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THE NEW AWAKENING: JUDICIAL ACTIVISM IN A CONSERVATIVE AGE*

by
The Honorable William Wayne Justice**

I.

WHEN I was a law student at the University of Texas, it was not uncommon for our professors to share with us their perceptions and opinions of how the form and the substance of the law would evolve in future years. Professors relished their frequent success in predicting the outcome of pending Supreme Court cases. In addition, most professors vociferously expounded their strongly held opinions concerning which particular course the law in their field would and should pursue. At the time, I was new to the formal study of law and somewhat overwhelmed by its intricacies and vastness. Because I was almost convinced that the law had a will of its own, I listened to their predictions with some degree of skepticism.

As it turned out, however, many of those professors possessed remarkable foresight, and their comments often proved portentous. For instance, the views of Dean McCormick, who wrote the first edition of McCormick on Evidence1 in 1954, provided much of the framework for the promulgation of the Federal Rules of Evidence. In addition, Professor Kenneth C. Davis, who has authored the definitive administrative law treatise since 1958,2 laid the scholarly groundwork for the explosive growth of administrative law.

In addition to being skeptical about these professors’ insights into the future, I was never really sure of what use the predictions could be. After all, as a law student, wasn’t my task simply to learn what the law was, or at least how to research the law to determine what the law probably was? As soon as I began to practice law with my father, however, I realized that a lawyer’s duty as an advocate requires him or her not only to contemplate, but actually to participate in the development of the law. A lawyer’s job is made much easier if he or she has some understanding of the inclinations of the judges before whom the lawyer practices, and of the direction in which institutional forces are moving legal doctrine in a particular field. This understanding is equally necessary for both proponents and detractors of the

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substantive developments of legal doctrine. A proponent may more readily prevail if his or her argument is structured in a way that advances the trend, while a detractor may insulate an otherwise unpopular substantive position in the rhetoric of the day, thereby ensuring that it is at least considered seriously.

I am not thrusting myself into the company of noted scholars such as Dean McCormick and Professor Davis. However, giving consideration to the general public perception—whether just or not—that I am a liberal, activist judge, I am perhaps qualified to express an opinion to you today regarding the future of activism in this age of conservative judges.

It may be a matter of surprise to you that, recently, I have been reading and considering the writings and decisions of particularly notable conservative judges and commentators. My real interest in their work began when I realized that one school of the faction-ridden conservative movement, the libertarians, is frankly relying upon natural law as the basis for advancing its pronouncements. Since I have been interested in natural law for a number of years, I began to delve considerably deeper; and by reason of my somewhat unstructured studies, I am now emboldened to predict, in this undeniably conservative era, the future course of certain facets of constitutional law.

As employed by judges and legal scholars, natural law is an expression of the point of intersection between law and morals. Natural law mediates between a moral sphere, which limits the powers of government, and the realm of law proper. Moral concepts by their nature are subject to competing theories that require interpretation. The text of the Constitution, which is silent on the matter of how to define or interpret its principles, traditionally has been supplemented through interpretive techniques like the natural rights methodology. Used in this way, natural law itself may be described as contentless, merely providing a means for scholars to express constitutional values.

While it would seem logical to find the constitutional basis of rights derived from natural law in the ninth amendment, which refers to rights not enumerated in the Constitution, or in the privileges and immunities clauses of the fourth and fourteenth amendments, this has not been the case. For the most part, the language of natural law provides the basis for interpreting the enumerated rights in the Constitution and their concomitant moral concepts, specifically, free speech, free press, and free exercise of religion in the first amendment; the ban against cruel and unusual punishment in the eighth amendment; the equal protection of the laws in the fourteenth amendment; and due process regarding deprivations of life, liberty, and property in the fifth and fourteenth amendments.

4. Id.
5. The use of natural law principles has been pervasive in constitutional law-making. The Court, invoking natural law to constitutionalize the common law standard of beyond a reasonable doubt in criminal proceedings, stated:

   It is critical that the moral force of the criminal law not be diluted by a standard
Throughout our legal history theorists have deeply probed the flaws in natural rights theory. It behooves attorneys, now, to recollect the many uses of natural rights theories and to develop cogent criticisms of their use. For as I have stated, I believe that we are entering an era when these ideas will reappear in service of conservative ideology, and that property rights and economic interests will emerge as sacrosanct.

In making my predictions, I am cognizant that many judges of conservative disposition would deny the existence of any political component in their decisions. Indeed, all judges, including myself, would make the same protestation. But Judge Skelly Wright may have expressed the actualities, when he said: “The connection between a mere consistent pattern of results and a political program lies in the decision maker’s mind and thus is impossible to bring to light other than circumstantially.”

If, then, I make statements indicating the probability of a conservative program in the making, I do not mean a program of deliberately formed goals. Instead, the agenda will probably develop as a “mere consistent pattern of results,” and the proponents of the results undoubtedly will announce them as being derived from neutral principles of interpretation. But all of these professedly neutral principles, as espoused by conservative scholars and judges, lead inevitably to the conclusion that property rights and economic interests are virtually inviolate. This is not an inconsiderable circumstance, in my opinion, in reaching the conclusion that a political program exists, even if its presence is unrecognized or disaffirmed by its proponents. I should point out, finally, that, in making these introductory remarks, I am, for the most part, paralleling the arguments made by conservative critics of the Warren Court.

II.

The broader context of these remarks will be, as with so much legal commentary presently, the constraints on legitimate interpretation of the Constitution. We may regard the elucidation of such interpretive inhibitions as only the rightful task of judicial authorities, or pragmatically, we may consider only the need for judges to render interpretations that the public perceives as valid. In either case, the ensuing remarks are firmly planted in

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of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.


8. *Id.*
the context of the interpretive, rather than the noninterpretive, tradition of legal commentary.

If, as Judge Wright believed, judges find "repositories of value" outside themselves and their theories of political morality to which they can turn to decide hard cases, we must ask why repositories such as tradition and consensus recur, despite shifting political agendas and changing political climates. One nearly universal repository, that of natural or fundamental rights, promises to provide the basis for significant law-making in the future, precisely because it is the shared rhetorical posture of various conservative lawmakers and commentators.

If these remarks smack of value skepticism, my response must be that doubt is useful in any age, particularly when strict notions about the right ordering of society announce themselves as neutral principles of interpretation. For the moment, allow me to place us at the rhetorical crossroad that I will term fundamental rights. As the Supreme Court has said, this term has replaced the term natural rights. At this mental juncture, we meet advocates of the original intent posture, proponents of traditional or consensus values, and the law and economics school. All suffer nausea in response to the value-suffused law-making that has gone before; all have untroubled confidence in their ability to look back to a bygone day to find truth; and all share an innately conservative view of personal liberty. Why do they all find repose in the concept of fundamental rights? The answer is, their interpretive stance is backward-looking; and, looking back into the far-distant past, they find support for their abstractions concerning fundamental rights. Looking forward, they see a popular majority that shares their constricted view of personal liberties, and that welcomes their assurances of economic liberty. These two visions may well be distorted, as I will seek to show. Hence, my assumed posture of skepticism.

The search for fundamental rights begins with the legal scholar's quest for tradition. But where must the scholar seek it and from whom? The framers were heirs to a rich natural law tradition of their own, one very different from that evoked in their names. Modern Americans have a harder time. In this regard, John Hart Ely cogently asked: "Is Henry David Thoreau an invocable part of American tradition? John Brown? John Calhoun? Jesus Christ?"

In seventeenth century England, natural law was legally supreme, unwritten, drawing its content from enactments, custom, usage, and reason; moreover, it was judicially enforceable. Natural law's foundations in reason were captured in that society's legal concept of common law. The tradition of natural law survived even the encroachments of an eighteenth century Parliament that was, in most respects, legally supreme. For example, in

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12. Id. at 853 n.41.
1766, in response to a crisis in parliament concerning taxation without representation, Lord Camden was moved to declare the act: "illegal, absolutely illegal, contrary to the fundamental laws of nature, contrary to the fundamental laws of this constitution . . . [a] constitution grounded on the external and immutable laws of nature."

The framers of our Constitution were greatly influenced by Blackstone and Locke. Indeed, the most often cited passage of Blackstone's Commentaries was: "[T]he law of nature is of course superior in obligation to all others . . . No human laws are of any validity, if contrary to this." Locke's concepts of life, liberty, and estate gained lasting importance, through the enshrinement of these principles in the Declaration of Independence—itself a triumph of natural law principles. The declaration was "submitted to a candid world." It was an appeal for recognition of the right to revolt, couched in the catch-phrases of the day, which evoked perceived universal human truths. Both the writings of Locke, on which it was modeled, and the declaration itself were documents of revolution, premised on the English intellectual tradition that Parliament's authority was legally limited by an unwritten constitution incorporating natural law.

Both stood for the proposition that natural rights were the protected arsenal of the people, to be wielded, if necessary, against tyrannical governments. When the written Constitution crystallized a part of the unwritten law, the judiciary continued to ascertain fundamental law in other contexts and gave it constitutional significance. Natural law came to be argued to courts as a vindication of the rights of an individual over the tyranny of government, in the manner it was argued to the world as a substantiation of the rights of the colonists over the tyranny of Britain. The strand of natural law through the fabric of legal history does not end with the framers. Throughout constitutional history, judicially enforceable moral principles, even those not explicitly stated in the Constitution, have played a vital role in law-making.

In *Calder v. Bull* Justice Chase invoked "the general principles of law and reason," said to constrain legislators even in the absence of explicit constitutional prohibitions. The basis of this position lies both in the framers' belief that moral rights bind popular governments and in the Constitution itself, which "secures" but does not confer rights. These concepts found purest expression in the ninth amendment, which calls upon interpreters of the Constitution not to "deny or disparage" the existence of rights not stated explicitly in the Constitution.

The history of the concept of natural law in legal argument supports the
proposition that the concept is inherently vague and called on to support myriad assertions of differing merit. As Justice Iredell said in *Calder v. Bull,* in concurrence: "The ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject . . . ."22 In colonial times, natural law was invoked to support the right to brew beer at home.23 In 1873 Justice Bradley invoked divine law as a justification for denying a woman the right to practice law: "[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . ."24 During its long usage in legal and political scholarship, natural law has been widely invoked, including application in favor of and against slavery,25 and to "prove" the inferiority of blacks.26 Both the 1850 Kentucky Constitution and the 1857 Kansas Constitution declared the right to own slaves "before and higher than any constitutional sanction."27

During the Civil War, the use of natural law in defense of human equality came to the fore. Abraham Lincoln described the central proposition of the Declaration of Independence as "an abstract truth applicable to all men and all times."28 Indeed, the very foundation of Lincoln's assertions was the principle that the competing claims of slaves and slave traders were morally distinguishable,29 an idea that has been lost in the flurry of critical material on the content of fundamental rights. To the extent that modern questions are posed in terms of fundamental rights, their determination only appears to have less weight than the question of slavery. The widespread application of the term fundamental rights, as well as the method of balancing competing interests, have served to alter the moral content of natural law. The greatest alteration of that content has occurred through the application of these principles to property rights and economic interests.

After the Civil War, the development of "substantive due process," linked to the fifth and fourteenth amendments, carried on the tradition of natural law as a rationale for judicially protected economic liberties.30 The doctrine of substantive due process was developed for this purpose. It is identified most closely with the case of *Lochner v. New York.*31 In *Lochner* the Court struck down a New York statute limiting the working hours of bakery employees as an abridgement of liberty of contract.32 *Lochner* has been described as emblematic of an era of judicial decisionmaking that brought into high relief implied limits on governmental authorities. At the core of this

22. 3 U.S. (3 Dall.) at 398 (Iredell, J., concurring).
25. *Id.*
26. *Id.*
27. *Id.*
29. S. Macedo, *supra* note 21, at 47.
30. *Id.*
31. 198 U.S. 45 (1905).
32. *Id.* at 57-58.
theoretical posture was the notion that state or federal governments had no power to act outside rightful jurisdiction so as to intrude upon the "natural rights" reserved to people within the private domain. During the period, the Supreme Court was more willing than it has ever been in other times to invalidate economic regulations pursuant to the due process clause. In Lochner the Court rejected New York's claim that its sixty-hour limit on bakery employees' work week was significantly and directly related to the promotion of employee health. The Court's finding seemingly discredited significant evidence that established risks to the health and welfare of employees.

This analysis continued to appear in the Court's decisions. In Adkins v. Children's Hospital the Court struck minimum wage laws for women on the grounds that governmental wage regulation was needed only in limited categories of employment. In these cases, the Court advanced the notion that government exists to advance general public welfare and total public good. Under this theory any statute that imposed burdens on individuals or corporations, in order to redistribute resources and thus benefit some persons at the expense of others, was invalid because it exceeded the scope of legislative authority. Such laws were seen to violate natural rights of property and contract, which were viewed as the core of the domain of private rights. Corrective justice thereby became the protected realm of the judiciary.

The judicial philosophy reflected in Lochner provides two distinct tools of interpretation to modern judicial conservatives. Not only does it stand for the proposition that economic liberties are inviolate, but it also supports the notion that the courts possess the proper authority to balance competing claims of right. The latter concept provides the underpinning for a seemingly inconsistent constriction of personal liberties that fits hand-in-glove with a laissez-faire economic agenda.

The fate of Lochnerian judicial philosophy is instructive in these times of its rebirth. The model supported by Lochner contained an internal tension—the private right versus public use controversy. Conceivably, a court could uphold a challenge to an act in the general public welfare under the strictures of Lochner. This is precisely the problem posed in Pennsylvania Coal Co. v. Mahon. In Pennsylvania Coal a homeowner sought an injunction against underground coal mining that would damage his property. His claim was founded on a Pennsylvania statute prohibiting such mining. It was argued that the presence of a preexisting deed granting the right to mine rendered the statute an infringement on subsistent rights to property and

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34. Id. § 8-2, at 568.
35. Id. § 8-3, at 569.
36. 261 U.S. 525 (1923).
37. Id. at 546-48.
38. L. Tribe, supra note 33, § 8-4, at 571.
39. Id. § 8-4, at 571.
40. 260 U.S. 393 (1922).
contract. The Court majority found for the coal company, because the company had not been compensated for the taking of its property.\textsuperscript{41} Under the court’s reasoning, eminent domain became a procedural substitute for substantive guarantees of contractual autonomy, thus blurring the distinction between private and public purposes that \textit{Lochner} had delineated.

The demise of \textit{Lochner} is commonly traced to the Supreme Court’s approval of the New Deal economic legislation, including minimum wage legislation, the Fair Labor Standards Act, the National Labor Relations Act, and the Agricultural Adjustment Act.\textsuperscript{42} By its own terms, \textit{Lochner} allowed for the prospect that legislative acts advancing the general public welfare could be upheld against claims of private rights. The internal tension of this interpretive model—between private right and public use—came to a head as the Court confronted the economic crises of the Depression.

Professor Tribe postulates three possible directions, post \textit{Lochner}, that the Court could have taken in the area of economic rights: (1) overt acceptance of economic legislation as political law-making, with control through monitoring of the political process; (2) all-out skepticism of the judicial competence to criticize such legislation; or (3) substantive interpretation, based on the theory that legislation can protect basic human freedoms.\textsuperscript{43} In Tribe’s view, had the Court accepted the second alternative in economic law-making, that is, the path of skepticism, the result would have been “wholesale abdication to the political process, [and] . . . insensitivity to matters of institutional competence and democratic legitimacy.”\textsuperscript{44} Modern originalists, majoritarians, and law and economics adherents nonetheless trace their origins to this strain of judicial philosophy.

The Warren Court, though, chose the third model of substantive review toward the end of protecting basic human freedoms. At the heart of many of the pronouncements of the Warren Court were natural law concepts. Among its holdings in the area of equal protection, and outside of it, the Court struck down durational residence requirements for welfare recipients, held poll taxes to be unconstitutional, applied a reasonable doubt standard to juvenile delinquency proceedings, and required a hearing before termination of welfare.\textsuperscript{45} As Judge Wright has characterized it, the Warren Court activism was “judging in service of conscience.”\textsuperscript{46}

The founding of many Warren Court determinations in the principles of natural law may seem right to those who believe these decisions were rendered in service of conscience. The Court’s value-laden decision in \textit{Roe v.}

\begin{itemize}
\item \textsuperscript{41} \textit{Id.} at 415.
\item \textsuperscript{42} Wickard v. Filburn, 317 U.S. 111 (1942) (Agricultural Adjustment Act); United States v. Darby, 312 U.S. 100 (1941) (Fair Labor Standards Act); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (National Labor Relations Act); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (minimum wage).
\item \textsuperscript{43} L. TRIBE, \textit{supra} note 33, § 8-7, at 583.
\item \textsuperscript{44} \textit{Id.} § 8-7, at 585.
\item \textsuperscript{46} Wright, \textit{supra} note 6, at 489.
\end{itemize}
Wade\textsuperscript{47} stood for the principle that a woman's right to choose an abortion was so important, or so fundamental, that our society could not permit it to be infringed legislatively.\textsuperscript{48} The Court's opinion in \textit{Lochner} was borne on the same reasoning, with the substitution of the right to contract. Employing the same concept, and assuming the posture of natural rights advocates, can we find a principled way of approving \textit{Brown v. Board of Education}\textsuperscript{49} while disapproving \textit{Lochner}? If the two cannot be distinguished on principle by natural rights advocates, we must concede a flaw in the methodology. Once again, I will suggest that it behooves advocates to distinguish these concepts, since Lochnerian economic rights are in the ascendancy in the present day.

It may still be declared, as Alexander Bickel has said, that "[t]he Court is 'an institution charged with the evolution and application of society's fundamental principles,' and its task, accordingly, is 'to define values and proclaim principles.'"\textsuperscript{50} But the Court has virtually discontinued the declaration of fundamental rights for the protection of human freedoms. In this regard, many of the Court's opinions since the Warren years are, at best, uneven and, collectively, a record of retrenchment. Both the Burger and Rehnquist Courts have retreated from the commitment to personal liberties that characterized the opinions of the 1950s and 60s. The Burger Court emblemized, if anything, the belief that the judicial system should restrain its encroachment into majoritarian political decisions as much as possible, but, when necessary, should restrain the federal majoritarian branches from intruding into state and local political autonomy. The Rehnquist Court, however, seems to embody a less rigorous commitment to institutional restraint; indeed, it has begun to show signs of an aggressive judicial activism—an activism seemingly undertaken, in part, to revitalize the once intense regard for and consideration of personal property and economic rights, an esteem that had been quiescent for many years.

III.

Predicting the future development of a particular academic field or societal institution is never easy. In constitutional jurisprudence, the task is exacerbated by three factors: (1) the Court is faced with issues that are generally complex and multifaceted; (2) the Court is constrained to address only those issues brought before it; and (3) the Court is composed of nine individuals with diverse educational backgrounds and political ideals, a majority of whose views represent the final interpretation of the supreme law of the land. Nonetheless, the hard row must be hoed, if attorneys are to fulfill, competently, their obligations to their clients to exert some influence on the future

\begin{itemize}
  \item \textsuperscript{47} 410 U.S. 113 (1973).
  \item \textsuperscript{48} Ely, \textit{supra} note 10, at 11.
  \item \textsuperscript{49} 349 U.S. 294 (1955).
  \item \textsuperscript{50} Ely, \textit{supra} note 10, at 15-16 (quoting A. Bickel, \textit{The Least Dangerous Branch} 68, 109 (1962)).
\end{itemize}
content of constitutional provisions and, in general, advance the work of the Court.

The doctrine of stare decisis, of course, acts as a powerful restriction on the ability of judges to depart radically from the framework established by preceding judges. The current Supreme Court, then, is not free to disregard totally the work of the Warren Court in identifying and securing fundamental rights to personal liberties, defined in terms of natural law. In fact, fidelity to precedent has often been associated with conservative theories of judicial legitimacy. In this context, I would not be surprised if you viewed with some skepticism a prediction that conservative judges will undertake an activist agenda and fundamentally alter the existing framework of natural law jurisprudence. I hope to dispel any skepticism that you may have, however, by outlining one of the possible scenarios by which the evolution of natural law jurisprudence could occur. This outline will include a discussion of recent decisions in which the early groundwork for the transformation has been laid and will explore the possible coalitions that could arise between proponents of different conservative judicial doctrines to support such a transformation.

Largely due to institutional pressures to remain faithful to precedent, the evolution of natural law theory as a defender of property rights will, I think, be slow and deliberate. In addition, each incremental movement in the direction of redefining natural law will be subtle and difficult to isolate. Even at this early stage, however, it is possible to identify a distinct trend: the Rehnquist Court has retreated from the willingness of previous Courts seriously to consider the possibility that a fundamental right may exist to enjoy a particular personal liberty, when that right is not expressly articulated in the Constitution. Interestingly, the first step in the debate that has emerged between the opposing factions concerning the existence of these rights has centered on the problem of how to define which right is at issue. Simply by rephrasing the issue raised for the Court’s consideration, a conservative majority is now able to deny the existence of a fundamental right where, were the issue framed differently, the Court would be bound by precedent to recognize the constitutionally protected nature of the liberty interest. Two recent cases, *Bowers v. Hardwick* and *DeShaney v. Winnebago County Department of Social Services*, illustrate the Court’s tactical retreat from the recognition of fundamental rights in personal liberties.

In *Bowers v. Hardwick* the Court was asked to evaluate the constitutionality of a Georgia statute criminalizing sodomy. The case came before the Court on a challenge by Hardwick, who had been arrested and charged with violating the Georgia statute by engaging in an act of sodomy with a consenting adult male in the bedroom of Hardwick’s home. Although Hardwick was a gay male being prosecuted for engaging in homosexual activity, the statute was written in a gender neutral fashion and, on its face, criminal-
ized any act of sodomy without regard to the gender, sexual orientation, or marital status of the persons who wished to engage in such acts.\textsuperscript{54}

The expansive wording of the Georgia statute, and the obvious possibility that it could be enforced to prevent married couples from engaging in consensual acts of sodomy in the privacy of their home, meant that \textit{Bowers} presented an easy issue to many legal scholars who had observed the development of the right to privacy.\textsuperscript{55} The Court's previous cases refining the liberty interests protected by the right to privacy had developed along two lines.\textsuperscript{56} First, the Court had recognized that the right to privacy protects an individual's liberty to make certain decisions free from state interference.\textsuperscript{57} Second, this right shielded the individual in his or her actions in certain places, regardless of what those particular actions may have been.\textsuperscript{58} The substance of these complementary concepts of privacy has been consistently premised on invocations of natural law. In \textit{Thornburgh v. American College of Obstetricians & Gynecologists},\textsuperscript{59} where the Court invalidated portions of an "Abortion Control" statute,\textsuperscript{60} Justice Stevens said, in concurrence, that "the concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'"\textsuperscript{61} The Court has also said that the liberties entitled to constitutional protection under the penumbral right to privacy are among "the basic civil rights of man."\textsuperscript{62} As the Seventh Circuit has noted, "[t]he character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable."\textsuperscript{63}

\begin{itemize}
\item \textsuperscript{54} GA. CODE ANN. § 16-6-2 (1981) (recodified at GA. CODE. ANN. § 26-2002 (1987)).
\item In fact, John and Mary Doe, a married couple, were also plaintiffs in the initial action. The Does alleged that they wished to engage in activity proscribed by the statute in the privacy of their home, but that "they had been 'chilled and deterred' from engaging in such activity by the existence of the statute and Hardwick's arrest." 478 U.S. at 188 n.2. The district court dismissed the Does' claim for lack of standing. \textit{Id.}
\item \textsuperscript{55} See \textit{Leading Cases}, 100 HARV. L. REV. 100, 210 (1986) ("[In \textit{Bowers v. Hardwick} the Court departed from the broader rationale that had supported its privacy decisions in the past two decades: the protection of individual autonomy and dignity in the making of intimate decisions."); cf. \textit{Rubenfeld, The Right of Privacy}, 102 HARV. L. REV. 737, 738-39 (1989) ("To those who imagined that the privacy doctrine could be explained by reference to [an intuition or tacit agreement that sexuality is an area of life into which the state has no business intruding], \textit{Bowers v. Hardwick} has startlingly revealed the inadequacy of their position." (footnotes omitted)).
\item \textsuperscript{56} See 478 U.S. at 203-04 (Blackmun, J., dissenting).
\item \textsuperscript{57} \textit{Id.}; see, e.g., \textit{Roe v. Wade}, 410 U.S. 113, 113 (1973); \textit{Griswold v. Connecticut}, 381 U.S. 479, 479 (1965).
\item \textsuperscript{59} 476 U.S. 747 (1986).
\item \textsuperscript{60} PA. CONS. STAT. ANN. § 3201-19 (Purdon 1983 & Supp. 1989).
\item \textsuperscript{61} 476 U.S. at 777 n.5 (Stevens, J., concurring) (quoting Fried, \textit{Correspondence}, 6 PHIL. & PUB. AFFAIRS 288-89 (1977)).
\item \textsuperscript{62} 381 U.S. at 484-85, 502.
\item \textsuperscript{63} \textit{Fitzgerald v. Porter Memorial Hosp.}, 523 F.2d 716, 719-20 (7th Cir. 1975), \textit{cert. denied}, 425 U.S. 916 (1976), \textit{cited in} \textit{Bowers v. Hardwick}, 478 U.S. at 217 (Stevens, J., dissenting).\end{itemize}
Given the precedential power of the fundamental right to make intimate decisions in the privacy of one's home free from state intrusion, the outcome of the *Bowers* case seemed almost pre-ordained.

A majority of the Court, however, articulated a significantly narrower perception of the issue raised in *Bowers*.64 The Court asked, in evaluating the gender-neutral Georgia sodomy statute, whether any of the Court's prior formulations of the right to privacy "would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."65 Having so defined the issue, the Court was able to acknowledge and pay tribute to the substantial body of privacy cases and still determine that the conduct proscribed by the Georgia statute was not protected by the fundamental right of privacy.66

An apparently thorough search of traditional values and the moral underpinnings of a civilized society convinced the Court that a right to engage in homosexual sodomy is neither "deeply rooted in this Nation's history and tradition"67 nor "'implicit in the concept of ordered liberty.'"68 More forcefully, Chief Justice Burger said, in concurrence, that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."69 Of course, given the Court's formulation of the right at issue, this conclusion is hardly surprising.

Justice Blackmun, with whom Justices Brennan, Marshall, and Stevens joined in dissent, took immediate and aggressive issue with the majority's formulation of the central issue raised in *Bowers*.70 The first paragraph of the dissenting opinion exhorted that "[t]his case is no more about a 'fundamental right to engage in homosexual sodomy' . . . than *Stanley v. Georgia* was about a fundamental right to watch obscene movies . . . . Rather, this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"71 As Justice Blackmun further explained, "[a] fair reading of the statute and of the complaint clearly reveals that the majority has distorted the question this case presents."72 Justice Blackmun emphasized the powerful effect that the formulation of the interest at stake has on the evaluation of whether the constitutional right of privacy embraces specific conduct when he said: "The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others."73

In rejecting Hardwick's claim the Court also set the tone for future de
sions by announcing that it was not "inclined to take a more expansive view of [its] authority to discover new fundamental rights imbedded in the Due Process Clause" and that "[t]here should be . . . great resistance to expand the substantive reach of [the due process clause], particularly if it requires redefining the category of rights deemed to be fundamental."\textsuperscript{74}

The Court's explicit reluctance to remain faithful to the Warren Court's expansive framework for analyzing fundamental rights resurfaced this term in \textit{DeShaney v. Winnebago County Department of Social Services}.\textsuperscript{75} In \textit{DeShaney} the majority and dissent once again disagreed vehemently about the correct formulation of the issue before the Court.\textsuperscript{76} In this case, the court was asked to determine whether the State of Wisconsin deprived four-year-old Joshua DeShaney of his fourteenth amendment liberty interest by failing to provide him with adequate protection against the violence of his custodial father.\textsuperscript{77} The lawsuit was brought by Joshua's noncustodial mother. The mother presented evidence that the Winnebago County Department of Social Services had been repeatedly informed by family members, doctors, and emergency room personnel that Joshua might be the victim of child abuse inflicted by his father. Notwithstanding numerous reports over a period of two years, the Department took no action to remove Joshua from his father's home. Eventually, Joshua was so brutally beaten by his father that he slipped into a life-threatening coma and suffered severe and irreversible brain damage.

This case again presented a dramatic example of how the manner in which a court chooses to formulate the interest at stake can virtually pre-ordain its answer to the question of whether the Constitution safeguards that interest. The majority in \textit{DeShaney} addressed the issue of whether the language of the due process clause required the state to protect the life, liberty, and property of its citizens against invasion by private actors.\textsuperscript{78} Previous Courts, of course, have advanced a consistent, if not universally accepted,\textsuperscript{79} position that the due process clauses create no general right to the affirmative provision of basic governmental services. Thus, it comes as no surprise that the majority in \textit{DeShaney} concluded that Wisconsin had not infringed Joshua's constitutionally protected liberty interests when it failed to protect him from his father's violence.\textsuperscript{80}

\textsuperscript{74} Id. at 194-95.
\textsuperscript{75} 57 U.S.L.W. 4218 (U.S. Feb. 21, 1989).
\textsuperscript{76} Id. at 4222.
\textsuperscript{77} Id. at 4218.
\textsuperscript{78} Id. at 4219. The \textit{DeShaney} court held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." \textit{Id}.
\textsuperscript{79} See, e.g., L. Tribe, supra note 33, § 15-9, at 1336 ("Emerging notions that government has an affirmative obligation somehow to provide at least a minimally decent subsistence with respect to the most basic human needs . . . thus fit quite naturally into a conception of bodily integrity in which a governmental omission can be as deadly as the most pointed of governmental acts"); see also Michelman, \textit{In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice}, 111 U. PA. L. REV. 962 (1973) (arguing in favor of constitutional right for all citizens to the minimal entitlements required to fulfill basic wants).
\textsuperscript{80} 57 U.S.L.W. at 4221.
The dissent, however, again argued with the majority's interpretation of the right at stake. The dissent portrayed Wisconsin's role in Joshua's tragedy as one of action, not of inaction, and concluded that, because Wisconsin undertook positive efforts to protect abused children like Joshua, once the state became aware that he was the victim of violence, it had an affirmative duty to take reasonable measures to ensure his safety. Under this formulation, the question of whether Joshua had a constitutionally protected liberty interest in Wisconsin's protective services was easily answered in the affirmative.

As the Bowers and DeShaney cases illustrate, the ability of courts to manipulate the definition of the question raised in any given lawsuit empowers the Court to expand or constrict existing understandings of fundamental rights. All the while, the Court is ostensibly able to remain faithful to precedent and search its understanding of natural law in a manner consistent with previous opinions. It is this power, exercised by a conservative majority, that is serving to truncate the work of the Warren Court, and is setting the stage for the emergence of property rights and economic interests as preeminent in the Court's conception of fundamental law.

In order to prove my prediction accurate, however, the Rehnquist Court will have to advance beyond merely restricting the continued development of fundamental rights in personal liberty. That is, it will be necessary for the Court to emphasize the constitutionally protected status of economic and property rights, employing the framework of natural law and fundamental rights. Given the dissonance that reigns among the various judicial theories that are labeled "conservative," one might wonder how such a development could occur. As you might have surmised, I have a theory as to how these factions are likely to come together in a somewhat uneasy coalition, which may well result in many plurality decisions.

In order fully to explain how this coalition might develop, I must first define for you what I mean when I refer to various conservative theories of constitutional interpretation. The first theory, originalism, has been most vocally supported by Robert Bork, the recently rejected Supreme Court nominee. According to originalists, the only legitimate basis for constitutional law-making is to ascertain the intentions of those who drafted, proposed, and ratified the Constitution and its amendments. Knowing that the framers approached the document in the social contractarian manner of the eighteenth century has in no way daunted the originalists. These dogmatists are convinced that the framers' intent is present, to be gleaned from

81. Id. at 4222.
82. Id.
83. Id. at 4222-23.
careful scrutiny of the document; further, in undertaking such an enterprise, they appear committed to the notion that the framers could have intended that a singular meaning be taken from the text. The scholarly tradition of the time, however, was decidedly anti-interpretive and firmly rooted in the common law. Nothing in the document, its history, or the early history of the Supreme Court suggests that the framers intended anything other than that the words had their own intrinsic meaning; and if interpretation was called for, it was for the judge to decide what the meaning was, regardless of what the authors may have intended. As Jefferson Powell has said, "[t]he relationship of modern intentionalism to this early interpretive theory is purely rhetorical."

The second theory, judicial self-restraint, is advanced thoughtfully by Judge Richard Posner. The theory of judicial self-restraint holds that a judge should include, as an important goal of his constitutional decision-making, the desire not to enlarge the power of the judiciary at the expense of any other government institution. As Judge Posner points out, this formulation of constitutional interpretation is inherently neither liberal nor conservative in the political sense. Rather, it will produce liberal or conservative outcomes depending on the political orientation of the other institutions. After eight years of the conservative agenda of the Reagan administration, and facing the prospect of at least four more with President Bush, it is difficult to deny that judges who adopt this posture in contemporary America can rightly be referred to as conservative. Proponents of judicial self-restraint can also be defined in contrast to those jurists and scholars who view the court as the legitimate counter-majoritarian force in our democracy.

The third conservative approach to constitutional interpretation is the libertarian theory. This voice from the right calls for judicial activism in the name of property and economic rights, and is represented by such scholars as Richard Epstein of the University of Chicago and Steven Macedo of Harvard University. Epstein builds his libertarian theory on a "corrected" reading of John Locke, whose philosophical insights undeniably pervade the Declaration of Independence and the Constitution. According to Epstein, an appropriately revised reading of Locke's theory of property entitlements leads to a textual interpretation of the Constitution that justifies only minimal state intrusion into privately held property and, in particular, severely

86. See Powell, supra note 23, at 888.
87. Id. at 948.
89. Id. at 11-12.
90. Id. at 12.
91. Id.
93. S. Macedo, supra note 21.
restricts the state's authority to institute redistributive policies.\textsuperscript{95}

The final conservative theory of the judicial role is the law and economics school. In considering alternative legal rules and policy options, the law and economics school seeks to determine their ultimate effects upon personal incentives and distribution of income. To make their findings, these jurists employ economic analyses as their tools. This approach is less often applied to constitutional interpretation than to common law or statutory decision-making. Nonetheless, its proponents advocate a heightened respect for private property and economic interests that may impel them to ally themselves with certain conservative constitutional doctrinaires.

At first it may be difficult to visualize the manner in which these conservative theories will merge in pursuit of an identifiable political agenda. For instance, it should be obvious that the school of judicial self-restraint will clash irreconcilably with the libertarians, whenever the majoritarian institutions act to restrict property interests or economic rights. In addition, it is not difficult to envision originalists disagreeing with Epstein, if they are unconvinced that the ratifiers were proponents of his version of Lockean political theory. Moreover, the insistence by the states on the inclusion of a Bill of Rights in the Constitution seems to pit the originalists firmly against advocates of judicial self-restraint.

A more focused analysis of these conservative theories, however, reveals a possible common ground. As we have seen, libertarian theorists advocate the reemergence—in the manner of \textit{Lochner}—of active judicial scrutiny of the substance of economic legislation. According to Macedo, an articulate and eloquent advocate of the libertarian position, the natural law concepts that lie at the heart of the Court's privacy cases compel active judicial protection of economic and property interests.\textsuperscript{96} Macedo advances economic security and property rights as shields for "some of the deepest and most valuable aspects of free human existence."\textsuperscript{97} He applauds Justice Blackmun's dissent in \textit{Bowers} as a recognition of the link between the fundamental right to personal privacy and an individual's economic rights, by emphasizing the fact that the challenged conduct occurred in Hardwick's home.\textsuperscript{98} In this manner, Macedo focuses the natural law inquiry on the importance of possessions, while Blackmun himself might have highlighted the opportunity for repose and freedom from intrusion that the physical structure of a house provides.

Originalists easily follow the libertarian lead if the former accept Epstein's theory of the pervasive influence of Lockean philosophy on the construction and ratification of the Constitution. The Constitution undeniably exalts, to some extent, private property interests over some interests in personal liberties and over many majoritarian considerations.\textsuperscript{99} Article 1, section 10, of

\textsuperscript{95} See R. Epstein, \textit{supra} note 92, at 11-16, 295-303, 322.

\textsuperscript{96} See S. Macedo, \textit{supra} note 21, at 82-92.

\textsuperscript{97} Id. at 83.

\textsuperscript{98} Id. at 78.

\textsuperscript{99} As Professor Tribe points out: "Many of the Framers believed that preservation of economic rights was the central purpose of Civil government." L. Tribe, \textit{supra} note 33, § 15-
the Constitution provides that no state shall enact any law impairing the obligations of contracts. Moreover, the fifth and fourteenth amendments prevent both federal and state governments from taking private property for public use without paying just compensation. Each of these constitutional provisions were interpreted in the *Lochner* era, using invocations of natural rights, to protect property and economic interests. It is indeed true that Locke was the first political theorist to assert that the traditional common law rights to life, liberty, and estate were actually universal human rights that existed prior to the formation of a civil government.\textsuperscript{100} If originalists ignore the fact that Locke's tenets constituted a theory of revolution based on the moral and political limits of legislative legitimacy and not a theory of constitutional interpretation, then they could firmly establish an alliance with the libertarians.

The role of judicial self-restraint theory in this conservative alliance requires little explication. The current political trend to reduce tax burdens and restrict federal and state spending on social welfare programs is just one example of the contemporary political climate that favors the security of property rights and economic interests. If the majority of the population is inclined to pursue a political agenda that defers to private property interests, then proponents of judicial self-restraint are also likely to ally themselves with the libertarian and originalist judges. Furthermore, the jurists who advocate a limited role for judicial review are likely to exhibit strong support for majoritarian decisions that restrict personal freedoms, advancing the agenda that I previously illustrated with *Bowers* and *Deshaney*.

I should note that these prophecies are not the product of aimless, abstract speculation. Rather, the groundwork for future conservative activism, in the name of natural rights, to advance property and economic interests is being laid by conservative judges today. In a recent Seventh Circuit opinion, Judge Posner remained true to his ideal of judicial self-restraint and upheld an interpretation of an Illinois regulation that bars psychologists from membership on medical staffs of state-regulated hospitals.\textsuperscript{101} Plaintiffs had claimed that the interpretation constituted a denial of equal protection and substantive due process. Although the court rejected both claims, Judge Posner could not help pointing out that precedent, rather than his own logic, mandated his decision.\textsuperscript{102} Posner said that *Williamson v. Lee Optical of Oklahoma, Inc.*\textsuperscript{103} controlled the court's decision, "whatever we might personally think of the Court's Manichean conception of 'personal' versus 'economic' rights . . . ."\textsuperscript{104} Posner went on to quote at length from dicta included in the Supreme Court's 1972 *Lynch* decision.\textsuperscript{105} As Judge Posner

\textsuperscript{13}, at 1373 n.1 (emphasis in original) (citing *The Federalist* No. 10 (J. Madison); 1 *Records of the Federal Convention* 533 (M. Farrand ed. 1911) (statement of Gouverneur Morris)).

\textsuperscript{100.} See Grey, *supra* note 11, at 860.

\textsuperscript{101.} See Illinois Psychological Ass'n v. Falk, 818 F.2d 1337, 1344 (7th Cir. 1987).

\textsuperscript{102.} *Id.* at 1314.

\textsuperscript{103.} 348 U.S. 483 (1955).

\textsuperscript{104.} 818 F.2d at 1341.

quoted it, that opinion seemed to elevate the status of property rights to a plane level with that of personal rights. In that case, the Court said, "the dichotomy between personal liberties and property rights is a false one. . . . [A] fundamental interdependence exists between the personal right to liberty and the personal right in property. . . . That rights in property are basic civil rights has long been recognized." This language foreshadows the prominent place that natural law theory will have in the future judicial activism of a conservative age.

IV.

This exploration of the possible development of constitutional law brings us back to the question I originally presented: How can the Constitution be interpreted legitimately and guarantee fundamental rights within existing constraints? I contend that the current conservative agenda, which employs natural rights methodology in the service of protecting property rights and economic interests, shares a common flaw with the *Lochner* methodology—they both ignore the most basic concern of rights decision-making, the protection of human dignity.

In their attack on the Warren Court, the new conservatives have gone so far as to say that the rights identified by it are simply not fundamental, from any principled posture. Instead, the more avid critics would substitute their own laundry list of protected freedoms, focusing primarily on economic liberties and property rights, or would strip the Constitution of its prophylactic purpose for any right not expressly articulated therein. Both of these approaches suffer from the methodological flaws that I illustrated previously. Specifically, neither can articulate a principled reason for preferring their list of fundamental values over others, nor for abdicating the judiciary's role as interpreter of such value laden, yet vague, terms as "liberty" and "due process." Moreover, it seems absurd to assert that the meaning of some of our Constitution's most critical provisions can be intelligibly discerned without "a substantial injection of content from some source beyond the documentary language and the discoverable intentions of those who wrote and ratified it." The recognition that the judicial task is necessarily a normative one is not to say, in the words of John Hart Ely, "that all bets are off, that we are therefore free to make the Constitution mean whatever we please." Rather, we must examine the purposes that underlie the protection of each right that is offered, by either conservative or liberal activists, as an appropriate candidate for the preferred status of fundamental right.

The list of fundamental personal rights elucidated by the Warren Court, and protected from the Warren years on, is impressive but incomplete. They include the rights to expression, association, education, academic freedom,

106. 818 F.2d at 1341.
107. 405 U.S. at 552.
108. Ely, supra note 10, at 5.
109. Id.
privacy of the home, and personal autonomy. Why, it may be asked, have such rights as the right to a job, to food, or to housing not been included? It is clear that, for a large portion of the American public, the right to job security, affordable shelter, and minimal nutritional and medical provisions are essential for the development and enrichment of the personal liberties currently protected under the rubric of economic rights. Thus, as Professor Tribe stated, “[i]n giving satisfactory content to the idea of personhood, it will not do to draw a bright line between ‘economic’ and ‘civil’ liberties, or between ‘property’ rights and ‘personal’ rights,” as this distinction “overlooks the importance of property and contract in protecting the dispossessed . . . .”

John Hart Ely has scathingly suggested that “[t]he danger that upper middle class judges and commentators will find upper middle class values fundamental is obviously present irrespective of methodology.”

The basic interdependence of economic and personal rights, coupled with the growing tendency of the Court to make a fetish of economic rights, should be examined critically. For despite the fact that government participation in the economic lives of individuals is, as the Court says, “pervasive” and “deep,” originalists, majoritarians, and law and economics advocates would strip away constraints on the so-called free-market. While this position protects property rights, it reflects scant regard for the welfare of those persons with little money or other significant assets. Unreflective constitutional protection of the right to rent one’s property to the highest bidding tenant and the right to close one’s factory without regard for the welfare of its workers are examples of what can be expected, if this program is adopted.

It has been asserted that the position that the Constitution provides protection of absolute dominion over one’s property for the sake of dominion alone contains no compelling moral argument. Countermanding this agenda is the mission of such personal rights activists as Justice Brennan himself, who feels that “hundreds of thousands of American[s] live entire lives without real prospect of the dignity and autonomy that ownership of real property could confer. Protection of the human dignity [and autonomy of those without property] requires a much modified view of the proper relationship of individual and state.” As Chief Justice Weintraub of the New Jersey Supreme Court said in *State v. Shack,* “[p]roperty rights serve human values. They are recognized to that end, and are limited by it.” It is thus possible to be critical of the shared but distinct methodologies of the Warren and neoconservative Courts, and still assert that the decisions of one were right and the other wrong. The interpretive process of the Court must be relied on to be self-corrective to some degree. In fact, some judge or justice will doubtless point out, before long, that Judge Posner’s interpretation of

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110. *Id.* at 37.
114. *Id.*
116. 277 A.2d at 372.
the quotation from *Lynch v. Household Finance Corporation*\(^1\) was actually not quite true to its intended meaning.\(^2\) For, instead of asserting that economic rights were equally as valuable as personal rights, the Court was actually reiterating its opinion that enjoyment of property rights is "an essential pre-condition to the realization of other basic civil rights and liberties which the [Fourteenth] Amendment was intended to guarantee."\(^3\)

This is where Justice Brennan's concept of interpretive legitimacy comes into play. Supreme Court decisions will continue to be value-laden, particularly in those cases where the Court is asked to breathe life into otherwise inert phrases. However, there will be no assurance that the Court's understanding will evolve, I maintain, unless it asks itself the right questions. When faced with the issue of whether to recognize a fundamental right in economic liberty or property possession, the Court must ask itself "for what human purpose—to what end—should these property rights be recognized as constitutionally protected?" In this regard, I suggest that the views of Judge Wright should be considered:

Questions about what "liberty" and "equality" mean, which is after all what both the *Lochner* and the Warren Courts were attempting to answer, are the very heart of our Constitution. Recognizing that the very heart of our Constitution is contested and contestable entails . . . that "the ultimate test of the Justices' work . . . must be goodness."\(^4\)

As advocates, it will be the task of many of you here to formulate the questions, in order to guide the courts; and to serve society by advancing the development of a principled constitutional philosophy of personal rights, along with the economic liberty necessary to ensure those rights. In that endeavor, you have my most earnest hopes and sincere best wishes.

\(^{117}\) 405 U.S. 538 (1972).
\(^{118}\) See *supra* text accompanying notes 105-107.
\(^{119}\) 405 U.S. at 544.
\(^{120}\) Wright, *supra* note 6, at 522.