1992

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The question of fundamental liberties under the Bill of Rights is surely an important one, but there is a sense in which the title of this panel—Should the Bill of Rights Fully Protect Fundamental Liberties?—is surely fatuous. To answer "no" to this question is perverse and perhaps odious. Why would we not want the Bill of Rights to protect these liberties? Should it protect the non-fundamental liberties and leave the fundamental liberties unprotected? A better formulation of the question, quite different from the title of this panel, is: Can we identify those fundamental freedoms that are worth protecting? Then, if we can identify that class of freedoms, is it possible to develop mechanisms that might enable us to protect these freedoms to the fullest?

Framing the basic inquiry in this form, however, only gives rise to a further set of difficulties that I want to address more fully. There is, I believe, a very dangerous sentiment abroad in the land that we can identify two classes of rights, those that are fundamental and those that are not. The first class of rights is regarded as robust against legislative interference, while the second is far more frail and less worthy of constitutional protection. However much I agree with most of Judge Winter's pointed remarks,[1] he fell into this trap when he indicated that he was going to put aside the protection of property and concentrate his attention on freedom of speech, justified as a means to prevent the creation of a government monopoly in so sensitive an area.[2]

I shall take a different tack. I believe that any approach to fundamental rights requires that the list be short, but that it be capable of uniform and comprehensive application across a wide range of phenomena that initially appear separate and distinct from each other. It is, in a word, necessary to work with powerful generalizations capable of concrete application. Noth-

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1. *See* Ralph K. Winter, *Coexistence and Co-Dependence: Conservativism and Civil Liberties*, 15 HARV. J.L. & PUB. POL'Y 1 (1992).

2. *See id.* at 3.

ing is more dangerous to intellectual discourse than the rapid proliferation of particularistic fundamental rights good only for certain protected individuals, groups, or political causes. Many of the major political dislocations that we have experienced during these past years stem from an attitude that the Constitution should provide major protection for our darlings and leave everyone and everything else to the mercy of the political process.

In this spirit, if I were asked to list my fundamental rights, I should begin with a quick trip to the Fourteenth Amendment and its short list of life, liberty, and property.[3] In dealing with this trinity, most of the problems of elaboration will stem from the last two terms, "liberty" and "property." It looks as though they are small in content, but an understanding of what they entail generates a comprehensive view of the proper relationship between the individual and the state. My conception of freedom is comprehensive and indivisible. Thus, when I speak of liberty, I mean liberty of action across the board—not only the physical ability to move about from here to there, but also freedom of contract, conscience, association, and speech. Liberty starts with the Lockean conception that each individual owns his own labor.[4] From that premise the task is to figure out exactly what ownership or control over that labor gives a person relative to the rest of the world. The cash value of that conception is the presumptive protection of all voluntary associations, and the presumptive invalidation of forced associations.

The second half of the basic network is the protection of property—not only the right to exclude all others from the use of particular things, but the right to use and dispose of those things as well. Thus, property is synonymous not with the bare possession of land or chattels, but with the robust system of protections for their use, improvement, and exchange that has developed at common law.[5] Only in a framework in which property rights are secure can persons exercise their rights of contract and association, because voluntary associations and

3. *See* U.S. CONST. amend. XIV, § 1 ("No State . . . shall deprive any person of life, liberty, or property, without due process of law . . . .").

4. *See* JOHN LOCKE, TREATISE OF CIVIL GOVERNMENT 18-33 (Charles L. Sherman ed., 1937) (1689).

5. *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (elaborating this theme).

personal liberties require private places and secure environments for their protection. Property and liberty work in harmony, not in opposition to each other.

The twin protection of liberty and property is not only designed to specify the relationships among private individuals. It is also designed to establish a sound relationship between the individual and the state. Where these rights of liberty and property are comprehensive and well-defined, the potential scope of government power can be checked by a diverse and unruly set of private enclaves and institutions that are as powerful in law as those that the government can command. Judge Winter and I part company over whether the protection of individuals against the monopoly of the state can be done by the protection of, say, speech alone, without some independent and antecedent protection of property rights and personal liberties more generally. I am skeptical about the ability of rights of free speech to survive in a vacuum in the long run.

There is, I believe, a great danger in placing too much weight on a single constitutional provision for the protection of individual liberties. Where that is done, the law creates its own Maginot line, and runs the same risk of loss. Because all the fortifications are bunched in one place, the line can be circumvented if not overrun. Therefore, if you ask me how to protect freedom of speech, my reply is that the protection does not begin when a newspaper seeks to publish its controversial words. Protection for speech begins far earlier, when the business that runs the newspaper is formed, when the site for its plant and distribution is selected, and when it decides whom to hire, fire, and promote. But we have adopted vast sets of zoning laws that restrict a newspaper's access to purchase and develop land, and we have passed complex labor laws, such as the National Labor Relations Act,[6] the minimum wage laws,[7] and Title VII of the Civil Rights Act,[8] which restrict the power of newspapers to hire and fire workers at will.

These statutes surely reach far beyond organizations whose output is protected by the First Amendment,[9] and it is for that

6. *See* 29 U.S.C. §§ 151-169 (1988).

7. *See, e.g.*, The Fair Labor Standards Act of 1938 § 6, 29 U.S.C. § 206 (1988).

8. *See* 42 U.S.C. §§ 2000e to 2000e-17 (1988); *see also* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

9. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

reason, among others, that they are normally viewed as beyond challenge under the First Amendment.[10] But why? The broad extent of these laws, and the mischief that they achieve in other areas, should not blind us to the enormous restrictions that they impose upon the press even as courts routinely pen florid passages that speak to the importance of free, open, and robust debate to the nation as a whole.[11] The amount of speech and debate that is generated depends not only on the formal restrictions on speech itself; it also depends on the cost of producing the speech in question. As regulation raises those costs, it diminishes the amount and quality of speech produced. Indirect or incidental restrictions may exert a more powerful influence than direct ones.[12]

The same line of argument can be carried over to other areas as well. Turning for the moment to the question of religious liberty, I think that it is a very dangerous strategy to say that religious organizations are "special" under the Constitution and therefore have the right to choose their membership, to select their leaders, to use their property as they see fit, to erect churches, and to conduct religious services and education and the like. These rights are of course ones that follow from the ordinary protection of liberty and property for all individuals, and nothing is inappropriate about religious organizations exercising these rights. But it is genuinely risky to state the case for religious liberty in this fashion. So long as these rights of association and property can be routinely denied to ordinary people, under the Constitution, then an insistence that they still apply with undiminished rigor to religious organizations opens these organizations up to a powerful Establishment

10. *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 595 (1974) ("So long as the zoning laws do not, under the guise of neutrality, actually prohibit the expression of ideas because of their content, they have not been thought open to challenge under the First Amendment."); Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) (holding that the Fair Labor Standards Act of 1938 does not violate the First Amendment because of the burden it imposes on the press). For a debate on the role of these incidental restrictions on property, see Richard A. Epstein, *Property, Speech and the Politics of Distrust*, 59 U. CHI. L. REV. (forthcoming Winter 1992) and Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. (forthcoming Winter 1992).

11. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

12. *See, e.g.*, American Communications Ass'n, CIO v. Douds, 339 U.S. 382, 402 (1950) ("Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes.").

Clause[13] challenge: It is unfair discrimination to give certain rights to religious organizations that are denied to people generally.[14] Religious liberty can no longer be defended as the ordinary outgrowth of a system of property and liberty. It has become a special privilege that now needs, and may not receive, some extraordinary justification to keep it viable.

Let me mention one situation that demonstrates the risks to religious organizations that follow from the decline in the constitutional protection of ordinary property rights. Consider the regrettable and misguided decision of the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*,[15] which held that the state could impose landmark designation restrictions on selected properties without paying their owners compensation for the loss of value that stems from the restriction on use. The upshot in that case was that New York City was able to prevent the Penn Central Company from building a new office tower on a site that it already controlled. The decision in effect cost the landowners millions of dollars, and the failure to require compensation for that loss means that the City is quite happy to take the development rights of the land, even if the preservation of the current structure is worth far less to the population of New York as a whole.

The decision, however, is not only mistaken on its own terms. It also set the stage for the confrontation concerning the efforts of St. Bartholomew's Church in New York City to develop its own air space in order to provide funds to keep the church in operation.[16] If the property-based decision in *Penn Central* had gone the other way, then the Church could have tucked itself under general precedent and claimed those rights and only those rights that inhere in the ordinary ownership of

13. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

14. *See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990). As the Supreme Court noted, "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " *Smith*, 110 S. Ct. at 1600 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). No standard of strict constitutional construction allows the transmutation of the language of "free exercise" into the language of equal protection. The Free Exercise Clause protects substantive rights. It is not a nondiscrimination provision.

15. 438 U.S. 104 (1978).

16. Saint Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

the land. The state could stop the new construction, but only if it first paid the Church its anticipated profit. There would be no reason to ask whether the Church had some special status or prerogative that entitled it to an exemption from the new baseline that inhered in the landmark preservation statute. In the end, the Second Circuit decisively rejected the Church's claim.[17] Religious liberties, in my judgment, were seriously compromised because of the weak protection that was afforded to the property of all individuals. A strong system of property rights fosters a strong system of religious liberty.[18]

The close connection that I see between property and freedom of speech and religious liberty thus draws us back to what is perhaps the central issue of constitutional law. If there is a comprehensive theory that accounts for all liberties simultaneously, then it becomes difficult to accept the present two-tiered system of constitutional rights that dates from the New Deal's *Carolene Products* decision.[19] Certain differences rightly divide speech and religion on the one hand and property on the other, and these differences must be taken into account. The ability to force exchanges, given the willingness to pay just compensation, should be more respected with ordinary property transactions than with those that involve either religion or speech. Indeed, it makes perfectly good sense that the just compensation requirement, which is so prominent in the Takings Clause,[20] has no parallel in the First Amendment. But even when this difference is taken into account fully, there is nothing in either the text or the structure of the Constitution that justifies the extraordinary judicial deference in the area of property or the far greater levels of scrutiny that are given to regulations of speech and, unfortunately with diminishing force, religion. We do not have a Bill of Rights that places some clauses in red ink and others in black. The parallel clauses in a single document should be construed as part of a coherent whole.

There is, then, an enormous amount at stake in understanding the comprehensive theory that undergirds the Constitution.

17. *See id.* at 355-57.

18. I have developed some of these themes at greater length in Richard A. Epstein, *Religious Liberties in the Welfare State*, 31 WM. & MARY L. REV. 375 (1990).

19. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

20. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

In my view, we cannot accept some parts of the theory and reject others. It all fits together as part of a coherent whole. It is the connectedness of constitutional discourse that raises the stakes for all concerned. If I am correct about the connections between property, speech, religion, and personal liberty, then a single principle will generate a comprehensive view of constitutional law. But putting the matter this way raises institutional complications that should be briefly addressed as well. My Lockean view of life, liberty, and property is not the only view of the just society that is abroad in the land. There are many writers today who start with a different vision of the just society and a different set of fundamental rights.

To take but one rival point of view, some writers start with the proposition that all persons have a fundamental right to some minimum level of social support.[21] This view of the social safety net is not only a liberal conception. Ronald Reagan, and other conservative politicians who desire to make peace with the welfare state, have embraced it, at least in the abstract. Without question, it is possible to erect a theory of constitutional interpretation that treats this minimum right to support as the linchpin of the entire system, and relegates liberty and property to a subordinate place. The set of interconnections across areas that works for my liberty and property theory can work as well for these rival theories. If one thinks, therefore, that the protections accorded to property should be overridden by broad conceptions of the "police power" and of "public use," then the same logic could be applied to speech and religion as well, until in the end these guarantees also are watered down.[22] It then becomes possible to read the First Amendment not as a restriction of the power of the state to regulate speech, but as the source of an affirmative duty to subsidize some forms of speech that are neglected (or so we are told) in the marketplace.[23]

21. *See* Akhil R. Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37 (1990).

22. *See generally* Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987) (arguing that an activist state is necessary to protect fully First Amendment rights); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986) (arguing that the state should actively regulate speech in order to avoid distortions that would result from a hands-off approach).

23. For a brief discussion of the equalization of speech rights, including state subsidization of "neglected speech," see generally Colloquy, *Equalization of Free Speech Rights*, 120 F.R.D. 165 (1988).

The sense of connectedness between doctrines has important consequences for the task of judging and deciding cases. A clash between rival views of the world makes it more difficult for judges and for academics to engage in the kind of incremental decisionmaking that is so characteristic of the common-law method. Once the implications of a decision in one area become quickly apparent for all others, everyone will recognize that even innocuous cases have high-stake implications. The parties and judges will respond accordingly. Because legal decisions will become contests between different world views, it will be less possible to cabin off important cases so that they deal with some limited and confined issue. In this world of high stakes decisionmaking, it becomes ever more important to develop a sound theory of fundamental rights, and to explain why the vision of decentralized power that animates the original Bill of Rights is as important today as it was at the time of the founding. This concern with fundamental rights should lead to a greater concern with the fundamentals of political theory.