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PROPERTY AND ITS RELATION TO CONSTITUTIONALLY PROTECTED LIBERTY

C. EDWIN BAKER[†]

This Article considers two interrelated questions. First, what is the appropriate treatment of property issues in constitutional analysis? Second, is government regulation of property or of economic activities different from, and more acceptable than, government regulation of activities—such as speech, procreation, and association—that currently receive greater constitutional protection? Specifically, is liberty really more at stake in the second case than in the first?

Part I suggests that property performs a number of functions; that these functions implicate several different values; and that constitutional analysis does and should depend on which functions (and hence which values) the challenged governmental practice implicates. Parts II through V build on Part I, developing and evaluating several theoretic-

[†] Professor of Law, University of Pennsylvania. B.A. 1969, Stanford University; J.D. 1972, Yale University. I have benefitted from, although not always followed, thoughtful suggestions by James Boyle, Sylvia Brown, Drucilla Cornell, Frank Goodman, Gerald Neuman, Margaret Jane Radin, and Lea Vander Velde. My debt to Frank Michelman's writings is even greater than the footnotes can suggest. I have also benefitted from the opportunity to present versions of this paper at a Symposium on Economic Liberty and the Constitution, University of San Diego Law School, and at faculty workshops at Boston University Law School and Brooklyn Law School.

cal arguments that justify collective control—that is, government regulation—of many aspects of property. These later portions of the Article lead to the conclusion that this collective control does not necessarily limit, but can further, important aspects of individual liberty. Although this conclusion will not seem surprising in light of existing constitutional jurisprudence, it does respond to recurring reactionary demands for a return to the *Lochner* approach.¹ The Article also answers those critics of modern constitutional law 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.²

I. DISAGGREGATING THE NOTION OF PROPERTY

Property is an aspect of relations between people. It consists of decisionmaking authority.³ "Authority" refers to the role of property as

¹ See *Lochner v. New York*, 198 U.S. 45 (1905). Even though none of the theorists have shown how a set of property rights can be abstractly derived from natural law or, more specifically, from Lockian premises, an assertion that such premises can provide a basis for property rights has become increasingly common since the publication of R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). Several recent books call for a return to *Lochner*. See, e.g., R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 7-18 (1985); B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980). Modern social theory, however, uniformly and persuasively repudiates the premises of *Lochner*. See Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 944-45 (1983).

² The task of this paper was set when Justices Douglas, Brennan, and Marshall, generally viewed as the most progressive members of the Court, joined Justice Stewart in arguing "that the dichotomy between personal liberties and property rights is a false one The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right . . ." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) (citing, among others, John Locke). Usually this theme of treating property rights as analogous to other personal liberties is expressed by more conservative, free-market advocates. See, e.g., F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY* (1979); F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960); M. FRIEDMAN, *CAPITALISM AND FREEDOM* (1962). It has also been emphasized in comparisons of freedom of speech and freedom of exchange. See, e.g., Coase, *The Market for Goods and the Market for Ideas*, AM. ECON. REV., May 1974, at 384 (Papers and Proceedings); Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1 (1964). In addition, the status of Charles Reich's classic article, *The New Property*, 73 YALE L.J. 733 (1964), indicates increased interest on the part of progressive scholars and judges in constitutionally based property arguments, a development possibly explaining the language in *Lynch*.

³ A more limited definition would correspond to more commonsense notions. Property would consist of decisionmaking authority over particular objects or resources, or over various types of intangibles, including previously formulated practices, techniques, or symbolic patterns. Given this more limited definition, a person's decision-making authority concerning her own body or mind might not be considered property. For my purposes, either the broader or the more limited conception will do.

Note that this broad definition seems as appropriate a definition of liberty as of

a claim that other people ought to accede to the will of the owner, which can be a person, a group, or some other entity. A specific property right amounts to the decisionmaking authority of the holder of that right. The standards used to determine the content and extent of decisionmaking authority, and to determine who holds this authority, are what I mean by "property rules." Property rules determine the relevance of various factors, including the behavior and status of people, to the evaluation of a person's claim to possess some specific decisionmaking authority.

This broad notion of property is consistent with radically different systems of property allocation, including those that would exist in a state of nature, a private property system, or a regime of completely collectivized property.⁴ Culture, history, and politics (broadly defined) necessarily determine both the content of the specific property rules accepted in a given society and the resulting property allocations. I will here assume what I think should be obvious: that the notion of a complete set of timeless, natural, or proper property rules is absurd.⁵

property. Nevertheless, as used in this Article, the two concepts will have different normative significance. I will claim that this broad conception of property does not lead to any general normative conclusions. In contrast, the conception of liberty used herein is designed to embody conclusions, first, that individuals have special claims to certain allocations of decisionmaking authority (freedom of speech, for example), and, second, that we can properly distinguish between types of limits on decisionmaking authority and that some types of limits are, and others are not, objectionable. Thus, the conception of liberty used herein will do different and narrower work than this broad conception of property, a conception that, even if narrowed, generally obfuscates useful normative discussion—an obfuscation accomplished, in part, by trading on property's overlap with useful conceptions of liberty.

The notion of property or ownership is sometimes said to include limits on decisionmaking authority. Becker, following Honoré, includes as elements of ownership "the absence of term," "the prohibition of harmful use," "liability to execution," and various "residuary rules." See Becker, *The Moral Basis of Property Rights*, in NOMOS XXII: PROPERTY 187, 191 (J. Pennock & J. Chapman eds. 1980); Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 121-24, 126-28 (A. Guest ed. 1961). The existence of these limiting elements is undeniable. But to consider the prohibition of harmful uses as an aspect of property would suggest an initial conception of some larger amount of decisionmaking authority from which authority to engage in harmful uses has been subtracted. I find it more helpful to think of property as the decisionmaking authority that a person has left after limitations are specified, so that property does not itself include the limitations. Likewise, elements such as liability to execution (potential attachment or garnishment) and the absence of term (duration of ownership rights) do not seem essential to the notion of property. The issue of *when* one has property seems separate from that of *what* one has.

⁴ See generally Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980) (discussing failure of abstract efficiency criterion to distinguish between private property, state of nature, and totally collectivized regimes).

⁵ Whether there are certain elements that any proper or just set of property rules must have, or certain rights that any proper or just system must not violate, presents a different issue.

Property rights are a cultural creation and a legal conclusion. Under the monolithic notion of property we commonly subsume many different rights. For example, property rules determine who possesses certain decisionmaking authority (ownership rules), what decisions may or may not be made (permitted uses), and the circumstances under which a person may alienate decisionmaking authority (transfer rules).⁶ Moreover, property rules can serve—or disserve—a number of distinguishable social functions. I will argue that a particular property rule may implicate some but not others of these social functions.

Constitutional interpretation inevitably is either explicitly or implicitly animated by value concerns. These animating values will not have the same relationships to each of the different functions of property, or to the various rules serving those functions. Thus, my thesis has two parts. First, the constitutional status of a given property right or a given regulation of property should depend on the relationship of the right or regulation to constitutionally grounded values. Second, the values implicated will depend on which of property's various functions the right or regulation involves. In other words, the constitutional status of a governmental rule or practice that abolishes, creates, changes, or regulates some specific property right does not follow in a uniform manner from its effect on some monolithic notion of property. Rather, the status should depend on the functions or values served by the rule in question. An outline of several different functions of property rights and a discussion of present and possible constitutional responses to each will illustrate this thesis.

A. *The Various Functions of Property*

1. The Use Value Function

People rely on, consume, or transform resources in many of their self-expressive, developmental, productive, and survival activities. These uses of resources are integral to a person's liberty, viewed either as self-realization or as self-determination. Property rules determine when the community will recognize a person's assertion of a right to use a particular resource for these purposes. Thus, the first function of property rules is to protect use values. The performance of this function can serve as a major support for individual liberty.

⁶ Professor Susan Rose-Ackerman argues that a property analysis that begins by distinguishing entitlement rules relating to ownership, use, and transferability would be more fruitful than analyses that view property more as a totality. See Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 931-33 (1985).

Two particular uses of property merit special attention. Although these two uses could properly be treated as subcategories of the use-value function, their normative implications are so significant and distinct that I treat them independently as the second and third functions of property.⁷

2. The Welfare Function

The second function, which I call the welfare function, is to secure individuals' claims on those resources that a community considers essential for meaningful life. Recognition of both the existence and importance of this function apparently influenced the more liberal members of the Supreme Court in *Arnett v. Kennedy*⁸ in their choice of what advice to take from *Board of Regents v. Roth*.⁹ Rather than quoting *Roth*'s positivist language, Justice Marshall, joined by Douglas and Brennan, found most insightful the notion that "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives."¹⁰ Particularly important for people's daily lives will be those necessities, possibly including some opportunity for work, that are essential, first, for survival and, second, for meaningful existence as understood in a person's own community.

Property rules always protect some people's claims on these neces-

⁷ It is important to note that the functional categories identified are not intended to be natural, nonoverlapping, or comprehensive. The welfare and personhood functions (and the property rules that serve them) overlap each other, and are both encompassed by the broader use function. I identify each as a separate function because each responds to different normative or constitutional concerns and, therefore, each has independent bases and different practical implications. My identification of different functions attempts to organize commonsense observations in a manner helpful for a value-oriented discussion.

⁸ 416 U.S. 134 (1974) (upholding the dismissal of a nonprobationary federal employee who had not been afforded an adversarial pretermination hearing).

⁹ 408 U.S. 564 (1972) (holding that the terms of a college professor's employment accorded him no property interest protected by procedural due process).

¹⁰ *Arnett*, 416 U.S. at 208 (Marshall, J., joined by Douglas & Brennan, JJ., dissenting) (quoting *Roth*, 408 U.S. at 577); see also *id.* at 165 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the result in part) (quoting the same passage from *Roth*, but including the surrounding positivist language); cf. *id.* at 151 (Rehnquist's plurality opinion for the Court quoting only the positivist language from *Roth* that was also quoted by Powell but not by Marshall: "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .") (quoting *Roth*, 408 U.S. at 577)). Justice Marshall, of course, was building on Reich's classic analysis, presented in Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965), and Reich, *The New Property*, 73 YALE L.J. 733 (1964). See *Arnett*, 416 U.S. at 207 n.2 (Marshall, J., dissenting). Both of Reich's articles are cited in *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970).

sary resources. If a community has a productive capacity sufficient to support its conception of necessities, there is no material obstacle to a set of property rules that would protect everyone's claim to these necessities. Thus, for at least some people and potentially for all, property rules perform the important function of protecting against being left without these necessities.¹¹

If a community denies a person's claim to resources that the community considers necessary for desired or meaningful self-expression and self-realization, that person could reasonably object that the denial subordinates her to others and, therefore, is unacceptable. Of course, all property schemes subordinate some visions or values to others. Still, when 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 these members have a particularly forceful argument that the community has unjustly subordinated them. This subordination, this denial of the worth of those left without, is inconsistent with any social system premised on respecting people as equals.¹² It should be unacceptable under our constitutional order.

3. The Personhood Function

Third is the personhood function of property. People define themselves primarily in terms of their activities, their personal relations (to others and to religious or mythical entities), their values and capacities, their projected or hoped-for futures, their individual histories, and their collective traditions. They define and realize themselves in a material

¹¹ John Rawls argued that the fear of being left without these necessities would provide a strong motivation for those in his "original position" to choose his second principle of justice, the difference principle, which he considers the principle most relevant to the proper content of property rules. See J. RAWLS, A THEORY OF JUSTICE 60-83 (1971). The difference principle states that "social and economic inequalities are to be arranged so that they are . . . to the greatest benefit of the least advantaged . . ." *Id.* at 83. I have argued that Rawls' emphasis on unacceptable outcomes is generally appropriate but should lead to a somewhat different choice of principles. See Baker, *supra* note 1, at 940-41.

Michael Walzer, who emphasizes the variability of different communities' understanding of necessities, claims that democratic communities typically guarantee the availability of these resources to all members of the community. See M. WALZER, SPHERES OF JUSTICE 83 (1983).

¹² Even strict material equality, a concept of dubious coherence, would favor some people and some values over others. Abstract arguments for such allocations are unconvincing and do not follow from the notion of respecting people's equality of worth. A wide range of democratically chosen allocations may better implement a respect for persons. See Baker, *supra* note 1, at 949-72. A denial by a community of the very resources that the community treats as necessary for the person is, however, more overtly an offense to the status of the deprived person.

world. For better or worse, people commonly invest part of their identity in material objects, such as diaries, wedding bands, family homes, and religious or cultural shrines. This identification characteristically occurs through the objects' particular relation to people's histories or traditions and, sometimes, to their current or prospective activities.

The personhood function of property is to protect people's control of the unique objects and the specific spaces that are intertwined with their present and developing individual personality or group identity. This function shares with the welfare function the status of being a highlighted aspect of the more general use-value function of property. The personhood and welfare functions, however, differ from each other in the way each contributes to people's well-being. These differences imply the need for different types of legal support. Generally, protection of claims to generic types of resources adequately serves the welfare function. In contrast, the personhood function characteristically requires protection of specific, unique objects or spaces.¹³

4. The Protection Function

Property rights can sometimes protect the individual against certain forms of unjust exploitation by other individuals or by governments. The scope of this fourth, protection function of property is difficult to describe precisely. This difficulty reflects two uncertainties. First, there is no simple, uncontroversial conception of what constitutes unjust exploitation. Identification of exploitation would require at least implicit reliance on some ethically grounded conception of acceptable practices and rights. Second, since exploitation can take many forms, any set of property rules will offer only limited protection against some forms. In fact, most modern commentators (not only Marxists) would acknowledge that presently recognized property rights not only reflect the outcome of past unjust exploitation, but also contribute to its continuing occurrence.¹⁴ The version of the protection function that I am

¹³ See generally Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (developing the thesis that the primary legitimate basis of property is the support of personhood).

¹⁴ Professor Anthony Kronman argues that both liberals and libertarians should recognize that unjustifiable exploitation can occur through the use of economic power in setting the terms of contractual relations. See Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 478-83, 493-98 (1980); see also Baker, *Starting Points in the Economic Analysis of Law*, 8 HOFSTRA L. REV. 939, 968-72 (1980) (discussing need for a normative defense of starting points). Under current doctrine, if the exploitation is too offensive to common sensibilities the agreement may be struck down or modified using doctrines of duress or unconscionability. Many progressive theorists, however, attempt more ambitious descriptions of exploitation. In an interesting account, John Gaventa describes how each of three dimensions of power based largely on own-

here attributing to property is only a way in which *private* property can partially limit certain specific forms of exploitation. For example, it would be exploitative for either the state or a private entity invidiously or otherwise unfairly to pick out a particular person or group to bear some unwanted burden. Property rules restrict this form of exploitation by creating the possibility of condemning some behavior as robbery, trespass, or uncompensated government taking.

The security that property rights can provide against invidious or otherwise unfair imposition of burdens is valuable. Nevertheless, frequently it is not justifiable to rely on property rights to serve this function. Even if the prevented exploitation is never justifiable, property rights are only one means of preventing it—and, like all means, it is subject to a policy analysis of its advantages and disadvantages. Even absolute protection of property rights would not prevent a government from taking some actions that would invidiously impose burdens on particular people. More important, the rigid formulation of property rules that would be necessary to prevent these specific, unjustifiable, exploitative private or governmental practices would often have the effect of blocking justifiable, nonexploitative practices. Such rules would eliminate or at least severely limit the possibility of change in the legal order. This result would undermine the most basic individual right, the right to be an equal member of a self-governing community. In fact, the unbending protection necessary to prevent this form of exploitation would significantly contribute to other, equally objectionable forms of exploitation. Thus, the extent to which we should rely on property to perform this protective function is unsettled.

5. The Allocative Function

Another vital function of property rules is to facilitate certain means and to block other means by which individuals or groups secure the resources that they need for their productive or consumptive activities. In other words, property rules serve an allocative function. The need to serve other functions of property, such as the welfare or personhood functions, may limit the acceptable ways the allocative function may operate. Still, there are various permissible ways to serve the allocative function. There certainly is no abstractly definable set of property rules that best serve this function.¹⁵ From the perspective of Chi-

ership of private property contributes to enforcing a falsified consensus in a rural Appalachian community. See J. GAVENTA, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY* 252-61 (1980).

¹⁵ See Kennedy & Michelman, *supra* note 4.

cago-school free-market theorists, the appropriate property rules—deviated from only to accommodate market failures or nonallocative concerns—are those that promote transactions that move resources to uses for which resource owners receive the highest payment. An alternative, now less commonly invoked conception of private property apparently had almost equally strong support in colonial America.¹⁶ This conception, identified with early republican sentiment, recognized property claims that promoted the movement of land into the hands of people who themselves would use the resources productively. Use rather than grant provided the superior basis for title. Analogously, other nonmarket-based sets of property rules might allocate resources by need, queuing, merit, present physical possession, or various other policy criteria.

Key aspects of this allocative function distinguish it from the first three, use-related functions. Obviously, property (decisionmaking authority) is both allocated and used. Human plurality, however, necessarily plays a role with respect to allocations that it does not necessarily play with use decisions. First, allocative rules adjudicate between competing claimants. These property rules sort out competing claims to resources and establish the possibility of and the conditions for the transfer of title. Human plurality is the source of the issue to which an allocation responds. In contrast, use decisions only necessarily involve the behavior of one entity. Second, to be effective, allocative decisions must be collectively accepted—whether the acceptance results from consensus, yielding to authority, deception, fear of sanctions, or mere inertia and inaction. Without this acceptance, competing claimants are likely to attempt to engage in inconsistent uses, thus rendering the allocative decision ineffective. This again differs from decisions about use, for which the concurrence of others is unnecessary.¹⁷

Although added elements of political theory would be needed to complete the argument, the inherent need for collective acceptance of allocative decisions and the nature of these decisions as a response to human plurality suggest that they are properly a matter, at least in part, of some form of democratic decisionmaking.¹⁸ Stated in another

¹⁶ See Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFFALO L. REV. 635, 644-45 (1982).

¹⁷ The allocation could be to a group or could recognize a commons. Thus, although use decisions do not inherently involve human plurality in the way allocation decisions do, this point about use is clearly consistent with either socialized or anarchist use decisions.

¹⁸ See Baker, *Counting Preferences in Collective Choice Situations*, 25 UCLA L. REV. 381, 399-413 (1978); cf. V. Magagna, *Between Disaster and Desire* (unpublished Ph.d dissertation, University of California at Berkeley) (historical and theoretical anal-

way, the authority to make allocation decisions is a basic form of property that is inherently collective.¹⁹ If there is an individual property right here, it could only be the right to decide autonomously how to participate politically in the necessarily collective decision. Presumably, this collective choice should reflect society's judgment as to which allocative framework best accords with or promotes societal self-definition, justice, virtue, the general welfare, or concerns such as the proper relations of people to their physical environment. Thus, although the allocative function can be described, as I described it initially, in terms of how it serves the individual, this function, more than the others, seems best described as a social function of property.

This is not to deny that the effective performance of the allocative function is of vital importance to the individual. People's lives and welfare depend on the effective use of resources for productive purposes. Our collective welfare also depends on getting goods into the hands of people who particularly value or need them. Properly designed property rules promote useful and desired forms of cooperative and productive activity. Ideally, these rules should facilitate the movement of resources to the people or organizations able to make the highest valued use²⁰ of them; and these same rules may provide incentives to engage in that use. Nevertheless, although property rules are often evaluated in terms of how well they perform this facilitative and incentive function, it is important to recognize that this evaluation is not based only on empirical observations, but also necessarily presupposes ethical and political judgments.

In addition to their instrumental role, allocative activities and, therefore, allocative rules may be substantively valued. People may value a group process of decisionmaking, or they may value the entrepreneurial, competitive, or cooperative activities that effectuate allocation. This positive evaluation of various aspects of different versions of the allocative process treats the economic or allocative activity like a consumptive good or, from another perspective, like a form of life that is valued in itself. In our society, however, the evaluation of the allocative function is usually more purely instrumental. We usually praise

ysis showing that threats by outsiders to local control over allocation and definition of property have been the primary basis of rebellion or, at least, rural rebellion).

¹⁹ Note that the collective decision may be to specify rules of private ownership and then to rely on individual decisions within the market as a means of allocation.

²⁰ Note, however, that there is no neutral or uniformly accepted measure or definition of "highest valued use." It is inherently a political (or ethical) issue. See Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 8, 32-41 (1975). Thus, the determination of what rules best promote the highest valued use is itself necessarily dependent on political, ethical, or other collective judgments.

either those property rules that most effectively reduce the costs of engaging in transactions that promote productive and desired uses of resources, or those property rules that promote productive uses without the need for transactions.

6. The Sovereignty Function

Property rules provide people with a means to exercise power over others. Sometimes this power over others will be of a degree appropriately called sovereignty.²¹ Power over other people is implicit in the capacity of governmental or private property holders to set conditions on the transfer of resources to others. Thus, this sovereignty function and the allocative function are intrinsically tied—they are both facets of conditional transfers and exchanges. Still, these two functions are appropriately distinguished. People value transfers and exchanges not only as a means to obtain valued resources, but also as an exercise of power over others. People also often criticize the distribution and use of this sovereignty aspect of property. Both the desires for and the criticisms of the sovereignty aspect of property are often independent of any concern for the instrumental effectiveness of the allocation system; both are often even independent of people's views of the acceptability of the allocations themselves, to the extent the allocations are not used to exercise power over others.

Although the exercise of power over others is a "use" of property, this use is very different from those represented by the first three functions of property. The first three functions do not necessarily involve other people or other people's desire for the property. Even in those frequent instances of the first three functions where a person's use of property does involve other people (but does not involve an exchange or a transfer with conditions attached), the use normally reflects joint or integrated values or endeavors; and in these situations, the structure of the activity will not inherently imply the exercise of power over another. For example, a group project, a celebration, or a game typically involves not the exercise of power over others but rather a joint endeavor. Both parties typically value the same use of the resources involved. In contrast, the role of property in the sovereignty function does

²¹ See Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11-14 (1927); cf. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943) ("Society, by proclaiming freedom of contract, guarantees that it will not interfere with the exercise of power by contract. Freedom of contract enables enterprises to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms.").

not require that the property have any value to the property owner, but only to the person influenced.²² The owner exercises power by making use of another person's needs or desires. The person influenced engages in a performance that she would prefer to avoid but for the fact that the performance is necessary to secure the exchange. Thus, from the perspective of the sovereignty function, it is property's *exchange*-value that is crucial, while from the perspective of the first three functions, the concern is with the property's *use*-value.²³

The use of property to exercise power typically involves reciprocal, whether or not equal, exercises of power.²⁴ Market theorists consistently emphasize the "voluntariness" of such exchanges. In addition, both the capacity to exercise power by means of exchange and the actual exercises of power are often socially desirable and ethically unobjectionable—just as is true with more commonly recognized forms of sovereign power. But neither the reciprocity nor the voluntariness of this form of power eliminates the crucial factor emphasized here: the property is used to obtain a performance by the other that the other would not have performed on her own. This constitutes an exercise of power.

The degree to which people use property to influence others' behavior—and even more importantly, the context and manner in which people exercise this power—will obviously affect the nature or quality of life in the society. But the significance of the sovereignty function tends to depend primarily on the distribution of resources in society. For example, its importance is accentuated when most people do not control the resources they need to engage in productive activity. In a society with such a distribution of resources, control of productive re-

²² My terminology here should not be allowed to obscure the fact that each party to the exchange both influences and is influenced by the other. See *infra* note 24.

²³ Not all transfers involve the sovereignty function. Only those made subject to conditions do. Gifts and certain other transfers by either government or private individuals may neither be intended to produce nor actually produce any change in the recipient's behavior (other than changes that occur because, after the transfer, the recipient has increased options or changed desires).

²⁴ Most exercises of power involve some degree of reciprocity and voluntariness. The fact that a person exercising power must engage in activities in order to secure compliance implies mutual influence. For example, in order to exercise power the person might need to offer something in exchange for compliance, buy and carry a gun, or threaten various actions. An abstract form of voluntariness always exists to the extent that the person over whom power was exercised could have resisted. Our more normal use of the notion of voluntariness, as well as the notion of coercion, implicitly relies on our acceptance or rejection of the propriety of the context of the action. Handing over the jewelry is considered voluntary if it is in response to an offer of money but not if it is in response to an "offer" not to shoot. This common usage indicates why the mere abstract voluntariness of an exchange cannot be used to show its legitimacy, while the legitimacy of the exchange can support a characterization of it as voluntary.

sources increasingly resembles potentially oppressive sovereign power.

This concludes my outline of six functions of property. Before proceeding, however, one further comment about my methodology and this particular breakdown of the functions of property is in order. Clearly, my decision to specify these six functions involved value choices and particular perspectives.²⁵ Other specifications might have clarified vision more or blurred it less. People surely can identify functions of property other than these six. For example, the role of property in protecting privacy, although perhaps implicit in the first and third functions, could have received explicit attention.²⁶ Another function of property rules that could be specified is to recognize and encourage the development of certain values or preferences. Because this vision-embodying function is so often ignored by the currently popular market-oriented law-and-economics literature—possibly because it tends to take values and preferences as givens—this function might merit special attention rather than being reduced to one of the policy concerns relevant to determining how property rules ought to further or restrict the six functions listed. Ignoring this vision-embodying function here, however, can best be defended on the ground that it raises no constitutional issues that differ from those raised by the allocative function.

Political theorists also often list as an important function of property the protection that multiple, privately controlled centers of power (based on control of property) provide against centralized governmental oppression. This function is different from what I described as the protection function, although both protect against exploitation. The protection function I described earlier primarily concerns procedures for identifying and stopping individualized abuses. The protection proposed here concerns power distributions that help structurally to restrict the evils of unequally distributed and highly centralized power. Certainly this separation-of-powers or “checking” function merits greater attention. Nevertheless, I ignore it in this Article partly because I do not believe that attention to it would result in any useful constitutional conclusions.²⁷ In fact, reasonable views concerning how property rules can

²⁵ The identification and characterization of functions inevitably depends in part on the outlook and concerns of the analyst. A particular functional disaggregation will help or hinder particular ethical inquiries. The value of any such functional analysis will turn on what it helps us to see; its inevitable disservice is that any particular functional focus will blur some value issues and hide some structural possibilities. No listing or characterization of specific functions can be neutral, and mine easily could have been different.

²⁶ See, e.g., Radin, *supra* note 13, at 996-1002.

²⁷ A possible exception relates to the role of a particular use of property, the press, in protecting against oppression. See Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521 (discussing the role of free ex-

help prevent governmental (or private) oppression take almost opposite tacks. Some theorists see the dispersion of property ownership as the fundamental safeguard against government oppression.²⁸ Others suggest that concentrations of private property can act as check on government oppression.²⁹ I suspect that there are no clear or abstractly convincing answers to the problem of how property rules can best prevent oppression. Obtainable answers will depend heavily on various contextual factors including political and cultural traditions, levels of technological development, and the content of other institutional arrangements. It should therefore not be surprising that abstract constitutional interpretation is not useful here.

Notwithstanding disputes about which functions I should have included in my list, the six-function analysis presented here should adequately serve my two primary objectives. First, this analysis helps identify and distinguish normative concerns that presently do, and should, influence legal and, in particular, constitutional analysis. Second, this breakdown illustrates my thesis that both defenders and critics of various property systems will obscure vision unless they disaggregate the

pression, particularly of the press, as a check on the abuse of official power); Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819, 828-36 (1980) (arguing that Blasi's description supports an instrumental interpretation specifically of the press as serving the checking function). Even with respect to the press, however, the government should have considerable power to structure the organization of decisionmaking authority, that is, to structure property rights. *See id.* at 869-87.

²⁸ Media concentration, for example, may undermine democratic control of government. *See* B. BAGDIKIAN, *THE MEDIA MONOPOLY* 226 (1983) ("[N]arrow control [of the mass media], whether by governments or corporations, is inherently bad. . . . The answer is the same as for other central institutions of a democratic society—equitable distribution of power."). *See generally* C. LINDBLOM, *POLITICS AND MARKETS* 170-233 (1977) (discussing consequences of market inequality and corporate wealth for popular control).

²⁹ The dispute as to whether dispersion of property or concentration of property better protects against government oppression reflects two conflicting currents of thought. The first, associated with early colonial republican sentiment and often with the writings of Jean Jacques Rousseau and Thomas Jefferson, is reflected today in the strain of antimonopoly sentiment that is concerned with concentrations of power rather than economic efficiency. This view is consonant with opposition to imposing of unconstitutional conditions on the receipt of welfare rights. By restricting the government's power to control the behavior of people whom the legal and social order has made to some degree dependent on the government, the doctrine of unconstitutional conditions serves the same liberty-protecting function as did the self-sufficient farm in days gone by. *See generally* Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984). The second conception, although occasionally associated with a progressive attitude favoring protection of the press, is today most often invoked by conservative defenders of wealth and privilege. *See, e.g.,* M. FRIEDMAN, *supra* note 2, at 15-17, 168. The identification of private property and free markets with liberty often seems to reflect a fear of the adoption of egalitarian laws and policies by government. *See, e.g.,* R. EPSTEIN, *supra* note 1, at 306-29.

notion of property and direct their defense or critique only at the specific aspects of property, and the related legal rules and practices, that have functions relevant to the commentator's value concerns. In the next section I focus on the relevance of the six functions of property for various constitutional issues.

B. *Constitutional Norms and the Various Functions of Property*

It might be that most governmental takings, regulations, and other practices have a roughly equal effect on each of the various functions of property. That is, "property" might be a unified whole, such that a regulation addressing one function would equally implicate property's performance of all the functions. If this were the case, constitutional analysis would not be significantly aided by a disaggregation of the various functions of property. If any function justified constitutional protection of property, the Constitution would restrict governmental choices that focused on the other functions equally.

For example, property might seem like a unified whole in a society where the household and the enterprise were not usually separate—such as a society made up of small farms and craftspeople owning their own tools. From the perspective of the early republican emphasis on use and occupancy as a basis for title to land, in contrast to the competing hierarchical emphasis on government grant,³⁰ property rights might serve as a useful form of allocation as well as serving the welfare, personhood, and protection functions. This unity of functions would be even greater if land was, as has sometimes been suggested, forfeited for nonuse, and if the sovereignty aspect of property were limited—that is, if land was not used to gain power over others as it can be if the property right includes the right of free exchange.³¹ A

³⁰ Professor Mensch discusses the interaction between two competing conceptions of property in colonial America. One notion of property based title to land largely on use—grants were conditioned on settlement—and even recognized the right of the community to reallocate land using criteria of need and willingness to cultivate. This perspective, which disapproved of using land for speculation or to gain power over others, was associated with leveling republicanism, religious dissent, and participatory democracy.

A second conception based property rights on patent grants from a central authority. This hierarchical theory was associated with those who saw a need to amass wealth in order to promote a form of economic development dependent on capital accumulation rather than on industrious self-reliance. See Mensch, *supra* note 16, at 641-60.

³¹ Mensch observes:

Absentee landowning led to forfeiture, and contracts to sell unimproved land could be voided. The goal was that all should be 'supplied with good and valuable lands to give each man as content as near may be,' but that none should use land for purely speculative profit or to gain power over others.

Mensch, *supra* note 16, at 646-47 (footnotes omitted).

threat to this basis of title or to the corresponding property rights might implicate all of the first five functions. Under these circumstances, a unified conception of property might seem natural and the need for disaggregation of the various functions of property would not be pressing.

Even if this type of society does not exist, to the extent that people imagine that it does exist—or that it should exist—they might not place particular importance on separating out the various functions of property for differential treatment. Moreover, those with competing visions both of society and of property might lack the interest to disaggregate their somewhat different conception of property, not because the functions would still be unified but because disaggregation would suggest regulation of the activities that they found advantageous.³² Under these circumstances, not faced with the continuous array of issues that constitutional litigation has forced the courts to analyze, people might not be able easily to distinguish the various roles of the historically contingent, but presently commonsense, notion of property.³³ Alternatively, the concern with these various functions could take the form of a dispute about the proper or the essential nature of property.³⁴ If this happened, a decision to accord property constitutional protection could represent a

³² In contrast, when the functions of property discussed in the text become radically separate in people's daily life and are supported by different legal rules, invocation of a unified conception of property becomes a distorting ideological tool that serves the interests of certain property holding groups. Thus, as one would expect, critics of the existing order, such as the reform-minded legal realists, become advocates of disaggregation. See, e.g., Cohen, *supra* note 21, at 11-14. Robert Hale notes that society may recognize privileges for particular purposes such that "[a] threat to exercise [the] privilege for private gain subverts the purpose for which the privilege is accorded." Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 619 (1943). Hale approves of courts that have not allowed a person "to realize on the full nuisance value of his rights"; that is, even when the rights are accorded "for the private benefit of their possessor [they] may sometimes be denied when a threat is made to exercise them in order to obtain some abnormal private advantage." *Id.* at 620. This analysis implicitly distinguishes between uses. For example, the individual's own use of the right is distinguished from the exchange value of the threat of use—that is, "extortion." See *id.* at 620.

³³ Professor Hoerder describes people's perspectives on property at the time of the American Revolution. He reports: "Property was the basis for liberty. According to contemporary ideology, it made men independent from the influence of others." D. HOERDER, *CROWD ACTION IN REVOLUTIONARY MASSACHUSETTS, 1765-1780*, at 371 (1977). In contrast, he also reports that "[e]conomic and political leaders looked upon the security of property as the opportunity to accumulate more capital and economic power. This kind of property and the power derived from it endangered the existence of widespread smaller property holding, the groundwork of society." *Id.* at 372.

³⁴ See Mensch, *supra* note 16, at 635-36 (noting that "the idea of property in the colonies was inextricably linked to two irreconcilable visions of social life" that remained unresolved, and therefore prevented a coherent definition of property from being formed).

compromise in which the dispute is continued—a decision to protect something the content of which is contested. In either case, however, disaggregation leaves unclear how we should understand today those decisions from our earlier period that granted constitutional protection to people's property rights. When the interest in interpretation relates to the activity of exercising authority, the interpretation must consider which, if any, of the now disaggregated functions convinced people then—or should convince us now—to protect property.

Irrespective of how people once understood property, it is clear that in our present society different types, uses, and distributions of resources do not involve each of the various functions equally. Different rights in the bundle called "property" and different governmental regulations implicate different functions. Consequently, an acceptable constitutional analysis first must identify rationales for constitutional protection of property. Next, it must consider the relation between each rationale and each particular function of property. Only then can we evaluate the constitutional validity of a challenged rule.³⁵

Existing constitutional doctrine already accords differential treatment to different functions of property. Presumably some combination of political conflict, theoretical insight, and intuitive sense produced these differences. Nevertheless, courts and commentators still may understand inadequately the need to disaggregate the concept of property.

³⁵ Implicit in my claims about the usefulness of this disaggregation of property for constitutional analysis is the view, first, that no single normative concern or value adequately justifies all aspects of property; and, second, that the different concerns or values have different places or status in an adequate political theory. If I am right that the most persuasive political or ethical theories will not be based solely on either fundamental rights or interests analyses, but rather will show how these analyses are properly integrated, then no thoughtful theorist (or "scientific policymaker") would even expect to succeed in an attempt to give, for example, a purely utilitarian or purely Kantian description or justification. *But see* B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977).

Elsewhere, I have argued that a just order would embody basic principles or "rights," that, first, would guarantee the centrality of collective choice about the general good (for example, provide a role for utilitarian or interest considerations), but, second, would also limit or constrain possible collective choices and mandate certain minimal features of the order. *See* Baker, *supra* note 1. Although this second aspect could be understood as a Kantian element, a philosophy of communicative action arguably would provide it a firmer basis than a Kantian philosophy of consciousness. *See* Baker, *Sandel on Rawls*, 134 U. PA. L. REV. 895, 900-902 (1985). This second aspect, including both mandated elements and limits on collective choice, may be a prerequisite (necessary but not sufficient condition) for the validity of claims deriving from the dialogue in which people give reasons for conceptions of the good and for the legitimacy of the political process in which the community reaches conclusions concerning the general welfare or the public good. A defensible theoretical account of the property system would show how it integrates public good (or utilitarian) considerations with more fundamental rights elements. The disaggregation of the notion of property is a crucial step in this account.

The existing distinctions may respond in part to proper normative concerns, but these distinctions may also reflect and perpetuate unjust structures of domination. If so, existing doctrine would reflect appropriate distinctions inadequately. This possibility motivates the following discussion. Nevertheless, this discussion is only tentative and suggestive. The acceptability of any of the doctrinal suggestions mentioned below would require a much more extensive discussion. These illustrative proposals should suffice, however, to demonstrate the normative and doctrinal gains that result from disaggregating the concept of property.

1. Use Value

The individual's decisions concerning resource use, even use for substantively valued purposes, has seldom received more than minimal constitutional protection in modern, post-1937, constitutional analysis—except where the use involved some specific constitutional right, like freedom of speech, religion, or association.³⁶ Of course, the relative absence of judicial protection may merely reflect a relative lack of societal attempts to regulate in this context. Most uses of resources that a society finds sufficiently offensive or troublesome to regulate seem to involve either productive or commercial uses that are dangerous, unfair, or polluting—which I will discuss later—or those personal or expressive uses that arguably receive first amendment protection.

Moreover, society's regulation of the use of resources in substantively valued activities may be less problematic if, as is often the case, the regulation does not prohibit the activity, but instead merely controls

³⁶ See, e.g., *Spence v. Washington*, 418 U.S. 405 (1974) (The use of one's own flag is protected speech.); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (protecting contraceptive use as a privacy aspect of the first amendment freedom of association); cf. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (protecting the use of a home for a family living together).

Although religious claims generally lose in the courts, exemptions from both zoning laws and prohibitions on drug or alcohol use have been, on occasion, granted by statute or judicial decision in order to protect certain religious uses of property. See 1 N. DORSEN, P. BENDER & B. NEUBORNE, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1029-36 (4th Law School ed. 1976).

In *Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976), the Court invalidated a law limiting expenditures on behalf of political candidates. Although expenditures implicate the exchange function, the Court clearly viewed the law as invalid because it was directed at the use of resources for expressive purposes. But *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180 (1985), which upheld the maximum fee of \$10 that may be paid to a lawyer in a veteran's benefit proceeding, may be read as undermining the logic of *Buckley*. *Walters* puts a financial limit on a person's right to speak to the government within the context of an institution, like an electoral process, that is specifically designed and created by the government. See *id.* at 3212 n.13 (Stevens, J., joined by Brennan & Marshall, JJ., dissenting) (analogizing \$10 fee limit with expenditure limits on campaign speech).

the time or location of the activity or imposes its costs on those who take part in it. These zoning or taxing regulations are in many respects less like an interference with or abridgement of a person's interest in the use value of property (the first function) and more like an allocation device (the fifth function). For example, in *Young v. American Mini Theatres*³⁷ the Court concluded that a law forbidding clustering of adult theatres did not substantially impinge either on the opportunity to open up adult theatres or on the substantively valued activity of seeing adult movies. Thus, the law did not abridge people's liberty. Instead, the regulation arranged (allocated) activities in a way that arguably promoted the general welfare.³⁸

Greater constitutional protection of people's use of their resources for substantively (as opposed to instrumentally) valued activities may make a crucial contribution to individual autonomy or liberty as well as to a democratic process of change.³⁹ This claim implies a strict constitutional limitation on the government's authority to prohibit substantively valued uses of resources. At a minimum, the government should not be allowed to prohibit a substantively valued use if each individual's choice to use or not to use the resource in the disputed manner adds roughly equally to the content of our social world—that is, if each person's choice is “additive” in its effect on the social world.⁴⁰ The government could prohibit a substantively valued use only if the disputed use would “determine” the social world; that is, if the choice of some people to engage in the activity would affect the social world in a manner that makes other people's contrary choices irrelevant. In the first, “additive” situation, each person's behavior contributes a small part to the collectively created social world. This situation allows for a form of democratic behavioral voting. By comparison, in the second, “determinative”

³⁷ 427 U.S. 50 (1976).

³⁸ If the Court thought that the college students in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), had no particular ties to housing in that place and that other locations were available, see Radin, *supra* note 13, at 1012-13, the case would present the same issue as *American Mini Theatres*. See generally Baker, *Unreasonable Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 Nw. U.L. REV. 937, 968-77 (1983) (arguing that, depending on character of the valued activity, an apparent time, place, or manner regulation may abridge rather than merely channel expressive activity and should be found unconstitutional); Mishan, *Pareto Optimality and the Law*, 19 OXFORD ECON. PAPERS 255 (1967) (In cases of conflicting use, application of different legal rules to different areas will often provide a result that is Pareto superior to any legal regime applied uniformly to both areas.).

³⁹ See Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1981) (proposing a theory of the process of “progressive change” and demonstrating how rights identified by the liberty theory of the first amendment contribute to that process).

⁴⁰ The remainder of this paragraph summarizes an argument developed in Baker, *supra* note 18.

context, a democratic accounting of each person's input requires group decisionmaking. In the more usual additive situation, the government should at most be permitted to impose the activity's costs on the person who engages in it. Not all costs, however, should be counted. The displeasure some people feel over a person's choice to engage in a particular activity and their dislike of precisely the consequences that the actor values are real costs of the activity. Nevertheless, the imposition of these costs would involve improper disrespect of the actor's autonomy and, therefore, should not be permitted. Greater recognition of the use function of property, whether under first amendment, substantive due process, equal protection, or other constitutional bases, could prevent improper impositions of these costs.

2. Welfare

The law promotes the welfare function of property when it protects an individual's claim to resources on which meaningful daily life depends. This function should receive strong doctrinal protection. I assume that the primary justification both for democracy and for constitutional limitations on democracy is that both help to effectuate our intuition that the collective must respect people's autonomy and equality. This intuition may be explained in a number of ways. An explanation that I have found compelling is that society must accord an individual this respect before it may justifiably request that she obey its rules. In other words, this respect is necessary (even if not sufficient) to justify legal obligation. Alternatively, even the theorist who ends her analysis on the bedrock of democracy should recognize that provision of some degree of economic welfare is an essential prerequisite for a properly functioning democratic process.⁴¹

Either theoretical approach justifies constitutional protection of individual claims to a certain quantum of property. An appropriately developed equal protection theory would require the government to guarantee to all members of society the minimum quantity of resources

⁴¹ Michelman argues that Dean Ely's political process argument, *see* J. ELY, DEMOCRACY AND DISTRUST (1980), entails the recognition of welfare rights. *See* Michelman, *Process and Property in Constitutional Theory*, 30 CLEV. ST. L. REV. 577 (1981); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659. Rousseau, evoking an image of a Jeffersonian world populated by self-reliant farmers, argued that a "solid and enduring State" depends on avoiding particularly objectionable distributions of wealth: "[W]ealth should never be so great that a man can buy his neighbour, nor so lacking that a man is compelled to sell himself." Rousseau, *The Social Contract*, in SOCIAL CONTRACT 167, 217 (E. Barker ed. 1947) (footnote omitted).

necessary for meaningful daily life.⁴² Less dramatically, various other constitutional doctrines could provide effective but less complete support for the welfare function of property. For example, if a court used equal protection analysis to invalidate a statutory classification that affects the availability of resources serving the welfare function, recognition of the constitutional status of the welfare function would suggest that the court should invalidate the statute in a manner that expands rather than contracts the availability of these resources. Similarly, the question whether a person has a property interest meriting a due process hearing to resolve factual disputes (and, if so, whether a post-deprivation hearing is adequate) should be decided in favor of recognizing the right to a hearing if the decision implicates her access to resources serving this function.⁴³ This same consideration should be relevant when the issue is whether there is state action: that is, state responsibility ought to be found whenever the state's rules routinely result in denial of access to basic necessities. Moreover, when necessities are at stake the government should not be permitted to forego a due process hearing by relying on a rule that irrebuttably presumes that claimant does not merit, or need, or have legitimate claims on the resources.⁴⁴

3. Personhood

Resources that individuals treat as central to their identity or personhood may make crucial contributions to their autonomy and integ-

⁴² Numerous articles by Frank Michelman provide the best arguments in support of this thesis. See, e.g., Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). Obviously, the appropriate content of a welfare guarantee will vary from society to society. See, e.g., M. WALZER, *supra* note 11, at 64-91; Baker, *supra* note 1, at 966-69, 993-95.

⁴³ That a due process hearing is required when resources serving the welfare function are implicated does not imply that other situations do not require a hearing. Other situations merely require other arguments for a hearing. See, e.g., Michelman, *Formal and Associational Aims in Procedural Due Process*, in NOMOS XVIII: DUE PROCESS 126 (1977).

⁴⁴ The current, apparent dead-end of the development of the irrebuttable-presumption doctrine reflects, at least in part, the criticism that it was more accurately viewed as an equal protection attack on rules than as a due process doctrine. Its apparent rigid demand for a perfect fit between means and end, however, could not be squared with any level of equal protection analysis. See, e.g., Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975). The irrebuttable-presumption doctrine does make sense as due process theory in that its claim is that the government must provide an opportunity for a hearing in order to determine certain facts on which a decision to deny certain benefits or opportunities must be based. However, the reason that these facts must be treated as crucial reflects constitutional values outside the due process clause—usually antidiscrimination or welfare rights values embodied in the equal protection clause. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1092-97, 1117-18 (1978).

rity. In this respect, these personhood objects resemble resources that are necessary for daily life and thereby serve the welfare function. The importance of the personhood function may justify some degree of constitutional protection for people's claims to the specific objects in which they have invested some degree of their identity. In particular, the Constitution could partially protect these claims against encroachments that are based merely on the community's general welfare-advancing policies.

Nevertheless, several differences between the personhood and the welfare function justify or even require different forms and degrees of protection. Most importantly, personhood-based claims to property can routinely place more extensive demands on the community and can lead more directly to unavoidable conflicts between different people's claims than do the welfare-based claims. For example, the welfare need for housing may be satisfied as long as the person receives enough money to secure minimally adequate housing. In contrast, not only might a person identify her personhood with a particular house, but different people might invest their identity in the same house and each person might require that house for a conflicting use. Thus, some personhood claims must be left unfulfilled. Also, unlike typical welfare claims, people may intertwine their identity with resources of tremendous value—for example, the family mansion, a huge industrial plant, a vast wilderness area, or an entire community. In these circumstances, fulfillment of their claims might cause a particularly serious interference with collective decisionmaking and with individual or collective self-determination. Moreover, recognition of these claims might require inequalitarian and possibly unjust distributions. Finally, the overlap between personhood claims and forms of commodity fetishism⁴⁵ that the law should not encourage also suggests that this concern should have a restricted scope.

The differences between the nature of welfare and personhood claims suggest that the state could not and should not guarantee the fulfillment of all personhood claims on resources. The importance of the personhood function of property may, however, justify a constitutional requirement that the state treat claims to property serving this function with special concern and generally in a more accommodating fashion than it treats claims to property valued, for example, primarily

⁴⁵ See Radin, *supra* note 13, at 968-70. Radin describes commodity fetishism as occurring when a person is bound up with a "thing" about which there is "an objective moral consensus that to be bound up with that category of 'thing' is inconsistent with personhood or healthy self-constitution." *Id.* at 969. Such a "thing" should "not be treated as personal vis-à-vis other people's claimed rights and interests." *Id.*

for its exchange value.

Various constitutional and nonconstitutional doctrines could help implement a requirement that the state treat claims based on the personhood function of property with special concern.⁴⁶ One doctrinal possibility involves the just compensation clause. As a threshold matter, a limitation on the use of personhood-related property could be treated as relevant to the question whether a taking has occurred. Once a taking is found, the involvement of personhood-related property could have a bearing on what constitutes just compensation. Just compensation may mean " 'a full and perfect equivalent for the property taken.' " ⁴⁷ When the significance of property to a person lies in its exchange value or its fulfillment of the welfare function, a perfect equivalent is theoretically always available. Money usually suffices. In contrast, there may be no equivalent for the unique property that an individual considers priceless because of the object's integration into her personhood. In this case, faithful application of the "full and perfect equivalent" standard apparently would require that the government forego the taking.⁴⁸ Nevertheless, if foregoing the taking would frustrate other people's substantive values, and possibly their personhood-related values, then "a full and perfect equivalent" may be more than justice—or "just compensation"—requires. Governmental respect for the current propertyholder's personhood claim may not require that her claim always prevail.

As an alternative to guarantees of perfect equivalency, respect for the personhood function could lead to other additions to just-compensation law. First, the just compensation clause could require the government to make a particularized showing of need before taking personhood property, such as a determination that collective goals could not be achieved by an alternative taking that would avoid interference with any personhood-related property. For example, before initiating a project that would inevitably destroy an irreplaceable ethnic community, the government could be required to show that the taking is necessary to achieve the government's ends or that any reasonable alternative would frustrate people's substantive values to a similar extent.⁴⁹

⁴⁶ In addition to the doctrines suggested in the text, many criminal procedure provisions may be interpreted in part as protecting this aspect of property. See Radin, *supra* note 13, at 996-1002.

⁴⁷ Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 150 (1978) (Rehnquist, J., joined by Burger, C.J. & Stevens, J., dissenting) (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893)).

⁴⁸ See Radin, *supra* note 13, at 1005-06.

⁴⁹ See, e.g., Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1110-14 (1981) (citing the case of Detroit's Poletown area, torn down by the city through the exercise of eminent domain power to make way for a plant that promised 6,000 jobs, as an example of this type of conflict); cf. Sax, *Do Communities*

Second, just compensation could require the government to consider more than market values (based on willingness to pay) in its cost-benefit decisionmaking. Before deciding that the destruction of a neighborhood is cost-justified, the government could be required to take into account both an estimate of the price that residents would require before they would willingly sell their property or abandon their rented residences and an estimate of the various external social benefits created by the community.

Third, just compensation could require the government to adopt special compensation practices when it takes personhood property. The government should provide compensation in a form and amount that comes as close as possible to being a real equivalent. If the taking of Indian land would force the Indians to move, and if a government response of providing the displaced Indians with only money and relocation in a city would predictably result in cultural trauma and personality disorders, then "just compensation" must at minimum include the provision of similar land and the resources necessary for rebuilding homes and cultural patterns.⁵⁰ In any case involving personhood-related property, ideally the government should compensate in an amount or manner that would make the holder willing to sell. The factors considered in determining compensation should include not only market value, but also replacement costs and the psychic and out-of-pocket costs of change.

4. Protection

The protection function could influence the interpretation of the takings clause and the procedural aspect of the due process clause. These constitutional provisions can provide some protection against unjust, individualized exploitation. As noted earlier, it is theoretically unclear what makes some but not other actions exploitative. A person's subjective experience of seemingly unjust deprivation is surely not sufficient and is presumably not necessary. Nevertheless, some commonly recognized aspects of exploitation can be specified. The government acts exploitatively if it invidiously picks out a particular person to bear the burden of some welfare-promoting action. When the choice is not based

Have Rights? The National Parks as a Laboratory of New Ideas, 45 U. PITT. L. REV. 499 (1984) (suggesting that when a national park is established in a place that has existing human settlements, the interest of the community as a whole as well as the individual interests of property owners should be considered).

⁵⁰ See generally J. KAMMER, *THE SECOND LONG WALK: THE NAVAJO-HOPI LAND DISPUTE* (1980) (describing the government's recent forced relocation of the Navajo).

on general, public, and ethically permissible policies, the selection is, or appears to be, invidious or, at least, capricious. To be treated as uniquely expendable is more offensive than to be subject to a general policy or an announced, random process of allocating burdens.⁵¹

Usually neither the public nor the courts have sufficient information to identify instances of this sort of personalized or invidious exploitation unambiguously. As a prophylactic measure, we could establish a complete ban on either rule changes or individualized decisions that, without just compensation or due process, reduce the property rights that people have or think that they have.⁵² This ban would provide considerable protection against individualized exploitation.⁵³ But even if this degree of protection of property would be effective in reducing cases of unjust exploitation, this protection would sweep so broadly that it would inevitably prevent or deter many desirable, nonexploitative government actions. Even victims of invidious exploitation, although unwilling to accept or condone the exploitation itself, could reasonably agree that some prophylactic measures would be more expensive than the added protection is worth.⁵⁴

⁵¹ See J. ELY, *supra* note 41, at 137.

⁵² Professor Kaplow argues that the danger of this form of abuse of power generally provides the strongest reason for granting compensation in the takings context. See Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 574-75, 605-06 (1986). In contrast, many typical arguments for providing compensation may be unpersuasive. Kaplow's primary point is that from the perspective of promoting an economic, market-based notion of efficiency, compensation is virtually never appropriate. The legal order should give market actors incentives to calculate properly the risk that their investments will turn out to be worthless. Insulating market participants from the risk of governmental actions, including takings, is generally as economically undesirable as insulating them from the risk of market competition or liability for product defects. Such insulations create improper incentives, encouraging overinvestment in unprofitable (risky) endeavors. Kaplow also recognizes, but does not fully develop, the point that another important consideration in choosing a compensation practice is a prediction and normative evaluation of the practice's impact on the nature and output of the political order—an analysis that requires a conception of preferred types of political orders. See *id.* at 573-74.

⁵³ Such a ban would not provide complete protection. For example, it would not prevent continued maintenance of practices for invidious or exploitative reasons. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (at-large electoral system maintained for invidious purposes); *Kassel v. Consolidated Freightways*, 450 U.S. 662, 685 (1981) (Brennan, J., concurring in judgment) (arguing that truck-length law was maintained by state for protectionist purposes). Likewise, this ban would not protect against someone's withdrawal, for purposes of exploitation, from an expected form of interaction (for example, a teaching position or a lease of grazing land) that the victim knew was not guaranteed.

⁵⁴ Michelman suggests that compensation should be paid when the demoralization costs, which include both the experience of exploitation and the negative effect this experience will have on incentives and production, are greater than the settlement costs, which include all the costs of providing compensation except for the cost of the compensation itself. (The compensation itself, as opposed to the administrative costs of provid-

Although identifiable exploitation should never be permissible, the need to avoid too much interference with desirable regulation implies that the Constitution should mandate only limited scope to prophylactic measures based on the protection function of property. Nevertheless, various constitutional doctrines properly further the general concern of preventing invidious exploitation. Obvious examples include the prohibitions on bills of attainder and ex post facto laws. In addition, we can identify particular contexts that create a high likelihood of personalized exploitation. These contexts may justify the provision of a due process hearing or the application of a just compensation requirement.

Several existing or emerging doctrines conform to this objective. First, although the same unjust deprivation may result from either *making* or *applying* governmental rules, the greater danger of unfair or even invidious treatment of individuals in the second case provides one justification for due process rights in the context of rule application. Second, the virtually per se rule requiring compensation when physical occupation of real property occurs,⁵⁵ although also explicable on a number of other grounds, could be explained on the basis of its contribution to this exploitation-prevention goal. Unlike regulations that apply generally to a large number of pieces of property in a relatively nonintrusive way, the physical occupation of a particular piece of real property usually advances purposes that could be equally well served by occupying any of numerous other pieces of property. A decisionmaker's choice of which property to occupy will usually involve enough discretion to create a real danger that the choice will reflect an unjustified desire to burden (or favor) particular people.⁵⁶ Requiring just compensation avoids much of the danger of individualized exploita-

ing it, is not a social cost of the compensation system, it merely distributes or allocates wealth.) See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214-15 (1967). This paragraph and the next are heavily influenced by Michelman's classic article.

Kaplow's point that compensation will typically create economically inefficient incentives, see *supra* note 52, is not inconsistent with Michelman's methodology, but merely influences the identification of costs. Combining Kaplow's point with Michelman's approach is likely to lead to results that most conservatives would not have expected.

⁵⁵ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁵⁶ See Kaplow, *supra* note 52, at 605 n.298. The absence of this danger in a law granting permanent use of certain property to cable television companies may have contributed to the dissent of Justice Blackmun, joined by Justices Brennan and White, in a recent application of this per se rule regarding physical occupations. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 442 (1982) (Blackmun, J., dissenting). Such particularized exploitation, of course, does not occur in general landlord/tenant law—even though the law may impose requirements that involve physical occupation of portions of the property.

tion in this context.⁵⁷ Third, if the government actively encourages people to expect that property will remain free of certain restrictions, then its later imposition of such restrictions, at least in the absence of significant changes in circumstances, would appear exploitative. A court might find that this encouragement justifies treating the restriction as a taking.⁵⁸

5. Allocative

The role of property rules in allocating resources and prescribing the terms on which or the means by which people can obtain these resources is vital for society's welfare and people's opportunities for self-realization. Property rules structure people's opportunities and incentives to obtain and use resources for productive and consumptive purposes. Different property rules can promote or impede different uses and distributions. Any set of rules will inevitably draw criticism for impeding democratic, efficient, or ennobling productive activities, or for leading to an inequitable distribution of goods. Yet the appropriate content of such labels as "democratic" and "inequitable" will obviously be contested and will depend on further value judgments.

Part II faces the question of the allocative function's relation to constitutionally protected liberty. Here I only want to concur in the presently accepted doctrinal view that, in a democracy, courts should not invalidate legislation based on their judgment concerning how well the legislation carries out the allocative function.

There is no abstract, principled manner to determine how best to carry out the allocative function. There is not even any abstract or generally defensible notion of the proper goals of allocation. Alternative methods of allocation and regulation will necessarily promote alternative visions of a good society and will necessarily favor some people over others. Criteria like the Chicago-school economists' notions of "efficiency" and "wealth maximization" are meaningful only in relation to a given set of goals and are determinate only in the context of a given distribution of goods and a given set of individual preferences. These criteria can provide little guidance in choosing the allocation rules that will both establish the distribution of goods and affect people's prefer-

⁵⁷ This exploitation represents a justifiably felt demoralization cost. See Michelman, *supra* note 54, at 1215-18 ("[L]osses which seem the proximate results of deliberate collective decision have a special counterproductive potency beyond any which may be contained in other kinds of losses.").

⁵⁸ See Michelman, *supra* note 49, at 1106-07 (interpreting *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)).

ences.⁵⁹ Judgments concerning what constitutes the general welfare and the derivative judgments concerning the appropriate content of allocation rules are preeminently political.

For a court to invalidate a law on rationality grounds—that is, on grounds that the law does not promote the general welfare—it must make two types of judgments: a value judgment concerning what constitutes the general welfare⁶⁰ and an instrumental judgment concerning the effectiveness of the law in promoting that welfare. A court cannot be expected routinely to do better than legislative bodies in making the second, instrumental judgment. The primary impropriety of invalidation on rationality or general welfare grounds is, however, that this invalidation always requires the court to rely on its own value judgment as to what constitutes the general welfare. This judicial value judgment is improper in constitutional cases for two reasons.

First, democratic theory assumes that this general welfare issue is the specific question on which the political process, presumably the legislative process, is most clearly authoritative. Second, any democratic theory that emphasizes people's right of self-determination as an aspect of liberty must place primary responsibility on these same people to correct collective decisions that do not promote their idea of the general welfare. Democratic theory thus assumes that people have a political responsibility to try to improve upon these general welfare decisions. People can either act within an existing democratic process to improve the substance of democratic decisions, or they can try to improve the

⁵⁹ See, e.g., Baker, *Posner's Privacy Mystery and the Failure of Economic Analysis of Law*, 12 GA. L. REV. 475 (1978); Kennedy & Michelman, *supra* note 4, at 714.

⁶⁰ Constitutional analysis, following deep currents in Western liberal theory, often reduces rationality to instrumental rationality—which presumably raises only ends-means or degree of “fit” issues. See Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029 (1980) (offering a critique of the claimed role of instrumental reason in equal protection analysis). In contrast, Tussman and tenBroek recognized that equal protection analysis requires putting “forward some conception of a ‘general good’ as the ‘legitimate public purpose’ at which legislation must aim.” Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 350 (1949). They concluded that this requirement makes equal protection analysis incompatible with a pressure group theory of legislation, which views law as “properly the resultant of pressures exerted by competing interests.” *Id.*

In a very thoughtful concurring opinion, Justice Stevens argues that the word “rational” must have substantive content, including “elements of legitimacy and neutrality.” *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3261 (1985) (Stevens, J., concurring). To the extent that Justice Stevens’ substantive notion of rationality generally allows collective choice and excludes only impermissible choices that undermine the legitimacy of government, see *infra* note 61, it conforms to the argument herein. Justice Stevens sounds almost Rawlsian when he concludes his finding of unconstitutionality with the remark: “I cannot believe a rational member of this disadvantaged class could ever approve” *City of Cleburne*, 105 S. Ct. at 3263 (Stevens, J., concurring).

quality of the democratic process itself. Judicial usurpation of this political role takes authority away from democratic decisionmaking and reduces the incentives for improving the political process.⁶¹ In contrast, judicial intervention does not partake of this illegitimacy when it is aimed at protecting individual rights or at implementing collective decisions through statutory construction that relies on the best, idealized, normative conception of the aims of politics.

The vital importance of property rules in allocating resources and facilitating their use in valuable and productive activities should not be denigrated. It is inevitable, however, that evaluation of either the methods by which or the extent to which various property rules serve this function will involve political or value judgments. Thus, except to the extent that a set of allocation rules fails to provide for welfare rights or manifests impermissible purposes,⁶² these rules do not raise constitutional issues. At least since 1937, the Supreme Court has generally recognized this conclusion in its due process and equal protection decisions and, implicitly, in its relatively narrow interpretation of what constitutes a taking.⁶³

6. Sovereignty

Those who believe in democratic values must view the role of property rights in enabling the propertyholder to exercise power over others (the sovereignty function) as having ambiguous value at best.

⁶¹ The assumption here is that people's rights are not violated if the political process produces policies that do not advance the general welfare or are not responsive to people's preferences. But when the government acts in a manner inconsistent with the equality and integrity of the individual, the framework that provides the ethical justification for legal obligation is violated. Of course, people also have a responsibility and should have an incentive to try to correct this failure through political action. Still, intervention by a court in these circumstances is not antidemocratic but rather responds to the same values that, in part, define the appropriate meaning of democracy and that thereby indicate essential limits on majoritarian decisionmaking.

⁶² See *supra* note 61.

⁶³ The Burger Court's revitalization of the contracts clause, see *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); but see *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983); its novel use of equal protection to strike down economic legislation, see *Metropolitan Life Ins. Co. v. Ward*, 105 S. Ct. 1676 (1985); *id.* at 1684 (dissent, with an unusual line-up of Justices O'Connor, Brennan, Marshall, and Rehnquist, found majority's holding "astonishing"); possibly its decision to give content to the notion of uniform bankruptcy laws, see *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 471 (1982); and its dicta in the takings context emphasizing investment backed expectations, if viewed as broadening the range of protected interests, see *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979), suggest the possibility of a dangerous, antidemocratic, unprincipled countermovement.

Surely one who respects individual autonomy could not see the exercise of power over another as itself a good.⁶⁴ Nevertheless, because allowing such an exercise of power opens up some opportunities (even though it also closes off others); because the exercise of power is reciprocal (whether or not equal in any relevant sense); and because the person controlled voluntarily accepts the other's exercise of power (even though she accepts it only because the law does not make available other, preferable alternatives and even if she does not accept the legitimacy or the justness of the legally created initial situation, the legally available options, or the result of the exchange),⁶⁵ this form of power, like exercises of sovereignty generally, should not be viewed as intrinsically bad or objectionable. Even if, all else being equal, people are freer if power is not exercised over them, all else is seldom equal. People may be and feel freer because of the new opportunities that they obtain as a consequence of accepting the exercise of power over them. This observation applies to exercises of sovereign power by both the political order and the economic order. Presumably, at least given the caveats mentioned above, both parties to most voluntary exchanges benefit or at least expect to benefit to some degree.

Moreover, this sovereignty aspect of property is frequently intertwined with other functions of property that are unquestionably desirable. The sovereignty function is present whenever people offer property as an incentive for productive efforts and whenever they trade in order to obtain preferred resources or opportunities. The process of exchange is often an effective means to allocate resources, including labor, to valued productive or consumptive uses. Thus, although the exercise of

⁶⁴ Note that the first four functions of property discussed above do not require that individuals be allowed to exchange property rights. Also, this analysis suggests a distinction between the rights to alienate, to transfer, and to exchange. Usually, a person will have the strongest claim of right in regard to alienation and the weakest in regard to exchange. A community may forbid the alienation of some rights, such as the right to vote, because the community needs people to have these rights in order to justify its interaction with them. Even when the individual's right to define herself implies the right to alienate property, this use does not necessarily imply the additional right to transfer ownership to another. The state might permit suicide while prohibiting slave contracts or permit the renunciation of citizenship while prohibiting the transfer of citizenship status. Even when a person has a right to transfer property as an aspect of using her property in a manner required by her substantive values, as with the tithe, political contribution or gift, this does not imply a right to transfer property conditioned on obtaining a performance by another. Even if a bribe and a gift are sometimes difficult to distinguish, we often rely on the distinction. See Rose-Ackerman, *supra* note 6, at 935-37 (economic analysis makes some similar distinctions).

⁶⁵ Robert Hale states: "The employer's power to induce people to work for him depends largely on the fact that the law previously restricts the liberty of these people to consume, while he has the power, through the payment of wages, to release them to some extent from these restrictions." Hale, *supra* note 32, at 627.

power over others may not itself be a good thing, neither is it necessarily a bad thing—and often the consequences of this activity will be desirable.

Although the sovereignty function of property rights could not and should not be eliminated, it is properly subject to limitation. The propriety of limitation follows from the observation that this exercise of power is neither intrinsically good nor an essential aspect of a persons's freedom, but is only justified by the good it creates. The doctrine of unconstitutional conditions properly limits the government's authority to condition the provision of resources on the recipient's willingness to forsake the exercise of constitutional rights. By prohibiting certain exchanges, the doctrine limits the owner's (the government's) right to use property to exercise power over others.⁶⁶ The capacity of private entities to exercise this conditioning power will exist only if the state recognizes those property rights that serve the sovereignty function. Like the public use, this private use of sovereignty power can also be objectionable. Serious constitutional debate has centered on the question whether the state, sometimes or always, must require that these "private" exercises of power over others meet the constitutional standards to which similar exercises of state power are held.⁶⁷ If the state's observance of these constitutional standards is essential to the legitimacy of the political order, their observance might also be essential before the state may legitimately permit, protect, or enforce individual exercises of power.⁶⁸

The argument that constitutional standards should be applied to private exercises of the sovereignty power is enhanced if, as I argue in Parts III through V, such application does not constitute interference with the liberty- or autonomy-promoting aspects of property that are involved in the use, welfare, and personhood functions discussed above.

⁶⁶ See Kreimer, *supra* note 29, at 1347-51.

⁶⁷ The debate has taken place under the doctrinal heading of "state action." Usually the issue involves first amendment rights, *see, e.g.*, *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Marsh v. Alabama*, 326 U.S. 501 (1946); antidiscrimination requirements, *see, e.g.*, *Bell v. Maryland*, 378 U.S. 226 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948); or due process procedures, *see, e.g.*, *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). Although generally the one-person-one-vote requirement is not advocated in the corporate context, those members of the Court most willing to require that corporate agents meet constitutional requirements (which could be accomplished doctrinally by dropping the state action requirement) also voted to require one-person-one-vote for commercial enterprises that were organized as governmental units. *See Ball v. James*, 451 U.S. 355, 374 (1981) (White, J., joined by Brennan, Marshall & Blackmun, JJ., dissenting); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 735 (1973) (Douglas, J., joined by Brennan & Marshall, JJ., dissenting).

⁶⁸ See Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952).

The policy grounds for applying these constitutional standards are further strengthened to the extent that the application does not seriously interfere with the vital resource-allocation function, because this function provides the primary justification for legally recognizing private exercises of sovereignty.

Courts have been hesitant and very selective in imposing constitutional standards on the sovereignty use of property. Legislative bodies and common-law courts, however, have frequently acted. They have imposed the substance of various constitutional mandates on private parties' sovereignty use of property. Such impositions occur most frequently in the market context, where people typically use property for instrumental purposes designed to increase exchange value. Obvious examples include guarantees of labor's organizing and speech rights, prohibitions on various types of private discrimination, protection of speech rights in shopping centers, and creation of common carrier duties. Moreover, legislatures limit the use of this sovereign power for many purposes other than the protection of constitutional rights. All regulations of private contractual dealings involve limits on the private exercise of this sovereignty power, while all state enforcement of such dealings involves recognition of the power. Of particular relevance here is the fact that legislatures often regulate in an attempt to reduce the unequal distribution of this sovereign power. All legislation that requires management or the owner of capital to defer to or negotiate with workers potentially involves a move toward equalization of this sovereign power.⁶⁹

Before leaving this discussion of the sovereignty function, one feature merits further comment. Clearly, an appealing aspect of exchange as a method of exercising power over others is its voluntary nature. This voluntariness provides a tempting justification for protecting the sovereignty function from legal restriction. In Parts III through V of this Article I argue that laws that interfere with the sovereignty function are unlike laws that improperly disrespect and undermine autonomy and liberty and are more like the necessarily collective decisions concerning resource allocation. The "voluntariness" premise, however,

⁶⁹ Much of twentieth-century labor law could be interpreted as moving generally in this direction. Likewise, this objective has been promoted by the recent development of codetermination legislation in Europe. See, e.g., Adams & Rummel, *Workers' Participation in Management in West Germany: Impact on the Worker, the Enterprise and the Trade Union*, 8 INDUS. REL. J. 4 (1977); Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367 (1980). Legislative bodies also regulate the exchange process or sovereignty function of property in order to promote the general welfare or to promote particular visions of the good life.

deserves more direct attention. A voluntary participant in an exchange does not necessarily voluntarily accept the other person's ownership of the property exchanged or the propriety of the use of property in these types of exchanges. A person's voluntary participation means only that, given that this type of exchange is permitted, given that resources are distributed the way they are, given that people's preferences have been conditioned as they have, and given any number of other presuppositions, she views her participation as preferable to nonparticipation. Given the circumstances, people also generally "voluntarily" hand over their money to a person holding a gun. Granting that voluntariness is a value to be respected, the voluntariness of the exchange does not speak to the question whether society should change the givens on which the voluntary response is based. Respect for voluntariness is fully consistent with regulating or prohibiting both exchanges and the use of guns.

More radically, a society might not recognize the right to exchange property but recognize only the right to use it. People might be permitted to make use of any presently unused property they desired. In such a society, all decisions would be as voluntary as they are in a society that recognizes exchanges. Neither the property rules of this imagined society nor those of a society that recognizes exchanges forces people to do anything; both simply forbid certain practices. In my imagined society, a person may not deny another the use of unused property or engage in an exchange; in the exchange society, a person may not use property without the owner's consent. The abstract criterion of voluntariness provides no basis for choosing between the two. Actual societies adopt a mixture of approaches to allocate resources. Some resources are treated as public goods, with use on a first-come-first-serve basis; some are treated as exchangeable private property; and some are treated as collectivized property with use requiring a group decision.

The primary normative reason for accepting the exchange system is that we expect, as an evaluative conclusion based on empirical predictions, that this degree of private sovereignty will lead to greater productivity, to a more desirable allocation of resources, and to collectively preferred types of social interactions. To the extent that we reject these evaluative conclusions, as many of us often do, we would act properly to restrict the sovereignty use of property in ways that we expect would lead to better collective results.

This discussion of various functions of property is not intended to be exhaustive, nor is the discussion of appropriate constitutional responses intended to be more than suggestive. Rather, the objective has been to show that property is not usefully seen as a unitary concept. Proper constitutional treatment should, as it to some extent implicitly

has, disaggregate the various functions that property can perform or the various values that it does or should serve.

II. SETTING THE ISSUE: PROPERTY AND LIBERTY

The conservative⁷⁰ critique of the post-*Lochner* Supreme Court⁷¹ claims that the modern Court's preference for certain individual liberties is unprincipled—that the Court cannot persuasively distinguish the preferred liberties that it protects from the property and contract rights that it does not protect. As implied in Part I, this statement of the conservative critique is too imprecise: the modern Court has been responsive to some property claims but not to others. In fact, except for rhetorical purposes, most conservative critics seem to have a narrower range of complaints. They object primarily to the modern Court's practice of rejecting all constitutional challenges to governmental regulation of commercial or market practices. They also object to the Court's relative inattention to constitutional challenges to governmental action that affects the market or exchange value of property. Sometimes they even argue that the distribution of wealth and power is not a matter of proper public or political concern. Still, the articulated conservative claim is that the individual liberties protected by the Court cannot be justifiably distinguished from other, unprotected property rights.

In the remainder of this Article, I argue that this conservative claim is wrong. I attempt to justify the distinction between the individ-

⁷⁰ As used herein, the terms conservative and liberal do not refer to pedigrees drawn from the history of political philosophy but rather attempt to embody more popular current usage. In this usage, conservatives are people who typically perceive themselves as committed to a so-called free market and typically do not view poverty or inequality in wealth to be conditions justifying much government intervention. Liberals carry on a perceived New Deal commitment to planned government interventions to improve society and, in particular, to make society more equal and more just. (As should be clear, I do not endorse but merely repeat the prejudice that private property and freedom of contract are not themselves massive government interventions and regulations.)

My references to the views of conservatives and liberals represent composite images drawn from conversation, newspaper columns and op-ed features, litigant arguments in constitutional cases, and scholarly writing. Cf. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59 n.8 (1984) (discussing use of similar methodology in another context). For readers who do not think anyone holds the views criticized, I welcome the implication that my discussion will hold little interest and is unnecessary except to reduce the readers' temptation to adopt such a position themselves or, possibly, to deepen their understanding of the position they do hold. (If only a writer could avoid stimulating the opposite of the intended effect!) Note also that my "functionalism" in Part I is, I hope, not the version Gordon criticizes but is the use that he considers both too broad and too narrow. See *id.* at 61 n.11. I am inclined to agree that this usage is too broad and too narrow for some purposes but not for others, for example, the purposes of this Article.

⁷¹ See *supra* note 1.

ual liberty that properly merits constitutional protection and the generally market-oriented "liberty" that does not. Initially, however, I must consider two other matters. First, Part II-A begins with a discussion of various notions of liberty. The conservative claim relies on a formal notion of liberty.⁷² Although strong arguments may be made against the relevance and coherence of this notion, I will adopt the formal conception of liberty, and thereby meet the conservatives on their own ground.

Second, my primary arguments assume that the collective necessarily determines the principles that control allocations of resources. Nevertheless, I assume that an individual still has some allocative claims, made under the rubric of liberty, to decisionmaking authority in regard to her own mind; speech, or body, that the collective cannot properly ignore. These assumptions are elaborated in Part II-B.

A. *Formal and Substantive Liberty*

The two conservative claims are, first, that market freedom is a basic, intrinsic aspect of liberty and, second, that there is no principled distinction between market freedom and those freedoms, such as freedom of speech, that the post-*Lochner*, post-1937 Court has often protected.

Many pragmatic liberal reformers would concede the second point. They agree that both freedom of exchange and freedom of speech sometimes do and sometimes do not contribute to real, substantive liberty—that is, meaningful choice, self-development, and self-realization. They conclude from this similarity that the extent to which freedom of speech and freedom of exchange should be protected depends on both determinations of fact and subjective value judgments. Pragmatic liberals may note that there are practical reasons to predict more governmental abuses—more substantively wrong decisions to regulate—with respect to speech. Thus, for prophylactic or rule-utilitarian reasons, speech should receive special protection. They recognize, however, that there is no principled—that is, formal—basis for distinction.

These pragmatic liberals rely on a substantive conception of liberty. Their approach effectively avoids the key conservative argument. The conservative usually invokes the claim that the two freedoms are indistinguishable in order to piggyback on the greater constitutional

⁷² A completely formal notion of liberty would presumably be empty. My references to "formal liberty" will always refer to some "relatively" formal conception that emphasizes some abstractly characterized absence of limits on a person's behavior and that lacks any direct concern with the liberty's actual significance for people's lives.

protection generally accorded freedom of speech. This conservative claim relies on the widely accepted notion, which the liberal's response implicitly rejects, that limitations on fundamental, constitutionally protected liberties should not be based on particularized, consequentialist analyses. This conservative strategy merely underlines what is clear in their first claim. In contrast to the pragmatic liberal, the conservative invokes a formal conception of liberty, under which market freedom and freedom of speech are equally fundamental aspects of liberty.

Rather than responding to the internal logic or persuasiveness of this conservative claim, the liberal rejects or even mocks the conservative's formal conception of liberty. This rejection rests on two criticisms. First, the liberal asserts that the formal conception has no proper ethical or political relevance; it has at most rhetorical political relevance, which takes the form of an ideological distortion or mystification that ought to be dissolved. We have no reason to be concerned with anything other than a substantive conception of liberty. The proper political or ethical concern is with real opportunities for people to develop, express, and fulfill themselves. Moreover, the most meaningful content for these opportunities, that is, the best substantive conception, will necessarily be particularistic—a matter of history, culture, and politics.

Second, the pragmatic liberal argues that the formal conception must be incoherent. No plausible formal conception of liberty has any discriminating content. All laws restrict formal liberty. Laws restrict formal liberty equally when they prohibit the use of a pistol to shoot another person, prohibit taking the creations of or touching the body of another person, prohibit pornographic books and dissident political expression, or prohibit wages below a certain minimum. Surely, maximization of this formal liberty has little to recommend itself. Alternatively, the pragmatic liberal may note that law inevitably creates opportunities for one person by restricting options for another; all legal orders arrange the set of options in a way some people will like and others will not like. Thus, rather than viewing all laws as unambiguous restrictions on liberty, the pragmatic liberal observes that all laws limit some people's formal liberty while increasing the formal liberty of others. But this observation, the liberal hastens to add, is no more helpful to the conservative, because there are no formal criteria with which to compare the liberty that the law restricts with the liberty that it makes available. Instead, the pragmatic liberal will argue that one must make historically particularistic, substantive evaluations of any law in order to determine whether it promotes or impedes real liberty. The pragmatic liberal concludes that any formal conception of liberty is vacuous. As an ideal, a formal notion of liberty has neither appeal nor the

capacity to discriminate among sets of laws.

Pragmatic liberals diverge on the implications the lack of principled distinctions between various liberties has for judicial review. Some recommend general abandonment of (activist) judicial review. Others, admitting that judicial review necessarily involves promoting substantive conceptions of liberty, argue that a judge should and necessarily will be as involved in this normative, political activity as any other political actor. Given the institution of judicial review, judges would be abdicating their responsibilities if they did not engage in the promotion of substantive liberty. Still, whatever the Court's past failings in pursuit of substantive liberty, the Court's present unwillingness to invalidate any economic regulation and its occasional willingness to protect personal liberties, like freedom of speech, are generally substantively desirable.⁷³

Despite the power of the pragmatic liberal's critique of any formal conception of liberty, Parts III through V attack the conservative claim on its own terms. But given the power of the critique, I will make here a few summary comments concerning, first, the appeal or relevance of a relatively formal conception of liberty and, second, the possible content of such a conception.

Civil libertarians commonly intuit that basic civil liberties, like freedom of speech, differ qualitatively or in principle from market freedom. Their intuition requires consideration and explanation. Some pragmatic liberals argue that, as a rule of thumb, constitutional guarantees of free speech more often contribute to substantive liberty than do constitutional guarantees of free markets. This differential substantive contribution may both explain and justify acting upon the civil libertarians' intuition. In other words, these pragmatic liberals view the civil libertarians' intuition as embodying an appropriate form of rule utilitarianism. But, these pragmatists argue, reification of these typical consequences into a rule immune from consequentialist repudiation in particular cases is a form of debilitating mystification that amounts to ethical authoritarianism, moral rigidity, and intellectual blindness.

Civil libertarians are apt to agree with the pragmatic liberal's predictions about the different substantive contributions of free speech and free market guarantees. Nevertheless, many of these civil libertarians continue to sense that protection of basic individual rights, like freedom of speech, should not turn on these consequentialist predictions. For

⁷³ Of course, liberal pragmatists quarrel about whether particular claims brought under the free speech rubric ought to prevail. For example, many conclude that the Court should not protect the use of personal and corporate wealth to dominate the political process.

example, many civil libertarians believe that minorities and dissidents can rightfully assert claims, based on fundamental notions of equality and liberty, that override the majority's determination that the denial of those claims would best promote the general welfare or substantive liberty. Certain minority claims deserve recognition, they argue, irrespective of predictions concerning the contribution of that recognition to the long-run welfare of the group. Moreover, the civil libertarian may also observe that the liberal pragmatist's identification of some consequences as progressive or welfare-promoting is often grounded on a stated or tacit commitment to the very values that lead the civil libertarian to believe that the collective must respect certain noninstrumentalist claims of individual liberty and equality.

A more abstract analysis may clarify and help justify the intuition that I have attributed to the civil libertarian. First, people exist and have substantive liberty only within collective structures—legal, linguistic, and cultural structures to which people generally are expected to, and in fact do, conform, and which often depend on people's conformity. People who rely on these structures (all of us) can properly and plausibly claim that other people should voluntarily conform to those aspects of these collective structures that demand conformity—for example, laws—only to the extent that the structures embody respect for individual equality and autonomy.⁷⁴ Thus, a system of laws that fails to meet these prerequisites loses its claim to legitimacy. The fundamental status of individual equality and autonomy appears to be very deeply embedded in the modern conception of ethical or meaningful human interaction. The full exercise of humanity's historically contingent capabilities for communicative and moral action requires that we treat these prerequisites as fundamental.⁷⁵ Those who hold this view recognize that it is a historical product. Yet many of these also accept the claim, itself implicit within the view, that the normative implications of this conception of human interaction have general or universal, not merely historically contingent or contextual, validity. Their analysis concludes that *any* legitimate obligatory order must meet these prerequisites. The content of these prerequisites may be only partially determined abstractly. Still, the abstract aspect of the analysis forms a basis that helps orient or ground more substantive arguments that are obviously contingent—those relating, for example, to how a society ought to

⁷⁴ I develop this admittedly controversial argument in Baker, *supra* note 1, at 959-72.

⁷⁵ See 1 J. HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* (T. McCarthy trans. 1984).

promote people's substantive liberty and equality.⁷⁶

Clearly more discussion would be required to defend the conclusion that respect for certain individual claims of autonomy and equality is a prerequisite to the legitimacy of any collective decisionmaking that purports to bind the individual. This Article, however, has a different purpose. It is addressed to those people who already accept the normative significance of an abstract or formal conception of liberty. It is designed for the person who believes that the need to respect individual equality and autonomy provides a justifiable, principled basis for constitutional interpretation, or for the person who believes that the legitimacy of the social order requires the defense of minority or dissenter rights, whether or not preservation of those rights contributes to the general welfare. Such people take a formal notion of liberty seriously—not as the full meaning of liberty, but as a starting point, a constraint on how a full or substantive notion of liberty ought to be developed and pursued. If this formal notion is taken seriously, then the conservative's claim that market freedom cannot in principle be distinguished from freedom of speech must be considered.

The pragmatic liberal argues not only that the formal conception of liberty has no moral significance, but also that it is empty. The latter claim also needs consideration here, for, if it is correct, formal liberty is nothing but a mirage unworthy of serious consideration. Several distinctions are helpful in developing a formal conception of liberty that differs from both the characterization of the formal conception that the pragmatic liberal usually attacks, and the substantive conception that the pragmatist prefers. Even if a completely formal conception is not possible, the degree of abstractness of the version I offer suffices for the universalist perspective that the conservative wishes to advance.

Rules or practices governing the allocation of property are a necessary constitutive aspect of any community. These rules and practices, which I call "allocation rules," determine who is entitled to make and carry out any particular decision. They embody the criteria that identify the possessor of a property right, that is, the possessor of decision-making authority. Examples of possible criteria include need, merit, consensual transfer of rights from another, and effective strategic or instrumental action. In the most atomistic order, the only accepted allocation practice might be that everyone is entitled to make any decision that she can effectively carry out. Although all social orders will have allocative rules or practices, the content of these allocative rules or practices will vary from society to society and within a society over

⁷⁶ See Baker, *supra* note 35, at 920-28 (defense of two-level theory).

time. Their specific content serves important societal self-definitional and social welfare functions.

Because the existence of these types of rules or practices is inevitable, they should not be seen as necessarily inconsistent with all meaningful conceptions of liberty. Rather, they are better seen as establishing the framework within which liberty exists. An acceptable formal conception of liberty must be consistent with a set of allocation rules that allow people to use their resources in their chosen expressive and developmental activities. Implicit in the allocation of decisionmaking authority is the notion that a person's freedom of choice concerning the use of resources can only extend to a point where the use directly conflicts with another person's authority. From this perspective, laws need not restrict liberty: those that only allocate and demarcate the boundaries of decisionmaking authority merely allocate liberty.

The government's respect for this formal notion of liberty will not unambiguously maximize substantive liberty. Formal liberty is consistent with radically different allocation rules with varying implications for substantive liberty. Moreover, as civil libertarians are aware, some conceptions of the general welfare or maximum substantive liberty may be promoted by laws that abridge this formal liberty—for example, laws against pornography, homosexuality, communists, or Catholics. Their critiques of these laws typically appeal to this formal conception of liberty.

I have argued elsewhere that the formal conception of liberty is also an important element of insightful political and ethical theory.⁷⁷ If society has a duty to respect people's autonomy, this formal conception will have an important role in evaluating forms of social organization. A society disrespects people's autonomy or liberty if it adopts laws directed not to allocation, but to preventing people from engaging in activities that they substantively value. By distinguishing rules that are inherently necessary, that is, allocation rules, from rules directed at restricting people's choices, the formal notion of liberty helps implement the duty to respect people's autonomy or liberty. Implementing this for-

⁷⁷ Although virtually all my equal protection and first amendment writing develops from this perspective, in *Sandel on Rawls* I outline the form and some of the reasons for accepting or rejecting such a perspective. See *id.* at 920-28. In *Counting Preferences in Collective Choice Situations*, I argue that relatively formal notions of liberty and equality provide the best basis for deeply held ethical and political intuitions, claim that these notions can be given a plausible justification, and try to give them some content. See Baker, *supra* note 18. In *The Process of Change and the Liberty Theory of the First Amendment*, I address the political left in arguing that substantively desirable and progressive change will predictably depend on societal maintenance of rights defined by this formalistic conception of the first amendment. See Baker, *supra* note 39.

mal notion of liberty would bar regulations directed at prohibiting a person's substantively valued activities. From the perspective of formal liberty, these two types of rules differ in the same way rules of the road differ from prohibitions on travel.

The most obvious difference between this formal conception of liberty and a substantive conception is that the formal conception only rules out certain methods by which the collective might attempt to further substantive liberty (or other conceptions of the general welfare). Specifically, the formal conception rules out certain means that disrespect individual autonomy. Suppressing choice is the evil; allocating choice is necessary and desirable. Thus, this formal conception of liberty does not provide a complete guide for social organization. Unlike substantive conceptions, the formal conception is concerned not with the allocation of resources, but only with people's freedom to use the resources they have been allocated. A person has no formal liberty interest in the allocation rules themselves—except for her formal right to participate in the political process of choosing the rules and practices that control allocations and, as is suggested below, a liberty interest in having allocation rules that accord her decisionmaking power over her “own” body and speech.⁷⁸

This analysis remains throughout almost libertarian. It attempts to specify when respect for individual autonomy requires recognition of the primacy of collective decisionmaking and when it requires recognition of the primacy of individual decisionmaking. Often, the proper resolution will itself be a matter of collective decisionmaking. The claim, however, is that both the broad reach of collective decisionmaking and the need for some limits on that decisionmaking derive from respect for individual autonomy. The analysis attempts to identify abstractly the types of collective decisions that we should find unacceptable as inconsistent with respect for individual autonomy. If this distinction can be made, it would supply a possible unitary justification for both democracy and limits on democracy—that is, for constitutionalism. Moreover, to the extent that any aspect of the distinction can be made and defended abstractly, the analysis would provide a basis for some timeless or universal principles of constitutional law. Finally, if the distinction can be made, it requires that one address seriously the conservative

⁷⁸ Whether a person has a fundamental equality interest that requires certain allocation rules or allocative results—for example, allocations that serve the welfare function—presents a different issue. Irrespective of how that equality issue is resolved, no equality-based allocative decision would be inconsistent with the formal conception of liberty. This is because the formal (unlike the substantive) conception of liberty says nothing about any specific allocation of resources, with the exception of the allocation of control over a person's body and speech.

claim that there is no principled distinction between market freedom and constitutionally favored liberties.

B. *Control over the Self*

The Enlightenment tradition treats the individual, typically perceived as including the physical body and the associated personality, as the locus of decisionmaking authority over the body's actions. According to this perspective, people ought to have decisionmaking authority over their own body and mind—at least unless their actions involve the use without consent of another person's body or the use without consent of resources not allocated to them. In contrast, a person normally cannot use a second person's body or control a second person's activities unless she obtains that person's consent.

Admittedly, this attribution of authority is a historical product. Still, the idea of individual liberty is sufficiently deeply embedded in our political, ethical, and economic practices that we find this allocation to be "natural."⁷⁹ Giving up this concept of the individuated person would require drastic changes in many of our most firmly held moral and political practices. These practices conceive of a person as an agent who is normally responsible for her own actions and who should be permitted to make decisions for herself. This conception may even be implicit in the possibility of communicative action.⁸⁰

Individual liberty—allocation of decisionmaking authority over the self to the self—has not always been the rule. Historically, laws and other social practices have granted some people control over the bodies or personalities of others. This is true of slavery, serfdom, male mastery

⁷⁹ Rather than "logically necessary" or "unchangeable," "deeply embedded" suggests the hard rock in one of Wittgenstein's most arresting images: "And the bank of that river consists partly of hard rock, subject to no alteration or only to an imperceptible one, partly of sand, which now in one place now in another gets washed away, or deposited." L. WITTGENSTEIN, *ON CERTAINTY* ¶ 99, at 15(e) (G. Anscombe & G. Wright eds., D. Paul & G. Anscombe trans. 1972); cf. Johnson, *Commercial Law*, 13 N.M.L. REV. 293 (1983) (discussing Wittgenstein's warning that "[a] picture held us captive") (emphasis omitted). Although I accept Wittgenstein's suggestion, when I think of his remark I often envision the late summer river in our western plains that only flows underground, beneath the dry surface of the river bed.

⁸⁰ Communicative action is action aimed at coming to understanding by bringing about agreement without the use of force. This concept implicitly raises validity claims with respect to truth, rightness, and truthfulness that, it seems, assume responsibility on the part of the speaker and autonomy on the part of the listener. See J. HABERMAS, *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 2-3, 118-20 (T. McCarthy trans. 1979). Habermas makes a claim even broader than the one made in the text: "Before norms of domination could be accepted *without reason* by the bulk of the population, the communicative structures in which our motives for action have till now been formed would have to be thoroughly destroyed. Of course, we have no metaphysical guarantee that this will not happen." *Id.* at 188.

over a wife, and parental control over children. Likewise, general limits on individual liberty have been common. People have often been absolutely prohibited from engaging in activities that involve only the self or that involve others only with their consent.

Critiques of these allocations and prohibitions have generally appealed to two intuitions: that slaves are no different from the rest of us, in that they too are people, and that an aspect of being a person is to have a unique and usually ultimate decisionmaking role concerning the use of one's body. Even most of the currently recognized exceptions help to prove the rule. For example, the modern understanding of a grant of parental decisionmaking authority is not that the parent may require the child to do whatever serves the parent's interests or needs; rather, the grant is justified on the assumption that the parent should and will make decisions that promote the development of the child, who will eventually make decisions about her own "self." More generally, I suspect that careful investigation would show that the notion of individualism implicit in our most basic political institutions, many of our moral commitments, and possibly even our communicative practices, requires that each person be allocated decisionmaking authority over her own body or personality.

In contrast, the issue of how to allocate decisionmaking authority over specific resources has no intuitively obvious or natural solution. Concern for the individual's integrity and autonomy in the expression and development of her values and personality may provide strong presumptions favoring a person's claims on some resources. For example, this concern may support claims on resources that are important for the personhood and the welfare functions of property, as discussed in Part I. Nevertheless, these presumptions will seldom be conclusive with respect to claims on specific resources. In addition, the personhood and welfare functions are not at stake in many governmental or legal decisions dealing with the allocation of productive resources. Moreover, these functions relate to use. They do not require any particular conclusion regarding rules of exchange or transfer. The welfare and personhood functions usually are not implicated by rules allowing multiple parties to make noninterfering use of the same resources. For the most part, no theoretically grounded or generally accepted values require either any particular resource allocations or any particular resource allocation rules. Identifying the allocation rules that will best serve human values is generally a controversial issue. The best answer will be both contextually dependent and devoid of abstract content. Moreover, at least within an individualist liberty theory, a justification for particular allocation rules must appeal to something more than either force or

tradition. Acceptance of either force or tradition as a justification restricts people's equal freedom to exercise control over their own lives and environment by restricting their equal claim to self-determination. A concern for individual liberty requires that allocation rules be subject to collective, political, or cultural determination.

Given a specific set of collectively accepted allocation rules, a second issue arises. Which decisions, if any, about how a resource is to be used should be matters of collective or political rather than individual choice?⁸¹ In other words, which property rights, if any, should be assigned to the collective? This issue can be expressed using various terminologies. I will call the rules that require or prohibit certain behavior "general prohibitions."⁸² These rules involve collective decisions not merely to allocate decisionmaking authority, as do allocation rules, but to limit individual choice. General prohibitions are not designed to determine who may make a choice but rather to eliminate the opportunity for anyone to make the choice. A general prohibition requires or prohibits a specific act for as long as the prohibition remains in force. The question for a formal notion of liberty is when, if ever, general prohibitions are permissible.

Since 1937 the Supreme Court has routinely upheld regulations in the economic sphere that require or prohibit various sorts of conduct while striking down many general prohibitions on expressive behavior

⁸¹ This analysis applies to resources over which individuals have general decision-making authority—that is, private property. Nothing in the argument, however, forecloses the possibility that substantial quantities of power will be collectively held, and thus put to uses, possibly by individuals that are collectively chosen. This collective ownership, if democratically established, may be necessary in order to ensure individual freedom and in order most effectively to promote individual fulfillment.

Still, the limitations on individual initiative implicit in collective control and decisionmaking are troublesome. To alleviate this potential problem, decisionmaking should be decentralized to the extent consistent with achieving collective goals. Guarantees for individual control over property that serves the personality and welfare functions will help. Finally, society should be required to permit individual uses of collectively held resources to the extent that the individual uses do not conflict with collective uses. *See* Baker, *supra* note 38.

⁸² *See generally* Baker, *supra* note 18 (discussing the significance for collective choice of the distinction between allocation rules and general prohibitions). I use this distinction throughout the rest of this Article. Allocation rules, which determine who has authority to make any possible decision (or take any possible action), are inevitable in any social situation; the debate therefore can be only over their content. "No rules," often identified with extreme anarchy, is in fact an allocation rule that says everyone has authority to make any decision she can successfully implement. Use is dependent on either who comes first or who exercises the most power; decisionmaking authority is allocated so that anyone may try to do anything but may not prohibit another from making conflicting efforts. General prohibitions, which take decisionmaking authority away from all individuals, are not structurally inevitable. Thus, they may be an unnecessary restriction on liberty. Unlike allocation rules, not only the content but also the very existence of general prohibitions may be questioned.

that it found to be protected under either the first amendment or a privacy rubric. Moreover, the few constitutionally mandated allocation rules announced by the Court, like the right to decide whether to bear a child and the right to decide what to say and believe, are related to a person's right to make decisions about the use of her body or voice. In contrast, the Court has mandated no specific allocation rules for commercial or market-oriented practices or property.

The next three sections offer three arguments in support of these decisions of the modern Court. The Court's practice has been proper because regulation of commercial or economic activity does not interfere with individual liberty or autonomy in the improper way that, for example, unconstitutional regulations of speech do.

The discussion will only consider whether the property or economic regulations violate an acceptable formal notion of individual liberty. I make no attempt to evaluate the substantive desirability of various regulations. I assume that the political branches should have priority over the judicial branch in resolving issues concerning the general welfare or substantive liberty. No acceptable criterion exists by which courts could show that any particular political decision does not promote the general welfare.⁸³ Thus, the appropriate constitutional issue is not whether challenged regulations fail to promote the general welfare, but whether the regulations impinge on constitutionally protected individual liberty. This interpretation of the constitutional issue addresses conservative critics of the modern Court on their home ground. In current constitutional debates, the conservative's primary objection usually is that economic regulation interferes with liberty in a manner similar to other, oftentimes invalidated, regulations.

III. MARKET DETERMINATION⁸⁴

A. *The Thesis*

The first argument for recognizing political authority to control or

⁸³ Certainly wealth maximization does not work. There is no reason to think that wealth maximization alone, without reference to the distribution of wealth and the conception of what constitutes wealth, would correspond to maximum general welfare. Nor is there any nonpolitical or uncontestable notion of what constitutes wealth. Pareto superiority may be acceptable but is irrelevant. Courts are unlikely to encounter situations where everyone—including supporters of the legislation and all actual and potential parties to the litigation—wants judicial invalidation of the legislation. Therefore, the Pareto criterion is unlikely to settle any real issue.

⁸⁴ Part III summarizes, modifies, and elaborates arguments that I have developed previously. I first presented the argument in Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 9-25 (1976); see also Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free*

regulate market-oriented activities is that, because the market operates to determine the content of our social world, we can be free only if we can control the market. This means that the extent and content of market-oriented activities must be subject to collective—that is, governmental—control. Any evaluation of the persuasiveness of this market-determination thesis requires careful examination of both the dominant abstract conception of the market and the significance of the divergence of the actual economic world from the abstract conception.

The most extolled aspect of a free market is its effectiveness in directing resources to their most valuable or efficient use—most valuable or efficient, that is, as measured by willingness to pay. The praise should not be too lavish, however. In practice, due to various types of market failures, free markets consistently fail to achieve efficient results. Moreover, these market-based criteria of efficiency and value take as their starting point existing preferences and distributions of wealth. A very different and arguably better notion of value, and a correspondingly different set of efficient outcomes, would result from a structure that produced outcomes based, for example, on an equal distribution of votes, on a more just distribution of wealth, or on reflectively or discursively arrived at preferences.

Beyond these doubts about the accuracy and the appeal of the market's efficiency claim, the presumed efficiency of the market raises another issue that is more important for purposes of the present discussion: the optimistic claim that the market moves resources to their highest valued use necessarily implies the troublesome conclusion that the market determines much of the content of the social world. If it functioned "properly," the market would move resources to a given use until the marginal value of the resource in that use was no higher than it would be in the best alternative use. To the extent that the market effectively directs resources to their most efficient use, the resulting social world reflects not the choices of the owners of productive resources, but rather the dictatorial force of the market. But if the market controls resource use, human freedom requires that we be able to control the market structure. Because laws and societal norms are key elements in any market structure, the ability to control the structure, and hence freedom, requires collective decisionmaking.

The claim that the market determines the content of our social world can be resisted from two directions. It may be argued that owners of productive resources are in fact free to determine their use of

Speech, 130 U. PA. L. REV. 646 (1982) [hereinafter cited as Baker, *Corporate Political Expenditures*]. Although also drawing on the above work, Parts IV and V rely primarily on *Counting Preferences*. See Baker, *supra* note 18.

these resources, or that the market embodies freedom by correctly translating the free choices of consumers into social outcomes. If these claims are persuasive, then the argument made in this section for political control of market practices fails (although political control would still be proper for the reasons developed in Parts IV and V). Nevertheless, despite the forcefulness of the counterarguments to the market-determination thesis, the thesis emphasizes important factors that a justifiable and intelligent choice of rules ought to take into account. I will therefore develop the market-determination thesis as well as comment critically on both counterarguments.

The most basic point, to which I will return in Parts IV and V, is that a market structure, like any framework of interaction or any set of property rights, determines the consequences of various individual actions that occur within the structure. The social world necessarily reflects the interaction between individual decisions and some collective framework.⁸⁵ As long as people are not able to choose the framework for their interactions, they are limited in their capacity for self-determination.

As compared to other structures, the possessive market operates in a particularly coercive manner to determine what choices are made in the worlds of production and commerce. Thomas Hobbes observed that the fear of losing one's present means will cause even those who would be satisfied with moderate means to strive constantly for more.⁸⁶ As C.B. MacPherson has shown, Hobbes' remark makes sense only in the context of possessive market systems.⁸⁷ The competitive market forces each entrepreneur to strive for more. A firm in competition with firms that use their resources efficiently must conform by also adopting efficient practices. A firm that does not conform, as long as it must buy its inputs and sell its output in the same markets as the efficient firms, will not be able to cover its costs, that is, to reproduce its capital. The virtue of an effectively operating competitive market is that it enforces

⁸⁵ Nozick fails to recognize the implications of this basic point when he argues that "[p]eople's holdings flow from their natural assets." R. NOZICK, *supra* note 1, at 225. No holdings flow solely from people's natural assets. Holdings flow from, among other things, the exercise of natural assets within a specific cultural and legal structure. These collective cultural and legal frameworks are crucial determinants of a person's holdings. Once this is recognized, Nozick's criticism of Rawls, whose theory is directed at determining the appropriate structure of the collective framework, begins to unravel. For example, contrary to Nozick's assertions, Rawls could accept both the notion that people are entitled to (although they do not deserve) their natural endowments and the notion that, within the justifiable structures, individual entitlements are historical and nonpatterned.

⁸⁶ See T. HOBBS, *LEVIATHAN* 80 (M. Oakeshott ed. 1962).

⁸⁷ See C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 59-68 (1962).

an efficiency orientation. Enterprises that do not adopt profit-maximizing strategies, that do not adopt available efficient practices, will move toward bankruptcy.⁸⁸

If optimistic claims about the efficiency consequences of market competition are correct, then those engaged in productive activities are not free. To the contrary, the enterprise's decisionmaking is disciplined by the market to adopt efficient practices and, thereby, to create a particular social world. Even if market failures prevent the achievement of efficient results, the market will still dictate outcomes as long as competition or other factors cause market participants to adopt profit-maximizing responses to the conditions that cause market failures. The same is true for market behavior after government intervention. According to the free market advocate, the problem with government regulation or intervention is that the intervention may prevent the market from achieving efficient results. The market-enforced profit orientation should still dictate the enterprise's responses to government regulation. Thus, the market-determination thesis normally applies even when the market-efficiency claim fails.

The market's capacity to determine results should be carefully considered. All firms have an incentive to introduce a technique that increases the market-recognized benefits of its activities or that reduces its costs—whether or not the technique increases real societal benefits or reduces real societal costs. A firm may, for example, introduce a less expensive production technique, an effective marketing or demand-creating strategy, or a technique that transfers some of the costs of the economic activity to people unable to bring these costs to bear on the enterprise.⁸⁹ Once one firm responds to the incentive, its innovation

⁸⁸ Note that these observations have always provided a major justification for national as opposed to state regulation of exploitative but "efficient" (or profitable) commercial practices. States compete with each other to maintain viable industries and so are under pressure not to adopt regulations that restrict the profitability of business. See, e.g., *Steward Machine Co. v. Davis*, 301 U.S. 548, 588 (1937).

⁸⁹ The market pressure that encourages the enterprise to impose its costs on those outside the enterprise is one aspect of how, in a world of real transaction costs, a free market can systematically operate to decrease even "economic" efficiency. The market-based incentive that operates on the resource owner encourages maximization of the return to itself, not the application of the resource to its most valuable use. The abstract possibility that the market-induced goal of maximizing return will encourage the enterprise to put resources to their most valued use—that is, most economically efficient use—makes the market and the profit orientation seem attractive from an efficiency perspective. Continual market failures should undermine this appeal.

A very important systemic form of this "inefficiency" is too often ignored in the simplified presentations used in much of the law-and-economics literature. In real situations, conflicting parties, for example, labor and management, are likely to seek the benefits of any productive use of resources. The return to the owners of resources will depend both on the value of their use of the resources and on the proportion of the total

forces competitor firms to respond as well. In order to compete without sustaining losses, the other firms will need to achieve a corresponding reduction in their costs, which usually means that, to the extent possible, they will duplicate or improve on the new technique. In this way, the market-dictated profit orientation systematically operates to diffuse efficiency-increasing or otherwise profit-maximizing techniques. The market thereby creates a social world.

This process does not work democratically: those with preferences inconsistent with the new technique do not have equal power to use their resources to promote their visions. In an effectively operating market, any firm's adoption of an efficiency-increasing technique, even if the technique is objectionable to consumers, workers, capitalists, and managers of other firms, forces the other firms to respond. The social world thus created may not reflect the preferences of any of these interested parties. For example, market competition forces cigarette companies to try to increase demand for their product, even if the owners, managers, and workers all recognize that smoking is unhealthy and

benefits that they are able to capture—that is, total benefits less benefits received by consumers and, more relevantly here, by workers.

The incentive to obtain as large a proportion of the benefits as possible leads systematically to two related types of inefficiencies. First, when the resource owners are different from the workers, they will have a market-based incentive to invest resources directed at reducing the capacity of the workers to obtain the gains that result from valuable use of the resources. Thus, investment in union-busting, denial of information to workers, political and legal expenditures directed at reducing the power of workers, and other investments aimed at disempowering the workers may all increase the resource owner's return on capital. Nevertheless, these market-induced investments do not produce any valued goods and could theoretically be avoided without making anyone worse off; thus they are inefficient. The same is true of the parallel expenditures made by workers. The reduction of both sets of expenditures could result in disarmament-like gains and provide an incentive for both sides to advocate "industrial peace." Parallel comments could be made regarding the inefficiencies caused by the incentive for the firm to capture all the benefits received by consumers. In fact, the law-and-economics literature frequently notes this point in its efficiency critique of monopolies.

Second, resource owners will have an incentive to eliminate or not to introduce efficient practices and to avoid investment designed to develop efficient practices if these practices will improve the ability of those other than themselves to capture the benefits resulting from the resource use. Thus, the market creates an incentive not to introduce practices that would increase the managerial skills, the unity, the interest in self-governance, and the power position of the workers. Surely this is tragic. The market creates incentives not merely to gain wealth for oneself, but also to undermine basic human capacities of most members of the workforce.

Of course, the trade-offs between the various market incentives will be complex. The point, however, is that an effectively operating market will systematically create incentives to maintain class dominance through inefficient uses of resources. These observations do not undermine the more general argument that the market dictates the content of the social world—that the market directs the enterprise to invest both in efficiency and in control until the marginal return on each type of investment is equal. Rather, the point is that this enforced profit orientation is not equivalent to an efficiency orientation even in the limited, market-value sense of efficiency.

should be discouraged.

A significant portion of most people's lives is devoted to productive activity. Many people consider this activity to be an important aspect of who they are. A meaningful notion of freedom requires that people's activity and the collective world created by this activity not be entirely independent of their preferences. Given the large stake of both capitalists and workers in the nature of their social world, concern for individual freedom requires that the structure itself be subject to conscious, human control. This implies the need for collective control of the structure.

The next three sections set out and comment on three critiques of the market-determination thesis. Each denies that the market acts autonomously to create the social world. The first asserts that the market only actualizes the preference of workers and capitalists. The second critique states that it is the preferences of consumers that ultimately are in control. According to the third, competitive forces are sufficiently lax that it is the choices of owners and managers, not the market, that exercise the control.

B. *Producer Sovereignty*

Many people experience some degree, often a great degree, of freedom to choose the particular elements of the social world to which their own productive efforts will contribute. For example, people experience some freedom to choose their occupations—although, for most people, particularly in times of high unemployment, the range and significance of this choice is minimal.

The existence of a limited degree of occupational and investment freedom does not undermine the thesis of this section. These freedoms primarily mean only that individuals have some choice regarding the location of their own contribution to the structurally determined overall outcome. Occupational freedom does not mean that social production will reflect an appropriate sum of individual preferences. If too many workers or investors choose or avoid particular economic opportunities, either excessively high or excessively low returns will operate to incline employment and investment choices toward the market-dictated results. A few individuals' willingness to perform a job outvotes the many who refuse. Despite the opportunity for individuals to make choices and despite people's formal freedom to try to fill any of the available economic roles, an unregulated market still effectively determines the content of economic opportunities, including what jobs will be available. Thus, human control over what jobs are available and over the social and physical environment requires collective control of the economic

structure.

People can and sometimes do avoid market dictates by subsidizing their non-profit-maximizing productive behavior—a practice of which academics and public-interest lawyers often claim to be intimately aware.⁹⁰ Conceptually, this subsidization represents a merger of people's consumptive and productive activities. The freedom comes from "consuming" some wealth by "buying" preferred but non-profit-maximizing economic activities. I will discuss this point later in connection with consumer sovereignty. Here I want only to note that the availability of this option may be very limited.

The need of an enterprise in a competitive market to reproduce its capital usually compels the firm whose operating expenses are primarily nonlabor to maintain a dominantly profit-maximizing orientation. To avoid this profit orientation, the firm normally requires resources that it can "spend" on the non-profit-maximizing practices. These resources could come either from a steady flow of subsidies from outside the firm or from a market system that has broken down sufficiently to make monopoly profits available.

In contrast to these capital-intensive firms, which must operate efficiently in order to cover unavoidable costs, individuals have more choices. Workers, either individually or collectively, are not forced to be profit-maximizing in the sale of their labor and, thus, can avoid this aspect of market determination. This follows to the extent that two factors hold true. First, individuals "naturally" reproduce their own capacity to labor. Second, a large portion of an individual's expenses are, at least theoretically, avoidable. As long as an employment option provides for the worker's subsistence, the market does not force the worker to take a higher paying job. Thus, individual workers can and sometimes do choose to accept lower payment in return for being able to engage in a preferred activity. Usually, these workers' choices primarily affect who fills roles that are basically structurally determined. But this need not always be the case.

In labor-intensive sectors of the economy, workers' choices have a greater capacity to avoid the dictates of the market and to control the nature of productive activity. Where labor is a major cost of production, workers will generally have more opportunity, through their "consumption" decisions, to subsidize their preferred forms of productive activity. Their willingness to work for less may suffice to make possible the desired productive practices that competitive pressures would other-

⁹⁰ This paragraph focuses on subsidies by workers. Obviously, owners of capital may also be willing and able to subsidize non-wealth-maximizing practices.

wise make unsustainable.⁹¹ In these circumstances, individual workers or groups of workers may be able consciously to choose practices that, when summed together, will have a significant effect on the nature of the social world. In advanced capitalism, however, labor-intensive enterprises appear to be waning—although portions of the growing service industries present a potentially important countertrend. Thus, even though this type of freedom may exist to some extent in some areas of the economy, the actual opportunities for such self-determinative behavior may not be great—and the costs to the individual of engaging in non-profit-maximizing practice may be unnecessarily and unjustifiably high. At least from the perspective of producers, therefore, respect for individual liberty generally justifies the expansion, rather than the limitation, of government authority to regulate economic activities. As discussed above, this conclusion arguably does not hold for certain relatively marginal, labor-intensive areas;⁹² nevertheless, I will argue in Parts IV and V that regulation is justified even in these marginal areas.

C. *The Consumer Sovereignty Model*

Defenders of the market who identify it with liberty often invoke the notion of consumer sovereignty. This notion posits that, although a smoothly operating market may control productive activity and the allocation of productive resources, it does not control the consumptive choices. The market determines the content of the social world only by integrating the desires and decisions of people as both consumers and producers. In this sense, the market embodies freedom and empowers individuals.

The abstract notion of a connection between consumer sovereignty and freedom has some force. It cannot be completely dismissed. Still, the identification of consumer sovereignty with freedom is fundamentally flawed. Before considering four flaws with this identification, I want to note that the change from a producer freedom model to a consumer freedom model entails a subtle shift in the meaning of freedom. If the social world reflected the choices of the producers who use their

⁹¹ Note that many of the situations in which workers accept lower pay do not involve this sort of subsidization. In recent industry give-backs, for instance, workers may be accepting cuts in order to retain any work or to retain, even after the cuts, the best-paying work available. In this context, characterizing the workers as subsidizing their preferred productive activity would be terribly inappropriate.

⁹² These observations concerning subsidizing value preferences with labor may, however, suggest that individual liberty requires greater and different limits on the government's authority to regulate labor unions than on its power to regulate corporate enterprises. On various asymmetries between the two contexts, see Baker, *Corporate Political Expenditures*, *supra* note 84, at 655-57, 672 n.87.

property and labor in their own work, freedom would exist in terms of the use-value function of property. The notion of producer sovereignty does not *inherently* rely on markets. In contrast, even if use—in consumption—eventually results, the consumer sovereignty model assumes a different role for people's choices. In this model, a person's free choice controls the nature of the social world only through the consumers' exercise of power over other people, which involves the sovereignty function of property. This change transforms the notion of freedom. Freedom becomes identified with the exercise of power over others. Of course, in the context of a market and inequality, the reality of producer sovereignty will also involve the exercise of power over others. When owners use their property not in their own productive activities but to control the efforts of others, and when workers do not (or cannot) exercise choice as to their productive activities, producer sovereignty exists only for the owners. Like consumer sovereignty, the reality of producer sovereignty becomes based not on the use function of property but on the sovereignty function.

The consumer sovereignty notion of freedom also highlights a particular type of interaction or cooperation. Interaction as the exercise of power over others is very different from interaction based on dialogue and discussion. Even if preferences provide the dynamic of the consumption system, different structures will respond to individual inputs differently, transforming preferences in different ways. The market is particularly unlikely to encourage self-reflective responses either to one's own or to other people's preferences. In contrast, a system in which consumptive preferences emerge through dialogue—either large scale dialogue, as in a political deliberative process, or small scale dialogue, as often occurs within small groups or families—is more likely to encourage reflection and conscious change or development of preferences. Thus, the identification of freedom with giving scope to individual preferences does not lead necessarily to a market consumer sovereignty model rather than, for example, a citizen or membership sovereignty model. Although both models emphasize freedom as self-realization and self-determination, they have somewhat different conceptions of the circumstances in which the individual can best express herself—and possibly somewhat different conceptions of the person.⁹³ At best, the consumer sovereignty model involves one particular notion of freedom and its relation to property. Thus, a critique of the con-

⁹³ Cf. M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 16 (1982) (asserting that different political and ethical theories implicitly rely on different conceptions of the person, and that the conception relied on should influence the appeal and persuasiveness of the theory).

sumer sovereignty notion of freedom and property could consist in a defense of another, preferred understanding of freedom and its realization.

1. Comparability of Realms of Freedom

The first flaw with identifying consumer sovereignty with liberty can be stated briefly. Any structure or practice, including a free market, constrains some choices as it facilitates others. A private property market system, as compared to either a more anarchical system or a more socialized system, advantages some and disadvantages others. As long as anyone desires a legal realm that does not fully establish a free market system, a plausible view of freedom or sovereignty would recognize that the freedom of that person is greater under the alternative. There is no natural or neutral notion of freedom or empowerment with which to demonstrate that the freedom provided by the market framework is greater than or preferable to that provided by some alternative framework. A persuasive conception of freedom may place some requirements on the content of legal rules or social practices. Nevertheless, advocates of consumer sovereignty have not shown that any such conception of freedom would include a guarantee that people be able to use property to exercise power over others.

2. The Market as Controlling Rather than Embodying Value Choice

Any theory claiming that consumer sovereignty incorporates people's capacity for self-determination and self-realization must assume that we can properly treat the market as embodying rather than creating the choices and preferences that drive the system. People's consumptive choices and preferences must be basically independent of the market structure. Otherwise, the social world would be significantly determined, not by human choice or reflection, but by a human creation—the market. If the market creates preferences, human choice prevails only to the extent that the scope and form of the market is a matter of collective decision.

The assumption that preferences are independent of the market structure is incorrect. This assumption fails in two ways—one characteristic of any structure and one peculiarly related to the dynamic quality of a competitive market system. First, preferences are never entirely exogenous. Who we are always partially reflects the structures in which we live. Market structures are no exception. Although the market's influence on preferences is highly complex, a few tendencies and

mechanisms can be sketched.

The market responds to some demands more than it does to others; preferences to which another system might respond strongly, the market does not, and vice versa. For example, the market is particularly responsive to demands that are money-backed or that can be realized with relatively low transaction costs.⁹⁴ As a result of this selective response, a market structure rewards the presence of particular, marketable skills and qualities. These rewards encourage the development of the market-favored traits.

The same reward and response process can operate on the preference side. A person is better off—has more preferences fulfilled—if she likes having and using these marketable skills. Thus, the market encourages the development of work-oriented preferences. A person is also rewarded if she develops those consumptive preferences that the existing order will satisfy.⁹⁵ This is so even though both the dynamic of the market and apparently unsuppressible aspects of our humanity always prevent reaching an equilibrium of satisfaction. The reward mechanism shifts portions of the demand curves upward for items that become realistically available. For example, the market capability to produce cars at affordable prices encourages (by its promise of satisfaction) more desires for cars as compared to mass transport, homes closer to work, or different work relations. Thus, neither skills, productive preferences, nor consumptive preferences are exogenous to the market.⁹⁶

The above argument could apply to any system for allocating resources. The market, however, influences preferences in a second way.

⁹⁴ One efficient system will favor brawn, another will favor a particular type of intellect, and so on. (I use "efficient" here in the Pareto sense of reaching a point where no one could be made better off without making someone else worse off.) Professor Kelman has argued that, despite the market's structural incentives, our underlying values are often reflected in our resistance to those market pressures that tend to make us into solely "economic" people. See Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 685-95 (1979) (discussing divergence of the actual conduct of people from the conduct that would be required under the Coase theorem).

⁹⁵ The psychological model on which this paragraph relies is obviously flat and oversimplified. It ignores the complex way in which the structures also encourage dissatisfaction in a manner that induces greater productive efforts. More important, it ignores the dissatisfaction, however developed, that encourages resistance to, or transformation of, the existing order. The history of both labor and lifestyle demonstrates people's resistance to market pressures and their attempt to maintain or create alternatives to these market pressures. See Kelman, *supra* note 94, at 685-95. Thus, the text should be read as describing a single tendency or as an account of one set of pressures.

⁹⁶ Moreover, the value of market-stimulated skills and preferences has no natural, nonpolitical, or nonethical measurement. Whether the development of these particular skills and preferences is desirable is subject to debate.

The market-enforced profit orientation forces enterprises to try to stimulate or create those types of preferences to which they can most profitably respond. In particular, enterprises will encourage preferences for commodities or individualized professional services rather than preferences for public goods, activities that generate uncapturable external benefits, or goods and activities that depend for their value on being independent of the market.⁹⁷ The market does not simply present options, but instead operates dynamically to create particular preferences that will help enterprises to make profits. This dynamic operation is an integral aspect of a competitive market structure. Even if many aspects of the exchange relations were desirable, this autonomously operating, preference-creating aspect of the market system could reasonably be subject to a different evaluation. It seems contrary to the idea of human freedom and control to allow a structure to stimulate and help create preferences not because anyone thinks that these preferences are desirable—consider preferences for alcohol, or armaments, or . . . (place here your idea of a recognizably wasteful or offensive consumer item)—but because of a structurally based inducement to create these preferences.

From a static perspective, consumers' preferences may seem sovereign in the market. In contrast, when consumers' preferences are seen to be partially the product of the market, the market itself is made partially sovereign unless it is subject to conscious, value-oriented control. From this more comprehensive and more realistic perspective, the social order most advances liberty if it enables people to choose how they want to structure, regulate, or limit the market. Liberty requires that a democratic political realm control the market.

3. Limited Scope

A third problem with the consumer sovereignty interpretation of freedom is its limited scope. No acceptable notion of freedom could sanction a lack of control in the significant portion of human lives de-

⁹⁷ Justice Rehnquist predicts that those "who inhabit" the pharmaceutical profession will "do everything they can to generate demand for [the prescription drugs that Virginia had prohibited pharmacists from advertising] in much the same manner and to much the same degree as demand for other commodities has been generated." *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 789 (1976) (Rehnquist, J., dissenting). He implies that it is appropriate for a legislative body to reach a considered judgment concerning whether this demand should be encouraged. *See id.*; *see also* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 571-72 (1980) (Justice Powell's dictum suggesting the validity of a narrowly drawn statute prohibiting promotional advertising that encourages behavior contrary to state's interest in energy conservation).

voted to production. According to the consumer sovereignty model, however, the competitive market gives effect only to people's consumptive preferences while countenancing a lack of freedom in the sphere of production.

This point, however, may overdraw the distinction between consumption and production (some economists even say, I think incorrectly, that there is no relevant distinction). Both production and consumption involve uses of resources and reflect consumers' preferences. Moreover, aspects of production can always be turned into consumption. For example, people sometimes choose jobs on the basis of the value of the job activity to them; thus, they can engage in less profitable activities by accepting lower wages. Nevertheless, as I noted earlier,⁹⁸ the modern economy's increasingly and dominantly capital-intensive organization makes this option less available and therefore less effective as a counter to the determination of the social world by market forces. To the extent that alternative, more efficient productive practices reduce costs significantly, the cost to a worker of subsidizing a preferred practice will be great. The introduction of "efficient" techniques dramatically redistributes wealth away from workers who value the displaced inefficient practices. Given this redistribution, the worker's market-based capacity to subsidize a preferred practice may be minimal.

Technological change, increased capital intensity, separation of the worker from the means of production, and competitive markets often increase the amount of commodity goods available to consumers. This does not, however, necessarily imply an increase in people's sovereignty as consumers. At least for those consumers who value things other than commodities, and, in particular, for many who value certain aspects of the quality or nature of work, the use of these new practices, even by others, will reduce, not increase their consumer power.

This point needs some explanation. If the new practices reduce the cost of the item produced, the market value of engaging in the old method of production will likewise have been reduced. In consequence, workers who would choose to use their labor to subsidize the old method will have less wealth available to do so—their labor, which is their main form of wealth, will now be worth less. Introduction of these new practices will have had a "wealth effect"—they will have distributed wealth to those with certain preferences and skills, namely those who desire the commodities or like the new forms of labor, and away from those with other preferences and skills. The introduction of "efficient" new techniques does not cause an unambiguous net increase in

⁹⁸ See *supra* text accompanying notes 90-92.

wealth or welfare—there is too much of a political and normative dispute about how to measure wealth for that. But it does cause a redistribution of wealth—a redistribution that characteristically favors certain types of values.

The market is not equipped to respond to preferences for or against the redistribution of wealth that are created by the introduction of a new production technique. The development and mere possibility of using the innovative technique distributes additional decisionmaking power—that is, wealth—to the innovators and the consumers of the innovatively produced product. The innovators could choose not to use their innovation or the consumers could choose to buy only products made in the old way. That is, the market could respond to preferences of these now more wealthy and more powerful people to give up some of their new wealth in order to return to the old distribution. But the pre-innovation distribution may also be preferred either by society as a whole or by those producers who wish or are able to use only the old technique. The market, however, is not equipped to respond to these distributive preferences. If society or these workers rely on the market and pay the innovators not to introduce the new technique, the undesired redistribution will have thereby occurred. Legal regulation or Luddite responses appear to be the only obvious, rational ways to implement these preferences and prevent the redistribution. Popular sovereignty requires a political order that can respond to distributive preferences.

4. Market Failures

The fourth flaw of the consumer sovereignty model is its dependence on a market that operates perfectly. Only with perfection will consumers' preferences control. In fact, all actual markets are subject to market failures, with the result that markets are not fully responsive to people's preferences. For example, as noted above, if some workers and consumers valued an innovation negatively more than others valued it positively, they could in theory pay to have the innovation scrapped. In fact, this would seldom occur. Bargaining costs between all the workers, consumers, and potential innovators would be immense. Each individual would have an incentive to wait for others to pay to scrap the innovation; they would then enjoy the benefits without incurring any costs. Holdout problems would thus be severe.⁹⁹ Market failures of this sort

⁹⁹ Defenders of *Lochner*-type substantive due process will usually grant the propriety of intervention to correct market failures—although often, as in *Lochner* itself, they will be grudging in recognizing the existence of a market failure. Doctrinally, the

are duplicated in countless other contexts. Mandatory reliance on a market will systematically frustrate desired purchases of public goods and even private goods for which transaction costs are high.¹⁰⁰ In contrast, wise use of the authority to adopt rules that regulate or restrict markets and market-oriented practices would increase people's freedom, their sovereignty over their lives, and their ability to realize their preferences.

Another pernicious result of market failures is their effect on people's preferences. Given the high transaction costs necessary in order to realize certain preferences through market dealings, a requirement that consumers pursue their desires through market transactions amounts to a structural rule that increases the cost of obtaining certain types of goods. For example, high transaction costs may impede the effective exercise of people's preferences for a better, cleaner environment or for group practices that would improve the quality of social relations. The effect is to reward people (with fulfillment of their preferences) for developing the preferences that are not disadvantaged by these costs. Thus, in addition to impeding the fulfillment of people's preferences, market failures, like the market itself, systematically act upon the content of the preferences or values that people develop. Small wonder that we are as consumer-oriented and materialistic as we are.

In summary, despite the rhetorical power of the image of a market as merely facilitating consumers' freedom, the image has many aspects of a delusion. First, consumer sovereignty begins to make sense as an embodiment of freedom only if one takes for granted particular answers to many important questions—how values or preferences should be formed, how they should be weighted, and how wealth should be distributed. But the answers to these questions are precisely what should not be taken for granted. Conscious control can be exercised over the content of these answers only if collective choices shape the structures that affect the answers.

Second, even if we adopt an interpretation of freedom as the maximization of people's ability to use their wealth to realize unreflectively

intervention designed to correct a market failure will be called a permissible exercise of the police power to promote a public purpose. Yet a static orientation prevents many conservative defenders of the market from viewing collective interventions for the purpose of influencing what and whose preferences will be promoted as exercises of liberty.

¹⁰⁰ The *Lochner*-era Court reflected this market bias when it required that federal regulations focus on the commodity, not on the commodity's underlying social history, as a basis for exercising the commerce power. Compare *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating the regulation of working hours of child factory workers) with *Champion v. Ames*, 188 U.S. 321 (1903) (upholding the prohibition of interstate trade of lottery tickets).

held preferences, the market model still presents problems. The market systematically determines results in a manner that is, in two respects, inconsistent with the ideal of human agency that lies behind the market-based interpretation of freedom. Initially, this ideal of human agency requires that people have a maximum role in determining their own preferences. For this condition to be met, those aspects of the market that influence people's preferences must be made subject to human control. In addition, the prevalence of market failures of various sorts prevents the market from realizing consumer preferences. Thus, whatever the merits of a consumer sovereignty interpretation of freedom, the market system will not realize that freedom. The actual market system both influences the content of preferences and fails to fulfill them.

D. *The Liberal Critique of the Market-Determination Thesis*

The conservative defender of the market typically claims that the market's determination of outcomes embodies freedom by efficiently and noncoercively fulfilling market registered preferences. The above discussion has offered a critique of this conservative defense of the market. Many liberal reformers challenge the market-determination thesis from almost the opposite direction. These critiques reject the image of the market implicitly shared by the laissez-faire economist's notion of market efficiency, the Weberian notion of market rationalization, and aspects of the Marxist theory of the dynamics of capitalism. These liberal reformers argue that the market does not effectively enforce an efficiency orientation—that the market pressure on enterprises is sufficiently lax that owners or managers can freely pursue a wide range of courses.

According to this reformist perspective, radicals are wrong to focus so much of their critique of capitalism on the capitalist structure rather than on the capitalists. These liberals argue that the problems of the poor and the working class result not so much from the dictates of the market as from freely made but objectionable choices of ill-willed or, more often, ill-advised capitalists. These capitalists, they suggest, might be prodded through moral persuasion to pursue more enlightened policies.

This reformist challenge to the market-determination thesis is of considerable subtlety, and deserves careful consideration. In fact, this challenge holds a degree of validity.¹⁰¹ Still, there are reasons to hesi-

¹⁰¹ But see, e.g., Clifton, *Competition and the Evolution of the Capitalist Mode of Production*, 1 CAMBRIDGE J. ECON. 137, 150 (1977) (claiming that market forces

tate before adopting this reformist analysis too completely. Social and structural factors may lead society's elites to accept it too readily and too fully. Business and academic elites are likely to find the analysis personally satisfying as well as useful. The analysis stresses the importance of these elites and their advisors in effecting societal change while at the same time deflecting arguments for market regulation or other major structural change. Because of their self-interest in advancing the reformist challenge, these elites' anecdotal interpretation of their experience would provide only suspect support for the analysis. Their interpretation is likely to be unconsciously ideologically distorted in a manner that overemphasizes the enterprise's freedom from market-determination. In any event, one should note a few tentative reasons to view the perspective stressed by the market-determination thesis as the more fundamental social fact, at least for purposes of political or legal theory.¹⁰²

First, market determination need not be treated as an all-or-nothing phenomenon. The reformist challenge to the market-determination thesis claims that for various reasons, including the inevitable irrationality and mistakes of management, competition does not operate effectively enough to control completely the decisions of market enterprises. This observation is consistent with the possibility that the market structure operates as a major force determining the broad outlines of the resulting social world. Market competition will still operate as a major constraint on the options available to the enterprise and as an effective inducement both to the emergence of "efficient" productive practices and to the creation of various commodity-oriented consumptive preferences. Thus, even if market determination is incomplete—even if the thesis has been overstated—market determination is still a significant force.

Second, even if the market does not effectively control choice, it

operate even more powerfully in today's world of large corporate firms than in the earlier period of smaller atomistic firms); Gintis, *Consumer Behavior and the Concept of Sovereignty: Explanations of Social Decay*, AM. ECON. REV., May 1972, at 267 (Papers and Proceedings) (offering a critique of reformist analysis and comparing Galbraithian theory of "producer sovereignty" with more radical economic models).

For an analysis supporting the reformist thesis, an excellent survey of the literature, and a thoughtful application of that thesis to one area of law, see Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403 (1985).

¹⁰² For purposes of promoting ethically and politically responsible individual choice within a structure, the reformist perspective may be more important. In these circumstances, too much emphasis on the market determination thesis also serves the ideologically repressive role of justifying and encouraging passive acceptance of market forces. Likewise, as Brudney demonstrates, the reformist thesis supports regulation to prevent self-serving action by corporate managers. See Brudney, *supra* note 101.

may still be appropriate to assume that it does for purposes of evaluating the permissibility of legal regulation of the market. The legal order may require a profit orientation—for example, by prohibiting corporate waste or imposing fiduciary-like obligations on corporate officers and directors.¹⁰³ Moreover, entrepreneurs implicitly assert the dominance of a profit orientation and the separation of the enterprise from the household when they deduct expenditures as business expenses. In this situation, the entrepreneur should be estopped from objecting to regulation of the market on the grounds that her own value choices—that is, her consumptive decisions—not a profit orientation, control. To the extent that a profit orientation is either legally required or is a premise of special privileges provided to economic actors, it may be appropriate to assume that profit orientation controls for purposes of evaluating arguments concerning the permissibility of regulation.

Third, even if the market-determination thesis as formulated in this section is not correct, it still may be effective as a ruling ideology. The power of even false belief to control behavior may justify regulating that behavior in the same way that would be proper if the belief were true. As long as people holding decisionmaking power believe that a profit orientation is structurally or legally mandated and is legitimate, they will act roughly in accordance with the market-determination model—even if the dictates of the market are contrary to the interests of society. They will do so even though they would not engage in such behavior in other, less structurally controlled contexts. In this situation, either or both of two responses may be appropriate. Initially, the reformer could expose both the inaccuracy of the market-determination thesis and the damaging results of acting as if it were true, thereby encouraging a sense of freedom to engage in new and better types of behavior.¹⁰⁴ Alternatively, the government might regulate the behavior. This alternative response to the abdication of responsibility on the part of ideologically influenced profit-oriented decisionmakers may be criticized in that the response, in effect, concedes their abdication. Arguably, the collectivist regulatory response undercuts the first re-

¹⁰³ The legal order is inconsistent in this respect. Legal opportunities for non-profit-oriented economic behavior by corporate elites certainly exist. Often their existence reflects the influence of progressive, democratic, or popular forces that demand "corporate responsibility" or "corporate citizenship."

¹⁰⁴ In the text, I hypothesize that this ruling ideology may lead corporate decisionmakers to pursue strongly profit-oriented policies rather than make more civic-minded choices. Alternatively, this false-but-ruling ideology of enforced profit-orientation might, instead, deflect regulation of their illegitimate power. See Brudney, *supra* note 101, at 1443-44 (arguing that neither markets nor current law prevent corporate management from pursuing their own chosen policies, including the policy of lining their own pockets at the expense of shareholders).

sponse—the attempt to show that market determination is not true, or at least not entirely true. Nevertheless, I think that historical circumstances, particularly the pressing need for an assertion of conscious human control, justifies this collectivist, political response. This conclusion is reinforced by the considerable extent to which market determination does occur, as well as by my fourth comment below.

At present, our society allows many people to have disproportionately great amounts of property and power. We accept this inequality in part because of our society's belief in the proclaimed efficiency of the market.¹⁰⁵ The propriety of corporate decisionmakers' authority to make decisions for the enterprise rests largely on the assumption that they are willing and relatively able to follow market dictates. That is, society accepts the authority of these corporate executives on the tacit understanding that their decisions will be profit-oriented. Likewise, investors typically provide resources to corporate officials only because of the officials' presumed skill at, and dedication to, the pursuit of profit by legal means.¹⁰⁶ Certainly the very falsity of this justification of inequality should not be transformed into a justification for asserting or protecting a right of the improperly advantaged people to use their greater wealth or power to dominate others. This observation leads to my fourth and final response to the reformist challenge to the market-determination thesis. To the extent the thesis is not true, the existing inequality of wealth and power is even less legitimate and regulation that reduces this form of wealth and limits this power is even more acceptable.

These four comments relate to three different possible factual possibilities, each leading to the same conclusion concerning the permissibility of regulation. First, market determination of market-oriented decisions may prevail. If this is this case, promotion of human freedom requires the recognition of the priority of political decisionmaking. Second, although market forces are not determinative, market-oriented decisionmakers may follow legal or institutional demands that they orient their decisions toward profits and, thus, act as if the market-determination thesis were correct. As in the previous case, corporate decisionmakers cannot claim that intervention would interfere with their freedom. Third, neither the market nor institutional demands may be determinative, so that decisionmakers are free to pursue their own poli-

¹⁰⁵ See, e.g., J. RAWLS, *supra* note 11, at 78.

¹⁰⁶ See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 804-06 (White, J., joined by Brennan & Marshall, JJ., dissenting) (asserting that corporate investors are united by the desire to make money and not by the desire for self-fulfillment through corporate speech).

cies or interests. The primary justifications for either investors or society as a whole to place capital in the hands of these decisionmakers depends on their not using it merely to pursue their own ends. Therefore, even in this case, the illegitimacy of the power of these decisionmakers justifies legal regulation. Under each scenario, since the corporate decisionmakers have no legitimate claim to the freedom that is at stake, freedom can only be identified with the opportunity for collective or political regulation.

IV. THE DIFFERENCE BETWEEN USE OF PROPERTY IN EXCHANGE AND OTHER USES

Doubts may remain about the validity of the market-determination thesis. Therefore, in this section I provide an alternative argument justifying the legitimacy of political control over resource allocation. This section will develop two theses. First, a person's use of property in an exchange differs fundamentally from other uses of property; similarly, people's interaction in a voluntary market exchange differs fundamentally from other, constitutionally protected forms of voluntary interaction. Second, these differences are relevant from the perspective of a defensible, formal conception of liberty. Specifically, these differences show that the regulation of exchange¹⁰⁷ does not infringe on liberty, while the regulation of other uses of property is presumptively an objectionable infringement. This second thesis relies on the claim that the essential function of exchange is to serve as an allocation device. I argue that exchanges should be subject to political control for the same reasons that allocations generally are and should be subject to such control.

Two observations suggest relevant differences between market exchanges and other, protected uses of property. First, for purposes of a market exchange, the owner values the property that she gives up only instrumentally as a means to influence or gain temporary power over another. That is, in this context the owner values property solely for its exchange value. By contrast, the use, personhood, and welfare functions of property (the first three functions discussed in Part I) do not involve the use of property as an instrument directed toward obtaining other resources by means of influencing another's behavior. With respect to these functions, the owner values the property itself or values her own decisionmaking authority, rather than valuing the property purely as a means to exercise power over others. When the government restricts

¹⁰⁷ References to "regulation of exchange" are intended, unless the context suggests otherwise, to include regulation of all the activities oriented toward market exchanges—for example, production as well as commerce.

choices related to the use, personhood, or welfare functions, it restricts people's autonomy or liberty. In contrast, when it restricts exchange-oriented practices, the government restricts people's opportunity to exercise power over others, not people's own autonomy; that is, it restricts only a purely instrumental role of property.

Second, exchanges are a means to achieve allocations. The purpose of exchange activity is to allow one person to obtain goods or services from another. Of course, the results of exchange may contribute to a person's substantive liberty in important ways. This contribution, however, occurs in the same way that any desirable allocation of resources contributes to liberty. Any allocative practice can contribute to substantive liberty by placing valued resources at one's disposal. Moreover, any particular allocative practice will result in allocations to which some people will object. Society can and should evaluate the resulting allocation in terms of fairness, general welfare, or societal self-definition. Regulation of exchange is thus more like a collective decision concerning allocation than like a restraint directed at a person's substantively valued activities.

A possible counterargument could claim a fundamental status for exchange. This argument emphasizes that liberty must include voluntary interaction, of which exchanges are an important example. This argument also notes that all interactions involve people influencing each other, which is merely a broader description of the aspect of exchange that I describe as the sovereignty function of property.

This counterargument starts out right. Personal liberty certainly extends beyond the opportunity to act alone to realize one's values. Liberty encompasses the opportunity to engage in interaction with others. A person's ability to understand herself, live her values, and satisfy her desires regularly depends on securing the association and cooperation of others. But interactions can take various forms. Interactions in which property is used for exchange differ fundamentally from constitutionally protected instances of interactive or interpersonal liberty. Two differences between personal-liberty-embodiment interactions (protected) and exchange-oriented interactions (unprotected) are central to their different relationship to liberty. First, if property plays any role in a given protected interaction, its role, like the role of the other party, is an integral part of the activity that is valued in itself. This is true of the use of property in activities that are aspects of freedom of association.¹⁰⁸ Both parties value the use of the ball in the game, the hall for the

¹⁰⁸ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (contraceptives); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (house or apartment).

meeting, or the boat for fishing, as well as the interaction with other people. Second, the exercise of power is not an essential or inevitable aspect of protected interactions: influence in these interactions can take forms other than instrumental manipulation.

The groundwork for seeing both of these distinctions was laid in Part I's discussion of the allocative and sovereignty functions of property.¹⁰⁹ In the context of exchange, these two functions are flipsides of each other. The allocative side emphasizes the result—what a person gets. The sovereignty side emphasizes the means—the use of property to exercise power over another. In an exchange, each party conditions the availability of a resource on the other party's doing something she would otherwise not choose to do. This exercise of power is inherent in an exchange. In contrast, in nonmarket voluntary interactions, the structure of the situation does not inevitably imply that either person views her response as undertaken only to secure some service or resource and as otherwise undesired. Often neither person gives up anything except for the use of her time and resources in a manner that she substantively values.

In order to examine the potentially different nature of the influence exerted in nonmarket exchanges, I will contrast this form of interaction with the market-exchange form from two perspectives: the perspective of the influencing party, and the perspective of the influenced party—although, of course, each participant plays both roles. In nonmarket interactions, a person exercising influence relies on a combination of the context of the interaction, the property that she makes available to be used in the interaction, and her personal qualities—for example, her personality, physical strength, beauty, interactive skills, intelligence, or persuasive skills—in order to secure the other's voluntary response.

Legal regulation of people's use of their personal qualities to obtain others' participation in interactions seems intuitively offensive as an overt limitation on liberty. Two observations help explain this intuition. First, as discussed in Part II-B, these personal qualities are much more integrally connected to our notion of the person than is wealth—particularly wealth that a person would willingly give up in an exchange. This connection of personal qualities to our notion of the person makes their distribution seem more "natural" than is the overtly conventional distribution of wealth.¹¹⁰ Second, when a person relies on

¹⁰⁹ See *supra* notes 15-24 and accompanying text.

¹¹⁰ Collective decisions inevitably affect the "exchange value" of different forms of such qualities as intelligence, beauty, and strength. This societal role provides one of several justifications for collective regulation of the use of these qualities in the context

personal qualities to exercise influence, she generally does not transfer or lose the resource—her own skill or other personal qualities. At most, she commits time and initiative to the interaction. The interaction often enhances her skills, knowledge, or other qualities. She frequently values her own involvement in the interaction.

Although the property that the influencer makes available for the interaction typically is not tied to her personhood in the way personal qualities are, many of my observations about personal qualities still apply. The influencer often does not transfer or lose the resource; at most, she uses it up. The possibility of use of the property in the interaction does not relate to its use value being lost to its owner. Rather, this possibility increases its use value to her. Certainly, the influencer may substantively value the joint use itself and not view the property merely as a means to induce the other to engage in otherwise unwanted action.

Whether or not the use of property is involved, an even more important difference between market-oriented interactions and protected interactions relates to the perspective of the party influenced. Whether payment or persuasion secures the influenced party's performance, the performance is in a sense voluntary. In both cases, at least at the time of the exchange, the person believes she has gained from the interaction. Nevertheless, in one crucial respect the party influenced will view the two forms of securing her performance as strikingly different.

When a person performs in order to secure the other's property, she presumably would have preferred to have already possessed the payment, thereby avoiding the necessity of her own performance. The owner of property has exercised power over her. This experience is not one of freedom. In contrast, in conversation, in play, in political, social, or religious activity, in friendships and loving relationships, and in some forms of joint productive activity, the structure is always consistent with the influenced party viewing her response as itself desirable. She need not view her performance as merely a means to obtain a transfer of rights, but may view it as itself a valued engagement. For both participants, the interaction is often more a mutual association than an exchange. The associate, whether a friend, playmate, lover, or political or cultural ally, offers a mutually valued association or offers support in engaging in a desired performance.

The exercise of power over others is therefore not inherent in the formal *structure* of nonmarket interactions. In practice, however, these

of market exchanges. Outside the context of exchanges, however, direct restrictions on the use of these personal qualities in one's chosen activities seems more obviously to be an objectionable collective interference with liberty than does an interference with the use of wealth to which a person has no natural claim.

nonmarket interactions often have a dark underside. People sometimes experience their interpersonal or associative interactions as exchanges rather than unifications. They may experience their own performance as burdensome rather than as itself valuable, and view the other's offers as manipulative exercises of power. Moreover, in practice, exchange-oriented activities often have a bright underside. Even if it is not a feature of formal liberty, there is nothing necessarily evil about the exercise of power in exchange. The point here is only that the instrumental or power-exercising aspect of exchange is not an inherent or essential feature of the associative interaction.

Thus, these other forms of interaction and property use differ from the market exchange in two interrelated ways. They differ first in the way each participant values the interaction itself and values, for purposes of the interaction, the performance or property that she brings to the interaction. Second, they differ in the way each participant experiences treating the other and being treated by the other. From the perspective of formal liberty, these differences are crucial.¹¹¹ A requirement that government respect individual autonomy would mean that the government could not act to restrict an individual in using herself or her property to express or embody her values. From this it follows that the government could not act to restrict interactions based on unity of values and noninstrumental aspects of association. Restrictions directed at these forms of interaction would be directed at a person's liberty.

No useful formal notion of liberty would include the idea that a person has a general right to exercise power over another, either to obtain the other's performance or to achieve a preferred distribution of resources. Respect for a person's use of herself or her property in expressing or embodying her values certainly does not require such a right, except to the extent she values exercising power over others. In market exchanges, however, the participants necessarily exercise power over each other.

Merely because the government recognizes unequal claims on wealth does not mean that it must also recognize a right of people to use this unequal wealth as a means to exercise power over other people. Unequal distributions of decisionmaking authority over resources exist only because social practices and rules recognize the claims that define these distributions. Perhaps the only justification for legal rules

¹¹¹ These differences certainly do not imply that market exchanges are not useful to people and society. People's actual opportunities, their substantive as opposed to formal liberty, depend to a great extent on the production and distribution of wealth. Exchange is often an effective means by which individuals secure resources and by which society promotes desirable allocations of resources.

or social practices that distribute claims to material resources unequally is that such rules promote the general welfare by increasing the total wealth, or that they promote society's self-definition and its preferred forms of social relations.¹¹² Certainly inequality is not intrinsic to liberty. If society allows unequal wealth to exist only for these policy reasons, it should be legitimate for society to restrict those aspects of inequality that are socially undesirable. A useful formal notion of liberty is implicated by restrictions aimed at people's use of property in their own self-expressive activities but not by restriction on people's use of property to exercise power over others.

Once the various functions of property are disaggregated, it is obvious that society's decision to adopt a particular distribution of property for individual use need not correspond to its view about the role or proper distribution of property as a means to exercise power over others.¹¹³ Particularly when property is unequally distributed, permitting unrestricted "voluntary" exchange undermines the experience of liberty by allowing the domination of some people by others. Society can properly assert a right to regulate or block certain exchanges. This authority follows from the unavoidable and inherently collective responsibility to adopt the rules or practices that will determine both the appropriate distribution of wealth for use and the appropriate distribution and form of the power to control others. The two allocations need not correspond to each other.

Both liberals and libertarians should approve of equalizing the distribution of wealth.¹¹⁴ Rules or practices that recognize claims on wealth and thereby control the distribution of wealth are inherently a matter of collective practice, and thus should be a matter of political choice. A decision to recognize only equal claims would be permissible, even though not mandated. An allocation system might even dispense with market exchanges entirely by allocating property to people only as they are prepared to use it. Unlike rules that prohibit a person's valued use of her property, such an allocation system would not abridge formal

¹¹² See *supra* text accompanying note 105.

¹¹³ Although he did not disaggregate the notion of property, and although he had other objections to inequality, Rousseau, like Marx, recognized that property exchanges could be exploitative and destructive of liberty. See Rousseau, *supra* note 41, at 217 n.11 ("Where [millionaires and beggars] exist public liberty becomes a commodity of barter. The rich buy it, the poor sell it.").

¹¹⁴ See Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980) (arguing that both liberals and libertarians should share the view that the law of contracts should have some egalitarian redistributive function); see also Baker, *Utility and Rights: Two Justifications for State Action Increasing Equality*, 84 YALE L.J. 39 (1974) (arguing that both a utilitarian and a rights analysis require some societal intervention in the market in order to increase equality).

liberty.

Despite being consistent with formal liberty, extreme egalitarian or use-oriented allocation systems might be substantively undesirable. These allocation systems might not effectively promote the most socially valuable uses and distributions of property. Most theorists conclude that these concerns justify some inequality in the distribution of wealth and power and justify the recognition of some role for both exchange and the corresponding opportunity to use property to exercise power.¹¹⁵ All of these justifications for inequality respond to concerns for social self-definition, general welfare, or substantive liberty. Such considerations are appropriate, even inherent, in choosing allocation rules. The exchange process is merely one of various practices that a society might recognize as a means to allocate claims on resources. These same considerations are also appropriate reasons to decide to regulate the exchange process.

In summary, a plausible argument that regulation of exchanges and productive activities necessarily interferes with liberty must rely on a formal conception of liberty. This is because regulations typically promote plausible, although contested, substantive conceptions of liberty. I have argued that even a formal conception of liberty does not support objections to regulation. The use of property in exchange differs fundamentally from those uses of property that are protected as aspects of liberty. The use of property in exchange serves an allocative function and involves an exercise of power over others.¹¹⁶ From the perspective of respecting people's expression of their substantive values, a limit on people's use of their property to exercise power over others is unlike limits on their use of property directly in self-realizing activities. The opportunity to exercise power over another cannot be an aspect of an appropriate conception of formal liberty.

I have also argued that the regulation of exchange is more like a rule establishing a socially desired distribution of resources than like a rule abridging a person's liberty to use her resources in her substantively valued activities. The exchange is merely one of various collectively recognized means of obtaining resources necessary for substantively valued activities. Normally, an exchange serves this instrumental, allocative function rather than being the valued use itself.¹¹⁷

Collective control is proper whether we view exchange as a means to exercise power or as a means to secure desired resources. It is proper

¹¹⁵ See, e.g., J. RAWLS, *supra* note 11, at 78.

¹¹⁶ These are the allocative and sovereignty functions described in Part I.

¹¹⁷ This last point is subject to challenge and will be reconsidered and partially defended in Part V.

because exercising power over others is not an inherent aspect of liberty and because allocative or distributive rules are inherently a matter for collective choice. These two observations are related. The obvious justification for allocative rules resulting in unequal claims to wealth is that the rules, and hence the inequality, serve such collective values as substantive liberty. As disaggregation of the notion of property makes clear, a collective decision to allow unequal distribution of property's use values does not necessarily entail the same distribution of the right to use property to exercise power over others. The use of property to exercise a disproportionate amount of power over others should be allowed only to the extent that the opportunity to use property in this way contributes to the collectively desired quality, general welfare, or justness of society. Exchanges should be allowed when they make such a contribution. When and under what conditions exchanges will do so necessarily and properly depends not only on empirical information and historical conditions, but also, most importantly, on collective, political value judgments.

V. THE SUBSTANTIVE VALUE OF PRODUCTIVE ACTIVITIES

People sometimes value their market-oriented productive activities as much as or more than they value their protected, expressive conduct. This may reflect in part a need to stave off boredom, but people also value work as an end in itself. People define themselves through making productive or creative contributions to society, exercising skills, and having their skills and contributions recognized by others. These observations suggest an important similarity between market-oriented activities and other substantively valued expressive activities. The issue addressed in this section is whether this similarity implies that regulation of productive activities should be treated like other limitations on liberty rather than like property allocation rules.

People value different aspects of economic activities. In distinguishing income taxation from forced labor,¹¹⁸ I have argued that:

A person may (positively or negatively) value (1) the laboring activity, (2) the liberty to choose among various activities given the nature of the activity and the reward for performance, and (3) the reward itself. Taxation of earnings relates only to this third factor; and taxation is only one societal practice among a wide range of societal practices that deter-

¹¹⁸ Nozick has suggested that the two are indistinguishable. See R. NOZICK, *supra* note 1, at 169.

mines the reward.¹¹⁹

Similar, although not identical, distinctions justify the view that regulation of people's productive activities is not an infringement on their liberty, even though they may substantively value these activities.

Regulation of economic activities should not be equated with taxation. Regulation has a broader impact. Often regulations relate to issues such as who can engage in a business, the terms of relations between employer and employees, what economic activities may be engaged in and by what techniques (such as rules relating to safety, environmental effects, financial reserves, and advertising), and how an enterprise may interact with customers and competitors. In other words, economic or market regulation requires or prohibits certain practices. In this respect, economic regulations seem to be more like forced labor than like taxation. Despite this superficial similarity, however, there are significant differences between forced labor and economic regulation; and although the former is obviously a violation of formal liberty, the latter is not.

It happens occasionally that regulations of economic activities—such as workplace safety regulations—restrict an activity that the worker substantively values or require an activity that she substantively disvalues. My guess is that there is a class-based tendency for observers to overestimate the frequency of this occurrence, a tendency that distorts our image of economic regulation. Usually, the benefits of economic regulations are ones that at least some people substantively value—like a safer workplace, a better physical environment, or more democratic and less dictatorial employment relations. The detriments of economic regulation, however, generally involve curtailment of activities that are valued only instrumentally, or require activities that are only instrumentally disvalued.¹²⁰ The typical objection is that the regulation restricts an efficient or a profitable practice, and that any gain from the regulation is not worth this cost. Although the person who objects may substantively value the overall productive activity, typically she does not substantively value the feature regulated—for example, the unsafe condition, the pollution, or the high price to the consumer. Moreover, in

¹¹⁹ Baker, *supra* note 18, at 398.

¹²⁰ I suspect that reports of workers disliking governmental regulations, such as safety rules, often reflect a context in which management's organization of the work activity, the equipment it provides, and the productivity that it demands make the rule seem burdensome. In other words, the situation should not be viewed as one in which the practices required by the rule are disliked in themselves. Rather, the worker's dislike of the rules reflects management's ability to transfer all or a portion of the instrumental cost of the rule to the workers. See *supra* note 89.

many cases where the objector does substantively value the restricted activity, the activity is only restricted in a market context—the objector is free to engage in the activity on her own. For example, regulation of the legal profession often does not—and should not—prevent a nonlawyer from offering free legal advice to her friends.¹²¹

Thus, the objection to an economic regulation is generally not that the regulation prohibits a substantively valued activity. Rather, the objection is that the regulation affects the valued activity's profitability.¹²² People are more likely to engage in an activity if they can get paid for it. Given the need for an income, we can spend more time painting, cooking, or practicing public-interest law if society allows us to receive payment for these activities. The regulations therefore operate like allocation rules. Rather than prohibiting substantively valued behavior, they take away wealth from some people—those who either like or would benefit from the prohibited practices—and allocate wealth to or advance the substantive values of others.

Regulations of market practices are typically intended to modify the consequences of people's use of property to exercise power over others, the distribution of wealth, or the preferences that the market processes generate. Economic regulations, with the possible exception of zoning, seldom have as a purpose the prohibition or restriction of substantively valued activities. Even zoning normally is intended merely to regulate the location of valued activities, not to prohibit them.

Thus, in terms of their effect on activities that people substantively value, regulations of market practices are more like taxes than like forced labor. Like taxes, they primarily affect the instrumentally valued economic reward accompanying market practices. Like taxes, they sometimes leave a person without the resources needed to engage in some substantively valued activity—a result inherent in all allocation rules. Usually, however, if a person values an activity itself, she may still engage in it if she is willing and able to forego an economic return.

The above argument moves too quickly. It is not only the miser, the confirmed haggler, and the empire builder who substantively value economic activities. Many other people substantively value economic activities specifically as economic activities. Restricting an activity to nonmarket contexts can change the quality of the activity. The argu-

¹²¹ This conduct, when not engaged in as a profession, should constitute protected freedom of speech and association.

¹²² The regulation may also restrict a consumer's access to a valued activity. This complaint, however, can be met by the same observations made with respect to the restriction on profitability: unless the restriction is the purpose of the regulations, the regulation is like any allocation rule in that it affects the distribution of decisionmaking options.

ment also studiously ignores the tremendous consequences that regulation can have for the actual opportunities to engage in a valued activity. Part IV emphasized important ways in which market-oriented activities are unlike other, substantively valued personal or interpersonal activities.¹²³ Nevertheless, people may substantively value both. The present objection concerns the relevance of the differences.

This question has already been answered. Once society provides for everyone's basic welfare claims, the formal concept of liberty does not require any particular approach to the allocation of resources.¹²⁴ Liberty requires only the opportunity to use resources either alone or in association with other people in the realization of personal values. Respect for individual autonomy implies that, in general, the state should leave these decisions to the individual.

In contrast, the availability of market-oriented opportunities necessarily will depend on collective choices. First, because other people's willingness and ability to pay is a crucial determinant of the content of economic opportunities, the existence of these opportunities depends on society's recognition of other people's claims to resources. Second, because these opportunities depend on consumers' money-backed preferences, they will depend on collective practices—including the society's choice of legal rules and such governmental activities as school curricula and immigration laws—that affect the content of people's preferences. Third, because market exchanges involve the exercise of each participant's power over others, society must have the right to determine which exchanges will be permitted. Thus, the existence of one set of economic or market-oriented opportunities rather than another—and the distribution of these opportunities—is something that society creates. A person should therefore not have a liberty-based constitutional complaint if a regulation designed to promote the general welfare or society's self-definition eliminates a particular economic opportunity.

For the above reasons, a person wishing to engage in a prohibited economic activity must concede that she has no right to the existence of that particular opportunity. Still, she might argue that the state should not act purposively to eliminate an opportunity. Therefore, the government should not refuse to enforce people's agreements, prohibit their voluntary interactions, or regulate their productive practices.

This argument is also wrong. The aim of regulating market-oriented activities is not to restrict autonomy but to allocate resources and to control exercises of power. The prohibited aspects are those that re-

¹²³ See *supra* notes 107-111 and accompanying text.

¹²⁴ See, e.g., Baker, *supra* note 1, at 949-63.

late to the distribution of resources and control the exercise of power over others. Society must and justifiably can make choices about the distributive or allocative order. The inevitable effect and appropriate purpose of these choices is to create or favor the opportunity for some activities, which inevitably eliminates or disfavors others. Likewise, a workable formal notion of liberty does not require protection of exercises of power; every society will permit some but not other exercises of power. Collectively accepted limitations on exercises of power also purposefully favor some activities while inevitably restricting activities that some people may value. In the market context, liberty requires only that a person be free to engage in those activities or roles that society makes available and in which, given the collectively adopted allocative criteria, she is qualified to engage.

CONCLUSION

Respect for liberty no more requires that legal rules permit all exchanges than it requires that legal rules permit people to make use of any resource they want. Neither restrictions on exchanges nor limitations on using somebody else's property without permission restrict people's choices concerning their own activities—activities in which they may use whatever resources that they can obtain. Neither set of restrictions limits formal liberty. Each set involves establishing the practices whereby people can obtain resources. Each set will promote various property uses and various resource allocations. Choosing rules that permit or restrict various types of exchanges and various forms of appropriation—or any other, necessarily culturally or politically chosen, set of allocative rules—will result in some people being deprived of opportunities that they desire. When legal rules create a right to exchange title, they create the sovereignty aspect of property. This aspect is not inherent in property. No particular collection of aspects or rights need be combined into any essential notion of property. Property can be valued for use-related purposes in the absence of this sovereignty aspect. The sovereignty aspect is, however, an inherent aspect of exchange, and thus may appropriately be regulated in a manner that society concludes will best protect against oppression and best promote substantively valued activities.

Legal rules address both how people may use their own resources and how these resources are allocated. Respect for people's liberty or autonomy constrains collective decisions about the use of one's property. But rules regulating exchange-oriented economic activities are usually directed at, and primarily affect, only the allocation and distribution of property. Respect for liberty implies expansion rather than restriction

of collective control over the constitutive rules that govern the allocation and distribution of property. While a formal conception of liberty encompasses the right to participate in this collective decisionmaking, it does not dictate the existence of any particular set of economic opportunities. Formal liberty is satisfied as long as people are allowed to pursue the opportunities that the rules make available.

If liberty means more than this, I suspect the additional aspect does not require a particular set of allocative rules—rules that are basically instrumental and collectively self-definitional. Certainly liberty does not require unrestricted individual opportunities to engage in exchange transactions. Rather, if respect for liberty means more than political choice in regard to allocative rules and economic opportunities, I suspect this additional aspect requires the further development of the welfare and personhood functions of property in a manner that mandates guaranteed, universal access to, and control over, meaningful work.