF SCHOOL SHOOTINGS (2005); *Newtown, Conn., School*

firearms and their possession, as well as acknowledged commerce power over the national market for them.<sup>95</sup> Since the purpose of that market is to provide possession, and since federal crimes of possession are common—think, for example, of the crime of possession of narcotics<sup>96</sup>—there was little sense in striking down the Gun Free School Zones Act<sup>97</sup> on any theory.

The current Court may be poised to expand on, limit, or even abandon *Lopez*—or in some way to put its own spin on the Commerce Clause. In *National Federation of Independent Business v. Sebelius*,<sup>98</sup> the Obamacare case, the Court, by Chief Justice Roberts, made scant use of *Lopez*. The Chief Justice was nevertheless able to delete the Commerce Clause as a source of power to enact the Affordable Care Act's<sup>99</sup> "individual mandate," the requirement that individuals buy insurance or pay a penalty.<sup>100</sup> The Chief Justice achieved this by ringing in a new test of commerce power, recently urged by myriad conservative pundits and journalists, that Congress can regulate "activity" but not "inactivity."<sup>101</sup> This tight parsing of the word "activity" is of particular interest, because the Commerce Clause does not mention it. The word "activities" appears in *Lopez*, in one of its three categories of matters within the commerce power of Congress.<sup>102</sup>

This distinction between "activity" and "inactivity" was not the only new weapon deployed against the controversial individual mandate. Still parsing the Commerce Clause closely, the Chief Justice declared that legislation regulating activities affecting commerce must be *regulatory*.<sup>103</sup> Congress has power to limit and prohibit but not, apparently, to require. Yet as Justice Ginsburg pointed out, dissenting, the nation exercises acknowledged power to provide

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*Shootings*, N.Y. TIMES (Jan. 3, 2013), [http://topics.nytimes.com/top/reference/timestopics/subjects/s/school\\_shootings/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/s/school_shootings/index.html) (including references to other articles on recent school shootings).

95. *Lopez*, 514 U.S. at 563.

96. Controlled Substances Act, 21 U.S.C. § 844 (2006).

97. 18 U.S.C. § 922(q).

98. 132 S. Ct. 2566 (2012).

99. Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A (2010).

100. *Id.*

101. *Sebelius*, 132 S. Ct. at 2586.

102. *United States v. Lopez*, 514 U.S. 549, 558 (1995).

103. *Sebelius*, 132 S. Ct. at 2586-87, 2590-91.

health insurance itself, as it already does, with Medicare.<sup>104</sup> How can legislation devolving the rest of the job on private commercial insurers divest Congress of commerce power? Is there anything so impressive about the words “activity” and “regulate” that they can do a better job than all the words brought to bear on Congress’s commerce power in the past?

Chief Justice Roberts’ new obstructions for Congress were not the only visible signs of dissatisfaction with *Lopez*. This same Term, in *Alderman v. United States*, Justice Thomas authored a revelatory dissent to a denial of certiorari.<sup>105</sup> Justice Thomas explained, or rather complained, that in denying certiorari the Court “tacitly accept[ed] the nullification of our recent Commerce Clause jurisprudence.”<sup>106</sup> Thomas was specific about this:

Joining other Circuits, the Court of Appeals for the Ninth Circuit has decided that an implicit assumption of constitutionality in a 33-year-old statutory interpretation opinion carves out a separate constitutional place for statutes like the one in this case and pre-empts a careful parsing of post-*Lopez* case law.<sup>107</sup>

In Thomas’s view, “[t]hat logic threatens the proper limits on Congress’ commerce power and may allow Congress to exercise police powers that our Constitution reserves to the States.”<sup>108</sup> Evidently the various categories and requirements of *Lopez*, the “careful parsing” of which is so desired by Justice Thomas, have not been applied without debate or difficulty in the United States Courts of Appeals.<sup>109</sup>

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104. *Id.* at 2628 (Ginsburg, J., dissenting in part).

105. 131 S. Ct. 700, 700 (2011) (denying certiorari in *United States v. Alderman*, 565 F.3d 641 (9th Cir. 2010)). This case marks a new tendency in the United States Courts of Appeals to rely on pre-*Lopez* authority. In *Alderman*, the Ninth Circuit had relied on *Scarborough v. United States*, 431 U.S. 563 (1977), which held that proof that a firearm had moved in interstate commerce provided a sufficient nexus with interstate commerce to ground a federal prosecution for possession of a firearm. *Alderman*, 565 F.3d at 643. This use of *Scarborough* was in disregard of *United States v. Bass*, 404 U.S. 336 (1971), and thus of *Lopez*, which relied on *Bass*. *Lopez*, 514 U.S. at 561.

106. *Alderman*, 131 S. Ct. at 700 (Thomas, J., dissenting); *Alderman*, 565 F.3d 641 (2010).

107. *Alderman*, 131 S. Ct. at 700 (internal quotation marks omitted).

108. *Id.*

109. For other examples of the courts of appeals’ struggles with *Lopez*, see *United States v. Vasquez*, 611 F.3d 325 (7th Cir. 2010); *Keys v. United States*, 545 F.3d 644, 646 (8th Cir.

A measure of the fragility of the new *Sebelius* tests is that the power to tax can obliterate them, as the *Sebelius* Court in effect held when it sustained the individual mandate.<sup>110</sup> Today, it would seem that taxation itself is well within the commerce power. It makes scant sense to distinguish the taxation of economic activity or nonactivity from other regulation of economic activity or nonactivity.<sup>111</sup> Fortunately, because the mandate was sustained on this other ground,<sup>112</sup> it became unnecessary to have reached the question of commerce power, although the Chief Justice played the trick of deciding that issue first.<sup>113</sup> It is now open to counsel to argue, and to judges to conclude, that the Commerce Clause ruling in the Obamacare case was obiter dictum.

The Court seems not to have thought very deeply about the chief difficulty presented by the analyses in either *Sebelius* or *Lopez*, as applied to the Affordable Care Act's individual mandate. Neither *Sebelius* nor *Lopez* acknowledges the possibility of the sort of dysfunction in the interstate system that can give rise to an exigent corrective national interest. Yet these sorts of interests are commonly held to authorize legislation under the Commerce Clause. Consider that, under its commerce power, Congress has thus far been permitted to enact antipollution law—a Clean Water Act<sup>114</sup> and a Clear Air Act<sup>115</sup>—evidently because a downstream or downwind state cannot protect itself from a neighboring state with lax environmental controls. There is always pressure on state legislatures and governors to avoid action costly to local enterprise. The consequence can be multistate degradation of the environment—in effect a classic “tragedy of the commons.”<sup>116</sup> Multistate dysfunction might not satisfy every post-*Lopez* or pre-*Lopez* formal test of interstate commerce, but it would justify action by Congress.

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2008); *United States v. Faasse*, 265 F.3d 475, 479 (6th Cir. 2001); *United States v. Chesney*, 86 F.3d 564, 580 n.11 (6th Cir. 1996) (Batchelder, J., concurring); *United States v. Bishop*, 66 F.3d 569, 603 (3d Cir. 1995) (Becker, J., concurring in part and dissenting in part).

110. *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594-95 (2012).

111. Richard A. Epstein, Op-Ed., *A Confused Opinion*, N.Y. TIMES, June 29, 2012, at A25.

112. *Sebelius*, 132 S. Ct. at 2600.

113. *Id.* at 2584-93.

114. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 843 (codified as amended in scattered sections of 33 U.S.C.).

115. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.).

116. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

The *Sebelius* Court made little of the argument that a nationwide failure of collective action in the health insurance market, encouraging the growth of a population that shifts the costs of its care to others—costs amounting to billions of dollars nationwide—must give rise to a national interest in correcting it.<sup>117</sup> Congress, of course, on any sensible view, has commerce power over the national market for health insurance, and in the face of a failure of collective action generating a free rider problem, has a legitimate governmental interest in regulating behavior to prevent that nationwide market failure. This conclusion has nothing to do with whether the free riders' behavior is "activity" or "inactivity," or with the differences between proscribing and prescribing. It has everything to do with a legitimate national governmental interest, and the appropriateness of the means used to address that concern.

The assault on national power in *Sebelius* was not limited to Congress's commerce power. Chief Justice Roberts went on to attack Congress's ability to condition spending when federal funds go to the states. Scrutinizing the Affordable Care Act's expansion of Medicaid, the existing program providing medical care to the indigent and disabled, the Court held that Congress may not earmark the money it gives to the states to fund Medicaid—not without a state's consent.<sup>118</sup> Nor may Congress exclude the rejecting state from the Medicaid program for withholding its consent. That would be "coercive."<sup>119</sup>

This startling new limit on the spending power is a serious impediment to national governance. It is also a serious impediment to public health. It confides to the discretion of each state the decision whether or not its indigent residents can have access to ordinary medical care without having to resort to emergency rooms. The costs of their doing so are merely shifted and are more substantial than the costs of ordinary medical care. Sadly, the costs of

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117. *Sebelius*, 132 S. Ct. at 2611 (Ginsburg, J., dissenting in part).

118. *Id.* at 2601 (majority opinion). The new limits on conditional spending seem in tension with the Court's previous tolerance for arguably unconstitutional conditions. *Cf. Rust v. Sullivan*, 500 U.S. 173 (1991) (sustaining regulations of the Department of Health and Human Services which prohibit Title X projects from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning). For current discussion, see Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479 (2012).

119. *Sebelius*, 132 S. Ct. at 2604-07.

their illnesses can fall on indigent uninsured residents themselves, in needless suffering. Or, worse, their untreated illnesses can threaten the health of others, risks that cannot be contained within state lines.

### *C. The Virginia Tech Rape Case*

The *Lopez* tests of national power can also fail to capture the national interest in dealing with a widespread failure of state justice. To take a somewhat analogous example, in enacting the Civil Rights Act of 1871<sup>120</sup> under its Fourteenth Amendment power,<sup>121</sup> Congress was attempting to deal with the terrorist tactics of the Ku Klux Klan, including the effects of Klan terrorism on *courts* throughout the defeated South.<sup>122</sup> In the debate preceding the enactment of the Civil Rights Act, one congressman described the situation:

Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices.... [A]ll the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice.<sup>123</sup>

Here one can see a collapse of justice in states throughout the South, generating a national remedial interest, and can see how that interest empowered Congress to enact the Civil Rights Act.

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120. Today codified at 42 U.S.C. § 1983.

121. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

122. See *Mitchum v. Foster*, 407 U.S. 225, 240-42 (1972) (“If the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate.... We are driven by existing facts to provide for the several states in the South ... the full and complete administration of justice in the courts.” (quoting CONG. GLOBE, 42D CONG., 1ST SESS. 374-76 (1871) (statement of Sen. Osborne))).

123. *Id.* at 241 (quoting CONG. GLOBE, 42D CONG., 1ST SESS. 460 (1871) (statement of Rep. Perry)).

A later narrowing construction of the Fourteenth Amendment<sup>124</sup> has meant that the battery of civil rights laws enacted during the Johnson administration in the 1960s had to be sustained under Congress's commerce power instead.<sup>125</sup> Yet surely a widespread failure of the states at the time to secure the civil rights of all persons within their borders was part of the justification for the national civil rights legislation of the 1960s, and a more plausible basis for the legislation than any consumption of sister-state produce,<sup>126</sup> just as it was a widespread failure of state justice that empowered Congress to enact the Civil Rights Act of 1871.

This brings us to *United States v. Morrison*.<sup>127</sup> There, the Court struck down a part of the Violence Against Women Act affording battered women a private right to sue the batterer.<sup>128</sup> The Court concluded that this private right of action was beyond the power of Congress under either the Commerce Clause<sup>129</sup> or the Fourteenth Amendment.<sup>130</sup>

Writing for the Court, Chief Justice Rehnquist had to acknowledge that Congress made substantial findings in support of the legislation.<sup>131</sup> But Congress emphasized, and Rehnquist chose to focus on, findings on the impact of violence against women on the victims and their families.<sup>132</sup> There was also much in the findings about the impact of domestic violence on welfare, as well as work.<sup>133</sup> But these emphases of Congress and amici were an artifact of *Lopez's* insistence that "activities affecting" interstate commerce be

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124. Civil Rights Cases, 109 U.S. 3, 23-24 (1883) (interpreting Section 5 of the Fourteenth Amendment as authorizing civil rights legislation to control only state, not private, action).

125. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 251 (1964) (sustaining Title II of the Civil Rights Act of 1964, 78 Stat. 241, under Congress's commerce power rather than its Fourteenth Amendment power; noting the impact on interstate commerce of discrimination against black travelers in places of public accommodation).

126. Cf. *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (sustaining Title II of the Civil Rights Act of 1964, 78 Stat. 241, under Congress's commerce power over discrimination against black travelers in places of public accommodation, in part on the theory that places such as Ollie's Barbecue used produce shipped interstate).

127. 529 U.S. 598 (2000).

128. 42 U.S.C. § 13981 (2006).

129. *Morrison*, 529 U.S. at 617.

130. *Id.* at 627.

131. *Id.* at 614.

132. *Id.* at 614-16.

133. See *id.* at 636 (Souter, J., dissenting).

“economic.”<sup>134</sup> There was less in the findings tending to show the unwillingness or inability or simple failure of state and local authorities to protect women from domestic or other violence or to furnish redress for it.

The record in *Morrison* is ambiguous. It can as easily be read as suggesting that the plaintiff was lying about being raped as it can be read as illustrating the problem of denials of justice in such cases. The defendant University had waffled in remediation of the plaintiff's complaint, in the end standing behind its football heroes; and a Virginia grand jury had refused to indict them.<sup>135</sup> Even supposing, however, that in some fraction of cases brought under the Act the plaintiffs will be lying, all that Congress had attempted to give a woman here was a chance to try to prove her case.

Chief Justice Rehnquist acknowledged that Congress had made some findings documenting state and local failures to remedy violence against women, going so far as to say that these findings, too, were “voluminous.”<sup>136</sup> But the Chief Justice pointed out that “the Fourteenth Amendment place[s] certain limitations on the manner in which Congress may attack discriminatory conduct.... Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action.... That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.”<sup>137</sup> By ringing in this unexceptionable admonition, Rehnquist manipulatively shifted the referent of the words “conduct” and “discriminatory” and “wrongful,” transmuting what was essentially an allegation of *official wrong* into an allegation of *rape*. Whatever the intent of Congress underlying other provisions of the statute,<sup>138</sup> these unemphasized congressional findings bore obvious relevance to Congress's provision in the legislation of the challenged private right of action. Had these

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134. *See id.* at 610-11 (majority opinion).

135. Michael Greve usefully detailed this background in a question to me from the floor at the Conference on Federalism and Its Future, University of Texas School of Law, Austin (Feb. 12, 2011).

136. *Morrison*, 529 U.S. at 619-20 (“[The] assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence is supported by a voluminous congressional record.”).

137. *Id.* at 621 (internal quotation marks omitted).

138. *Cf.* Brief of Law Professors as Amici Curiae Supporting Petitioners, *Morrison*, 529 U.S. 598 (Nos. 99-5, 99-29), 1999 WL 1032805, at \*23-24.

findings been given full value, the nation might not have lost the private cause of action in the Violence Against Women Act.<sup>139</sup> And the Court would not have been able to suppose as blithely as it had that Congress was addressing *the local crime of rape* rather than a *nationwide failure of justice*.

## V. ARTICLE III AND THE LIMITS OF ENUMERATION

### A. *The Nigerian Torture Case*

In an earlier article I dealt with the advantages that due process reasoning could provide in cases raising questions of federal jurisdiction under Article III.<sup>140</sup> I will not revisit the cases discussed there. But I should point out that the question of jurisdiction and its relation to the national interest has moved to the forefront in the waning days of the 2011-2012 Term with *Kiobel v. Royal Dutch Petroleum Co.*<sup>141</sup>

*Kiobel* began as a federal action by an alien for a tort in violation of the law of nations, fitting the odd requirements of an ancient grant of federal jurisdiction, the Alien Tort Statute.<sup>142</sup> *Kiobel* also more or less matches the peculiar facts of *Filartiga v. Pena-Irala*,<sup>143</sup>

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139. The Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 16 U.S.C., 18 U.S.C., and 42 U.S.C.), requires reauthorization every five years, and Congress has reauthorized it repeatedly, *sans* the private cause of action struck down in *Morrison*. See Sen. Chris Coons, *Violence Against Women Act Must Be Reauthorized*, HUFFINGTON POST (Feb. 2, 2012), [http://www.huffingtonpost.com/chris-coons/violence-against-women-ac\\_b\\_1249516.html](http://www.huffingtonpost.com/chris-coons/violence-against-women-ac_b_1249516.html). At the time of writing this, in May of 2012, S.1925, the Violence Against Women Reauthorization Act of 2011, was languishing in Congress. Previous such reauthorizations have been bipartisan, but in this Congress, the bill's support is largely on the Democrats' side of the aisle. The bill makes changes intended to be both economizing and progressive. Senator Chris Coons, a sponsor of the bill and member of the Senate Judiciary Committee, noted the intention of the reauthorization is "to keep pushing federal, state and local government to do more to save lives and serve victims." See Coons, *supra*.

140. Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 BYU L. REV. 731.

141. 621 F.3d 111, 148 (2d Cir. 2010) (holding that corporate defendants have no liability within the jurisdiction provided by the Alien Tort Statute), *cert. granted*, 132 S. Ct. 472, 472-73 (2011).

142. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (codified at 28 U.S.C. § 1350 (2006)) (the "Alien Tort Statute").

143. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878-79 (2d Cir. 1980) (taking jurisdiction of an action by Paraguayan relatives of a Paraguayan tortured to death by a Paraguayan official

the famous Second Circuit case taking jurisdiction under the Alien Tort Statute of a case on wholly foreign facts, to found a modern jurisprudence of universal jurisdiction and human rights.

The original question before the Supreme Court in *Kiobel* was whether there could be corporate liability for aiding and abetting official torture of Nigerian citizens in Nigeria. The claim invoked the federal common-law action implied by *Filartiga* and its progeny under the Alien Tort Statute.

The foreign corporate defendants in *Kiobel* did not trouble to argue a jurisdictional question when the case was first argued before the Supreme Court. The defendants may have considered any jurisdictional question in the case settled, or may have preferred on this occasion to settle the issue of corporate liability *vel non*. Nor did the defendants raise the considerable difficulties now attending implied actions against aiders and abettors.<sup>144</sup> But at the time I thought the more interesting question had to do with the rational limits of judicial power.<sup>145</sup>

The difficulty in *Kiobel*, as in *Filartiga*, was that nothing in the case seemed to have any connection with the United States. If that were so, under both *Home Insurance Co. v. Dick* and *Erie v. Tompkins*, the United States could not apply its law in such a case. And therefore, under Article III, there was no federal question under which the case could arise and the jurisdiction appeared to be unconstitutional. Even Judge Kaufman, writing for the *Filartiga* panel, and, in effect, authorizing a federal common-law cause of action for torture committed by an alien,<sup>146</sup> understood the jurisdictional difficulty in a wholly foreign case for a tort in violation of international law.<sup>147</sup> What saved the jurisdiction in *Filartiga* was Judge Kaufman's apparent reliance on universal jurisdiction, with

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in Paraguay); *id.* at 890 (concluding that the case would be "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence"). For discussion of *Filartiga* and analogous criminal actions abroad, see Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 MICH. J. INT'L L. 927 (2009).

144. On secondary actions in securities litigation, see *supra* note 31

145. Note in press: *Kiobel* has been reargued specifically on this issue. Transcript of Oral Argument, *Kiobel*, No. 10-1491, 2012 WL 4486095 (Oct. 1, 2012). On reargument the conservative justices were particularly concerned with extraterritoriality and the want of national interest in the case. The discussion in this Part remains pertinent.

146. A return to Paraguay's courts would have been "futile," *Filartiga*, 630 F.2d at 880; the plaintiffs' lawyer had been jailed in Paraguay for representing them. *Id.* at 879.

147. *Id.* at 877.

a suggested basis in an underlying reciprocal interest shared among all nations. Judge Kaufman argued, memorably, that “the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.”<sup>148</sup> The torturer could and should be amenable to civil suit wherever found.

*Kiobel* in fact is a stronger case for adjudication here than was *Filartiga*, because the Nigerian plaintiffs gained asylum in this country and now reside here;<sup>149</sup> and the named defendant companies are present and doing business in this country. Personal jurisdiction over them was not transitory. The joint residence of the parties will have at least an adjudicatory interest in resolving their dispute.<sup>150</sup>

Nevertheless in the original oral argument in the Supreme Court, Justice Alito raised the question whether the United States had any interest at all in the case.<sup>151</sup> The case was put over for reargument in order to deal with this question.<sup>152</sup>

148. *Id.* at 890.

149. See Transcript of Oral Argument, *supra* note 145, at \*4:

JUSTICE KENNEDY: What effects that commenced in the United States or that are closely related to the United States exist between what happened here and what happened in Nigeria?

MR. HOFFMAN: The—the only connection between the events in Nigeria and the United States is that the plaintiffs are now living in the United States and have asylum because of those events, and the defendants are here. There’s no other connection between the events that took place in the—in Nigeria and the forum. The—the basis for suing the defendants here was because they are here and because it was possible to get jurisdiction.

150. Even the after-acquired residence of a plaintiff may have an interest in its new resident’s compensation for tortious injury, even when the tort occurred elsewhere. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981).

151. Transcript of Oral Argument at \*11, *Kiobel*, 132 S. Ct. 1738 (2012) (No. 10-1491):

JUSTICE ALITO: [T]he first sentence in your brief in the statement of the case is really striking: “This case was filed ... by twelve Nigerian plaintiffs who alleged ... that Respondents aided and abetted the human rights violations committed against them by the Abacha dictatorship ... in Nigeria between 1992 and 1995.” What does a case like that—what business does a case like that have in the courts of the United States?

MR. HOFFMAN: Well —

JUSTICE ALITO: There’s no connection to the United States whatsoever. The Alien Tort Statute was enacted, it seems to be—there seems to be a consensus, to prevent the United States—to prevent international tension, to—and—does this—this kind of a lawsuit only creates international tension.

152. *Kiobel*, 132 S. Ct. at 1738 (“Case restored to calendar for reargument. Parties are directed to file supplemental briefs addressing the following question: ‘Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign

Notwithstanding *Kiobel's* supposed want of connection with the United States, the question of the *constitutionality* of the district court's jurisdiction under the Alien Tort Statute, as applied in *Kiobel*, must have seemed to the Court, as to the corporate defendants below, too easily answered. Formalistically speaking, there is no Article III problem in *Kiobel*. The jurisdiction of the federal courts in both *Kiobel* and *Filartiga* arises under federal common law for purposes of Article III.<sup>153</sup> The statute vesting the jurisdiction in both cases, the ancient Alien Tort Statute,<sup>154</sup> explicitly contemplates an action for a tort in violation of the law of nations, in either set of courts, and in our courts the law of nations is administered as federal common law.<sup>155</sup>

The Court has never approved general federal-question jurisdiction over a case pleadable under the Alien Tort Statute. *Filartiga* should be adjudicable as a case arising under federal law within the meaning of the general federal-question jurisdictional statute,<sup>156</sup> as Judge Kaufman saw,<sup>157</sup> and indeed in all courts of general jurisdiction. The statutory federal-question jurisdiction was pleaded in the similar case of *Mohamad v. Palestinian Authority*,<sup>158</sup> a fact that went unremarked in the Supreme Court. True, the cause of action in *Palestinian Authority* was statutory, under the Torture Victim Protection Act.<sup>159</sup> That statute is a narrow codification, with sig-

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other than the United States.”).

153. *Cf. Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (holding that federal common law can ground federal statutory jurisdiction). Of course, in our time any question of federal law grounds Supreme Court jurisdiction and also evokes federal law and lawmaking power with respect to the particular federal question in all courts in cases within their jurisdiction.

154. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (“[T]he district courts shall have ... cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”), as codified today at 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

155. *The Paquete Habana*, 175 U.S. 677 (1900); *cf. U.S. CONST.* art. I, § 8, cl. 10 (“[The Congress shall have Power To] define and punish ... Offences against the Law of Nations.”); *id.* art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under ... the Laws of the United States.”).

156. 28 U.S.C. § 1331 (2006).

157. Jurisdiction in *Filartiga* originally rested on § 1331. The Alien Tort Statute, § 1350, was raised chiefly on appeal. Judge Kaufman “preferred” to rest jurisdiction on § 1350. *Filartiga v. Pena-Irala*, 630 F.2d 876, 889-90 (2d Cir. 1980).

158. 132 S. Ct. 1702 (2012).

159. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified as

nificant adjustments, of *Filartiga*. But it should not matter for purposes either of statutory or Article III jurisdiction whether the tort pleaded is the statutory tort or the common-law tort<sup>160</sup>—although the Court seems to think pleading *Filartiga* as a federal question instead of an alien tort would open up the whole universe of federal common law and import it into *Filartiga*.<sup>161</sup>

This is a fallacy. Consider that, except for antitrust jurisdiction, the general rule is that federal jurisdiction is concurrent with that of the states unless Congress says explicitly that the jurisdiction is exclusive. Yet bringing a federal claim in state courts does not change its substantive nature and limits in any respect. And recall that the original text of the Alien Tort Statute explicitly conferred jurisdiction on state as well as federal courts. The head of jurisdiction under which a federal case is brought can have no effect on the substantive law invoked by the complaint. It remains the same in all courts, whether it is statutory or arises from a line of cases.

The difficulty expressed by Justice Alito during the first oral argument in *Kiobel* was the existence *vel non* of a national adjudicatory interest, and although that question could be decided formalistically under Article III, as I have shown, and is the right question, it is a question that essentially reflects a due process concern that would have to be read into Article III, if, as is most likely, Article III were held to control it. I would answer that question from Judge Kaufman's point of view, which was tacitly interest-analytic and as such would satisfy due process. The national interest that sustained the jurisdiction in *Filartiga*, and indeed sustains the Alien Tort Statute altogether, is the universal, shared, reciprocal interest in enforcing the norms of international law.<sup>162</sup> This evidently is the national adjudicatory interest in the assertion

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a note to the Alien Tort Statute at 28 U.S.C. § 1350 (2006)).

160. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 101 (1972) (holding that federal common law will ground federal-question jurisdiction, 28 U.S.C. § 1331). *But see* *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959) (Frankfurter, J.) (holding that a nonstatutory maritime claim cannot ground federal-question jurisdiction, but can be made pendent to a statutory maritime claim, which can).

161. For this fallacy, see, for example, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004).

162. Sitting in a then-premier admiralty jurisdiction, I imagine that Judge Kaufman would have been accustomed, analogously, to the universal venue in admiralty. This presumably reflects a universal, shared, reciprocal interest among seagoing nations that the quick and experienced justice of a maritime admiralty court be available wherever a defendant ship, in rem, or shipowner, in personam, can be found.

of subject-matter jurisdiction in these cases; this is what satisfies due process. The constitutional question, then, that we would frame as an Article III question depends for answer on identifying some national interest in—some rational basis for—the assertion of jurisdiction.

The *Kiobel* Court would find scant precedent for framing its answer as a matter of due process, however.<sup>163</sup> It is likely to hold either that the Alien Tort Statute has or does not have extraterritorial application—or that Article III does not allow for *universal jurisdiction*. Both *Kiobel* and *Filartiga* may be considered cases calling for exercises of universal jurisdiction, based on the universally shared reciprocal interests of civilized nations. If *Kiobel* falls, *Filartiga*, and the burgeoning body of international human rights law as administered in this country, falls with it.

There are seemingly powerful prudential arguments that American assertions of universal jurisdiction over foreign corporations and, as in *Filartiga*, foreign officials, in cases alleging tortious conduct occurring abroad, can translate into hostile foreign courts asserting universal criminal jurisdiction over American officials, military leaders, and American corporations doing business abroad, in prosecutions charging them with crimes against humanity<sup>164</sup>—notwithstanding that *Filartiga* itself was explicitly limited to cases of civil liability.<sup>165</sup> The argument is a disturbing one even so. Yet

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163. *But see* *Mesa v. California*, 489 U.S. 121, 123, 136-39 (1989) (O'Connor, J.) (holding the officer removal statute ineffective to ground Article III jurisdiction when the officers in question were defendants in ordinary motor vehicle cases in state court, although they had been operating the vehicles in the course of their employment; explaining that the officers failed to invoke any federal defense, or any party-protective interest of the United States, such as bias in the state courts). Whether or not this was the right result, Justice O'Connor's interest analysis was on the right track. In contrast, see the remarkable flight from analytic thinking in *American National Red Cross v. S.G.*, 505 U.S. 247, 257 (1992) (Souter, J.) (sustaining Article III jurisdiction over a case against the American Red Cross without inquiry into the existence of a national adjudicatory interest (actually quite strong); relying instead on the fact that the legislation chartering the Red Cross mentions federal courts). *But see id.* at 265 (Scalia, J., dissenting) (charging the Court with engaging in a jurisprudence of "magic words").

164. *Cf.* MICHAEL HAAS, GEORGE W. BUSH: "WAR CRIMINAL"? THE BUSH ADMINISTRATION'S LIABILITY FOR 269 WAR CRIMES (2008); INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES (Wolfgang Kaleck et al. eds., 2006); STEPHEN MACEDO, UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (2004).

165. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (stating the case's holding as

declining to adjudicate extraterritorial violations of human rights here would not necessarily yield similar restraint in hostile foreign courts seeking to assert universal jurisdiction over our officials and companies. At most, it would deprive those courts of an argument.

## VI. SUPER-GENERALIZATION

### A. *Rights*

We have been discussing the counterintuitive role of due process, in effect, as a source of governmental authority. But the question of governmental power arises not only in direct challenges to governmental authority but also in litigation of individual rights, and not only in defense to an assertion of right but also as the actual *source* of rights. This brings us to the concept of substantive due process.

Commentators have objected to “substantive due process” as an oxymoron.<sup>166</sup> It is doubtful, however, that many are prepared to strip themselves of federal rights against state and local governments, substantive rights which exist today only through inclusion in the concept of due process. The project of “incorporating” the Bill of Rights into the liberty protected by the Due Process Clause of the Fourteenth Amendment<sup>167</sup> was extended recently to the Second Amendment<sup>168</sup>—perhaps, ironically, to the gratification of the project’s critics. But their objection to substantive due process is not, at root, an objection to incorporation of the Bill of Rights. Rather, their objection is to rights not enumerated in the Bill of Rights, and only to certain unenumerated rights.

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“for the purposes of civil liability”).

166. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 249-82 (2d ed. 1997); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31-32 (1990); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980); cf. *Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir. 1982) (Posner, J.); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 *CONST. COMMENT.* 315, 318 (1999).

167. That substantive due process governs the constitutionality of state action has become, in large part, a literal fact. See *supra* note 61.

168. *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3050 (2010) (incorporating the Second Amendment into the Due Process Clause of the Fourteenth Amendment); cf. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (holding that the Second Amendment is one of individual rather than collective right).

The chief repository of enumerated rights is the First Amendment, which protects speech, assembly, and religious rights. The bulk of the Bill of Rights, however, is concerned with protections afforded to those accused of crime.<sup>169</sup> It is difficult to believe that additional identifiable rights do not exist. If they do, they would seem to call for judicial protection. The Ninth Amendment acknowledges the existence of such rights. It states a rule of construction, mandating that the Constitution and the Bill of Rights not be construed in disparagement of rights not enumerated there.<sup>170</sup> Surely we have rights to marry, to have children, to seek education, to seek gainful employment, to acquire property, and so on. Even the severest critics of substantive due process would allow for such rights, perhaps arguing only that the Due Process Clause is the wrong place in which to lodge them.<sup>171</sup>

Alternatively, these rights could be considered inherent attributes of citizenship. They were considered inherent in state citizenship by judges from earliest times.<sup>172</sup> Or such rights could be legitimized by thinking of them as among the “unalienable rights” mentioned in the Declaration of Independence.<sup>173</sup> In this last conception, these are natural rights which existed before the Constitution, and the Constitution necessarily assumed their continued existence, because they are inalienable.

After the adoption of the Fourteenth Amendment in 1868, it was supposed that both the enumerated and the unenumerated rights were included among the privileges and immunities of American citizenship mentioned in the first section of the Fourteenth

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169. See U.S. CONST. amends. IV-VI, VIII (variously providing rights against unreasonable search and seizure, self-incrimination, and cruel and unusual punishment; also providing positive rights to counsel, to indictment by grand jury, to trial by jury, and to confrontation of witnesses).

170. *Id.* amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

171. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 521 (1999) (Thomas, J., dissenting) (arguing that the *Slaughter-House Cases* should be overruled and the Privileges and Immunities Clause restored as the proper locus of rights against the states).

172. *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230) (listing certain property and civic rights as examples of privileges and immunities of citizenship within the meaning of Article IV); see also U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

173. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), available at <http://teachingamericanhistory.org/ratification/tansill/declaration-of-independence.html>.

Amendment.<sup>174</sup> That they are not must be taken as settled, a casualty of the *Slaughter-House Cases*,<sup>175</sup> in which the Supreme Court held that the Privileges and Immunities Clause of the Fourteenth Amendment protects only the rights of national, not state, citizenship—rights for the most part already protected by the Supremacy Clause in any event. Even so, the *Slaughter-House* Court did not endorse the view that the rights of national citizenship included the rights enumerated in the Bill of Rights.<sup>176</sup> After *Slaughter-House*, the Bill of Rights was no more usable against state and local government than it had been before.<sup>177</sup> In effect, the *Slaughter-House* Court stripped the Privileges and Immunities Clause, whatever the intention of its framers, of any serious meaning.

In the shadow of the *Slaughter-House Cases* and their demolition of the Privileges and Immunities Clause, due process ultimately emerged as the repository of personal liberties as against the states. And, conversely, rights found only in the Fourteenth Amendment are assumed applicable, when relevant, as against the nation as well.<sup>178</sup>

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174. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 89-90 (1873) (Field, J., dissenting) (referring to an unenumerated “right to pursue a lawful and necessary calling”); *id.* at 96 (referring to rights “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property” (quoting the Civil Rights Act of 1866, 14 Stat. 27)); *id.* at 112-13 (Bradley, J., dissenting) (arguing that the privileges and immunities of state citizenship that are extended, under Article IV, to visitors to the state, are by the Privileges and Immunities Clause of the Fourteenth Amendment granted to all residents of the state); *id.* at 118-19 (arguing also that the Privileges and Immunities Clause embraces the rights enumerated in the Bill of Rights).

175. *Id.* at 36 (majority opinion). The only prominent recent case to find use for the Fourteenth Amendment’s Privileges and Immunities Clause was *Saenz*, 526 U.S. at 501-02 (locating the right to interstate travel within the Fourteenth Amendment’s Privileges and Immunities Clause). That right had previously been dealt with as a matter of equal protection. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

176. The Fourteenth Amendment, of course, is about federal constitutional control of the states. As to rights, the Amendment proceeds with the pivotal words, “No state shall.”

177. *Cf. Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (Marshall, C.J.) (holding the Bill of Rights inapplicable to the states).

178. *Cf. Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding, in the Washington, D.C. school desegregation case, that the Fifth Amendment’s Due Process Clause contains an equal protection component). Today *Bolling* is commonly read as a “reverse incorporation” of the Fourteenth Amendment’s Equal Protection Clause into the Fifth Amendment’s Due Process Clause.

In 1923, in *Meyer v. Nebraska*, the Court recognized a host of unenumerated rights among the liberties protected by the Fourteenth Amendment's Due Process Clause. These included but went far beyond *Lochner's* "liberty of contract." Writing for the Court, Justice McReynolds declared:

While this court has not attempted to define with exactness the liberty thus guaranteed, ... [w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with.<sup>179</sup>

Justice McReynolds also based *Meyer*, in part, on an unenumerated right in the parent to control the rearing of the child.<sup>180</sup> This right of parental control is the wellspring of cases ultimately leading to the still-controversial modern unenumerated rights of family planning and sexual privacy.<sup>181</sup>

Those who object vehemently to a right to reproductive choice may not have considered how the want of such a right in our country once permitted forced sterilization,<sup>182</sup> or, in China, how

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179. 262 U.S. 390, 399-400 (1923) (McReynolds, J.) (citations omitted). For an investigation into McReynolds's unlikely authorship of *Meyer*, see Louise Weinberg, *The McReynolds Mystery Solved*, 89 DENV. U. L. REV. 133 (2011).

180. *Meyer*, 262 U.S. at 400 ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life."). Justice McReynolds more specifically elaborated on this right in the follow-up case of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

181. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that homosexual couples have a due process right to sexual privacy, striking down a law criminalizing sodomy, and overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that women have a due process right to seek an abortion in the first three months of pregnancy); see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding, as a matter of due process as well as equal protection, that there is a right to marry the person one chooses; striking down a state antimiscegenation law).

182. Cf. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking down a statute authorizing sterilization of habitual criminals as a violation of the Equal Protection Clause); *id.* at 543 (Stone, C.J., concurring) (pointing out that the right to bear children is a fundamental right of all, not of a minority, and that the Equal Protection Clause is inadequate

want of such a right still permits forced abortion and has led to the unintended consequence of disappearing baby girls.<sup>183</sup> Reportedly, although it was an old tradition in China to “expose” baby girls to the elements,<sup>184</sup> China may be reconsidering its attempt to control a family’s desire for children.<sup>185</sup> Justice Cardozo once declared that the rights enumerated in the Bill of Rights are “implicit in the concept of ordered liberty.”<sup>186</sup> It is not clear, however, that this formulation adds much to enumerated rights beyond the fact of their enumeration. And what of rights *not* enumerated in the Bill of Rights? How are such rights to be identified? When can an asserted but unenumerated right serve as a meaningful limit on governmental power in a court of law? In answer to these questions, the Justices have given us a piling-up of phrases as famous and as vague as Cardozo’s. As if to quiet an inner doubt or placate those who would monitor the liberties of others, Justice Frankfurter variously described unenumerated rights as strictly limited to those rights which are “fundamental.”<sup>187</sup> Of course there are statutory or common-law rights that are enforceable yet not ordinarily considered “fundamental.” But it is rather awkward to suppose that among the unenumerated constitutional rights there are some that are enforceable but not fundamental, or perhaps not as fundamental as others, or as fundamental as those in the Bill of Rights. Yet how can the right to marry, for example, be less “fundamental” than the right to a warrant issued on probable cause? Perhaps what we mean when we say that a right is a constitutional right is that the right is fundamental.

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to protect it).

183. See Edward Wong, *Reports of Forced Abortions Fuel Push to End Chinese Law*, N.Y. TIMES (July 22, 2012), <http://nytimes.com/2012/07/23/world/asia/pressure-to-repeal-chinas-one-child-law-is-growing.html>.

184. See William L. Langer, *Infanticide: A Historical Survey*, 1 HIST. CHILDHOOD Q. 53 (1974).

185. See *China Considers Easing ‘One Child’ Family Planning Rules*, N.Y. DAILY NEWS (Nov. 28, 2012), <http://www.nydailynews.com/news/world/china-reconsidering-child-rule-article-1.1209369>.

186. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

187. For the earliest fully developed description I have found of the relation of fundamental rights to due process, see Louise Weinberg, *An Almost Archeological Dig: Finding a Surprisingly Rich Early Understanding of Substantive Due Process*, 27 CONST. COMMENT. 163 (2010).

Justice Frankfurter also variously suggested that unenumerated rights are those that protect against government acts that “shock the conscience;”<sup>188</sup> or that are “deeply rooted” in the “traditions” of the “English-speaking peoples.”<sup>189</sup> In *Meyer*, Justice McReynolds had similarly referred to “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>190</sup> These formulations seem of scant relevance to the modern rights to contraception, abortion, or sodomy.<sup>191</sup> What has been deeply rooted and long recognized at common law is moral or religious disapproval of such matters. The freedoms to use contraception, resort to abortion, or perform acts of sodomy, are liberties that have been only belatedly, grudgingly, and controversially acknowledged. It is for this very reason that the Constitution, and a vigilant judiciary, are needed to protect them.

### *B. Scrutinizing Scrutiny: The Problem of Economic Rights*

Although in *Carolene Products* the Court extended a generous presumption of constitutionality to ordinary commercial regulation, in Footnote Four the Court distinguished certain rights the abridgment of which should be afforded strict judicial scrutiny. Perhaps this now familiar “tiered” scrutiny might benefit from further refinement. The distinction best drawn might not necessarily be a distinction between economic rights and other constitutional rights.

In theory, Anglo-American legal tradition makes no distinction of persons. But Footnote Four does. Footnote Four recognizes that discrete and insular minorities are deserving of particular constitutional protection, perhaps because they can less readily make way in the scrum of politics.<sup>192</sup> They have the vote but cannot be presumed to vote en bloc; and they may find it difficult to form coalitions. Perhaps a way can be found to provide a similarly more

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188. *Rochin v. California*, 342 U.S. 165, 172 (1952).

189. *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (Frankfurter, J.); *Bridges v. California*, 314 U.S. 252, 284 (1941) (Frankfurter, J., dissenting).

190. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (McReynolds, J.).

191. See *supra* note 181 and accompanying text (citing cases on intimate rights).

192. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (raising the question whether prejudice against “discrete and insular minorities” may “curtail the operation of those political processes ordinarily to be relied upon to protect [them], and which may call for a correspondingly more searching judicial inquiry”).

rigorous scrutiny to government actions affecting economic and property rights when they are *the personal rights of individuals*.

In thinking about economic rights, a focus on individuals and their small businesses and properties would guard against any weakening of *Carolene Products'* deference to reasonable economic regulation. Such regulation affects corporate "persons" or associations with sufficient resources to come within the regulatory intentions of a legislature, and affects whole markets or classes of workers or industries of interest to Congress. Such actors on the economic stage generally have sufficient resources to absorb, spread, or insure against economic harms.

In *Texaco Inc. v. Pennzoil Co.*,<sup>193</sup> the Second Circuit Court of Appeals, affirming the district court, authorized an injunction to protect Texaco from a Texas appellate bond requirement that would require Texaco to forego appeal unless it deposited billions not readily available to it.<sup>194</sup> The Supreme Court reversed,<sup>195</sup> extending the doctrine of *Younger v. Harris*<sup>196</sup> to bar any such injunction, and leaving Texaco to seek the protections of bankruptcy.<sup>197</sup> Justice Marshall concurred separately to express the view that it would be unconscionable for Texaco to be excused from compliance with the state's appellate bond requirement simply because the sum involved was in the billions of dollars. He argued that parties like Texaco should be treated with no greater consideration than would be afforded a "small grocery."<sup>198</sup> A small grocery would have been forced to meet the bond requirement without question.

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193. 784 F.2d 1133 (2d Cir. 1986).

194. *Id.*

195. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 9 (1987) (barring a federal injunction against a state's requirement of a bond on appeal as an interference with an important state interest in securing a judgment for damages).

196. 401 U.S. 37 (1971) (holding that principles of equity, comity, and federalism bar federal injunctions against pending state criminal proceedings). For discussion see Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977). In *Pennzoil*, the Court extended *Younger* to bar injunctions against state civil proceedings involving an important state interest even though no "proceeding" was ongoing in the state courts. *Pennzoil*, 481 U.S. at 14.

197. See *Pennzoil*, 481 U.S. at 18 (Scalia, J., concurring) (reasoning that Texaco's right to appeal would be unaffected by bankruptcy); *id.* at 32 (Stevens, J., concurring). When Texaco did file for bankruptcy, Pennzoil settled for a fraction of the value of its claim. See Debra Whitefield, *Texaco Agrees to Pay Pennzoil \$3 Billion*, L.A. TIMES, Dec. 20, 1987, at A4.

198. *Pennzoil*, 481 U.S. at 27 (Marshall, J., concurring).

Perhaps courts should go further than Justice Marshall and consider that Marshall's "small grocery" might well be afforded *more* protection than is afforded litigants as powerful as Texaco. Governmental acts or regulations that may be reasonable and necessary on the larger scale can be unreasonable and even abusive as to individuals. It would not be more inappropriate to take this factor into consideration than it has been to disregard it, for the very reasons adumbrated in Footnote Four to justify the protection of discrete and insular minorities. The following discussion of recent cases may help to make the point.

### C. *Kelo*

The most notorious of recent cases of economic right begging for some such solution as heightened scrutiny is probably the 2005 case of *Kelo v. City of New London*.<sup>199</sup> There, the Supreme Court, in effect, sustained a classic "naked preference"—a taking from *A* to give to *B*.<sup>200</sup>

In *Kelo*, on vague, speculative, and underfunded plans,<sup>201</sup> a rich private developer, in the supposed interest of a powerful drug company, armed itself with the government's right of eminent domain to destroy a neighborhood and acquire prime waterfront property cheaply.<sup>202</sup>

This had been an old waterfront neighborhood of little houses and small shops. The neighborhood was free of "blight"—the usual trigger of redevelopment plans. The taking was effected, rather, in the supposed interest of putting the land to higher uses and raising city revenue.<sup>203</sup> The developer was proposing impressive changes

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199. 545 U.S. 469, 489-90 (2005) (holding that homeowners had no right to stop a taking of their homes by eminent domain for transfer to a private developer in aid of a private company, in the speculative interest of redeveloping the land to higher uses and increasing city's revenue).

200. Justice Kennedy concurred in Justice Stevens's opinion in *Kelo*, providing the fifth vote for the majority. His was the only opinion in the case not dealing in terms with the argument that the Court was authorizing a "taking from *A* to give to *B*." But his opinion may be read as a tacit struggle with the problem of naked preference.

201. *Cf. Kelo v. City of New London*, 843 A.2d 500, 596 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part) (opining that there was scant evidence that the development plan would ever be realized).

202. *Id.* at 508-11.

203. *Id.*

likely to enhance the drug company's nearby headquarters: a hotel, a retail complex, a beautiful marina, and so on.

Most of Susette Kelo's neighbors accepted modest payments and moved out, but when Kelo and others refused to sell, the city made plans to take their houses and shops by eminent domain.<sup>204</sup> Kelo unsuccessfully sought an injunction against the threatened taking, and when she lost her battle in the United States Supreme Court, the city handed the little neighborhood over to the private developer for a decade without serious charge to the developer. Most of the neighborhood was bulldozed. But as long as Susette Kelo continued her fruitless fight for rehearing and for costs,<sup>205</sup> and her sympathizers struggled to gain control of the City Council, her pink cottage was left intact. Then, at the developer's urging, the city had Kelo's cottage moved, stick by stick, to a downtown location.<sup>206</sup>

Eventually the redevelopment project collapsed for insufficiency of funds, and today the barren land where a community once flourished is used as a dump for refuse from a hurricane that roared through the city in 2011. At about the time when the drug company's tax breaks were set to expire, it abandoned the city. Seeing that it had nothing to show for all this destruction and had now lost the revenue and charisma that Kelo's scenic little neighborhood had provided, the city council held three days of commemorative events and dedicated Kelo's pink cottage as a museum.<sup>207</sup>

In *Kelo*, the Supreme Court more clearly established that, even in cases of economic redevelopment for private use, the Fifth Amendment's requirement of "public use" will be satisfied by the speculation that a "public purpose" may be served. This is so even when the property taken is a flourishing neighborhood which will be destroyed, even when the "public purpose" is little more than the assertion that a better class of property owners might pay higher taxes. It is assumed that there is a "public purpose" when an attempt is made to put land to more expensive use. In dissent,

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204. *Id.*

205. See *Kelo v. City of New London*, 546 U.S. 807 (2005) (denying costs); 545 U.S. 1158 (2005) (denying rehearing).

206. See JEFF BENEDICT, *LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE* (2009). Kelo did not want to live there and now resides in some other part of Connecticut.

207. See Scott Bullock, *Susette Kelo's Little Pink House Finds a New Foundation*, INST. FOR JUST. (June 2008), <http://www.ij.org/susette-kelos-little-pink-house-finds-a-new-foundation-2>.

Justice O'Connor warned that "[t]he specter of condemnation [now] hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."<sup>208</sup> Justice O'Connor added, "As for the victims, the government now has license to transfer property from those with fewer resources to those with more."<sup>209</sup>

It is somewhat surprising that it was the liberal wing of the Court that, with Justice Kennedy's swing vote, approved this taking. The explanation may lie in the fact that current American liberalism has roots in the New Deal, when the struggle was to discourage judicial review—to let the government govern. The problem with such views in this case is that the *Kelo* plaintiffs did not comprise a standard Footnote Four exception to that general rule. No discrete and insular minority was targeted. The Court saw only economic property rights at stake. And yet it is obvious that a taking of the homes and shops of individuals can incur costs, tangible and intangible, that are not covered by "just compensation." These costs suggest that it is essential that such takings, at least when affecting the personal rights of individuals, occur only to meet the necessities of actual "public use," and that courts need to provide not only substantial scrutiny of such takings, but both prospective and general retrospective relief.

The *Kelo* plaintiffs suffered intangible but real losses. They lost homes in which some of their families had lived for generations. They lost the sentimental attachments to every room, their cherished waterfront views, their familiar neighbors, the comfort and security of their familiar neighborhood, and the right to go about their usual lives without a permanent disruption and irrevocable change. As for money losses, plaintiffs in cases like *Kelo* lose the costs of their attempt to fight a taking, and the income from the small businesses on which they and their families have

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208. *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting).

209. *Id.* at 505. Justice Thomas dissented even more angrily:

Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.

*Id.* at 521 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

depended.<sup>210</sup> They lose the difference between the market value of their homes and the low appraisal at which “just compensation” too often is afforded. If they oppose the taking, the authorities sometimes turn around and claim back rent for the years of their struggle, as reportedly occurred in *Kelo*.<sup>211</sup> These sorts of costs, which can be spread or absorbed or insured against by larger businesses, can be devastating to individuals and their families.

The reaction to *Kelo*, nationwide, has been outrage. The political backlash was immediate and has been widespread and persistent, amounting to a legislative revolution. Some forty-four states (and still counting) have enacted *Kelo* reform legislation of varying degrees of effectiveness.<sup>212</sup> In 2006 President Bush issued a *Kelo* reform executive order applicable to federal agencies, and in the spring of 2012 the House of Representatives sent a *Kelo* reform bill to the Senate.<sup>213</sup>

Heightened scrutiny of the economic rights of individuals might have avoided the result in *Kelo* if it could have induced a healthier skepticism about the wherewithal for the grandiose but vague plans the developer presented to the city. But heightened scrutiny could not guarantee an injunction for the *Kelo* plaintiffs. A more direct and effective course might be to recognize that “just compensation” is not an adequate legal remedy, and to provide easier access to an injunction in cases alleging irrevocable harm when there is to be a taking of the property of an individual for no public use; or, if it is too late for that, to allow damages for intangible and future harms, as well as known monetary harms and costs. The due process pleadings of the parties should not be ignored; these sorts of takings are deprivations not only of property but of liberty. Dissenting in

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210. See Mark D. Obenshain, *Property Rights Need Constitutional Protection*, RICH. TIMES-DISPATCH (Jan. 22, 2012), [http://www.timesdispatch.com/news/property-rights-need-constitutional-protection/article\\_4650f198-6b1a-5e29-a28b-29e9e14e43a1.html](http://www.timesdispatch.com/news/property-rights-need-constitutional-protection/article_4650f198-6b1a-5e29-a28b-29e9e14e43a1.html) (pointing out that “just compensation” does not include the costs of fighting eminent domain or, when small shops are taken, does not include lost income and resultant family distress).

211. *This Land Was Your Land: City Wants Back Rent from Kelo Residents*, WND (Aug. 20, 2005, 1:00 AM), <http://www.wnd.com/2005/08/31873/>.

212. The chief problem appears to be that most *Kelo* reforms make an exception for blight, and “blight” turns out to lie in the eye of the beholder. See, e.g., Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 184 (2007).

213. Private Property Rights Protection Act of 2012, H.R. 1443, 112th Cong. (2d Sess. 2012).

*Kelo*, Justice O'Connor can be read to have suggested as much,<sup>214</sup> as could Justice Thomas.<sup>215</sup>

#### *D. Astrue*

A very different problem arises when the government deprives an individual of a statutory economic benefit. When a legislature creates a property interest, the expectation is that courts will scrutinize the deprivation quite strictly, particularly when the case is treated as one of constitutional right rather than statutory interpretation.<sup>216</sup> It is important, among the complexities such cases can present, to consider such factors as the degree of dependency of the individual upon the entitlement, and the importance to society and the economy that the beneficiary not be denied the particular entitlement. Government can rarely be justified in withholding a statutory entitlement from an individual dependent on it, not only because broad interpretation is inherently necessary in such cases but also for consequential reasons. Society generally benefits when the costs of caring for dependent individuals are not permitted to fall on the individual or those who must care for her, or on the limited resources of some charity. Thus, speculation concerning fiscal needs or administrative burdens generally should not be held to justify deprivation of a statutory entitlement upon which the individual deprived of the benefit is dependent. Denials of welfare benefits, for example, are likely to receive substantial judicial scrutiny.<sup>217</sup>

This brings us to the case of *Astrue v. Capato*.<sup>218</sup> The following brief account of Karen Capato's litigation against Commissioner

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214. See *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting) (criticizing the majority for permitting a taking for solely private use; suggesting the necessity of considering the intangible harms caused by takings in economic redevelopment cases).

215. *Id.* at 518 (Thomas, J., dissenting) ("[I]t is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits, ... while deferring to the legislature's determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals' traditional rights in real property."); *id.* at 522-23 (terming the urban renewal of the 1970s "negro removal" and complaining that the majority had cleared the way for the transfer of properties from people without the wherewithal for long legal battles with powerful private entities).

216. *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970).

217. *Id.*

218. 132 S. Ct. 2021 (2012).

Michael J. Astrue of the Social Security Administration is a composite one taken from the below-cited judicial opinions in the case. Shortly after Karen and Robert Capato were married, Robert was diagnosed with cancer of the esophagus. Chemotherapy offered a slim chance to save him but was likely to make him sterile if it did. Although Robert had two children from a previous marriage, the couple wanted children from their own marriage. Robert therefore began to make contributions to a sperm bank. Miraculously, the couple conceived naturally and bore a son. The Capatos asked their lawyer to make a change in Robert's will to clarify that all his children should share equally in whatever he could leave them upon his death, but their lawyer neglected to make the change. They also prepared a notarized document specifying that any children born to Karen after Robert's death should be understood to be his children with all the rights of his other children.<sup>219</sup> Robert died soon thereafter. The grieving widow turned to the sperm bank, and with the assistance of in vitro technology bore twin children of Robert eighteen months after his death. Thereafter, under a statutory insurance program, into which Robert had paid part of his wages throughout his working life, she applied to the Social Security Administration for support for her five children. Support was allowed, but not for the in vitro twins.<sup>220</sup>

It is disturbing that in *Astrue*, the *unanimous* Supreme Court, by Justice Ginsburg, found no unconstitutional deprivation of property in the Social Security Administration's denial of benefits. The twins were dependent minor survivors of a deceased wage earner. They met all statutory requirements.<sup>221</sup> Their decedent parent had consistently paid into the statutory survivors' benefit insurance scheme.<sup>222</sup> The agency did not contest the fact that the statutory requirements were fully satisfied by Karen Capato's twins.

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219. *Id.*

220. *Id.* For early discussion, see Benjamin C. Carpenter, *A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J.L. & PUB. POL'Y 347 (2011).

221. 42 U.S.C. §§ 401-433 (2006) (Title II of the Social Security Act); *id.* § 402(d)(1) (providing benefits to dependent minors surviving the death of a "fully or currently insured individual"). The purpose of these insurance benefits for dependent minors is not to provide general welfare benefits but to help replace support the child would have received from its father's wages had the father not died. *Mathews v. Lucas*, 427 U.S. 495, 507-08 (1976).

222. *Astrue*, 132 S. Ct. at 2033.

Because these children satisfied all statutory requirements, the Eleventh Circuit Court of Appeals<sup>223</sup> vacated a judgment of the district court denying the children their benefits.<sup>224</sup> The court of Appeals refrained from characterizing the district court's judgment as absurd, but treated it as absurd. The court of appeals could see no reason for the Social Security Administration to strip the Capato twins of paid-for statutory insurance.

True, under the Social Security Act, when there is some doubt about qualification, the Social Security Administration is directed to consult state intestacy law to see if the children could qualify under that legislation. But if that does not help, there are further ways a child can qualify, including a showing of actual dependency at the time of death of the father. None of these alternatives render the statute "ambiguous," as the district court supposed.<sup>225</sup> These latter alternatives are clearly fallback provisions—Congress's attempts to make certain that the proceeds of the father's paid-for insurance go to the child. And so the Court of Appeals held.<sup>226</sup>

The trouble was that successive commissioners of the Social Security Administration had opposed benefits for all in vitro children. There were at least a hundred such cases pending at the time.<sup>227</sup> When, back in 2004, in a factually identical case,<sup>228</sup> the Ninth Circuit had reached the same result the Eleventh Circuit would reach in Karen Capato's case, the commissioner at the time had filed a notice of "acquiescence,"<sup>229</sup> announcing that his agency would *not* comply with the Ninth Circuit's decision beyond its territorial scope. The commissioner made clear that the agency viewed state intestacy law as the gatekeeper to Social Security survivors' insurance benefits, however well qualified a child might be under the federal statute itself. Commissioner Astrue's position was in line with this history.

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223. *Id.* at 2033-34.

224. *Capato v. Comm'r*, 631 F.3d 626 (11th Cir. 2011).

225. *Capato v. Astrue*, No. 08-5405, 2010 WL 1076522 (D.N.J. Mar. 23, 2010).

226. *Capato v. Comm'r*, 631 F.3d at 630.

227. James Vicini, *U.S. Top Court Decides In Vitro Fertilization Benefits*, REUTERS (May 21, 2012, 10:55 AM), <http://www.reuters.com/article/2012/05/21/us-usa-socialsecurity-benefits-idUSBRE84K0SD20120521>.

228. *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004).

229. *See Social Security Acquiescence Ruling 05-1(9)*, 70 Fed. Reg. 55,656 (Sept. 22, 2005).

The position had nothing to do with deference to the states' traditional authority over the definition of the word "child." Rather, the agency's point was that children like the Capato twins simply were not statutory children. The statute did not mention posthumous children conceived by means of in vitro technology.<sup>230</sup>

State intestacy laws, like Florida's in this case, tend to be hard on posthumously born children, but if the child is born in wedlock, some states hold the statute inapplicable. The problem addressed by those laws that are applied even if a child is conceived in wedlock is evidentiary. How can the state confidently say that the deceased was indeed the claimant's father? Would the deceased have wanted some other man's child to share his own children's inheritance?

Needless to say, such a statute should not bar an inheritance if DNA testing proves the paternity of the decedent.<sup>231</sup> The statute would be equally inapplicable if it is the mother who has died and there is no question of her maternity. Similarly, the Florida statute should have no rational application in cases like Karen Capato's. Any evidentiary reason for stripping posthumous children of inheritance rights was irrelevant in the *Capato* case—the paternity of the decedent sperm donor father was known, provable, and conceded, as was the certainty of the twins dependency on him had he survived.<sup>232</sup> The only nonevidentiary reason for state law denying posthumously born children inheritance rights—to protect the patrimony of actual offspring from the grasp of those having no relation to the decedent<sup>233</sup>—simply vanishes in cases like Capato's, in which the paternity of the decedent sperm donor is known. But Commissioner Astrue was contesting all such cases, the irrelevance of state intestacy law notwithstanding.

Writing for the unanimous Court in *Astrue*, Justice Ginsburg produced an appallingly unconvincing opinion, swallowing Commissioner Astrue's every proposition. She insisted that the statute was ambiguous, although the Court of Appeals had shown that it was not. Because the statute was ambiguous, Justice Ginsburg concluded that the statutory fallback reference to state

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230. The silence of the statute on this point is not mysterious. There had been no such technology when the legislation was enacted.

231. See, e.g., *Woodward v. Comm'r*, 760 N.E.2d 257, 266-67 (Mass. 2002).

232. *Astrue v. Capato*, 132 S. Ct. 2021, 2025-26 (2012).

233. *Id.* at 2033.

law was called for, and that that reference satisfied “rational-basis” review.<sup>234</sup> She reasoned that using state law as a gatekeeper in every case would alleviate the administrative burden upon the agency of proving dependency on a case-by-case basis.<sup>235</sup> Justice Ginsburg did not explain how consulting fifty different state laws would be less burdensome than simply following the language of the existing single federal law, the requirements of which the Capato children fully satisfied. She did not say why the agency’s convenience, if indeed there were a convenience problem, should trump the statutory obligation toward infant dependents of a wage earner to provide the needed support their father had paid for and Congress had authorized.

Justice Ginsburg also accepted Astrue’s argument that denials of benefits under state intestacy laws helped the agency to husband its funds for better-qualified children. To be sure, in the abstract, the preservation of scarce funds for better-qualified recipients might make fiscal sense. But in the specific case of the Capato twins, there were equally dependent siblings. Recall that there was a naturally conceived son of the Capato’s, and two children of his earlier marriage. There was no way of husbanding the twins’ support to better the lot of the other three children in the family. The denial to the twins would instead result in deprivation to the other children, who would then have to share their support, meager in any event, with their less fortunate siblings.

Shockingly, the *Astrue* Court held unanimously that the agency’s funds should be husbanded to support only naturally conceived children, and that the happenstance of state law determines whether a child is naturally born.<sup>236</sup> Apparently Congress intended that in vitro babies must, if state intestacy law so decrees, be left to fend for themselves.

Yet the Supreme Court has at least twice held it a violation of the Equal Protection Clause for a state to discriminate among classes of children.<sup>237</sup> The counterargument, with which both the Ninth and

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234. *Id.*

235. *Id.* at 2027.

236. *Id.* at 2033-34.

237. *Plyler v. Doe*, 457 U.S. 202 (1982) (holding it a violation of the Equal Protection Clause to bar undocumented immigrant children from the public schools); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (placing equal protection limits on discrimination against illegitimate

Eleventh Circuits regrettably agreed,<sup>238</sup> is that this discrimination is no discrimination at all, because not all posthumous children are denied benefits, but only those disqualified by state intestacy law. Yet it is hard to see why discrimination against a subclass of posthumously born infants is more justifiable than discrimination against all posthumously born infants, when the subclass has no rational relation to the child. No amount of creative subclassing can save *Astrue* from its denial of equal protection. Tellingly, Justice Ginsburg ventured to remind us, as if in extenuation, that economic rights invoke only rational-basis review:

Under rational-basis review, the regime Congress adopted easily passes inspection. As the Ninth Circuit held, that regime is “reasonably related to the government’s twin interests in [reserving] benefits [for] those children who have lost a parent’s support, and in using reasonable presumptions to minimize the administrative burden of proving dependency on a case-by-case basis.”<sup>239</sup>

I think the reader at this point would question the rationality of these “rational bases.” The Capato children *had* lost a parent’s support. That they would have been dependent on Robert, had he survived, was conceded—there was no administrative burden in proving it. But even if a burden of proving dependency existed in this case, the inability of posthumously born offspring to inherit under state law could not rationally alleviate a burden of proving dependency. State intestacy laws apply to self-supporting adults as well as minor children and do not necessarily contain a requirement of dependency. The governmental purposes that should matter are the primary purposes of a challenged act. Abridgments of right should not be justifiable for reasons that are hypothetical or speculative or irrelevant.

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children).

238. See *Capato v. Comm’r*, 631 F.3d 626, 628 n.1 (11th Cir. 2011) (“We will affirm the dismissal of Ms. Capato’s Equal Protection claim. As the Ninth Circuit found in a similar challenge, ‘the [Social Security Administration] is not excluding all posthumously-conceived children, only those that do not meet the statutory requirements under State law.’” (alteration in original) (citing *Vernoff v. Astrue*, 568 F.3d 1102, 1112 (9th Cir. 2009))).

239. *Astrue*, 132 S. Ct. at 2033.

In the end, Justice Ginsburg fell back on the general rule that federal courts should defer to an agency's interpretation of the statute it administers.<sup>240</sup> The *Astrue* Court certainly deferred to Commissioner Astrue's views in every respect. But deference to an irrational and discriminatory interpretation cannot be due process; and abridgment of right should not be held justified by speculative suppositions of administrative or fiscal burdens.<sup>241</sup>

Beyond these considerations, the case appears an offense to justice as well as reason. It could not have been the intention of either Congress or the twins' father that his payments toward their support, together with their benefits, necessary to the well being of the other children as well, be confiscated by the government. The Court should not have shrugged off the equal protection problem the case presented, and certainly should have seen the unreason of the collateral harm to the twins' siblings. Counsel and the courts involved throughout should have seen identified deprivations of property and liberty to the Capato family within the meaning of the Due Process Clause of the Fifth Amendment, although Capato sought statutory benefits, not damages.

Damages could not fully remedy the personal harms caused by the Dickensian hardness of government in cases like *Astrue*, or, for that matter, the recklessness of cronyism that one sees in cases like *Kelo*. When the personal economic rights of individuals are at stake, a more probing scrutiny of the strength of governmental interest, the appropriateness of the means employed, and the seriousness of the injury caused might have saved the Justices the embarrassment of such decisions, and the moral indignation of those who become aware of them.

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240. *Id.* at 2033-34 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

241. For recent discussion of fiscal justification, see, for example, *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2086 (2012), and *Saenz v. Roe*, 526 U.S. 489, 505-06 (1999). On administrative justification, see Justice Scalia's recent discussion in *Arizona v. United States*, 132 S. Ct. 2492, 2521 (2012) (concurring in part and dissenting in part).

*E. A “Theory of Everything”? (Why the Bill of Rights Is Alive and Well)*

To mock the extravagance of the claimed unifying and analytic advantages of the Due Process Clauses, a skeptic might raise some interesting questions: Why bother with a Bill of Rights? Why bother with unenumerated rights? Why not discard Article I? Why not rely on due process to encompass all constitutional claims?<sup>242</sup>

Of course, no unconstitutional law or act can be due process.<sup>243</sup> Moreover, due process already does substantively protect virtually every right, enumerated and unenumerated, because it is held to incorporate them, making them usable against both state and federal officials. But if our skeptic would like to see some formal “limit,” there certainly is one, at least as to substantive due process.

The Due Process Clauses belong to a class of legal protections against unspecified “deprivations” or “wrongs.” The class includes, for example, wrongful death statutes,<sup>244</sup> the Civil Rights Act of 1871,<sup>245</sup> and, on the criminal side, the federal crime of aiding and abetting.<sup>246</sup> Although such texts create liabilities, they refer to rights defined elsewhere. A wrongful death statute or the Civil Rights Act, standing alone, would not ground a claim on which relief could be granted. These sorts of statutes require separate pleading of the particular “wrong” or “deprivation” that is the gravamen of a complaint. In the same way, a substantive due process deprivation of liberty is typically a deprivation of some more specific constitutional right.<sup>247</sup>

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242. This important question, in part, was raised from the floor by a participant in this Symposium, directed in the first instance to Kermit Roosevelt, who kindly said that he had gotten his due process thinking from me, passing the buck. The inquirer might well have added, “And how can the source of powers also be the source of rights, which are the limits of powers?” But he did not.

243. This was my initial response in real time to the question raised *supra* note 242.

244. Every state has a wrongful death statute, following the general outline of Lord Campbell’s Act of 1846, 9 & 10 Vict., c. 93 (Eng.). Under the influence of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (holding that an action for wrongful death is available in admiralty as a matter of federal common law), nonstatutory wrongful death has also become available in some states. *See, e.g.*, *Gaudette v. Webb*, 284 N.E.2d 222 (Mass. 1972).

245. 42 U.S.C. § 1983 (2006).

246. 18 U.S.C. § 2 (2006).

247. In criminal prosecutions the enumerated rights tend to be procedural ones.

The right pleaded can be an enumerated one, like the right to freedom of speech, or an unenumerated one, like the right of sexual privacy. As Chief Justice Rehnquist explained in *Washington v. Glucksberg*, a substantive due process claim is limited, at the threshold, by the requirement that it refer to some specific fundamental right.<sup>248</sup>

This is not to say that a bare substantive due process claim of a deprivation of liberty, unaccompanied by a more specific claim of right, is unimaginable. The second Justice Harlan's conception of due process was free of reference to any more specific right.<sup>249</sup> A claim of a violation of bare due process that is a deprivation of liberty can be a simple deprivation of some procedure, usually remediable by providing the procedure or remitting the plaintiff to it. It can also be a challenge to governance that is arbitrary or irrational. This last category can cover a range of increasingly serious deprivations, from an irrational choice of law to application of law that is irrational in itself. In *Glucksberg*, Justice Souter, concurring, argued that, instead of considering whether there was a fundamental right to die, the Court should consider whether the state's criminalization of assisted suicide constituted an "arbitrary and purposeless restraint"<sup>250</sup> within Justice Harlan's meaning.<sup>251</sup> But the Court rejected this suggestion. The Court has not adopted Justice Harlan's view that substantive due process "rides on its own bottom."<sup>252</sup>

### 1. *The Arizona Immigration Case*

To my mind the closest Supreme Court case furnishing an instance of simple irrationality as a substantive deprivation of liberty

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248. 521 U.S. 702, 722 (1997) (Rehnquist, C.J.) (stating that, in triggering strict scrutiny, there is "a threshold requirement [] that a [due process] challenge [to] state action implicate a fundamental right"); e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down a statute prohibiting sodomy as violating the Due Process Clause of the Fourteenth Amendment and the unenumerated right of sexual privacy that is part of the "liberty" the Due Process Clause protects).

249. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

250. *Glucksberg*, 521 U.S. at 752 (Souter, J., concurring in the judgment).

251. *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

252. *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) ("While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.").

is *Plyler v. Doe*<sup>253</sup>—although *Plyler* was decided on equal protection grounds and engaged specific liberties. *Plyler* should have figured heavily in *Arizona v. United States*,<sup>254</sup> the Arizona immigration case the Court recently handed down, and would have, if the case below had been pleaded, briefed, argued, and decided on the merits, rather than on the arid technicalities of preemption doctrine.

The several Justices filing opinions in *Plyler* had been baffled by the sheer irrationality of a Texas law that would have blocked access to public schooling for the children of undocumented immigrants. In effect, the law would inevitably create a class of street urchins and a permanent underclass of unemployable illiterates.<sup>255</sup> Concurring, Justice Powell perceived a further piece of unreason in the law's punishment of children for the sins of their parents.<sup>256</sup> The consequentialist argument—that the challenged state law would create an illiterate underclass—is a policy argument; but it also is relevant to an evaluation of the state's interest in denying an essential public good to resident children.

Perhaps because the *Plyler* Court was unwilling to say that a free public education is a fundamental right, or that alienage is an inherently suspect classification, it decided the case as a matter of equal protection, applying only rational-basis scrutiny. But even minimal rational-basis scrutiny was sufficient to expose the law's sheer irrationality.

Due process might have been superior in *Plyler* to the Court's equal protection rationale. Texas's asserted interest lay in discour-

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253. 457 U.S. 202, 230 (1982) (requiring the state, under the Equal Protection Clause, to admit children of undocumented immigrants to public schools). The opinion and concurrences in *Plyler* severally note the irrationality of denying education to resident children, documented or not. *But see, e.g.*, *Guaman v. Velez*, 23 A.3d 451, 452 (N.J. Super. Ct. App. Div. 2011) (ruling that the plaintiffs, legal resident aliens, were unlikely to prevail in their challenge to the constitutionality of state termination of their medical benefits).

254. 132 S. Ct. 2492, 2510 (2012) (holding three provisions of an Arizona immigration law preempted; remanding the notorious “show your papers” provision for further consideration). *But see* *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (holding that Arizona's requirement that employers check the immigration status of employees survives a preemption challenge). Yet Arizona, unlike the United States, criminalized violations of the employment provisions of its law. *Arizona*, 132 S. Ct. at 2497-98. As litigated, briefed, and argued, these cases, focusing on preemption, failed to reach the question of the constitutionality not only of the Arizona law, but also of the federal law.

255. *Plyler*, 457 U.S. at 230 (Brennan, J.); *id.* (Marshall, J., concurring); *id.* at 234 (Blackmun, J., concurring); *id.* at 239 (Powell, J., concurring).

256. *Id.* at 238-39 (Powell, J., concurring).

aging the presence of undocumented immigrants within its borders.<sup>257</sup> Even assuming this to be a legitimate governmental interest, and not a mere expression of animus to the class, the means chosen were fatally irrational.

*Plyler* may not be as clear an example of bare substantive due process as I have been supposing. Rather, thinking about *Plyler* suggests that education *is*, in fact, a fundamental right as well as a prime concern of every state. The attempt to deprive undocumented resident children of that right strongly suggests the value of due process for the case. Equal protection is hardly a substitute for due process where rights of this magnitude are concerned.<sup>258</sup> A salient feature of *Plyler*, in both its equal protection and implicit due process aspects, was the state's reckless disregard of the injury its law would inflict on the lives and fortunes of the most vulnerable—the children—of a very vulnerable class of persons—undocumented immigrants. The federal trial judge, William Wayne Justice, was outraged by this. In *Plyler*, Justice Brennan thought him worth quoting:

As the District Court observed ..., the confluence of Government policies has resulted in “the existence of a large number of employed illegal aliens, such as the parents of plaintiffs in this case, whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state’s natural citizens and business organizations may wish to subject them.”<sup>259</sup>

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257. *Id.* at 243-44 (Burger, C.J., dissenting) (“[A] state has a legitimate reason to differentiate between persons who are lawfully within the state and those who are unlawfully there.”); *cf. Arizona*, 132 S. Ct. at 2511 (Scalia, J., concurring in part and dissenting in part) (“As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress. That power to exclude has long been recognized as inherent in sovereignty.”).

258. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down, under the Due Process Clause of the Fourteenth Amendment, a statute criminalizing sodomy, thus overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *see also, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (Warren, C.J.) (striking down an antimiscegenation law as a denial of equal protection, and further ruling that in view of the fundamental nature of the right to marry, the law in question also deprived interracial couples of their liberty within the meaning of the Fourteenth Amendment’s Due Process Clause).

259. *Plyler*, 457 U.S. at 219 n.18.

A due process case involves not only assessment of the abridgment of some specified right but also analysis of the government's reasons for the alleged abridgment. If the government acts without good reason, or if its reasons fail to justify the extent of the harm, or if the means used to effectuate them are irrational—in *Plyler* the means were actually destructive to the state's higher interests—it should not matter whether or not the pleader can find some more specific or fitting “right” to plead. *Plyler* comes close to illustrating Justice Harlan's view that due process can “ride on its own bottom.”<sup>260</sup>

In the Arizona immigration case, part of the state's immigration law made it a crime for an undocumented alien to seek work, although this conduct—seeking work—was “only” subject to civil penalties under federal law.<sup>261</sup> On this ground, the Supreme Court struck down the Arizona law as preempted by federal law.<sup>262</sup> But the case would have been better handled had the Supreme Court ordered reargument to address the substantive constitutionality of *both* state and federal laws. The preemption question could not begin to touch on the unreason and sheer destructiveness of law that would discourage lawful employment and invite underground or criminal activity. The preemption question could not address the evil of a law that would operate to deprive any person within its jurisdiction of the fundamental right to seek otherwise lawful and gainful employment. The deprivation need not be complete. Threats inhibiting and obstacles to the exercise of this right would be equally irrational and unconstitutional.

## 2. Other Writers

I have tried to show in this Article the usefulness of due process and its interest-analytic methodology for thinking about questions of the allocation of governance in a federal union. I have tried to show the ways in which interest analysis addresses the question of governmental power in the litigation of rights, and to show, further, that governmental interest is the source of governmental power.

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260. *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

261. *Arizona*, 132 S. Ct. at 2503, 2505.

262. *Id.* at 2510-11.

I am finding that other writers have considered theory similar in part to the general due process theory proposed here.<sup>263</sup> These writers typically reject general due process theory. They fear a possible world in which a general theory makes the Bill of Rights superfluous. They point to the valuable separate specificity of each right in the Bill of Rights, each with its own doctrinal history, tests, maxims, great cases, bits of memorable language—the myriad treasures that the past bequeaths to the present.

My proposal here, however, is certainly not to abandon the Bill of Rights, to which we are all committed, and certainly not to abandon the United States Reports. Indeed, I have shown that the Due Process Clause scarcely works unless it is accompanied by some identified more specific right.<sup>264</sup> Rather, my effort has been to show how due process thinking—governmental interest analysis—can help to provide a stronger foundation in *reason* for the uses we make of the past.

Purposive interest analytic inquiry is likely to work better than definitional and formulaic analysis. The American legal realists taught us that abstractions inevitably place the thinker at a remove from the real stakes in a case.<sup>265</sup> To the extent this is so, the path forward would lie in consciously acknowledging the analytic framework invoked by due process thinking, and using that framework to help us in thinking about problems of constitutional law. To the extent reason can help to justify the wisdom of the past, surely reason, in turn, can be sustained and nourished by it.

## VII. ENVOI

We have fairly arrived at a general unified theory descriptive not only of the allocation of lawmaking power in our federalism but

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263. See, e.g., Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012). For criticism of general due process theories, see, for example, Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 339 (1957); Yale Kamisar, *How Much Does It Really Matter Whether Courts Work Within the “Clearly Marked” Provisions of the Bill of Rights or with the “Generalities” of the Fourteenth Amendment?*, 18 J. CONTEMP. LEGAL ISSUES 513 (2009); John E. Nowak, *Foreword—Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397, 400-01 (1979).

264. See *supra* note 248 and accompanying text.

265. See generally MORTON WHITE, *THE REVOLT AGAINST FORMALISM* (1949).

of much of substantive governance as it is tested under the Constitution. Although interest-analytic thinking has long been second nature to lawyers, judges, and commentators, somehow we have not fully internalized its significance. We go on speaking a different language, one of formalisms and abstract categories, when *this* is what we mean—have meant—all along.

Some scientists say that they are seeking a “theory of everything,” some foundational set of principles to which all accumulated knowledge of nature reduces in a profoundly satisfying chain of explanation.<sup>266</sup> John Donne expressed the hopefulness of reductionist thinking centuries ago:

These three houres that we have spent,  
Walking here, two shadowes went  
Along with us, which we our selves produc'd;  
But, now the Sunne is just above our head,  
We doe those shadowes tread;  
And to brave clearnesse all things are reduc'd.<sup>267</sup>

Unlike science or sunlight, however, law is not only about what is but about what should be. A general way of looking at most constitutional questions, like the one proposed here, may seem simplistic, a piece of arrant reductionism. We would think it naïve to suppose that we could take even one of the subjects discussed here and pitch it on some single methodological trope.

But the due process theory outlined in these pages, with its attendant purposive, interest-analytic methodology, is general enough, I think, yet specific enough, to be of real use. At the very least it can discourage modern misuses of *Erie*, and more realistically describe the American two-law, two-court system as it is experienced by lawyers and judges. Beyond this, it can help us understand the relation of due process to substantive rights. Due process and its interest-analytic method provide a foundation in reason for thinking not only about the rights of individuals, but also

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266. See, e.g., STEPHEN W. HAWKING, *THE THEORY OF EVERYTHING: THE ORIGIN AND FATE OF THE UNIVERSE* 147 (2006).

267. JOHN DONNE, *A Lecture upon the Shadows*, in *THE COLLECTED POEMS OF JOHN DONNE* 50, 50 (Roy Booth ed., 2002).

the bounds of individual rights. It thus can enlarge an understanding of the sources, nature, and limits of governmental power.

This way of thinking has long been available, and in some ways it is very familiar. It needs only to be perceived to be understood—if not as the key to constitutional jurisprudence, then at least as a light at the gate.