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The Constitutionality of Business Regulation in the Burger Court: Revival and Restraint

By Scott M. Reznick*

The Burger Court is now revitalizing constitutional limits on the government's power to regulate private market business activities. It has given new meaning to the constitutional attributes of private property. It has revitalized atrophied constitutional provisions and discovered new applications for limitations not previously used to restrain economic regulation. Furthermore, it has established intermediate levels of scrutiny to balance the competing constitutional claims of private economic interests and the public welfare.

To restrain the regulatory authority of the legislative and executive branches, the Burger Court has used its own constitutionally-derived political authority. After its long inertia, this reemergence of judicial activism is of contemporary political significance. While government regulation of business has proliferated, contemporary political opinion has questioned the ability of such regulation to promote the general welfare. The Supreme Court has the constitutional discretion to check, balance, and prevent this increase in regulation. Constitutional

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1. "Regulatory reform... strikes a sympathetic chord in all Americans who have watched with dismay the accelerating transition from representative democracy to government by distant public administration. Modern government at all levels has extended its reach and strengthened its grasp. Countless social and economic decisions once in the province of the market or of individual choice are now decisively influenced by government agencies and employees. Even calculated by primitive methodologies, the costs are immense. [A]n otherwise inexplicable alliance has arisen between the free enterprise right and the 'small is beautiful' left. Populists championing economic autonomy or civil liberties can be equally comfortable with the implicit promises of the otherwise time-worn battle cry of 'regulatory reform.' Impressionistic evidence suggests that the great American center shares this growing disenchantment with governmental intrusiveness." Frohnmayer, Regulatory Reform: A Slogan in Search of Substance, 66 A.B.A.J. 871 (July, 1980). See Center for the Study of American Business, The Cost of Government Regulation (1977).
history, however, contains many examples of the abuse of judicial discretion to declare unconstitutional legislative and executive determinations of regulatory policy. Thus, the expansion of judicial authority itself raises issues of political concern. As the Burger Court revitalizes its discretion and extends the reach of its authority, the risk increases that the Court will ignore the mistakes of its predecessors, succumb to the allure of power, and overreach its institutional limitations.

This Article seeks to illuminate the Burger Court’s methods of assessing the constitutionality of business regulation. The Burger Court has developed a manageable and relatively consistent analytical methodology, rooted in prevailing political economic values, to establish its view of the constitutional relationship between private property and the public welfare.

This Article proceeds in four sections. The first sec-

2. See cases cited in note 228 infra.

3. The business regulation cases examined in the Article share three essential characteristics. They involve (1) the constitutional assessment of (2) the scope of regulatory power, and (3) they define economic rights that originate in and arise from private market activities. That is, they involve “traditional” or “old” property. The “entitlement” and “government employment” cases, in which economic expectations are predicated upon government largesse under the spending power, are not examined. See notes 274-75 & accompanying text infra.


tion sets forth an interdisciplinary, legal-political-economic methodology for describing and evaluating the Burger Court's business regulation opinions. Each of the following sections explores constitutional property rights of a particular nature. The second section examines the Court's protection of market prerequisites: the right to exclude and the reliance interest. The Article next analyzes the private rights that are prerequisites to competitive efficiency: the right to market information and the right to enter the market, including the right to remain in the market and the right to enter interstate markets. The final section reviews the cases in which regulation has attempted to ameliorate market failures. These decisions have conferred constitutional dimension on the right to externalize and the right to consume common pool resources.

An Interdisciplinary Methodology

The United States has a mixed economy: elements of government control are intermingled with elements of private activity in the organization of production and consumption. This mixed market system is predicated upon several assumptions about public and private legal and economic behavior. Two principal assumptions are that people want more than is available and that individual control over available resources will permit these wants to be satisfied as fully as possible. Individuals cooperate or compete for scarce resources for their personal satisfaction; ultimately, this benefits the aggregate welfare of society. Given available resources, the mixed market system should enhance society's welfare by reducing the costs and increasing the benefits of economic activity. When the system allocates those costs and benefits efficiently, society's welfare is enhanced. The mixed market system also distributes costs and benefits. When aggregate welfare is distributed, however, individuals may find their share of benefits too small and their burden of costs too great. Other forms of individual economic behavior, perhaps less beneficial to the aggregate welfare, would more significantly enhance personal welfare. Scarcity and the mixed

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7. Resources might also be managed by the community or by the state. The literature examining the costs and benefits of the various ownership systems is vast and beyond the scope of this Article. See generally Furubotn and Pejovich, The State and Property Rights: Assignments, in The Economics of Property Rights 167 (E. Furubotn & S. Pejovich eds. 1974).
8. Alchian & Allen, supra note 6, at 12.
market's means of allocating and distributing available resources can thus create a tension between individual economic behavior and the optimal aggregate economic welfare.

In the mixed market system, both the law and the private marketplace have essential roles to fulfill. Private economic interests are recognized and defined by the law and given value by the marketplace. Only in combination do legal and market systems allocate scarce resources in ways that optimize welfare. A failure in the legal-economic interaction may cause the costs of an activity to exceed its benefits and

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10. Individuals trade with one another to enhance their own and society's economic welfare. Through its auction system, the marketplace gives value to the private economic interests available for trade. Economic value is ordinarily expressed in terms of money. Thus, a principal function of the market is to establish and maintain a pricing mechanism. Through its prices, the market provides information about consumer preferences. As the demand for a particular good increases, its price rises. Resources will then be redirected to its production, new producers will enter the market and output will expand. Eventually, the quantity of the good demanded will equal the quantity supplied and competitive efficiency will have been achieved. Consumer preferences will have been satisfied, the benefits of trade realized by consumers and producers alike and society's general economic welfare enhanced. See generally Samuelson, supra note 5, at chs. 4, 20.
thereby unnecessarily decrease the aggregate welfare. It may also cause an inequitable distribution of costs and benefits.

According to contemporary political economic theory, the principal function served by the law in the mixed market system is to specify the attributes of ownership in economic interest, that is, to define rights in property. In theoretical terms, property may be defined as the sanctioned behavioral relations among people that arise from the existence and scarcity of resources and that pertain to control over the costs and benefits of their use, consumption, and exchange in an attempt to maximize welfare. The law grants society's sanction only to particular behavioral relationships. When government regulates economic behavior, it simultaneously specifies the attributes of private property.

The law defines and regulates private property in three principal ways: it establishes and enforces the market prerequisite right of exclusion, it maintains the market conditions necessary for competitive efficiency, and it mitigates "market failures." The law sanctions an owner's right to exclude others from enjoying the benefits of his or her labor. The right to exclude gives an owner the ability to use and consume his or her resources or to enter into enforceable exchanges of them for resources held by another. Without the capacity to use, consume or exchange, an owner will have little expectation of deriving personal satisfaction from his or her resources and little incentive to produce or trade them in order to increase that satisfaction. The law also regulates the conditions necessary for competitive efficiency. It regulates the flow of market information concerning the quality and

11. "Property rights are understood as the sanctioned behavioral relations among men that arise from the existence of goods and pertain to their use. These relations specify the norms of behavior with respect to goods that each and every person must observe in his daily interactions with other persons, or bear the cost of non-observance." Furubotn & Pejovich Introduction, supra note 9, at 3.

12. Government, through its taxing and spending laws, fulfills an additional fundamental economic function: it provides public goods and services. The right to exclude is essential to the functioning of the auction system that is the private marketplace. Certain kinds of goods and services, however, are not susceptible to exclusion; it is impossible to prevent other people from enjoying the benefits of their ownership. For example, an individual's consumption of the nation's nuclear capability, that is, nuclear protection, does not reduce the amount of protection that another is able to enjoy. The benefits of consumption are "nonrival." One cannot prevent another from consuming nuclear deterrent. There is no reason, therefore, for an individual to pay for the protection. Government must coercively require payment by levying taxes. See generally R. Musgrave & P. Musgrave, Public Finance in Theory and Practice ch. 3 (2d ed. 1976) [hereinafter cited as Musgrave & Musgrave]. The scope of this Article is limited to government control over the marketplace through regulatory processes. It does not examine issues of taxation and expenditure.

13. See notes 44-48 infra.
price of goods and services available for trade. Through its licensing powers, the government exercises significant control over access to the market by producers and consumers. In addition, the law alleviates the costs of "market failures." The operation of competitive markets may not optimize the aggregate welfare available from existing resources. The costs and benefits derived from economic activities are not always borne exclusively by the actors. Externalities may exist. Private costs and benefits may differ from social costs and benefits. Individuals other than the actual producers and consumers may incur some of the costs or enjoy some of the benefits arising from the activity. The law attempts to internalize these cost and benefit externalities by rearranging legal rights and responsibilities through regulation.

The benefits of regulation ordinarily exceed its costs. When costs exceed benefits, however, the regulation in question is inefficient. When costs and benefits are distributed disproportionately, the regulation may be inequitable. The United States Constitution contains our society's most fundamental political proscriptions for determining when a regulation is inefficient and, particularly, when the resultant distribution of costs and benefits is inequitable. Constitutional mandates identify the private regulatory costs and benefits that may be of constitutional dimension and provide the means by which they may be weighed and balanced against the public benefits of regulation. Constitutional ideals determine the extent of government's political intervention in private economic activities and provide the checks and balances needed to restrain the exercise of regulatory power.

Constitutional proscriptions are rendered relevant to prevailing social, economic, and political conditions by the United States Supreme Court. The Court gives constitutional ideals contemporary meaning by establishing a normative balance of constitutionally relevant regulatory costs and benefits. The Court, however, is not the only institution of American government that balances regulatory costs and benefits. Political authority over questions of regulatory policy is divided among the three branches of government. The political economic relationship between the private market and the public welfare is defined by the

14. See note 125 infra.
15. See note 126 infra.
16. See notes 405-06 infra.
17. "'Internalizing' such external effects refers to a process, usually a change in property rights, that enables these effects to bear (in greater degree) on all interacting persons. A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities." Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347, 348 (1967).
legislature that enacts a regulation and the executive that enforces it. The Supreme Court, therefore, is an institution with a limited political role and circumscribed discretion. Its responsibility is to ensure that the economic policies of the legislative and executive branches do not contravene constitutional ideals. When the Court exercises its authority to check and balance the legislative and executive branches, it must, therefore, respect the separation of powers. As the appointed court of final appeal in a democratic society, it must be especially circumspect in its exercise of discretion. Moreover, as a court of limited jurisdiction, it must not extrapolate broad judicial policy from the limited facts of the case or controversy before it.

The Court resolves the tension between its responsibility to balance the legislative and executive branches and its limited institutional role by determining the substantive breadth and analytical depth of its constitutional review. When defining the constitutional attributes of property and specifying the standards of review and levels of scrutiny available for their protection against regulatory encroachment, the Court both exercises its political and economic discretion and shows respect for the policy judgments of the legislative and executive branches. Manageable and consistent methods of analysis permit the Court to exercise its discretion with restraint. Moreover, judicial predictability itself enhances society's economic welfare.19

The Constitutionality of Economic Regulation

Historically, the Court has responded to the prevailing political

19. "It is also true that the sharpness of specification of property rights and their development over time affect welfare. The logic of competition (i.e., the heeding of alternative uses) indicates that a more complete and definite specification of individual property rights diminishes uncertainty and tends to promote efficient allocation and use of resources. Dynamic questions are more complex. At this stage, the way in which the specification process unfolds is not entirely clear; nevertheless, it seems plausible to say that either a reduction of the costs of transaction, or an increase in the value of a given commodity will result in fuller specification of property rights in that commodity and, hence, in an improvement in the accuracy of private accounting calculations." Furubota & Pejovich Introduction, supra note 9, at 6. "A capitalist system is aided by cheap transferability and exclusivity of rights to physical use of human and nonhuman goods. When these rights do not prevail, or are 'expensive' to define or exchange, the market exchange system fails. Other forms of competition for determining uses of goods dominate." Alchian & Allen, supra note 6, at 161.

The goal of this Article, restated in terms of political economic theory, is to describe the dynamic process by which the United States Supreme Court affects economic welfare by specifying constitutional property rights with varying degrees of sharpness or ambiguity. Analytical consistency tends to sharpen that specification, reduce uncertainty and inefficiency and, therefore, enhance the general economic welfare.
opinion on the propriety and effectiveness of regulation in its resolution of the tension between its constitutional responsibilities and its institutional role. Shifts in the prevailing political consensus have resulted in reevaluations of the breadth and depth of the Court's authority. The opinions of the Burger Court represent only the latest such reevaluation.

From 1868 to 1905,\textsuperscript{20} the Court's discretion over regulatory authority was in its formative doctrinal years.\textsuperscript{21} Initially hesitant,\textsuperscript{22} the Court began to develop the capacity for constitutional review inherent in the newly promulgated due process clause. The permissible purpose-rationality of relationship test was developed,\textsuperscript{23} and liberty to contract was defined as a constitutional right.\textsuperscript{24} Nevertheless, in weighing and balancing regulatory costs and benefits, the Court ordinarily deferred to legislative judgment: "For protection against abuses by legislatures the people must resort to the polls, not to the courts."\textsuperscript{25} In response to burgeoning industrialization and urbanization, the scope of regulatory authority was expanded.\textsuperscript{26}

From 1905 to 1933, the doctrine of substantive due process was in its heyday. The Court exercised extensive political authority over eco-

\textsuperscript{20} The just compensation, contract, and commerce clauses provided the Court with jurisdiction over matters of regulatory power prior to 1868. The Court's principal just compensation clause case, Pumpelly v. Green Bay Canal Co., 80 U.S. (13 Wall.) 166 (1871), was, however, decided shortly after the enactment of the fourteenth amendment. The Court's contract clause cases included Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Fletcher v. Peck, 10 U.S. (6 Cranch.) 87 (1810). The commerce clause was relied upon in The Passenger Cases, 48 U.S. (7 How.) 283 (1849); The License Cases, 46 U.S. (5 How.) 504 (1847); City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).


\textsuperscript{22} See, e.g., The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); Barbier v. Connolly, 113 U.S. 27 (1885).

\textsuperscript{23} Mugler v. Kansas, 123 U.S. 623, 661 (1887). See note 22 infra.

\textsuperscript{24} Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897). See note 23 infra.

\textsuperscript{25} Munn v. Illinois, 94 U.S. 113, 134 (1876); see also Sweet v. Rechel, 159 U.S. 380 (1895); Powell v. Pennsylvania, 127 U.S. 678, 685 (1888): "The power which the legislative has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large."

\textsuperscript{26} Chicago B. & Q. Ry. v. Drainage Comm'r, 200 U.S. 561, 592 (1906): "We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety." See also Bacon v. Walker, 204 U.S. 311, 318 (1907); Manigault v. Springs, 199 U.S. 473, 480-81 (1905); Barbier v. Connolly, 113 U.S. 27, 31 (1885).
onomic policy: "[F]reedom of contract is . . . the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."\(^{27}\) This judicial attitude reflected the prevailing laissez faire economic philosophy. Property rights were given preferred constitutional status. The Court was not restrained by institutional deference to the legislative and executive branches. Nonetheless, it did not frequently exercise its discretion to the fullest extent.\(^{28}\) The political, institutional, and analytical consequences of those few occasions on which unrestrained discretion was exercised, however, have been of historic significance.\(^{29}\) These examples of the Court's potential for abusing its discretion illustrate the necessity of judicial restraint.

The New Deal era, 1933 to 1940, was a time of transition for both the nation and the Court. The Depression radically altered the prevailing political consensus, and increased government involvement in a chaotic private marketplace gained widespread acceptance. The Court's laissez faire attitudes evolved into a more evenhanded approach: "Equally fundamental with a private right is that of the public to regulate it in the common interest."\(^{30}\) Although economic interests were no longer preferred, they were still afforded constitutional protection. The political authority of the New Deal Court was active but restrained.\(^{31}\)

Following the New Deal transition, the Court adopted an attitude of extreme deference to legislative and executive determinations of regulatory policy: "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . The concept of the public welfare is broad and inclusive."\(^{32}\) From 1940 to 1969, the Court subordinated its constitutional authority to the economic policy judgments of the legislative and executive branches. It narrowly construed the Court's institutional role and capabilities. Substantive analysis suffocated under the weight of virtually irrebuttable presumptions in favor of the constitutionality of regulation.\(^{33}\) The power of the legis-

\(^{27}\) Adkins v. Children's Hosp., 261 U.S. 525, 546 (1923).

\(^{28}\) See note 227 infra.

\(^{29}\) See note 228 infra.


\(^{33}\) See note 234 infra.
lative branch to intervene in private market affairs was virtually unchecked by constitutional limitations. Regulation proliferated.

The history of the Court's attempts to resolve the tension between its political authority and its institutional role reveals shifts from one analytical extreme to another. Both extremes were abuses of the Court's constitutionally derived and mandated political authority. The abdication of checks and balances authority from 1940 to 1969 was as much an abuse of judicial discretion as were the excesses of review during the heyday of substantive due process.\(^3\)

The Burger Court: Revival and Restraint

The Burger Court has attempted to exercise its constitutional discretion over regulatory policy with evenhanded restraint. Its analysis ordinarily has been manageable and consistent; its decisions and rationales generally have been predictable. The constitutional protections currently granted to private economic interests, and the concomitant limitations on the government's authority to regulate them, have resulted from methods of analysis that reflect an awareness of the Court's checks and balances responsibilities and the limits upon its institutional role. Triggered by the nature and importance of the property right alleging infringement, the analytical interaction between the Court's definition of constitutional property, its standards of review, and its levels of scrutiny reveals that the Burger Court is aware of both the lessons of history and the reality of today's social, economic, and political conditions.

The analytical methodology of the Burger Court's constitutional assessment of business regulation ordinarily has followed the permissible purpose-rationality of relationship model originally developed to apply the mandates of substantive due process. While the Court has on occasion scrutinized the legitimacy of the legislature's purpose, it has ordinarily limited itself to an examination of the likelihood that the means of implementing the purpose will produce the desired public benefits without also producing excessive or disproportionately distributed regulatory costs to constitutionally protected private economic interests. As an analytical adjunct to rationality of relationship-means

\(^3\) The error of decisions like Lochner v. New York lay not in judicial intervention to protect 'liberty' but in a misguided understanding of what liberty actually required in the industrial age. The authority and the duty of judges, as well as legislators and executive officials, to seek a better understanding and to enforce it in accord with their constitutional oaths, were undiminished by the constitutional revolution of 1937. L. Tribe, AMERICAN CONSTITUTIONAL LAW 564 (1978) (footnotes omitted) [hereinafter cited as Tribe].
The nature and importance of the economic interest in issue have been the principal analytic values controlling the Court's use of its discretion. The nature of the economic interest first determines the availability of constitutional review. The Court has conferred constitutional dimension on only some of the attributes of private property; protection of other economic expectations, not deemed "constitutional property," has been left to legislative and executive discretion. The nature of the economic right then dictates the applicable standards of review. Only certain public and private regulatory costs and benefits arising from the conflict between constitutional property rights and the public welfare have been the subject of judicial review. The importance of the property right has determined the Court's degree of deference to legislative and executive judgments of regulatory policy. When the alleged infringement is upon important rights, the Court has relied upon presumptions against the constitutionality of the regulation. Presumptions favoring validity have been used when less significant rights are in issue. Four such levels of scrutiny have been used. Together, nature and importance have given constitutional content to the Burger Court's analysis of economic regulation. It thus has avoided the abuse of its inescapable discretion over regulatory policy.

The nature of the economic interest in issue has determined the breadth of the Court's political discretion. It has established the constitutional provision, or vehicle, under which the Court has conferred constitutional dimension upon the economic interest in issue and identified the regulatory costs and benefits relevant to constitutional scrutiny. Eight such provisions have been relied upon: the just compensation clause, the contract clause, the first amendment, the commerce clause, the privileges and immunities clause, the equal protection clause, procedural due process, and substantive due process. Only those private economic interests that have been deter-

35. See note 69 infra.
36. U.S. Const. amend. V. See notes 52-100 & accompanying text infra.
42. U.S. Const. amend. V. See notes 224, 271-308 & accompanying text infra.
mined to fall under the protection of one of these provisions are "constitutional property" and will generate judicial scrutiny. Only regulatory costs to these private economic interests are constitutional costs. With the exception of substantive due process, each provision also focuses the Court’s evidentiary investigation of the conflict. The applicable standards of review permit the Court to balance only certain of the costs and benefits caused by the regulation in issue.

The nature of constitutional rights in property are categorized here in terms of the three principal economic functions served by the law: the rights of exclusion, the competitive pre-conditions, and the market failure rights. There is a high correlation between these categories of rights and the constitutional vehicle chosen to give private market economic interests constitutional dimension and, at times, constitutional protection against the regulatory costs they have incurred. The market prerequisites include the right of exclusion, or the right to use, consume or exchange property, and the reliance interest. These have been protected by the just compensation and contract clauses respectively. Commercial speech has been protected by the first amendment. The right to enter the market as a competitor has been subject to both substantive due process and equal protection analysis. The obverse right to remain in the marketplace has generated procedural due process scrutiny. The commerce clause and privilege and immunities clause have been relied upon to resolve the entry problems peculiar to our federal system of government; each has conferred protection upon the right of interstate entry. Substantive due process and equal protection have provided shelter for the market failure right to consume common pool resources. The market failure “right to externalize” has been a right in search of a vehicle. The three cases in this area have involved equal protection, substantive due process, and procedural due process scrutiny.

The Burger Court’s reluctance to assess the legitimacy of legislative purpose and its reliance on multiple constitutional vehicles to illuminate the substantive focus of its rationality of relationship scrutiny must be contrasted with the virtually exclusive use of substantive due process prior to the New Deal. Prior Courts independently determined the permissible goals of regulation and demanded that the purpose underlying a regulation comport with their notions of the public health, safety, morals or general welfare. This issue is now left almost exclusively to the discretion of the legislature. Moreover, substantive due process was then, and remains today, a broad provision that fails to focus the Court’s cost-benefit analysis. The use of multiple provisions,
however, each with its own substantive focus, has enabled the Burger Court largely to avoid these abuses of judicial discretion.

The importance of the property right undergoing constitutional review has determined the degree of judicial deference to legislative and executive policy judgments and, therefore, the depth of the Court's political discretion. By governing the distribution of the presumption of constitutionality among the litigants, the importance of the right in issue has established the applicable level of judicial scrutiny. Four such levels have been used. Level I involves a virtually irrebuttable presumption against constitutionality in which an extremely heavy burden is placed on the state to demonstrate the constitutionality of its legislation. Rights at Level I are very important in the constitutional hierarchy. At Level II, the Court relies upon rebuttable presumptions against constitutionality. The burden of persuasion is still held by the state, but may be overcome by evidence that public benefits substantially exceed private costs. Level II rights are constitutionally important. At Level III, a rebuttable presumption favoring constitutionality is used. The burden of persuasion is shifted to the private party, who may overcome it with evidence that private costs substantially exceed public benefits. Level III rights are significant. Level IV involves reliance upon a virtually irrebuttable presumption favoring constitutionality. A very heavy burden is placed on the individual to demonstrate the unconstitutionality of the legislation. Rights at Level IV are constitutionally insignificant.

The constitutional analysis of economic regulation at Levels I and IV does not involve the exercise of substantive discretion by the Court. The Court's initial decision to rely upon virtually irrebuttable presumptions does involve judicial discretion, but the narrow scope of review prohibits a substantive weighing and balancing of the evidence of constitutional costs and benefits. Rather, the initial determination of the level of scrutiny dictates the outcome of the case and eliminates the further exercise of political discretion.

At Level I, the Court's political discretion is at its zenith; its deference to legislative and executive judgments is minimal. Only by showing that the public purpose underlying the regulation is "compelling," and that the means chosen to effectuate it are "necessary," will the state overcome the virtually irrebuttable presumption against constitutionality. At Level IV, the Court's political discretion is at its nadir; its deference is extreme. Only by showing that the legislature's purpose is "illegitimate," and its means "not even rationally related" to the
achievement of its purpose, will the individual prove unconsti-
tutionality.

Only at Levels II and III does the Court exercise substantive dis-
cretion by weighing and balancing the evidence of constitutional costs
and benefits. At Level II, the state must demonstrate that its purpose is
“important” and its means “substantially related” to its ends. The state
may also be called upon to prove that less intrusive means of accom-
plishing its purpose do not exist. At Level III, the individual holds the
burden of persuasion, which may be met by showing an “unimportant”
purpose and an “insubstantial relationship” between means and ends.
The individual facing Level III scrutiny may also be called upon to
prove that equally effective and less intrusive means do exist.

The importance of a property right generally has depended upon
how essential it is to the maintenance of the prerequisites and precondi-
tions of a competitively efficient private marketplace. In addition, a
link between the economic right and a suspect classification or funda-
mental interest has increased the applicable level of scrutiny. Mainte-
nance of the right to exclude has been afforded Level III scrutiny, while
the reliance interest has been afforded Level II scrutiny. A linkage be-
tween economic rights in the free flow of commercial information and
fundamental first amendment interests has most often generated Level
II analysis. A linkage of economic rights with the fundamental interest
of interstate entry under the commerce clause has generated both Level
I and II analysis. The suspect classification of alienage has triggered
Level I equal protection scrutiny of regulatory prohibitions of the right
to enter the market place as a competitor. The semi-suspect classifica-
tion of gender, when allied with economic interests in entry, has pro-
duced Level II equal protection analysis. Of the rights essential to
competitive efficiency, only the right to enter the marketplace, standing
alone, has been treated as constitutionally insignificant, thus generating
Level IV scrutiny. The market failure right to externalize also has ordi-
narily generated only Level IV scrutiny.

In contrast to the Burger Court’s reliance on four levels of scru-
tiny, pre-New Deal Courts abused their political discretion by inverting
the presumption of constitutionality and placing heavy burdens of per-
suasion on the state. Post-New Deal Courts, however, inflated the pre-
sumption of constitutionality to “well-nigh conclusive” status and
treated property rights as constitutionally insignificant. The Burger
Court’s development of intermediate levels of scrutiny permits it both
to exercise and manage its political discretion.
Market Prerequisites: The Rights of Exclusion and the Reliance Interest

To render the abstract more readily understandable, this Article employs a fable about cave dwellers. Their continuing story may help to clarify the interaction between the law and the marketplace and to make the economic functions of the law more concrete.

One spring, a cave dweller planted corn. He had never done so before and was looking forward to having food to eat with his family during the following winter. His neighbors, too, were hopeful that his experiment with agriculture would succeed. Game became scarce for all when cold weather settled upon their valley. As harvest time approached, a band of nomads came into the valley and took the corn. The outraged farmer picked up his club to chase the nomads. He realized, however, that they were too many. He could always return to hunting. But that meant empty bellies in the winter. Surely it made little sense to plant and tend corn when nomads could take it with impunity. Then, all the cave dwellers in the valley volunteered to pursue the nomads and recover the lost corn, which they did. The following spring, they all planted corn and together protected it from the nomads.

One of the cave dwellers in the valley was old and infirm. She could neither hunt nor farm. She could, however, make arrows that flew straight and true. No other craftspeople in the valley made arrows for sale, and the old woman's arrows were much in demand. Hunters traded game and corn for these prized arrows. She ate very well and they benefitted from hunting with superior arrows. All were better off for having traded. Only once did the arrowmaker have difficulty. One hunter had neither food nor arrows. He promised to bring the arrowmaker his payment for the arrows as soon as he had hunted. Reluctantly, the arrowmaker agreed. The hunter never returned.

When the cave dwellers joined together to recover the farmer's corn, they established his right to exclude. The right to exclude is a necessary attribute of property. When society sanctions exclusion, individuals, like the farmer, can reasonably expect to enjoy the benefit of their labors. They may use, consume, or trade their property for the

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44. "Private-property rights in goods constitute the exclusive rights of the owners to use their goods, and only their goods, in any way they see fit, including the right to transfer these rights to other people. . . . Exclusivity of control constitutes a basic component of the private-property economic system. We emphasize that property rights are not rights of property; they are rights of people to use of property." ALCIANG & ALLEN, supra note 6, at 158; see also Furubotn & Pejovich Introduction, supra note 9, at 4.

45. "[T]he legal protection of property rights has the important economic function of
property of another in a mutually beneficial exchange.46

The auction system of the marketplace breaks down when individuals cannot be excluded and therefore cannot be required to pay in trade for the benefits they consume.47 When the auction system functions effectively, however, optimum economic welfare may be approached through trade.48 Both the hunters and the arrowmaker gained from the exchange of food and arrows. When the arrowmaker permitted the hunter to purchase the arrows and pay later, she extended the capacity of trade as a means of enhancing welfare. To realize that capacity, however, the community of cave dwellers must enforce the trade.49 Otherwise, only simultaneous exchanges will take place.

Each of the market prerequisite rights has been protected by the Constitution. The rights of use, consumption, and exchange have constitutional dimension under the just compensation clause.50 The enforcement of exchanges, the reliance interest, has been protected under the contract clause.51 The market prerequisite rights have illuminated the Court’s definition of constitutional property, determined the regulatory costs and benefits open to substantive scrutiny, and informed its judgment of the constitutional importance of the right under review.

The Right to Use, Consume or Exchange

The just compensation clause states: “Nor shall private property be taken for public use, without just compensation.”52 This clause provides the Constitution’s most fundamental protection of private prop-

46. “In sum, two basic elements of private property are exclusivity of right of use and voluntary transferability or exchangeability of that right.” ALCHIAN & ALLEN, supra note 6, at 158.
47. “The market can function only in a situation where the ‘exclusion principle’ applies, i.e., where A’s consumption is made contingent on his paying the price, while B, who does not pay, is excluded. Exchange cannot occur without property rights and property rights require exclusion.” MUSGRAVE & MUSGRAVE, supra note 12, at 50.
48. See generally ALCHIAN & ALLEN, supra note 6, ch. 3.
49. “Holding people to their promises is . . . [an] economic function of contract law.” POSNER, supra note 9, at 66-67.
50. U.S. CONST. amend. V. See notes 52-100 & accompanying text infra.
52. U.S. CONST. amend. V.
roperty rights against government intrusion. It protects the rights of exclusion.\textsuperscript{53} When used as the eminent domain clause,\textsuperscript{54} it requires the government to pay fair market value for private property appropriated for governmental use. When used as the taking clause, it requires the government to distribute regulatory costs equitably. This section of this Article is concerned solely with taking issue jurisprudence.

The government must alter regulations to respond to changing social and economic conditions. Changes in regulation necessarily alter the property rights of use, consumption, and exchange. The owner's expectations and the property's value are often diminished. These alterations are generally noncompensable: "To require compensation in

\textsuperscript{53} The Burger Court has also acted under the fourth amendment search and seizure clause to protect the right to privacy of certain business interests against warrantless administrative searches of commercial and industrial property pursuant to a regulatory inspection program. "This Court has already held that warrantless searches are generally unreasonable, and that this rule applies to commercial premises as well as homes." Marshall v. Barlow's Inc., 436 U.S. 307, 312 (1978) (invalidating § 8(a) of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 657(a) (1976), which empowered agents of Secretary of Labor to conduct warrantless inspections of the work area of any employment facility within OSHA's jurisdiction for safety hazards and violations of OSHA's regulations). See also See v. Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967), overruling pro tanto Frank v. Maryland, 359 U.S. 360 (1959). The Constitutional property right involved is not as deserving of protection, however, as the right to privacy in one's home. "[G]reater latitude to conduct warrantless inspections of commercial property" is constitutionally permissible. Donovan v. Dewey, 49 U.S.L.W. 4748, 4749 (June 17, 1981).

The Court has, moreover, carved out a significant exception to the general rule expressed in Barlow's Inc. In Donovan, the Court upheld the warrantless inspection of a quarry under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a) (Supp. III 1979). "[A] warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." 49 U.S.L.W. at 4749. This "implied consent" rationale is strengthened when the industry involved has been subject to a "long tradition of close government supervision," id. at 4751 (quoting Marshall v. Barlow's Inc., 436 U.S. 307, 313 (1978)); when the regulatory legislation in question "provides a specific mechanism for accommodating any special privacy concerns," id., at 4750; and when "a warrant requirement clearly might impede the 'specific enforcement needs' of the regulation," id. (quoting Marshall v. Barlow's Inc., 436 U.S. 307, 321 (1978)). See also United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

While the Court has not made its level of scrutiny explicit in these cases, it appears to be relying on Level II analysis.

all such circumstances would effectively compel the government to reg-
ulate by purchase.” When the costs and benefits of regulation are
disproportionately distributed, however, the regulation may be an un-
constitutional taking of private property without compensation: “[T]he
Fifth Amendment guarantee . . . [i]s designed to bar Government
from forcing people alone to bear public burdens which, in all fairness
and justice, should be borne by the public as a whole.” The general
taking clause issue, therefore, is to determine when a change in regu-
lation, or the promulgation of new regulations, so unevenly distributes
regulatory costs and benefits that an owner’s right to use, consume or
exchange his or her property and, therefore, its value, have been uncon-
stitutionally diminished, that is, taken.

The “taking” issue has had a rich constitutional history, but was
relied upon only sparingly by post-New Deal Courts. Recently, how-
ever, taking issue jurisprudence has been revitalized. Having rendered
only one prior opinion, Penn Central Transportation Co. v. New York
City, the Burger Court decided four taking issue cases in the 1979-

York City, 438 U.S. 104, 124 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413
(1922). In Mahon, Justice Holmes stated: “Government hardly could go on if to some ex-
tent values incident to property could not be diminished without paying for every such
change in the general law.” Id.

56. “[T]he Fifth Amendment ‘prevents the public from loading upon one individual
more than his just share of the burdens of government, and says that when he surrenders to
the public something more and different from that which is exacted from other members of
the public, a full and just equivalent shall be returned to him.’” Pruneyard Shopping
United States, 148 U.S. 312, 325 (1883)).

57. See, e.g., Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922); Hadacheck v. Sebas-
tian, 239 U.S. 394 (1915); Chicago, B. & Q. Ry. v. Drainage Comm’rs, 200 U.S. 561 (1906);
Wall.) 166 (1871). The just compensation clause was made applicable to the states in Chi-
bago, B. & Q. Ry. v. Chicago, 166 U.S. 226, 239, 241 (1897). See generally F. Bosse-
man, D. Callies & J. Banta, The Taking Issue (1973); Dunham, Griggs v. Allegheny County in
Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 SUP. CT. REV. 63;
Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of “Just
Compensation” Law, 80 HARV. L. REV. 1165 (1967); Sax, Takings, Private Property and Pub-
lic Rights, 81 YALE L.J. 149 (1971); Schreiber, The Road to Munn: Eminent Domain and The
Concept of Public Purpose in the State Courts, 5 PERSPECTIVES IN AM. HIS T. 329 (1971);
Stoebuck, Police Power, Takings, and Due Process, 37 WASH. & LEE L. REV. 1057 (1980);
Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation

58. See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Berman v. Parker,


60. 444 U.S. 51 (1979).
City of Tiburon,62 and Pruneyard Shopping Center v. Robins;63 and two in its 1980-1981 term: Hodel v. Virginia Surface Mining and Reclamation Association, Inc. (Hodel I),64 and Hodel v. Indiana (Hodel II).65 In these opinions, the Court explicitly defined the property rights protected by the taking clause in terms of the rights of exclusion and identified three significant components of its substantive review:66 actual physical invasion, diminution in value, and reciprocity of advantage. Moreover, the Court consistently relied on Level III rebuttable presumptions favoring constitutionality to defer to legislative judgments.67

The Court, in opinions by Justice Rehnquist, has explicitly defined taking clause property in terms of the right to exclude. In Kaiser Aetna, for example, the Court stated: “In this case we hold that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.”68 It also distinguished between mere economic expectations and those private economic interests sanc-
tioned by the law as rights in property.69

That sanction does not, however, extend to an owner's use of his or her property in ways that damage a neighbor's property.70 The state

69. "But not all economic interests are 'property rights'; only those economic advantages that are supported by the law are 'rights' and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979) (quoting United States v. Willow River Co., 324 U.S. 499, 502 (1945)). Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 455 U.S. 15. In Webb's, the Court invalidated, as a violation of the takings clause, a Florida statute authorizing its county courts to take as their own interest accruing on monies deposited with the registry of the court pending the outcome of litigation. The Florida Supreme Court had upheld the statute, reasoning that the deposited funds temporarily assumed the status of "public money" while on deposit and that, therefore, "the interest 'is not private property.'" Id. at 163. Justice Blackmun, for an unanimous Court, disagreed. Recognizing that "'[p]roperty interests . . . are not created by the Constitution, . . . [but rather] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law,'" id. at 161 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)), he nevertheless declared: "This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." Id. at 164. "The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry." Id. (emphasis added). This physical invasion of private property was a "forced contribution to general governmental revenues," id. at 163, did not amount to the taking of "a mere unilateral expectation or an abstract need that is not a property interest entitled to protection," id. at 161, and was, therefore, unconstitutional.

There is some disagreement in the Court over the competing roles of the states and the federal government in the definition of property. Justice Rehnquist would confer the fundamental responsibility for defining rights in property upon the states. See Kaiser Aetna v. United States, 444 U.S. at 173-80; Pruneyard Shopping Center v. Robins, 447 U.S. at 80-81. Justice Blackmun, on the other hand, is unwilling to abrogate all federal responsibility for defining rights in property: "I do not think Hawaii or any other State is at liberty through local law to defeat the navigational servitude by transforming navigable water into 'fast land . . . . [S]tate law cannot control the scope of federal prerogatives.'" Kaiser Aetna v. United States, 444 U.S. at 192 (Blackmun, J., dissenting). See note 280 infra.

70. The distinction between permissible uses and nuisances has affected taking issue decisionmaking in America since the inception of the common law maxim, sic utere tuo ut alienum non laedas, "Use your own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY 1551 (4th ed. 1968). It underlay the 19th century definition of the police power as the government power to protect society against harms. See Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 HARV. L. REV. 366, 479 (1911); Hastings, The Development of the Law as Illustrated by the Decisions Relating to the Police Power of the State, 39 PROCEEDINGS OF THE AM. PHILOSOPHICAL SOCIETY 359 (1900); Smead, Sic Uttere Tuo Ut Alienum Non Laedas: A Basis of the State Police Power, 21 CORNELL L. REV. 276, 285-92 (1936).

The permitted uses-nuisance dichotomy was also a principal determinant during the 19th century of the difference between noncompensable regulations and eminent domain condemnations requiring compensation. See, e.g., Mugler v. Kansas, 123 U.S. 623, 668-69 (1887), in which the first Justice Harlan stated: "A prohibition simply upon use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation
properly may abate a nuisance or a noxious use without offering compensation; this is not a "taking" within the ambit of the taking clause.\footnote{See Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 378 (1911).}

In \textit{Penn Central}, for example, the application of historic preservation legislation to Grand Central Station was upheld, at least in part, in reliance upon the dichotomy between sanctioned uses and nuisances.\footnote{Penn Central Transp. Co. v. New York City, 438 U.S. 104, 125-27 (1978). In his dissenting opinion in \textit{Penn Central}, Justice Rehnquist, however, pointed out that the railroad company had not been required to cease from injuring others through the use of its land. Rather, because it had to maintain Grand Central Station in its historical condition, it was being required to perform an affirmative duty. Justice Rehnquist's point here is that, while actions taken by government to prohibit the noxious use of property do not run afoul of the Taking Clause, nevertheless regulations that place affirmative obligations on a landowner can infringe upon his or her right to use and consume and can, therefore, be an unconstitutional taking. 438 U.S. at 146 (Rehnquist, J., dissenting).}

The inclusion of all legally sanctioned economic expectations within the definition of taking clause property has limited the Court's willingness to find a regulatory taking.\footnote{"The denial of one traditional property right does not always amount to a taking. . . . [T]he destruction of one 'strand' of the bundle [of property rights] is not a taking, because the aggregate must be viewed in its entirety." Kaiser Aetna v. United States, 444 U.S. at 65-66. "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather on both the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." Penn Central Transp. Co. v. New York City, 438 U.S. at 130-31 (emphasis added).}

The regulatory deprivation of rights of use, consumption, and exchange must be virtually complete before an unconstitutional taking will be found to have occurred.

The Burger Court's substantive standards of taking clause review have, by its own admission, produced "essentially ad hoc, factual inquiries."\footnote{Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). See note 66 supra.} The Court has, however, identified the costs and benefits of regulation that are of particular analytical significance:

The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property of property for the public benefit. . . . In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner." The distinction has also been recognized in political economic theory. See, e.g., Alchian & Allen, supra note 6, at 159: "Think of private-property rights as a person's rights to decide on the use of his and only his goods and services (that is, without violating the same rights of other people) and to sell or exchange those rights. We do not exchange goods \textit{per se}; we exchange \textit{rights} over goods. Physical possession is not the essence of property rights; at best, physical possession is a means of asserting or giving evidence of rights." (Emphasis added).
can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.\textsuperscript{75}

When determining private regulatory costs, the Court also will offset the deprivation with private regulatory benefits received, a form of nonmonetary compensation.

Moreover, "[t]hese 'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances."\textsuperscript{76} In \textit{Hodel I} and \textit{Hodel II}, certain "steep slope" and "prime farmland" provisions of the federal Surface Mining and Reclamation Control Act of 1977 were challenged as unconstitutional takings. As the regulations in question had not yet been applied to individual parcels of land, the Court held that taking issue weighing and balancing "simply is not ripe for judicial resolution."\textsuperscript{77}

Physical invasion is perhaps the most objective of the Court's taking issue analytical factors. An actual physical appropriation of the right to exclude without compensation is ordinarily unconstitutional, however insignificant the value of the property taken.\textsuperscript{78} In \textit{Kaiser Aetna},\textsuperscript{79} for example, the Army Corps of Engineers sought not only to regulate a newly constructed marina as a navigable waterway, but also to provide a right of access and consumption to the public. The Court upheld regulation of the use of the waterway. However, because public access would "result in an actual physical invasion,"\textsuperscript{80} an unconstitutional taking had occurred. Granting a right of public access and consumption imposed disproportionately burdensome costs upon the owner.

The regulatory creation of a public right of access, nevertheless, may be justified if it fulfills an important public interest. In

\textsuperscript{75} Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); see also Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82-83 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979): "[Taking issue analysis has] identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance."


\textsuperscript{77} \textit{Id.} See also Hodel v. Indiana, 101 S. Ct. 2376, 2388 (1981).

\textsuperscript{78} Cf. Griggs v. Allegheny County, 369 U.S. 84 (1962) (requiring just compensation for air easements "taken" by flights over plaintiffs' homes); United States v. Causby, 328 U.S. 256 (1946).

\textsuperscript{79} 444 U.S. 164 (1979).

\textsuperscript{80} \textit{Id.} at 180.
Pruneyard, the Court held that the “exercise [of] state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants’ property rights under the Taking Clause.”

The evidence that the right of access “physically invaded” appellants’ property cannot be viewed as determinative of constitutionality. The owners could not demonstrate that access to political speakers “will unreasonably impair the value or use of their property as a shopping center.” Thus, when the Court included first amendment political speech values in its cost-benefit balance, it found that the physical invasion of the owner’s right to exclude was not an unconstitutional taking.

Assessing the diminution in economic value is the second taking issue standard of review. The Supreme Court has never specified a percentage of value that, when lost to the owner, automatically establishes an unconstitutional taking. In diminution of value situations, the Court has neither erected a per se rule of invalidity nor relied upon a virtually irrebuttable presumption against unconstitutionality. Nor has it specified how to measure regulatory impact on private market value. Because of the vagueness of the constitutional standards for identifying and weighing regulatory costs and their impact on property value, the Burger Court has used diminution in value only as evidence

81. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), is the latest in a line of cases balancing the right of access and expression against the right to exclude. See Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968); Marsh v. Alabama, 326 U.S. 501 (1946). After an initial ruling in favor of first amendment rights, the Court reversed its course and, in Logan Valley and Hudgens, upheld the right to exclude. These cases, however, did not involve the scope of regulatory authority. Pruneyard is distinguishable because there the California Supreme Court ruled that the relevant rights of access and expression are based on state constitutional values and override the owner’s right to exclude.

82. 447 U.S. at 83.
83. Id. at 84.
84. Id. at 83.
85. In Pruneyard, the shopping center owners attempted to counterbalance the first amendment interests of the individuals seeking access with first amendment interests of their own. 447 U.S. at 85-86. The Court concluded “that neither appellants’ federally recognized property rights nor their First Amendment rights have been infringed.” Id. at 88.

86. Diminution in value analysis was promulgated by Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Justice Holmes saw government’s power to regulate under the police power as existing along a continuum with its power to appropriate property under eminent domain. The question was how to distinguish between a valid exercise of the police power and one that so deprived an owner of his or her reasonable economic expectations that compensation was required. “When [diminution in economic value] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.” Id. at 413. Justice Holmes, however, did not give monetary value to the term “certain magnitude.”
of taking. In *Penn Central*,87 for example, Justice Brennan characterized the case law as "uniformly reject[ing] the proposition that diminution in property value, standing alone, can establish a 'taking.'"88 As the regulation permitted *Penn Central* not only to continue the present use of the terminal, but also to obtain a reasonable return on its investment, no unconstitutional taking had occurred.89

In *Andrus v. Allard*,90 the Court declined to find an unconstitutional taking despite a virtually complete diminution in value. The Secretary of the Interior had promulgated regulations prohibiting the sale of Indian artifacts made with the feathers of federally protected birds. The loss of virtually all exchange value, however, "is not necessarily equated with a taking. . . . [L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform."91

A challenge to the taking issue constitutionality of regulations that have not yet been applied to specific property also requires a virtually complete diminution in value. In *Hodel I* and *Hodel II*, the regulations in question easily survived such a facial challenge. "[T]here is no reason to suppose that 'mere enactment' of the Surface Mining Act has deprived appellees of economically viable use of their property."92 The Act neither "categorically prohibit[ed] surface coal mining"93 nor "pur-

87. 438 U.S. 104.
88. 438 U.S. at 131. In his dissenting opinion, Justice Rehnquist took exception to the majority's statements on diminution in value. His view of taking includes more than mere "physical seizures of property rights. . . . 'The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking.'" 438 U.S. at 143. (Rehnquist, J., dissenting) (quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945)).
89. 438 U.S. at 136. Justice Rehnquist, dissenting, disagreed with this characterization of diminution in value. Contrary to the majority's view that a taking occurs only when "a property owner is denied all reasonable value of his property," Justice Rehnquist asserted: "A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some 'reasonable' use of his property. '[I]t is the character of the invasion, not the amount of the damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.'" 438 U.S. at 149-50 (Rehnquist, J., dissenting) (quoting United States v. Cress, 243 U.S. 316, 328 (1917)).
91. *Id.* at 66.
port[ed] to regulate alternative uses”\textsuperscript{94} of coal bearing lands. Absent a complete deprivation and evidence of the application and effect of the regulations on individual property, no unconstitutional taking could be shown.

When the regulation in question benefits owners of private property, the Court will use these benefits to offset the regulatory costs imposed. Reciprocal benefits or advantages arise when the regulated party is compensated for his or her individual loss by his or her share of the public’s regulatory benefits.\textsuperscript{95} Regulatory benefits provide a kind of nonmonetary compensation to the aggrieved property owner for bearing the costs of implementation. In essence, reciprocity of advantage diminishes the disproportionate impact of regulatory costs on the property’s value. In \textit{Agins v. City of Tiburon},\textsuperscript{96} for example, an owner claimed that a one-acre minimum lot size restriction on his property forever prevented its development and thereby completely destroyed its value. The Court brought reciprocal benefits into its cost-benefit balance: “Appellants . . . will share with other owners the benefits and burdens of the city’s exercise of its police power . . . . [T]hese benefits must be considered along with any diminution in market value that the appellants might suffer.”\textsuperscript{97}

In these taking issue decisions, the Burger Court has implicitly relied on Level III scrutiny, granting the statute a rebuttable presumption of constitutionality. In \textit{Agins},\textsuperscript{98} Justice Powell indicated that a regulation “effects a taking if the ordinance does not substantially advance legitimate state interests.”\textsuperscript{99} The Court has not only been consistently

\textsuperscript{94} Id.

\textsuperscript{95} Reciprocity of advantage, like diminution in value, was the product of Justice Holmes’s opinion in Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922). \textit{See also id.} at 422. (Brandeis, J., dissenting).

\textsuperscript{96} 447 U.S. 255 (1980).

\textsuperscript{97} Id. at 262. In his dissenting opinion in \textit{Kaiser Aetna}, Justice Blackmun, joined by Justices Brennan and Marshall, would have relied on the reciprocal advantage received by the marina operators to uphold the constitutionality of public access: “Whatever expectancy petitioners may have had in control over the pond for use as a fishery was surrendered in exchange for the advantages of access when they cut a channel into the Bay.” 444 U.S. at 190-91 (Blackmun, J., dissenting); \textit{see also Penn Central Transp. Co. v. New York City}, 438 U.S. at 147 (Rehnquist, J., dissenting), in which Justice Rehnquist noted that government may legitimately prohibit non-noxious uses of property “[i]f the prohibition applies over a broad cross-section of land and thereby ’[s]ecures an average reciprocity advantage.’” When regulation burdens individual property values “relatively evenly,” and the individual harmed by the regulation in certain respects is benefitted in others, reciprocity of advantage exists and no unconstitutional taking has occurred. Id.

\textsuperscript{98} 447 U.S. 255 (1980).

\textsuperscript{99} Id. at 260.
willing to weigh and balance the evidence of regulatory costs and benefits, it has also consistently placed the burden of persuasion on the individual challenging constitutionality. In *Pruneyard*, Justice Rehnquist stated, "[A]ppellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state authorized limitation of it amounted to a 'taking.'"\(^{100}\) Given the ambiguity of its substantive analysis, the Court has restrained its political discretion by deferring to legislative judgments.

The Burger Court has offered some minimal protection to the rights of exclusion. Although the promotion of free speech has justified public access to private property, an unconstitutional taking will usually be found when exclusionary rights have been physically appropriated. When there is a diminution in the property's value, the Court has offset regulatory costs to the owner against reciprocal benefits and then weighed and balanced private costs against benefits to the general welfare, relying on Level III rebuttable presumptions favoring constitutionality and placing the burden of proof on the property owner. Only a grossly disproportionate distribution of costs will justify a finding of unconstitutionality; regulatory costs must destroy virtually all value in the property instead of merely destroying future expectations that arise from the possibility of exchange. This is particularly true with regard to facial challenges to a regulation’s taking issue constitutionality. Despite the importance of the right to exclude, the Court’s reliance on Level III scrutiny seems justified if the Court is to restrain its political discretion over regulatory policy.

The Reliance Interest

The contract clause states: “No State shall enter into any . . . Law impairing the Obligation of Contracts.”\(^{101}\) It protects the reliance interest,\(^{102}\) an individual’s legally sanctioned expectation that the terms

\(^{100}\) 444 U.S. at 66.
\(^{101}\) U.S. CONST. art. I, § 10, cl. 1.
\(^{102}\) The reliance interest has also been accorded constitutional dimension in a series of procedural due process cases involving the right to possess, upon default, property pledged as security in debtor-creditor contracts. See North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969). The issue in these cases was whether the creditor’s reliance interest in obtaining possession of the encumbered property could be enforced without prior notice and hearing. The Court’s resolution of these issues has changed with changes in its membership. In general, however, it has relied on Level II presumptions and an increasingly specific enunciation of its standards of procedural due process review to weigh the costs and benefits and to establish the need for
of existing agreements will be fulfilled or damages paid. The contract clause, however, protects only vested contract rights against regulatory encroachment. It must, therefore, be contrasted with "liberty to contract," which, when protected during the heyday of substantive due process, encompassed the much broader right to enter into private market agreements.\textsuperscript{103}

Agreements to exchange property rights are created by legal stipulation.\textsuperscript{104} Two individuals, an arrowmaker and a hunter, negotiate and agree to exchange some of their legally defined and sanctioned rights of use, consumption or exchange. They agree also upon the value of the benefits exchanged; they decide how much meat is worth how many arrows. They also distribute the risks and costs of their exchange. These economic decisions are encompassed by their agreement. Rights of exclusion, defined by law, have been allocated and distributed by a private agreement sanctioned by law. The arrowmaker and the hunter are reasonably certain that their respective promises will be honored.

\textsuperscript{a} Limited prior hearing. In Fuentes v. Shevin, 407 U.S. 67 (1972), Justice Stewart established both the nature and importance of the procedural due process reliance interest: "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." Id. at 90-91. These three elements have restrained the Court's discretion in specifying the nature and importance of the reliance interest. \textit{See also} Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Lynch v. Household Finance Corp., 405 U.S. 538 (1972); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972); Swarb v. Lennox, 405 U.S. 191 (1972).

\textsuperscript{103} During the heyday of substantive due process, liberty to contract was given preferred status under the Constitution. \textit{See, e.g.}, Tyson & Brother v. Banton, 273 U.S. 418 (1927); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1896) (quoted in note 231 infra); \textit{see also} Pound, \textit{Liberqy of Contract}, \textit{18} \textit{YALE L.J.} 454 (1909).

\textit{Lochner v. New York} elevated this liberty to contract to the status of a preferred constitutional right. In \textit{Lochner}-derived substantive due process cases, the Court used a virtually irrebuttable presumption against constitutionality to defeat most regulations. The abuse of political discretion imposed by this laissez faire judicial activism contributed significantly to its demise following the New Deal.

\textsuperscript{104} "The contractual arrangements and exchanges needed for the market operation cannot exist without the protection and enforcement of a governmentally provided legal structure." \textsc{Musgrave & Musgrave, supra} note 12, at 6. "[T]rade permits the exchange of 'bundles' of rights authorizing the recipients to do things with the goods that are traded. A contractual agreement is vitally important here because it represents the \textit{means} by which the bundles of rights are exchanged." Furubotn & Pejovich \textit{Introduction, supra} note 9, at 6.
This certainty is based on the belief that the law will continue to define their rights of exclusion in the same way; the terms of their agreement will continue to merit legal sanction for the life of their contract. However, social and economic conditions change and, thus, the regulatory definition of both exclusion rights and protected agreements also evolve. When the laws upon which a contract was based are altered, the economic expectations created and distributed by that contract similarly may be altered. Reliance interests may be destroyed. The issue in the Burger Court's sole business regulation-contract clause case was to identify the constitutional nature of these reliance interests.105

Prior to the advent of substantive due process, the contract clause provided a principal constitutional restraint on regulatory power.106 In 1880, however, the Court drastically reduced the protection available to reliance interests when it held that state authority to regulate was inalienable by contract and, therefore, superior to vested contract rights.107 Thereafter, changes in regulation were generally permissible without regard to the destruction of reliance interests. In 1933, however, the Court gave renewed vitality to contract clause analysis. It combined the vested rights definition of contract clause property with the permissible purpose-rationality of relationship analytical model of substantive due process.108 This case, Home Building and Loan Association v. Blais-
dell,\textsuperscript{109} is the fountainhead of the few\textsuperscript{110} modern contract clause cases. The Burger Court has decided only one case involving analysis of business regulation under the contract clause.\textsuperscript{111} In \textit{Allied Structural Steel Co. v. Spannaus},\textsuperscript{112} the Court invalidated the Minnesota Private Pension Benefits Protection Act, which required the company to pay \$185,000 into a pension fund covering its Minnesota employees to close its Minnesota operations. The money was needed to fund pension rights vested by the Act that had not been stipulated in the employees' contract. The Act was new and had retroactive effect in an area of precarious economic conditions. "While emergency does not create power, emergency may furnish the occasion for the exercise of power." \textit{Id.} at 426. Subsequent to \textit{Blaisdell}, the post-New Deal courts consistently deferred to legislative judgments in contract clause cases. \textit{See, e.g., City of El Paso v. Simmons, 379 U.S. 497, 508-9 (1965); East N.Y. Savings Bank v. Hahn, 326 U.S. 230, 233 (1945). But see United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). For a discussion of \textit{United States Trust Co. v. New Jersey}, see note 111 infra.}

\textsuperscript{109} 290 U.S. 398 (1934).


\textsuperscript{111} The Burger Court has also examined the scope of the state's taxing and spending powers under the contract clause when the state is a party to an agreement with private market interests. Its opinion in United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), was the model for its subsequent decision in Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978). The challenged statute in \textit{United States Trust Co.} repealed a covenant that limited the Port Authority's ability to subsidize commuter rail transportation out of revenues and reserves pledged as security for its consolidated bonds. In a suit by bondholders claiming impairment of security, the Court invalidated the statute by a four to three vote.

Justice Blackmun, writing for the majority, relied on broad standards of review and the heightened scrutiny of Level II. "As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." 431 U.S. at 25-26. In addition, the majority was willing to search for "less drastic" means. \textit{Id.} at 29-30. The burden of demonstrating constitutionality was placed on the state.

Justice Brennan, joined by Justices Marshall and White, dissented. "This Court should have learned long ago that the Constitution—be it through the Contract or Due Process Clause—can actively intrude into such economic and policy matters only if my Brethren are prepared to bear enormous institutional and social costs." \textit{Id.} at 62 (Brennan, J., dissenting). He advocated the deferential scrutiny of Level IV review. "[I]f a State, as here, manifestly acts in furtherance of its citizens' general welfare, and its choice of policy, even though infringing contract rights, is not "plainly unreasonable and arbitrary," . . . our inquiry should end: 'The question is . . . whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.'" \textit{Id.} at 53 (quoting \textit{Home Bldg. & Loan Ass'n v. Blaisdell}, 290 U.S. 398, 438 (1934)).

private market activity previously left to private negotiation. Generally, the majority would interpret the clause to be a broad restraint on the government's authority to alter regulations. The dissent would narrow the substantive reach of the clause and curtail the depth of the Court's contract clause discretion with a Level IV virtually irrebuttable presumption.

The majority found that the impairment of virtually any reliance interest could trigger contract clause scrutiny. "Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." The dissent would severely limit the protections available to only the reliance interests generated by certain types of agreements. Historically, the Contract Clause was not intended to embody a broad constitutional policy of protecting all reliance interests grounded in private contracts. Moreover, the dissent would not extend contract clause protection to new contract obligations created by regulation. Rather, they would limit its protection to the preservation of existing obligations that have been destroyed. In sum, the dissent and majority disagreed completely about the nature of the economic interests given dimension by the contract clause.

The majority identified the specific standards of review to be applied in contract clause cases:

The law was not even purportedly enacted to deal with a broad, generalized economic or social problem. It did not operate in an area already subject to regulation at the time the company's contractual

113. *Id.* at 245.
114. "[The contract clause] was made part of the Constitution to remedy a particular social evil—the state legislative practice of enacting laws to relieve individuals of their obligations under certain contracts—and thus was intended to prohibit States from adopting 'as [their] policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them,' Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 439 (1934). But the Framers never contemplated that the Clause would limit the legislative power of States to enact laws creating duties that might burden some individuals in order to benefit others. . . . The Clause was thus intended by the Framers to be applicable only to laws which altered the obligations of contracts by effectively relieving one part of the obligation to perform a contract duty." *Id.* at 256-57 (Brennan, J., dissenting) (footnote omitted).
115. *Id.* at 256.
116. "Since creating an obligation when none had existed previously is not an impairment of contract, it of course should follow necessarily that legislation increasing the obligation of an existing contract is not an impairment." *Id.* at 258-59 (Brennan, J., dissenting) (footnote omitted). The imposition of new obligations on contracting parties, in Justice Brennan's view, should be scrutinized under the due process clause to the extent that it operates to protect existing economic values. In this regard, Justice Brennan would apply Level IV scrutiny and uphold Minnesota's regulation.
obligations were originally undertaken, but invaded an area never before subject to regulations by the State. It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships—irrevocably and retroactively.117

The majority felt free to assess the legitimacy of the Minnesota legislature’s purposes in enacting the legislation. New regulations encompassing only aspects of more comprehensive problems may be suspect under the contract clause. The retroactive extension of government control over private market activity produced regulatory costs that were permanent and irrevocable, immediate and severe.

The judicial balance had initially been in favor of private rights. The majority found the reliance interest constitutionally important. “The presumption favoring ‘legislative judgments as to the necessity and reasonableness of a particular measure,’ simply cannot stand in this case.”118 The severity of the impairment119 dictated the use of Level II scrutiny, in contrast with the general deference accorded legislative judgments in post-New Deal contract clause cases.120 Because of the broad range of protectable reliance interests, the majority’s use of Level II presumptions substantially increased the risk of abuse present in contract clause scrutiny.

In dissent, Justice Brennan suggested that “[t]oday’s decision greatly expands the reach of the [contract] clause.”121 His concern with the risk of judicial abuse was clear.122 To limit that discretion, he would have relied on Level IV virtually irrebuttable presumptions.123 Added to his extremely narrow conception of the nature of the reliance

117. Id. at 250.
118. Id. at 247 (quoting United States Trust Co. v. New Jersey, 431 U.S. 123 (1977)). “[I]t is not necessary to hold that the Minnesota law impaired the obligation of the company’s employment contracts ‘without moderation or reason or in a spirit of oppression.’” Id. at 250 (quoting W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 60 (1935)).
119. “Minimal alteration of the contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.” Id. at 245 (footnote omitted).
120. See note 110 supra.
121. 438 U.S. at 251 (Brennan, J., dissenting).
122. “The necessary consequence of the extreme malleability of these rather vague criteria is to vest judges with broad subjective discretion to protect property interests that happened to appeal to them.” Id. at 261.
123. “Decisions over the past 50 years have developed a coherent, unified interpretation of all the constitutional provisions that may protect economic expectations and these decisions have recognized a broad latitude in States to effect even severe interference with existing economic values when reasonably necessary to promote the general welfare.” Id. at 260 (Brennan J., dissenting).
interest, his use of Level IV would effectively abdicate the Court’s contract clause jurisdiction.

*Allied Structural Steel* may allow for a significant expansion of the Court’s political discretion over changes in regulatory policy with retroactive effect. Regulations, both new and altered, may easily violate the broad substantive standards and heightened scrutiny of the majority. The extreme judicial deference advocated in dissent would, however, abdicate the Court’s checks and balances authority and emasculate its constitutional review of contract clause issues.

**Competitive Preconditions: Information and Entry**

It became known that the old arrowmaker sold arrows of superior quality. Many hunters came to her cave to trade corn and game for arrows. She was soon rich, but she could not make arrows fast enough. She hired a young apprentice, and soon another. Seeing the arrowmaker’s stockpile of corn and game, other cavedwellers began to make arrows. Apprentices learned the trade and sold their own arrows. In the face of this competition, the old arrowmaker was forced to accept less corn and game for her arrows. Eventually, all the arrowmakers were taking only enough game and corn to pay for the flint, wood, and feathers needed to make their arrows and to compensate for their labor. To their amazement, however, many more arrows were being traded and they had even more game to eat. The hunters, too, had more to eat. With their many new arrows they were more successful hunters.

The cavedwellers were able to enjoy the benefits of the old arrowmaker’s superior arrows only after they had learned of their availability and price. In the cavedwellers’ valley, the information of commerce flowed freely by word of mouth. Today, commercial information flows by more circuitous means. It continues, however, to perform the same economic function. Accurate information about the availability, quality, and price of goods and services permits consumers knowledgeably to express their preferences. With awareness of those preferences, producers can supply the goods and services demanded. When commercial information is readily available, competitive efficiency is improved. When, however, the costs of obtaining accurate information are high, economic welfare is reduced. If information costs become too high, the pricing mechanism of the marketplace may

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124. See *Alchian & Allen*, *supra* note 6, at 155. See note 125 *infra*.
break down.\textsuperscript{125}

The apprentice arrowmakers entered the market when they sensed that demand in excess of supply was driving up the price of arrows. Surplus profits promised opportunity. Apprentices eventually grew in number and proficiency, and other cavedwellers entered the arrowmaking business. Supply then met demand and prices fell. The supply of food grew with the supply of arrows and everyone prospered, except perhaps the original arrowmaker. Free entry into the arrowmaking industry brought supply into equilibrium with demand and eliminated her monopoly profits.\textsuperscript{126}

The constitutional nature and importance of rights in commercial information have been determined under the first amendment. The right to enter the marketplace has found constitutional dimension in substantive due process and constitutional protection in the equal protection clause. The rights of individuals to remain in the market may not be suspended or terminated by regulation unless the mandates of procedural due process have been fulfilled. Interstate entry, an entry problem unique to our federal system of government, is protected by the commerce clause\textsuperscript{127} and the privileges and immunities clause of article IV.\textsuperscript{128}

\textsuperscript{125} "The extent of mutually preferred revision of goods among consumers is affected by the costs of obtaining information about bids and offers for goods or their uses, by the costs of negotiating a binding exchange, by the costs of policing the contract, and by the kinds of property rights people have to the goods. The higher these costs or the more weakened are private-property rights, the less will mutually preferred re-allocation of goods occur. One person may be prepared to offer a second party more for goods or services than the second party is now getting from those goods and services, but with sufficiently high exchange-negotiation costs the mutually preferred revision or exchange will not occur." \textsc{Alchian\& Allen, supra note 6, at 173; see also Demsetz, Information and Efficiency: Another Viewpoint, 12 J.L. \& Econ. 1 (1969)}.

\textsuperscript{126} "Every seller in the market has an incentive to try to keep out other sellers. In the absence of arbitrary obstacles or legal restrictions, the prospect of profits will entice new sellers into the market. . . . The government will be appealed to as a means of keeping out new competitors—that is, restricting the open market in order to maintain a larger buying-selling price spread, under the guise of protecting the consumer from unscrupulous sellers, who would undermine the quality of the product." \textsc{Alchian\& Allen, supra note 6, at 53; see also G. Stigler, The Citizen and the State 116-18 (1975)}.

The existence of monopolies and oligopolies has engendered regulatory response since \textit{Munn v. Illinois}, 94 U.S. 113 (1876). Attempts to monopolize or oligopolize private market production are subject to antitrust legislation. The Court's role in antitrust cases is to interpret the relevant statutes rather than the Constitution. An analysis of the Court's statutory interpretation is not within the scope of this Article.

\textsuperscript{127} U.S. Const. art. 1, § 8, cl. 3.

\textsuperscript{128} U.S. Const. art. IV.
The Right to Commercial Information

The first amendment states: "Congress shall make no law . . . abridging the freedom of speech . . ."¹²⁹ The first amendment protects "[f]reedom of speech as an essential corollary of representative democracy."¹³⁰ The corollaries of democracy have encompassed both "political speech"¹³¹ and other forms of personal expression.¹³² The protection of these two forms of speech customarily has invoked Level I scrutiny.¹³³ They have, however, until very recently, included only

¹²⁹. U.S. CONST. amend. I.

In addition, the Burger Court has considered the use of "loyalty oaths" as a condition of government employment. See, e.g., Cole v. Richardson, 405 U.S. 676 (1972); Connell v. Higginbotham, 403 U.S. 207 (1971); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971); In re Stolar, 401 U.S. 23 (1971); Baird v. State Bar of Arizona, 401 U.S. 1 (1971). These cases did not explicitly include a judicial appreciation of the economic as well as political manifestations of the legislation in question.

the flow of information in the marketplace of ideas.

Information in the marketplace of goods and services first achieved the status of a constitutional property right in 1976 in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.\textsuperscript{134} The definition of first amendment commercial speech promulgated by Justice Blackmun in \textit{Virginia State Board} has allowed the Court to review the costs and benefits of regulations controlling or prohibiting the flow of information in the private marketplace.\textsuperscript{135} In subsequent opinions, many of them by Justice Powell, the substantive standards of review initially propounded in \textit{Virginia State Board} have been refined with particular attention to the problems of deceptive advertising, the time, place, and manner of communication, and the development of a more precise analytic means of balancing regulatory costs and benefits. The constitutional importance of the right to commercial information also has evolved so that, ordinarily, the Court relies on Level II scrutiny. As commercial speech is more robust than political speech, it warrants review less burdensome of the states' interests. In cases of deceptive advertising, the Court has more readily deferred to the legislative judgment.

The constitutional history of commercial speech is brief. In 1942, in \textit{Valentine v. Chrestensen},\textsuperscript{136} the Court placed commercial expression

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136. 316 U.S. 52, 54 (1942): "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. \textit{We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.}" (Emphasis added).
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outside the ambit of first amendment protection. *Chrestensen*, and its mandate of deference to legislative judgments, controlled the availability of first amendment protection for commercial expression until *Virginia State Board*.\(^\text{137}\)

The Burger Court first examined the precedential vitality of *Chrestensen* in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.\(^\text{138}\) The challenged ordinance prohibited newspapers from publishing columns of want ads segregated by gender. Justice Powell, writing for the majority, declined to give commercial speech "a higher level of [first amendment] protection than *Chrestensen* and its progeny would suggest."\(^\text{139}\) He did, however, suggest that a commercial right to information "might arguably outweigh the governmental interest supporting the regulation."\(^\text{140}\) When "the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity,"\(^\text{141}\) benefits would be far in excess of costs and the regulation constitutional.

*Pittsburgh Press* was followed by *Bigelow v. Virginia*,\(^\text{142}\) in which a newspaper editor, found guilty of publishing an advertisement for abortion services not legally available in Virginia, sought first amendment protection. The right involved was strictly his own, and did not

\(^{137}\) *See* Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring), in which Justice Douglas dismissed *Chrestensen*: "The ruling was casual, almost off-hand. And it has not survived reflection."


\(^{139}\) *Id.* at 376 (1973).

\(^{140}\) *Id.* at 388.

\(^{141}\) *Id.* at 389. "Discrimination in employment is not only commercial activity, it is illegal commercial activity under the Ordinance." *Id.*

include that of the abortion group to advertise. The advertisement was clearly of a commercial nature. Nevertheless, "[t]he fact that the particular advertisement . . . [was in] appellant's commercial interest did not negate all First Amendment guarantees." The content of the advertisement, however, was of "public interest." While the means of communication were purely commercial, the ends sought were also political. Thus, the Court did not place purely commercial expression completely under first amendment protection. Justice Blackmun indicated, however, that "[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."

First amendment protection for commercial speech was established in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, in which the Court examined a regulation prohibiting price advertising of prescription drugs. The Court considered the constitutional dimension of purely commercial speech and concluded that it did not lack all first amendment protection, although the private right to advertise is "purely economic."

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143. 421 U.S. at 817.
144. Id. at 818. The Court concluded: "The State was not free of constitutional restraint merely because the advertisement involved sales or 'solicitations,' or because appellant was paid for printing it, or because appellant's motive or the motive of the advertiser may have involved financial gain." Id.
145. Id. at 822.
146. Id. at 826. Justice Rehnquist, dissenting, would have denied the advertisement in *Bigelow* all protection under the first amendment. In his view, the advertisement was "a classic commercial proposition directed toward the exchange of services rather than the exchange of ideas." Id. at 831. He would, therefore, have applied a limited rationality-of-relationship test, with the burden of persuasion on the individual. On this basis, he would have upheld the statute given that "the States have a strong interest in the prevention of commercial advertising in the health field." Id. at 832.
149. 425 U.S. at 762. The Court noted that economically motivated speech retained overtones of public political interest found in traditionally protected speech. Commercial expression is "indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal." Id. at 765 (footnotes omitted).
150. Id. at 762. Justice Rehnquist argued that the application of first amendment protection to commercial speech inappropriately applies laissez-faire economic principles to limit the states' regulatory authority. "[T]here is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in
sumer's right to receive commercial information was also of constitutional notice, for "that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."151 The Court emphasized, however, society's interest in an efficiently functioning competitive marketplace. "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable."152 The Court thereby elevated a precondition of competitive efficiency to the status of a constitutional property right. The free flow of commercial information as well as its effects on the private marketplace required the availability of first amendment protection.153

In Virginia State Board, the Court expressly incorporated commercial speech into the ambit of first amendment protection.154 The Court there considered a standardized commodity—prescription drugs. In subsequent decisions, the Court has added different kinds of commodities to the commercial activities protected by the first amendment. These have included real estate,155 "routine legal services,"156 promotional advertising by public utilities,157 and billboards.158 It has also

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151. Id. at 763.
152. Id. at 765.
153. "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." Id. at 756 (footnotes omitted).
154. In Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y., 447 U.S. 557 (1980), Justice Powell defined commercial speech in two distinct ways. First, it was defined as "expression related solely to the economic interests of the speaker and its audience." Id. at 561. Somewhat more narrowly, commercial speech was defined as "speech proposing a commercial transaction." Id. at 562. In his concurring opinion, Justice Stevens took exception to these definitions. He concluded the first was too broad; it encompassed all speech entitled to maximum protection under the first amendment. He thought the second was too narrow; it did not include the entire range of communication protected under the commercial speech doctrine. Id. at 579-80. (Stevens, J., concurring). For a discussion of Central Hudson, see notes 181-83 & accompanying text infra.
reviewed regulations prohibiting in-person solicitation by lawyers and the use of trade names by optometrists.

These cases necessarily have involved the Court in the creation of an appropriate standard of first amendment review. Three separate standards have evolved. The Court has recognized that commercial information can only enhance aggregate information when it is truthful. To the extent that a "right to deceptively advertise" may be said to exist, it has, therefore, been disfavored by the Court. The time, place or manner of communication may be regulated only on a content-neutral basis and when alternative avenues of communication are available. Regulations predicated upon the content of suppressed commercial expression were initially prohibited per se. This blanket first amendment ban, however, has evolved into a four-step balancing process that assesses the importance of the legislature's purpose and the substantiality of the relationship between that purpose and the narrowly drawn means designed to effectuate it.

Commercial information has the potential to enhance aggregate economic welfare when it is accurate and reliable. In Virginia State Board, Justice Blackmun recognized that the regulation of deceptive advertising was a permissible public purpose supporting the imposition of regulatory constraints on commercial speech. In Bates v. State Bar of Arizona, explicitly recognizing that "the public and private benefits from commercial speech derive from confidence in its accuracy

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161. "The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." 425 U.S. at 771-72. Justice Stewart, concurring in Virginia State Board, agreed that commercial speech has constitutional dimension, but was concerned with the states' continued capacity to regulate false and misleading advertising. This concern, at least implicitly, caused him to reason that allegedly deceptive commercial speech deserves less rigorous levels of scrutiny. "The scope of constitutional protection of communicative expression is not universally inelastic." Id. at 778. "Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First-Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking." Id. at 781.
and reliability," Justice Blackmun denied deceptive advertising even that benefit of constitutional doubt customarily accorded misleading political speech, a more fragile form of expression. Because issues of deception were not before the Court, however, these statements were dicta. The advertisement in question only informed consumers of the availability and price of "routine legal services"; it contained no "claims, extravagant or otherwise, as to the quality of services." The regulation was a prohibition of truthful commercial speech and, therefore, was unconstitutional. The first amendment costs to lawyers, their prospective clients, and the system of justice outweighed the putative benefits of that prohibition.

163. Id. at 383. "Advertising that is false, deceptive, or misleading of course is subject to restraint." Id.

Justice Powell dissented, arguing that legal services are not standardized as were the prescription drugs in Virginia State Board. The majority's failure to recognize the significance of this distinction, in his view, also "fails to give appropriate weight to the two fundamental ways in which the advertising of professional services presents a different issue from that before the Court with respect to tangible products: the vastly increased potential for deception and the enhanced difficulty of effective regulation in the public interest." 433 U.S. at 391 (Powell, J., dissenting) (emphasis added). His view did not prevail in Bates, but he convinced a majority of the Court to approve a wholly analogous rationale in Friedman v. Rogers, 440 U.S. 1, 12 (1979). For a discussion of Friedman v. Rogers, see text accompanying notes 170-72 infra.

164. "[T]he leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." 433 U.S. at 383.

In Bates, Justice Blackmun rejected the use of the overbreadth doctrine in commercial speech cases. Id. at 379-80. This doctrine has provided a broad scope for determining standing in first amendment cases. "This Court often has recognized that a defendant's standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally privileged." Bigelow v. Virginia, 421 U.S. 809, 815 (1975) (Blackmun, J.); see also Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970). In Bigelow, the Court left undecided the availability of overbreadth analysis in commercial speech cases. 421 U.S. at 818. In Bates, Justice Blackmun declined to incorporate this form of scrutiny into first amendment protection of commercial speech. "The reason for the special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech . . . . But the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context . . . . Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." 433 U.S. at 380-81. The inapplicability of overbreadth analysis in commercial speech cases was confirmed in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 565 n.8 (1980).

165. 433 U.S. at 366.

166. Justice Blackmun's balancing of regulatory costs and benefits was quite detailed and extensive. Throughout this analysis, he demonstrated a keen awareness of the political economic function of freely flowing commercial information and the costs and benefits of its regulation. For example, when assessing the alleged public purpose of preserving the administration of justice from the adverse effects of advertising legal services, he stated: "Advertising is the traditional mechanism in a free-market economy for a supplier to inform a
When a lawyer attempted to solicit clients in person, however, the pressure of solicitation greatly increased the risk of deception. In *Ohralik v. Ohio State Bar Association*, the Court, in an opinion by Justice Powell, upheld the indefinite suspension of an attorney who had personally sought to represent two teenage automobile accident victims. "[I]n-person solicitation of professional employment does not stand on a par with truthful advertising . . . let alone with forms of speech more traditionally within the concern of the First Amendment." The burden of persuasion, therefore, was placed on the attorney to demonstrate unconstitutionality.

The potential for deception determined constitutionality in *Friedman v. Rogers*, in which the Court upheld a Texas law prohibiting the use of trade names in optometry. Justice Powell, writing for the majority, observed that "there is a significant possibility that trade names will be used to mislead the public." The state's interest in protecting consumers from deception was neither "speculative" nor "hypothetical" and justified the regulatory costs imposed on trade-name optometrists.

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168. *Id.* at 455.
169. *Id.* at 457.
171. *Id.* at 12-13. Justice Powell also explained the status of deceptive advertising in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). "The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity." *Id.* at 563-64. Somewhat cryptically, and in seeming contradiction to both his own and the general doctrine on deceptive advertising, he also stated: "Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all." *Id.* at 562. Incomplete information, apparently, need not be misleading.

172. 440 U.S. at 13. The majority also took a dim view of the type of speech-involved. "[A trade name] has no intrinsic meaning. A trade name conveys no information about the price and nature of the services offered by the optometrists until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality." *Id.* at 12 (footnote omitted). The value of a trade name as a
The substantive standards for reviewing time, place, and manner of regulations of commercial speech were specified by Justice Blackmun in *Virginia State Board*. "We have often approved restrictions provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information."173 In *Linmark Associates, Inc. v. Township of Willingboro*,174 Justice Marshall relied on these standards to invalidate an ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs on the lawns of the township's homes. The ordinance did not fulfill a significant, or even a legitimate, public purpose. "Willingboro has proscribed particular types of signs based on their content because it fears their 'primary' effect—that they will cause those receiving the information to act upon it."175 Moreover, it failed to leave open "ample" alternative channels of communication.176

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173. 425 U.S. at 771.
174. 431 U.S. 85 (1977); cf. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980) (invalidating ordinance prohibiting solicitations by charitable organizations that do not use at least 75% of receipts for "charitable purposes" as unconstitutionally overbroad): "[B]ecause charitable solicitation does more than inform possible economic decisions and is not primarily concerned of providing information about the characterics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech." See also United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 101 S. Ct. 2676 (1981); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Carey v. Brown, 447 U.S. 455 (1980) (invalidating on equal protection grounds a prohibition of all residential picketing except that related to labor disputes); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).
175. 431 U.S. at 94. "If the ordinance is to be sustained, it must be on the basis of the township's interest in regulating the content of the communication, and not on any interest on regulating the form." Id.
176. "The options to which sellers realistically are relegated . . . involve more cost and less autonomy . . . are less likely to reach persons not deliberately seeking sales information . . . and may be less effective media for communicating the message. . . . The alternatives, then, are far from satisfactory." Id. at 93.
cial speech, based on its content, have evolved from an absolute constitutional ban into a four-step process that identifies, weighs, and balances regulatory costs and benefits. This doctrinal evolution is illustrated by the juxtaposition of Justice Blackmun’s majority opinion in *Virginia State Board* with Justice Powell’s majority opinion in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*. The difficulties in applying the new four-step balancing process consistently became apparent in *Metromedia, Inc. v. City of San Diego*.

In *Virginia State Board*, Justice Blackmun established blanket protection for commercial speech against content-based prohibition:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed and that the best means to that end is to open the channels of communication rather than to close them . . . . The choice among these alternative approaches is not ours to make or the Virginia General Assembly’s. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its abuse if it is freely available that the First Amendment makes for us.

To be valid, a regulation may not keep consumers in ignorance. Such a suppression of commercial speech would be invalidated, therefore, if the *Virginia State Board* criteria had prevailed.

In *Central Hudson*, Justice Powell enunciated a four-step balancing test, modeled on Level II permissible purpose-rationality of relationship scrutiny, for examining the suppression of advertising that promotes the availability, quality, or price of goods and services in trade.

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

177. 447 U.S. 557 (1980).
179. 425 U.S. at 770.
180. “Virginia is free to require whatever professional standards it wishes of its pharmacists; . . . [b]ut it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.” Id. at 770.
181. 447 U.S. at 566. Dissenting in *Central Hudson*, Justice Rehnquist inveighed against the Court’s return to the “bygone era of *Lochner v. New York*, 198 U.S. 45 (1905), in which it
Justice Powell's commercial speech test did not provide blanket protection against the content-based suppression of advertising. The ambit of first amendment protection was narrowed and no longer included a right to advertise illegal activities or to advertise in a deceptive manner. Justice Powell's test then followed permissible purpose-rationality of relationship scrutiny at Level II. Government interests should be "substantial"; means should "directly advance" the legislature's ends and should not be more intrusive of the right to commercial information than is necessary.

Under Justice Powell's test, the regulation prohibiting Central Hudson from promoting the consumption of its electricity in its advertising was unconstitutional. Justice Powell found that commercial speech was implicated, that the government's interests were "clear and substantial," and that the regulation directly advanced the state's interest in energy conservation. Nevertheless, the prohibition was invalid because alternative and less intrusive means were available to accomplish the regulatory goals. The state had not carried its burden of persuasion at all four analytical steps. The regulatory costs imposed on the right by the means of regulation outweighed the benefits to the public.

Justice Powell's four-step Central Hudson test was relied upon by both the plurality and the concurring Justices in Metromedia, Inc. v. City of San Diego. The city had enacted an ordinance prohibiting outdoor advertising display signs in commercial and industrial areas, but permitting two exceptions to its general ban: on-site commercial signs and billboards conveying twelve specific categories of noncommercial political and social messages. Justice White rendered the plurality opinion for Justices Stewart, Marshall, and Powell. Justices was common practice for the Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies." 447 U.S. at 589. Justice Rehnquist viewed the prohibition on promotional advertising in issue as "more akin to an economic regulation to which virtually complete deference should be accorded by this Court," id. at 591, and thus would use Level IV scrutiny to defer to the legislature. He apparently had far greater faith in the wisdom of regulators than in the "invisible hand" of the marketplace. "There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market." Id. at 592.

182. Id. at 569.
183. "The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression." Id. at 570.
185. Id. at 4926-27.
Brennan and Blackmun concurred. The Chief Justice\textsuperscript{186} and Justices Rehnquist\textsuperscript{187} and Stevens\textsuperscript{188} dissented.

Limiting the plurality’s analysis of first amendment values to the “law of billboards,”\textsuperscript{189} Justice White first “observe[d] the distinction between commercial and noncommercial speech, indicating that the former could be forbidden and regulated in situations where the latter could not be.”\textsuperscript{190} As a ban on off-site commercial billboards, the regulation withstood \textit{Central Hudson} scrutiny.\textsuperscript{191} The advertisements were neither unlawful nor deceptive. The city’s twin purposes, traffic safety and the advancement of its esthetic interests, were substantial. In addition, the ordinance was no broader than necessary to fulfill those goals and directly advanced them. The plurality, however, eschewed analytical predictability and chose to rely upon Level IV presumptions rather than the Level II presumptions established in \textit{Central Hudson}. Recognizing that the meager record did not adequately show the connection between the billboards and traffic safety, and that “esthetic judgments

\begin{footnotesize}
\footnote{186}{Chief Justice Burger would follow Kovacs v. Cooper, 336 U.S. 77 (1949), and defer to the local legislative judgment of San Diego. “This is the long arm and voracious appetite of federal power—this time judicial power—with a vengeance, reaching and absorbing traditional concepts [of] local authority.” 101 S. Ct. 2882, 2917 (Burger, C.J., dissenting). Chief Justice Burger set forth a test: “Although we must ensure that any regulation of speech ‘further[s] a sufficiently substantial governmental interest,’ given a reasonable approach to a perceived problem, this Court’s duty is not to make the primary policy decisions but instead is to determine whether the legislative approach is essentially neutral to the messages conveyed and leaves open other adequate means of conveying those messages.” \textit{Id.} at 2920. He would thus replace Level II rationality of relationship analysis with a Level IV standard of review that is merely neutral in content. \textit{Cf.} \textit{id.} at 2897-99 (Justice White’s critique of the Chief Justice’s view).}

\footnote{187}{Justice Rehnquist, like the Chief Justice, recoiled from what he believed to be the excessive judicial activism of the plurality and concurring opinions. “Nothing in my experience on the bench has led me to believe that a judge is in any better position than a city or county commission to make decisions in an area such as aesthetics. Therefore, little can be gained in the area of constitutional law, and much lost in the process of democratic decision-making, by allowing individual judges in city after city to second-guess such legislative or administrative determinations.” \textit{Id.} at 2925 (Rehnquist, J., dissenting).}

\footnote{188}{Justice Stevens stated, as a preliminary matter, that “a city may entirely ban one medium of communication.” \textit{Id.} at 2910 (Stevens, J., dissenting). “[I]n my judgment the constitutionality of a prohibition of outdoor advertising involves two separate questions. First, is there any reason to believe that the regulation is biased in favor of one point of view or another, or that it is a subtle method of regulating the controversial subjects that may be placed on the agenda for public debate? Second, is it fair to conclude that the market which remains open for the communication of both popular and unpopular ideas is ample and not threatened with gradually increasing restraints?” \textit{Id.} at 2915 (Stevens, J., dissenting).}

\footnote{189}{\textit{Id.} at 2889.}

\footnote{190}{\textit{Id.} at 2892.}

\footnote{191}{\textit{Id.} at 2892-95.}
\end{footnotesize}
are necessarily subjective," Justice White nevertheless stated: "[A] legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside. It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived an 'esthetic harm.' Although the ordinance was underinclusive, because it permitted on-site commercial billboards while prohibiting all others, it nevertheless reflected a reasonable, and therefore constitutional, judgment by the city. As a regulation of commercial speech, San Diego's ordinance was constitutionally valid.

The plurality, however, found that the ordinance was not a constitutionally valid regulation of noncommercial speech. Three rationales were advanced by Justice White. First, "our recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech." By permitting on-site commercial advertising but not on-site noncommercial advertising, San Diego in effect had inverted the Court's hierarchy of first amendment protection. Second, by exempting twelve kinds of noncommercial speech from its general ban, the city had attempted unconstitutionally to control the content of permissible speech. "Although the city may distinguish between the relative value of different categories of commercial speech . . . with respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse." Finally, the ordinance was not a reasonable time, place, and manner regulation of noncommercial speech. "Signs that are banned are banned everywhere and at all times." The ordinance failed to provide sufficient alternative means of communication. In addition, "the ordinance distinguishes in several ways between permissible and impermissible signs at a particular location by reference to their content."

Justice Brennan, joined by Justice Blackmun, concurred. Treating
the ordinance as a total ban of billboards, the concurrence would require the city to "show that a sufficiently substantial governmental interest is directly furthered . . . and that any more narrowly drawn restrictions, i.e., anything less than a total ban, would promote less well the achievement of that goal." Thus, the concurrence, as had the plurality, would rely on the Central Hudson standards of review but, unlike the plurality, would place the burden of persuasion on the city through use of Level II scrutiny. The concurrence thus treated the ordinance as an unconstitutional prohibition of both commercial and noncommercial speech.

The importance of the right to commercial information has evolved with the substantive standards available for its review. In Pittsburgh Press and Bigelow, the Court, still influenced by Valentine v. Chrestensen and unwilling to confer constitutional dimension on commercial advertising having no political content, relied on Level IV scrutiny. Subsequently, when the purpose underlying the regulation was to insure the truthfulness of advertising, in Ohralik and Friedman, Level III scrutiny was utilized. Time, place, and manner regulations must be constitutionally justified by the state under Level II analysis. In Linmark, Justice Marshall went so far as to require that the legislative means be "necessary" to the fulfillment of its ends. The prohibition of commercial speech ordinarily has been scrutinized at Level II. In Virginia State Board and Bates, Justice Blackmun was not explicit in his ranking of the right. Nevertheless, he indicated in Virginia State Board that "common sense differences between speech that does 'no more than propose a commercial transaction,' and other varieties" justified "a different degree of protection." That protec-
tion was also clearly of lesser degree. The "greater objectivity and hardness" of commercial speech made it less necessary to use the virtually irrebuttable presumptions relied on to protect political speech. In Justice Powell's *Central Hudson* balancing test, the right to commercial information also had constitutional importance; thus, Level II scrutiny was relied upon. "The Court review[s] with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech related policy." Moreover, the four-step analysis required a "substantial" governmental interest and a "direct" relationship between means and ends. The "lesser protection [accorded] to commercial speech than to other constitutionally guaranteed expression" was justified by its "greater objectivity and hardness." Justice Powell thus affirmed Justice Blackmun's evaluation of the constitutional importance of commercial speech.

In Justice Powell's view in *Central Hudson*, however, the level of scrutiny available to protect commercial speech from suppression turned not only on the "nature . . . of the expression," but also on the "governmental interests served by its regulation." This ad hoc juxta-

"[T]he differences between commercial price and product advertising . . . and ideological communication' allow the States a scope in regulating the former that would be unacceptable under the First Amendment with respect to the latter." *Id.* at 774 (Burger, C.J., concurring); see also *id.* at 779 (Stewart, J., concurring).

212. *Id.* at 771-72 n.24. Justice Blackmun justified his reliance on Level II scrutiny by suggesting that the truth of commercial information "may be more easily verifiable by its disseminator" than may other forms of speech. *Id.* "Also, commercial speech may be more durable than other kinds," because it is motivated by the advertiser's desire for profit. *Id.* "[T]here is little likelihood of its being chilled by proper regulation and foregone entirely." *Id.*

213. 447 U.S. at 566 n.9.
214. 447 U.S. at 563.
216. 447 U.S. at 563. Concurring in *Central Hudson*, Justice Blackmun, joined by Justices Brennan and Stevens, took exception to the majority's use of Level II scrutiny. They would have relied upon Level I: "I agree with the Court that this level of intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech. I do not agree, however, that the Court's four-part test is the proper one to be applied when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly." *Id.* at 573. In Blackmun's opinion, a state regulation that attempts to suppress information about the availability or price of legally offered goods or services is never permissible. "I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to 'dampen' demand for or use of the product." *Id.* at 574. Moreover, he would not distinguish between commercial and political speech. "No differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information." *Id.* at 578.
position of the private right and the public welfare made the depth of
the Court's substantive analysis more difficult to manage consistently.
Indeed, in *Metromedia*,\(^{217}\) the plurality's reliance on Level IV scrutiny
to assess the directness of the relationship between San Diego's goals
and the means chosen to implement them illustrate the analytical pit-
falls inherent in relying on ad hoc balancing to determine the applicable level of scrutiny. The public welfare purposes that may be
advanced to justify the suppression of commercial information are
likely to be far more complex and laden with legislative value judg-
ments than are the purposes of preventing deception or controlling
time, place, and manner. To the extent that the Court will continue to
depart from its consistent reliance on Level II scrutiny, the risk of
abuse and uncertainty in the exercise of judicial discretion will
increase.

The advent of first amendment protection for "speech proposing a
commercial transaction"\(^ {218}\) reveals the Burger Court's creation of doc-
trine in a new area of constitutional review. Such speech, when truth-
ful, may be controlled in the time, place, and manner of its
communication by only the least intrusive of regulations. The Court
has more readily deferred to legislative judgment in matters of decep-
tive advertising. Commercial speech may be suppressed only when the
state has demonstrated that its regulation furthers an important public
purpose by direct means that are only as intrusive as necessary.

Regulations of commercial speech have been held unconstitutional
when the constitutional costs of regulation to the public, the consumer,
or the advertiser exceed the purported benefits to the public welfare. In
so holding, the Court has given constitutional dimension and protec-
tion to a private economic right that is a precondition to optimizing
competitive efficiency. The Court's evolution of commercial speech
document shows active management of its political discretion. Specified
substantive standards of review and established levels of scrutiny have
permitted it to weigh and balance regulatory costs and benefits with a
relatively high degree of consistency and predictability.

The Right to Enter the Marketplace

The Burger Court has distinguished three interests associated with
the right of entry to the marketplace: the right to compete, the right to
remain a competitor, and the right to enter interstate competition. The


\(^ {218}\) 447 U.S. at 562. See note 154 supra. See also 425 U.S. at 762.
private interest denied in the right to compete cases has been a license to enter the marketplace. The Court has relied upon substantive due process and equal protection to weigh and balance the costs of denial to the prospective licensee against the benefits accruing to the public from limiting market access to qualified individuals, but has not yet recognized a constitutional value in the public costs inherent in arbitrarily limited market access. The Court has applied Level IV scrutiny unless the right to compete was linked with a suspect or semi-suspect classification. The Court has protected the right to remain in the marketplace with procedural due process scrutiny of the suspension or termination of licenses previously issued. Initially this right generated Level II scrutiny. In more recent opinions, the Court has increasingly deferred to legislative judgments: the benefit of promptly removing the licensee from the marketplace has outweighed the costs of license removal without a hearing. The right of interstate entry has been protected under the commerce clause and the privileges and immunities clause of article IV. While using Level I to scrutinize regulations that discriminate against interstate commerce, the Court has assessed merely burdensome regulations at Level II. The Court has clearly recognized the economic benefits created when an open, national marketplace is maintained. Private and national regulatory costs ordinarily have outweighed local public benefits in these cases.

The Right to Compete

The fourteenth amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."219

The right to compete has found constitutional recognition in both substantive due process and equal protection under the fourteenth amendment.220 Unlike the rights of exclusion221 and commercial speech,222 no provision in the Constitution explicitly protects the right to enter the competitive marketplace. The cases considering the right to compete have involved the denial of a license, the regulatory prerequisite to entry. The Court has weighed and balanced the private costs of denying the license to the prospective licensee against the benefits accruing to the public from restricting entry to qualified individuals.

220. See notes 241-49 & accompanying text infra.
221. See notes 52-100 & accompanying text supra.
222. See notes 134-218 & accompanying text supra.
The Court has not included in its costs-benefits balance the economic costs to society from inappropriately restricted market access. Thus, the right to compete has been afforded heightened scrutiny only when linked with a suspect or semi-suspect classification.

Historically, the due process and equal protection clauses have been the Supreme Court's principal vehicles for limiting the scope of regulatory authority. They have a common doctrinal heritage, and both continue to rely on the permissible purpose-rationality of relationship model to weigh and balance the costs of enforcing economic regulations against their benefits to the community. Substantive due process has been used by the Court to scrutinize virtually any characteristic of the means used to implement regulatory goals. Equal protection analysis ordinarily is focused on the legislature's means of classification.

Due process was originally conceptualized and applied as a procedural limitation on the powers of government. In the late nineteenth century, due process was entrusted, after some reluctance, with substantive authority over economic regulation. From 1905 to 1933, substantive due process was the Court's primary vehicle for enforcing its laissez faire doctrines and preventing the incursion of regulation into the private marketplace. Many of the cases of this period remain valid. Others, particularly those based on *Lochner v. New York*,

223. See *R. Mott, Due Process of Law* 275-99 (1926).

224. See notes 271-72 & accompanying text infra.


226. The Court independently reviewed challenged legislation's purposes and effects. "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); see also *Brown, Due Process of Law, Police Power and the Supreme Court*, 40 HARV. L. REV. 943, 947 (1927).


have been repudiated. In *Lochner*, the Court relied on presumptions against constitutionality when assessing legislative purposes and means. In its progeny, the Court inclusively defined the economic rights deserving constitutional dimension and identified the regulatory costs and benefits to be weighed and balanced on an ad hoc basis. Substantive due process based on *Lochner* was thus an abuse of the Court's political discretion, for it was both unrestrained and unfocused. Substantive due process was abandoned by New Deal Courts in favor of a more carefully balanced analysis. After 1940, it succumbed entirely to the "well-nigh conclusive" presumption in favor of constitutionality. Post-New Deal Courts consistently deferred to leg-

Hardy, 169 U.S. 366 (1898). For a discussion of *Village of Euclid*, see text accompanying notes 442-45 infra.


230. "The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor." *Lochner* v. New York, 198 U.S. 45, 57-58 (1905).

231. "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer* v. Louisiana, 165 U.S. 578, 589 (1897).


234. "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."

islative judgments of economic regulatory policy.

With the demise of substantive due process, the Court began to develop strict scrutiny equal protection analysis. During the heyday of substantive due process, equal protection was of limited use. When relied upon, it required only the most minimal relationship between legislatively chosen classifications and the purposes they were designed to serve. This mere rationality Level IV scrutiny is still relied upon by the Court when dealing with insignificant economic rights, such as the right to compete, standing alone. In contrast, strict scrutiny equal protection analysis uses the Level I virtually irrebuttable presumption against constitutionality. It has been relied upon in situations involving suspect classifications or fundamental interests.


237. See notes 241-49 & accompanying text supra.

The Burger Court, however, early moved to restrain the political authority implicit in strict scrutiny equal protection analysis and has instead grown to rely more on Level II rationality of relationship scrutiny.

239. See, e.g., San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973): “It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws... Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.”


240. Sliding scale scrutiny was enunciated in Justice Marshall’s dissenting opinion in Dandridge v. Williams, 397 U.S. 471, 520-21 (1970): “In my view, equal protection analysis of this case is not appreciably advanced by the a priori definition of a ‘right,’ fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits they do not receive, and the asserted state interests in support of the classification.” (footnote omitted); see also San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).
The Burger Court has decided three cases involving the alleged regulatory infringement of the right to compete standing alone: *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 241 *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 242 and *City of New Orleans v. Dukes*. 243 *Snyder's Drug Stores* and *Orrin W. Fox* were both decided under substantive due process. *Dukes* was decided under the equal protection clause. In each, the Court presumed constitutionality, using Level IV scrutiny, to uphold the regulations in question.

In *Snyder's Drug Stores*, a statute required certain professional qualifications for a permit to operate a pharmacy. Justice Douglas's opinion for the majority was characteristic of the demise of substantive due process: it examined neither costs nor benefits. Justice Douglas merely quoted extensively from post-New Deal opinions, which he and Justice Black had authored, to establish complete judicial deference to legislative judgments. 244

In *Orrin W. Fox*, a California statute required prior administrative approval for the opening or relocation of an automobile dealership if requested by a competing dealer. The Court was faced with both procedural and substantive due process challenges. 245 Concerning procedural due process, the Court held that "California was not required to provide for a prior individualized hearing each and every time the provisions of the Act had the effect of delaying consummation of the business plans of particular individuals." 246 Concerning substantive due

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244. For example, Justice Douglas quoted from *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963): "We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulation of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. . . . [R]elief, if any be needed, lies not with us but with the body constituted to pass laws . . . ." 414 U.S. at 165-66.
245. Fox, a franchisee, and General Motors, a franchisor, were required to seek administrative approval for a proposed relocation. Challenging the regulation's facial constitutionality on the basis of its adverse impact on competition, they contended that "absent a prior individualized trial-type hearing they . . . [have] a due process protected interest right to franchise at will . . . ." 439 U.S. at 106.
246. *Id.* at 108. Justice Stevens dissented. He agreed that the right to enter and compete is of constitutional insignificance, but treated the Act as an impermissible delegation of legislative authority to existing, established franchisees. The "special benefit," *id.* at 120, conferred on these individuals gave them the "unfettered ability to invoke the power of the State to restrain the liberty and impair the contractual arrangements of their new competi-
process, the Court also used a virtually irrebuttable presumption: “'For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.'”

In Dukes, a New Orleans ordinance prohibited vendors from selling food in the French Quarter, but exempted two vendors who had more than twenty years of seniority. In a per curiam opinion, the Court explicitly indicated that economic rights standing alone are constitutionally insignificant under the equal protection clause. Great deference was granted to legislative judgments.

Standing alone, the right to compete has not been accorded signifi-

247. Id. at 111 (quoting Exxon v. Governor of Md., 437 U.S. 117, 133 (1978)). The Court noted: “Even if the right to franchise had constituted a protected interest when California enacted the Automobile Franchise Act, California’s Legislature was still constitutionally empowered to enact a general scheme of business regulation that imposed reasonable restrictions upon the exercise of the right. ‘[T]he fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.’” 439 U.S. at 106 (quoting Zemel v. Rusk, 381 U.S. 1, 14 (1965)). At least since the demise of the concept of 'substantive due process' in the area of economic regulation, this Court has recognized that, '[l]egislative bodies have broad scope to experiment with economic problems. . . .'” 439 U.S. at 106-07 (quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)); see also id. at 114 (Blackmun, J., concurring): “In asserting a right to franchise at will and a right to franchise without delay, appellees are essentially asserting a right to be free from state economic regulation. But any claim the appellees may have to be free from state economic regulation is foreclosed by the substantive due process cases, such as Ferguson v. Skrupa.” Justice Blackmun, moreover, denied the existence of a constitutional property interest cognizable under the fourteenth amendment. “T]he abstract expectation of a new franchise does not qualify as a property interest.” Id. at 113. Justice Marshall, concurring, wrote: “In view of the substantial public interest at stake and the short lapse of time between notice and hearing, the Due Process Clause does not dictate a contrary legislative decision.” Id. at 112-13.

248. “When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . [O]ur decisions presume the constitutionality of statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulation.” 427 U.S. at 303.

249. “We cannot say that these judgments so lack rationality that they constitute a constitutionally impermissible denial of equal protection.” Id. at 305.
cant constitutional protection by the Burger Court. The Court has permitted the right to compete to bear any and all costs of regulation. It has declined to recognize either the public costs of artificially limiting entry or the role regulation can play in enhancing competitive efficiency. Thus, it has declined to weigh and balance the substantive merits of the competing claims under either the due process clause or the equal protection clause. Instead, the Court has deferred to legislative judgments.

Judicial deference, however, has given way to heightened scrutiny in two cases linking the right to compete with the suspect classification of alienage. In *In re Griffiths* and *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, the Court relied on Level I equal protection strict scrutiny review to invalidate regulations prohibiting resident aliens from admission to the bar in Connecticut and denying them licenses as civil engineers in Puerto Rico. Justice Powell established the applicability of Level I scrutiny in *Griffiths*. “In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is ‘necessary . . . to the accomplishment’ of its purpose . . . .” The state’s interest in preserving high standards in the professions was clearly “permissible and substantial.” The means chosen, classification by alienage, however,


253. 413 U.S. at 721-22. Justice Rehnquist and Chief Justice Burger dissented. Justice Rehnquist rejected the application of strict scrutiny analysis to classifications based on alienage. “In my view, the proper judicial inquiry is whether any rational justification exists for prohibiting aliens . . . from admission to the state bar.” *Id.* at 658 (Rehnquist, J., dissenting). In the Chief Justice’s view, the questions involved were policy decisions within the legislative sphere and outside the ambit of fourteenth amendment review. *Id.* at 730 (Burger, C.J., dissenting). Moreover, he questioned the analytical soundness of the use of suspect classifications as a means of triggering strict scrutiny analysis. “In recent years the Court, in a rather casual way, has articulated the code phrase ‘suspect classification’ as though it embraced a reasoned constitutional concept. Admittedly, it simplifies judicial work as do ‘per se’ rules, but it tends to stop analysis while appearing to suggest an analytical process.” *Id.*
254. *Id.* at 722. Justice Powell noted the various formulations of the state interest or
was not sufficiently related to achieving that interest. Alternative available means, less intrusive of Griffith’s right to compete, could effectively protect the state’s welfare.

In *Flores de Otero*, the Court explicitly relied on *Griffiths* to justify its Level I scrutiny and invalidated the statute. Moreover, Justice Blackmun’s majority opinion noted the importance of the right to compete: “[A]liens have been restricted from engaging in private enterprises and occupations that are otherwise lawful. . . . It is with respect to this kind of discrimination that the States have had the greatest difficulty in persuading this Court that their interests are substantial and constitutionally permissible, and that the discrimination is necessary for the safeguarding of those interests.” Heightened scrutiny was justified, at least in part, by the importance of the right to compete.

The importance of the right was the principal subject of debate in the Burger Court’s only business regulation, sex discrimination case.

Public purpose requirement, such as “overriding,” “compelling,” “important,” or “substantial.” *Id.* at 722 n.9. He declined to distinguish analytically among the consequences of these descriptions. “We attribute no particular significance to these variations in diction.” *Id.*

255. “[T]he arguments advanced by the [state] fall short of showing that the classification . . . is necessary to the promoting or safeguarding of this interest.” *Id.* at 725.

256. *Id.* at 725-27. “In sum, the [state] simply has not established that it must exclude all aliens from the practice of law in order to vindicate its undoubted interest in high professional standards.” *Id.* at 727 (footnote omitted).

257. 426 U.S. at 601-02.

258. *Id.* at 603.

259. Gender-based discrimination was first placed within the ambit of the equal protection clause in *Reed v. Reed*, 404 U.S. 71 (1971). In an opinion by Chief Justice Burger, the Court invalidated an Idaho statute that established a mandatory preference for men over women for appointment as an administrator of a deceased minor’s estate. The Chief Justice was somewhat vague in his choice of the appropriate level of scrutiny in sex discrimination cases: “The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’” *Id.* at 75-76.

A year after *Reed*, the Court decided *Frontiero v. Richardson*, 411 U.S. 677 (1973). At issue was the availability of military benefits for the husband of a woman in the Air Force. A plurality of the Justices, in an opinion by Justice Brennan, agreed that “classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore by subjected to close judicial scrutiny.” *Id.* at 682. They therefore applied Level I analysis. Justice Powell, joined by the Chief Justice and Justice Blackmun, concurred in the judgment. While they, too, believed that the statutes in issue violated the equal protection clause, they took exception to the plurality’s reliance on the virtually irrebuttable presumption against constitutionality. “It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all the far-reaching implications of such a holding. *Reed v. Reed*, which abundantly supports our decision today, did
Craig v. Boren. In seven separate opinions, the Court invalidated an Oklahoma statute that prohibited eighteen to twenty year old men from purchasing 3.2 percent beer, while permitting women of the same age to do so. Justice Brennan, for a four member plurality, relied on Reed v. Reed to justify the use of Level II scrutiny. The statute was invalid because its means were not "substantially related" to the promotion of traffic safety, its admittedly "important" end. Concurring, Justice Powell expressed reservations, but also relied on Level II rebuttable scrutiny:

not add sex to the narrowly limited group of classifications which are inherently suspect." 411 U.S. at 691-92 (Powell, J., concurring in the judgment); see Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980); Califano v. Westcott, 443 U.S. 76 (1979); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); see also Kirchberg v. Feenstra, 450 U.S. 455 (1981), in which the Court invalidated a Louisiana statute that gave a husband, as "head and master" of property jointly owned with his wife, a right to dispose of such property without her consent. Justice Marshall explicitly relied upon Level II scrutiny: "[T]he burden remains on the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an 'exceedingly persuasive justification' for the challenged classification." Id. at 4272 (quoting Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979)). To meet that burden, it is necessary to demonstrate that the gender-based classification in issue "was substantially related to the achievement of an important governmental objective." Id. at 4271. But see Rostker v. Goldberg, 49 U.S.L.W. 4798 (June 25, 1981); Schlesinger v. Ballard, 419 U.S. 498 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); Kahn v. Shevin, 416 U.S. 351 (1974); Stanley v. Illinois, 405 U.S. 645 (1972).

presumptions to find that the "gender-based classification does not bear a fair and substantial relation to the object of the legislation." Justice Stevens, concurring, denied the existence of multiple levels of equal protection scrutiny, but agreed that the statute should be invalidated because its discrimination was based on an accident of birth, reflected a tradition of discrimination, and was "perverse" in its effects. In Justice Stewart's view, the disparate treatment produced by gender-based classification "amounts to total irrationality." The level of scrutiny invoked by the Court was therefore inconsequential. Chief Justice Burger and Justice Rehnquist dissented separately. The Chief Justice would use deferential Level IV scrutiny in gender-based discrimination cases. Justice Rehnquist would eliminate entirely the use of strict scrutiny analysis because it is too open to the abuses of subjectivity.

When the individual claiming an arbitrary or discriminatory limitation of his or her right to compete has not been a member of a suspect

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264. 429 U.S. at 211 (Powell, J., concurring).
265. "There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. . . . I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." Id. at 211-12 (Stevens, J., concurring).
266. Id. at 212-13 (Stevens, J., concurring).
267. "The disparate statutory treatment of the sexes here, without even a colorably valid justification or explanation, thus amounts to invidious discrimination." Id. at 215.
268. Id.
269. "Though today's decision does not go so far as to make gender-based classification 'suspect,' it makes gender a disfavored classification. Without an independent constitutional basis supporting the right asserted or disfavoring the classification adopted, I can justify no substantive constitutional protection other than the normal McGowan v. Maryland protection afforded by the Equal Protection Clause." Id. at 217 (Burger, C.J., dissenting).
270. "Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough. . . . [T]he Judicial Branch is probably in no worse position than the Legislative or Executive Branches to determine if there is any rational relationship between a classification and the purpose which it might be thought to serve. But the introduction of the adverb 'substantially' requires courts to make subjective judgments as to operational effects, for which neither their expertise nor their access to data fits them." Id. at 221 (Rehnquist, J., dissenting) (emphasis in original). Further, Justice Rehnquist would not elevate the level of scrutiny when the alleged gender-based classification discriminates against men rather than women. Id. at 217.
class, the right has been held constitutionally insignificant. When linked with a suspect or semi-suspect classification, however, the right to compete has triggered heightened scrutiny under the equal protection clause. The constitutional importance of protecting against discrimination in legislative classifications based on alienage or gender has been used to justify the invalidation of regulations limiting access to the marketplace. In both instances, the Court has declined to weigh and balance the costs and benefits arising from the regulation and instead has relied on the presence or absence of a suspect classification to trigger its constitutional discretion.

The Right to Remain a Competitor

In addition to its substantive aspects, the due process clause has procedural components, which ensure that the processes by which the government applies its laws to particular individuals comport with society's notions of justice and fairness. Although the definition of justice and fairness may vary with the circumstances, procedural due process has required that an individual be afforded notice and an opportunity to be heard prior to suffering permanent deprivation of a lib-


272. A fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552
The majority of the Burger Court's economic rights-procedural due process cases have involved the deprivation of "government entitlements" or government employment. The Court, however, has also examined the procedures used to suspend or terminate licenses to compete in the private market granted under regulatory authority in *Barry v. Barchi*, *Bell v. Burson*, *Dixon v. Love*, and *Mackey v. Montrym*. Two principal issues have arisen in these cases: whether a state may deprive an individual of his or her license, and thus of the right to remain in the marketplace, without the benefit of a presuspension hearing and, if such a hearing is required, what components of the conflict between the individual and the state must be scrutinized.

The Burger Court has included the right to retain a license within the ambit of economic interests protected by the due process clause.


280. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), Justice Stewart enunciated the standards against which the application of procedural due process would be measured: "[T]o determined whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake . . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." *Id.* at 570-71. With regard to the definition of property rights under the fourteenth amendment,
“[L]icenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.” In its most recent decision, however, the Court cut back the attributes of the right to remain in the marketplace that constitute constitutional property. In *Barry v. Barchi*, the licensee, a race horse trainer, was suspended when a post-race urinalysis revealed that one of his horses had been drugged. Justice White, for the majority, held that mere possession of a license was insufficient to invoke procedural due process review. Rather, he conferred constitutional recognition only upon those specific attributes of the right to remain in the marketplace explicitly granted by the license. “[S]tate law has engendered a clear expectation of continued enjoyment of a license absent proof of culpable conduct by the trainer. Barchi, therefore, asserted a legitimate ‘claim of entitlement . . . that he may invoke at a hearing.’” Justice Brennan, joined by Justices Stewart, Marshall, and Stevens in concurrence, objected to the majority’s narrow view, preferring to predicate constitutional dimension on the mere issuance and possession of the license. To the concurring Justices, Barchi’s license, authorized by state statute, was per se a property interest within the ambit of procedural due process protection.

Justice Stewart continued: “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state-law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Id.* at 577; see also *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Goldberg*, the Court repudiated the right versus privilege distinction that had frequently determined procedural due process issues during earlier eras of constitutional jurisprudence. Economic interests denominated privileges generally had received less rigorous procedural due process protection than those denominated rights. See also *Barry v. Barchi*, 443 U.S. 55, 70-71 (1979) (Brennan, J., concurring); *Bell v. Burson*, 402 U.S. 535, 539 (1971).

281. *Bell v. Burson*, 402 U.S. 535, 539 (1971). “Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees.” *Id.*

*Bell* was determinative of the constitutional protection of a licensee’s right to remain in *Dixon v. Love*, 431 U.S. 105, 112 (1977), and *Mackey v. Montrym*, 443 U.S. 1, 10 n.7 (1979).


283. *Id.* at 64 n.11.

284. “No extended inquiry into the formal and informal ‘rules or understandings that secure certain benefits and that support claims of entitlement to those benefits,’ is necessary here. Appellee’s claim to an entitlement in his duly issued trainer’s license is confirmed by the state statutes authorizing the issuance of licenses.” *Id.* at 70 n.2 (Brennan, J., concurring).
The Court's substantive standards of review have permitted examination of two principal issues: the timing and the evidentiary content of the hearing. The individuals in these cases have alleged that an evidentiary hearing, or some component thereof, must be held before they may be even temporarily deprived of their right to remain and compete. The Justices have weighed and balanced the costs to the individual of suspending his or her competitive participation in the marketplace against the benefits accruing to the public welfare from the individual's prompt removal.

In *Bell*, the Court examined the evidentiary content of an administrative hearing in which an uninsured motorist's driver's license could be suspended if he or she failed to post security against potential damages arising from an automobile accident. The available hearing did not consider the uninsured motorist's fault or liability. Justice Brennan, for the Court, held that due process required the hearing to consider liability because "the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his licenses." On balance, the Court found that the state interests served by this hearing could not justify the denial of due process.

In *Dixon*, a truck driver's license was summarily suspended on the basis of official records of his repeated convictions for traffic violations. As the statute provided an adequate hearing after the suspension, "[t]he only question is one of timing." Relying on *Mathews v. Eldridge* for the applicable substantive standards of review, Justice

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286. Id. at 541. "If the statute barred the issuance of licenses to all motorists who did not carry liability insurance or who did not post security, the statute would not, under our cases, violate the Fourteenth Amendment." Id. at 539.
287. Id. at 542-43.
289. Id. at 112.
290. 424 U.S. 319 (1976). In *Eldridge*, involving the termination of disability payments,
Blackmun concluded that "requiring additional procedures would be unlikely to have significant value in reducing the number of erroneous deprivations," and that the public's interests in traffic safety and administrative efficiency are sufficiently visible and weighty for the State to make its summary initial decision effective without a predecision administrative hearing. Moreover, the driver had "had the opportunity for a full judicial hearing in connection with each of [his] traffic convictions." The costs of suspension to the individual arising from the procedures relied upon did not outweigh the public benefits arising from and the public costs of altering suspension.

In Mackey, a Massachusetts statute mandated suspension of a driver's license upon the driver's refusal to take a breath analysis test. This "implied consent" law required only a police report for suspension, but provided for an immediate post-suspension hearing. In weighing the competing interests, Chief Justice Burger, for the majority, found the property interest less substantial than in Dixon. The police report offered "a reasonably reliable basis for concluding that the Court used three factors in its due process analysis: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interests including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Id. at 335.

291. 431 U.S. at 114.

292. The statute served "the substantial public interest in administrative efficiency" and the "[f]ar more substantial . . . public interest in safety on the roads and highways, and in the prompt removal of a safety hazard." Id. The traffic safety purposes distinguished Dixon from Bell, in which the "only purpose" of the statute had been to "obtain security from which to pay any judgments" against the licensee resulting from the accident. Id. at 114 (quoting Bell v. Burson, 402 U.S. 535, 540 (1971)).

293. Id. at 115. In dicta, Justice Blackmun discussed the alternatives to a full trial-type hearing in the administrative process. "The present case is a good illustration of the fact that procedural due process in the administrative setting does not always require application of the judicial model. When a governmental official is given the power to make discretionary decisions under a broad statutory standard, case-by-case decisionmaking may not be the best way to assure fairness. . . . The decision to use objective rules in this case provides drivers with more precise notice of what conduct will be sanctioned and promotes equality of treatment among similarly situated drivers." Id.

294. Id. at 113.


296. The statute in Mackey "authorizes suspension for a maximum of only 90 days, while [in Dixon] the Illinois scheme permitted suspension for as long as a year and even allowed for the possibility of indefinite revocation of a license." Id. at 12. The Chief Justice, however, did conclude that Dixon, and by derivation Eldridge, controlled Mackey analytically: "In each [case] the sole question presented is the appropriate timing of the legal process due a licensee. And, in both cases that question must be determined by reference to the factors set forth in Eldridge." Id. at 11.
the facts justifying the official action are as a responsible governmental
official warrants them to be."297 Chief Justice Burger concluded that
administrative efficiency and "the compelling interest in highway safety
justify[ ] the Commonwealth in making a summary suspension effective
pending the outcome of the prompt post-suspension hearing
available."298

In Barry,299 the Court was principally concerned with the timing
of post-suspension review. The regulation under which the horse
trainer's license had been suspended did not specify when such review
would occur. Justice White, for the majority, held that "it was neces-
sary that Barchi be assured a prompt post-suspension hearing, one that
would proceed and be concluded without appreciable delay."300 Bal-
ancing the private costs and public benefits involved in pre-suspension
hearings was not relevant to this post-suspension timing issue. None of
the public benefits arising from prompt removal were involved for
there was little or no public benefit arising from the delay.301

297. Id. at 13.
298. Id. at 19. "The summary and automatic character of the suspension sanction avail-
able under the statute is critical to attainment of [the state's] objective." Id. at 18. The Chief
Justice, moreover, declined to explore the availability of alternative procedures: "Nor is it
any answer to the Commonwealth's interest in public safety that its interest could be served
as well in any other way. . . . [I]n exercising its police powers, the Commonwealth is not
required by the Due Process Clause to adopt an 'all or nothing' approach to the acute safety
hazards posed by drunk drivers." Id. at 18-19.

Justice Stewart, joined by Justices Brennan, Marshall, and Stevens, dissented. "[T]he
constitutional guarantee of procedural due process has always been understood to embody a
presumptive requirement of notice and a meaningful opportunity to be heard before the
State acts finally to deprive a person of his property." Id. at 20 (Stewart, J., dissenting). The
burden of persuasion was placed on the state. "The State—in my view—has totally failed to
demonstrate that this summary suspension falls within any recognized exception to the es-
tablished protections of the Fourteenth Amendment." Id. at 30. Justice Stewart concluded
that the state's purposes failed to justify its summary procedure. Id. at 26-27. He also ques-
tioned the value of the state's alleged immediately available postsuspension hearing. Id. at
27-30.

299. 443 U.S. 55 (1979). The Court also balanced costs and benefits to establish the
content required in the presuspension "probable cause" hearing afforded Barchi: "Unques-
tionably, the magnitude of a trainer's interest in avoiding suspension is substantial; but the
State also has an important interest in assuring the integrity of the racing carried on under
its auspices." Id. at 64. Its "probable cause" standards closely parallels the majority's view
in Mackey of the reliability of the reports of government officials: "To establish probable
cause, the State need not postpone a suspension pending an adversary hearing to resolve
questions of credibility and conflicts in the evidence. At the interim suspension stage, an
expert's affirmation, although untested and not beyond error, would appear sufficiently reli-
able to satisfy constitutional requirements." Id. at 65. Four concurring justices would not
have reached the presuspension issues. Id. at 74.

300. Id. at 66.
301. "Once suspension has been imposed, the trainer's interest in a speedy resolution of
the controversy becomes paramount, it seems to us. We also discern little or no state inter-
Thus the standards of review of procedural due process have evolved. While the content of presuspension review has been explained with some specificity, the Court has not required evidentiary hearings prior to the infringement of the right to remain. The public benefits of prompt removal and administrative efficiency have outweighed the private costs of suspension. A postsuspension hearing, on the other hand, at which the evidence is reviewed, must be held promptly.

The importance of the right to remain in the marketplace also evolved in these four procedural due process cases. In Bell, the burden of persuasion was borne by the state. "[D]ue process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." 302 Six years later, in Dixon, the Court reversed its position and placed the burden on the licensee. "[T]he nature of the private interest here is not so great as to require us 'to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.'" 303 The right to remain in the marketplace had clearly lost some of its constitutional importance. By adopting the Eldridge balancing test, the Court predicated the distribution of the presumption upon an initial balance of the right to remain and the public interest in issue. In Dixon, the weight of the right depended upon its necessity and the possibility of retroactively compensating victims of erroneous deprivations. 304 In Mackey, the weight of the right depended upon the "personal inconvenience and economic hardship" suffered by the individual and upon "[t]he duration of any potentially wrongful deprivation of a property interest." 305 Balanced against the interests of public safety and administrative effi-

302. 402 U.S. at 542.
303. 431 U.S. at 113 (quoting Mathews v. Eldridge, 424 U.S. 319, 343 (1976)). For a discussion of Eldridge, see note 290 supra.
304. Id. at 113. Eldridge had involved the termination of disability payments under the Social Security Act. Suspension of a driver's license, while irreparable, nevertheless "may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence." Id. Moreover, the regulation in issue included special provisions for hardship and for commercial licensees and thereby limited the possibility of irreparable harm. Id.
305. 443 U.S. at 11-12. The absence of "hardship" exceptions was not "controlling," because a postsuspension hearing was immediately available. Id. The availability of "prompt post-deprivation review" reduced the procedural due process requirements to be met by presuspension procedures. Id. at 13. The suspension in Dixon could be for up to
ciency advanced by the states, these deprivations were insufficient to outweigh the Court's presumption for the regulation. The Court used Level III presumptions; it has "traditionally accorded the States great leeway in adopting summary procedures to protect public health and safety." In Barry, the Justices agreed that "the consequences to a trainer of even a temporary suspension can be severe." When the timing of postsuspension evidentiary review was in issue, Level II scrutiny was relied upon.

The four procedural due process-right to remain cases illustrate the Burger Court's concern with the breadth and depth of its political discretion. It has narrowed its specification of the constitutional attributes of the right to those granted in the license in question. It has declined to require presuspension evidentiary review on a per se basis and has instead sought to balance the private costs of suspension against the public benefits of prompt removal. The Court, however, has required postsuspension review to be prompt. Under its recently adopted balancing approach, the Court has determined its level of scrutiny by weighing the importance of the right against the importance of the public's interest. This balancing increases judicial flexibility in the distribution of rebuttable presumptions for and against constitutionality, but correspondingly enhances the risk that the Court's analysis will lose consistency and predictability. This method is less certain than the more standardized hierarchy of rights developed under other constitutional vehicles.

The Right of Interstate Entry

The commerce clause states: "The Congress shall have Power . . . To regulate commerce . . . among the several states . . . ." By its explicit language, the commerce clause authorizes Congress to regulate the free flow of market activities among the states. Unlike other constitutional vehicles, this provision aligns the powers of governments in a federal system rather than creating a limitation directly out of the personal or economic rights of American citizens. It has, however,
played a fundamental role in the constitutional protection of private economic rights. "[A]t least since Cooley v. Board of Wardens, it has been clear that the Commerce Clause by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." 310

In commerce clause cases concerning the right of interstate entry,311 the Court has reconciled the power of state and local govern-


311. The Burger Court recently issued its only major opinion on the scope of Congress’ authority to regulate business activities under the commerce clause. In Hodel v. Virginia Surface Mining & Reclamation Ass’n, 101 S. Ct. 2352 (1981) (Hodel I), discussed in text accompanying notes 76-77, 92-93 supra, and Hodel v. Indiana, 101 S. Ct. 2376 (1981) (Hodel II), discussed in text accompanying notes 76-77, 92-93 supra, and 410-35 infra, the Court upheld various “steep slope” and “prime farmland” provisions of The Federal Surface Mining Control and Reclamation Act of 1977 against, inter alia, commerce clause challenge. In both cases, the Court relied upon a permissible purpose-rationality of relationship test applied at Level IV: “The task of a court that is asked to determine whether a particular
ments to regulate matters of local interest with the national interest in maintaining and enhancing an open interstate marketplace. These right of entry problems arise from our federal system of government. To resolve them, the Court "is called upon to make 'delicate adjustments of the conflicting state and federal claims,' thereby attempting 'the necessary accommodation between local needs and overriding requirement of freedom for the national commerce.'" 312 Evidence of local benefits must be weighed and balanced against evidence of interstate burdens. "[I]f [the Court] finds that a challenged exercise of local power serves to further a legitimate local interest but simultaneously burdens interstate commerce, [it] is confronted with a problem of balance." 313

exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. Thus established, the only remaining question for judicial inquiry is whether 'the means chosen by [Congress] is reasonably adapted to the end permitted by the Constitution.' The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. at 2360; see Hodel v. Indiana, 101 S. Ct. at 2382.

In Hodel I, appellees insisted that the principal goal of the regulations in issue was the regulation of the use of private land in contravention of the States' inherent police powers, and not the regulation of the interstate commerce effects of surface mining. 101 S. Ct. at 2359. The Court found, however, that Congress' commerce clause power extends "[e]ven to activity that is purely intrastate in character . . . where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." 314 Id. at 2360 (quoting Fry v. United States, 421 U.S. 542, 547 (1975)). Ample support existed in the legislative record to justify Congress' largely environmental protection purposes. In addition, the means chosen to implement those purposes were not "redundant or unnecessary," id. at 2363, in light of other federal environmental protection regulations. Moreover, Congress believed, and the Court agreed, "that inadequacies in existing state laws and the need for uniform minimum nationwide standards made federal regulations imperative." 315 Id. at 2362. Of particular importance was the congressionally perceived need to protect state regulatory efforts from being undermined by competition among sellers of coal produced in different states with different surface mining standards. "The prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause." 316 Id. at 2363.

In Hodel II, the Court similarly found that Congress had ample evidence to support its regulations. 101 S. Ct. 2383-84. The protection "of agriculture, the environment, or the public health and safety, injury to any of which interests would have deleterious effects on interstate commerce," id. at 2385, particularly when coupled with "the congressional goal of protecting mine operators in states adhering to high performance and reclamation standards from disadvantageous competition with operators in states with less rigorous regulatory programs," id., were constitutionally legitimate goals that were reasonably advanced by the regulatory scheme adopted by Congress.

313. 424 U.S. at 371. In Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), the Court established the basic theme of commerce clause jurisprudence. "The validity of state
Historically, the Court has relied upon a number of analytic formulae to distinguish state legislation that validly regulates aspects of commerce from that which infringes upon Congress’ authority to maintain an open national marketplace. During the twentieth century, particularly prior to the New Deal, commerce clause analysis distinguished between “direct” and “indirect” burdens on interstate commerce. This method of analysis, however, has been rejected as “overly conclusory and misleadingly precise.” In its place, post-New Deal Courts upheld state regulations affecting interstate commerce if they were rationally related to legitimate local purposes and if the state or local benefits derived from achieving those purposes outweighed the burdens imposed upon interstate economic activity.

The Burger Court generally has followed the permissible purpose-rationality of relationship methodology to balance the interstate costs of regulation against local benefits. It has declined to extend constitutional dimension to rights of interstate entry adversely affected by local governments functioning in their proprietary capacity. It has also found that state action may affect interstate commerce without generating the discrimination or burden required for invocation of the commerce clause. The Court’s substantive standards of review and level of scrutiny depend on the type of costs incurred by the interstate market-

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314. “Cooley v. Board of Wardens . . . distinguished between subjects ‘imperatively demanding a single uniform rule’ and subjects ‘imperatively demanding that diversity, which alone can meet the local necessities.’ Other cases have distinguished between state regulations that affect interstate commerce ‘directly,’ and those that affect it ‘indirectly.’ And many cases have distinguished between regulations that are an exercise of the State’s ‘police powers,’ and those that are ‘regulations of commerce.’” Raymond Motor Transp. Inc. v. Rice, 434 U.S. 429, 441 n.15 (1978). For a discussion of Raymond Motor Transp., Inc. v. Rice, see notes 368-74 & accompanying text infra.


316. L. TRIBE, supra note 34, at 326.

place. When the regulation has a discriminatory or protectionist effect, the Court, using Level I scrutiny, has applied “a virtually per se rule of invalidity.” When, however, the regulation is evenhanded and merely burdens interstate commerce, the Court has adopted a much more flexible approach, assessing the relationship between the legislature’s means and ends, and exploring the possibility of alternative available means. Under this more flexible methodology, the distribution of the burden of persuasion has depended upon the importance of the asserted state or local public interests as well as the importance of the economic right. In general, the Court has used Level II scrutiny to place the burden of persuasion on the state.

When regulations are challenged as discriminatory or burdensome on interstate commerce, the individual’s right to interstate entry will usually be granted some constitutional dimension under the commerce clause. On two occasions, however, the Burger Court has held that state action interfering with interstate commerce did not fall within the

318. “The crucial inquiry, therefore, must be directed to determining whether [the regulation in question] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.” City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). For a discussion of City of Philadelphia, see notes 346-49 & accompanying text infra. “Over the years, the Court has used a variety of formulations for the Commerce Clause limitation upon the States, but it consistently has distinguished between outright protectionism and more indirect burdens on the free flow of trade. The Court has observed that ‘where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.’ In contrast . . . legislation that visits its effects equally upon both interstate and local business may survive constitutional scrutiny if it is narrowly drawn.” Lewis v. BT Inv. Managers, 447 U.S. 27, 36 (1980). For a discussion of BT Investment Managers, see notes 382-84 & accompanying text infra.

319. “The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects.” Id. at 37. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). For a discussion of City of Philadelphia, see text accompanying notes 346-49 infra.

320. “All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset.” City of Philadelphia v. New Jersey, 437 U.S. 617, 622 (1978), "Philadelphia v. New Jersey made clear that there is no 'two-tiered definition of commerce.' The definition of ‘commerce’ is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation.” Hughes v. Oklahoma, 441 U.S. 322, 326 n.2 (1979). For a discussion of Hughes v. Oklahoma, see text accompanying notes 350-53 infra.

The Burger Court has had only one occasion to distinguish goods in intrastate commerce from those being traded interstate commerce. In Allenberg Cotton Co., Inc. v. Pittman, 419 U.S. 20 (1974), the Court held that a wholly intrastate transaction between a cotton warehouser and a farmer nevertheless implicated the commerce clause. The cotton that was the subject of the exchange was destined for the interstate marketplace. Id. at 30; cf. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974) (use of material on interstate highway does not mean producer of the material is “in commerce”).
ambit of the commerce clause. In Hughes v. Alexandria Scrap Corporation\textsuperscript{323} and Reeves, Inc. v. Stake,\textsuperscript{324} the Court distinguished between government as regulator and government as private market participant. As a private market participant, the state has been bound only by the “invisible hand” of the competitive marketplace; commerce clause restraints have not been applied.

In Alexandria Scrap,\textsuperscript{325} Maryland had enacted a “bounty” scheme in which it subsidized automobile wreckers who removed abandoned cars from its streets. By a 1974 amendment, the state had eased title documentation requirements for in-state wreckers, giving them “an advantage over . . . non-Maryland processors in the competition” for subsidized abandoned automobiles.\textsuperscript{326} Although, in the past, the creation of a local competitive advantage has been evidence of discrimination against interstate commerce,\textsuperscript{327} the majority, in an opinion by Justice Powell, declined to apply the mandates of the commerce clause.\textsuperscript{328} Maryland was merely functioning as a participant in the private marketplace.\textsuperscript{329} The effects of its actions on interstate commerce were, therefore, outside of constitutional protection. “Nothing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others.”\textsuperscript{330}

\begin{itemize}
  \item \textsuperscript{323} 426 U.S. 794 (1976).
  \item \textsuperscript{324} 447 U.S. 429 (1980).
  \item \textsuperscript{325} 426 U.S. 794 (1976).
  \item \textsuperscript{326} 426 U.S. at 802.
  \item \textsuperscript{328} 426 U.S. at 805. The scrap company also argued that Maryland’s documentation requirements violated the equal protection clause. The Court used Level IV scrutiny, \textit{id.} at 813, to conclude: “The 1974 amendment bears a rational relationship to Maryland’s purpose of using its limited funds to clean up its own environment and that is all the Constitution requires.” \textit{id.} at 814.
  \item \textsuperscript{329} The Court distinguished prior cases in which “the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. By contrast, Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price.” \textit{id.} at 806.
  \item \textsuperscript{330} \textit{id.} at 810. Justice Stevens, concurring, would have upheld the “bounty” scheme as a permissible form of legislative experimentation with business incentives. \textit{id.} at 817.

In dissent, Justice Brennan, joined by Justices White and Marshall, declined to distinguish among the regulatory, taxing, and purchasing functions of government when determining whether local actions have unconstitutionally burdened interstate commerce. “Certainly the Court’s naked assertion today that ‘[n]othing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others’ . . . stands in start contrast to our ‘repeated emphasis upon the principle that the State may not promote its own economic advantages by
"Alexandria Scrap was decisive of the conflict in Reeves." A plant owned and operated by South Dakota had stopped selling cement to an out-of-state company after years of interstate activity. Justice Blackmun, writing for the majority, relied on the distinction between the state as market participant and the state as market regulator and denied the applicability of the commerce clause. He would have the Court defer to legislative judgment whenever the state acts as a participant in market activities.

The substantive standards of review and level of scrutiny relied upon by the Burger Court in applying the commerce clause have distinguished between regulations that are discriminatory in effect and those that merely burden interstate commerce. Discriminatory regulations must now undergo Level I scrutiny, while burdensome regulations have been assessed at Level II.

As a preliminary matter, an individual challenging constitutionality must demonstrate that his or her right of interstate entry has been infringed. In Exxon Corp. v. Governor of Maryland, the majority, per Justice Stevens, was unwilling to find either the requisite discrimination or burden. A Maryland statute required interstate oil refiners curtailment or burdening of interstate commerce. The dissenters would have applied a balancing test and invalidated the amendments. The dissenters would have applied a balancing test and invalidated the amendments.

Justice Powell, joined by Justices Brennan, White and Stevens, dissented. In their view, South Dakota's refusal to sell cement in interstate commerce was "precisely the kind of economic protectionism that the Commerce Clause was intended to prevent." South Dakota's role as a market participant was inconsequential for commerce clause purposes. "State action burdening interstate trade is no less state action because it is accomplished by a public agency authorized to participate in the private market." The competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, Alexandria Scrap wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court.

Exxon also alleged that the regulation violated substantive due process. Justice Stevens relied on Level IV analysis to uphold its constitutionality. "Appellants' substantive due process argument requires little discussion. The evidence presented by the refiners may cast some doubt on the wisdom of the statute, but it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary to sit as a "superlegislature to weigh the
to divest themselves of their company-owned retail service stations. At the time, no refineries were located in Maryland and, therefore, the Court found no basis for concluding that interstate commerce was the victim of discriminatory regulation. Moreover, even though the "regulation cause[d] some business to shift from one interstate supplier to another," the refiner's right of interstate entry had not been burdened. The commerce clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." Absent a showing of either discriminatory effect or burden, that is, absent a demonstration that costs of regulation recognized by the commerce clause were implicated, the statute was upheld.

The Burger Court has decided three cases involving discrimination in effect that reflect its willingness to extend its political authority over the exercise of regulatory power. In *Hunt v. Washington State Apple Advertising Commission*, the Court balanced the interstate costs against the local benefits, relying on Level II scrutiny. In *City of Philadelphia v. New Jersey*, it elevated the right of interstate entry to very important status and relied on a virtually irrebuttable presumption against constitutionality. In *Hughes v. Oklahoma*, the Court confirmed the use of Level I scrutiny to protect interstate entry against the effects of discriminatory regulations.

In *Hunt*, North Carolina apple grading requirements increased the costs of doing business for Washington apple growers, but left local growers unaffected. The state thus "shield[ed] the local apple industry wisdom of legislation". Regardless of the ultimate economic efficacy of the statute, we have no hesitancy in concluding that it bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market, and we therefore, reject appellant's due process claim." *Id.* at 124-25 (footnote omitted).

337. "Plainly, the Maryland statute does not discriminate against interstate goods, nor does it favor local producers and refiners. Since Maryland's entire gasoline supply flows in interstate commerce and since there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless." *Id.* at 125.

Justice Blackmun, dissenting in part, would have invalidated the statute as impermissibly discriminating against interstate commerce in retail gasoline marketing. "The divestiture provisions... preclude out-of-state competitors from retailing gasoline within Maryland. The effect is to protect in-state retail service station dealers from the competition of the out-of-state businesses. This protectionist discrimination is not justified by any legitimate state interest that cannot be vindicated by more evenhanded regulation. [The divestiture provisions], therefore, violate the Commerce Clause." *Id.* at 135 (Blackmun, J., dissenting).

from . . . competition."342 With such a discriminatory effect in evidence, the Court used Level II scrutiny.343 The state was required to show not only that the public benefits derived from the statute outweighed interstate costs, but also that adequate nondiscriminatory alternatives were unavailable.344 North Carolina failed to sustain either burden.345

In its next discrimination case, City of Philadelphia,346 the Court heightened its scrutiny of discriminatory regulations. "[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. . . . The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders."347 New Jersey had prohibited the shipment of most solid and liquid wastes into the state. Writing for the majority, Justice Stewart recognized the legitimacy of the state's environmental purpose, but nonetheless concluded that the state could not rely on means of implementation that saddled those outside it with the total burden of fulfilling its goals.348 "The evils of protectionism can reside in legislative means as well as legislative ends."349

The Court again confronted state protectionism in Hughes.350 The state had prohibited the interstate transportation of naturally spawned minnows. In an opinion by Justice Brennan, the Court relied heavily on the analytical methods and Level I scrutiny formulated in City of Philadelphia to invalidate the regulation. It declined to defer to the legislative judgment with regard to the statute's purpose,351 its

342. 432 U.S. at 351.
343. "[T]he challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them." Id. at 350.
344. "When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests and state." Id. at 353.
345. Id. at 353.
347. Id. at 624.
348. "The State has overtly moved to slow or freeze the flow of commerce for protectionist reasons. . . . What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." Id. at 628.
349. Id. at 626.
351. "[W]hen considering the purpose of a challenged statute, this Court is not bound by '[t]he name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law." Id. at 336.

In dissent, Justice Rehnquist and Chief Justice Burger disagreed with the majority with regard to the importance of the state's interest in preserving wildlife within its borders. "To
means, or the availability of alternative means.

These three discrimination cases show significant growth in the Court's willingness to exercise its political authority to protect the right of interstate entry against the encroachments of state regulation. By relying on proof of discriminatory effect for Level I scrutiny, however, it has moved away from weighing and balancing the substantive evidentiary merits and instead relied on presumptions to decide the issue. This per se rule of invalidity extends the Court's authority to find constitutional limitations on state regulatory power, but also reduces the Court's capacity for making flexible decisions.

When a discriminatory effect is not found, a state statute may still be challenged as unconstitutionally burdening interstate commerce. In these cases, the Burger Court consistently has relied upon the balancing test developed in *Pike v. Bruce Church, Inc.*

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of

be sure, a State's power to preserve and regulate wildlife within its borders is not absolute. But the State is accorded wide latitude in fashioning regulations appropriate for protection of its wildlife." *Id.* at 342 (Rehnquist, J., dissenting) (footnote omitted).

352. The majority found the statute discriminatory because it "forbids" interstate transportation and "thus overtly blocks the flow of interstate commerce at [the] State's borders." *Id.* at 336-37 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978)). "[F]acial discrimination by itself may be a fatal defect, regardless of the State's purpose, because 'the evil of protectionism can reside in legislative means as well as legislative ends.' At a minimum such facial discrimination invokes the strictest scrutiny of any purportedly legitimate local purpose and of the absence of nondiscriminatory alternatives." *Id.* at 337.

In dissent, Justice Rehnquist and the Chief Justice declined to find discrimination. The statute in question was evenhanded; it prohibited residents of Oklahoma as well as nonresidents from the interstate transport of natural minnows. "The State has not used its power to protect its own citizens from outside competition." *Id.* at 344 (Rehnquist, J., dissenting). Justice Rehnquist would, therefore, have relied on Level IV scrutiny with regard to both legislative purposes and legislative means.

353. Oklahoma had not chosen the "least discriminatory alternative." *Id.* at 337. The regulation "is certainly not a 'last ditch' attempt at conservation after nondiscriminatory alternatives have proved unfeasible. It is rather a choice of the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose more effectively." *Id.* at 338.

Justice Rehnquist and the Chief Justice, dissenting, would not have required the state to demonstrate that it had chosen the least discriminatory alternative among the available means. "[T]he range of regulations that a State may adopt . . . is extremely broad, particularly where, as here, the burden on interstate commerce is, at most, minimal." *Id.* at 344 (Rehnquist, J., dissenting).

course depend on the nature of the local interests involved, and on whether it could be promoted as well with a lesser impact on interstate activities.\textsuperscript{355}

The Court thus balances the local benefits derived from the regulation against the costs to interstate economic activities and determines whether alternative means of adequately fulfilling the legislature's purpose are available. Whether the balance between local benefits and interstate costs is tipped in favor of the individual or the state depends not only upon the nature and importance of those costs but also upon the nature and importance of the state's public welfare goals.

In \textit{Pike}, the statute prohibited the transportation of uncrated Arizona cantaloupes to California to be packed. The state's asserted interest was its desire to enhance the reputation of its cantaloupe growers by requiring in-state packaging.\textsuperscript{356} The statute's effect was to require the company to build a packing plant in Arizona. Even assuming the legitimacy of the state's purpose,\textsuperscript{357} the Court noted in a unanimous opinion, "this particular burden on commerce has been declared to be virtually \textit{per se} illegal."\textsuperscript{358} The judicial balance therefore was tipped in favor of the interstate company. The local benefits derived from the statute did not outweigh the interstate costs. Had "a more compelling state interest"\textsuperscript{359} been advanced, however, the regulation might not have been invalidated.

The \textit{Pike} permissible purpose-rationality of relationship-alternative available means balancing test characterizes the Burger Court's commerce clause burden analysis. It has been relied upon in \textit{Great Atlantic & Pacific Tea Company, Inc. v. Cottrell (A & P)},\textsuperscript{360} \textit{Raymond Motor Transportation, Inc. v. Rice},\textsuperscript{361} \textit{Kassel v. Consolidated Freightways Corporation of Delaware},\textsuperscript{362} \textit{Lewis v. BT Investment Managers, Inc.},\textsuperscript{363}

\textsuperscript{355} \textit{Id.} at 142. In Hughes v. Oklahoma, 441 U.S. 322, 336 (1979), the Court, with the benefit of intervening opinions, restated the \textit{Pike} test with greater specificity: "Under that general rule, we must inquire (1) whether the challenged statute regulated evenhandly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purposes; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce." For a discussion of \textit{Hughes v. Oklahoma}, see text accompanying notes 351-54 \textit{supra}.

\textsuperscript{356} \textit{Id.} at 145.

\textsuperscript{357} \textit{Id.}

\textsuperscript{358} \textit{Id.} "The nature of that burden is, constitutionally, more significant than its extent." \textit{Id.}

\textsuperscript{359} \textit{Id.} at 146.

\textsuperscript{360} 424 U.S. 366 (1976).

\textsuperscript{361} 434 U.S. 429 (1978).

\textsuperscript{362} 450 U.S. 662 (1981).

\textsuperscript{363} 447 U.S. 27 (1980).
and *Minnesota v. Clover Leaf Creamery Company.*\(^{364}\) In *A & P,* the Court invalidated a regulation requiring reciprocity in the interstate sale of milk. Statutes purportedly advancing highway safety were declared unconstitutional in *Raymond Motors* and *Consolidated Freightways.* In *BT Investment Managers,* a regulation prohibiting foreign bank holding companies from owning or controlling investment advisory service companies was held unconstitutional. In these four cases, the Court's balance of the nature and importance of the right against those of the public purpose resulted in Level II scrutiny. In *Clover Leaf,* a prohibition of plastic, disposable milk containers was upheld in apparent reliance on Level III scrutiny.

In *A & P,*\(^{365}\) a Mississippi statute permitted the in-state sale of milk produced out-of-state only when the producing state also accepted Mississippi milk for sale. The Court, in a unanimous decision written by Justice Brennan, held the statute unconstitutional, in part because the burden imposed on interstate commerce clearly outweighed the asserted "vital interest"\(^{366}\) of maintaining the health of Mississippi's citizens, but primarily because of the availability of alternative means.\(^{367}\) Mississippi could itself inspect milk from nonreciprocating states.\(^{368}\)

In *Raymond Motor,*\(^{369}\) an administrative regulation limited the length and configuration of trucks operating in Wisconsin. Numerous in-state exceptions were granted. The plaintiff company, an interstate operator, could not use its sixty-five-foot double-trailer rigs. Although the public purpose of highway safety traditionally had been viewed as presumptively compelling\(^{370}\) and, thus, in the *Pike* balancing method would ordinarily have triggered Level IV scrutiny, Justice Powell, for the majority, declined to defer to legislative judgment and, instead, placed the burden of persuasion on the state.\(^{371}\) With its exceptions,

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366. 424 U.S. at 375. "Only state interests of substantial importance can save [the regulation] in the face of that devastating effect on the free flow of interstate milk. Mississippi's contention that the reciprocity clause serves its vital interests in maintaining the State's health standards borders upon the frivolous." *Id.*
367. "Inquiry whether adequate and less burdensome alternatives exist is, of course, important in discharge of the Court's task of 'accommodation' of conflicting local and national interests, since any 'realistic' judgment whether a given state action 'unreasonably' trespasses on national interests must, of course, consider the 'consequences to the state if its action were disallowed.'" *Id.* at 373.
368. *Id.* at 377.
370. *Id.* at 442-43 (citing Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) and South Carolina v. Barnwell Brothers, Inc., 303 U.S. 177 (1938)).
371. 434 U.S. at 447-48. Justice Blackmun, joined by the Chief Justice and Justices
the statute "discriminated on its face," thus weakening the presumption favoring constitutionality. The exceptions undermined the assumption that the "[s]tate's own political processes will act as a check on local regulations that unduly burden interstate commerce." Moreover, the company had presented uncontradicted evidence that the regulation made no contribution to highway safety. Justice Powell weighed the costs and benefits with some specificity and invalidated the regulation as a "substantial burden on the interstate movement of goods."

Consolidated Freightways involved the constitutional validity of an Iowa statute that, with significant exceptions, also prohibited the use of sixty-five-foot double-trailer trucks within the state. Iowa, like Wisconsin in Raymond Motors, sought to justify its regulation as a safety measure. While the Court recognized that "[t]hose who would challenge . . . bona fide safety regulations must overcome a 'strong presumption of validity,'" it nevertheless stated that "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." When, as here, the

Brennan and Rehnquist, concurred. They would have placed the burden of persuasion on the individual challenging constitutionality. "[I]f safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." Id. at 449 (Blackmun, J., concurring). Justice Blackmun, for example, would not apply the alternative available means test when dealing with commerce clause assessments of safety regulations. Id. at 450.

372. Id. at 446-47.
373. Id. at 446.
374. "The State, for its part, virtually defaulted in its defense of the regulations as a safety measure." Id. at 444.
375. Id. at 445, 447.
376. 450 U.S. 662.
377. As Justice Powell stated for the majority: "This case is Raymond revisited." Id. at 671. Justice Rehnquist, joined by the Chief Justice and Justice Stewart, dissented. They did not view Raymond Motors as controlling, id. at 700 (Rehnquist, J., dissenting), and would generally rely on highly restrained judicial review: "A determination that a state law is a rational safety measure does not end the Commerce Clause inquiry. A 'sensitive consideration' of the safety purpose in relation to the burden on commerce is required. When engaging in such a consideration the Court does not directly compare safety benefits to commerce costs and strike down the legislation if the latter can be said in some vague sense to 'outweigh' the former. Such an approach would make an empty gesture of the strong presumption of validity accorded state safety measures, particularly those governing highways. It would also arrogate to this Court functions of forming public policy, functions which, in the absence of congressional action, were left by the Framers of the Constitution to state legislatures." Id. at 691 (Rehnquist, J., dissenting). Moreover, the dissenters found the evidence advanced by Iowa in support of its safety purpose persuasive. Id. at 696 (Rehnquist, J., dissenting).

378. Id. at 670.
379. Id.
state’s safety purpose is “illusory,” and the statute contains “several exemptions that secure to Iowans many of the benefits of large trucks while shunting to neighboring states many of the costs associated with their use,” ordinary judicial deference is inappropriate. Applying Level II scrutiny and weighing the evidence in some detail, the Court invalidated the regulation.

In BT Investment Managers, a Florida banking statute was invalidated because the Court was “convinced that the disparate treatment of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns.” The state’s alleged purposes were “not well-served” by the statute, were readily achievable by “some intermediate form of regulation” rather than its chosen prohibition, were tinged with “local parochialism,” and did not “justify the heavily disproportionate burden . . . [placed] on bank holding companies that operate principally outside the state.”

In Clover Leaf, the Court scrutinized a Minnesota regulation

380. Id. “In addition the costs of the trucking companies (and, indirectly, of the service to consumers), Iowa’s law may aggravate, rather than ameliorate, the problem of highway accidents. . . . Iowa’s law tends to increase the number of accidents, and to shift the incidence of them from Iowa to other States.” Id. at 674-75.

381. Id. at 676.

382. Id. at 669-79. Justice Brennan, joined by Justice Marshall, concurred. “For me, analysis of Commerce Clause challenges to state regulations must take into account three principles: (1) The courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation. (2) The burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the State’s lawmakers, and not against those suggested after the fact by counsel. (3) Protectionist legislation is unconstitutional under the Commerce Clause, even if the burdens and benefits are related to safety rather than economics.” Id. at 679-80 (Brennan, J., concurring). Justice Brennan stated that “Iowa’s actual rationale . . . [was] to discourage interstate truck traffic on Iowa’s highways. Thus, the safety advantages and disadvantages . . . are irrelevant to the decision.” Id. at 681-82 (Brennan, J., concurring). He viewed the regulation as protectionist and would, therefore, have applied Level I scrutiny and invalidated the regulation. Id. at 686 (Brennan, J., concurring).


384. Id. at 42. There was evidence that this prohibition, with the strong support of the Florida financial community, had been enacted in direct response to BT Investment Manager’s attempt to enter the state. Id. at 31-32. Despite this evidence of intent, “[t]he principle focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects.” Id. at 37. Viewing the effect of the statute as erecting an explicit barrier to out-of-state competitors, the Court nevertheless declined to invalidate the regulation on the basis of the per se rule of invalidity promulgated in City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). See text accompanying notes 347-49 supra. “We need not decide whether this difference is sufficient to render the Florida legislation per se invalid . . . .” 447 U.S. at 42.

385. Id. at 43-44.

prohibiting the retail sale of milk in plastic, nonreturnable, nonrefillable containers. The regulation had been promulgated to promote energy conservation and ease solid waste disposal problems. The majority, in an opinion by Justice Brennan, relied on *Pike* balancing analysis to find that the “relatively minor” burdens on interstate commerce were outweighed by the ample local benefits created in support of a “substantial state interest.” Moreover, the alternative means of implementation advanced by the creamery were “either more burdensome on commerce . . . or less likely to be effective.” Relying, at least implicitly, on Level III scrutiny, the Court upheld the prohibition.

The balancing analysis of *Pike* has provided the Burger Court with an opportunity to weigh and balance state regulatory interests against their impact upon free entry into interstate commerce. The Court, however, has not specified a consistent level of scrutiny in these burden on interstate commerce cases, but rather has relied upon a preliminary, case-by-case weighing of the economic right against the regulatory goal to determine the distribution and weight of the burden of persuasion. The absence of a predetermined level of scrutiny makes future consistency of analysis difficult to predict.

In addition to its reliance on the commerce clause, the Burger Court has had two recent occasions to invoke the privileges and immunities clause of article IV to protect the right of interstate entry. The privileges and immunities clause provides: “[T]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Historically, the Supreme Court has infrequently invoked this provision to determine the constitutionality of state regulation.

387. Justice Powell concurred. He “would not . . . reach the Commerce Clause issue.” 449 U.S. at 475 (Powell, J., concurring), because it had not been decided by the Minnesota Supreme Court. For comparable reasons, Justice Stevens dissented. Id. at 486 (Stevens, J., dissenting).

388. Id. at 472.

389. “Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a [nondiscriminatory] regulation violate the Commerce Clause.” Id. at 474.

390. Id. at 473.

391. Id.

392. U.S. Const. art. IV, § 2, cl. 1.

393. “That Clause is not one the contours of which have been precisely shaped by the process and wear of constant litigation and judicial interpretation over the years since 1789.” Baldwin v. Fish & Game Comm’n, 436 U.S. 371, 379 (1978). See generally Mullaney v. Anderson, 342 U.S. 415 (1952); Toomer v. Witsell, 334 U.S. 385 (1948); Hague v. Committee for Indus. Org., 307 U.S. 496 (1939); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868); Corfield
In *Baldwin v. Fish and Game Commission*, the Court determined that the mandates of the privileges and immunities clause were insufficient to invalidate Montana's discriminatory elk hunting license fee structure, even though the nonresident fee was seven and one-half times the resident fee. "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." The Court concluded that "[e]quality in access to Montana elk is not basic to the maintenance or well-being of the Union."

In a dissent joined by Justices White and Marshall, Justice Brenann objected to the majority's narrow view of privileges and immunities. "I cannot agree that the Privileges and Immunities Clause is so impotent a guarantee that such discrimination remains wholly beyond the purview of that provision." Relying on *Toomer v. Wittest* and *Mullaney v. Anderson*, he would have applied a Level II permissible purpose-rationality of relationship test and invalidated the statute.

Justice Brennan's *Baldwin* dissent became the majority position in

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395. Appellants also urged that Montana's distinction between residents and nonresidents violated the equal protection clause. Relying on the virtually irrebuttable presumption favoring constitutionality characteristic of Level IV scrutiny, the Court upheld the classifications. "The legislative choice was an economic means not unreasonably related to the preservation of a finite resource and a substantial regulatory interest of the State." *Id.* at 390; see also *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 814 (1976). For a discussion of *Alexandria Scrap*, see text accompanying notes 324-31 supra.
396. 436 U.S. at 383. "When the Privileges and Immunities Clause has been applied to specific cases, it has been interpreted to prevent a State from imposing unreasonable burdens on citizens of other States in their pursuit of common callings within the State . . . in the ownership and disposition of privately held property within the State . . . and in access to the courts of the State." *Id.*
397. *Id.* at 388.
398. *Id.* at 394 (Brennan, J., dissenting).
399. 334 U.S. 385 (1948).
400. 342 U.S. 415 (1952).
401. "[T]he State could not meet the plaintiffs' privileges and immunities challenge simply by asserting that the discrimination was a rational means for fostering a legitimate state interest." 436 U.S. at 400 (Brennan, J., dissenting) (quoting 334 U.S. 398 (1948)). "Drawing from the principles announced in *Toomer* and *Mullaney*, a State's discrimination against a nonresident is permissible where (1) the presence or activity of nonresidents is the source or cause of the problem or effect with which the State seeks to deal, and (2) the discrimination practiced against nonresidents bears a substantial relation to the problem they present." *Id.* at 402.
Hicklin v. Orbeck,402 decided one month later. In a unanimous decision, the Court relied on Level II scrutiny to invalidate an Alaska statute that required residents to be preferred over nonresidents in employment in the state's oil and gas industry. Again relying on Toomer and Mullaney, Justice Brennan stated: "[C]ertainly no showing was made on this record that nonresidents were 'a peculiar source of the evil' [the statute] was enacted to remedy, namely, Alaska's 'uniquely high unemployment.'"403 The mere preference of residents was a choice of means that did not "bear a substantial relationship to the particular 'evil' [the nonresidents] are said to present."404 Moreover, less intrusive alternative means were available.405

The commerce clause and the privileges and immunities clause have enabled the Burger Court to confer both constitutional dimension and protection upon the right of interstate entry. The Court has broadly defined the right, precluding commerce clause review only when government has entered the marketplace in its proprietary capacity. Costs to interstate entry and benefits to the local public welfare have been determined in terms of discriminatory effects as well as burdens on interstate trade. The Court has also established the means by which it will distribute the burden of persuasion. Perhaps in deference to the importance of a free, open marketplace to the protection and enhancement of the nation's general economic welfare, the Court ordinarily has relied on elevated levels of scrutiny. Level I scrutiny is now used in discrimination cases. Level II generally has been relied upon in burden cases, although in the presence of more substantial state interests and relatively minor costs to interstate entry, the Court has relied upon Level III presumptions favoring constitutionality.

The right of interstate entry cases illustrate the Burger Court's active management of its political authority and discretion over regulatory policy. The Justices have narrowed their specification of the attributes of the right as constitutional property and elevated review of discriminatory statutes. While subsequent opinions have approved this increase in the Court's authority, the use of Level I scrutiny in discrimination cases has resulted in a shift away from evidentiary balancing and towards a more rigid reliance on an evidentiary trigger. Political discretion has, in part, given way to virtually conclusive presumptions.

403. Id. at 526.
404. Id. at 527.
405. Id. at 528.
Market Failures: Externalities

Some time after the cavedwellers began growing corn, an enterprising cavedweller who liked neither hunting nor farming began raising sheep. His sheep grazed in a pasture in the valley. Soon, other cavedwellers were grazing their sheep in the pasture. The sheep ate well and multiplied, and began to overgraze the pasture. As the pasture was owned by the community in common, none of the shepherds had incentive to limit the number of his or her grazing sheep. The benefits of husbanding the supply of grass could not be personally enjoyed because the other shepherds would continue to overgraze. Recognizing that there soon would be no grass left, the shepherds agreed to divide the pasture and provide a means of excluding sheep from one another’s property. Fences were erected; but fences needed mending. The sheep of one of the shepherds who refused to mend fences, wandered into neighbors’ property and ate the grass. Sometimes the sheep would wander into the cornfields.

The unfenced pastureland was a common pool resource held for use by all. The right to exclude had not yet been established. Each shepherd was able to enjoy the personal benefit of overgrazing his or her sheep without cost. There was no incentive to conserve grass. Nevertheless, each shepherd’s use or overuse directly reduced the use and value of the pasture to the other shepherds. Overgrazing produced external costs. It reduced and eventually would have eliminated the grass resources of the pastureland. The cave dwellers internalized the costs of overgrazing when they established exclusion: the private right to use, consume or exchange pastureland. Both the costs and benefits of overgrazing were then borne by individual shepherds. If sheep were permitted to overgraze, the individual shepherd would eventually have no grass to feed them. If the grass were conserved, however, the sheep could graze indefinitely. Private costs and benefits and social costs and

406. “A common pool resource is one that is available for everyone’s use; i.e., it is characterized by nonexclusion because exclusion of users or limitations of use are not feasible or legal, but nevertheless one person’s use directly reduces the use or value of the common pool to others . . . . The efficient utilization of common pool resources requires collective action among all users to curtail or ration use to nondestructive levels . . . .” R. Bish & H. Nourse, URBAN ECONOMICS AND POLICY ANALYSIS 119-20 (1975); see also Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347 (1967), reprinted in THE ECONOMICS OF LEGAL RELATIONSHIPS 23 (H. Manne ed. 1975); Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968), reprinted in ECONOMIC FOUNDATIONS OF PROPERTY LAW 2 (B.A. Ackerman ed. 1975). The fable of the cave dwellers as shepherds and the accompanying political economic analysis closely follows the analysis and examples in Professor Demsetz’s Article.
benefits were no longer divergent. Then, however, a new form of externality arose. With fences unmended, sheep wandered. Shepherds were no longer assured that they would enjoy the future benefits of their conserved resources. Actions or inactions taken by their neighbors could impinge upon those expectations and diminish the value of their property.\(^{407}\)

The management of common pool resources by regulation has been the subject of scrutiny in three substantive due process cases and one equal protection case. Neighborhood externalities, as treated in zoning ordinances, have been examined in three cases involving procedural due process, equal protection, and substantive due process. These externalities cases reveal the Court's business regulation analysis at its least substantively manageable. The Court, however, has generally relied on Level IV presumptions to restrain its discretion. The willingness to use Level II presumptions in an unfocused substantive due process case, however, illustrates the Burger Court's maximum exercise of judicial discretion and extension of its political authority.

**Regulation of Common Pool Resources**

The due process clause of the fifth amendment states: "No person shall . . . be deprived of life, liberty, or property without due process of law."\(^{408}\) The Burger Court has relied on it to resolve conflicts between private economic interests and the public welfare arising from the management of common pool resources. As the federal analogue of fourteenth amendment due process limitations on state action, the fifth amendment due process clause restrains congressional legislation. Its substantive standards of review similarly have suffered from ambiguity. While the Court has followed the permissible purpose-rationality of relationship model, the regulatory costs and benefits open to scrutiny have been chosen on an ad hoc basis.

The Burger Court has relied on fifth amendment substantive due process in two cases involving insurance funds to which both the federal government and the affected private industries have contributed:


\(^{408}\) U.S. CONST. amend. V.
Usery v. Turner Elkhorn Mining Company\textsuperscript{409} and Duke Power Company v. Carolina Environmental Study Group, Inc.\textsuperscript{410} Fifth amendment substantive due process and equal protection were used in Hodel v. Indiana (Hodel II)\textsuperscript{411} to examine sections of environmentally-motivated federal regulations of strip mining. In Minnesota v. Clover Leaf Creamery Company,\textsuperscript{412} fourteenth amendment equal protection was relied upon to assess an environmental regulation banning disposable plastic milk containers. All four cases involved the use of Level IV virtually irrebuttable presumptions and upheld regulations designed to ration resources held in common.

In Turner Elkhorn,\textsuperscript{413} a federal statute required that former as well as present miners be compensated for death or disability due to black lung disease. Coal mine operators alleged that the statute violated due process in two principal respects:\textsuperscript{414} the retroactive liability to former miners\textsuperscript{415} and the inability to pass the costs of compensation on to consumers.\textsuperscript{416} In an opinion by Justice Marshall, the majority used a virtually irrebuttable presumption favoring constitutionality.\textsuperscript{417} The imposition of retroactive liability was per se supported by constitutional precedent\textsuperscript{418} and was "justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers."\textsuperscript{419} Whether those costs could, as a practical matter, be passed on to the consumer was "not a question of constitutional dimension."\textsuperscript{420} The majority was unwilling to assess the wisdom of the congressional

\textsuperscript{409} 428 U.S. 1 (1976).
\textsuperscript{410} 438 U.S. 59 (1978).
\textsuperscript{413} 428 U.S. 1 (1976).
\textsuperscript{414} The mine operators also challenged a series of rebuttable and irrebuttable evidentiary presumptions relied upon in the statutes. 428 U.S. at 10-12.
\textsuperscript{415} Id. at 15.
\textsuperscript{416} "The Operators contend that competitive forces will prevent them from effectively passing on to the consumer the costs of compensation for inactive miners' disabilities, and will unfairly leave a burden on the early operators alone." Id. at 18.
\textsuperscript{417} Id. at 15.
\textsuperscript{418} "Our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." Id. at 16. But see Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). For a discussion of Spannaus, see text accompanying notes 112-23 supra.
\textsuperscript{419} 428 U.S. at 18. In addition, the Court noted that "a substantial portion of the burden for disabilities stemming from the period prior to enactment is borne by the Federal government." Id.
\textsuperscript{420} Id. at 19.
In *Duke Power*, the Court considered the constitutionality of regulations that limited aggregate tort liability for a single accident at a nuclear power plant. Chief Justice Burger delivered the majority opinion. Relying on *Turner Elkhorn* for his standards of review and Level IV scrutiny, he nevertheless examined the merits of the substantive due process issues with some specificity. Recognizing that the congressional decision to limit liability to $560,000,000 was "based on imponderables" and was therefore "arbitrary," he determined

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421. Justice Powell, concurring, seriously questioned both "[t]he rationality of retrospective liability as a cost-spreading device," and "the Court's view that the costs now imposed by the Act may be passed on to consumers." *Id.* at 42 (Powell, J., concurring). Despite his reluctance to agree with the majority's conclusion on these matters, he nevertheless felt constrained to concur in the judgment. "Congress had broad discretion in formulating a state to deal with the serious problem of pneumoconiosis affecting former miners. Nor does the Constitution require that legislation on economic matters be compatible with sound economics or even with normal fairness. As a result, economic and remedial social enactments carry a strong presumption of constitutionality, and the operators had the heavy burden of showing the Act to be unconstitutional." *Id.* at 44.


423. The Price-Anderson Act provided for maximum liability of $560,000,000 for damages in the event of a nuclear incident. In the event that a nuclear accident resulted in damages in excess of the $560,000,000 limitation, "the Congress will thoroughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude." 42 U.S.C. § 2210(e) (Supp. V 1970), quoted in 438 U.S. at 66-67.

424. "The liability-limitation provision thus emerges as a classic example of an economic regulation—a legislative effort to structure and accommodate 'the burdens and benefits of economic life . . . It is by now well-established that [such] legislative Acts . . . come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.'" 438 U.S. at 82-83 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). For a discussion of *Turner Elkhorn*, see text accompanying notes 414-21 supra.

425. The Court was presented with three substantive due process assertions. First, "'[t]he amount of recovery is not rationally related to the potential losses.'" Second, "'[t]he Act tends to encourage irresponsibility in matters of safety and environmental protection . . . .'" Third, "'[t]here is no quid pro quo' for the liability limitations." *Id.* at 82.

Appellees had also urged that the legislation violated the equal protection clause "because the Act 'places the cost of [nuclear power] on an arbitrarily chosen segment of society, those injured by nuclear catastrophe.'" *Id.* at 82. The Court dismissed the equal protection issues in a perfunctory manner. "The general rationality of the Price-Anderson Act liability limitations—particularly with reference to the important congressional purpose of encouraging private participation in the exploitation of nuclear energy—is ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes. Speculation regarding other arrangements that might be used to spread the risk of liability in ways different from the Price-Anderson Act is, of course, not pertinent to the equal protection analysis." *Id.* at 93-94.

426. *Id.* at 86.
that it was not, however, "the kind of arbitrariness which flaws otherwise constitutional action." The contention that the liability ceiling would encourage irresponsible conduct by nuclear licensees similarly could not "withstand careful scrutiny." Congress had imposed stringent licensing requirements, and the "risk of financial loss and possible bankruptcy to the utility" was a substantial inducement to the exercise of due care. Moreover, it was not clear that the due process clause required "that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." This common law expectation was not a property right.

Destroying the expectation did not leave "the potential victims of a nuclear disaster in a more disadvantageous position than they would be in if left to their common-law remedies—not known in modern times for either their speed or economy."

In *Hodel II*, the Court upheld those provisions of the federal Surface Mining Control and Reclamation Act that allowed variances from its steep-slope reclamation requirements, but failed to allow a comparable variance from its prime farmland reclamation standards. The district court had held that this disparity in treatment amounted to impermissible geographic discrimination against the Midwestern states and coal mine operators under the fifth amendment's equal protection mandates, and to arbitrary, irrational, and capricious regulation under

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427. *Id.*. "When appraised in terms of both the extremely remote possibility of an accident where liability would exceed the limitation and Congress' now statutory commitment to 'take whatever action is deemed necessary and appropriate to protect the public from the consequences of' any such disaster, we hold the congressional decision to fix a $560 million ceiling, at this stage in the private development and production of electric energy by nuclear power, to be within permissible limits and not violative of due process." *Id.* at 86-87 (footnote omitted).

428. *Id.* at 87.

429. *Id.*

430. *Id.* at 88.

431. "Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' despite the fact that 'otherwise settled expectations' may be upset thereby." *Id.* at 88 n.32.

Justice Stewart concurred in the result. He stated that property rights of constitutional dimension were implicated in the litigation: "One of those property rights, and perhaps the sole cognizable one, is a state-created right to recover full compensation for tort injuries. The Act impinges on that right by limiting recovery in major accidents." *Id.* at 94 (Stewart, J., concurring in result). He also stated, however, that the issues were not ripe for adjudication and that the appellees lacked standing to sue: "[T]here has never been such an accident, and it is sheer speculation that one will ever occur." *Id.* at 95.


433. *Id.* at 92.
its substantive due process manifestations. The Court disagreed. Relying on Level IV scrutiny, Justice Marshall, for the majority, stated: "A claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact." Moreover, the Court remonstrated the district court for "act[ing] as a superlegislature" and "substitut[ing] its policy judgment for that of Congress."

In Clover Leaf, the creamery pressed only limited fourteenth amendment equal protection claims against Minnesota's disposable plastic milk container prohibition. It conceded the applicability of the "rational basis" test and the legitimacy of the state's environmental purposes. It contested only the rationality of relationship between that purpose and the classifications chosen to implement it. While the Court examined the four justifications advanced by the state in support of its classification, its choice of Level IV scrutiny required that "[i]f any one of the four substantiates the State's claim, we must . . . sustain the Act." Moreover, if any of the state's justification of rationality "is at least debatable," the challenged regulation is constitutional:

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434. 101 S. Ct. 2386.
435. "Social and economic legislation like the Surface Mining Act that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose. Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. As the Court explained in Vance v. Bradley, 440 U.S. 93, 97 (1979), social and economic legislation is valid unless 'the varying treatment of different groups and persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational.' This is a heavy burden, and appellees have not carried it." Id.

436. The Chief Justice and Justice Rehnquist, relying upon their opinions in Hodel I, concurred.

437. Justice Marshall stated: "Nor does the Commerce Clause impose requirements of geographic uniformity . . . . Congress may devise . . . a national policy with due regard for the varying and fluctuating interests of different regions." 101 S. Ct. 2387 (quoting Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 616 (1950)). Congress, aware of those varying geographical conditions, "presumably concluded that allowing variances from the prime farmland provisions would undermine the effort to preserve the productivity of such lands." 101 S. Ct. at 2387.

438. 101 S. Ct. at 2387.
439. Id.
441. Id. at 461-62.
442. Id. at 465-70.
443. Id. at 465. Justice Stevens dissented, stating that the Court was overstepping the bounds of its authority when it chose to review "the Minnesota courts' perception of their role in the State's lawmaking process." Id. at 489 (Stevens, J., dissenting).

444. Id. at 464. "This Court has made clear that a legislature need not 'strike at all evils at the same time or in the same way,' and that a legislature 'may implement [its] program
“Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.”

These four common pool resources cases reveal the Burger Court eliminating the risk of judicial overreaching by relying upon Level IV virtually irrebuttable presumptions in favor of constitutionality. Substantive due process, however, continues to provide individuals with a variety of potential complaints against constitutionality.

Regulation of Externalities

The government has regulated externalities among neighboring property owners in many ways. The common law of nuisance, for example, was the traditional means by which the government prevented the use of real property harmful to neighboring lands. When nuisance law proved insufficiently responsive to industrialization and urbanization, it was superseded by prospective legislative determinations of the permissible uses of property, principally zoning. Zoning prevents harmful and promotes beneficial land uses by distributing costs and benefits among the landowner, neighbors, and the community at large.

Zoning was first measured against constitutional standards during the heyday of substantive due process. In Village of Euclid v. Ambler Realty Company, the Court relied upon Level III scrutiny to give constitutional sanction to regulations that not only internalized nuisance costs but also required private property owners to contribute affirmatively to the public welfare. Since Village of Euclid, zoning has been measured step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. . . . Whether in fact the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature could rationally have decided that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives.”

445. Id. at 464.
446. See note 70 supra.
448. “[B]efore a zoning ordinance can be declared unconstitutional, it must be shown to be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” 272 U.S. at 395.
449. “Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded,
received little scrutiny by the Supreme Court.\textsuperscript{450}

The Burger Court has rendered three zoning decisions:\textsuperscript{451} \textit{City of Eastlake v. Forest City Enterprises, Inc.},\textsuperscript{452} \textit{Village of Belle Terre v. Boraas},\textsuperscript{453} and \textit{Moore v. City of East Cleveland}.\textsuperscript{454} In \textit{Eastlake}, the Court relied upon Level III scrutiny to uphold a city charter provision that required referendum approval of rezonings against a procedural due process challenge. In \textit{Belle Terre}, equal protection analysis at Level IV was used to uphold an ordinance restricting occupancy of single-family dwellings to related individuals, but to not more than two unrelated individuals. In \textit{Moore}, Level II substantive due process analysis was invoked to invalidate an ordinance that precluded some related individuals from occupying a single-family home. The diversity of these opinions shows the Court’s political authority over regulatory policy at its least manageable. The “right to externalize” has been an economic interest in search of both a constitutional vehicle and an appropriate level of scrutiny.

The issue in \textit{Eastlake}\textsuperscript{455} was whether a property owner was denied due process by a city charter requirement that proposed zoning changes be approved by referendum. For the majority, Chief Justice Burger concluded that property rights did not include reasonable expectations that a zoning classification could be changed. “No existing rights are being impaired; new use rights are being sought from the City Council.”\textsuperscript{456} The referendum was neither an unconstitutional delegation of

\textsuperscript{450} See note 447 \textit{supra}.

\textsuperscript{451} See \textit{County Board of Arlington County v. Richards}, 434 U.S. 5 (1977); \textit{James v. Valtierra}, 402 U.S. 137 (1971). \textit{Valtierra} involved racial issues. See note 3 \textit{supra}. \textit{Arlington County} was a \textit{per curiam} opinion involving equal protection analysis at Level IV scrutiny of a zoning ordinance prohibiting automobile commuters from parking in designated residential neighborhoods.

\textsuperscript{452} 426 U.S. 668 (1976).

\textsuperscript{453} 416 U.S. 1 (1974).

\textsuperscript{454} 431 U.S. 494 (1977).

\textsuperscript{455} 426 U.S. 668 (1976).

\textsuperscript{456} \textit{Id.} at 679 n.13. Justice Stevens, joined by Justice Brennan in dissent, stated that property rights of constitutional significance had been impaired. “The expectancy that par-
legislative power nor an unconstitutional failure to specify standards and criteria to guide the public’s decision. The majority determined that the principal issue was “whether the zoning restriction produces arbitrary and capricious results.” As the developer had not raised these substantive issues, the Court had little difficulty in upholding the constitutionality of the referendum requirement.

In Belle Terre, the Court used equal protection analysis to scrutinize a zoning ordinance that precluded more than two unrelated individuals from living in a single-family home. Six unrelated college students challenged the ordinance’s constitutionality, contending that it abridged many of their personal constitutional rights. The majority, in an opinion by Justice Douglas, rejected their claims. “We deal [here] with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be ‘reasonable, not arbitrary,’

ticular changes consistent with the basic zoning plan will be allowed frequently and on their merits is a normal incident of property ownership. . . . [T]he opportunity to apply for an amendment [to the zoning ordinance] is an aspect of property ownership protected by the Due Process Clause of the Fourteenth Amendment.” Id. at 682-83 (Stevens, J., dissenting).

457. “A referendum cannot . . . be characterized as a delegation of power. . . . [T]he people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.” Id. at 672.

The dissenters, including Justice Powell in a separate opinion, stated that the issues involved procedural rather than substantive due process: “The fact that an individual owner (like any other petitioner or plaintiff) may not have a legal right to the relief he seeks does not mean that he has no right to fair procedure in the consideration of the merits of his application.” Id. at 682 (Stevens, J., dissenting).

458. Such guidance is unnecessary when an exercise of regulatory authority is “reserved by the people to themselves.” Id. at 675. Earlier cases, invalidating the delegation of zoning authority “to a narrow segment of the community, not to the people at large,” were distinguished as such. Id. at 677 (emphasis in original). See Eubank v. City of Richmond, 226 U.S. 137 (1912) (invalidating an ordinance conferring power to establish building setback lines on owners of two-thirds of the property abutting a street); Washington v. Roberge, 278 U.S. 116 (1928) (invalidating an ordinance conferring the power to prevent development of philanthropic homes for the aged on the owners of two-thirds of the property within four hundred feet of the proposed facility).

459. Id. at 675 n.10.


461. “The present ordinance is challenged on several grounds: that it interferes with a person’s right to travel; that it interferes with the right to migrate . . . to the present residents; that it expresses the social preferences of the residents for groups that will be congenial to them; that social homogeneity is not a legitimate interest of government; that the restriction of those whom the neighbors do not like trenches on the newcomers’ rights of privacy; that it is of no rightful concern to villagers whether the residents are married or unmarried; that the ordinance is antithetical to the Nation’s experience, ideology, and self-perception as an open, egalitarian and integrated society.” Id. at 7.

462. Id. at 7-8.
and bears 'a rational relationship to a [permissible] state objective.'"463 The Court thus invoked a Level IV virtually irrebuttable presumption favoring constitutionality to endorse the regulation.464

In Moore,465 an ordinance, similar to that upheld in Belle Terre,466 restricted the occupation of a single-family home to specified categories of related individuals. Mrs. Moore was charged with violating the ordinance by living with her sons and two grandsons. The two grandsons were cousins, not brothers. The Justices divided principally over the importance of the right in issue. These divisions were most apparent in Justice Powell's plurality opinion467 and Justice White's dissenting

463. Id. at 8.

Justice Marshall dissented. He agreed with the majority that economic rights are of limited constitutional significance and that the purposes served by the ordinance were permissible. When, however, fundamental interests such as the students' right of association and privacy are implicated, he would rely on the Level I virtually irrebuttable presumption against constitutionality and invalidate the statute. "Because I believe that this zoning ordinance creates a classification which impinges upon fundamental personal rights, it can withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest. And, once it be determined a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden." Id. at 18.

464. Justice Douglas, for the majority, gave zoning an extremely expansive regulatory scope: "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." Id. at 9; see also Berman v. Parker, 348 U.S. 26, 32-33 (1954). Judicial deference extended to the legislative judgment in specifying its classifying traits: "[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." 416 U.S. at 8.


466. The city argued that East Cleveland's ordinance regulated occupancy of a single dwelling unit as in Belle Terre and so should be upheld. In a plurality opinion, Justice Powell distinguished Belle Terre because "[t]he ordinance there affected only unrelated individuals. It expressly allowed all who were related by 'blood, adoption, or marriage' to live together, and in sustaining the ordinance we were careful to note that it promoted 'family needs' and 'family values.' East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. . . . On its face it selects certain categories of relatives who may live together and declares that others may not." 431 U.S. at 498-99 (emphasis in original).

Dissenting, Justices Stewart and Rehnquist viewed Belle Terre as controlling. Since the Court had there rejected the argument that the ordinance contravened protected rights of privacy or association, it established binding precedent that the Court must follow in Moore. Id. at 534-35 (Stewart, J., dissenting).

467. Justice Stevens, concurring, stated that "the right of a property owner to determine the internal composition of his household" is a "basic property right." Id. at 518-19. "[T]he critical question presented by this case is whether East Cleveland's housing ordinance is a
opinion. To Justice Powell, Mrs. Moore and her family possessed a right of constitutional importance: the right to live together. Level II scrutiny was predicated upon a "careful respect for the teachings of history [and] solid recognition of the basic values that underlie our society." Justice Powell recognized the risks of the abuse of judicial discretion in coupling these vague standards of substantive due process review with heightened scrutiny. While the city's goals were legitimate, "the ordinance before us serves them marginally, at best... [It] has but a tenuous relation to alleviation of the conditions mentioned by the city." At Level II scrutiny, this "marginal" and "tenuous" relationship between means and ends was insufficient to support constitutionality.

In dissent, Justice White agreed that Mrs. Moore and her family possessed a permissible restriction on appellant's right to use her own property as she sees fit. Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his own property. [Euclid v. Ambler Realty Co.] vastly diminished the rights of individual property owners. It did not, however, totally extinguish those rights. On the contrary, that case expressly recognized that the broad zoning power must be exercised within constitutional limits." Id. at 513-14.

468. See notes 473-76 infra.

469. "When a city undertakes such intrusive regulation of the family... the usual judicial deference to the legislature is inappropriate.... [T]his Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." 431 U.S. at 499.

In their concurring opinion, Justices Brennan and Marshall agreed that the regulatory infringement of family rights justified heightened analysis: "[T]he zoning power is not a license for local communities to enact senseless and arbitrary restrictions which cut deeply into private areas of protected family life. ... The plurality's opinion conclusively demonstrates that classifying family patterns in this eccentric way is not a rational means of achieving the ends East Cleveland claims for its ordinance. ... The Constitution cannot be interpreted... to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living." Id. at 507-08 (Brennan, J., concurring).

Justices Stewart and Rehnquist, dissenting, agreed that family rights had been intruded upon, but rejected the application of heightened scrutiny under the due process clause. Such scrutiny should be utilized only "in those rare cases in which the personal interests at issue have been deemed 'implicit in the concept of ordered liberty.'" Id. at 537 (quoting Roe v. Wade, 410 U.S. 113, 152 (1973), quoting, in turn, Palko v. Connecticut, 302 U.S. 319, 325 (1937)). To use it here would "extend the limited substantive contours of the Due Process Clause beyond recognition." Id.

470. 431 U.S. at 503.

471. "Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the Lochner era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court." Id. at 502.

472. Id. at 500.
had rights of constitutional dimension.\textsuperscript{473} He would, however, have limited the availability of heightened scrutiny only to those rights “implicit in the concept of ordered liberty,”\textsuperscript{474} that is, explicitly protected constitutional rights. By granting the family rights in issue constitutional importance, the Court “unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.”\textsuperscript{475} As the “teachings of history”\textsuperscript{476} were too ambiguous to provide the Court with sufficient guidance in the exercise of Level II substantive due process scrutiny, he would have relied on Level IV virtually irrebuttable presumptions favoring constitutionality to uphold the statute.\textsuperscript{477}

\textsuperscript{473} Id. at 550.
\textsuperscript{474} Id. at 549 (White, J., dissenting). “I cannot believe that the interest in residing with more than one set of grandchildren is one that calls for any kind of heightened protection under the Due Process Clause. . . . The present claim is hardly one of which it could be said that ‘neither liberty, nor justice would exist if [it] were sacrificed.’” Id. (quoting \textit{Palko v. Connecticut}, 302 U.S. 319, 326 (1937)). In this regard, he was in complete agreement with Justices Stewart and Rehnquist. See note 469 supra.

\textsuperscript{475} Id. at 544. “The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive application of the Clause disappeared in the conflict between the Executive and the Judiciary in the 1930’s and 1940’s, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare.” Id.

\textsuperscript{476} “What the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable. The [plurality’s] view would broaden enormously the horizons of the Clause; and, if the interest involved here is any measure of what the States would be forbidden to regulate, the courts would be substantively weighing and very likely invalidating a wide range of measures that Congress and State legislatures think appropriate to respond to a changing economic and social order.” Id. at 549-50 (White, J., dissenting).

In the plurality opinion, Justice Powell responded: “To the contrary, an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on the abstract formula taken from \textit{Palko v. Connecticut} and apparently suggested an alternative.” Id. at 504 n.12.

\textsuperscript{477} Justice White listed three potential standards of review, each differing in the severity of review and the degree of protection offered to the individual. First, a court may merely assure itself that there is in fact a duly enacted law which proscribes the conduct sought to be prevented or sanctioned. Id. at 547 (White, J., dissenting).

The second standard of substantive review involves the legitimacy and rationality of relationship test: “This means-end test appears to require that any statute restrictive of liberty have an ascertainable purpose and represent a rational means to achieve that purpose, whatever the nature of the liberty interest involved. This approach was part of the substantive due process doctrine prevalent earlier in the century, and it made serious inroads on the presumption of constitutionality supposedly accorded to state and federal legislation. But with \textit{Nebbia v. New York}, and other cases of the 1930’s and 1940’s such as \textit{West Coast Hotel
The Burger Court's market failure business regulation cases demonstrate the risks of unfocused standards of review, particularly when coupled with heightened scrutiny. The standards of review are too often substantively inconsistent, and lead to unpredictable results. Nonetheless, only through the flexibility of varying standards of review can the Court protect interests, such as that of Mrs. Moore, that would otherwise not receive constitutional protection.

Conclusion

This Article has described and evaluated the methods used by the Burger Court to assess the constitutionality of business regulations. The Justices have relied on the nature and importance of the property right in issue to ensure the manageability and consistency of their analysis of constitutionality. The nature of the right has determined the availability and substantive standards of constitutional review, while the importance of the right has determined the distribution and weight of the burden of persuasion. Thus, nature and importance have been the Burger Court's principal analytical variables for articulating the constitutional values that inform its business regulation analysis. Through the use of these variables, the Court has both revived its analysis of constitutionality and restrained its exercise of judicial discretion.

The attributes of constitutional property have been described and categorized herein in terms of contemporary political economic theory. Constitutional review has been available only to some private economic interests or expectations. In general, the Burger Court's definition of constitutional property has included: 1) the right to use, 

Co. v. Parrish, the courts came to demand far less from and to accord far more deference to legislative judgments. This was particularly true with respect to legislation seeking to control or regulate the economic life of the State or Nation. Even so, "while the legislative judgment on economic and business matters is "well-nigh conclusive...", it is not beyond judicial inquiry." No case that I know of, including Ferguson v. Skrupa, has announced that there is some legislation with respect to which there no longer exists a means-end test as a matter of substantive due process law. This is not surprising, for otherwise a protected liberty could be infringed by a law having no purpose or utility whatsoever. Of course, the current approach is to deal more gingerly with a state statute and to insist that the challenger bear the burden of demonstrating its unconstitutionality; and there is a broad category of cases in which substantive review is indeed mild and very similar to the original thought of Munn v. Illinois that "if a state of facts could exist that would justify such legislation," it passes its initial test." Id. at 547-48.

Justice White's third heightened scrutiny standard "require[s] that infringing legislation be given closer judicial scrutiny, not only with respect to existence of a purpose and the means employed, but also with respect to the importance of the purpose relative to the invaded interest." Id. at 548. Justice White did not include Mrs. Moore's interest among them. He therefore applied Level IV deferential analysis.
consume, and exchange resources when such use does not merely involve expectations of future gain and does not injure the property rights of others; 2) vested reliance interests; 3) the right to send and receive truthful information about the availability, quality, and price of goods and services legally offered for sale; 4) the right to compete and the right to remain a competitor when in compliance with license requirements imposed to protect the general welfare; 5) the right to enter into interstate competition unless the regulatory burden has been imposed by a proprietary regulation; 6) the right to an equitable rationing of resources held in common; and 7) some right to impose neighborhood externalities.

The Burger Court's specification of property's constitutional attributes indicates active judicial management as well as analytical restraint. The dimensions of constitutional review have been both expanded and contracted. The broad definition of the contract clause reliance interest and the inclusion of commercial speech within the ambit of first amendment protection have added significantly to the breadth of judicial review. The exclusion of proprietary regulations from commerce clause scrutiny has narrowed its breadth, as has the apparent limitation of entry rights to those expressly stipulated in state law and licenses. Substantive due process has continued to provide individuals with an opportunity to seek to establish constitutional dimension for economic interests not otherwise mentioned in the Constitution.

The Court's management of the breadth of its review has shown marked awareness of the virtues of doctrinal predictability. Having once established that truthful speech proposing a commercial transaction constitutes a right of first amendment dimension, for example, the Court has consistently relied on that definition in its subsequent decisions. Proprietary regulations were left to the internal disciplines of legislative discretion and the invisible hand of competition in 1976 and again in 1980. This doctrinal predictability has served to restrain the breadth of the Court's political authority over regulatory policy.

The nature of the constitutional property right sought to be protected has also determined the Court's choice of the substantive standard of review. The Court has used the nature of the right seeking protection to identify the regulatory costs and benefits to be considered in its permissible purpose-rationality of relationship review. Alleged regulatory injury to particular attributes of constitutional property has triggered particular substantive standards for weighing and balancing the evidence of costs and benefits on its constitutional merits. In-
dependent analysis of the legitimacy or importance of the public purpose underlying a regulation has been infrequent. Instead, the Court has emphasized the ability of the legislative means of implementation to achieve the desired public goals, without producing either an excess of regulatory costs over benefits or their disproportionate distribution. Means analysis has also frequently involved an assessment of the availability of alternative, less intrusive means of accomplishing the desired public welfare goal.

Under the just compensation and contract clauses, the Court has weighed and balanced the costs of uncertainty in legal stipulations of property rights and the enforcement of legally stipulated exchanges against society's need to maintain the responsiveness of its regulations. The disproportionate distribution of taking issue costs and benefits has been assessed in terms of physical invasion, diminution in value, and reciprocity of advantage. Vested contract clause reliance interests in private agreements have been protected from retroactive regulations that produce immediate, irrevocable, and severe costs.

The costs and benefits arising from the regulation of the free flow of commercial information, as measured under the first amendment, have involved the risks of deception, the time, place, and manner of communication, and the suppression of content. The substantive constitutional values for reviewing content-based prohibitions of advertising have yet to be articulated with specificity. Nevertheless, the Court's most recent opinions suggest the use of permissible purpose-rationality of relationship, alternative available means analysis.

The fourteenth amendment and commerce clause have provided the Court with its principal vehicles for identifying the costs and benefits of regulating rights of entry. Costs to the right to compete as articulated under due process and equal protection standards have been balanced against the public benefits of limiting entry to qualified competitors. In the right-to-remain-a-competitor cases, procedural due process standards, examining the timing and evidentiary components of both presuspension and postsuspension hearings, have balanced the costs to an individual denied the continued possession of a license against the public benefits of promptly removing from the marketplace competitors who no longer fulfill regulatory requirements. The right of interstate entry has generated two degrees of substantive, evidentiary scrutiny. When a regulation discriminates, either overtly blocking the flow of interstate traffic or placing interstate business at a competitive disadvantage with regard to local counterparts, it has been strictly examined by the Court. When the regulation merely burdens interstate
commerce, however, the Court has relied on permissible purpose-rationality of relationship-alternative available means balancing to determine whether the regulatory costs to an open national marketplace outweigh local benefits or have been disproportionately distributed among interstate and intrastate economic activities.

When protection has been sought for "market failure" rights, the Court has used ad hoc fifth and fourteenth amendment substantive standards of review. Due process and equal protection have not provided substantive, evidentiary focus. The Court has inadequately identified the regulatory costs and benefits subject to judicial balancing. Nevertheless, flexibility in the substantive content of due process has permitted the balancing of costs and benefits generated by regulation that reflect traditional values of social importance.

Consistency and predictability in the Burger Court's management of its substantive standards of review have been difficult to generalize. Nevertheless, the Court has shown knowing restraint in its identification of constitutionally relevant regulatory costs and benefits. It has continually relied on permissible purpose-rationality of relationship methodology and on specific substantive standards of review. While the breadth of the Court's stipulation of constitutional costs and benefits has expanded and contracted, the Justices have demonstrated discretionary restraint. The standards of review applicable in protection of the right to use, consume or exchange and the right of interstate entry have been true to doctrinal tradition. Contract clause scrutiny and commercial speech analysis under the first amendment have been expanded. In contrast, the standards of procedural due process review of license suspensions have contracted. Substantive due process review continues to present a significant risk of abuse of political discretion, particularly as applied in market failure cases.

The importance of the right in issue has generally determined the depth of the Court's analysis, distributing the burden of persuasion and the weight of the presumption of constitutionality. Four levels of scrutiny have been relied upon. Level I virtually irrebuttable presumptions against constitutionality have protected both an alien's equal right to compete and the right of interstate commerce to be free of the effects of local discrimination. The virtually irrebuttable presumptions favoring constitutionality of Level IV scrutiny have been applied in cases involving the right to compete standing alone, proprietary regulations of interstate commerce, and the rationing of common pool resources. The Court has most frequently relied upon the Level II rebuttable presumptions against constitutionality. The state has borne the burden of per-
suasion when it desires to regulate the reliance interest or truthful commercial speech, when it burdens interstate commerce, and when it discriminates against entry rights on the basis of gender. The state was also required to prove constitutionality in a market failures zoning case involving family rights. Level III rebuttable presumptions favoring constitutionality have dictated the depth of substantive review in taking clause cases, under commercial speech deception analysis, when the right to remain a competitor has alleged infringement, and in a rezoning referendum case. The principal changes in the distribution of presumptions have been the elevation of scrutiny in interstate commerce discrimination cases to Level I and the demotion to Level III of procedural due process scrutiny of the right to remain.

The importance of the right generally has been measured by the political economic function served by the right in establishing and maintaining optimum competitive efficiency in the private marketplace and, when applicable, by its link to a suspect classification or fundamental interest. The Court also has lowered its level of scrutiny when it perceives that the substantive breadth of its analysis may, without restraint, permit abuse of discretion. The level of scrutiny was thus lowered in substantive due process scrutiny of entry cases and, with one notable exception, in market failure cases. This may also explain the Court's reliance on Level III scrutiny of taking clause issues.

The Burger Court's reliance on presumptions favoring constitutionality when the breadth of its analysis has been unrestrained by the nature of the right in issue reflects the awareness of the Justices of the institutional limits imposed by the separation of powers on their checks and balances authority. In general, that awareness has resulted in an evenhanded application of its political discretion over regulatory policy. The Court's determination of the availability, substantive standards, and weight of review have managed that discretion with reliability and predictability. The Burger Court has avoided both the abuse and the abdication of judicial discretion that has characterized much of the constitutional history of economic rights and regulation.

There has, however, been one significant exception to restraint. In Moore v. City of East Cleveland, the Court applied heightened Level II substantive due process scrutiny to protect the right of a grandmother to live with her children and grandchildren. Substantive focus and the presumption against constitutionality were ostensibly predicated upon the traditional significance of family values in American
society and also constitutional jurisprudence, a source of dubious reliability. Nevertheless, the Court recognized the risks attendant upon its unrestrained and unfocused discretion: "Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights." Perhaps more eloquently than does methodological consistency, that awareness explains the Court's judicious exercise of its constitutional discretion over regulatory policy. Unlike its predecessors, the Burger Court has had the lessons of history from which to learn the costs and benefits of both judicial abuse and abdication. As those lessons are understood with increasing clarity and extended in the evolution of constitutional doctrine, the capacity of the Supreme Court to articulate society's constitutional, political values in its search to optimize welfare should continue to improve.

\footnote{479. \textit{Id.} at 502.}