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Constitutional Deregulation: Notes Toward a Public, Public Law

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The struggle to maintain, to deepen, or to alienate the force of a legal text is called interpretation.

-Mitchell Franklin

I

Suppose some group of merchants decided to seek state legislation protecting itself from competition. Because such protection could not be sought openly, the group developed a strategy that involved the presentation of its substantive case in terms of the group's need for protection from even more powerful economic interests outside the state. This request for protection was, of course, not to be presented as self-interested, but rather as essential to the continuation of the group's current service to the consuming public. Suppose further that the strategy were successful. Legislation was passed which in fact provided substantial protection from competition, but in a statutory form arguably (albeit mediately) related to the interests of the consuming public. Would such a statute violate the U.S. Constitution?

The cynical among you will by now be laughing, not up your sleeves, but openly. "Suppose?" you will say. "What do you mean 'suppose'? That is state regulatory legislation as I know it. And you know darn well that so far as the federal courts are concerned it's constitutional. The Supreme Court has said so often and loudly, ever since 1937. 'Substantive due process' is dead where 'economic' issues are concerned."

And, indeed, it is. I have done nothing in my little hypothetical but describe an imaginary legislative scenario that we

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suspect is too often real and ask a constitutional question whose answer, unlike most questions of that genre, comes back crisp and clear. Am I trying to suggest that there is something to be discussed here? A tricky fact in the hypo, perhaps? Or am I merely one of those conservative constitutionalists who longs for *Lochner*,¹ whose eyes mist over at the mere mention of Mr. Justice McReynolds?²

Well, there is no trick and I confess that I have never counted Justice McReynolds among my heroes. But I do want to assert that there is something to be discussed. In fact I want to argue about it. I think anti-competitive regulation is a very serious problem. It is not just that such regulation distorts incentives, feeds inflation, and makes most of us somewhat worse off. There is a different frame of reference for such legislation: It demoralizes many whose efforts should instead be praised. It confiscates talent. It invades people's rights.

"Now, wait a minute," you must be saying. "Aren't you veering off toward 'liberty of contract' or some such defunct notion?" Surely, we've heard all of this before." And I must confess that in some sense you have. But wait awhile. For I want to make a particular sort of argument here—an argument somewhat more methodological than substantive. I want to convince you that there is a coherent approach to serious judicial review of economic legislation. Moreover, I want to argue that our revulsion at "Lochneresque" review will not infect that approach. It need contain none of the objectionable elements that the critics of *Lochner* ascribe to that case and its progeny: No judicial second-guessing concerning the desirability of debatable legisla-

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². Some might object to the exaltation of McReynolds' role in connection with substantive due process rather than Peckham, who authored the majority opinion in *Lochner* and who had participated in the development of the doctrine at the state level in cases like *People v. Gillson*, 109 N.Y. 389, 17 N.E. 343 (1888). But for curmudgeonly loyalty to the substantive due process idea, particularly in dissent, McReynolds is second to none. *See, e.g.*, *Nebbia v. New York*, 291 U.S. 502, 539 (1934) (McReynolds, J., dissenting).

³. There is some question, of course, whether this notion should be considered defunct. It has a perfectly respectable intellectual history. For a grounding in the language of the Constitution, see, for example, Corwin, "The Higher Law" *Background of American Constitutional Law*, 42 Harv. L. Rev. 149 (1928); U.S. Const. art. I, § 10, cl. 1.
tive goals, and no formalistic exaltation of abstract economic liberty (or any other value) in the face of a contradictory social reality.\footnote{There is some doubt whether \textit{Lochner} and its progeny contained these faults to a degree greater than cases involving other areas of judicial review. But the association of substantive due process with conceptions of “natural order” and \textit{laissez faire} made \textit{Lochner} particularly vulnerable to the attacks of philosophical relativists (the legal realists) and to the emerging political consensus that underlay the New Deal. For an excellent short description, see L. Tribe, American Constitutional Law 446-55 (1978).}

Indeed, I will argue that the federal judiciary’s current posture, abdication of review,\footnote{The abdication has never been formalized by a clear renunciation of “rational basis” review. See Bennett, \textit{“Mere” Rationality in Constitutional Law: Judicial Review and Democratic Theory}, 67 Calif. L. Rev. 1049 (1979); McCloskey, \textit{Economic Due Process and the Supreme Court: An Exhumation and Reburial}, 1962 Sup. Ct. Rev. 34. The Court merely refuses to inquire seriously into the means and ends of state economic regulation. \textit{Id.} at 36-40.} comes closer to producing the ills ascribed to \textit{Lochner} and its progeny than would serious judicial review of economic legislation. It ignores serious individual interests that have an obvious constitutional basis. It implicitly exalts as fundamental a problematic constitutional value. It ignores social and political reality. It cannot be applied consistently. To remedy this situation I will propose a new cause of action, a claim to public-regarding legislation, that will permit such review—a cause of action grounded in no particular text, but in the Constitution as a whole. I shall further argue, but only cursorily, that the proposed cause of action is judicially manageable.

\section{II}

Let us begin again, this time with a real case. \textit{New Motor Vehicle Board v. Orrin W. Fox Co.}\footnote{439 U.S. 96 (1978).} involved a California statute that required approval from the state’s New Motor Vehicle Board for the opening or relocation of a retail automobile dealership within the market area (314 square miles) of any existing dealership carrying the same make of car if the existing dealer objected to the location. Under the statute, objection by an existing dealer resulted in notice to the proposed dealership that its plans must be held in abeyance pending a hearing in which the objectors would attempt to establish “good cause” for not creating an additional franchise in that market area. The objec-
tors bore the burden of proof at the hearing, but had only to say "I protest" in order to secure the notice of hearing that would maintain the status quo.

Fox, one of the plaintiffs, demonstrated at trial that the principal use of the statute was to delay the opening of new dealerships. Of 117 protests filed with the Board, only one had been sustained at hearing and two-thirds had been withdrawn. Nevertheless, the existing dealer's objection was sufficient to defer Fox's opening for at least fifteen months—more than a complete model year—and one of the plaintiffs had had its relocation completely stymied when delay forced it to default on its lease.

Plaintiffs attacked the statute on several grounds. Their principal argument was that the automatic deferral of their proposed action by the filing of a protest deprived them of due process of law. In their view, the Board's failure at this stage to inquire into at least the plausibility of the protest and its prospects for ultimate success denied them the individualized judgment prior to the exercise of state power that is required by the Constitution. This procedural due process argument was combined with an argument characterizing the "empty protest" mechanism as a standardless delegation of state power to private citizens. Plaintiffs further argued that, by giving effect to private attempts to restrain trade, the California statute conflicted with the Sherman Antitrust Act.

Mr. Justice Brennan, writing for the majority, made short work of these arguments. In his view, the procedural due process claim was really a disguised substantive due process argument. Because the statute gave the Board no discretion in scheduling a hearing, it was the statute that delayed plaintiffs' activities, and not a summary administrative order. Viewed as an attack on the statute, the question was whether the plaintiffs had some right to be free from state economic regulation that was expressly identified by the legislature as protecting "the general economy of the state and the public welfare." Quoting the language of Ferguson v. Skrupa that "[l]egislative bodies

7. Id. at 98-111.
8. Id. at 105 n.12.
have broad scope to experiment with economic problems,"9 the Court answered with the usual resounding “No.” Having thus characterized the basic claim, the delegation and antitrust questions were easy. Otherwise valid state regulation is not invalid merely because it employs private enforcement, or has anti-competitive effects. A contrary holding on these two issues would lead, respectively, to the absurd conclusion that most schemes of state private law were unconstitutional and that states had virtually no power to engage in economic regulation.

Mr. Justice Brennan’s opinion for the Court fully represented the views of only five Justices. Justice Powell joined in a concurrence authored by Justice Blackmun, Justice Marshall concurred specially, and Justice Stevens, alone, dissented. The Blackmun opinion, viewed the case very much as did the majority—an easy substantive due process claim.10 The only interesting wrinkle is that Blackmun and Powell saw state regulatory power as so pervasive that the California statute should not be viewed as affecting any of the plaintiffs’ liberty or property interests. The plaintiffs’ procedural due process claim failed at the threshold of the now conventional two-step analysis. Justice Marshall, on the other hand, saw the case in wholly procedural terms.11 Yet for him, a simple statement of state and private interests—the state interest in effective regulation versus the private concern with delays in permissible projects—was sufficient to make it clear that a process giving the state interest greater weight, at least initially, did not strike an unreasonable balance.

Justice Stevens, in dissent, vigorously objected to the majority’s characterization of the case as concerned fundamentally with the substantive validity of the California scheme.12 Indeed, he “assumed” that California would be able to prohibit the location or relocation of automobile dealerships. Rather, in his words, “The case involves the validity of a procedure that grants private parties an exclusive right to cause harm to other private parties without even alleging that any general rule has been vio-

10. 439 U.S. at 113-14 (Blackmun, J., concurring).
11. Id. at 111-13 (Marshall, J., concurring).
12. Id. at 114-27 (Stevens, J., dissenting).
The dissenting opinion took a careful tour of the California scheme to demonstrate that it indeed evidenced no general intent to preclude, or even inhibit, the creation of new dealerships. Thus, the prohibition on franchise establishment that flowed from the simple filing of a protest did not immediately further any state interest. From this it was an easy matter for Stevens to conclude that the case was essentially on all fours with Fuentes v. Shevin, which, while invalidating a state statute permitting pre-judgment repossession, said:

The statute, moreover, abdicates effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.

III

The straightforward characterization of the plaintiffs’ complaint is captured by the hypothetical scenario with which we began. The Fox dealership and its cohorts (and Justice Stevens) see private parties making use of state power to harass competitors. They want to know what justifies this disadvantage. Potential competitors are told, in effect, that their private interest must yield to the public interest. But the public interest is not to be discussed with any seriousness. If the state intones certain buzz words like “overreaching” or “ruinous competition”—or even “protection of the public”—the discussion is over.

Although we shall return in a more systematic way to what might be “discussable” in such cases, we should note that the Fox plaintiffs had some prima facie plausible rebuttals to the state’s buzz words. Ostensibly, the California scheme is meant to protect two groups: Franchisees from overreaching by manufacturers, and the public generally from the shoddy service that might attend “ruinous competition.” But California has other

13. Id. at 115 (Stevens, J., dissenting).
15. Id. at 93.
legislation that directly serves both of those ends. Automobile dealers are licensed, and to obtain those licenses they must meet qualifications designed to assure adequate and responsible service. There is also direct policing of the form and execution of franchise agreements. Given these regulations, the Fox plaintiffs might sensibly have wondered what the subject statute adds to consumer protection or franchising equity. Is a licensing scheme without competition better for consumers than a licensing scheme with competition? How do you persuade potential franchisees to put up $100,000 or more of their own money to join manufacturers in a plot to "over-franchise" an area to the detriment of the public and all franchise holders? What does the manufacturer say to induce this lemming-like behavior? "How would you like to get involved in some ruinous competition (in which you will probably be bankrupted) under the sponsorship of a manufacturer who uses multiple franchising to gouge the franchisees who survive?"

But if the public-interest gains seem ephemeral, the private damages are real. And here I am not talking about general and widely-distributed economic harms. I mean focused and non-transferable injuries to particular persons. People do not become automobile dealers, or much of anything else, by random choice of occupation. They do so because they have personal histories that fit them for the position—or at least seem to fit them better for that than for the alternatives. We needn't tell poignant tales of working one's way up from mechanic or clerk or salesman to branching out on one's own, to recognize that to thwart ambition is often to preclude the application of expertise garnered, perhaps "hard-won," over a substantial portion of a working life.  

The unhappy systemic effect of the individual harm is, of course, the increasingly frequent blocking of the avenues of opportunity

16. Having abandoned "economic rationality" as a constitutional doctrine in the 1930s, the Court has perhaps missed one of the major developments in economic theory since that time—developments that earned Herbert Simon the Nobel Prize. See, e.g., H. Simon, Models of Man (1957). Economic theory now recognizes that rationality is "bounded," that economic actors make decisions based on the special and often non-transferable knowledge that they have. Thus, when some line of progression based on experience and knowledge is foreclosed, the worker or entrepreneur is often unable to make a lateral transfer into some larger field. Taking the "next best alternative" may involve larger rather than marginal losses, particularly where, as may be true generally, productive intelligence is very specifically related to work experience. See generally L. Thurow, Generating Inequality (1975).
and self-realization that make bearable the constant need to accommodate our personal desires to the rights of others in scarce resources.

But none of this is talked about in Fox. The plaintiffs, no fools, were not about to frame their attack in terms of the rationality of the statute. A strategy was developed that avoided the substantive jugular and instead hacked away at the capillaries—delegation, procedure, anti-trust. The Court’s consistent refusal to consider substantive-rationality attacks on “economic” regulation, of course, invites this strategy. The majority’s recharacterization of the claim in jugular terms thus must have been a shock. It also meant that the case was decided on a theory that was never argued—indeed, is generally considered to be “nonarguable.” Perhaps for this reason the substantive question is treated in its most general form, as a claim to freedom from state regulation.

In that form it is not just a sure loser—it also infects the procedural claim. If that’s the liberty or property claim that the plaintiff is putting forward, then Justice Blackmun was correct to treat it as non-existent. And if it is, indeed, the power of the state to regulate that is to be weighed against private delay costs, then surely Justice Marshall was right to see the scales as clearly overbalanced in favor of state power.

The general power of the state to regulate is obviously not what the plaintiffs in Fox wanted to talk about. They wanted to talk about their serious and substantial interest in carrying on their occupations, about the opportunities the statute provides for potentially crippling harassment from competitors, and about the extremely modest public gains that flow from the legislation. Yet somehow, even when they talked about these things in process terms, and seemed to be heard, they were heard through a substantive-claim filter that eliminated essential detail.

Only Justice Stevens seemed to hear and respond in the specific terms that the plaintiffs demanded. He managed to do so by drawing an iron curtain between substance and procedure and then framing the procedural issue in analogical terms. Suppose, he said, this were a private civil action and the state had given the hypothetical plaintiffs the right to an injunction on a mere complaint—a complaint that did not so much as allege
that the defendants had engaged, or were about to engage, in any wrongful conduct. Surely, such a procedure would violate due process.

But, alas, the analogy won’t wash—or rather it won’t stand up to the majority’s alternative analogical construction. For Justice Brennan answered Stevens specifically. This is not civil litigation, said Brennan, this is a state licensing law. That applicants for licenses must suffer some delay in processing their applications is endemic to a licensing system. Indeed, this scheme is more beneficial to the applicant than some. If no one objects there is no wait.

Because Brennan’s analogy is closer to the structure of the regulatory scheme than Stevens’, it has a strong a priori claim to superiority. And using the voting in Fox as an empirical sample of analogical appeal, the superiority is on the order of five to one. At this point (because discussion of the substance of the regulation has been Ferguson v. Skrupa’d out of bounds) Stevens, and the plaintiffs, are left with nothing to say. The fundamental issues have never been addressed.

IV

The methodological problems of avoiding substantive-rationality review are deeper still. As Mr. Justice Holmes pointed out in his Lochner dissent, the “Lochnerish” demand for sufficient state purpose, appropriately pursued, in order to legitimize state regulation gives “freedom of contract” an unexamined and powerful constitutional status.

Two critical positions are possible with respect to such judicial assertions of constitutional values. One attempts to “neutralize” analysis, to purge judicial review of value assertions. That approach seems doomed. The other asks, “Why that value?” and “Why that much weight in a contest with other values?” It views the quality of constitutional argument from the perspective of how convincing the answers are to those ques-

17. 439 U.S. at 108-09.
The current no-review-of-economic-legislation posture does not have a good answer to either question.

By refusing to review the substance of state economic legislation, the Court asserts the preeminence of the democratic political process. As fundamental values go, democracy is of course pretty unobjectionable. The point is that it is not always unobjectionable, nor does the category "social and economic legislation" identify a domain within which objections to democracy do not operate. Making democracy the trump suit encounters the same difficulties as any other "fundamental value" analysis.

All of this may be obvious. The institution of judicial review, after all, presupposes that democratic judgment as expressed through state legislation is not always accorded constitutional supremacy. It is commonplace that the "founding fathers" did not wholly trust legislatures. And the drafters of the Civil War amendments particularly distrusted state legislatures. As someone (only mock humorously) once suggested, "At Appomattox General Lee surrendered to John Marshall."

But it is not only constitutional history that dampens our enthusiasm for democracy. The unhappy fact is that, if by "democracy" we mean "majority rule," and if we expect majority rule to produce what a majority really wants, then democracy cannot work flawlessly even in theory. Voting theorists, at least since Condorcet, have known that the outcome of majority voting, even in a direct democracy with no opportunity to form coalitions, may be merely the artifact of the placement of issues on the public agenda. And when one adds to these difficulties the

20. Obviously this category contains constitutional theories of enormous diversity, including theories that have some taint of the neutral principles ideal. Although the forms of argument differ, in major efforts such as A. Bickel, The Supreme Court and the Idea of Progress (1978); C. Black, Structure and Function in Constitutional Law (1969); Ely, Toward a Representation-Reinforcing Mode of Judicial Review, 37 Md. L. Rev. 451 (1978); Tribe, Structural Due Process, 10 Harv. C.R.-C.L. L. Rev. 269 (1975); Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221, 278 (1973), scholars have argued that certain values are constitutionally important, that they have particular (sometimes decisive) weights, and that the task of constitutional adjudication is to implement those values as best as possible in the context of competing values and institutional concerns.


23. For a modern demonstration, see Levine & Plott, Agenda Influence and its
obvious impediments to the expression of true majority sentiment that inhere in mediate or representative democracy, plus the predictable outcomes of coalition formation with logrolling, it would seem peculiar, as an original proposition, to draft a constitution that wraps legislative outputs in a legally impervious mantle called "democracy" or "majoritarianism."

Theoretical imperfections do not, of course, exhaust our concerns with the use of democracy cum majoritarianism cum state legislative action as an unexamined major premise in constitutional adjudication. We also know something about state legislatures as real-world institutions. Perhaps no governmental institution is held in as little esteem as our state legislatures. Cataloguing their weaknesses has provided professional employment for generations of political scientists. And telling tales of their inanities, irregularities, and outright dishonesty is a favorite indoor sport for those "in the know" about the state legislative process.

It seems reasonable to conclude that the reverse-Lochner, no-review policy of the Supreme Court stands indicted on both counts of "bad" constitutional theory: It does not seriously address the "Why that value?" question, nor does it justify giving democracy conclusive weight where "economic" questions are involved. Indeed, this posture produces one of the results that most outrages the critics of Lochneresque review: A constitutional axiom that flies in the face of social reality. That state legislation always represents the will of the people seems at least

27. Perhaps the most comprehensive catalogue of the structural and organizational deficiencies of state legislatures is to be found in The Citizens Conference on State Legislatures, State Legislatures: An Evaluation of Their Effectiveness (1971). For a less structural, more "political" approach to the evaluation of state legislative performance see, e.g., State Legislatures in American Politics (A. Heard ed. 1966).
28. McCloskey, supra note 5, could find no basis for this conclusion nearly twenty years ago; nor have recent (and more sympathetic) commentators provided convincing explanations. See, e.g., L. Tribe, supra note 4, at 427-55; Wellington, supra note 20, at 284.
as laughable as the proposition that sweatshop working conditions always represented the contractual will of bakers.

V

The Supreme Court is not unmindful of these arguments. While it says that state, social and economic legislation will not be reviewed, it does in fact review it. The problem is that the review provided tends to occur either in some disguised form of procedural review or via some connected, and otherwise protected, substantive value. In either guise the review is misdirected and therefore potentially irrational.

In a way, the suggestion that the Court seriously reviews and invalidates social and economic regulation is too easy.\(^29\) What could be more obvious than that \textit{de jure} segregation of the races was regulation both social and economic;\(^30\) that invalidation of a prohibition on providing counseling as to means of contraception thwarted a social policy;\(^31\) or that state laws precluding advertising of the prices of pharmaceuticals implemented state economic policy?\(^32\) Nor is there any reason in either the text of the Constitution or the importance of the interest to individual human beings to treat all straightforward questions of access to economic opportunity as systematically different from those same questions when presented as issues of race, marital privacy or speech. The Constitution, after all, does not say that segregation is unequal, that advertising is speech (or that “Congress” also means “state”), or that marital privacy has any constitutional status at all. And I have difficulty conceiving of the citizen who would not trade some smidgen of speech, privacy, or racial equality for some large portion of personally relevant economic activity.

But, as I say, that argument is too easy, and it leads in the wrong direction. I do not wish to argue that all of these examples of review of social or economic legislation are simply examples of Supreme Court error. I prefer to suggest rather that in-

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tervention by the Court into the realm of social and economic regulation is inevitable—even when some previously determined or newly constructed fundamental value is not at issue—and that that intervention is only made less coherent, and ultimately less sensible, by denying what is going on.

Reconsider, for example, the pharmaceuticals advertising case. The anti-competitive effects of the prohibition on price advertising are clear. What is less clear is the effect of advertising on the integrity of the process of dispensing drugs. But does anyone seriously believe that that question gets easier by framing the issue as a question of free speech? The infusion of the speech idea can only reverse the presumption. It provides a different rule of decision, not additional clarity concerning the issue that is central to rational decision-making. Do we really want the Court to think carefully about a regulation affecting advertising by car dealers within another's "territory," but not about a regulation affecting the location of a competitive business within that territory? If so, would you agree that the distinction is elusive?

Thus it comes ineluctably to pass that in the next case (or the next, or the next) the Court perceives the ghost of Lochner-esque review lurking behind the free speech claim. And at that point, seeking somehow to preserve the anti-Lochner principle, the Court must take evasive action. One possibility is to modify free speech doctrine so that commercial speech does not get a strong presumption of protection. Another is to identify some state regulatory purposes that will get special consideration. A third is to compartmentalize commercial speech into important and unimportant commercial speech. In fact, in the case that revealed the ghost at the banquet table, the Court took all these routes at once. (Ghosts are scary.) But the irony is that these devices do not exorcise substantive review, they invite it. The Court must ask what the state's purposes are, how the regulation effects those purposes, what the uses are of the speech that is being suppressed, how alternative regulation might accommodate all the values involved, and so on.

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33. Id.
Now, as the next section of this discussion will make clear, I don't object to consideration of those questions in appropriate ways and in appropriate contexts. But here the Court is being led into the substantive review thicket on a peculiar pretext—that it must do so to protect speech—speech that (given the Court's limited approach to review) it must not view as fundamentally related to the core purposes of the first amendment. If the Court is to review seriously the rationality of some state economic and social regulation, surely there are better criteria of selection than the tangential involvement of a non-fundamental free speech claim.

One may also believe that the analysis of such cases would be improved were the specter of the speech issue excised from the proceedings. When the Court tells us that advertising drug prices is to be distinguished from trade-name advertising of optical services, on the ground that drug price advertising involves health and is therefore inherently more valuable speech, my respect for the tradition of judicial reason-giving is being stretched very thin.

Nor are the commercial speech cases the best examples of rationality-review combined with reason-giving bordering on the lunatic. As our previous discussion of Fox reveals, translation of substantive claims into procedural ones is an obviously attractive device for inducing review. Fox got caught with its substantive claim showing—or perhaps we should say that for some reason the Court was willing to look through the procedural veil to see the substantive rationality issue. But this is not always true. Sometimes the Court is blinded by a process claim that is transparent to everyone else.

The "irrebuttable presumption" cases of the early 1970s are classics of this genre. What was painfully clear in cases like Bell v. Burson and Stanley v. Illinois was that the legislation involved was overly general. All drivers who are involved in accidents but have no insurance (Bell) are not dangerous or irre-

35. Id. at 12-16.
37. 405 U.S. 645 (1972). Some commentators do not include Bell and Stanley in the irrebuttable presumption flurry, see Tushnet, "... And Only Wealth Will Buy You Justice"—Some Notes on the Supreme Court. 1972 Term, 1974 Wis. L. Rev. 177, 194-96, but this is a detail.
sponsible. All unwed fathers (Stanley) are not poor parents. But the attack in these cases was not directly on the rationality of the substantive legislation. Rather, the plaintiffs demanded hearings. Their argument was that the statutory rules “decided” individual cases on the basis of irrebuttable factual presumptions, thereby denying the plaintiffs due process of law—to wit, an opportunity to establish that the facts were different in their cases. The Supreme Court agreed. It ordered that the plaintiffs be given hearings. Later, in the same line of cases, the Court enunciated the rule that irrebuttable statutory presumptions could not be used to decide particular cases unless they were “necessarily” and “universally” true.\(^{38}\)

There are two major problems with this approach. First, the cases make hash of the prior procedural due process jurisprudence. It had been (indeed still is) thought obvious that there was no need for a hearing where there was nothing to talk about.\(^{39}\) And since the driver in Bell and the father in Stanley admitted that they fell squarely within the legislative disqualifications, “hearing” talk seems misplaced—substance and procedure have somehow been conflated.

Analytic confusion might, of course, have no disastrous consequences. But in this instance it does. The irrebuttable presumption doctrine has a voracious appetite for statutes. Left long at large it will gnaw its way through substantial portions of the codes of the fifty states and the U.S. Code as well.\(^{40}\) If the validity of some of our most ubiquitous legal rules—the fifty-five mile per hour speed limit, twenty-one years as the age of majority, statutes of limitations, formal requirements for testamentary disposition, for example—is to be tested by asking whether the general principle or purpose that underlies the rule (safety, knowing consent, etc.) is furthered in every instance of its application, then rules are no longer possible.

Because such a state of affairs is insupportable we need some way of avoiding this particular proceduralist perspective. But in the irrebuttable presumption cases the Court does not


\(^{39}\) The basic cases are FPC v. Texaco, 377 U.S. 33, 39-41 (1964) and United States v. Storer Broadcasting Co., 351 U.S. 192, 204-05 (1956).

\(^{40}\) See Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534, 1548-49 (1974).
(and indeed cannot) tell us when an attack on legislative overgenerality should be perceived for what it is—a substantive rationality claim that under current doctrine is a sure loser—and when it may be translated into a “right-to-hearing”/“irrebuttable presumption” claim that is a sure winner. Confronted with an extremely important question (When is it permissible to generalize by rule rather than particularize by reference to a principle or standard?) the Court, having barred itself from considering the substantive rationality of legislative judgments, had nothing to say.

A final technique for inducing substantive review provides a nice counterpoint to the irrebuttable presumption cases. In this situation it is the movement from a rule to a standard with individualized decisionmaking that, at least in part, excites judicial interest. The case in point is Gibson v. Berryhill, another in the long and continuing line of challenges to state regulation of the practice of optometry—a line that in Williamson v. Lee Optical Co. seemed to provide the reductio ad absurdum that confirmed the total destruction of Lochneresque review.

Berryhill involved action by the Alabama Board of Optometry to remove the licenses of optometrists who practiced in the optical departments of corporations or other business establishments. The charge was that such practice constituted unprofessional conduct—a charge that entitled the licensees to a hearing before the Board. Interestingly, the statutes of Alabama had, until 1965, clearly conferred authority to practice in the challenged manner. In that year, however, the legislature rewrote the “optometry code,” eliminating the clear contemplation of practice in corporations and other commercial establishments. The Board immediately began proceedings under the general unprofessional conduct provision.

The plaintiffs sought to enjoin the Board’s action on the procedural ground that they could not get a fair hearing before the Board. Their argument was that the Board was composed


42. That there is something to say, but that it involves at least “intermediate” rationality review, is argued by Professor Tribe. L. Tribe, supra note 4, at 1097.


44. 348 U.S. 483 (1955).
entirely of self-employed optometrists, that lifting the licenses of
the "commercial" optometrists would cut the number of optometrists in the state in half, and that the Board was thus obviously financially interested in the proceedings. The district court found, as a fact, that the Board was self-interested and granted the injunction. The Supreme Court affirmed on the facts, merely noting its prior cases holding that personal financial interest disqualified an adjudicator.45

_Berryhill_ has several interesting aspects. First, we should note the Court's circumspection. It affirms a _factual_ finding of financial self-interest. It does not approve a simple inference of self-interest from the existence of regulation by one competitor of another. The standard forms of professional licensing remain untouched. Second, the procedural posture of the case clearly suggests that had the Board of optometrists persuaded the legislature to eliminate "commercial" practice by statute, the plaintiffs would have been left without an argument. The chink in the armor of the no-substantive-review principle is thus small. The legislature must confer the power to suppress competition on a private group in a fashion that leaves open the question whether competition will indeed be suppressed, before this procedural approach has a fighting chance.

Yet, if we combine this technique with the others we have discussed—association of the claim with a recognized fundamental value and the irrebuttable presumption idea—it becomes clear that our old friend _Fox_ had the makings of a case. Surely there is something to the notion that _Fox_ 's freedom of movement, not to mention its freedom of association, was being impaired by the California scheme. Moreover, the failure of the New Motor Vehicle Board to exercise any discretion about the plausibility of a protest transferred a tactic for harassment, _à la Berryhill_, directly to _Fox_ 's competitors. And, finally, the statute contains an "irrebuttable presumption" that any location or re-location that excites a protest is worth looking into via a hearing device with all its attendant delay—a presumption that the California Board's experience hardly reveals to be universally true.

But I do not want to argue that the Court should have listened to _Fox_ 's claim more carefully because it could have been

45. 411 U.S. at 579.
articulated in terms sometimes persuasive in cases that might otherwise be recognized as requests for review of the substantive rationality of state economic and social legislation. These techniques are after all techniques of evasion. They misdirect analysis, and because they do, they may generate unwarranted judicial intrusion into state policymaking. The requirement that claims be presented obliquely, that review of substantive irrationality be under cover, that it be tied to the contingency of the form of the legal proscription or the tangential involvement of some otherwise protected interest, makes it as difficult to be appropriately restrained as it is to be appropriately activist. The requirement that substantive rationality be officially ignored, in the face of plausible claims of irrational injury, may produce its own peculiarly irrational forms of judicial second-guessing of legislative policy choices.

VI

If the foregoing is at all persuasive we should by now be agreed that the attempted wholesale retreat from review of economic and social legislation produces many ills. But we may nevertheless suspect that as a comparative matter we get less of them with the Court's current posture than we would if it returned to the sort of review actually espoused in the *Lochner* case. Perhaps. But I am not convinced.

The underlying difficulties of the old economic substantive due process were two-fold. First, the means-end rationality approach invited oversimplification. As is demonstrated with great clarity by a student note concerning the functionally equivalent area of equal protection analysis, there is in such review a substantial propensity to conflate complex purposes into unitary ends, and to reject as irrational means that merely reflect an appreciation of conflicting purposes.46 As Hans Linde has put it, the Court must recognize that the legislature intended to do what it did47—as compromised and conflicting as the results may be. Second, at least as originally practiced, substantive due process review failed to appreciate (or rejected) the distributional purposes of legislation. That society might view bakers, or

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workers in general, as worthy of special contractual protections was not credited unless the Court could divine a special problem, a need, that justified deviation from the usual rules of contract. The Court sought a market failure justification where paternalism would have sufficed.

The question, then, is whether there is a role for judicial review when the full play of dominant and subsidiary legislative purpose, of allocational and distributional ends, is recognized. In my view there is. But in order appropriately to orient such review we need to put it on a somewhat different footing: To recognize that the appropriate constitutional demand is not for “rational” or “efficient” legislation, but for legislation that is public-regarding—that can make a coherent and plausible claim to serve some public, rather than a merely private, interest.

That such a demand has support in the Constitution itself is relatively non-problematic. There is hardly an idea of greater moment in the whole of the constitutional structure than the notion that public legislation should provide for the public welfare. Indeed, the idea of legislative action for the public welfare, rather than for private or factional gain, is so pervasive with respect to the national government that it is difficult to locate it in any particular text. There is, of course, the preamble, which tells us something about how the rest of the document is to be interpreted. And it is commonplace that the general structure of checked and balanced powers was designed to avoid the evils of dominant factions that might use governmental institutions for their own ends. Legislators are also enjoined from concurrently holding other offices or from feathering a subsequent nest by increasing the pecuniary rewards. Surely these specific and structural features, plus the “tax and spend for the general welfare” clause, should be enough to convince anyone who found the initial statement of the proposition at all problematic.

“But what about the states?” you may say. The separation of powers principle and the general welfare clauses do not, strictly speaking, apply to them. And that statement is certainly correct, although I would hasten to add that the emasculation of

48. A good start toward a taxonomy of legislative purposes is made in Note, supra note 1.
49. U.S. Const. art. I, § 6, cl. 2.
50. Id. § 8, cl. 1.
the guarantee clause, the privileges and immunities clause, and
the ninth amendment has something to do with its correctness.
But we need not flay dead horses. No one, to my knowledge, has
ever argued that state governmental powers can legitimately be
exercised for private ends. The difficulty has been to sort out the
public from the private, given the wide range of efficiency and
equity concerns that might actuate public policy, and the multi­
tude of implementation devices that just might further those
policies in an uncertain social and economic environment. Of
course, it is implicit in the constitutional scheme that legislation
be public-regarding. But is that a justiciable standard for judi­
cial review?

To put the matter in its usual institutional terms, if we
would recognize “public-regardingness” as a principle of consti­
tutional moment, to be enforced in part through judicial review,
we must explain how to accommodate majority rule with public­
regardingness in realistic cases of legislative action. For the
question whether the legislative action has a public purpose is
always one that the legislature purports to have decided affirma­
tively. The state does not come into court admitting that it had
no legitimate purpose. And, at that point, my critic will suggest,
I must presume either that the Court will seek to discover a
“true” public- or private-regarding motive, or that it will decide
whether the legislation’s public benefit was worth the cost to the
affected private interests. The first enters a fantasyland, probing
the collective consciousness of the legislature, that the Court has
hitherto wisely (for the most part) avoided; \(^{51}\) the second usurps
the policy function of the legislature.

I do not, of course, want to argue for full scale judicial in­
quiry into legislative motive. I would, however, suggest that a
refusal to search for motivation should not encompass a willing­
ness to accept insubstantial public purposes as substantial and
validating. That the Court suspects fraud should not serve to
protect ineptitude or corruption. The Court need not take up
the awkward judicial posture of “bending over backwards” to
avoid the suggestion that it is searching for motive. \(^{52}\) On the

\(^{51}\) See generally Ely, Legislative and Administrative Motivation in Constitu­
tional Law, 79 Yale L.J. 1205 (1970); Brest, Palmer v. Thompson: An Approach to the

\(^{52}\) This seems to be the posture in United States v. O’Brien, 391 U.S. 367 (1968).
other hand, I do, obviously, advocate judicial review of the ade-
quacy of a statute's beneficial purposes when judged in the light
of its harmful effects. I believe the citizen is entitled to an expla-
nation of why his private harm is at least arguably outweighed
by some coherent and plausible conception of the public good.
How is this to be accomplished while maintaining an appropri-
ate respect for the policy functions of legislation?

One answer is “In the same muddled way that interests and
claims are balanced in other areas of constitutional adjudica-
tion.” The potential gains and losses are analyzed and the legis-
lature’s choice is validated unless its cost-benefit calculus is
patently unreasonable. Such balancing is never wholly convinc-
ing, and the presumptions of validity decide most cases. But
withholding a similar analysis from claims asserting unreasona-
able invasions of private interests in realms denominated “eco-
nomic” or “social” can be justified only by opposing all “balanc-
ing” or by demonstrating the peculiarly unmanageable nature of
balancing in the domain of economic and social policy.

To critics of balancing as an adjudicatory technique, I
have little to offer. I must, of course, recognize that they point
to a discontinuity between pleading a constitutional law claim
and deciding a constitutional law case. Pleading demands rights
assertions, while decisionmaking seems only to balance interests.
But I cannot agree that the solution to this “problem,” if it is
such, lies in the “rights analysis” direction. I cannot sustain a
vision of a world in which constitutional (or other) rights ring
out true and clear, unencumbered by contrary considerations of
the conflicting “rights” of others. And it is the fundamentally
compromised nature of social life that “balancing interests” both
recognizes and confronts. An attempt to function at the level of
rights can result only in a submersion of substantive problem-

53. In procedural due process cases the Court has perhaps most explicitly enunci-
ated criteria that take this form. See, e.g., Mashaw, The Supreme Court’s Due Process
Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in
54. E.g., Note, Specifying the Procedures Required by Due Process: Toward Lim-
its on the Use of Interest Balancing, 88 Harv. L. Rev. 1510 (1975). See generally R.
Dworkin, Taking Rights Seriously (1977); C. Fried, Right and Wrong (1978).
55. My previous criticism of the Court’s due process calculus, see note 53 supra,
should not be misread. The criticism is of balancing without clarifying the values at
stake, not a suggestion that balancing can somehow be avoided.
solving in formal categories and in the misdirections and hypocrisies of formal characterization that we have previously described.

Yet there is a subtler objection to interest-balancing that may partially rehabilitate the notion that constitutional adjudication should proceed only on the basis of claims of right. It is the requirement that a right be asserted that potentially distinguishes judicial from legislative interest-balancing. The assertion of a right provides a legitimate occasion for judicial review and, by restricting its domain, prevents the Court from becoming a simple Council of Revision. If no right to be free from economic and social regulation is being asserted, isn’t the review that I am proposing simply a review of the wisdom or lack thereof of state legislatures? Shouldn’t I be tossed out of court for failure to state a claim? Or, alternatively, wouldn’t counting such claims as legal claims necessarily invade the appropriate domain of legislative policy choice?

My answer is “No.” But the question is a good one. It requires that I state the cause of action that I espouse with somewhat more precision and say something about the “facts” that would be relevant to its proof. If this can be done, there seems no reason to object to a demand for public-regarding legislation as raising an inherently unmanageable type of constitutional claim.

The claim is, in fact, relatively straightforward: It begins by alleging some cognizable harm— injury-in-fact, to use the vernacular of the standing cases. The further “elements” of the claim include the lack of a coherent and plausible public purpose, either on the face of the statute or when it is considered in operation and in the context of other legal norms, and the absence of important circumstantial “process” guarantees on the “public spiritedness” of legislation that usually attend legislative action.

To fix these ideas somewhat more concretely, let us return to Fox. There, you will remember, the car dealers complained of lost profits from delay, and occasionally of total frustration of a proposed enterprise, with attendant out-of-pocket losses. Injury-in-fact seems clear enough.

The analysis of public purpose. The suggested requirements for a satisfactory public purpose are that it be “coherent
and plausible." Of course, some purposes will be excluded by di-
rect prohibitions. One could imagine the Fox statute as a redis-
tributive scheme designed to insure quasi-monopoly rents to au-
tomobile dealers. But that purpose is excluded by the antitrust
laws. The question in a case like Fox would then be whether
the consumer protection and dealer oppression purposes are co-
herent and plausible.

The consumer protection notion certainly verges on the in-
coherent. It is difficult to see how consumers in a rising marginal
cost industry would be made better off by reducing competi-
tion. Moreover, the protection of consumers via the preexisting
licensing scheme renders this purpose implausible.

Protection of dealers from manufacturer overreaching
seems, on the other hand, a coherent purpose. In many long-
term contracts there may occur periods in which events make it
possible for one of the parties to skew the advantages from con-
tinuing the arrangement strongly in its favor. Where history,
expertise, and market power suggest that one party will have a
decided advantage in the initial structuring of the relationship,
legislative constraints on the exercise of bargaining power may
seem advisable. But the plausibility of this purpose in the case
of the Fox statute strains credulity. How could manufacturers
entice new dealers to join them in extorting prior dealers when
the predictable costs are bankruptcy? And given the unlikeli-
hood of new dealers moving into saturated markets, how could
manufacturers oppress dealers (whose franchises are already
protected from arbitrary termination by other legislation) by
backing unreasonable demands with threats of new competition?

The enforcement scheme in Fox is also peculiarly unsuitable

56. There is, of course, no antitrust objection to other means of making automobile
dealers "better off"—subsidies, tax exemptions, procurement policies, exemptions from
land use or other regulatory controls, and so on.

57. The basic rationale for regulatory limitations of entry is "ruinous competition,"
that is, a situation in which all competitors will fail because continuously declining mar-
ginal costs press competitive prices relentlessly below average costs, thereby precluding
profitability. For a general discussion see, for example, J. Bonbright, Public Utilities and
the National Power Policies (1972). This situation afflicts only a few industries requiring
very large fixed investments to begin operation in relation to their incremental costs of
operation. Automobile dealerships are very unlikely "natural monopolies."

58. See generally Williamson, Transaction-Cost Economies: The Governance of
Contractual Relations, 22 J. of L. & Econ. 233 (1979).
to the purposes envisaged. Although consumers and oppressed dealers are the purported beneficiaries, there is no role for the former in enforcement and the state has no power to protect either on its own initiative. Moreover, the complaint procedure is set up in a fashion that maximizes the opportunities for harassment while sharply constraining the state’s power to control pernicious uses of the system. It is not merely that one can imagine better ways of implementing the purported purposes of the legislation—it is hard to contrive worse schemes. And the historic output of the process confirms this a priori analysis. Whatever the legislature wanted to do, what it in fact did was provide a means for delaying, and perhaps thwarting, new competition.

I do not want to oversell this analysis. One can imagine that some peculiarity of the California market (the licensing scheme, perhaps) makes automobile dealers natural monopolies. It is conceivable that dealers give better service without competition. The legislature may have reason to mistrust agency enforcement discretion. Perhaps the manufacturers are capable of extortion via threats of ruinous franchising. Maybe the legislature just wants to limit the number of automobile franchises for aesthetic reasons. Or to produce a waiting period in which ill-considered franchising or relocation plans can be reconsidered. But I have to admit that I find these imaginings rather fanciful. In the absence of some demonstration to the contrary I can see no good reason to resist describing the legislation in terms of its dominant effects: It permits existing dealers to delay and sometimes forestall potential entrants. And that is not a permissible public purpose.

Yet even with this lopsided “substantive” analysis there is some discomfiture in arguing for invalidation. If the legislative scheme has merely turned out badly, why not return to the legislature and make the argument there? Legislative correction would solve the problem without either the unhappy confrontation of legislative and judicial power or the potential for dampening legislative willingness to experiment with new forms of economic regulation or redistribution. Indeed, because I believe these views to be basically sound, I would advocate invalidation only when the underlying structure of competition in the political marketplace suggests that self-correction is unlikely.

The “special interests” problem. In some sense all legislation is special interest legislation. We rely, therefore, on the
competition among special interests to limit simple transfers from the general public to particular persons or groups in circumstances that make the donees improbable subjects of general social concern. Logrolling, disguised transfers, and outright corruption make the competitive democratic check an imperfect protection, but the structure of governmental institutions—bicameralism, executive vetoes, and judicial review—adds further insulation. Because the last check, judicial review, speaks with finality and is less connected to electoral politics than other checks, the appropriate place of judicial review has always been considered a problem. Most would perhaps agree that judicial activism is most appropriate when other checks are inadequate. The question is what evidence of inadequacy should be required to actuate serious judicial review.

The conventional response is that of the Carolene Products footnote. Courts should enforce direct prohibitions, should be alert to protect “discrete and insular minorities” from the effects of democracy combined with prejudice, and (perhaps) should also have a special role in maintaining the openness of democratic institutions. This description of an appropriate judicial role has a certain intuitive, as well as an historically validated, appeal. Indeed, to the extent that it focuses on defects in the democratic process and uses those defects as justifications for judicial intervention, I believe it looks in the right direction. But there is a subsidiary theme in the Carolene Products footnote. It seems to distinguish the review it approves from the economic due process review the remainder of the case disapproves on grounds of judicial competence.

Yet the specific prohibitions of the Bill of Rights, and the ideas of minority status and the integrity of the democratic process, speak with greater clarity concerning important constitutional values only on superficial inquiry. Brown v. Board of Ed-

59. Madison was both alive to the problem, The Federalist No. 10, (J. Madison), and too sanguine concerning the power of factions in a heterogeneous political space. See Dahl, supra note 24, at 15-17.
61. When “exhuming” substantive due process nearly 20 years ago, Robert McCloskey convincingly demonstrated the similarity of that review to other areas of constitutional adjudication. See McCloskey, supra note 5, at 45-50. He “reburied” substantive due process review only on the ground that the Court, perhaps, had too much other business. Id. at 60-61. Yet, having so thoroughly demolished the idea that review in this
leads inevitably to Bakke. One-man-one-vote turns out to be a gerrymanderer's delight, and freedom of speech doctrine approaches the principled clarity of the Internal Revenue Code. There is no absolute value or procedural approach to the question of the appropriate role of judicial review that will save the courts from the hard questions of when legislative judgment is legitimate. I would, therefore, advocate that the question of "legislative failure" be directly confronted.

Consider again the Fox situation. Three groups are potentially harmed by the legislation in question, consumers, new dealers, and manufacturers. The consumer is, of course, the "pitiful giant" of legislative processes. Numerically a majority—indeed almost coextensive with "voters"—consumers are traditionally viewed as unorganized and, therefore, relatively powerless politically. Yet surely this overstates the weakness of consumer interests. Political entrepreneurship in electoral politics consists, at least in part, in seeking out unrepresented interests and representing them. The potential for "Olson effects" cannot alone be the basis for declaring the political process inoperative, if democratic governance is to remain the dominant form of policy choice.

But in Fox the amorphousness of consumer interests is combined with a situation in which the more focused opponents of a simple transfer to existing car dealers are also powerless. The class of potential dealers may turn out to be quite large over area was different from other areas, one almost doubts that McCloskey himself could have been persuaded by that argument to cast a spadeful of earth back into the open grave.

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66. Cf. Cohen, Hearing on a Bill: Legislative Folklore?, 37 Minn. L. Rev. 34 (1952) (different procedural approaches taken by legislators to determine whether the goal sought to be implemented will be realized); Ely, supra note 20 (different approaches to filling in the Constitution); Linde, supra note 47 (different theories of due process in legislation).
time, but it is not likely to have many existing representatives at any time in particular. And the manufacturers are out-of-state corporations. This combination of factors makes it unlikely that effective political competition surrounded the passage of the statute or that the legislative process will be self-correcting. The state representative who hitches his wagon to nonexistent and/or extra-territorial interests is not long for the constituent assembly.

Again, note that the claim is modest. I do not advocate overturning legislation on “process” grounds (because relevant political competitors are arguably excluded) when coherent and plausible public purposes are served by legislation. Nor should a court ignore actual competition, however implausible its occurrence may seem a priori. Ideologies may substitute for interest groups or provide proxies who “represent” them.69

VI

“Public-regardingness” turns, thus, on a combination of substantive and process concerns. Conversely, I would have the courts look for a combination of substantive and decision-process “danger signals” that together would suggest that legislation is essentially private-regarding—that it benefits some group in ways that cannot convincingly be explained in terms of a broad range of possible public purposes, or in terms of a well-functioning democratic process. Methodologically the argument is for viewing both the Constitution and constitutional cases whole; for taking seriously, to paraphrase Justice Frankfurter, the complicated as well as the simple-minded ways in which legislation fails its most basic function—to pursue the public welfare.

This suggestion, of course, raises as many questions as it answers. It launches the Court into areas of judicial review that it has attempted to avoid. To be sure it has not avoided them, but it has avoided many of the hard questions that straightforward review entails; questions that cannot be resolved on the high ground of neutral principles, whatever the level of judicial craftsmanship. Many questions—such as what counts as a public

69. On the complexities of representation, see generally H. Pitkin, The Concept of Representation (1967).
purpose, how burdens of proof should be allocated, what "failings" of representative democracy are inconsistent with a well-functioning legislative system, how broad or narrow the constitutional remands from the courts to the legislature should be, what level of public purpose spread on the legislative record or embodied in the statutory form will sustain legislation in the face of effects demonstrably unrelated to the achievement of those public ends—all remain to be addressed. These are the perennial issues of judicial review in other areas. They must be addressed here, as elsewhere, in context. And we cannot here, in an article that would hold even my attention, speculate on how the Court will resolve the question of the constitutionality of the myriad regulatory schemes that might be presented to it.

The basic point can, however, bear repeating. The Constitution presumes that private activity will be constrained only to promote public purposes. The recognition first, that there is a wide range of such purposes, and second, that democratic, collective choice may pursue any or all of them in a complex and eclectic body of regulatory statutes, in no way reduces the force of the basic principle. The citizen has a constitutional right to demand that public law be public-regarding. Otherwise, his private harm is constitutionally inexplicable.