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NAKED PREFERENCES AND THE CONSTITUTION

Cass R. Sunstein *

INTRODUCTION

One of the most striking facts of modern constitutional law is the overlap—almost the identity—of current tests under many of the most important clauses of the Constitution: the dormant commerce, privileges and immunities,[1] equal protection, due process, contract, and eminent domain clauses.[2] Although these clauses have different historical roots and were originally directed at different problems, they are united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want. I will call this underlying evil a naked preference.

The prohibition of naked preferences captures large areas of doctrine under all six clauses. The privileges and immunities clause, for example, prohibits a state from preferring its citizens over outsiders unless "there are perfectly valid independent reasons for" the preference.[3] The dormant commerce clause allows discrimination against interstate commerce, with its attendant costs to out-of-staters, only if the discrimination is a means of promoting some goal unrelated to protectionism.[4] The equal protection clause allows a state to distinguish between one person and another only if there is a plausible connection between the distinction and a legitimate

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1. The reference throughout is to the privileges and immunities clause of article IV, not of the fourteenth amendment. After the Slaughter-House Cases, 83 U.S. 36 (1873), the latter provision became a "practical nullity." E. Corwin, The Constitution of the United States of America 1306 (1972).

2. Freedom of religion or speech will not be discussed here, though both may be understood as embodying similar principles. See generally P. Kurland, Religion and the Law (1962) (discussing neutrality principle of religion clauses); Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189 (1983) (exploring reasons for special distrust of content-based classifications under free speech clause).

3. Toomer v. Witsell, 334 U.S. 385, 396 (1948).

4. See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

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public purpose.[5] The contract clause does not forbid an impairment of contractual obligations if the impairment is the "incidental" consequence of "a generally applicable rule of conduct" designed to promote legitimate government goals.[6] The eminent domain clause embodies similar principles, both in the requirement that a "public use" must be shown to justify a taking of private property and in the distinction that has been developed between permissible exercises of the police power and prohibited takings.[7]

Because of their common concern with naked preferences, these clauses share a number of features. They are all directed in large part at discrimination[8] based on an impermissible purpose.[9] Effects are relevant, if at all, only to show such a purpose. A number of devices—most prominently, the required showing of some degree of means-ends connection and the identification of a category of impermissible government ends—are applied under all of these clauses to filter out naked preferences.

The prohibition of naked preferences captures a significant theme in the original intent. It is closely related to the central constitutional concern of ensuring against capture of government power by faction.[10] The framers' hostility toward naked preferences was rooted in the fear that government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another. The constitutional requirement that something other than a naked preference be shown to justify differential treatment provides a means, admittedly imperfect,[11] of ensuring that government action results from a legitimate effort to promote the public good rather than from a factional takeover. The Court's adherence to this requirement under the various clauses and over long historical periods showing otherwise considerable doctrinal change reflects a striking continuity in general approach.

The prohibition of naked preferences also reflects the Constitution's

5. See, e.g., Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).

6. Exxon Corp. v. Eagerton, 103 S.Ct. 2296, 2306 (1983).

7. See Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321 (1984); Miller v. Schoene, 276 U.S. 272 (1928).

8. I use the term "discrimination" throughout this Article to refer to treating one group or individual differently from another. The term need not connote hostility.

9. The Court has assumed, under all of the clauses, that it is possible to discover or construct a legislative or executive "purpose" that can be used as the basis for analysis. That assumption will not be questioned here, and there will thus be no discussion of the problem of ascertaining the purpose of a collective decisionmaking body. For such discussions, see Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970); Moore, The Semantics of Judging, 54 S. Cal. L. Rev. 151 (1981); Note, Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction, 86 Yale L.J. 317 (1976).

10. The Federalist Nos. 10, 51 (J. Madison) are the classic statements. See, e.g., D. Epstein, The Political Theory of The Federalist 5-7, 94-110 (1984); G. Wills, Explaining America: The Federalist (1981).

11. The extent of the constraint depends on the vigor with which courts enforce it. See infra text accompanying notes 43-66.

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roots in civil republicanism and accompanying conceptions of civic virtue.[12] The notion that government actions must be responsive to something other than private pressure is associated with the idea that politics is "not the reconciling but the transcending of the different interests of the society in the search for the single common good."[13] Civil republicanism embodies a conception of politics in which preferences are not viewed as private and exogenous. Their selection is the object of the governmental process.[14] The model for this conception of government is the town meeting, where decisions are made during a process of collective self-determination.[15]

In accordance with the original Madisonian understanding,[16] the prohibition is focused on the motivations of legislators, not of their constituents. The prohibition therefore embodies a particular conception of representation. Under that conception, the task of legislators is not to respond to private pressure but instead to select values through deliberation and debate.[17]

Finally, the prohibition of naked preferences is reflected in the structural provisions of the Constitution. Indeed, the framers believed that those provisions would provide the most important means of implementing the prohibition. The separation of powers, both in general and in its concrete constitutional manifestations, was designed to limit the power of self-interested groups or factions by ensuring that government power would be exercised in accordance with certain predetermined constraints. It is no coincidence that the most celebrated case employing the nondelegation doctrine involved a delegation of legislative authority to private groups.[18] Similarly, the general welfare provision of the spending clause was designed

12. See D. Epstein, supra note 10, at 5-7, 94-110. This is not to deny, however, that traces of a pluralistic and interest-group oriented political conception can also be found in the Constitution's background. See, e.g., The Federalist Nos. 10, 51 (J. Madison). There has been considerable debate in recent years over the extent of such traces. See, e.g., J. Pocock, The Machiavellian Moment (1975); H. Storing, What the Anti-Federalists Were For (1981); The Moral Foundations of the American Republic (R. Horwitz ed. 1979); G. Wills, supra note 10; G. Wood, The Creation of the American Republic, 1776-1787 (1972).

13. G. Wood, supra note 12, at 58. See generally H. Arendt, On Revolution 127-37 (1977) (describing role of conceptions of civic virtue, or "public happiness," in American revolutionary thought); J. Mansbridge, Beyond Adversary Democracy (1980) (contrasting "adversary" and "unitary" conceptions of democracy); W. Sullivan, Reconstructing Public Philosophy (1982) (arguing in favor of recovering republican heritage).

14. Of course, such an express preference-creating role for government raises the spectre of tyranny, see Stewart, Regulation in a Liberal State: The Role of Non-commodity Values, 92 Yale L.J. 1537 (1983), as the framers were well aware. See The Federalist No. 10 (J. Madison).

15. This model is a dominant presence in first amendment law. See A. Meiklejohn, Free Speech and its Relation to Self-Government (1948).

16. See The Federalist No. 10 (J. Madison); Wood, Democracy and the Constitution, *in* How Democratic is the Constitution 11-12 (R. Goldwin & W. Schambra eds. 1980).

17. See H. Pitkin, The Concept of Representation 168-89 (1967) (discussing Burkean understanding of representation); Morgan, Madison's Theory of Representation in the Tenth Federalist, 36 J. Politics 852 (1974).

18. See Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

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to ensure that public resources would be devoted to broad social interests.[19] Nor is it surprising that the Court's legislative veto decision—perhaps the most important separation of powers decision in recent years—focused on the factional dangers produced by evasion of the presentment and bicameralism requirements of article I.[20]

Quite apart from its roots in original intent, the prohibition of naked preferences captures the judicial understanding that the Constitution requires all government action to be justified by reference to some public value. The "reasonableness" constraint of the due process clause is perhaps the most obvious example. The minimum requirement that government decisions be something other than a raw exercise of political power has been embodied in constitutional doctrine under the due process clause before, during, and after the *Lochner* era.[21] The equal protection clause, in its core requirement that classifications be justified by reference to some public value, reflects an identical understanding.[22] The same principle has been embodied in constitutional doctrine under many other clauses as well. The contract and eminent domain clauses, for example, are efforts to apply the general prohibition of naked preferences to several specific instances of government action about which the framers were most concerned.[23]

The notion that government action must be grounded in something other than an exercise of raw political power is in considerable tension with many of the most prominent theories of how government does and should operate.[24] It is especially at odds with pluralism. Naked preferences are common fare in the pluralist conception; interest-group politics invites them.[25] The prohibition of naked preferences, enforced as it is by the courts, stands as a repudiation of theories positing that the judicial role is only to police the processes of representation to ensure that all affected in-

19. See Steward Machine Co. v. Davis, 301 U.S. 548, 586-87 (1937). The breadth of the general welfare provision is a response to changes similar to those that expanded the permissible ends of government under the due process, contract, and eminent domain clauses. See text accompanying note 186.

20. INS v. Chadha, 103 S.Ct. 2764, 2782-84 (1983).

21. See infra text accompanying notes 133-41.

22. See infra text accompanying notes 114-17.

23. See infra text accompanying notes 142-44, 167-74.

24. See, e.g., A. Bentley, The Process of Government (1908); R. Dahl, A Preface to Democratic Theory (1956); D. Truman, The Governmental Process: Political Interests and Public Opinion (1962); cf. R. Dahl, Dilemmas of Pluralist Democracy: Autonomy vs. Control (1982) (amending pluralist conception). On the economic side, see, e.g., Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q.J. Econ. 371 (1983); Peltzman, Toward a More General Theory of Regulation, 19 J.L. & Econ. 211 (1976); Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971). But see Kalt & Zupan, Capture and Ideology in the Economic Theory of Politics, 74 Am. Econ. Rev. 279 (1984) (criticizing interest-group theory of legislation). For a brief restatement and critique of pluralism, see J. Habermas, Legitimation Crisis 122-24 (1975); see also T. Spragens, The Irony of Liberal Reason 301-10 (1981) (positive and normative attack).

25. See R. Dahl, Dilemmas of Pluralist Democracy: Autonomy vs. Control 31-54 (1982); Posner, The Defunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 Sup. Ct. Rev. 1, 27-28.

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terest-groups may participate.[26] It presupposes that courts will serve as critics of the pluralist vision, not as adherents striving only to "clear the channels" in preparation for the ensuing political struggle. In this respect, the prohibition of naked preferences reflects a distinctly substantive value and cannot easily be captured in procedural terms. Moreover, it reflects an attractive conception of politics, one that does not understand the political process as simply another sort of market.[27] It is hardly surprising that the prohibition is reflected in many areas of constitutional law.

This Article will argue that the prohibition of naked preferences captures large areas of current constitutional doctrine and is therefore the best candidate for a unitary conception of the sorts of government action that the Constitution prohibits.[28] But courts have interpreted the prohibition in different ways over time and among clauses, and these differences are of independent interest. In tracing the evolution of the prohibition, the focus of this Article will be primarily descriptive. In addition, however, it will suggest that the prohibition embodies an understanding of governance that has considerable appeal, and that, if taken seriously, could form the basis for a distinctive conception of politics and a distinctive judicial role.

I. NAKED PREFERENCES AND PUBLIC VALUES: THE FRAMEWORK

It will be useful to begin by distinguishing between two bases for treating one person or group differently from another. The first is a naked preference. When a naked preference is at work, one group or person is treated differently from another solely because of a raw exercise of political power; no broader or more general justification exists. For example, state *A* may treat its own citizens better than those of state *B*—say, by requiring people from state *B* to pay for the use of the local parks—simply because its own citizens have the political power and want better treatment. Or a city may treat blacks worse than whites—say, by denying them welfare benefits—because whites have the power to restrict state largesse to themselves. Or a state may relieve a group of citizens from a contractual obligation, thus

26. See J. Ely, Democracy and Distrust (1980).

27. Conceptions of civic virtue, in one form or another, have been the centerpiece of the frequent recent attacks on pluralism in political and constitutional theory. See, e.g., J. Habermas, supra note 24; A. MacIntyre, After Virtue: A Study in Moral Theory (1981); R. Unger, Knowledge and Politics (1975); R. Wolff, The Poverty of Liberalism (1968). For a discussion of the relationship of the radical critique of pluralism to republican conceptions of civic virtue, see Whelan, Marx and Revolutionary Virtue, *in* Marxism: Nomos XXVI 67–71 (J. Pennock & J. Chapman eds. 1983). Whether such conceptions can be sustained in an industrialized nation controlled largely by well-organized groups with competing interests is an important and difficult question. No attempt will be made to resolve it here.

28. Any unitary conception, of course, risks oversimplification of a complicated reality. It would hardly be surprising to find that the Constitution, written by many different people, interpreted by many more, and assembled over a period of centuries, prohibits more than a single evil. Cf. Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802 (1982) (discussing impossibility, under certain conditions, of achieving consistency through decisions by collective bodies).

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benefiting them at the expense of another group of contracting parties, simply because the first group and its allies seized the political power to dispossess the second group of the rights that it previously had.

These examples illustrate a conception of the political process as a mechanism by which self-interested individuals or groups seek to obtain wealth or opportunities at the expense of others. Political ordering is assimilated to market ordering. The public interest is understood as the aggregation of private interests. The task of the legislator is to respond to the pressures imposed by those interests. This conception of the political process reflects a set of values within which any other conception appears mystical, potentially totalitarian, or both.

Contrast with this a conception of a political process in which differential treatment is justified not by reference to raw political power, but to some public value that the differential treatment can be said to serve. A public value can be defined as any justification for government action that goes beyond the exercise of raw political power.[29] For example, a state may impose regulatory requirements on opticians, but not on optometrists, because the methods used by the former group create special risks of deception or overreaching. Or a state may relieve a group of people from a contractual obligation because the contract called for an act—say, the passing on of increased costs to consumers—that violated a public policy demanding that consumers be insulated from some of the dislocations caused by an unregulated marketplace. Or state *A* may treat its own citizens better than those of state *B*—say, by limiting welfare payments to its own citizens—because it wants to restrict social spending to those who in the past have made, or in the future might make, a contribution to state revenues.[30]

These examples reflect a conception of the political process as an effort to select and implement public values. The process is primarily one of collective self-determination, rather than of compromises or trade-offs among preexisting private interests.[31] The role of the representative is to deliberate rather than to respond mechanically to constituent pressures. Politics cannot, in this view, be reduced to the aggregation of private interests. Such interests are not preexisting. They are themselves a product of the political

29. Thus defined, the requirement that government action be justified by reference to some public value, which is the minimal requirement imposed by the prohibition of naked preferences, is more lenient than other liberal principles to which the requirement bears some resemblance. See B. Ackerman, Social Justice in the Liberal State 10-12 (1980) (neutrality); R. Dworkin, Taking Rights Seriously 272-73 (1977) (equal concern and respect).

30. The Supreme Court has recently held that this justification for differential treatment may in fact not be a public value. See Zobel v. Williams, 457 U.S. 55, 63 (1982). Whether this decision heralds the beginning of stricter judicial enforcement of the prohibition of naked preferences remains to be seen. See Monaghan, Third Party Standing, 84 Colum. L. Rev. 277, 303 n.142 (1984).

31. In theory, it would be possible to understand such trade-offs as promoting the public good. Cf. Becker, supra note 24 (arguing pluralist trade-offs likely to produce more efficient results than alternatives). But the courts have rarely done so.

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process, whose function is not to choose among preselected values but instead to select values through public deliberation and debate.

These competing portraits of the political process are of course caricatures of a far more complex reality.[32] It is rare that government action is based purely or exclusively on raw political power. Losers in the political process may have lost for a very good reason that has little or nothing to do with the power of their adversaries. Belief that an action will promote at least some conception of the public good almost always plays at least some role in government decisions. Moreover, it is rare for government action to be based on a disembodied effort to discern and implement public values, entirely apart from considerations of private pressure. What emerges is therefore a continuum of government decisions, ranging from those that are motivated primarily by interest-group pressures to those in which such pressures play a very minor role.[33] The rest of Part I examines the devices used by the courts to determine which of these poles a particular measure approaches.

A. *The Minimal Requirement*

If naked preferences are a legitimate basis for government action, a significant judicial constraint on the exercise of government power is lifted.[34] It is sufficient that a particular group has been able to assemble the raw political power to obtain what it seeks; might makes right. Under some theories of legislation, the whole enterprise of government consists of efforts by various groups to obtain the power to do precisely this. Modern pluralism, for example, depends in large part on the idea that competing groups struggle, in a largely unprincipled fashion, to obtain a share of the pie.[35] If naked preferences are a legitimate basis for government behavior, there is nothing wrong with that.

If naked preferences are forbidden, however, and the government is forced to invoke some public value to justify its conduct, government behavior becomes constrained. The nature and extent of the constraint will depend on several considerations. The first is the content of the catcgory of public values that courts will accept as a legitimate basis for government

32. See supra note 24.

33. See Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013, 1022-23 (1984) (distinguishing "constitutional" and "ordinary" politics); Michelman, Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy, 53 Ind. L.J. 145, 194-99 (1977-78) (distinguishing public-interest model and market-failure model in context of land-use regulation).

34. Of course, judicial enforcement of constitutional prohibitions may not be the only, or even the most effective, constraint on government action. A host of other constraints exist. Social conditioning imposes a set of values on legislators that prevents them from acting on the basis of naked preferences in certain situations. Political pressure from constituents also acts as a check on the types of justifications that legislators and other elected officials believe they may advance. Indeed, it would be possible to conclude that the prohibition of naked preferences ought to be enforced only through politics, and not through the courts.

35. See supra note 25.

action. The constraint would be strengthened if, for example, the government were barred from relying on disfavored stereotypes of women or members of minority groups, on the ground that reliance on such stereotypes is illegitimate and ought to be excluded from the category of public values. The constraint would also be strengthened if a judicial decision were to prohibit the redistribution of resources through regulation—say, regulation that imposes minimum housing standards for poor tenants[36]—on the ground that redistribution of this sort is a pure transfer of wealth and thus should be assimilated to the category of naked preferences.

The second consideration relates to the devices developed to ensure that public values do in fact account for legislation. If courts are willing to hypothesize a public value as the basis for government action and do not require a close fit between the public value and the measure under review, all or almost all government action will be upheld.[37] By contrast, if courts require a good reason to believe that a naked preference was not in fact at work, many statutes may be invalidated.

This consideration raises the question of how courts are to determine whether a public value accounts for legislation. Under a lenient test, any legislation for which such a value can be hypothesized is automatically valid. The fact that the statute satisfies the formal requirements for legislation, together with a not implausible connection between a public value and the statute under review, would suffice to validate it.[38] A stricter test might focus on both the legislative process and the outcome in order to ensure against the possibility that even a formally unobjectionable enactment was the result of a naked preference.[39]

Let us assume that the category of public values has not been limited at all, and that courts will not carefully scrutinize either the process or the outcome to ensure that a public value was actually at work. These assumptions generate what might be called the "weak version" of the prohibition of naked preferences. This version is characterized by two main features. First, there is no category of impermissible ends beyond the prohibition of decisions based solely on raw political power. Second, means-ends scrutiny

36. Whether and how such regulation will redistribute wealth is a sharply debated question. See Posner, Economic Analysis of Law § 16.8 (2d ed. 1977) (arguing redistribution will not occur); Ackerman, Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy, 80 Yale L.J. 1093, 1096-98 (1971) (arguing redistribution will occur under various programs, including cash-payment and in-kind programs); Komesar, Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor, 82 Yale L.J. 1175, 1176, 1179-80 (1973) (arguing redistribution highly unlikely under cash-payment program); Markovits, The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications, 89 Harv. L. Rev. 1815, 1817 (1976) (contrasting redistribution under in-kind and cash-payment programs).

37. See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (deferential review under commerce and equal protection clauses); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (deferential review under due process clause).

38. See, e.g., United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980).

39. See, e.g., Schweiker v. Wilson, 450 U.S. 221, 244-45 (1981) (Powell, J., dissenting).

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is deferential because courts will adopt a strong presumption that legislative outcomes can be justified by reference to some public value.

The weak version, thus described, places only a minimal constraint on government action, for it is nearly always possible to justify an action on grounds other than the raw exercise of political power. But because the weak version does require *some* justification that goes beyond raw political power, it cannot be dismissed as a purely formal constraint. It forces those who seek to obtain government assistance to invoke some public value as a basis for assistance. In so doing, the weak version strikes two familiar constitutional themes. By requiring that a public value justify the exercise of government power, it acts as a check on the danger of factional tyranny. Moreover, it reflects the notion that the role of government is not to implement or trade off preexisting private interests, but to select public values.

The weak version accounts for much of modern constitutional doctrine. Rationality review is the prime example. Courts have interpreted the due process and equal protection clauses as imposing the minimal requirement that government action be "reasonable." This corresponds to the core demand of the weak version that government decisions based on the exercise of raw political power be prohibited. Rationality review thus represents a judicial search for some public value by which to justify the measure in question.

Modern rationality review does not seek to rule out a separate category of impermissible government ends; only exercises of raw political power are expressly prohibited.[40] In the *Lochner* era, the Court attempted to create a separate category of impermissible ends, using the libertarian framework of the common law as a theoretical basis. Under that framework, the government's police power was sharply limited, and modern social legislation—for example, maximum hour and minimum wage provisions—appeared not as an effort to promote a public value, but instead as a raw exercise of political power by the beneficiaries of the legislation. But the theoretical basis of the *Lochner* era foundered on a mounting recognition that the market status quo was itself the product of government choices. When private property was viewed as a creation of such choices, efforts to reallocate property rights could be understood as a legitimate effort to promote the public good. In response to this new understanding, the category of impermissible government ends under the due process and equal protection clauses became much narrower.

Modern rationality review is also characterized by extremely deferential means-ends scrutiny. The Supreme Court demands only the weakest

40. The category of exercises of raw political power includes what is treated as the same thing—decisions based on the intrinsic value of treating one person better than another, or on a desire to help, harm, or subordinate someone as an end in itself. Cf. B. Ackerman, supra note 29, at 10-12 ("neutrality" principle). In practice, however, this is largely another way of stating the weak version, for it is nearly always possible to justify government action by reference to some broader or more general consideration. See infra text accompanying notes 114-19 (discussing rationality review under the equal protection clause).

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link between a public value and the measure in question, and it is sometimes willing to hypothesize legitimate ends not realistically attributable to the enacting legislature. As a result, few statutes fail rationality review. This phenomenon raises the question whether the Court's commitment to the prohibition of naked preferences, exemplified by the existence of rationality review, is merely rhetorical. This question, along with possible reasons for the Court's deference, is explored below.

The weak version also accounts for much of modern doctrine under the contract and eminent domain clauses. Under the contract clause, a state may impair an obligation of contract only if it is able to show a connection between the impairment and a public value.[41] But the category of public values is very broad. Moreover, the connection between a public value and the measure under review need not be tight; means-ends scrutiny is highly deferential. The "public use" requirement of the eminent domain clause reflects an identical framework: the prohibition of naked preferences, combined with a broad category of public values and deferential means-ends scrutiny.[42]

B. *Beyond the Minimal Requirement*

The weak version of the prohibition of naked preferences may account for much of current doctrine; but, as described thus far, it is minimal indeed. It merely requires something other than raw political power to justify an exercise of authority. In most respects, this is a trivial constraint, for almost any decision can be justified by reference to some public value. One might, for example, support preferential treatment of the poor on the ground that they have a special need for public assistance; preferential treatment of the rich might be justified on the ground that it provides incentives for more work and investment. Discrimination in law enforcement against racial minority groups might be justified on the ground that statistics show a propensity to violent crime among their members.[43] Both progressive and regressive taxes would be unobjectionable. Even segregation might be explained on the ground that it is good for whites and blacks alike. Everything, in short, is at least potentially lawful. To develop a more vigorous set of constraints on government, it is necessary to go beyond the weak version described thus far.

The Constitution expressly provides a few—but only a few—of the elements of a more robust set of constraints. Under the privileges and immunities and dormant commerce clauses, a preference for in-staters at the expense of out-of-staters is impermissible. Under the equal protection clause, the same is true for discrimination against blacks. As a constitutional matter, both out-of-staters and blacks are entitled to special protec-

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41. See infra notes 155-63 and accompanying text.

42. See infra notes 167-74 and accompanying text.

43. Cf. R. Posner, The Economics of Justice 376-77 (1981) (economic explanation of discrimination).

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tion from discrimination; discrimination against either group for its own sake cannot be understood as a public value.

Even these apparently express constraints, however, can be ambiguous. What if a state justifies discrimination against out-of-staters on the ground that they have been the main factor contributing to in-state unemployment,[44] or discrimination against blacks on the ground that, when blacks are jailed with whites, the likelihood of violence is dramatically increased?[45] Outside of the narrow areas of discrimination against out-of-staters and blacks, the judicial inquiry is even more open-ended. To be sure, certain constitutional provisions give some guidance. For example, it may be possible to derive from the equal protection clause a general principle by which to judge all classifications. But in giving content to that principle, there is enormous room for judgment. In such cases, how do the courts enforce the prohibition of naked preferences?

In answering this question, we begin by examining several devices that have been of special importance under all six clauses. These devices, which are logically independent, have been the key elements in strengthening and supplementing the constraint imposed by the weak version of the prohibition.

1. *Heightened Scrutiny.* — The first device involves the scope of review of government claims that a public value is being served. "Heightened scrutiny" consists of a careful examination of the government's claim that a public value is in fact the motivating force behind its actions. Here courts find it insufficient, as a basis for a conclusion that a public value is at work, that the measure under review has satisfied all formal requirements and a connection can be hypothesized between it and some public value. Under this approach, a public value is what emerges from a well-functioning political process in which legislators do not respond only to raw political power, and courts will scrutinize the process to ensure that it is in fact well functioning.

Heightened scrutiny involves two principal elements. The first is a requirement that the government show a close connection between the asserted public value and the means that the legislature has chosen to promote it. If a sufficiently close connection cannot be shown, there is reason for skepticism that the asserted value in fact accounted for the legislation.[46] The second element is a search for less restrictive alternatives—ways in which the government could have promoted the public value without harming the group in question.[47] The availability of such alternatives also suggests that the public value justification is a facade.

Heightened scrutiny also requires that the government show that it

44. See Hicklin v. Orbeck, 437 U.S. 518 (1978).

45. See Lee v. Washington, 390 U.S. 333 (1968) (per curiam).

46. See J. Ely, supra note 26, at 145-48.

47. See, e.g., Orr v. Orr, 440 U.S. 268, 281-83 (1979) (equal protection); United States Trust Co. v. New Jersey, 431 U.S. 1, 29-31 (1977) (contract clause); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354-56 (1951) (commerce clause).

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actually considered the public value in enacting the measure in question.[48] Such a requirement represents a similar effort to ensure that the values on which a statute rests are genuinely public, in the sense that they resulted not from private pressure but from broad deliberation about what the relevant rule should be. In this respect, the requirements of heightened scrutiny serve as a means, though very tentative and undeveloped, of implementing the republican ideal.

Heightened scrutiny is triggered by a concern that in the circumstances it is especially likely that the measure under review reflects a naked preference. The most familiar example is review of racial classifications under the equal protection clause. Review of statutes that discriminate on their face against noncitizens under the privileges and immunities clause falls into the same category. In both cases, heightened scrutiny is justified by a perception that the groups in question lack the political power to protect themselves against factional tyranny.[49]

By contrast, more relaxed scrutiny—typified by rationality review—reflects a strong presumption that a public value is at work. That presumption is conventionally supported by reference to considerations of judicial competence and legitimacy.[50] The underlying idea is, first, that courts lack the capacity to review the factual determinations of other branches of government and, second, that vigorous judicial scrutiny of whether a naked preference is at work would be inconsistent with what is taken to be the central constitutional commitment to representative democracy.[51]

2. *Theory of Impermissible Ends.* — A second device in a more rigorous version of the prohibition, typified by doctrines developed under the due process and equal protection clauses, consists of judicial formulation of a normative theory designed to distinguish between legitimate and illegitimate bases for government action.[52] The courts attempt to root this norma-

48. See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 532, 548-54 (1980) (Stevens, J., dissenting); Califano v. Goldfarb, 430 U.S. 199, 212-17 (1977); Hampton v. Mow Sun Wong, 426 U.S. 88, 103, 114-16 (1976); Tribe, Structural Due Process, 10 Harv. C.R.-C.L. L. Rev. 269, 299-303 (1975).

49. Under a pluralist conception, heightened scrutiny would be justified when it appeared that some group was not represented in the political process. The justification would turn not on fear that a naked preference was at work, but instead on the presumptive invalidity of outcomes reached through a process unavailable to some. This justification accords well with many of the cases, and it may be that the prohibition of naked preferences and pluralism can be said to account equally well for much of modern doctrine calling for heightened scrutiny. But pluralism does not explain those aspects of heightened scrutiny that require not merely access to the political process, but also judicial scrutiny to ensure that the process is one involving broad deliberation.

50. See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 730-32 (1963) (due process); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 190-91 (1938) (commerce clause).

51. See Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 2-8 (1971); Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 201-35 (1976).

52. The requirement of such a normative theory is the basis for recent suggestions that the notion of equality requires some such theory to have content. See A. Gutmann, Liberal Equality 10 (1980); Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982). That requirement also underlies recent attacks on the view, see B. Ackerman, supra note 29, that a

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tive theory in the text or history of the Constitution. Under this approach, the weak version of the prohibition of naked preferences is buttressed by a conclusion that a number of ends are illegitimate even if they are not exercises of raw political power in the ordinary sense. This element thus supplements the procedural requirements of heightened scrutiny with a substantive constraint.

During the *Lochner* era, for example, the redistribution of resources from employer to employee was not thought to respond to a public value and was therefore placed in the category of naked preferences. Numerous goals now considered to fall within the realm of public values were not recognized as such,[53] largely because common law conceptions of rights and obligations dominated early public law.[54] If a measure enacted by the government was not a proper exercise of the police power under common law standards, it was impermissible under the due process clause as a naked preference for one group at the expense of another.[55] Identical results occurred under the contract clause.[56] In short, a particular normative theory sharply limited the category of public values.

Under current law, by contrast, all sorts of redistributive measures are permissible. The weak version of the prohibition of naked preferences still applies to such measures, but the normative theory supplementing the weak version has been dramatically altered in a way that has expanded the category of public values to include redistribution. When a normative theory outlaws certain kinds of government action even though such action is not solely an exercise of raw political power, the prohibition of naked preferences has gone well beyond the weak version. To develop a complete theory of the resulting "strong version," it is necessary to identify the expanded category of public values with precision.

The strong version could of course accommodate a wide range of normative theories of government. The *Lochner* era embodied one such theory. Modern equal protection doctrine reflects another: courts do not recognize as public values certain government ends associated with disadvantaging women, aliens, illegitimates, and members of racial minority groups.[57] For example, the government has attempted to justify classifications based on gender on the ground that women participate less frequently or less ably in

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notion of neutrality has sufficient content to generate solutions to disputed issues. See, e.g., Fishkin, Can There be a Neutral Theory of Justice?, 93 Ethics 348 (1983). The various strategies discussed in this Article are efforts to generate the requisite normative theory.

53. See infra text accompanying notes 133-38 (due process); infra text accompanying note 169 (eminent domain).

54. See J. Vining, Legal Identity 13-27 (1978); Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1671-76 (1975).

55. See infra notes 133-38 and accompanying text.

56. See infra notes 145-48 and accompanying text.

57. See, e.g., Trimble v. Gordon, 430 U.S. 762 (1977) (legitimacy); Craig v. Boren, 429 U.S. 190 (1976) (gender); Graham v. Richardson, 403 U.S. 365 (1971) (alienage).

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the labor market.[58] Although justifications of this sort would qualify as public values under the weak version, very good reasons can be advanced for prohibiting them under the strong version. Most important, such justifications may be based on values that are in fact merely reflections of existing power relations.[59]

The Court's suggestion that its skeptical attitude toward gender-based classifications is designed to ensure that government action is "determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women" supports this point.[60] In this sense, the strong version of the prohibition is close to the weak; the difference is that the former, in its modern form, sometimes reflects a willingness to scrutinize public value justifications to see if they are actually rooted in, or are disguises for, private power. But the unwillingness to permit justifications that reflect private power, or are otherwise illegitimate, does go beyond the weak version.

The use of these theories of impermissible government ends as an additional source of constraints on government is highly controversial. For one thing, the use of such theories may allow constitutional prohibitions to change dramatically over time as the category of public values expands and contracts—to many, a questionable phenomenon.[61] Moreover, selection of public values is made by the judiciary—an allocation of authority that was sharply criticized during the *Lochner* era and has its share of critics today, at least when selection of the relevant values cannot easily be attributed to the constitutional text and history.[62]

The existence of a shifting and open-ended framework of public values to supplement the weak version of the prohibition of naked preferences makes development of a complete theory of the prohibition much more dif-

58. See Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

59. The relationship between particular values and private power—sometimes described as "ideology"—raises complicated questions that cannot be explored here. For recent discussion by social theorists of how social and scientific knowledge are dependent on particular interests, see M. Foucault, Power/Knowledge (1980); J. Habermas, Knowledge and Human Interests (1971).

60. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 726 (1982) (footnote omitted).

61. See, e.g., Bork, supra note 51; Easterbrook, Substance and Due Process, 1982 Sup. Ct. Rev. 85, 90-94.

62. Consensus-based theories, see Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221 (1973), are open to familiar objections. See J. Ely, supra note 26, at 63-69; M. Perry, The Constitution, The Courts, and Human Rights 94-97 (1982). Such theories may be made to depend not on actual consensus, but on the agreement that would emerge under circumstances of undominated discourse. Habermas' ideal speech situation is a familiar example. See Habermas, Towards a Theory of Communicative Competence, 13 Inquiry 360, 372 (1970); Habermas, A Reply to My Critics, *in* Habermas: Critical Debates 219, 234-37 (J. Thompson & D. Held eds. 1982); cf. B. Ackerman, supra note 29, at 8-10 (constrained conversation). But these approaches face difficulties of their own. See, e.g., Lukes, Of Gods and Demons: Habermas and Practical Reason, *in* Habermas: Critical Debates, supra, at 134. See generally M. Sandel, Liberalism and the Limits of Justice (1982) (attacking deontological theories of justice).

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ficult at both the positive and normative levels. For present purposes, it is enough to recognize that the framework exists, to show how it goes beyond the weak version of the prohibition, to describe its changes over time, and to suggest some reasons why the changes may have occurred.

3. *Rights Constraints.* — The final device involves a category of rights that operate as a shield against certain government actions even when no naked preference has taken place. The Court's recognition of certain fundamental rights, including the right to "privacy,"[63] falls in this category of "rights constraints," as did the rights of contract recognized during the *Lochner* era. This approach constrains government action not by assimilating certain justifications to the category of naked preferences, or by concluding that certain ends of government are impermissible, but by invalidating measures even if they are properly motivated under the framework previously described. Rights constraints are sharply distinct from both the weak and the strong versions of the prohibition of naked preferences. Far from making judicial decisions depend on the reasons for government action, such constraints create a shield of private autonomy that operates regardless of the end the government is trying to achieve.[64] In this respect, rights constraints reflect a normative framework altogether different from that underlying the prohibition of naked preferences.

The strong version of the prohibition of naked preferences is reflected in much of modern constitutional law. Many areas of doctrine that cannot be explained by the weak version can be explained by the strong. Most prominently, the equal protection clause contains a theory of impermissible ends that extends well beyond the prohibition of decisions based on raw political power. Many of the justifications associated with decisions to single out women, aliens, and illegitimates for special treatment are regarded as impermissible. Such justifications are not treated as public values at all, though they are not exercises of raw political power in the ordinary sense. Moreover, heightened scrutiny is readily applied to statutes that use such characteristics as the basis for a classification. Such scrutiny is justified as a means of ensuring that something other than the impermissible end accounts for the classification.

Elements of this framework are also reflected under the dormant commerce and privileges and immunities clauses. Here the category of impermissible ends includes decisions based on raw political power and—what may often in practice be the same thing—decisions based on a perception that it is intrinsically desirable to prefer in-staters over out-of-staters. When a statute discriminates on its face between in-staters and out-of-staters, heightened scrutiny is applied because of a perception that a naked preference is especially likely to be at work.

63. See Carey v. Population Serv. Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973).

64. It would of course be possible to collapse rights constraints and theories of impermissible ends by concluding that the former is based on a willingness to declare certain government purposes to be illegitimate. But the focus of the two sets of constraints is very different.

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Finally, heightened scrutiny plays a role in modern contract clause cases involving a state's abrogation of a contract to which it is a party. Heightened scrutiny is justified in such cases by a suspicion that the state may be acting for illegitimate reasons when it is an interested party.

A final preliminary point involves the relationship among the various devices that have been developed to strengthen or supplement the weak version of the prohibition of naked preferences. Although these devices are frequently intertwined in practice, they are independent and can be applied separately to constrain goverument action. For example, it would be possible to have an expansive conception of what counts as a public value and at the same time adopt heightened scrutiny in cases in which it is especially likely that a naked preference is at work. Indeed, some areas of current doctrine under the contract and equal protection clauses reflect this approach.[65] Courts look skeptically at legislative outcomes because of a perception that raw political power is likely to be at work, but do not create a category of impermissible ends as an additional source of constraints on government action.

It would also be possible to impose a rights constraint regardless of whether there were heightened scrutiny or any category of impermissible ends. Under this approach, the category of rights would create a shield of private autonomy into which the government could not intrude, regardless of the reasons for the attempted intrusion.[66] As a result, invalidation would be automatic, and heightened scrutiny unnecessary.

Finally, one could restrict the category of impermissible ends, but at the same time abandon heightened scrutiny as incompatible with the proper role of the courts in light of the separation of powers. As we will see, however, it is more common to combine the three devices, generating a regime of constraints that falls somewhere between the minimal requirement and the most intrusive versions of the prohibition of naked preferences.

II. Applications: Naked Preferences and the Clauses

This Part is primarily an effort to show the ways in which the various elements of the framework introduced in Part I have interacted under all six clauses as they have been interpreted in the last century or more. The principal aim is to explore how both the weak version of the prohibition of naked preferences and the various methods of supplementing it have been used under the different clauses. This Part attempts to identify both significant overlaps in doctrine and differences over time and among clauses. At times, however, it departs from description, criticizing some developments and explaining or suggesting others.

65. Parts of equal protection doctrine, however, reflect a strong version of the prohibition. See infra notes 98-113 and accompanying text (strict scrutiny of racial classifications).

66. It is uncertain whether, as a matter of current constitutional doctrine, any such "absolute" rights can be said to exist.

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A. *Dormant Commerce Clause*

The commerce clause[67] is both an authorization to Congress and, more controversially,[68] a self-executing prohibition on certain state actions burdening interstate commerce—the so-called "dormant" commerce clause. Under current doctrine, the dormant commerce clause is aimed primarily at measures taken out of a desire to improve the economic position of in-staters at the expense of out-of-staters. Illustrations of such protectionism in its purest form are relatively rare, but *Welton v. Missouri*[69] is a good example. The Missouri statute at issue in *Welton* defined as "peddlers" persons selling merchandise produced or manufactured outside the state and required all such persons to obtain licenses. No license was required for persons selling merchandise produced or manufactured inside the state. There was no doubt that the statute had been enacted to protect in-state industries by insulating them from out-of-state competition. Underlying the Court's invalidation of the statute was a perception that it was based on this naked preference.[70]

The prohibition of protectionism in the dormant commerce clause rests on a familiar political theory. When discrimination is worked against persons outside the state, ordinary avenues of political redress are unavailable to the burdened class, which does not have access to the state legislature.[71] In the *Welton* case, for example, those who manufactured or produced merchandise outside of Missouri had little or no voice in the Missouri legislature.[72] By contrast, when regulation imposes burdens on in-staters as well as out-of-staters, the political safeguard is more reliable.[73] If, for example, a state imposes safety regulations on persons who do construction within its borders, in-staters will be affected in the same way as out-of-staters and should represent the interests of out-of-staters adequately in the political

67. U.S. Const. art. I, § 8, cl. 3.

68. See, e.g., Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale L.J. 425 (1982).

69. 91 U.S. 275 (1876).

70. Id. at 281-83.

71. See generally South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938) (judicial review of regulations burdening out-of-staters appropriate because normal avenues of political redress closed); Eule, supra note 68 (judicial review justified when discriminatory or protectionist nature of legislation indicates breakdown in representational government); Tushnet, Rethinking the Dormant Commerce Clause, 1979 Wis. L. Rev. 125 (judicial review appropriate when some affected interest excluded from political process).

72. To be sure, Missouri peddlers would have had some incentive to seek permission to sell out-of-state merchandise, and to that extent would have represented the interests of outsiders. Consumers as well might have exerted pressure. But those sources of representation are indirect and therefore less effective. See R. Hardin, Collective Action (1982); M. Olson, The Logic of Collective Action 122-25 (1971).

73. Whether the Court's perception of the relative burdens on in-staters and out-of-staters is correct is a complex question. For discussion, see McLure, Incidence Analysis and the Supreme Court: An Examination of Four Cases from the 1980 Term, 1 Sup. Ct. Econ. Rev. 69 (1982).

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process.[74] Formally, of course, the dormant commerce clause is aimed not at discrimination against out-of-staters, but against interstate commerce—a point that the Court itself sometimes misses.[75] But, in practice, discrimination against interstate commerce always turns out to be discrimination against out-of-staters at one or the other end of the transaction.

To this extent, the dormant commerce clause reflects the prohibition of naked preferences, weakly defined. The underlying notion is that when a group of citizens enacts a measure of which they are the sole beneficiaries, there is a peculiar likelihood that raw political power is at work. The absence of representation is undesirable not for its own sake, but because it increases the likelihood that the legislature is acting on the basis of a naked preference.[76] In addition, the prohibition of protectionism results from a perception that the dormant commerce clause reflects an authoritative judgment that a state may not prefer its own citizens over out-of-staters simply because it values their welfare more highly. In this respect, the dormant commerce clause forbids a conclusion that a preference for in-staters over out-of-staters is a permissible public value.

Most of modern doctrine under the dormant commerce clause can be derived from the theory of political representation discussed above in conjunction with the prohibition of naked preferences in favor of in-staters. Cases like *South Carolina State Highway Department v. Barnwell Brothers*[77] are at one pole. At issue in *Barnwell* were width and weight limitations on trucks used on state highways. The limitations, challenged on the ground that they imposed an undue burden on interstate commerce, treated in-staters the same as out-of-staters. For this reason, in cases like *Barnwell*, the Court's scrutiny of legislation is highly deferential. It is sufficient to show that there is a "rational basis" for the asserted benefits and that the burden on interstate commerce is not grossly excessive in relation to those benefits.[78] In the absence of facial discrimination or discriminatory effects, there is no basis for suspicion that a naked preference in favor of in-staters is at work.

In light of the absence of discrimination, why must the state make even the minimal showing that the burdens imposed by the regulation are not grossly excessive in relation to the benefits? One answer is that the dormant commerce clause should invalidate regulations that interfere with free trade, regardless of the legitimacy of the reasons for the interference.[79] An alternative answer, more relevant for present purposes, is that such a re-

74. See Tushnet, supra note 71, at 139-40.

75. See, e.g., South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938).

76. This point is missed in both Ely, supra note 26, and Tushnet, supra note 71.

77. 303 U.S. 177 (1938).

78. See, e.g., Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938).

79. Such an approach, which has support in the cases, would posit a purpose for the dormant commerce clause other than preventing protectionism. See Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). The emphasis of the recent cases, however, is on protec-

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quirement "filters out" illegitimate motivations. When the asserted benefits turn out to be illusory, or are minimal in relation to the burdens imposed, there is good reason to suspect that an illegitimate motivation—something other than the asserted benefits—in fact accounts for the regulation.[80] It is highly unlikely that protectionism would account for a nondiscriminatory restriction, and the judicial approach is therefore deferential. Nevertheless, judicial review operates as a check against the possibility of covert protectionism.

At the opposite pole from *Barnwell* are cases involving regulations that distinguish on their face between persons who are involved in interstate commerce and those who are not. In *Welton v. Missouri*,[81] for example, the burden of the statute fell entirely on out-of-staters;[82] the benefits were enjoyed entirely by in-staters. The Court has applied either a per se rule[83] or a strong presumption[84] of invalidity to such classifications. In such cases there is reason for suspicion that raw political power, not a public value, accounts for the legislation. The presumption of invalidity can be overcome, if at all, only by showing, first, an extremely close connection between the asserted public value and the statutory enactment and, second, that less restrictive alternatives are unavailable. For example, in *Hughes v. Oklahoma*[85] the Court was faced with a state statute prohibiting the transportation outside the state of minnows seined or procured from waters within the state. The Court found that the asserted interest—conservation and protection of wildlife—could be served in ways that did not discriminate against interstate commerce; for example, by limiting the number of minnows that could be seined by licensed dealers. If the state had been able to make both of the required showings, the presumption that the public value was a sham would have been overcome.[86]

In many cases, however, the Supreme Court has condemned as protectionism statutes that did not discriminate on their face between in-staters

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tionism. See, e.g., Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

80. This form of analysis is parallel to that employed in rationality review under the equal protection clause. There, too, the examination of whether a rational basis exists for a classification serves largely as a check on illegitimate motivations; there, too, the test is deferential because it is adopted when there is no reason to suspect that an illegitimate motivation is at work. See infra notes 114-19 and accompanying text.

81. 91 U.S. 275 (1876).

82. See supra text accompanying note 69.

83. See City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).

84. See Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) ("At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.").

85. 441 U.S. 322 (1979).

86. This branch of dormant commerce clause doctrine is paralleled by the treatment given to statutes that classify on their face on the basis of race. Outside of the area of affirmative action, see, e.g., Fullilove v. Klutznick, 448 U.S. 448 (1980), such statutes face a similar rule of presumptive or per se invalidity.

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and out-of-staters. In *Dean Milk Co. v. City of Madison*,[87] for example, the relevant provision required distributors of milk to pasteurize their goods within five miles of Madison, Wisconsin. Although this requirement burdened many Wisconsin citizens who had to travel close to Madison to sell their milk, its greatest impact fell on out-of-staters. For this reason, the Court employed a form of heightened scrutiny, searching for less restrictive alternatives. The Court found that such alternatives—for example, inspection of distant milk sources—were available to serve the city's asserted safety goals. In other cases involving facially nondiscriminatory statutes, the Court has usually reacted to a showing of discriminatory effect by requiring a close connection between legitimate ends and statutory means and by looking to the existence of less restrictive alternatives.[88]

The reasons for this development should be clear. Once it is shown that a statute has a disproportionate adverse effect on out-of-staters, or gives disproportionate benefits to in-staters, there is reason to suspect that a naked preference in fact accounted for the legislation. An examination of the means-ends relationship and of less restrictive alternatives filters out such preferences. To be sure, there is less reason for suspicion here than in cases involving regulations that discriminate on their face against out-of-staters. When burdens fall disproportionately on out-of-staters, but are felt by some in-staters as well, redress through political representation is to some extent available. The disadvantaged in-staters ought to represent the interests of the out-of-staters. But the comparative inadequacy of the representation afforded under such circumstances is reason for somewhat less deference by the Court.

Current doctrine under the dormant commerce clause thus emerges as a relatively simple structure. The principal prohibited end is protectionism—measures that reflect an exercise of raw political power by in-staters at the expense of out-of-staters. That perception of the prohibited end is reflected in a three-part doctrinal framework: a per se rule or strong presumption of invalidity applied to measures that discriminate on their face against interstate commerce; heightened scrutiny, in the form of examination of less restrictive alternatives and means-ends review, when the burdens fall disproportionately on interstate commerce, the benefits accrue mostly to intrastate commerce, or both; and deferential review when there is no discrimination at all. To a large extent, all three parts of the doctrinal framework attempt to filter out naked preferences for in-staters over out-of-staters.

B. *Privileges and Immunities Clause*

The privileges and immunities clause of article IV provides that "Citi-

87. 340 U.S. 349 (1951).

88. See Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977). The Court's treatment of cases involving disproportionate impact has not, however, been consistent. See, e.g., Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (upholding statute despite discriminatory effects).

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zens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[89] The basic themes of the clause are almost identical to those of the dormant commerce clause.

The privileges and immunities clause received its preeminent modern interpretation in *Toomer v. Witsell*.[90] At issue was a South Carolina law that imposed license fees on boats engaging in commercial shrimp fishing. The fee was $25 for citizens, $2500 for noncitizens. The Supreme Court said that the function of the privileges and immunities clause was to "bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States."[91] This is a classic description of the constitutional prohibition of naked preferences. Disparate treatment of citizens and noncitizens is permissible only when "there are perfectly valid independent reasons for it."[92] The question under the clause, according to the Court, was "whether such reasons do exist and whether the degree of discrimination bears a close relation to them."[93]

In *Toomer* itself, the Court noted that the statute discriminated on its face against noncitizens. Such discrimination justified skepticism about the state's asserted purpose, conservation of the shrimp supply, because the absence of ordinary avenues of political redress for noncitizens increased the danger that the discriminatory enactment was an exercise of raw political power.[94] As under the dormant commerce clause, such skepticism requires an examination of whether the asserted purpose can be served by alternative nondiscriminatory means. In *Toomer*, such means were obviously

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89. U.S. Const. art. IV, § 2.

90. 334 U.S. 385 (1948).

91. Id. at 396.

92. Id.

93. Id. (footnote omitted).

94. Cases decided after *Toomer* reflect a similar understanding of the function of the privileges and immunities clause. See, e.g., United Bldg. & Constr. Trades Council v. Mayor of Camden, 104 S. Ct. 1020 (1984); Hicklin v. Orbeck, 437 U.S. 518 (1978).

The *Camden* case involved a municipal ordinance requiring that at least 40% of the employees of contractors and subcontractors working on city construction projects be Camden residents. The Court held that the ordinance was subject to the privileges and immunities clause notwithstanding the fact that it adversely affected New Jersey citizens as well as noncitizens. According to the Court, the disproportionate effect of the ordinance justified scrutiny under the clause:

> Given the Camden ordinance, an out-of-state citizen who ventures into New Jersey will not enjoy the same privileges as the New Jersey citizen residing in Camden. It is true that New Jersey citizens not residing in Camden will be affected by the ordinance as well . . . . But New Jersey residents at least have a chance to remedy at the polls any discrimination against them. Out-of-state citizens have no similar opportunity . . . .

104 S. Ct. at 1027. *Camden* is the privileges and immunities analogue of Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951), which held that a municipal ordinance having disproportionate effects on out-of-staters was subject to heightened scrutiny under the dormant commerce clause. See supra note 87 and accompanying text.

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available.[95]

There is a substantial overlap between the privileges and immunities clause and the dormant commerce clause. Both are aimed at discrimination against out-of-staters. Both focus on the theme of political representation, justifying an active judicial posture when discrimination alerts courts to the likelihood that unrepresented persons have been harmed.

At the same time, there are three differences between the two clauses. First, while both protect out-of-staters, the dormant commerce clause is formally aimed at discrimination against interstate commerce, not against out-of-staters. For this reason, a plaintiff attacking a measure as protectionist under the dormant commerce clause need not be an out-of-stater. At the same time, a plaintiff under the privileges and immunities clause need not show that commerce is involved at all. Second, the privileges and immunities clause is not triggered unless the discrimination operates against a "fundamental right."[96] Third, doctrine under the privileges and immunities clause has a much simpler, perhaps much cruder structure. The clause generally has been invoked only upon a showing of facial discrimination against noncitizens. Discriminatory effects have rarely been sufficient to trigger any scrutiny at all.[97] The availability of the dormant commerce clause as the doctrinal avenue for invalidating discriminatory state action, at least where commerce is concerned, may have produced this development by relieving the pressure for use of the privileges and immunities clause as a barrier against such discrimination. In any event, despite their differences the two clauses are aimed at substantially identical evils.

C. *Equal Protection Clause*

The equal protection clause is not concerned solely with the special case of discrimination between in-staters and out-of-staters; its prohibition is far broader. Indeed, in many respects the clause may be understood as a generalization of the core concerns of the dormant commerce and privileges and immunities clauses, applying their basic prohibition of naked preferences to all classifications.

Discrimination against blacks, the central evil at which the equal protection clause was aimed, is the equal protection analogue of discrimination against out-of-staters under the dormant commerce and privileges and immunities clauses. The doctrinal framework for addressing the central evil is formally almost identical under the three clauses. When a statute discriminates on its face against blacks, the Court applies a per se rule or strong

95. For example, shrimp conservation could be ensured through limiting the number of shrimp that fishermen could take.

96. See Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978).

97. But see United Bldg. & Constr. Trades Council v. Mayor of Camden, 104 S. Ct. 1020, 1027 (1984) (disproportionate effects on out-of-staters trigger stricter scrutiny). See generally Varat, State "Citizenship" and Interstate Equality, 48 U. Chi. L. Rev. 487 (1981) (discussing proper scope under privileges and immunities and dormant commerce clauses of state authority to favor state residents in distribution of public resources).

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presumption of invalidity.[98] The presumption, here as elsewhere, can be overcome only by showing a legitimate and "compelling" government interest and an extremely close connection between that interest and the particular means chosen by the government to promote it.[99]

Thus, for example, in *Korematsu v. United States*[100]—the first case employing "strict scrutiny"—the Court upheld a statute placing Japanese-Americans in relocation centers on the ground that the discrimination rested neither on raw political power nor on a perception that the Japanese-Americans were worse than anyone else, but on a neutral desire to promote national security. The Court relied on the importance of the state interest and the perceived closeness of the connection between that interest and the measure under review. In the Court's view, these considerations justified the conclusion that the state's decision was not a naked preference at all.[101] Other cases use the same devices as a means of filtering out naked preferences.[102]

One reason for heightened scrutiny is a belief that when a statute discriminates on its face against racial minorities, a naked preference is almost certainly at work. Here, as under the dormant commerce and privileges and immunities clauses, a familiar political theory helps to account for that belief. The relative political powerlessness of members of minority groups is a classic reason for active judicial scrutiny of statutes that disadvantage them.[103] The notion is that the ordinary avenues of political redress are much less likely to be available to minorities, and the danger that such statutes will result from an exercise of raw political power is correspondingly increased. The equal protection context is of course different in that the political remedy is formally available to members of the protected group; the doctrinal framework is based on the functional rather than literal absence of a political remedy.[104] By contrast, when discrimination is worked against whites, as in affirmative action legislation, there is good reason to suppose that the government motivation will be entirely different.[105]

98. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); Anderson v. Martin, 375 U.S. 399 (1964).

99. See Korematsu v. United States, 323 U.S. 214 (1944); cf. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (Powell, J.) (finding such a connection in the context of affirmative action for minority medical school applicants).

100. 323 U.S. 214 (1944).

101. Id. at 223-24. This is hardly to say that *Korematsu* was rightly decided. The means-ends connection was not as tight as normally required. See, e.g., Anderson v. Martin, 375 U.S. 399 (1964).

102. See, e.g., Lee v. Washington, 390 U.S. 333 (1968).

103. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). It is no coincidence that Justice Stone was the author of both *Carolene Products* and *Barnwell Bros.*, where a substantially similar theory spawned the modern development of the dormant commerce clause. For a generalization of this theory, see J. Ely, supra note 26.

104. See J. Ely, supra note 26, at 145-70.

105. See K. Greenawalt, Discrimination and Reverse Discrimination (1983); Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 735 (1974).

As a result, the same degree of scrutiny is not applied.[106]

In one sense, then, the equal protection framework might be understood as derivative of the weak version of the prohibition of naked preferences, combined with heightened scrutiny in cases in which the prohibition is likely to be violated. But current equal protection doctrine goes beyond the use of heightened scrutiny and also employs the device of impermissible ends. The category of prohibited ends includes a wide range of justifications that involve more than exercises of raw political power. Segregation in prisons, for example, has been justified on the ground that, when blacks are jailed with whites, there is an increased likelihood of violence—and surely preventing violence is a public value.[107] All sorts of measures that disadvantage blacks have been similarly justified.[108] Such measures are presumed invalid because of a concern not that they are based on raw political power, but that they depend on impermissible attitudes towards blacks.

The matter becomes even clearer in cases involving judicial scrutiny of classifications drawn on the basis of gender, alienage, and legitimacy.[109] For example, when a statute provides that the spouses of male workers automatically qualify for social security benefits, but that spouses of female workers must show dependency, the classification hardly reflects an exercise of raw political power, but instead reflects certain—perhaps invidious—conceptions about female participation in the labor market. The Court's willingness to invalidate such statutes[110] cannot be explained as an enforcement of the minimal requirement alone.

All of this suggests that, in the equal protection context, the Court has adopted the strong version of the prohibition of naked preferences, ruling out, as impermissible bases for differential treatment, a wide range of legislative judgments about certain social groups. We have suggested that the strong version goes far beyond the minimal requirement that classifications rest on something other than raw power.[111] In the equal protection context, the strong version embodies a complex normative framework. In part, the framework is the logical outgrowth of a theory that prohibits government from treating one person differently from another solely on the ground that it is intrinsically desirable to do so.[112] The framework also

106. Although the precise constitutional status of affirmative action is unsettled, it seems clear that it will be treated more deferentially than discrimination against blacks. See, e.g., Fullilove v. Klutznick, 448 U.S. 448 (1980) (Burger, C.J.); id. at 517 (Marshall, J., concurring); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (Powell, J.); id. at 324 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

107. See Lee v. Washington, 390 U.S. 333 (1968).

108. In Brown v. Board of Educ., 347 U.S. 483 (1954), to take the most famous example, the defendants attempted to justify segregation on the ground that it was best for all concerned, not on the ground that it was intrinsically desirable to treat whites better than blacks.

109. See supra note 57.

110. See supra note 58.

111. See supra text accompanying notes 43-64.

112. See Sunstein, Public Values, Private Interests, and the Equal Protection Clause, 1982 Sup. Ct. Rev. 127.

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reflects changing social conceptions about the role and status of the relevant groups. Such conceptions have made justifications involving the inability of women to compete in the job market, or the punishment of adultery through adverse treatment of the illegitimate, seem increasingly intolerable—not public values at all. Justifications of that sort, it is thought, both reflect and perpetuate existing relations of power and are not the product of reasoned analysis. In this respect, the Court's skeptical attitude toward such justifications reflects a willingness to scrutinize apparent public values to see whether they are in fact the product of raw political power.[113]

In cases involving review of classifications for "rationality," however, equal protection doctrine embodies a weak version of the prohibition. Although the rationality test is highly deferential, its function is to ensure that classifications rest on something other than a naked preference for one person or group over another. Thus, to take the most familiar example, in *Williamson v. Lee Optical, Inc.*,[114] the Court upheld differential treatment of optometrists and opticians on the ground not that the equal protection clause tolerated an unprincipled distribution of wealth to one rather than to the other—though there is a plausible argument that such a naked preference was indeed taking place—but that the differential treatment was a means of protecting consumers.[115] The Court has made clear in rationality cases that the government must be able to invoke some public value that the classification at issue can be said to serve.[116] The Court has invalidated classifications for which the government is unable to invoke a plausible public value justification,[117] thereby demonstrating that the function of rationality review is to enforce the weak version of the prohibition of naked preferences.

To be sure, rationality review under the equal protection clause, as elsewhere, is highly deferential and almost always results in the validation of statutory classifications. The Court has demanded only the loosest fit

113. How such judicial attitudes change over time, and how they should interact with the equal protection clause, are questions that need not be explored here. Cf. J. Vining, Legal Identity 171 (1978) ("we do not know how a value becomes a public value"). It is sufficient for present purposes to show that the equal protection clause reflects the strong version of the prohibition of naked preferences because it refuses to recognize certain justifications even though they go beyond the exercise of raw political power.

114. 348 U.S. 483 (1955).

115. According to the Court, "there can be no doubt that the presence and superintendence of the specialist tend to diminish an evil," and the "legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify" the regulation. Id. at 487 (citation omitted).

116. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976); Dandridge v. Williams, 397 U.S. 471, 483-85 (1970); Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).

117. See Zobel v. Williams, 457 U.S. 55 (1982); Department of Agriculture v. Moreno, 413 U.S. 528 (1973). It is probably no coincidence that *Zobel*, one of the few cases in which the Court has invalidated a statute on rationality grounds, had strong overtones of discrimination between in-staters and out-of-staters. See 457 U.S. at 71-81 (O'Connor, J., concurring in the judgment) (relying on privileges and immunities clause).

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between the classification and the relevant public value and has been willing to hypothesize public values—legitimate legislative purposes—even in cases in which it seems highly unlikely that such purposes actually accounted for the measure under attack.[118] Such results may lead to understandable skepticism about whether the rationality constraint—the weak version of the prohibition of naked preferences—is a constraint at all.[119]

Rationality review is of course the equal protection analogue of cases involving nondiscrimination under the dormant commerce clause. The equal protection clause forbids naked preferences, but the standard of review indicates the Court's belief that it ought to be extremely reluctant to conclude that a naked preference has in fact occurred. Undoubtedly, this reluctance can be attributed in part to separation of powers concerns,[120] reflecting a judgment that although naked preferences are prohibited the courts ought to create a strong presumption that they hardly ever occur. There is considerable awkwardness in attributing an impermissible motivation to a coordinate branch of government. The reluctance might also be justified by the familiar difficulties in divining legislative purpose: legislatures always act on the basis of mixed motives, and the case of a "pure" interest group transfer may be rare. Perhaps, too, the Court is reluctant to enforce the notion, to which its rhetoric steadfastly adheres, that the Constitution requires that some public value justify government action.[121]

In the rationality area, then, modern equal protection doctrine reflects the weak version of the prohibition of naked preferences. Heightened scrutiny is unavailable, and no background normative theory limits the ends that government may seek. Only a few rights are said to be fundamental for equal protection purposes, generating an infrequent rights-based constraint on government action in pursuit of public values.[122] Almost every classification survives rationality review.

This general understanding of the equal protection clause fits nicely with the requirement that a litigant show that the government decisionmaker acted out of an impermissible motivation.[123] Under this understanding, the clause is centrally concerned with the reasons for differential treatment; effects themselves are irrelevant. But many classifications may be impermissibly motivated under the equal protection clause even though

118. See, e.g., Schweiker v. Wilson, 450 U.S. 221 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).

119. See Linde, supra note 51, at 201-22; Posner, supra note 25, at 28-30.

120. See Ferguson v. Skrupa, 372 U.S. 726, 730 (1963); Williamson v. Lee Optical, Inc., 348 U.S. 483, 496 (1955).

121. For such a conclusion, see Linde, supra note 51, at 244-48; Posner, supra note 25, at 27. Cf. Stewart, supra note 14, at 1547-55 (criticizing interest-group theory and indicating its inconsistency with judicial and political process, rhetoric, and results).

122. See Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667-68 (1966); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

123. See Personnel Adm'r v. Feeney, 442 U.S. 256, 273-74 (1979); Washington v. Davis, 426 U.S. 229, 244-48 (1976).

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they are not based on a desire to harm.[124] The notion of impermissible motivation encompasses a wide range of classifications based on a perception that blacks should be treated differently from whites, women differently from men, or aliens differently from citizens. In ascertaining the prohibited intent, the relevant question is not whether the state intended to hurt the group in question, but whether the state would have enacted the measure under attack regardless of which groups were helped and which hurt.[125] The question, in short, is whether the state operated in a way that was unaffected by the fact that a particular group benefited from or was burdened by the measure in question. In all cases in which no such neutrality is shown, it is likely that an impermissible motivation in fact accounted for the measure.

This general understanding also helps explain the careful scrutiny that the Court has applied to statutes disadvantaging certain other groups, including women, illegitimates, and aliens.[126] Here, as elsewhere, a partial justification for applying heightened scrutiny is a perception that such groups have relatively little political power, increasing the danger that the statute in question was the product of an impermissible motivation. The vision of the prohibited end—government action resulting from a naked preference—is close to what it is in the race and rationality cases; the doctrinal framework accommodates a perception that, in terms of the likelihood that this end will occur, these are intermediate cases.

Modern equal protection doctrine can be attacked on two primary—and opposing—grounds, each of which is best seen as responding to the general understanding of the clause discussed above. The first ground for attack is that the political process is filled with decisions based on exercises of raw political power, and that there is nothing wrong with that.[127] Under this view, rationality review is a sham, threatening either hypocrisy about the real reasons for statutory enactments—public value justifications in cases in which the usual pluralist struggle is taking place—or judicial invalidation of the many statutes that are best explained as resulting from exercises of raw political power.

The second ground for attack is based on several related arguments. The first argument is that moderu equal protection doctrine rests on an untenable premise that outside of a few limited contexts—race, gender, alienage, and perhaps illegitimacy—the political process can be trusted as a

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124. See Schweiker v. Wilson, 450 U.S. 221, 233-34 (1981) (relevant intent is intent to classify rather than intent to harm).

125. See Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 6-8 (1976). An unfortunate consequence of the requirement of discriminatory purpose is that institutional practices generating discriminatory results are immunized from attack. Such results often derive from a series of decisions made by many people, no one of whom can be charged with impermissible motivation. It is for this reason that the discriminatory purpose requirement has stood as a barrier to recent attacks on administration of the death penalty. See Stephens v. Kemp, 104 S. Ct. 562, 564-65 (1983) (Powell, J., dissenting).

126. See supra note 57.

127. See Linde, supra note 51, at 222-35; Posner, supra note 25, at 27-28.

safeguard against naked preferences.[128] The notion that, outside of these unusual contexts, the political process can serve as an impartial mechanism for "summing up the opinions of the citizenry"[129] reflects the adoption of a highly controversial model of government and personality.[130] This argument maintains that the pluralist understanding that a wide range of groups can protect themselves through politics blinks reality. The second argument is that the Court's willingness to hypothesize legitimate purposes and to accept remote connections between those purposes and statutory classifications produces a doctrinal framework that, in practice, involves no judicial scrutiny at all. In this respect, the Court's commitment to the prohibition of naked preferences might be seen as merely rhetorical. The final argument is that the effort to generate public value justifications serves an indefensible legitimating function, forcing lawyers and judges to talk in terms of public values even though naked wealth transfers are taking place. The public values discourse tends to obscure the actual power relations behind most modern legislation while at the same time providing an apparently legitimate basis for upholding it.

These attacks suggest that a more vigorous equal protection doctrine would protect a wide range of other groups from disabilities created by the political process. In addition, it would raise the level of means-ends scrutiny, thus responding to the suggestion that rationality review is too deferential in practice. Under this approach, the separation-of-powers objections to such a judicial role are an insufficient basis for refusal to implement the constitutionally mandated prohibition of naked preferences. Such an approach would, in these and other respects, expand considerably on the very tentative efforts of current doctrine to ensure that the relevant values are genuinely public[131] by creating procedural and substantive devices designed to diminish the risk that government decisions result from the pressures produced by preexisting private interests.[132]

These attacks also call into serious question the coherence of the modern understanding of what the equal protection clause is aimed at, or at least the adequacy of modern devices used to implement the clause. But for purposes of the present discussion, it is not necessary to evaluate these attacks in detail. The critical point here is that equal protection doctrine encompasses weak and strong versions of the prohibition of naked preferences. That evil is very close to the core concerns of the dormant commerce and privileges and immunities clauses. The various attacks grow out of per-

128. See, e.g., Parker, The Past of Constitutional Theory—And Its Future, 42 Ohio St. L.J. 223 (1981); Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 561, 602-16 (1983); see also The Bias of Pluralism (W. Connolly ed. 1969) (positive and normative attack on pluralism); T. Spragens, supra note 24 (same).

129. See Unger, supra note 128, at 607.

130. Id. at 607-15.

131. See supra note 48 and accompanying text.

132. Such developments would parallel recent trends in administrative law. See Sunstein, Deregulation and the Hard-Look Doctrine, 1983 Sup. Ct. Rev. 177.

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ceptions that the evil is not an evil at all, or on the contrary that the Court ought to enforce the prohibition much more vigorously.

D. *Due Process Clause*

Similar considerations apply to constitutional tests for rationality under the due process clause. Because of the substantial identity of the standards under this clause and the equal protection clause, a brief discussion should suffice.

The notion that legislation is unconstitutional if it represents a naked decision to distribute resources to one group rather than to another came through most clearly in the *Lochner* era. In *Mugler v. Kansas*,[133] for example, the Court noted that the test is whether "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety" has a "real or substantial relation to these objects"[134]—the same question the Court now asks under the equal protection clause.

There are, however, several differences between the two clauses. The first relates to what falls within the category of public values. Here the *Lochner* case is itself the best illustration. The statute at issue there prohibited employment in a bakery for more than sixty hours per week or ten hours per day. The question whether the measure fell within the "police power," as understood by the Court, translated into the question whether it involved "the safety, health, morals, and general welfare of the public."[135] In *Lochner*, the Court held that no public value was served. "It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees . . . in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employees."[136] The same position can be found in many cases.[137]

In this respect, the *Lochner* Court regarded redistribution on an ad hoc basis as an essentially private taking from one person to another, a measure based on raw political power or on the intrinsic desirability of treating the benefited better than the burdened group. A now familiar problem with the *Lochner* reasoning is its perception of the market status quo as natural or preexisting—not as a matter of conscious choice.[138] It was as if the Court did not "see" certain values, generally including redistribution, as legitimate public ends. For this reason, in part, an effort to regulate the hours of labor was considered an impermissible taking from *A* in order to benefit *B*.

133. 123 U.S. 623 (1887).

134. Id. at 661.

135. Lochner v. New York, 198 U.S. 45, 53 (1905).

136. Id. at 64.

137. See, e.g., Adkins v. Children's Hosp., 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

138. See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1746–51 (1976).

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The decline of the *Lochner* era represented a dramatic broadening of the category of public values. This was brought about by an understanding of how the operation of the private sector is dependent on public choices. Once it became clear that harms produced by the marketplace were also the products of public choices, efforts to alleviate those harms came to be regarded as permissible exercises of government power.

In the post-*Lochner* era, a wide range of justifications count as exercises of the police power and are not treated as naked wealth transfers. The police power is properly used to safeguard the interests of groups or subgroups of workers, of consumers, of the victims of discrimination. There has thus been a shift from the strong to the weak version of the prohibition of naked preferences. One consequence of this development has been to make the line between naked preference and public value quite thin in practice, as we saw earlier in connection with the weak version of the basic prohibition. If protection of the class of statutory beneficiaries is itself seen as a public value, many exercises of raw political power—even if in the service of faction—become automatically justifiable. Current law reflects such perceptions.[139]

The second difference relates to the nature of judicial scrutiny of the state's justifications. In the *Lochner* era, the Court did not merely limit the permissible ends of government, but also demanded a fairly close fit between those ends and enactments attacked as naked wealth transfers.[140] Again, the best example is *Lochner* itself, where the Court found an insufficient connection between protection of the health of bakers and maximum hour legislation. There is no question that the connection would pass modern scrutiny under the rationality test: a legislative judgment that there is a connection between health impairment and workdays of more than ten hours is surely a rational one. Thus, with respect to means-ends scrutiny as well, the *Lochner* era reflected a highly intrusive version of the prohibition of naked preferences. The expansion in legitimate ends under current doctrine has been accompanied by a relaxation in the required means-ends connection, resulting in an extremely weak version of the basic prohibition.

Modern due process doctrine contains at least one holdover from the *Lochner* era. When government action places an undue burden on a fundamental right—most prominently, the right to "privacy"[141]—the action is unconstitutional. In this respect, modern doctrine under the due process clause has gone beyond the weak version of the prohibition of naked preferences. A fundamental right operates as a barrier to government action even if no naked preference is at work. An action may have been properly motivated—in the sense that something other than an exercise of raw political power generated it—but nonetheless be invalid because it invades the realm of personal autonomy.

139. See, e.g., United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); City of New Orleans v. Dukes, 427 U.S. 297 (1976).

140. See supra note 137.

141. See supra text accompanying notes 63-64.

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E. *Contract Clause*

The contract clause prohibits states from passing any "Law impairing the Obligation of Contracts."[142] The clause was enacted in response to a perception that contracts were entitled to special protection from government control. In the framers' view, recent history had shown that contractual obligations frequently had been abrogated because of the acquisition of political power by those who had made agreements that later turned out to disadvantage them. This was considered especially true in the context of debtor relief laws.[143] In short, the constitutional concern about the capture of government by faction was a prominent theme behind the contract clause.[144]

For a long period, the clause operated as a significant constraint on government action,[145] but eventually it became clear that the nature and extent of the constraint would depend on whether there was a police power exception to the general prohibition against contractual impairments. In early decisions, the Court held that there was such an exception.[146] If a state was acting pursuant to the police power, it could impair an obligation of contract, and it need not provide the disappointed party with compensation for the impairment. The rationale for the police power limitation was that the contract clause was not intended to interfere with the reserved sovereignty of the state. Surely the clause was not meant to prevent a state from outlawing a contract for murder or for the sale of heroin,[147] even if the impairing law applied retroactively.

Even after the recognition of a police power exception, however, the contract clause remained a significant limitation on state action because the police power was itself highly restricted. At common law, the government's exercise of that power was limited to a few conventional ends—most prominently, protection of its citizens from conduct that was tortious, or the functional equivalent of tortious, at common law.[148] There was no general

142. U.S. Const. art. I, § 10.

143. B. Wright, The Contract Clause of the Constitution 4-5 (1938).

144. See Epstein, Toward a Revitalization of the Contracts Clause, 51 U. Chi. L. Rev. 703 (forthcoming 1984).

145. See G. Gunther, Constitutional Law 554-57 (10th ed. 1980); Hale, The Supreme Court and the Contract Clause (pts. 1-3), 57 Harv. L. Rev. 512, 621, 852 (1944).

146. See Manigault v. Springs, 199 U.S. 473 (1905); Stone v. Mississippi, 101 U.S. 814 (1880).

147. See Manigault v. Springs, 199 U.S. 473, 480 (1905):

> [T]he interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal . . . . This power, which in its various ramifications is known as the police power . . . is paramount to any rights under contracts between individuals.

This result was not inevitable. It would have been possible to provide that such retroactive impairments demanded compensation or equitable relief. But the *Manigault* reading best comports with the intended function of the clause. See Epstein, supra note 144; cf. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (limiting ex post facto clause to criminal cases and thus allowing subsequent impairments of contractual obligations).

148. See E. Freund, The Police Power, Public Policy and Constitutional Rights 4-12

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authority to engage in the wide range of activities of modern government: protecting victims of discrimination, providing pensions and social security benefits, helping consumers from dislocations caused by the market. As under the due process clause, the expansion in the conception of the permissible ends of government rendered the contract clause at best a sporadic limit on government authority. The shift, in short, has been from the strong to the weak version of the prohibition of naked preferences.

The key case in this shift was *Home Building and Loan Association v. Blaisdell.*[149] It involved a Minnesota mortgage moratorium statute that allowed courts to postpone the time for redemption from foreclosure sales for a period of thirty days, with the possibility of a further limited extension. The consequence of the statute was to relieve debtors of their contractual obligations to lenders—precisely the evil at which the contract clause was originally aimed.

The critical step in the *Blaisdell* Court's reasoning was its conclusion that the state's control over private contracts extended not only to remedies, but also to all other authority deemed necessary "to safeguard the vital interests of its people."[150] This "reservation of essential attributes of sovereigu power," the Court said, was to be "read into contracts as a postulate of the legal order."[151] The question as thus conceived was "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."[152] This standard would not allow a state "to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them."[153] But it would permit use of the police power "in directly preventing the immediate and literal enforcement of contractual obligations."[154]

One consequence of *Blaisdell* was to recognize a police power limit built into the contract clause. But that was hardly controversial. The real shift came in the understanding of what the police power allowed, a shift that resulted in a dramatic expansion of the permissible ends of government. When government action was no longer limited to protection against common law torts or analogous conduct, and the state could intervene to

(1904). For a modern effort to reassert this understanding of the police power, see R. Epstein, On Eminent Domain: The Unification of Public and Private Law ch. 8 (1985) (forthcoming) (copy on file at the offices of the Columbia Law Review). Such accounts are vulnerable for the same reasons that underlie the demise of the *Lochner* understanding of the police power: they define the permissible ends of government by reference to the principles of the common law.

149. 290 U.S. 398 (1934).

150. Id. at 434.

151. Id. at 435.

152. Id. at 438.

153. Id. at 439.

154. Id. at 440. The Court was aware that its interpretation of the clause differed in significant ways from that of the framers. See generally C. Miller, The Supreme Court and the Uses of History 39-51 (1969) (discussing *Blaisdell* Court's treatment of historical evidence).

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protect, for example, tenants as a class or subgroups thereof, the police power limitation threatened to engulf the contract clause—a classic case of an exception expanding to eliminate the rule. If the contract clause were aimed at naked preferences, and if the police power were broadened to include as public values a wide range of regulatory measures, the prohibition of naked preference would come in its weakest form. As we have seen, such a weak version is almost no prohibition at all.

The *Blaisdell* Court did not go that far. It was still necessary to show that there was some connection between the asserted police power goal and the challenged exercise of authority. The function of this means-ends scrutiny, here as elsewhere, is to ensure that the government has not abrogated a contract merely to distribute resources or opportunities to one set of persons rather than another. The requirement of showing a public value and a connection between that value and the measure at issue is designed to filter out such discriminatory government action.

It is in this general sense that modern contract clause doctrine remains faithful to the original intent underlying the clause. Abrogations of private contracts must not result from a naked preference for one person or group over another, but must arise from an effort to promote a public value. The "requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests."[155] This basic understanding is reflected in two recent developments in contract clause doctrine. The first is a mild resuscitation of the constitutional prohibition; the second is a revitalization of that prohibition when a state abrogates contracts to which it is a party.

The mild resuscitation of the contract clause occurred in *Allied Structural Steel Co. v. Spannaus*,[156] which involved a Minnesota statute that imposed a "pension funding charge" if a private employer terminated a pension plan or closed a Minnesota office.[157] The Court invalidated the statute on the ground that it was a "substantial impairment of a contractual relationship"[158] justifying "a careful examination of the nature and purpose of the state legislation."[159] The statute had "an extremely narrow focus,"[160] applying to only a few private employers. It did not, in short,

155. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412 (1983) (footnote omitted).

156. 438 U.S. 234 (1978).

157. See id. at 236-38. The charge was imposed if the employer's pension funds did not cover full pensions for all employees who had worked at least ten years. Employers were required to satisfy the deficiency by purchasing deferred annuities payable to employees at their retirement age. The company's own plan allowed for amendment or termination of the pension plan at any time. Because the Minnesota statute required the plaintiff to fulfill pension obligations far beyond those to which it had voluntarily agreed, the effect of the statute on the plaintiff was quite severe.

158. Id. at 244 (footnote omitted).

159. Id. at 245.

160. Id. at 248.

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"protect a broad societal interest rather than a narrow class."[161] On these grounds, the Court concluded that the Minnesota provision was unlike the statute upheld in *Blaisdell.*

In *Spannaus*, the Court believed that the narrow application of the statute suggested a peculiar likelihood that it had resulted from interest group pressures operating at the expense of a single company—in short, that a naked preference was involved. A possible response, with which the Court did not attempt to deal, would be that the state's protection of unjustly disappointed expectations—by requiring vesting of the pension rights—should now be treated as a classic exercise of the police power. But apparently in the Court's view, something else was behind the legislation in *Spannaus.*

Some of these points were elaborated in two recent cases that permitted states to abrogate contractual provisions allowing companies to pass on certain price increases to consumers.[162] According to the Court, the effort to relieve consumers from the dislocations caused by increased prices was a legitimate public purpose sufficient to justify the abrogation.[163] Like the rationality cases under the due process and equal protection clauses, these two cases reveal that when the permissible ends of government are expanded to include a wide range of redistributive measures, the constraint on government action is sharply curtailed. Indeed, in both cases protection of the class of statutory beneficiaries was itself taken as a public value—a notion that, as we saw in discussing the weak version of the prohibition, threatens the distinction between naked preferences and public values, at least for practical purposes.

It is not accurate, however, to say that under these recent cases the constraint imposed by the contract clause disappears altogether. First, decisions based on raw political power are still prohibited—even though the implementing devices designed to filter out such decisions are extremely deferential. Protection of consumers was considered a public value not because a factional takeover is permissible, but because the Court agreed that in the circumstances there was nothing illegitimate about an effort to pro-

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161. Id. at 249 (footnote omitted).

162. Exxon Corp. v. Eagerton, 103 S. Ct. 2296 (1983); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983). In *Energy Reserves*, the Court upheld a statute prohibiting a state from enforcing a contractual provision allowing escalation of prices if the federal government fixed a price for natural gas higher than the price specified in the contract. According to the Court, the police power includes the authority "to protect consumers from the escalation of natural gas prices caused by deregulation." 459 U.S. at 417. *Exxon* involved a state statute prohibiting producers of oil and gas from passing on to consumers the costs of an increase in the state's severance tax. The Court held that the contract clause did not bar "a generally applicable rule of conduct designed to advance 'a broad social interest'." 103 S. Ct. at 2306 (footnote omitted). This holding is reminiscent of the requirement of discriminatory intent under the equal protection clause: when an enactment is not directed by its terms at an existing contract, but abrogates it as part of a more general function, there is less basis for suspicion that a naked preference is at work.

163. See supra note 162.

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tect consumers from the dislocations caused by deregulation. Moreover, the prohibition of naked preferences is still implemented by an examination of the connection between means and legitimate ends.

Under the contract clause, heightened scrutiny is applied to the narrow range of cases that fall within the rule of *United States Trust Co. v. New Jersey*,[164] which held that more stringent review is appropriate when a state abrogates a contract to which it is a party.[165] The underlying notion is that when a state's self-interest is at stake, its motives are less likely to be trustworthy and there is a correspondingly greater likelihood that no public value is being served.[166] Although the scrutiny may be somewhat more deferential, this is the contract clause analogue to the heightened scrutiny applied in the dormant commerce clause cases involving discriminatory effects and in the equal protection clause cases involving suspect classes. In the contract clause context, as elsewhere, heightened scrutiny takes the form of demanding a close fit between statutory means and ends and a showing that less restrictive alternatives are unavailable.

The contract clause cases are thus another example of an area in which the weak version of the prohibition of naked preferences provides little barrier to government action in most cases. There is no normative theory to constrain the category of public values; developments like those associated with both the *Lochner* era and heightened scrutiny under the equal protection clause have not occurred under the contract clause. Judicial scrutiny, moreover, is highly deferential—in general, identical to what we have seen when the weak version is applied under the equal protection and due process clauses, and open to similar criticisms. Scrutiny is heightened only when there is a particular basis for suspicion about the reasons for government action.

F. *Eminent Domain Clause*

The eminent domain clause prohibits the taking of "private property . . . for public use, without just compensation."[167] In what must be the judicial understatement of the last decade, the Supreme Court has con-

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164. 431 U.S. 1 (1977).

165. In *United States Trust*, the state had abrogated a contract prohibiting it from using bondholders' investments in the Port Authority to pay for mass transportation. The Court concluded that the legitimate police power goal—promoting energy conservation through mass transportation—could be accomplished through means that did not abrogate the contract, including alternative strategies for promoting the use of mass transportation.

166. This notion is questionable. As an historical matter, it is doubtful that the contract clause was intended to apply at all to contracts to which a state is a party. Moreover, a state's interests are not as unilateral as the Court suggests; the mechanisms of political representation serve as a check on abrogation. Finally, the state is not usually understood as a person with interests independent of its citizens. Cf. id. at 33-62 (Brennan, J., dissenting) (challenging heightened scrutiny applied by Court). On the other hand, the likelihood of overreaching may be greater in the *United States Trust* context. See Note, A Process-Oriented Approach to the Contract Clause, 89 Yale L.J. 1623 (1980).

167. U.S. Const. amend. V.

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fessed its inability "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[168] It will be sufficient here to show some of the reasons for the current morass, reasons that require revisiting many of the themes appearing under the due process and contract clauses. In particular, two aspects of eminent domain doctrine are centrally concerned with the prohibition of naked preferences: eminent domain doctrine requires that a taking be for a "public use," and it draws a distinction between an impermissible taking and a legitimate exercise of the police power.

A principal theme of the eminent domain clause cases is that government action cannot be used to serve purely private ends. Taking property from *A* in order to benefit *B* is the core example. The text of the clause attests to this theme in the basic requirement that a "public use" be shown before a taking is permitted, even with compensation. The function of this requirement is to prevent purely private wealth transfers—that is, naked preferences.

For a long period, the public use requirement was understood to mean that if property was to be taken, it was necessary that it be used by the public. That the new use was in some sense beneficial to the public was insufficient.[169] Eventually, however, it became clear that this test was unduly mechanical, for a wide range of uses by government served the public at large, even if the public did not actually have access to the property. The Mill Acts, which permitted riparian owners to erect and maintain mills on neighboring property, provided an example.[170] After the courts upheld those acts, exceptions were built into the general rule until the general rule itself was abandoned.[171]

This change in the public use requirement is the eminent domain analogue of the expansion in permissible government ends that followed the *Lochner* era. At about the same time, courts began to recognize that a range of state regulatory activities going well beyond actual use by the public or even the common law understanding of the police power were for "public use"—justifiable by reference to some public value—and not naked prefer-

168. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). Many commentators have explored the underpinnings of current doctrine. See, e.g., B. Ackerman, Private Property and the Constitution (1977); R. Epstein, supra note 148; Dunham, Griggs v. Alleghany County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 63; Epstein, Not Deference, But Doctrine: The Eminent Domain Clause, 1982 Sup. Ct. Rev. 351; Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964).

169. See generally Dunham, supra note 168, at 65-71 (recounting demise of public use doctrine); Note, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L.J. 599, 614 (1949) (arguing for "permanant interment" of public use doctrine).

170. See Note, supra note 169, at 604-05.

171. Id.

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ences at all. After *Berman v. Parker*[172] and *United States ex rel. TVA v. Welch*,[173] the public use requirement is met by standards that conform to the weak version of the prohibition of naked preferences. Indeed, the test is even more deferential than the rationality requirements of the due process and equal protection clauses, for the legislative judgment on the point is accepted as nearly conclusive.[174]

Analogous considerations apply to the distinction, critical to current eminent domain doctrine, between permissible exercises of the police power and impermissible takings. For many years, of course, that distinction has been the key to separating "takings" from "regulation." The point is illustrated by *Pennsylvania Coal Co. v. Mahon*.[175] The statute at issue there forbade the mining of coal if the mining would cause subsidence of any place used for human habitation. In its discussion of the police power, the Court indicated that the statute would be plainly unconstitutional if it amounted to a wealth transfer from the coal company to the homeowner for the homeowner's private benefit.[176] In *Miller v. Schoene*,[177] the Court upheld a statute requiring the destruction of cedar trees that were host to a communicable plant disease on the ground that destruction was necessary to protect against the infection of surrounding apple orchards, which were vital to the state economy.[178] If that statute could be shown to have conferred a general benefit—if, in short, the police power requirements were met—the statute would not be understood as reflecting a naked preference.

Miller in one sense reflects a familiar point. At least in the absence of a physical taking, if a statute falls within the police power there is generally no violation of the takings clause, even if no compensation is paid.[179] In another sense, however, the decision went far beyond this conventional understanding. In *Miller*, those whose cedar trees had been destroyed may not have been committing a public nuisance at common law. But the Court responded that if the government had failed to act,

> [i]t would have been none the less a choice. . . . When forced to such a choice the state does not exceed its constitutional powers by

172. 348 U.S. 26 (1954).

173. 327 U.S. 546 (1946).

174. See Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321 (1984). In *Midkiff*, the Court unanimously upheld a Hawaii land reform statute that transferred title in real property from lessors to lessees in order to reduce the concentration of land ownership. Relying on Berman v. Parker, 348 U.S. 26 (1954), and other cases, Justice O'Connor's opinion expressed an extremely deferential public use standard. See 104 S. Ct. 2328-31.

The Court's understanding of the police power as a prohibition of naked preferences renders the public use requirement superfluous. There is, however, considerable awkwardness in assimilating, as the Court has, the public use and police power principles of the eminent domain clause. For discussion, see Epstein, supra note 144.

175. 260 U.S. 393 (1922).

176. Id. at 415-16.

177. 276 U.S. 272 (1928).

178. Id. at 279-80.

179. See, e.g., Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82-85 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-28 (1978).

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> deciding upon the destruction of one class of property in order to save another . . . for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other.[180]

The *Miller* Court's statement reflects a point made earlier in connection with the due process clause: the new conception of the market status quo as neither natural nor inviolate led the way after the *Lochner* era toward a dramatically expanded understanding of the police power. This development led to a weak version of the prohibition of naked preferences. Indeed, the seeds of a destruction of the eminent domain clause may lie within the *Miller* Court's statement. If government inaction can be understood as government action—if a decision not to act is understood as an intrusion in the same way as "affirmative" regulation—then the traditional notion of private property as natural and prepolitical loses much of its coherence.[181]

This perception accounts, at least in large part, for the existing doctrinal disarray. The requirement that a taking be for a public purpose has been eroded by an understanding that almost all government action, even that which transfers property from *A* to *B*, can be responsive to some public purpose. This requirement is the eminent domain analogue to the rationality requirement of the due process clause; and for the same reasons that apply there, both requirements are nearly always met. When "some public program adjust[s] the benefits and burdens of economic life to promote the common good,"[182] a taking will less readily be found.

The Court has not, of course, altogether abandoned the constraint imposed on government action by the eminent domain clause. Indeed, there is a core of prohibited action that is more sharply defined than anything under the contract or due process clauses. If the state physically invades a person's property and transfers it to another, compensation is required even if a public use can be shown.[183] This requirement is best understood as a rights constraint, for the government's motivation is irrelevant. In this respect, the eminent domain clause is not merely a prohibition of naked preferences. The Court has required compensation even in cases of unobjectionable government motivation.

Perhaps this phenomenon can be attributed to a less ambiguous text. Perhaps, too, it derives from the availability of the compensation requirement, a route by which government can achieve its purposes even if the constitutional requirements for a "taking" have been met. Indeed, the requirement of compensation can be understood as rough insurance that a

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180. 276 U.S. at 279.

181. Cf. Michelman, Property as a Constitutional Right, 38 Wash. & Lee L. Rev. 1097 (1981) (discussing changing conceptions of property).

182. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

183. This physical-takings constraint does not, however, perfectly capture the core of prohibited action under the eminent domain clause. See Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82-85 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 172-80 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-28 (1978).

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public value is at stake. If government is willing to compensate the victim, there is some reason to believe that a public value is in fact being served. Public willingness to pay suggests that the measure in question is unlikely to be a naked preference for one person at the expense of another.[184]

III. The Prohibition of Naked Preferences Revisited

Part II of this Article has shown that a number of constitutional provisions, as currently interpreted, are aimed at a similar evil. The privileges and immunities and dormant commerce clauses prohibit government from treating in-staters better than out-of-staters, a prohibition based on a perception that a naked preference is especially likely to occur when political representation is absent. The equal protection and due process clauses generalize this theme into an across-the-board prohibition of certain kinds of government action. The contract and eminent domain clauses apply the same prohibition to the particular areas of contracts and private property.

Because of the dramatic broadening in the category of permissible ends that followed the *Lochner* era, the content of the contract and eminent domain clauses, as well as of the due process clause, has been sharply restricted. The shift has been from the strong to the weak version of the basic prohibition as government has been permitted to implement, as public values, a wide range of redistributive measures. The prohibition is thus rarely a basis for judicial invalidation under those clauses—perhaps because of separation-of-powers concerns, perhaps because of a tacit belief that naked preferences frequently occur in modern legislation and ought not to be too readily subject to judicial invalidation. The results have changed dramatically over time, but the basic framework and the conception of the evil prohibited by the various clauses has remained the same.

Current doctrine reflects significant overlaps in the implementing devices designed to filter out naked preferences. Under all six clauses, heightened scrutiny is applied when there is reason to suppose that a naked preference is at work. In the equal protection context, heightened scrutiny is triggered when there is facial discrimination against blacks or other groups whose interests are believed inadequately served by the political process. Facial discrimination against out-of-staters is treated the same way under the privileges and immunities and dormant commerce clauses. Under the contract clause, abrogation by a state of contracts to which it is a party receives similar treatment.

We are now in a position to examine the ways in which the basic prohibition of naked preferences varies under the several clauses. Under the due process, contract, and eminent domain clauses, the Court has generally adopted the prohibition in close to its weakest form. Raw political power is

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184. See L. Tribe, American Constitutional Law §§ 9-2, 9-4, at 458, 463-65 (1978). As discussed earlier, however, modern contract clause doctrine has generally rested on a perception that compensation, while perhaps a sufficient condition for concluding that a public value is at work, is hardly a necessary condition.

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not a legitimate basis for government action, but no other normative theory limits the ends that the government may pursue. For practical purposes, the line between public value and naked preference is quite thin, since attempts to protect particular groups are usually justifiable as responsive to some public value. Heightened scrutiny is applied under the contract clause only when a state abrogates a contract to which it is a party. A rights constraint, invalidating even well-motivated government decisions, appears only in a narrow category of cases under the due process clause and in cases of physical invasion under the eminent domain clause.

The dormant commerce and privileges and immunities clauses reflect a somewhat different structure. Here, too, no normative theory beyond the weak version of the prohibition operates to limit the permissible ends of government; and there is no rights constraint under these clauses. But heightened scrutiny is applied more readily. Under both clauses, there is a per se rule or strong presumption of invalidity in cases of facial discrimination against out-of-staters. Under the dormant commerce clause, the existence of discriminatory effects on out-of-staters triggers close examination of the means-ends connection and investigation of whether there are less restrictive alternatives. These two clauses thus embody a version of the prohibition with no theory of impermissible ends beyond the prohibition of naked preferences for in-staters, but with ready resort to heightened scrutiny to ensure that the state has not violated the prohibition.

The equal protection clause has the most complex structure of all. As under the due process clause, rationality review reflects the weak version of the prohibition. In addition, as under the due process clause, there is a rights constraint on government action, though the category of rights is somewhat different.[185] Finally, facial discrimination against members of racial minority groups triggers a strong presumption of invalidity.

But modern equal protection doctrine also reflects a normative theory that prohibits discrimination against women, aliens, and illegitimates, even in cases in which the weak version of the prohibition of naked preferences has not been violated. In part, these results are responsive to the perceived powerlessness of the various groups and to a resulting fear that a naked preference is at work. The cases go further than this, however. Perhaps the Court's normative theory can be attributed to changing social perceptions of the role and status of such groups; perhaps it can be attributed to a perception that the relevant values in fact reflect existing relations of power; perhaps it can be justified on independent grounds. But there is no doubt that it assimilates several forms of discrimination to the prohibition of naked preferences, adopting a normative theory that identifies certain government ends as impermissible.

An important question raised by these developments involves the reasons for the shift from a strong to a weak version of the basic prohibition and—under several clauses—the more recent shift to a different kind of

185. Compare supra note 122 (equal protection) with supra note 63 (due process).

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strong version. The due process, eminent domain, and contract clauses in particular reflect an almost identical shift from a *Lochner*-like conception of impermissible government ends to modern rationality review.

A central reason for the shift is the declining centrality of private property to modern constitutional adjudication. Under all three clauses, courts have come to see the existing distribution of entitlements and wealth not as inviolate, but as the result of conscious choice by government. The very decision to allow the existing distribution to stand is a choice requiring justification.[186] As a result, efforts to alter that distribution in favor of an alternative one do not appear to be naked wealth transfers, but legitimate efforts to promote the public good.

The abandonment of private property as a touchstone for judicial inquiry has left something of a vacuum in constitutional adjudication. Under the contract, eminent domain, and due process clauses, private property served an important ordering function. The *Lochner* era decisions under the due process clause, and similar decisions under the contract and eminent domain clauses, illustrate the point. There, a large category of legislative ends, usually including the redistribution of wealth or entitlements, were not treated as public values. In the modern era, the vacuum left by the decline of private property has been filled only by a crudely conceived right of "privacy" developed under the due process clause.

A strong version of the prohibition has reemerged in recent years, primarily under the equal protection clause. That strong version substitutes for the touchstone of property a new conception based on an amalgam of three principal features: a theory of impermissible motivations for treating one group differently from another; a rough guess about the groups that are likely to be mistreated in the pluralist process; and (occasionally) an effort to inspect the legislative and administrative process in order to ensure that the relevant values are genuinely public, in the sense that they are the product of broad deliberation rather than interest-group struggle.

All of these elements amount to an attack on the premises of interest-group pluralism. The last one in particular embodies a perception that, even if the political process is open and available to all, particular exercises of government power should be inspected to ensure that a public value, defined in both procedural and substantive terms, is at work. In this respect, the rise of equal protection scrntiny may be understood as compatible not with the *Lochner* era itself, but with the subsequent understanding, reflected in *West Coast Hotel v. Parrish*,[187] that the existing social order should not be regarded as natural but as the product of public choices and should therefore be subjected to critical scrutiny. Such an understanding holds out the promise (or threat) of a highly intrusive judicial posture. But whether the various developments discussed in this Article will coalesce into a coher-

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186. See Ackerman, On Getting What We Don't Deserve, 1 Soc. Phil. & Pol'y 60 (1983); supra text accompanying note 138.

187. 300 U.S. 379 (1937).

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ent substitute for the property-based rationale of previous constitutional doctrines remains to be seen.

CONCLUSION

Many of the provisions of the Constitution are aimed at a single evil: the distribution of resources to one person or group rather than another on the sole ground that those benefited have exercised the raw political power needed to obtain government assistance. This conception of the evil prohibited by the Constitution has manifested itself in the weak and strong versions of the prohibition of naked preferences, which together account for much of modern constitutional doctrine. Both versions of the prohibition are in dramatic contrast with modern pluralist theory, which suggests that the political process is precisely this sort of unprincipled warfare for scarce social resources.[188] Under all of the clauses examined in Part II, such warfare is constitutionally impermissible. To be sure, the prohibition does not always result in invalidation. But the cases are strikingly unanimous in their vision of the prohibited end. In this respect, they reflect a sharp critique of interest-group pluralism, rather than an attempt to improve it through ensuring the representation of all private interests.

To say that various constitutional provisions are targeted at the same basic evil is not to deny that considerable work needs to be done in order to understand and filter out the naked preferences that these provisions prohibit. The prohibition has been applied to both the state and federal governments; perhaps the institutional differences between the two justify different forms of judicial scrutiny. There is evidence that state governments are peculiarly susceptible to capture by groups bent on distributing wealth or opportunities in their own favor.[189] On the other hand, the consequence of any such capture is far more severe in the federal system, since "exit" is not a realistic option in that context. And it may be that the civic virtue associated with the republican tradition is most likely to be found and promoted in relatively small communities. Theories involving federalism or other forms of decentralization may therefore play a significant role in the evaluation and development of the prohibition of naked preferences.

Moreover, the basic prohibition may seem puzzling in light of the general perception[190] that legislation is frequently the result of an unprincipled struggle for power. It would be most useful to develop an understanding of the functions, good and bad, served by the courts' simultaneous insistence that naked preferences are prohibited and that they rarely occur. Such an understanding might offer the basis for an evaluation of the powerful attacks that have been made on review of statutes for "rationality" under the

188. See supra note 25.

189. See R. Posner, The Crisis of the Federal Courts 237 (1985) (forthcoming) (copy on file at the offices of the Columbia Law Review).

190. See supra note 24.

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due process and equal protection clauses.[191]

A strong theory of limitations on government must also have a well-developed conception of impermissible ends. Such a theory would rule out certain ends despite the fact that they do not violate the weak version of the prohibition of naked preferences. Under both the due process and equal protection clauses, and sometimes under the contract and eminent domain clauses as well, the weak version of the prohibition has been supplemented by theories of impermissible government ends. Judicial creation of such theories is highly controversial, especially when they shift over time or can be tied only with difficulty to the text and intended function of the relevant clauses. Important tasks thus remain in developing both a coherent theory of the judicial role and, under all of the clauses discussed here, a substantive theory to buttress the weak version of the prohibition.

A vigorous theory must also develop devices, exemplified by modern means-ends scrutiny, to filter out naked preferences, whether weakly or strongly defined, and must establish when heightened scrutiny is appropriate under all of the relevant clauses. As we have seen, the prohibition of naked preferences could, if vigorously enforced, serve as the basis for a distinctive conception of the government process and a distinctive judicial role—both with considerable appeal. Such a conception would require the creation of mechanisms to guarantee that the values to be served by legislation are genuinely public, in the sense that they are selected through processes designed to ensure that government decisions are the product not of preexisting private interests but of broad and open-ended public deliberation.[192] Such an approach, attempting to promote discussion and debate rather than Hobbesian warfare, would be rooted in a perception that some values may represent ideology—the result of private power—and thus may not be truly "public" at all.[193] Generalizing from the decline of *Lochner* and associated conceptions of private property, the effort would be to subject existing social practices and relations to public scrutiny and review.[194] In its most ambitious form, an approach of this sort would require a highly

191. See supra notes 127–41 and accompanying text.

192. Cf. 1 J. Habermas, The Theory of Communicative Action 286-88, 391-93 (1984) (communicative action as basis of social determinations); C. Macpherson, Democratic Theory: Essays in Retrieval (1973) (proposing a form of liberalism without possessive individualism); Unger, supra note 128, at 602 (proposing "superliberalism"). The premise that genuinely public values at least potentially exist is subject to doubt by those who believe that, under current conditions, the result will not be dialogue but domination. See Brest, Interpretation and Interest, 34 Stan. L. Rev. 765 (1982). And the project of discerning such values is of course especially vexing in a large, industrialized polyarchy consisting of groups with competing interests. See J. Mansbridge, supra note 13, at 293–98.

193. See Mashaw, Constitutional Deregulation: Notes Toward a Public, Public Law, 54 Tulane L. Rev. 849, 866-76 (1980); Michelman, Politics and Values or What's Really Wrong with Rationality Review, 13 Creighton L. Rev. 487 (1979).

194. See R. Unger, Passion: An Essay on Personality 7–15 (1984) (describing "modernist view" that mental and social life depend on institutional and imaginative assumptions that should be subject to critical scrutiny).

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intrusive judicial role, though it may be doubted to what extent courts would be able to perform the relevant tasks.

However these issues are resolved, the constitutional prohibition of naked preferences serves to unite the dormant commerce, privileges and immunities, equal protection, due process, contract, and eminent domain clauses. All of these clauses have been interpreted to require a particular form of representation, one in which legislators do not respond solely to interest-group pressures, but instead attempt to discern public values. Similar themes appear under other individual rights provisions of the Constitution as well. The principles governing regulation of speech,[195] for example, are based largely on faith in the relationship between public dialogue and the processes of self-governance and an associated belief that free expression is an indispensable means of ensuring the emergence of public values. Due process rights to notice and an opportunity to be heard are intended to ensure that government may not impose harms without justifying its action by reference to a legitimate goal.[196] Indeed, we have seen that there is good reason to believe that not only the individual rights provisions, but also the structural provisions of the Constitution, are aimed at this core evil.[197]

To be sure, many constitutional provisions, including those discussed here, are occasionally aimed at government action other than naked preferences. But the basic theme cuts across a surprisingly wide variety of clauses. It is for this reason that the prohibition of naked preferences serves as the most promising candidate for a unitary theory of the Constitution.

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195. See supra note 2. The most obvious illustration is the difference in the nature of the scrutiny applied to discriminatory and nondiscriminatory legislation. Legislation discriminating on the basis of the content of speech is subject to almost automatic invalidation. See, e.g., Carey v. Brown, 447 U.S. 455 (1980); Police Dep't v. Mosley, 408 U.S. 92 (1972). Content-neutral restrictions on speech are treated far more sympathetically. See, e.g., United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981). Similar distinctions appear under the religion clauses. See Larson v. Valente, 456 U.S. 228 (1982); Widmar v. Vincent, 454 U.S. 263 (1981).

196. Michelman, Formal and Associational Aims in Procedural Due Process, *in* Nomos XVIII: Due Process (J. Pennock & J. Chapman eds. 1977); Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193 (1982).

197. See supra notes 18-20 and accompanying text. A recent example is INS v. Chadha, 103 S. Ct. 2764 (1983) (invalidating legislative veto, in part on ground that evasion of bicameralism and presentment requirements increases risk of capture by faction).

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