Liberties, Fair Values, and Constitutional Method

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Meeting a friend in a corridor, Wittgenstein said: “Tell me, why do people always say it was *natural* for men to assume that the sun went round the earth rather than that the earth was rotating?” His friend said, “Well, obviously, because it just *looks* as if the sun is going round the earth.” To which the philosopher replied, “Well, what would it have looked like if it had looked as if the earth was rotating?”¹

If judges were bringing to property-rights adjudication the same system of thought they bring to free-speech adjudication, what would our constitutional doctrine of property look like? I think the answer (for better or for worse) must be the same as the one invited by Wittgenstein’s mind teaser: The doctrine would look like . . . what it looks like.

Is Professor Richard Epstein saying differently?² It would be surprising if he were, because insistence on the pull toward unity in constitutional thought has been a consistent mark and strength of Professor Epstein’s scholarship. In *Property, Speech, and the Politics of Distrust*, Professor Epstein does say that if we would only carry over into Takings Clause analysis the “doctrinal structures,” organizing “presuppositions,” and “dominant tendencies” of First Amendment adjudication, we would greatly change the law of Takings.³ But this is no claim of deep disjuncture between Takings adjudication and First Amendment adjudication as we find them conducted today. Rather, Professor Epstein looks past the

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¹ Tom Stoppard, *Jumpers* 75 (Faber and Faber, 1972) (emphasis in original).

² Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U Chi L Rev 41 (1992).

³ *Id.* at 42-43, 47.

surface confusions of the moment (“through the eyes,” as he says, “of a cautious libertarian”⁴) to immanent, normative foundations of First Amendment law. Finding these deeper inspirations not always honored in contemporary practice, Epstein urges that their full restoration to constitutional law would return that law—including First Amendment law—to a sound condition.⁵

By Professor Epstein’s standards, the state of constitutional law today is one of corruption and decline. First Amendment law is not exempt. Epstein thinks, however, that First Amendment law can be made to yield a corrective model for Takings doctrine because it is comparatively less decayed, and therefore a better initial guide to recovery and reconstruction of sound constitutional reason. Foremost among the normative impulses he finds better preserved there is distrust, “the sense that government is a necessary evil.”⁶ Professor Epstein, as usual, argues his case with vigor and rigor. As usual, illumination results. We see normative shapes, structures, symmetries—contestable as many of us find them—where before we had not glimpsed their possibility.

There is, though, such a thing as blinding light, the flood of incandescence that washes out of perception not just the small details but the structural fixtures of the scene before us. Part II of this Article warns against letting the light of distrust theory wash out main features of our constitutional landscape. It contends that among the fixtures of First Amendment doctrine that Professor Epstein agrees must limit any reconstructive “internal adjustment” of the doctrine⁷ is one—the comparatively free pass for “incidental” restrictions of speech—that simply will not allow for canonization of distrust as *the* surpassing precept of American constitutionalism.

Section I takes more direct issue with Professor Epstein’s well-known recommendations for greatly tightened judicial review of legal regulation of proprietary and economic liberties. Rather than treating contemporary constitutional law’s elevation of free speech rights over property rights as a sign of decadence, I start with the thought that this practice strikes most people as making some kind of functional sense. Without claiming (or believing) that today’s practice is above reproach, I describe a set of normative premises

⁴ Id at 47.

⁵ Id at 46.

⁶ Id at 47.

⁷ Id at 44.

that the general shape of this practice seems designed to carry out, and claim that these premises are good ones.

We begin with commonplaces. The Constitution contemplates lawmaking. It entrusts to lawmakers a range of legislative discretion. It does so, we have to presume, out of a regard for justice and welfare.⁸ Presumably out of a like regard, the Constitution also establishes certain rights and otherwise limits lawmakers' discretion to make laws. The Constitution calls upon courts of law to help effectuate these rights⁹ and other limits¹⁰ on lawmaker discretion, by adjudicating claims of transgression. Yet it also calls upon the courts, in their adjudications, to support and defend the discretionary authority of lawmakers.¹¹

Between discretion and limits, discretion and rights, courts are to hold the balance true.¹² But if there is a true balance, can there be more than one? Why should courts have multiple sets of scales and calipers in use: "strict" scrutiny in some cases, "loose" scrutiny in others, various "intermediate" scrutinies in still others, depending upon which rights are in question? How can our courts presume to give different protection to Fifth Amendment property rights than to First Amendment expression rights? That is our question.¹³

In this Article, I advance for consideration a loosely policy-analytic answer to this question, relying on a broadly functionalist, or consequentialist, argument. I make no claim that this kind of argument can stand by itself as a complete and sufficient response to any large question of political morality or legitimacy. Yet, I believe, most would consider such an argument an indispensable support for other forms of political justification. Suppose that we cannot discover any policy-motivated, functional reason for such a quirky-looking practice as methodically stricter judicial review under the Free Speech Clause than under the Takings Clause of

⁸ See Sanford Levinson, *Constitutional Faith* (Princeton, 1988). The entrustment may be misguided—a question we shall be considering—but the fact of entrustment and its presumptively benign intention seem undeniable.

⁹ See *Cooper v Aaron*, 358 US 1 (1958).

¹⁰ See *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

¹¹ See *McCulloch v Maryland*, 17 US (4 Wheaton) 316 (1819).

¹² See *id.* at 423.

¹³ My response to the question follows some, but not all, of the leads furnished in Professor C. Edwin Baker's more elaborate response to "those . . . who claim that a principled justification has never been given for distinguishing currently protected individual liberties from currently unprotected, or minimally protected, economic or property rights." C. Edwin Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U Pa L Rev 741, 742 (1986).

one and the same Bill of Rights. The inability to do so will tend to undermine other arguments—such as that natural law requires the quirky practice, that the Framers intended it, that hypothetical social contractors would adopt it, or even that our society's evolved wisdom and usage contain it.

If I have done my work correctly, and you do not find persuasive force in what follows, it will be because you reject certain normative assumptions I have had to build into the functionalist argument in order to make it work. In that case, my effort's value for you will have been to help make clear precisely what is questionable about a constitutional policy of "'strict scrutiny' for speech, 'loose scrutiny' for property."

I. LIBERTIES AND INTERESTS

To value human freedom is both to interpret and to value human interest; it is to construe freedom as a human good. To value particularly defined "liberties" is to value interests more specifically distinguished—interests we may attribute to individuals whose liberties are in question, to others standing in particular relations to those individuals, or to the public at large. Consider, now, how American constitutional lawyers talk about liberty. We regularly speak not simply of liberty, but of various liberties. We speak of religious liberties, expressive liberties, economic and proprietary liberties. We thus classify liberties by function. Which label we use depends on just what it is we have in mind that a person may or may not be at liberty to do. It depends, in other words, on what sorts of interests are at stake.

Now, this way of speaking is no accident. It seems we must understand constitutional liberties as comprising certain kinds of interests, as long as we understand the Constitution as a deliberate human act. When people designedly write protections for liberties into their constitution, they must be doing so out of desire to protect corresponding interests. Why else would they do it?¹⁴

¹⁴ To take this position is neither to overlook nor to downgrade the expressive aspect of the practice of recognizing and respecting human rights, or the centrality of this practice to moral justification of political authority. See, for example, Baker, 134 U Pa L Rev at 780-81 (cited in note 13). It is just to insist that the expressive value or moral "point" of respect for liberty would evaporate if we lacked a strong and steady sense of liberty's close connection with interest.

To take this interest-conscious view of liberty is also not necessarily to exclude from constitutional practical reason the use of "formal" conceptions of liberty that flatly rule out certain ways of collectively promoting the value of liberty for all. Compare *id* at 744 (observing that "[c]onstitutional interpretation inevitably is either explicitly or implicitly animated

With that for a premise, we easily reach the first, very general point of my argument: given such an interest-based classification of liberties, there may well be good reasons for agents charged with protecting the liberties to look beyond formal symmetries, and accord different forms and degrees of protection to different classes of liberties. Judges are such agents. Their protection takes the form of more-or-less censorious review of laws infringing on liberties of one or another class. There should be no great surprise in finding variation in the forms and degrees of such review, depending on which classes of liberty are in question. These variations may be an intelligent response to perceived, relevant differences among the interests corresponding to the various classes of liberties of which we speak.

A. Liberty Interests: Intrinsic Value

The interests corresponding to expressive liberties are those in people's freedom from government control over what they say and over how, when, and where they say it. The interests corresponding to economic liberties are those in people's freedom from government control over their choices and modes of productive activity and investment. The interests corresponding to proprietary liberties are those in people's freedom from government control over their retention, use, and disposition of lawfully obtained holdings of wealth.¹⁵

Ever since the celebrated Footnote 4,¹⁶ theorists have considered whether stricter judicial protection for some liberties than for others can be justified by showing how the some have intrinsically deeper libertarian¹⁷ or civic¹⁸ value than the others. That will not

by value concerns"), with id at 777, 780-81 (granting the force of "pragmatic" critiques of libertarian formalism but also advocating formalistic exclusion of liberty-optimizing methods that violate individual autonomy).

¹⁵ Baker enumerates the interests corresponding to proprietary and economic liberties as interests in the use of things, welfare-maintenance, personhood, protection against exploitation by others, allocation (facilitating acquisition and exchange), and sovereignty (power over others). Id at 744-53. For good measure, he then adds privacy, recognition and development of values, and decentralization of social power. Id at 753-54.

¹⁶ *United States v Carolene Products Co.*, 304 US 144, 152-53 n 4 (1938).

¹⁷ See, for example, David A.J. Richards, *Toleration and the Constitution* (Oxford, 1986); Martin H. Redish, *The Value of Free Speech*, 130 U Pa L Rev 591 (1982); Louis Henkin, *Privacy and Autonomy*, 74 Colum L Rev 1410 (1974); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U Pa L Rev 45 (1974).

¹⁸ See, for example, Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* 1-3 (Harper & Brothers, 1948); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 75-98, 105-16 (Harvard, 1980).

be precisely the line of argument here. For present purposes, we can stipulate that people's freedom to say what they please is no more foundational to personal or societal fulfillment than are their proprietary securities or their freedoms of choice in productive endeavors,¹⁹ and, further, that there is no historical American consensus that they are.²⁰

B. "Negative" Liberties

We may further take it as given (for this occasion only) that American constitutional law knows only "negative" and not "positive" liberties, and knows even these negative liberties only as against the state and not as against nongovernmental agents. American constitutional lawyers regularly and sharply differentiate liberty from empowerment. We know the conceptual difference between being at liberty to speak and having the ability and resources with which to speak effectively. The prevailing view is that our Constitution by and large guarantees only the liberties, not the abilities or resources;²¹ and, further, that it guarantees relief only against infringements by governments, and not by private agents.²²

¹⁹ See Frederick Schauer, *Free Speech: A Philosophical Enquiry* ch 4 (Cambridge, 1982); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L J 1, 14-15 n 67, 78-79; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1, 25 (1971).

²⁰ See generally Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* (Chicago, 1990). From the standpoint of civic interest, proprietary "independence" was historically regarded in America as foundational to good citizenship. See, for example, Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 Harv J L & Pub Pol 37, 37 (1990); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 Iowa L Rev 1319, 1327-34 (1987). Perhaps there is one class of freedoms that have arguably occupied such a consensually preferred status in American political thought—the freedoms of conscience and religious profession.

²¹ See, for example, David P. Currie, *Positive and Negative Constitutional Rights*, 53 U Chi L Rev 864 (1986) (recognizing limited exceptions to the primarily negative nature of American constitutional rights).

²² These two limits—the negative nature of constitutional rights and the state action rule—are logically connected. See, for example, *DeShaney v Winnebago County Department of Social Services*, 489 US 189 (1989). If the Constitution guaranteed protection of my negative liberty of speech against your interference (as a private citizen), it would by the same token grant me an affirmative claim against the government to: (1) prosecute you for interfering; (2) prevent you from interfering; or (3) guarantee me the resources to prevent you from interfering myself. See Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 Duke L J 1153, 1195-96. For an example of the second alternative, see *Robins v Pruneyard Shopping Center*, 23 Cal 3d 899, 592 P2d 341 (1979), *aff'd*, *Pruneyard Shopping Center v Robins*, 447 US 74 (1980) (ordering property owner to refrain from denying access to persons exercising free expression rights guaranteed by California constitution).

C. Existence vs. Value of a (Negative) Liberty

Thus we readily distinguish between two types of putative constitutional entitlements. We find it natural to think that people do have constitutional entitlements to be free from certain intrusions and restraints by the state, but simultaneously that people do not have corresponding constitutional entitlements to the state's assurance of access to the means of using and enjoying this freedom. Conceptually, we have no trouble with this conjunction of having and not having. It is perfectly conceptually possible for a negative liberty against the state to exist as pure entitlement, regardless of the holder's access to the means of enjoyment. From this standpoint of pure entitlement against the state, a well-defined negative liberty has only the one dimension of existence/non-existence.²³ However—and here is a crux of my argument—matters are not so simple when we regard negative liberties from the standpoint of interests. In an interest-sensitive view, constitutionally guaranteed liberties are not simply formal entitlements, such that we either have them or we don't, and that is all there is to be said. Instead, liberties then also take on practical dimensions of magnitude and value.²⁴ To illustrate, imagine for a moment that proprietary liberties are absolute. Then my proprietary liberty would presumptively be worth more than that of a broke and homeless fellow citizen; there is a clear sense in which I stand to lose more than he does by a general revocation or restriction of proprietary liberties.

²³ If constitutional negative liberty were construed as an entitlement *in rem*—good against all agents—then distributions of legal property holdings would determine the scopes of such liberty accruing to various persons. To speak of property distribution would, then, be to speak of the distribution of negative liberty itself. See Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L Rev 295, 302-08 (1991). However, constitutional negative liberty is construed as running only against the state. Therefore, we cannot speak of property distribution as affecting the *scope* of constitutional liberty any person has (since, under suitably general laws, rich and poor alike will have exactly identical rights to be left unmolested by the state). We can, however, still speak of property distribution as affecting the *values* of these rights to various persons.

²⁴ See John Rawls, *A Theory of Justice* 204 (Harvard, 1971):

[L]iberty and the worth of liberty are distinguished as follows: liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework the system defines.

See also Waldron, 39 UCLA L Rev at 317 (cited in note 23) ("If we value freedom . . . because of the importance of choice . . . , then that value ought to lead us to pay attention" to what choices people actually have.).

D. The Systemic Character of Liberty Under Law

A constitution is a rule of law. To speak of liberties established by a rule of law is to speak of a general scheme of liberties for all;²⁵ it is to invite the question of distribution.²⁶ Given that the reason for protecting liberties is regard for the corresponding interests, a constitutional scheme of liberties cannot reasonably or lawfully blind itself to the distributive relations of the liberty interests that it cherishes and, in a sense, creates. And given further that these liberty interests have dimensions of value, the scheme cannot reasonably blind itself to the configurations of the values—the distributions of the values among persons—of these liberty interests.²⁷ It cannot disregard either the fairness of these distributions or their social-systemic ramifications.

This is not (as you may be thinking) to admit judicial enforcement of “positive” rights through the back door. Constitutional concern with the fair values of negative liberties-as-interests need not involve judicially enforceable entitlements to government aid. Such a concern may rather lead to judicial respect for government actions designed to provide aid, or otherwise ensure the fair value of liberty—perhaps even sometimes when such actions infringe liberties; it may be manifested in what courts will recognize as adequate justification for liberty-infringing actions.²⁸ Such a concern is arguably manifest, for example, when the Supreme Court upholds laws prohibiting political speech funded by general treasury assets of business corporations, on the theory that government may pre-

²⁵ See Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L Rev 428, 432 (1967) (“Freedom of speech is indivisible; unless we protect it for all, we will have it for none.”).

²⁶ See Mary Ellen Gale, *Reimagining the First Amendment: Racist Speech and Equal Liberty*, 65 St John’s L Rev 119, 154-58 (1991). See particularly id at 154 (“The idea of equality is built into the structure of the first amendment. Free speech is guaranteed not just to one . . . class of speakers but by simple inference to all speakers.”).

²⁷ Compare Baker, 134 U Pa L Rev at 746 (cited in note 13):

[W]hen a community possesses the productive capacity to supply all of its members with the resources it considers as prerequisites to meaningful life, but adopts property rules that deny those resources to some, then . . . [t]his subordination, this denial of the worth of those left without, is inconsistent with any social system premised on respecting people as equals.

²⁸ Some recent scholarship proposes that the “government interests” allowed by courts to justify legislative infringements of *prima facie* constitutional rights ought themselves to be understood as manifestations of rights, or of values of equivalent import with rights. Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 BU L Rev 917 (1988).

vent certain "distortions" in the political system of expressive liberty.²⁹

E. Negative Liberty Interests: Scarcity and Distribution

1. Proprietary liberty.

Look, now, at constitutional proprietary liberty. It comprises the interest people have in freedom from government control over wealth; inextricably, it comprises the power that goes with wealth. The "interest" and its "value" are practically and conceptually inseparable. The interest in proprietary liberty is just the interest in maintaining proprietary value (or power).

In a capitalist order, one person's proprietary value (or power) is obviously relative to other people's.³⁰ A constitutional system of proprietary liberty is, therefore, incomplete without attending to the configurations of the values of various people's proprietary liberties. The question of distribution is endemic in the very idea of a constitutional scheme of proprietary liberty. Thus, it can by no means be said of laws aimed at nothing but property distributions that they are *ipso facto* antithetical to that idea.³¹ Richard Epstein agrees, up to the point of exempting rich-to-poor transfers, financed by system-wide general taxes, from presumptive invalidity as uncompensated takings of property.³² However, I mean to press the argument a good deal further.

A constitutional scheme of proprietary liberty, we said, is incomplete without attention to the distribution of wealth. Let us now add that such a scheme can hardly ignore qualitative distinctions among wealth holdings.³³ Thus, most Americans would see at least an arguable issue of justice in the question of distribution between the possessory solitudes of shorefront second-home owners and the general public's freedom of movement along the sea-

²⁹ *Austin v Michigan Chamber of Commerce*, 110 S Ct 1391, 1396-98 (1990).

³⁰ See, for example, Baker, 134 U Pa L Rev at 788-90 (cited in note 13).

³¹ Baker similarly argues for the necessity (despite the difficulty) of distinguishing between laws that "restrict liberty" and laws that "allocate and demarcate the boundaries of decisionmaking authority" and thereby "establish[] the framework within which liberty exists." "An acceptable formal conception of liberty," says Baker, requires "a set of allocation rules." Id at 780.

³² Epstein, 59 U Chi L Rev at 88 (cited in note 2).

³³ See Baker, 134 U Pa L Rev at 744 (cited in note 13) ("[T]he first function of property rules is to protect use values."). Among legal theorists, Margaret Jane Radin has done the most to clarify this point. See, for example, Margaret Jane Radin, *Residential Rent Control*, 15 Phil & Pub Aff 350 (1986); Margaret Jane Radin, *Property and Personhood*, 34 Stan L Rev 957 (1982).

shore.³⁴ Likewise, many doubtless see issues of justice in questions of distribution between commercial landlords' profits and residential tenants' living conditions³⁵ (and also believe that there are circumstances in which residential renter-protection laws can effectively respond to these issues³⁶). In the sight of such qualitatively discriminating, pragmatic appraisals, fairness in the constitutional scheme of proprietary liberties will sometimes call for laws whose restrictions fall unevenly on various kinds of property holdings.³⁷

Such issues of proprietary justice may, moreover, be so context- and culture-dependent that they are unfit for resolution at the level of abstraction and fixity at which the text of a strongly entrenched, rarely amendable bill of rights must speak. The principle of respect for property is a core commitment of American constitutionalism, but the contours of protection have always throughout our history been wrapped in controversy.³⁸ Perhaps this is because the contours have always been in flux. Property—the claim to security of possession or entitlement—is significantly a matter of justified expectation, and expectation is at bottom a “cultural possession.”³⁹ It is certainly true that our culture justifies attaching a degree of expectation to extant positive laws, but in a common-law based “culture of property,” the possibility of change, of evolution, is “always understood.”⁴⁰ For these or other reasons, a

³⁴ See *Nollan v California Coastal Comm'n*, 483 US 825, 847-48, 856-58, 863-64 (1987) (Brennan dissenting).

³⁵ Compare Margaret Jane Radin, *Diagnosing the Takings Problem*, in John H. Chapman, ed, *Compensatory Justice* (Nomos XXXIII) 248, 257 (New York, 1991) (“*Takings Problem*”) (“Home-ownership carries greater moral weight in the legal system than does ownership of vacant land held for investment.”).

³⁶ See, for example, Radin, 15 Phil & Pub Aff 350 (cited in note 33); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md L Rev 563, 610-14 (1982).

³⁷ The distributive impacts of such restrictions would deviate from population-wide proportionality or progressivity relative to numerary net income or net worth. Thus they would fail the test adumbrated by Justice Scalia in his dissenting opinion in *Pennell v City of San Jose*, 485 US 1, 21-24 (1988), and in his prevailing opinion in *Nollan*, 483 US 825, at least as some read it. See, for example, Douglas Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak nor Obtuse*, 88 Colum L Rev 1630, 1650-52 (1988).

³⁸ See Radin, *Takings Problem* at 248-49, 265 (cited in note 35).

³⁹ Margaret Jane Radin, *Evaluating Government Reasons For Changing Property Regimes* (forthcoming) (“*Regimes*”). See also Bruce A. Ackerman, *Private Property and the Constitution* 116-18 (Yale, 1977) (distinguishing between “social property” and “legal property” and emphasizing importance of the former).

⁴⁰ Radin, *Regimes* (cited in note 39). For example, in criticizing *Nollan*, 483 US 825, Radin persuasively describes (and documents) the recent “culture of private property . . . on the west coast” as evidently

evolving toward an understanding that beaches are a special resource not treated the same as ordinary objects of property. . . . The cultural understanding seemed to be that

democratic constitution may well leave the precise contours of property protection, or some of them, to ongoing political hammering-out within rather broad limits.⁴¹

2. Economic liberty.

Very much the same is true of economic liberties, people's freedoms from government control over choices of productive endeavor or investment. These freedoms and their fair values are obviously, in practice, socially interdependent. If major corporate employers relocate their workplaces, or refuse to allow women to work on certain jobs, the displaced workers or excluded women retain their economic liberties (conceived as legal entitlements against the state), but the values of these liberties may be gravely impaired. If the government seeks to protect these values by restricting such employer actions or policies, then the values of a quite different class of economic liberties, those of actual and prospective investors in the regulated employer firms, suffer.⁴² As a general matter, it seems quite likely that holding the values of economic liberties in reasonable adjustment will call for considerable regulatory control over the manner in which such liberties are exercised.⁴³

the stereotyped private property regime, with its broad discretion of owners to control use and exclusion was, with respect to this particular resource, wrong.

Id. See also Radin, *Takings Problem* at 252 (cited in note 35) ("In some more environmentally conscious future, [decisions denying compensation for highly restrictive wetlands regulation] could come to appear easy."); Elizabeth V. Mensch, *The Colonial Origins of Liberal Property Rights*, 31 Buff L Rev 635, 646-48 (1982) (describing "voluntarist" strain in early American property law that favored direct use of resources by owners and recognized authority of communities to realign titles to correspond with personal need and desire to cultivate); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 13-36 (Kansas, 1985) (describing American formative-era, common-law understanding of property rights as fluid, relational, and regulable according to changing conceptions of public interest).

⁴¹ See, for example, Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 68-83 (Basic, 1983); Michael Walzer, *Philosophy and Democracy*, 9 Pol Theory 379, 391-92 (1981); Baker, 134 U Pa L Rev at 781, 783-85 (cited in note 13).

⁴² No natural person's economic liberties—as distinguished from the worths of such liberties—are directly infringed by such regulations. Of course, if we attribute liberties to the corporations themselves, then those liberties are directly infringed by the regulations. Compare *Santa Clara County v Southern Pacific Railroad Co.*, 118 US 394, 396 (1886) (treating corporations as "persons" protected by the Fourteenth Amendment), with *First Nat'l Bank of Boston v Bellotti*, 435 US 765, 776 (1978) (bypassing question of "whether corporations 'have' First Amendment rights").

⁴³ See Baker, 134 U Pa L Rev at 790 (cited in note 13) (Given that many people spend major portions of their lives in productive activity and identify themselves with what they do, "concern for individual freedom requires that [economic] structure . . . be subject to conscious, [collective] control.").

In short, to repeat, we cannot broadly say that laws aimed at nothing but modifying property distributions or regulating the economy are inimical to the idea of a system of proprietary or economic liberty.

3. Expressive liberty.

By contrast—and here we reach an important turning point in the argument—we do find reason to say, of most laws aimed at nothing but suppressing communication, that they are inimical to the idea of a system of expressive liberty. In American constitutional thought, concerns about scarcity, distribution, and value simply have not played out in the same way for expressive liberties as they have for economic and proprietary liberties.

It may seem peculiar, but American constitutionalists have generally perceived the interests contemplated by (negative) expressive liberty as non-scarce and even, in a rather special sense, as non-competitive, as explained below. This perception arises out of a particular set of ideas about what gives communication its constitutionally estimable worth, both to individuals and to society—ideas that impart a rather special meaning to our regnant image of a marketplace of ideas.

This particular “marketplace” understanding requires that we not measure the value of my expressive liberty in terms of either the likelihood that I will speak or the likelihood that others will be moved by what I say. In fact, this understanding is powerfully inclined against any kind of comparative assessments of the values of various people’s expressive liberties, as long as the negative liberties themselves are unobstructed. Insofar as it does make such assessments, the only axis of variation it recognizes is the degree to which one’s communications, once launched, have a fair, competitive chance to reach others, to get through effectively to others and receive their unobstructed attention. Once equipped with such an understanding, American constitutionalists can plausibly maintain that rarely is there a need to curb anyone’s expressive liberty out of a concern for the values of other people’s expressive liberties; that in general everyone can talk as much as they choose, however they choose, about whatever they choose, to whomever they choose, without restricting or devaluing anyone else’s freedom to communicate.

This approach is not without serious problems.⁴⁴ Nevertheless, for committed liberals, including many committed egalitarians, it contains a sufficient core of common sense to make it a reasonable starting point for a constitutional doctrine of freedom of speech. The “marketplace” approach underwrites a doctrine making highly suspect all government actions that serve no plausible goals apart from restricting expression and communication. Of course, such a presumptive rule can allow for exceptional cases in which some people’s exercises of expressive freedom do adversely affect the values of other people’s expressive freedoms, defining such values as the marketplace principle requires.⁴⁵ The easiest such cases to recognize are those involving conflicts of “time, place, and manner.”⁴⁶

There are other cases, such as racial hate speech, in which some people’s speech arguably impairs the fair values of other people’s expressive freedoms, but in which a liberally acceptable remedy is harder to fashion.⁴⁷ It does not seem obviously mistaken to

⁴⁴ Sensible people must admit that this is far from a fully realistic view. For a wide-ranging critique, see Ingber, 1984 Duke L J 1 (cited in note 19). First, some speech can degrade the fair value of other people’s speech by simply obstructing it, as by drowning it out. Second, some speakers and messages are able to preempt or dominate the most effective channels of communication. See *id.* at 38-40. Doing so degrades the fair value of other people’s expressive liberties, measuring that value (just as “marketplace” theory demands) in terms of a fair chance to command the attention of an audience. Third, it seems hard to deny (however problematic may be the implications of admitting) that speech can degrade the fair value of other people’s speech by summoning perceptions of them (quite aside from their messages) as human types unworthy of being heard or credited—that is, by exploiting cultures of oppression to induce prejudice. See Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 193-95 (Harvard, 1987); Iris Marion Young, *Justice and the Politics of Group Difference* 58-61 (Princeton, 1990); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L J 431, 468-72.

⁴⁵ See note 24.

⁴⁶ Even their apparent simplicity may be deceptive. See, for example, C. Edwin Baker, *Human Liberty and Freedom of Speech* 125-60 (Oxford, 1989) (criticizing such restrictions as neither necessary nor desirable).

⁴⁷ See, for example, Thomas C. Grey, *Civil Rights versus Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 Soc Phil & Pol 81 (1991); Lawrence, 1990 Duke L J 431 (cited in note 44). There are other arguable cases of unfair impairment by some people’s speech of the value of other people’s speech that a committedly liberal constitutional-legal order may have little choice but to disregard. It may happen that less meritorious arguments backed by an individual speaker’s superior personal endowment of wit,chutzpah, eloquence, or charisma gain undue advantage in the speech market over more meritorious insights that a slower-witted, duller-spoken person has trouble articulating. See Ingber, 1984 Duke L J at 31 (cited in note 19) (questioning the assumption that “people can distinguish rationally between a message’s substance and the distortion caused by its form or focus”). However, personal handicapping in such circumstances seems not a liberally entertainable possibility. See, for example, *id.* at 50-55; Baker, 134 U Pa L Rev at 806-07 (cited in note 13) (explaining why “[l]egal regulation of people’s use of their personal qualities to obtain

regard these as boundary cases, for which exceptions might conceivably be crafted but on which one would be ill-advised to base a general, doctrinal approach.⁴⁸

F. Negative Liberty Interests: Interdependence and Externalities

We have seen that a constitutional scheme of liberties must rationally concern itself with how one person's exercise of liberty X affects the values of other people's liberty X. Of course, it must also rationally concern itself with how one person's exercise of liberty X affects the values of other people's liberties Y and Z. And here we discover an additional reason why expressive liberties stand on a different constitutional footing than proprietary or economic liberties.

Plainly, some people's exercises of proprietary and economic liberties can spill over to devalue other people's expressive liberties. Reasonable adjustment will often require regulation. Political campaign spending poses a problem of this kind. Few doubt that the problem is real. The existence of spending on political cam-

others' participation in interactions seems intuitively offensive as an overt limitation on liberty"). Again, it may happen that what an audience experiences as comparative cogency and soundness of argument is just a reflex of the comparative familiarity or conventionality of the ideas being urged. See, for example, Ingber, 1984 Duke L J at 25-36 (cited in note 19). If this is at all a frequent occurrence, then public-forum doctrines of content-neutral order-maintenance and equal access may be a recipe for ensuring that currently prevalent views and perspectives will continue to prevail regardless of their responsiveness to the interests and values of the audience. See id at 40-44. But by what standard can liberals deal out "deviance" or "dissidence" subsidies? See id at 50-55.

⁴⁸ See Gale, 65 St John's L Rev at 158-59, 168-83 (cited in note 26). It is not, however, a sufficient liberal response to the "hate speech" problem to point out that hate speech produces its degradation of the values of the expressive liberties of target-group members by transmitting derogatory "ideas" about the latter. See, for example, Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U Chi L Rev 225, 245 (1992). Liberals must first decide whether verbal trashings of classes of persons do significantly prevent the intended audiences from attending to messages (claims, stories, expressions of need, arguments) that those persons utter. If the answer is yes, then some people's speech is seriously degrading the values of other people's expressive liberties (just as surely as the racially discriminating employer is seriously degrading the values of some people's economic liberties and the major polluter is seriously degrading the values of some people's proprietary liberties). Liberals must then face the question of whether the degradation is so great as to constitute as a deviation from the constitutionally contemplated system of expressive liberties. See, for example, Robert Post, *Racist Speech, Democracy, and the First Amendment*, 32 Wm & Mary L Rev 267, 312-14 (1991).

If hate speech does thus impair the fair value of expressive liberty to those who suffer the degradation, then we have a problem on our hands that no amount of imprecation can make go away. It is an especially thorny problem if it cannot be treated except by some kind and degree of restriction on expressive liberty. But see id at 317 (arguing that there are a "host of ways to address this challenge short of truncating public discourse"). Of course, being thorny does not make the problem *not* a problem, either.

paigns confirms a truth we have already established: that along with property rights come considerations of distribution and relative values of liberties that do not, in liberal contemplation, normally arise with respect to expressive liberty strictly speaking.

Of course, spillovers can run in the reverse direction, too. Exercises of expressive liberties can affect the extent and values of proprietary and economic liberties. Free public debate may lead to a rent control law or a lettuce boycott. The two cases, however, are hardly the same; the latter but not the former represents democracy in action. American constitutionalism assigns a drastically superior moral status to the political power of communicative persuasion than it does to the political power of the purse.

Just now, it seems as though a national debate may be gathering over the question of government-guaranteed, universal health care protection. Suppose that those who oppose universal health care eventually carry the day in the chambers of government, and people widely believe that this happened just because the opponents were able, by force of superior wealth, to outspend the proponents. Most Americans would find this result objectionable in principle, and the objection would be precisely to the 'spillover' from wealth into politics. By contrast, whatever may be objectionable about a rent control law, the objection simply cannot be that the law resulted from effective communicative persuasion in a fairly conducted debate. No one will think the law objectionable merely because free speech brought it about. If, however, the ground for objection were that disparities in wealth between supporters and opponents produced the rent-control law, then that would be a very different case.

II. THE MYTH OF DISTRUST

A. Distrust As Universal Solvent

To this point, I have argued that functional differences between expressive liberties on the one hand, and proprietary and economic liberties on the other, may justify more exacting judicial scrutiny of laws restricting expression than of laws restricting proprietary and economic liberties. Here is the argument, in outline:

- (1) Liberties are interests, and as such they have dimensions of value.
- (2) A regime of law protecting liberty interests as human rights must attend to the systemic relations of their values.
- (3) Concern for such systemic relations requires restraint of expressive liberty only exceptionally.

- (a) Spillovers from exercises of expressive liberty to the values of (other people's) expressive liberties are reasonably treated as exceptional.
 - (b) Spillovers from exercises of expressive liberty to the values of other (nonexpressive) liberties can be substantial, but there is nothing wrong with them.
- (4) Concern for the systemic relations of the values of liberties often requires substantial regulatory oversight of exercises of proprietary and economic liberties.
- (a) Spillovers from exercises of proprietary and economic liberties to the values of sundry liberties are not only substantial, they are often normatively problematic.
 - (b) The contours of the appropriate controls depend on issues of justice that are often fairly open to political debate.
- (5) These functional differences between expressive liberties on the one hand, and proprietary and economic liberties on the other, can amply explain and justify a practice of exceptionally strict judicial scrutiny of laws directly infringing expressive liberties.

It is now time to acknowledge that this argument depends on certain assumptions about how lawmakers go about their business. It imagines lawmakers debating and judging, competently and in good faith, the daunting issues of values-of-liberties and systemic justice. Opposite assumptions about lawmaker motivation and competence would greatly weaken the argument, perhaps to the point of overthrowing it. If lawmakers are usually and mainly strategic self-servers, and ignorant to boot, then there is no good reason for setting them loose on these daunting issues or according them discretion to work out the issues as best they can. Conceivably, in that case, the least bad solution would be the one Professor Epstein urges: a prohibition, no less strictly enforced than the prohibition against direct restraints of expressive liberty, against laws that result in any net redistributions of wealth (saving express, population-wide, uniformly proportional or progressive taxes).⁴⁹

⁴⁹ There are reasons for doubting whether Professor Epstein's is even then the least bad solution. Among them is uncertainty about why we should place greater trust in judges enforcing the prohibition, in what will often be highly contestable circumstances, than in legislatures enacting laws. There is no less injustice, and no less inefficiency, in mistakenly requiring compensation (or mistakenly frustrating government action where compensation is refused) than in the opposite mistakes. Is it so clear that judges are more trustworthy than

Suppose that were our conclusion. Distrust, then, would have swamped the counsels of what would have been constitutional prudence, supposing some modicum of lawmaker competence and good faith. Distrust would have launched a preemptive strike against constitutional practical reason. But to grant to distrust such a preemptive force in American constitutional argument is wrong.

B. Demythifying Distrust

A myth is not a falsehood; it is a warped truth. It is a truth preserved but also a truth displaced, a truth inflated and hypostatized, a reification. In recent American constitutional theory, the notion of distrust has undergone something of a mythification. To see this, all we need do is look at First Amendment doctrine—the very body of doctrine that Professor Epstein takes as containing the true model for American constitutional practice, from which he thinks judicial protection for property rights (and to a less pronounced degree, for free speech rights) has unfortunately strayed.

It is certainly true that current doctrine provides nothing like sweeping protection for proprietary and economic liberties. Neither, however, does it do so for expressive liberties. In fact, there is a very sizeable gap between current First Amendment doctrine and sweeping protection of expressive freedom against government control. The gap I have in mind is not the doctrine's allowance for exceptionally "compelling" justifications for governmental restrictions of communicative action,⁵⁰ nor is it the doctrine's refusal or dilution of protection for expressive acts classed as "not-speech" ("obscenity"⁵¹ and, arguably, "fighting

legislatures in determining whether, for example, a scheme of workplace safety regulation violates any justly compensable entitlement of employer firms, or provides firms with adequate "implicit in-kind compensation"? See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 195-216 (Harvard, 1985).

⁵⁰ An example of a compelling justification is preventing imminently likely "lawless acts." See *Brandenburg v. Ohio*, 395 US 444 (1969). Hans Linde argues forcefully that it would be preferable to focus first on whether a given law categorically abridges freedom of speech (that is, to invalidate any law "directed in terms at expression . . . or [] association for the purpose of expression"), rather than pass directly to the question of whether the law's restrictive effects on expression are sufficiently justified by countervailing interests. See Hans A. Linde, "Clear and Present Danger" Reexamined: *Dissonance in the Brandenburg Concerto*, 22 Stan L. Rev 1163, 1174-76 (1970). There can be no doubt, however, that the Supreme Court employs the latter approach in "subversive speech" cases.

⁵¹ See, for example, *Miller v. California*, 413 US 15, 23 (1973).

words”⁵²) or “low-value” speech (“adult” films,⁵³ advertising⁵⁴). I have in mind, rather, the protection gap resulting from the doctrine’s distinction between direct and incidental governmental infringements of expressive freedom.

Current doctrine declines to treat a law (or a specific application of a law) as constitutionally suspect just because it severely burdens or impedes expressive acts. If the law plausibly serves unforbidden ends that are themselves “unrelated to the suppression of free expression”⁵⁵—if the law does not demonstrably aim at suppressing conduct “precisely because of its communicative attributes”⁵⁶—then judicial protection for the “incidentally” affected free speech interest is relatively minimal.⁵⁷

The resulting gap in protection is large. Vietnam-era criminalization of patently expressive draft-card burning gets by on pleas of administrative tidiness.⁵⁸ Exclusion from city utility poles of the political campaign material of an insurgent, low-budget city-council candidacy gets by on a plea of combatting “visual clutter.”⁵⁹ (By the same reasoning, so would a total, absolute, statewide ban on billboards.⁶⁰) Criminalization of nude dancing in indoor estab-

⁵² See *Chaplinsky v New Hampshire*, 315 US 568, 571-72 (1942); Grey, 8 Soc Phil & Pol at 91-94 (cited in note 47).

⁵³ See *Young v American Mini Theatres*, 427 US 50, 70 (1976).

⁵⁴ See *Board of Trustees v Fox*, 492 US 469, 473-78 (1989).

⁵⁵ *United States v O'Brien*, 391 US 367, 377 (1968).

⁵⁶ *Barnes v Glen Theatre*, 111 S Ct 2456, 2466 (1991) (Scalia concurring). An alternative route to strict scrutiny, fashioned on the same principle, is to show that the law pursues its allegedly speech-independent aims in ways that discriminate against speech in general or against particular speech. Courts will apply strict scrutiny to laws that selectively burden speech as opposed to other activity. See *Minneapolis Star v Minnesota Comm'r of Revenue*, 460 US 575 (1983) (striking down special tax on publishing which state used to raise general revenue). Courts also apply strict scrutiny to laws that selectively burden some messages or speakers as opposed to others. See *Police Department of Chicago v Mosley*, 408 US 92 (1972) (striking down prohibition on picketing of schools except for picketing related to labor disputes involving school).

⁵⁷ If Justice Scalia has his way, it will soon be nil. See *Barnes*, 111 S Ct at 2463 (Scalia concurring) (“[A]s a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all.”); *Employment Division v Smith*, 110 S Ct 1595, 1598-1606 (1990) (Scalia) (holding that the First Amendment’s bar against laws prohibiting the free exercise of religion does not excuse anyone “from compliance with an otherwise valid law [of general applicability] prohibiting conduct that the State is free to regulate”).

⁵⁸ *O'Brien*, 391 US 367.

⁵⁹ *Members of City Council of Los Angeles v Taxpayers for Vincent*, 466 US 789, 806 (1984).

⁶⁰ The Court left this question open in *Metromedia, Inc. v City of San Diego*, 435 US 490 (1981), but that was prior to its decisions in *Taxpayers for Vincent*, 466 US 789, and *Barnes*, 111 S Ct 2456.

lishments populated by volunteer, adult customers gets by on the plea of defending public morals.⁶¹

If this is a doctrine born of distrust of lawmakers, the distrust is very strangely selective. Actual judicial practice distrusts government picking and choosing among things private agents can discuss or views they can express. It does not distrust government weighing—or purporting to weigh—non-speech related goals against freedom of speech. Thus, it does not distrust incumbent city officials refusing the use of utility poles for insurgent political advertising, on what might well be a pretext of aesthetic sensibility. It does not distrust the Vietnam-era Congress criminalizing draft-card burning on a transparent pretext of administrative concerns. It does not distrust a town council criminalizing nude dancing in private establishments on the excuse that it must keep you and me from prancing nude down Main Street at noon and cannot be bothered with writing a law that distinguishes the situations.⁶²

Now, one may well believe (as I do) that the Supreme Court might do a much better job than it has of protecting expressive liberties while retaining this distinction between “direct” and “incidental” restrictions of expression. One may well protest the Court’s near-absolute refusal to attack pretextuality,⁶³ to infer repressive purpose from paltriness of speech-independent purpose,⁶⁴

⁶¹ It may be that restrictions on nude dancing are defensible because the dancers ought not be regarded as volunteers, but that was not the Court’s reasoning in *Barnes*. See MacKinnon, *Feminism Unmodified* at 179-83 (cited in note 44) (discussing coercion of women acting or modeling for pornography production). See also *New York v Ferber*, 458 US 747, 756-60 (1982) (justifying restriction on production and sale of child pornography as a child-protection measure). But see Margaret Jane Radin, *Market-Inalienability*, 100 Harv L Rev 1849, 1915-17 (1987) (discussing “double bind” created for women by disallowing commodification of personal sexuality).

⁶² I know that this was not the official story in *Barnes*, 111 S Ct 2456, but it is a kind of story that *Barnes* and its ilk (*O’Brien*, 391 US 367; *Taxpayers for Vincent*, 466 US 789; Justice Powell’s concurring opinion in *Young*, 427 US at 73; *Clark v Community for Creative Non-Violence*, 468 US 288 (1984) (no sleeping in public park)) apparently make perfectly admissible. The official story in *Barnes* is threefold: First, the town may claim (or, to be more precise, the Court may claim on the town’s behalf) a general moral interest in the prevention of nudity, even among volunteers within the walls of private establishments if those establishments are also “places of public accommodation.” Second, this general moral interest is quite unconnected to any concerns about communication. Third, this interest is quite sufficient to override any consequential suppression of expression. Neither the Court’s analysis in *Barnes* nor that of Justice Scalia’s concurrence purports to rest on the “low-value” status of dancing, or of nudity, as a form of expression.

⁶³ See *O’Brien*, 391 US 367. For criticism, see Frank I. Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 Stan L Rev 1337, 1345 & n 28, 1353 (1990) (citing prior critics).

⁶⁴ See *O’Brien*, 391 US 367; Michelman, 42 Stan L Rev at 1345 & n 28 (cited in note 63).

to subordinate moral majoritarianism to expressive freedom,⁶⁵ or to demand genuinely weighty, speech-independent reasons for refusing accommodations⁶⁶ and declining less restrictive alternatives.⁶⁷ Yet, whatever faults one may find with the Court's handling of the direct/incidental distinction, it is hard to withstand the inevitability of the distinction itself. The distinction is plainly designed to preserve lawmaker discretion against the otherwise boundless, trumping power of free expression rights.⁶⁸ It responds to a fear that if laws were rendered highly constitutionally suspect by their side-effects on speech, then either too many laws designed for good and proper ends would go under, or else courts (in order to avoid that consequence) would have to engage in too much ad hoc "balancing" of policies and values.⁶⁹

Clearly, there are conflicting pulls on First Amendment doctrine—a pull toward distrust, and a pull toward something like its opposite. We can call this opposite confidence, or we can call it resignation. Whichever, its gist remains the same: there is no future in establishing governments for purposes of looking after certain matters without trusting them to do it; establishment is entrustment.⁷⁰ This simple truth does not eradicate distrust from constitutional thought or argument; what it does is deflate—or demythify—distrust, and hold it to the status of a factor in (as Frederick Schauer says) a calculus.⁷¹

But, you ask: If across-the-board distrust of government is not what drives the limited-government side—the libertarian bill-of-

⁶⁵ See *Barnes*, 111 S Ct 2456. Compare *Poe v Ullman*, 367 US 497, 545-55 (1961) (Harlan dissenting), in which Justice Harlan, prefiguring *Griswold v Connecticut*, 381 US 479 (1965), would have subordinated moral majoritarianism to the "fundamental" right of marital privacy.

⁶⁶ See *Community for Creative Non-Violence*, 468 US 288.

⁶⁷ See *O'Brien*, 391 US 367. At the very least, the Court should demand justification beyond abstract rule-formalist prudence or the nuisance to administrators or lawmakers of having to draw lines and distinguish cases.

⁶⁸ The distinction may well be traceable to contributions from committed civil libertarians. See Thomas Scanlon, *A Theory of Freedom of Expression*, 1 Phil & Pub Aff 204, 209 (1972); Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L Rev 29, 38-46 (1973); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv L Rev 1482, 1496-1502 (1975); Laurence H. Tribe, *American Constitutional Law* § 12-2 at 1496-1502 (Foundation, 2d ed 1988).

⁶⁹ See generally John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L J 1205 (1970).

⁷⁰ This argument is advanced and examined, with characteristically engaging subtlety, by John Dunn, *Trust and Political Agency*, in Dunn, *Interpreting Political Responsibility* 26, 26-44 (Princeton, 1990).

⁷¹ See Frederick Schauer, *The Calculus of Distrust*, 77 Va L Rev 653 (1991).

rights side—of our constitutionalism,⁷² and its support by judicial review, then what does drive it? The answer lies in substance. It lies, that is, in not imagining distrust as a universal solvent⁷³ indifferent to substance.⁷⁴

American constitutionalists have, for better or for worse, always focused their attentions on the problem of the state. It is state power that our constitutional law has been concerned to establish, organize, motivate, direct, and restrain. There are certain kinds of effects that, all other things being equal, Americans have preponderantly wanted accomplished by governmental power: for example, creation, maintenance, and defense of a continentally integrated, commercial republic. At the same time, there are certain other kinds of effects that, all other things being equal, Americans have preponderantly wanted *not* accomplished by governmental power: suppression of communication, for example. Finally, there is a residual category of what we may call “contingently wanted” effects, those that Americans have expected sitting governments to pursue when and as those governments have judged it opportune to pursue them: for example, the kinds of regulatory enhancements and adjustments of the values of liberties that I sketched earlier.

When the only available rationale for a burden or restraint on expressive action depends on the speech-restrictive effect itself, then governmental power is being used—with identifiable, important exceptions—to accomplish an unwanted effect. Not so when the restrictive effect on speech is “incidental.” Then the law may be accomplishing other effects that we expect our governments to pursue, including, as I have argued, certain adjustments and enhancements of the values of liberties. The calculus of distrust simply must allow some room for such adjustments. How much room is uncertain. The functionalist case for variable judicial respect of government discretion remains, in that sense, vague and perhaps uneasy. It is nevertheless a coherent case, it is rational, it is traditional, and it contains grounds for methodically differentiating how reviewing courts treat expressive, proprietary, and economic liberties.

⁷² Some recent scholarship seeks to revive a non-libertarian, pro-popularist strain in the Bill of Rights, but not by denying that the libertarian element is also there. See generally Akhil Reed Amar, *The Bill of Rights As a Constitution*, 100 Yale L J 1131 (1991).

⁷³ Epstein, 59 U Chi L Rev at 48 (cited in note 2).

⁷⁴ If “substance” encompasses the kinds of considerations I have marshalled in support of varying judicial treatments of different liberties, then distrust theory, carried to the point of swamping those considerations, is a flight from substance. Compare Richard A. Epstein, *Modern Republicanism—Or the Flight From Substance*, 97 Yale L J 1633 (1988).

C. Impossible Assimilation?

Whether Professor Epstein's alternative is likewise coherent is subject to question. The distinction between "direct" and "incidental" restrictions on expression is, after all, not a secondary detail of constitutional law. It is a crucial, organizing feature. It is a feature evidently designed to preserve the validity of a great deal of regulation whose speech-suppressive effects might otherwise render it highly constitutionally suspect. If constitutional protection of proprietary and economic liberties is truly to follow the freedom-of-speech model, must it not contain an analogously permissive, preservative feature? But what could that feature possibly be? (Someone please tell us, what is the intelligible distinction between a "direct" and an "incidental" restriction on property?⁷⁵)

A direct restriction of speech is one for which there is no plausible goal apart from restricting communication. By analogy, a direct restriction of property would be one for which there is no plausible goal apart from restricting how people use and enjoy their lawful possessions. But then to say that direct restrictions of property are strictly scrutinizable would make every bit of government regulatory action presumptively unconstitutional.⁷⁶ (Someone

⁷⁵ Baker has offered a possible response in the form of his proposed distinction between laws that "allocate" liberty and those that "restrict" liberty. See Baker, 134 U Pa L Rev at 785-815 (cited in note 13). Clear as this distinction may be in conception, it might prove extremely contestable in practice. On Baker's own understanding of it, it is orders of magnitude too permissive for Epstein's purposes.

⁷⁶ Professor Epstein suggests that a piece of legislation's non-redistributive nature could be demonstrated either by an explicit, special compensation payment or by a demonstration that the action carries its own implicit, in-kind compensations to those on whom it also imposes burdens. Epstein, 59 U Chi L Rev at 51-53 (cited in note 2).

These responses, however, do not meet the objection I am raising. First, some government actions are prompted and justified by distributive considerations, in such a way that requiring compensation would defeat their purposes. Second, against what baseline of pre-existing value are we to determine whether a government action is redistributive (wholly aside from any attendant compensation, explicit or implicit)? The strictest view would be that any legislatively or judicially announced deviation from positive law, or from the common law as of some fixed date, is a *prima facie* compensable taking, at least insofar as it causes a decrement in market value. Such a doctrine, I have argued, would often defeat the ends of justice. If, alternatively, we are to determine baseline values by methods sufficiently attentive to cultural evolution and expectations of legal dynamism to be consonant with justice, then it is unclear why that work is better entrusted to judges than to ordinary lawmakers.

In general, it seems that distrust-based justifications for judicial review have, to date, been remarkably inattentive to the fact that judges, too, are plausible objects of distrust. Schauer signals a welcome corrective to this silence. See Schauer, 77 Va L Rev 653 (cited in note 71). See also Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, 1990); Ingber, 1984 Duke L J at 30 (cited in note 19) ("Members of the judiciary, responsible for upholding the values protected by the first amendment, are not

please give us an example of a regulatory goal that operates independently of curtailing anyone's use of any of their property.) The preservative side of the "direct"/"incidental" distinction would be missing.

Take a simple example. Today, it seems that sweeping anti-billboard laws are virtually exempt from First Amendment scrutiny, despite the substantial suppression of communication they effect, because they also plausibly serve aesthetic and (it is sometimes said) safety goals. Such goals are considered to be independent of any concern on the government's part about what people say or communicate to one another. Such goals, however, cannot possibly be considered independent of governmental concern about how people use their property holdings; how people use their property is exactly what such regulations are about. They are, then, direct regulations of property, although not of speech. Are they, on that account, constitutionally suspect? To say so is directly to undercut what in free speech analysis is a major premise—speech-independent considerations of public amenity or safety are not only legitimate but *redemptive* justifications for regulations that also restrict expression. Thus, the preservative side of the "direct"/"incidental" distinction would have vanished.⁷⁷ The property-restrictive effects of ordinary regulations, which in free speech analysis are their ticket to constitutional salvation, are by Professor Epstein's proposal transmuted into stigmata of constitutional sin.

In sum, the idea of having courts approach proprietary and economic rights with the same formulaic kit of analyses and "tests" that they use in free speech cases seems bound for massive

immune from the same processes of socialization and indoctrination that predispose the general public to certain perspectives."); Radin, *Regimes* (cited in note 39) (remarking that judges who understand their role to be that of preventing socially costly legislative rent-seeking "have yet to face the full implications of the idea that their own activities, as individuals and as government actors, should also be interpreted as rent-seeking").

⁷⁷ This trouble cannot be avoided by fiddling with the "level" of judicial scrutiny of government's justifications for laws infringing on proprietary or economic liberties—for example, by using "intermediate" rather than "strict" scrutiny, demanding that the questioned regulation "substantially" advance an "important" interest, rather than that it be "necessary" to a "compelling" interest. Any level of judicial scrutiny between quasi-automatic approval (toothless rationality review) and quasi-automatic invalidation (fatal-in-fact strict scrutiny) involves the court in what is loosely called "balancing"—that is, in judgmental second-guessing of the lawmakers' ostensible appraisals of policy and justice. So to choose such an intermediate level of judicial involvement is already, in effect, to concede that the regulation in question does truly present legitimate questions of policy and justice that someone ought conscientiously and responsibly to resolve. It is thus, again, to invite the question of why such work is better entrusted to judges than to ordinary lawmakers.

conceptual disorder. My argument has identified two sources for this disorder. The first is failing to take account of relevant differences among the ways in which various classes of liberties function in American society and what they signify. The other is overestimating the degree to which distrust of lawmakers is or logically can be thought to be the preemptively dominant theme of American constitutional thought and practice.