MARKET RIGHTS AND THE RULE OF LAW: A CASE FOR PROCEDURAL CONSTITUTIONALISM

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I. INTRODUCTION

It is widely believed that a commitment to the rule of law is neutral among theories of rights. On the prevailing view, the classical liberal idea that market rights ought to be protected under the rule of law reflects a contingent substantive belief about which rights there are, rather than a more intimate relationship between the rule of law and market rights. Thus, Joseph Raz writes that "the rule of law . . . can hardly be used to oppose in principle governmental management of the economy," as long as such management may "increase freedom" understood as "power of action."[1] By "market rights," I mean the

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1. *See* JOSEPH RAZ, THE AUTHORITY OF LAW 220 & n.9 (1979). Insofar as Raz admits

rights to self-ownership, to exclude others from the use of certain external things, and to voluntarily exchange such things. Acknowledgement that individuals have welfare rights (*i.e.,* rights to a minimum provision of welfare goods, such as health care) in addition to, or perhaps competing with, market rights should lead us, according to the prevailing view, to subject a wider realm of rights to the discipline of the rule of law. I disagree. I will argue that the rule of law requires that market rights be strong enough to exclude legal[2] welfare rights as they are upheld in typical welfare states. I will also argue that an important lesson of my exploration of the conflict between welfare rights and the rule of law is that the way in which liberal constitutionalism has addressed the protection of core rights and liberties must undergo major revision.

We frequently contrast the rule of law with the rule of men. In his classic work on constitutional law, A.V. Dicey wrote that the rule of law encompasses three ideals: (a) law prevails over arbitrariness and discretionary power, (b) "every man . . . is subject to the ordinary law of the realm and amendable to the jurisdiction or the ordinary tribunals," and (c) "the general principles of the constitution (as, for example, the right to liberty, or the right of public meeting) are [. . .] the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts," rather than the result of legislation.[3] Only the ideal that law prevails over arbitrariness is close to the understanding of the rule of law that I shall adopt in this article. Dicey's ideal that no one is exempt from the duty to obey the law and to be subject to prosecution under the law requires equal treatment or non-discrimination, and is incorporated into the Fourteenth Amendment of the American Constitution. In my restrictive sense of the "rule of law," this can coexist with forms of discrimination or exemptions condemned by the Equal Protection Clause. Thus, if public officials are legally bound to apply laws involving gender discrimination, but lack discretionary powers to decide the form and scope of such measures, then their behavior is, in my sense, subject to the rule of law, even if those laws offend the

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that "power of action" necessitates general, open, and stable rules (which, as we will see, are essential to the rule of law), he must be thinking that some curtailments of classical liberal rights involved in governmental management of the economy are consistent with, and perhaps necessitated by, the rule of law.

2. I shall henceforth refer to legal rights (duties, etc.) simply as "rights" (duties, etc.), save in a few occasions where adding "legal" seems to me advisable on grounds of emphasis or clarity.

3. *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 183-91 (10th ed. 1915).

Equal Protection Clause. This shows that violations of the Equal Protection Clause that are consistent with my understanding of the rule of law may be grossly objectionable.[4] For this reason, the rule of law, as I explain it in this article, is not sufficient for a legitimate polity. Whether the rule of law is *necessary* for a legitimate polity will turn on a theory of the trade-offs between the rule of law and other ideals of political morality. I shall not take sides in this issue, except to say that the rule of law is important enough to concern anyone whose theory of rights requires breaching it: we attach value to the fact that men are subject to legal rules rather than to other men.[5]

The rule of law is usually understood as requiring that even rule-makers be subject to legal rules. Indeed, the ideal of a government bound by law has been central in the rhetoric of the rule of law.[6] I shall not address the more general question of whether things other than law can limit discretionary power, but two possibilities deserve brief mention. First, a benevolent despot can be said to be limited by moral rules that he has internalized to the point that he cannot (*i.e.*, without being sanctioned by his moral consciousness) impose his will on others. My concern is with the types of rights that the law should contain if the rule of *law* is to prevail, rather than with the general conditions on which not being dominated by others' discretionary will depends.[7] Theories of legal interpretation holding that moral considerations inform the very concept of law complicate this picture and I shall consider Ronald Dworkin's views in this regard in Part IV. The second possibility is that government is limited *de facto* by social forces that threaten revolution should government exercise its powers in certain ways. Thus, rational choice theorists explain political stability as the result of the strongest social forces acquiescing in a government, provided that it does not overstep certain limits.[8] My focus will be on legal not social limits to power.

Formulas such as "government subject to law" and "government bound by law" threaten tautological vacuity if they allow us to say

4. In Part IV, I consider, and reject, Ronald Dworkin's attempt to derive (what I would call) the rule of law from legal "integrity," which is closely related to equal protection.

5. Phillip Pettit calls the ideal that I have in mind here "non-domination." *See* PHILLIP PETTIT, REPUBLICANISM. A THEORY OF FREEDOM AND GOVERNMENT 51-109 (1997). My use of "rule of law" resembles some conceptions of liberty that oppose it to slavery. *See* QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 86-99 (1998).

6. *See, e.g.*, F.A. HAYEK, THE ROAD TO SERFDOM 54 (1944); F.A. HAYEK, THE CONSTITUTION OF LIBERTY 153-54 (1960).

7. This latter concern is the central topic in PETTIT, *supra* note 5.

8. *See, e.g.*, RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY (1999).

that any governmental action respects the rule of law to the extent that the law authorizes it. As Joseph Raz points out, this condition is definitionally met by any governmental action as such—*i.e.,* as something different from unlawful actions, or at any rate actions going beyond the agent's governmental capacities.[9] Thus, Raz concisely captures the essence of the rule of law when he argues that: "Government by law and not by men is not a tautology if 'law' means general, open, and relatively stable law."[10] I shall henceforth adopt this non-tautological understanding of the rule of law. Under the rule of law, a "general, open, and relatively stable" constitution binds legislators, and the constitution itself can be amended only by its own procedural rules.

The rule of law excludes *discretionary power—i.e.,* power that is exercised at will on others, without regard to their subjective interests. This follows from the fact that the rule of law prohibits everyone from issuing (in a sense that requires no foundation on general rules) opaque or changing rules for others, which rules are instrumental to imposing our will on others.[11] I use the term "discretionary" instead of "arbitrary" to underscore the objective nature of power that is incompatible with the rule of law. Sometimes "arbitrary power" is meant to indicate a certain type of objectionable motivation behind lawmaking (for example, self-interest). When that is so, arbitrary power can coexist with the rule of law as long as legal rules meet the conditions of generality, openness, and stability. "Discretionary" seems to better capture an essential objective feature of decisions contrary to the rule of law—*i.e.,* their being unbounded by rules.[12] Notice that decisions based upon *reasons*, even reasons other than self-interest, are discretionary (though non-arbitrary, in another, natural sense of this term), provided the agent is at liberty to select such reasons.[13]

We may bring the value of the rule of law into focus by contrasting it with its opposite, the rule of men. Ideas of subjugation to another's arbitrary will, of inequality, of servitude, etc., are naturally associated with discretionary governance by men. Why such things are

9. *See* RAZ, *supra* note 1, at 212.

10. *See* RAZ, *supra* note 1, at 213.

11. *See* PETTIT, *supra* note 5, at 51-79.

12. *See* RAZ, *supra* note 1, at 219-20.

13. *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 138 (1975). A further complication is that the selection of reasons or rules may itself be governed by rules (*e.g.,* moral rules); I touch on this latter issue in Part IV below.

objectionable is, however, a question that I will not endeavor to answer in this essay. Nor shall I explore whether the rule of law can be defended on grounds other than avoidance of such things. For example, some writers argue that the rule of law has a coordination function exemplified, for instance, by traffic rules[14] The primary target of my critique will be those who adhere to the rule of law *because they find discretionary power objectionable* and who also think that the rule of law makes room for welfare rights of the sort that typical welfare states are intent on upholding.

A related caveat is that I will not offer independent arguments against welfare rights. To be sure, welfare rights have been subjected to a variety of objections. Among these are the ideas that market rights have overriding stringency and hence leave no room for welfare rights, that welfare rights spawn economic inefficiency, and, more generally, that rights are illusions that moral thinking should get rid of. Yet, my critique of welfare rights will not rely on those objections or on any other independent reservation about welfare rights. My goal is to criticize the view that there is nothing in the idea of the rule of law that should require specific rights and oppose the view that maintains that the rule of law is hospitable to welfare rights, provided that they are governed by legal rules, as something different from someone's discretionary will.

The article is organized as follows. In Part II, I briefly characterize rights in general, and market and welfare rights in particular. In Part III, I argue that welfare rights are contestable in a way that market rights are not; I further contend that such contestedness renders welfare rights intractable by the rule of law. I also argue that certain procedural rules for political decision-making bring the hope of generating a mutually advantageous system of non-contestable market rights. I then proceed to examine and reject several attempts to overcome the tension between welfare rights and the rule of law. I conclude Part III by arguing that only if typical welfare arrangements are dismantled can all the good things that welfare rights are expected to deliver be brought under the rule of law. In Part IV, I take issue with the idea that the rule of law could incorporate welfare rights if judges adopted an interpretive theory that Dworkin terms as "law as integrity." In Part V, I reply to the objection that my rejection of contestedness involves a highly counterintuitive result—namely,

14. Two recent examples are Larry Alexander and Frederick Shauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359-87, and RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 90-99 (1998).

rejection of the right to freedom of expression and other key rights in classical liberalism. I also qualify my preference for procedural rules: the rule of law, I argue, makes a substantive approach to some basic civil liberties preferable. I reject, in Part VI, the view that people are less dependent on another's discretionary will if they are legally entitled to welfare than if they are relying on private charity. Part VII argues that, to the extent that they require reciprocal noninterference, market rights hold friendly relationships with the rule of law. Finally, Part VIII delimits the scope of my conclusions by giving mention to some tenets that I did not endeavor to defend.

II. SOME CONCEPTUAL ISSUES

To assess the claim that the rule of law is rights-neutral, and in particular, that it is compatible with welfare rights, we need a characterization of rights in general. W.N. Hohfeld famously analyzed the concept of a "right" in terms of claims, powers, liberties, and immunities.[15] On Hohfeld's account, to say that *X* has a right to be paid the price at which she sold something to *Y* is tantamount to saying that *Y* has a duty to pay such a price to *X*. We have here a *claim*-right, the simplest type of right. Hohfeld's account reduces rights ultimately to duties.[16] Thus, powers, liberties, and immunities can respectively be described as abilities to impose duties, lack of duties, and lack of powers.[17] Talk of rights sometimes refers to various bundles of claims, powers, liberties, and immunities.[18] Property rights illustrate a particularly complex and important bundle of rights. For example, *X*'s having full ownership rights over object *O*

15. *See* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (Walter Wheeler Cook, ed., 1919). What follows is a somewhat modified exposition of Hohfeld's views. For a compelling critique of such views, see JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 179-81 (1980). Raz's critique does not affect, however, my use of Hohfeld's analysis in this essay.

16. For detailed discussions of the definitional priority of duties, see RAZ, *supra* note 13, at 156-66 and 181, and JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 39-43, 61-78 (1990).

17. A fuller account is this. A *liberty*-right is a type of right whereby the right-holder is under no duty either to do or to refrain from doing a certain thing. For example, one is at liberty to sit down (or to refrain from sitting down) on an unoccupied park bench. One has a *power*-right when one has the ability to modify a legal situation (*i.e.*, to create or to extinguish others' rights or duties); thus, some public officials have the power to marry people. An *immunity*-right places the right-holder beyond the scope of a power. Thus, the assertion that I have a right to freedom of expression may be analyzed in terms of my having an immunity-right against the power of Congress to pass legislation abridging my freedom of expression.

18. Refined, but basically Hohfeldian, analyses of rights can be found in THOMSON, *supra* note 16, at 37-104, and HILLEL STEINER, AN ESSAY ON RIGHTS 55-85 (1994).

entails that others have a duty not to trespass on *O*, that *X* has an immunity from expropriation of *O* without compensation, that *X* is at liberty to use *O* in ways that are harmless to others, etc.[19] As I understand them here, market rights allow for full ownership rights over anything, but do not require such rights. Nor do they require any specific distribution of whatever bundles of rights. They only require that bundles of rights of use and/or consumption of things, whatever such bundles may be, be transferable. Thus, they are compatible with cooperatives, corporations, partnerships, and other forms of joint ownership, provided that each collective owner may voluntarily transfer his or her collective rights.

Since, as we saw, the Hohfeldian analysis reduces all types of rights to duties, let us concentrate on duties. One common classification that will concern us here is that between positive and negative duties, where positive duties are duties to act, while negative duties are duties to refrain from action. Typically, market rights are correlated with negative duties, unless people become positively duty-bound through voluntary exchanges. Thus, full ownership rights, which are characteristic of market systems, are centrally[20] correlated with others' duties to refrain from using the owner's holdings without his consent. On the other hand, welfare rights seem to have (non-contractual) positive duties as their flip side. However, they are not correlated with legal duties in the straightforward way in which market rights are. *Someone* has to provide *some people* with, say, *basic education*, *health care*, and *decent housing*. When we say, for example, that everyone has a right to decent housing, it is unclear who the duty-bearers are. Is it government, through, say, housing programs? Are they the taxpayers, who will generate the revenue that is needed to build the houses? Is it a certain mix of taxpayers and government? Are they specific governmental agencies in charge of setting the standards for "decent" housing, or of drawing up the housing programs? It is also unclear what the correlative duties are. What performances are involved in discharging a duty to provide someone with a *decent* house? There is a lot of room for controversy

19. *See* A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 1961); LAWRENCE C. BECKER, PROPERTY RIGHTS 18-22 (1977). I expand on the concept of full ownership in Part III.

20. Typical market systems do involve positive duties, such as the duty to pay taxes from which police and courts get the resources needed to enforce negative duties. It remains true, however, that the remaining non-contractual duties enforced by police and courts (*i.e.*, the duties entailed by what I shall call in Part III "the substance" of market rights) are negative in character.

surrounding such questions, and it might be precisely the task of legislation to provide determinate answers to them. In the next two sections, however, I will argue that such indeterminacy cannot be eradicated to the satisfaction of the rule of law.

III. CONTESTABLE RIGHTS AND THE RULE OF LAW

In the free market, the Hohfeldian analysis applies straightforwardly to the physical control of things: that I own an external thing or my body *logically entails* that everyone else is forbidden (negative duty) to use that thing or to injure my body unless I consent to such acts.[21] Holders of market rights confront easily identifiable duty-bearers: everyone else (*i.e.,* non-owners of particular things), or parties to voluntary exchanges. I have suggested in the previous section that welfare rights yield no parallel entailment. Consider what course of action would violate, say, the right to decent housing. It will not do to say that such violations are members of a class of actions that *would* collectively fail to secure decent housing to everyone (*e.g.,* by transfer payments), for there are many, and very different, ways of constructing such a class. Suppose, however, that government has the responsibility to define the class of potential violations of the right. If we were fortunate enough to possess a theory of representation sufficiently specific to select particular officials, we would even be able to identify particular duty-bearers. Legislators, for example, might be held responsible for passing, or failing to pass, certain laws. But this will hardly solve all determinacy problems, for we would still lack knowledge about how the burden is to be allocated among individual taxpayers. Indeed, the questions do not end even there. What *is* a decent house? What counts as *being unable to* secure a decent house for oneself (a usual requirement for welfare recipients in actual welfare states)?

Such questions suggest that welfare rights are contestable in a way that market rights are not. We can draw a distinction between the *concept* of a certain value and its *conception.* The concept of a value—say, equality—expresses the ordinary meaning of the word "equality." This meaning can be conveyed through a lexical definition or through a more formal kind of definition that lists necessary and sufficient conditions for the term's correct use. For instance, a

21. As I said in Part II, the analysis gets more complicated with respect to the powers and immunities possessed by the owner, but "complicated" does not mean "contestable." See *supra* notes 15, 18, and 19 for references to relevant literature.

candidate rendering of the concept of "equality"[22] may zero in on treating people with equal concern and respect.[22] Notice that the concept of a value leaves crucial normative questions open. Consider, for example, the question of how we are to establish whether a political morality expresses *concern* for everyone. Presumably, we do not want to say that it falls short of concern for *X* just because it allows *X* to be jailed if *X* committed a serious crime. We presuppose certain views about the appropriateness of jailing people as a response to their committing serious crimes. Moreover, we presuppose a normative background against which the notion of "serious crime" makes sense. More obviously, determinations of whether one is showing or failing to show *respect* for others presuppose normative views. All of these normative presuppositions fill in the different *conceptions* of equality. Debates about equality are made possible by the opposing sides holding both a shared *concept* of equality and different *conceptions* of equality.[23] These two features are the mark of a value's—in this case, equality's—contestedness.[24]

Armed with the foregoing distinction between concepts and conceptions of a value or ideal, we may now ask ourselves how market rights and welfare rights fare as regards the rule of law. Market rights are Hohfeldian rights; they entail definite duties borne by identifiable individuals—namely, everybody else or parties to

22. Dworkin's distinction between the "concept" or "ideal" of equality and its "forms," "interpretations," "conceptions," or "theories" can be found in Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185, 185-88 (1981), and Ronald Dworkin, *What Is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1, 10-13 (1987).

23. For stylistic reasons, I will sometimes talk of a "contestable conception" of a concept, meaning that it is a conception of a contestable concept. Among the authors who draw the concept/conception distinction are (with reference to justice) JOHN RAWLS, A THEORY OF JUSTICE 5-6 (1971), and (with reference to equality) Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, *supra* note 22, at 185-88.

24. It may be worth observing that this account has no relativistic or skeptical implications. Christine Swanton formulates a compelling critique of "essential" contestedness, which is roughly the view that disputes among rival conceptions of a concept cannot be settled because there is no best conception of the concept, or no warrant for the claim that a certain conception is the best. *See* Christine Swanton, *On the "Essential Contestedness" of Political Concepts*, 95 ETHICS 811-27 (1985). My argument that welfare rights are differentially contestable will not depend on such relativistic or skeptical bases. I only need to assume that (a) there are quite different competing conceptions of welfare rights, and (b) all those conceptions are plausible ones. I do *not* assume that we are at a loss how to argue for or against those conceptions. Thus, my argument is compatible with (though it does not entail) the claim that sometime in the future such disputes will be rationally settled. Notice, also, that in talking of "plausibility" and "rational settlement" of theories of welfare rights we need not commit ourselves to moral realism or objectivism. More on related points can be found *infra* in note 42 and note 66.

voluntary exchanges. Think of the right to life viewed as a market right in the sense here adopted, *i.e.*, as entailed by the right of self-ownership asserted by advocates of free markets. Such a right is quite definite as regards the contents of the correlative duties, and as regards who the duty-bearers are. We straightforwardly connect the right-holders with duties and duty-bearers through Hohfeldian definitions. This is not to say that the expression "a right to life" is absolutely precise, to the point of yielding definite answers to any imaginable question about whether someone has violated that right. But vagueness should not be confused with contestedness. Like any other general term, "a right to life" is vague: whether some particular cases are covered by the concept or not is a question that demands factual and/or normative decisions. For example, consider the question whether *X* killed *Y* in a context where *Y* dies as a result of a heart attack brought about by *X* scaring her with a toy gun. Or, is abortion a violation of a right to life? In questions such as these, normative issues are intertwined with factual ones. What counts as reckless behavior for purposes of holding someone responsible for another's death? How do we ascertain such recklessness? What counts as killing *a person*? And so on.

Nevertheless, we all agree that certain acts *clearly* count as killing a person. And we widely agree on the characterization of the class to which such acts belong (*e.g.*, "intentionally or recklessly causing another's death"), even though we may disagree about whether a relatively small number of cases belong to that class.[25] By contrast, people arguing about contestable conceptions of a concept may hold widely non-overlapping beliefs about what cases *clearly* fall under the concept's reach. Those who share a certain conception of a concept are likely to agree that certain cases clearly instantiate the concept, but this belief need not be shared by those holding a different conception of the same concept. For example, there is wide agreement on what a clear case of (lack of) equality before the law is, and on what a clear case of (lack of) equality of welfare is. Typically, however, supporters of the equality-before-the-law conception of equality and supporters of the equality-of-welfare conception of equality will hold widely non-overlapping beliefs about what cases

25. We should reject the myth that there are rules that can (always) be mechanically applied. Consider a candidate rule for mechanical application: the two witnesses rule. Even such a rule has blurred contours: we have to decide what counts as seeing or hearing enough. I take the example from M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 939-40 (6th ed. 1994).

clearly fall under the concept of equality. (Vagueness will in any event be present, making even adherents to the same conception hesitate about its application to certain cases.[26])

Contestedness differs from nondeducibility. The Constitution might explicitly protect market rights. It might provide that "market rights are inviolable," or that "private property rights are inviolable," or such provisions. Even so, a wide array of legislative possibilities remains open. Consider adverse possession.[27] The usual understanding of market rights makes room for adverse possession, but no specific term for adverse possession is *deducible* from an abstract constitutional guarantee of market rights.[28] Does this mean that market rights are contestable?[29]

I submit that the answer should be negative. There might be considerable variety in the modes of *ascertaining* and *protecting* market rights, but not in their *substance, i.e.,* the spheres of exclusive control over (including voluntary exchange of) external things that market rights generate. The indeterminacy in adverse possession and in the examples mentioned in note 28 does not pertain to the *substance* of market rights. Rather, such indeterminacy stems from differing views about the ways of *ascertaining* or *protecting* such rights. The rights' substance is itself clear and conceptually uncontroversial, although they remain underdetermined as to the ways of officially ascertaining who has them and over what things—as well as to what counts as appropriate punishments or compensations for those violations.

To be sure, such determinations presuppose a legitimate baseline from which voluntary exchanges start. We might then wonder whether the selection of such a baseline is in turn contestable. To the extent that market systems have been working for a long time, this may pose no serious difficulty, for the rules of adverse possession of

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26. I realize that the boundaries between vagueness and contestedness are themselves vague. I tend to think, however, that these boundaries are not in turn *contestable*: it is hard to discern an interesting meaning in the notion of a "preferred conception of contestedness—or vagueness."

27. The acquisition of property rights by openly asserting control over abandoned land.

28. Indeed, nondeducibility pervades abstract market rights. Do voluntary exchanges require written consent, and in what types of contracts? Are witnesses required in the execution of certain contracts, and if so how many? Is theft to be punished by imprisonment rather than fines? How long or how much, respectively, is appropriate? No response to such queries is deducible from abstract market rights (or, for that matter, from abstract proclamations of private property rights).

29. On the possible ways in which the rule of law can accommodate nondeducibility from abstract principles, with especial reference to the adverse possession example, see BARNETT, *supra* note 14, at 112-13.

real estate and presumption of ownership in personal estate make it usually unnecessary to refer to the baseline. Be that as it may, for present purposes the baseline need not be any of those required in usual *justifications* of market rights. In particular, it need not be a version of the Lockean requirement that "enough and as good" be left for others after original appropriation. The crucial point is that *once* some such baseline is selected, only ascertainment and protection problems remain. As I argue below in this section, indeterminacy as regards ascertainment and protection does not render market rights contestable, whatever baseline one adopts.[30]

Things are different when it comes to the choice among conceptions of contestable concepts. The concept of equality is not merely underdetermined as to the ways of ascertaining and protecting an abstract right to equal resources. The very idea that resources (rather than welfare, for example) ought to be equalized needs lots of complex theoretical support.[31] Even after the question about the proper object of equalization has been settled, other deep issues remain. Suppose, for example, that we have come to believe that we ought to equalize resources in accordance with people's choices, as something different from factors beyond their control. How are we then to deal with differences in resources that are traceable to different ratios of choices to factors beyond the individual's control? Was any outcome that resulted from someone's choices *eo ipso* within her control, or should we rather allow for choices that are themselves sometimes attributable to factors beyond the individual's control? It is plain that reasoned answers to such questions require deep forays into complex philosophical issues. Nothing of this sort obtains in the market rights case.

Of course, deep philosophical problems are likely to emerge as one tries to *justify* market rights. But the difference that is relevant here concerns the *concepts* of market rights and welfare rights. We do not have deep disagreements as to what a distribution of market rights would look like, even though we sometimes disagree about the ways of ascertaining who owns what, or how to enforce such rights, or how to react to violations. Disagreements of these sorts are not unique to market rights. What is crucial here is that, in settling such disagreements, we will hardly be forced to commit ourselves to

30. This does not mean, of course, that the baseline itself is uncontroversial. More on baseline contestedness appears below in this section.

31. As shown, for example, by the subtle discussion in Dworkin's *What Is Equality? Part 1: Equality of Welfare*, *supra* note 22.

controversial views about the *substance* of market rights, simply because there are no such controversies.

There is indeed a sense in which the choice among the various ways of determining market rights is *arbitrary*, provided that this means only that such a choice is not deducible from the very concept of market rights. This concept defines the rights' substance, not how to ascertain or protect them. Indeed, the fact that people have market rights entails that some authority *ought to* choose one among the alternative ways of determining those rights. In the absence of such a choice, no one, by hypothesis, exclusively controls external things because control entails protected use and ways to counter ascertainment challenges. Moreover, once procedures of protection and ascertainment are authoritatively determined (once, for example, a certain period for adverse possession is settled upon), they normally must remain in force for a long time if the expectations on which exclusive control rests are not to be frustrated.[32] Significant stability in the rules of ascertainment and protection of market rights is a conceptual requirement of market rights. This is not an argument *for* exclusive control—an argument centered on the importance of devising life plans, for example. Rather, it is an argument based on what "exclusive control" means. There might be changes in the rules of ascertainment and protection of market rights, provided that such changes are governed by the goal of facilitating exclusive control; the more frequent such changes are, the less exclusive *control* there is.

It might be objected that philosophical issues are unavoidable as long as we engage in legal interpretation; adjudication of market rights cases would be no exception. Think of the deep conceptual and normative issues involved in cases in which the validity of a contract is disputed on grounds of *duress*, or in cases in which someone charged with theft adduces that *intention* was lacking. It would seem that market rights frequently refer to contestable concepts, such as duress or intention. Dworkin's ideas on legal interpretation may be thought to support this view.[33] (In Part IV, I shall discuss more extensively Dworkin's views and their bearings on the rule of law.) According to Dworkin, interpretation essentially appeals to moral theory. Sometimes legal materials (the constitution, statutes, judicial decisions, etc.) fail to determine a solution for a given case. In those cases, the judge ought, Dworkin says, to resort to the best moral

32. More on legal continuity in note 69.

33. *See* RONALD DWORKIN, LAW'S EMPIRE 164-90 (1986).

theory compatible with the materials. Now, moral theory is conspicuously controversial. Different professional philosophers endorse radically different moral theories; indeed, they sometimes endorse radically different views about what a moral theory *is*. Suppose, for example, that legal materials are indeterminate as to whether emotional, in addition to monetary, damages ought to be awarded in a given case. A hedonist utilitarian will presumably award emotional damages on the grounds that this would provide people with the right incentives to avoid behavior that threatens to decrease the amount of psychological satisfaction in the world. This solution would diverge from the one proposed by a moral theorist who insists that people have natural rights to their own bodies and to consensually acquired external things, and takes this to imply that people have duties to compensate only for behavior that decreases the market value of another's property. Were these two moral theories the only plausible ones consistent with legal materials, the correct interpretation of what *the law* says would, in Dworkin's view, require the judge to work out a solution by taking sides between these contestable moral theories. Therefore, it appears that Dworkinian interpretation makes contestedness unavoidable to the extent that it requires the judge to resort to contestable moral theories.

Admittedly, ascertaining and protecting market rights is often difficult because of deep indeterminacies that affect our use of mental or psychological concepts such as "intention" and "duress." Still, such indeterminacy is far from destabilizing to the rule of law, at least as compared to the extent that welfare rights are. The interpretive problems raised by welfare rights are not confined to, say, ascertaining whether a putative welfare mother has *intentionally* misrepresented her income. Welfare rights raise interpretive problems *besides* the kinds of ascertainment and protection problems that we found in market rights. The very *substance* of welfare rights poses difficult conceptual and normative problems.[34] Their conceptual contestedness radically widens the scope of the *decisions* about who ought to possess what provided by whom—over and above indeterminacy at the ascertainment or protection levels *once* such decisions are made. By contrast, no such contestedness obtains in a regime of market rights. Indeed, by definition, market rights leave no room for decisions (other than consensual decisions under market

34. I have already illustrated this point with some questions, which can surely be multiplied: What is a *decent* house? When are *basic needs* met? What is an *adequate* level of medical care? And so on.

rules) about who ought to possess what provided by whom. The impersonal workings of market forces, as it were, make such decisions.

Contestedness bears on the rule of law. To the extent that their substance is uncontestable, market rights prevent governments from toying with a variety of conceptions of them. Rulers cannot use them to impose their discretionary will on citizens. Holders of market rights are subject to a set of abstract rules (property rights rules) that generate concrete rights to things, and no one may change the rules. This is a setting in which men are governed by rules, not by men.

We saw earlier that welfare rights, unlike properly Hohfeldian rights, entail no definite duties. Consider again equality. Even if there were a right to equality, and even if we were to reach an agreement on the concept of equality (say, in terms of "equal concern and respect"),[35] considerable room would still be left for deciding what "equal concern and respect" requires—what conception, in other words, of "equal concern and respect" we should adopt. The passage from:

> "Congress shall show equal concern and respect for everyone"

to

> "Subsidizing *X*'s primary schooling is within congressional powers"

is not like the passage from:

> "Congress shall ensure respect for full ownership rights"

to

> "Enacting laws that penalize the theft of properly acquired property is within congressional powers."

Given the Hohfeldian analysis of full ownership rights, in the latter case we have a deductively valid specification of congressional powers. Nondeducibility is here confined, as we saw, to ascertainment and protection issues. By contrast, in the "equal concern and respect" case it is by no means obvious that a deductive argument is being made, let alone what its additional premises or assumed definitions

35. Concepts may involve layers of contestedness. We may have two *concepts* of equality, each arguably giving rise to various *conceptions* of equality. Thus, "equal concern and respect" and "equal worth" are both candidate concepts of equality, whereas "equality of resources," "equality of welfare," and "equality of opportunities" are all potential alternative conceptions of each of those concepts. I ignore this complication, which in any event reinforces the contrast I am drawing between market rights and welfare rights.

are. Deductive arguments are hardly forthcoming when we defend a particular conception of equality by balancing various (perhaps mutually incommensurable) considerations and by inferring generalizations from particular intuitions. Nor are they forthcoming when, as in the primary schooling reasoning, we try to infer specific laws or institutions from our preferred conception of a contestable concept.

Dworkin's distinction between policies and rights may be used to highlight the tension between welfare rights and the rule of law. The main purpose of Dworkin's distinction is not, as in Hohfeld (see Part II), analytical; rather, its purpose is normative. Dworkin aims at showing the relative weight of different considerations in political morality. He characterizes policies as political measures aimed at aggregate goals—typically, welfare maximization. Such goals range across individuals, and hence presuppose interpersonal comparisons. Thus, policies typically require welfare trade-offs among individuals. On the other hand, rights are benefits that should be discretely distributed among individuals—they allow no trade-off. Government should not overstep a given threshold for rights-violation. That threshold may be set by aggregative considerations (*e.g.*, whether huge expected welfare will derive from infringing a certain right) or from meta-rules for the balancing of conflicting rights. Due care in tort law and reasonableness in constitutional law are examples of standards for assessing whether a course of action that affects interests or choices protected by a certain right violates that right or not. Infringing a right to bodily integrity as a result of exercising a right to freedom of speech by falsely shouting "Fire!" in a crowded theater is an example of a conflict of rights.

According to Dworkin, legitimate policies are those rights-respectful policies supported by the majority. As such, only elective branches of government may dictate policies. Rights, however, are immune to majority rule and ought to be upheld—and, if necessary, defined—by the courts, *i.e.*, by a branch of government that is expected to enforce principles rather than to follow public opinion.[36]

In sum, the Dworkinian picture suggests the following moral: there is a positive correlation between the rule of law and the scope of rights, and there is a negative correlation between the rule of law and the scope of policies. Rights concern matters of principle, whereas policies answer to the vagaries of public opinion. This is as it should

36. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82-88 (1977).

be, since—as a major tradition in political thought has taught us—rights are devices primarily aimed at limiting governmental discretion, even that which is democratically based. So, from the point of view of the rule of law, what could possibly be the objection to welfare *rights*?

Welfare rights are inimical to the rule of law because they share with policies precisely those features that undermine the rule of law. Being conceptually contestable, welfare rights admit of a variety of conflicting conceptions and methods of implementation. Accordingly, courts could not be accused of failing to uphold a welfare right should their judgments be consistent with *any of those conceptions*. (In Part IV I shall address the rejoinder that adjudication on the basis of a given conception may bind the courts in future cases.) In addition, legislatures will be at liberty to choose among those conceptions, and such choices cannot by hypothesis be objectionable on the grounds that they fail to implement *the* correct conception of the given welfare right. So, welfare rights share a crucial feature with policies: both necessitate wide (as measured by the range of plausible conceptions) government powers, in the Hohfeldian sense. Welfare rights enlarge the political realm exempted from judicial control. Indeed, the extent to which welfare rights increase government power is greater than in the case of policies. For, as long as welfare rights are "taken seriously"[37] as *rights*, they aspire to sometimes *prevail* over conflicting rights (market rights among them), this aspiration being conceptually excluded from policies.

Conceptual contestedness is compounded by what we may call "causal contestedness." If one major task of government is to protect the rights of the people,[38] then it should be empowered to enforce those rights. As we have already seen, in order to enforce welfare rights, government should have powers to implement any of the widely differing conceptions of such rights. This, as we saw, undermines the rule of law. But plurality of conceptions is not the only reason why welfare rights lead to governmental discretion. Welfare rights are causally contestable in addition to being conceptually contestable. Suppose that we manage to ascertain which of several conceptions of a welfare right is best. Let us further suppose that we are fortunate enough that this conception entails

37. This is a variant of Dworkin's phrase "taking rights seriously," a phrase he employed in titling the work cited *supra* note 36.

38. I am referring here to moral rights that ought, all things considered, to be backed by law.

specific judgments—for example, we know who the right-holders are, what is owed to them, and by whom. We may imagine a setting in which, say, a right to decent housing unequivocally requires tax-funded housing programs for the needy, and in which all the questions about tax rates, taxpayers, who the needy are for these purposes, and other details have been settled by the best conception of that right. Even so, crucial, contestable issues of causality remain. How are we to *identify* the needy, as generically defined by such programs? We would have to rely on a number of controversial causal hypotheses about the bureaucratic structures that will best accomplish this task, including hypotheses about the most efficient ways to prevent various forms of fraud and cheating with respect to the programs. The funding of the bureaucratic apparatus itself depends on controversial issues of financial consistency with other goals that we may want government to pursue, including the enforcement of other rights. Therefore, government needs leeway far in excess of what the conceptual contestedness of welfare rights suggests—it needs discretionary powers to an extent that can accommodate both conceptual and causal contestedness.

Although I have argued in this section that market right are free from *conceptual* contestedness, is it possible that they, like welfare rights, suffer from issues of *causal* contestedness? Is not, for example, the question of how to best protect market rights causally controversial? The enforcement of market rights raises complex problems of causality regarding police organization and equipment, levels of investment in surveillance vis-à-vis prosecution and punishment of criminals, and judicial organization and procedures, among others. Shall we conclude that the enforcement of market rights necessitates wide governmental discretion?

I do not think so. The causal indeterminacy of market rights disappears if we agree that mutual advantage is a minimal requirement of a legitimate polity. What I have in mind is this. A regime of market rights is what economists call a "public good." A public good is a good that everyone can use without reducing the amount available for others to use (*non-rival consumption*, in the terminology of economics) and whose benefits cannot effectively be denied to individuals who are unwilling or unable to buy the good (*nonexclusion*). Lighthouses were a classic example of a public good, at least until alternative technologies for safe navigation were discovered. Nobody has an incentive to contribute to the production of a public good, since anybody can take a free ride on others'

productive efforts. So, unless the incentive structure changes, for example by charging user fees, self-interested individuals will not cooperate in the production of public goods even if each would obtain net benefits if those goods were produced. Crucially, a regime of market rights is a public good. By penalizing theft and fraud and by enforcing contracts, a regime of market rights discourages people from free riding on others' productive efforts. Being a public good, a regime of market rights works to everyone's advantage.

What about the more familiar cases of public goods, *i.e.,* the cases usually cited as proof of *market failure*? A market failure is a market's inability to produce the cost-efficient level of output—under- or overproduction is the predictable outcome. Among the causes of market failure are externalities (*i.e.,* uncompensated benefits obtained by, or uncompensated costs imposed upon, third parties to private agreements) and free riding on the production of public goods. Imagine that the constitution authorizes the government to provide *only* goods that are both non-rival and nonexclusive. Such an authorization may fail to meet the mutual advantage requirement, for government may engage in the production of non-rival and nonexclusive goods whose marginal cost to some people is higher than their marginal benefit. For example, government may enact environmental laws from which some individuals derive marginal benefits (because of the cleaner atmosphere) that they regard as unworthy of their increased tax shares. This possibility is excluded if we incorporate mutual advantage into the notion of "public good." That is, if, in addition to non-rivalry and nonexclusion, we require an improvement in everyone's *net* preference satisfaction, then consensual governments will produce public goods alone. They will not produce non-rival or nonexclusive goods that some individuals regard as unworthy of their cost to themselves, nor will they produce private goods (*i.e.,* those involving redistribution). A government producing things other than public goods fails to work to everyone's advantage. I am not suggesting that satisfaction of the mutual advantage test is a *sufficient* condition for political legitimacy. Fairness may be an additional requirement forcing us to select the most egalitarian point on the Pareto frontier (*i.e.,* the curve representing all mutually advantageous combinations of shares in the surplus generated by social cooperation). However, on certain assumptions about appropriate baselines (an issue I shall address shortly), mutual advantage may well be a necessary condition for political legitimacy.

Procedural rules for political decision-making may be designed to give legislators incentives to pass laws aimed at producing public goods alone, *including* a legal regime of market rights. We may think, for example, of supermajoritarian decision rules at the federal level, or of majority rule within small districts in a federal system where the costs of moving to another district are low.[39] In such settings, people will locate their homes and businesses in accordance with the different mixes of "public goods-to-taxes" offered by national, state, and local units. Procedural rules for political decision-making thus generate incentives, both in public officials and in citizens, to act in mutually advantageous ways.[40]

It is important for my argument that such procedural rules be uncontestable. Constitutional requirements of congressional majorities to pass a law, or to become a senator, to mention two examples, do not lend themselves to much interpretive contest. This is compatible with the recognition that there are contestable views about constitutional *interpretation*. I submit, however, that interpretive contestedness does not affect procedural rules. To see this, consider the following contrast with substantive rules. We read substantive constitutional rights as part of a whole document, a constitution, and have to strike a contestable balance not only among the rival conceptions of such rights, but also among our preferred conception of them and the various plausible theories of constitutional interpretation. For example, we have to decide whether the Equal Protection Clause of the Constitution, according to which no state may "deny to any person within its jurisdiction the equal protection of the laws,"[41] should be read in the light of the aim of enhancing democratic deliberation (in turn inferred from a certain structural

39. For detailed discussion of a variety of consensually based rules for political decision-making, see JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962). *See also* James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government, in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 3 (James D. Gwartney & Richard E. Wagner eds., 1988); DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 50-73 (1996); *Id.* at 77-94 (with special reference to federalism). Presumably, such rules will yield distributive schemes from which individuals will easily exit—we may presume that public (rather than private, redistributive) goods will be the norm under such schemes. *See* Ilya Somin, *Revitalizing Consent*, 23 HARV. J.L. & PUB. POL'Y. 753 (2000) (presenting a consent-based argument for wide exit rights).

40. *Mutatis mutandis*, the argument applies also to externalities. Appropriate procedural rules for bringing lawsuits to the courts (*e.g.*, relaxed requirements for bringing lawsuits on behalf of dispersed interests) could force everyone to internalize the external effects of their behavior, thus leading them to behave in mutually advantageous ways.

41. U.S. CONST. amend. XIV, § 1.

reading of the whole constitutional document), or, rather, in the light of the original intent of the Founding Fathers, which presumably aimed largely at the equal protection of commercial rights. Besides deciding which of these two interpretive standards is to prevail, we have to decide which is the best (contestable) conception of "equal protection of the laws." Thus, we have at least three layers of contestable issues here. First, we have to decide among interpretive standards. Second, and assuming that we adopt, *e.g.*, the original intent standard, we have to determine what the Framers *meant* by the Equal Protection Clause. And third, and assuming, as seems arguable, that we take the Framers to have meant something sensitive to subsequent argument about equality (*i.e.*, not just what they took equality to imply for their society at the stage of constitutional drafting), we are left with the current contest between conceptions of equality.[42] None of these contestable issues is involved when it comes to interpreting procedural rules.

We may presume the outcomes of such procedures to be mutually advantageous, even in terms of the parties' preferences for certain causal routes towards the achievement of their preferred goals. But the case for specific procedural rules is not completed yet. The baseline from which mutually advantageous moves enjoy moral respectability is notoriously controversial. Is the status quo an appropriate baseline? Must people agree on institutions, or rather on principles for institutional assessment? Is valid agreement attainable only under conditions that ensure impartiality? What is a fair starting gate for mutually advantageous moves? Questions such as these suggest that I am resorting to a conceptually contestable baseline in my attempt to show that market rights need not be causally contestable. It would seem that a baseline for mutual advantage must inherit the contestedness that affects the ideals that contractarian

42. Cass Sunstein argues that interpretive theories that either are conventionalist or stress radical indeterminacy share a skeptical view of moral discourse. Sunstein believes that rational debate on substantive normative issues is possible, and on these grounds, he rejects those interpretive theories and advocates certain substantive tenets as a framework for constitutional interpretation. As I explain *supra* note 24, *infra* note 66, and in their accompanying texts, my contention that contestedness disrupts the rule of law does not depend on moral skepticism. My advocacy of procedural constitutional rules is compatible with Sunstein's (I think correct) claim that interpretation presupposes normative viewpoints. But I contend that such viewpoints are uncontestable when it comes to procedural rules. That is, we are bound to agree on what the best interpretation of procedural constitutional rules is. Accordingly, I reject Sunstein's belief that constitutionalism (and, more generally, the rule of law) makes room for a judiciary that engages in substantive (and I would add "contestable") issues. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 93-122 (1993).

political philosophers have tried to reflect by means of the contract device.

Such worries are irrelevant here, though. The fact that the baseline is contestable does not make the *institutional output* contestable. The baseline involves a distribution of property rights, which serves as the background for a (hypothetical) contract. Depending on how much information the parties to the contract have, they may agree on more or less specific principles for institutional assessment, on institutions, or even on an initial *distribution* of property rights. The contractors' motivations, knowledge, aims, rights, etc., affect, of course, the contents of their choices. What those motivations, etc., should be, for purposes of a contractarian argument, is admittedly a contestable matter. The crucial point, however, is that no such contestedness affects the choice of *institutions*. This is so because it is rational for the parties to allow for mutually advantageous exchanges from whatever initial distribution of property rights they prefer. Indeed, since the contractarian logic precisely rests on the presumed moral force of the parties' agreement, why should not the same logic apply to after-social-contract moves? Institutions that facilitate (a) voluntary exchanges of the rights contained in an initial distribution chosen by the parties and (b) the production of public goods enable people to make such moves. Such institutions are quite definite. They involve private property rights and procedural rules that provide political incentives for the production of public goods (including the enforcement of private property rights)—in short, largely market rights, and no (non-consensual) redistribution.

Notice that the parties to the hypothetical social contract need not have private property rights in any recognizable sense. Suppose, for example, that the baseline is a regime of joint ownership—no one can use anything unless everyone else consents to such use. Such a regime will seriously discourage productive activities from which everyone would benefit, unless differential incentives are provided to the most productive individuals. Thus, it will be rational for every joint owner to consent to certain individuals' having exclusive control of certain things, to their freely exchanging such things, and to institutions that are expected to correct market failures. So, they will agree on procedural rules for political decision-making aimed at the protection of private property rights and at the production of public goods. Indeed, there are reasons to be quite specific about the contents of such agreements. Recent developments in the economics of property rights suggest that *full ownership* rights (rather than more dispersed

rights of excluding others from the use of certain things) are needed to overcome incentive structures leading to underproduction.[43] Another way of putting this point is to say that market *institutions* are invariant across different property rights baselines. Of course, this does not mean that all baselines will yield the same distribution of rights. There is wide scope for variety at the particular level, the specific distributions being a function of the parties' prior rights, their motivations and knowledge, sheer luck, and other features of the social contract setting. The crucial point is that, unless we make quite odd assumptions about the rationality, knowledge, or motivations of the parties, they will stipulate that the free exchange of rights will be allowed. Whatever the baseline distribution of rights, rational parties will allow for voluntary exchanges of *those* rights, for collective decisions to produce public goods, and for institutional corrections of market failures. They will *not*, however, (unanimously) agree on empowering government to redistribute their preferred initial distribution of rights (*i.e.,* their exchangeable rights to particular things plus the rights to participate in collective decision making in accordance with procedural rules designed to produce public goods).

The upshot of all this is that market rights need not suffer from significant indeterminacy. They are conceptually uncontestable, and the mutual advantage requirement defuses worries of causal contestedness.[44] There is hope of satisfying that requirement on relatively uncontroversial bases. The crux of the matter is whether political decisions stem from procedures that make impossible the redistribution of consensual property rights (*i.e.,* those agreed upon in a morally appropriate contractarian setting). In other words, political decisions under the rule of law must be the outcomes of procedures unanimously accepted in an ideal setting. In the real world, strategic holdouts and transaction costs require us to content ourselves with proxies of the unanimity rule, such as supermajoritarian rules, or even majority rule, depending on the issue.[45] For example, congressional decisions under supermajoritarian voting rules may be presumed to rest on unanimous agreement, although at a lower transaction cost than under unanimity rule. Laws enacted in this setting can be

43. *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

44. In this section, I will argue that full transferability of rights is also dictated by a nonperfectionist account of rights, and that the rule of law makes no room for perfectionism.

45. For the classic discussion of such proxies, see BUCHANAN & TULLOCK, *supra* note 39, at 97-116.

presumed to work to everyone's advantage.[46] Indeed, the fact that controversial substantive issues about rights are circumvented by procedural approaches of this sort speaks in favor of the view that market rights, *i.e.,* the outcome of such procedures, have better prospects of harmonizing with the rule of law than welfare rights do. (See, however, Part V for qualifications to this procedural approach). Notice, also, that consensual collective decision procedures will settle the *formalities* involved in the ascertainment and protection of market rights. Issues such as what is to count as a valid transfer of real estate or which court has jurisdiction in certain criminal cases will be decided in accordance with political procedures chosen on the grounds that they will best facilitate voluntary transfers of rights. In short, consensual procedures will ensure that collective decisions will aim at producing public (not private, redistributive) goods only—among them, a legal system providing for market rights.

A welfare rights theorist who is committed to the rule of law may try the following maneuver: constitutions should adopt *one* among the several plausible *conceptions* of welfare rights. This would be better than nothing. It would block, in addition, the move that I made from conceptual contestedness to discretionary powers: government would be constitutionally bound to uphold the preferred conception alone. Moreover, if constitutions endorsed *one* among the several plausible *causal hypotheses* needed to ensure efficient enforcement of the preferred conception, then additional fears of discretionary powers would disappear as well. For example, the constitution may endorse a conception of welfare rights that requires that the welfare of the worst-off be maximized. It may also provide that a certain negative income tax[47] rate will implement that conception of welfare rights. (The point of an explicit constitutional commitment to a *conception* of welfare rights, in addition to the tax provision, may be to induce interpreters to solve all residual interpretive problems by reference to that conception. For example, there would be a constitutional case for determining and apportioning the costs of monitoring compliance with the tax law in a way that will most benefit the worst-off.)

Notice that this proposal is immune to an objection faced by abstract constitutional guarantees of welfare rights. Being contestable,

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46. On mutually advantageous constitutional rules, see BUCHANAN & TULLOCK, *supra* note 39, and MUELLER, *supra* note 39.

47. A negative income tax awards increasing payments to people as they fall below some "break even" level of income, and increasingly taxes people as they are above that level.

welfare rights lend themselves to rent-seeking manipulation. Special interests have an incentive to invest in various forms of influence in the political process in order to make it work to their own benefit. In the parlance of public choice theory, *rent seeking* is a profitable activity whenever political benefits are available. In the absence of specific enough constitutional provisions, the politically favored conception of welfare rights will predictably be sensitive to differential rent-seeking abilities, including the ability to spread self-serving interpretations of the constitution. This is a scenario in which legislative change will hardly be compatible with the rule of law: subgroups of the population will gain or lose in proportion to their influence on the *shaping* of the legal game rather than on their ability to *play* the game. A constitutional provision upholding a specific conception of welfare rights, and specific policies aimed at implementing that conception, may hope to narrow, if not eliminate, the interpretive leeway that unspecific welfare rights and policies leave to rent-seeking activities. Would not the above constitutional guarantee of a negative income tax be a good substitute for the bureaucratic structures and the discretion attendant on the multi-program structure of the traditional welfare state?[48]

I am skeptical, however, about the prospects of placing such proposals within a rule-of-law framework. One familiar proposition of economics states that extraordinarily high rates of return are unsustainable over a long period because they generate an incentive to invest in the activities that yield such returns: entry of competitors erodes those extraordinary benefits. I shall shortly indicate how this proposition bears on the rule of law, but first let me briefly expand on the economics point itself. Unemployed and low-salary workers will tend to invest time and effort (prompting one's own dismissal, having children, filing forms, making queues, and so on) in order to acquire the features that are relevant to qualifying as a welfare recipient (being unemployed, having low salaries while bringing up children, and so on). High earners will react with defensive moves: they will find it profitable to invest in accountants and lawyers who will help them lower their tax share, or to move to businesses whose expected after-tax net incomes are higher (though, by hypothesis, lower in the absence of the welfare transfers). Resources that would have been used in production are now diverted into rent-seeking activities.

48. For references to literature on rent seeking and its distributional effects, see *infra* note 49.

Growing numbers of (potential) welfare recipients compete with each other for a shrinking output. Once everyone adjusted to the incentives created by the welfare transfers, the expected return of investing in eligibility for welfare benefits is lower. But then, it would be unreasonable to think that in the new equilibrium welfare benefits will reach all and only those individuals whom the programs were intended to benefit in the first place.

Crucially, it will be hard to secure the intended results in a rule-of-law framework. The deeper the doubts that the welfare benefits will reach the intended targets (in the above example, "benefiting the worst-off"), the stronger the need to monitor who is getting what. At *this* level, that of *enforcing* specific welfare rights, wide legislative and administrative discretion is *needed* to promptly react to the above behavioral adjustments. But, again, there is no guarantee that such discretion will be exercised in ways that will improve the lot of the worst-off. Rent seeking will predictably affect the *contents* of the rules intended to enforce the constitutional provision (rules for measuring and monitoring incomes, rules for staffing welfare agencies, rules for setting bureaucrats' salaries, etc.), as well as the *enforcement* of those rules. This will jeopardize the fulfillment of the goals pursued by constitutional drafters. For, as shown by public choice analysis, relative success in rent-seeking is directly related to organizational capabilities, money spent in supporting campaigns, lobbying coalitions between bureaucrats and clients of the bureau's services, and other factors that only contingently will correlate with the interests of the worst-off.[49] More importantly for our purposes, all these factors aim at *shaping* the rules for the sake of special interests, rather than *playing by* rules that no one is capable of changing. This is a scenario in which men, rather than rules, rule.

For the sake of argument, however, suppose that these worries are unwarranted: somehow, the negative income tax effectively helps the worst-off. What would society look like? Traditional, bureaucratic, rent-seeking-sensitive welfare schemes would have been wiped out. No social security, health, schooling, and other typical welfare state programs would remain. People would live amidst a fully privatized market, earning incomes more or less corrected by the tax. This

49. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965); Robert D. Tollison, *Rent-seeking*, *in* PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 506 (Dennis C. Mueller ed., 1997). For a brief account of why typical welfare state regulations hurt the poor, see Roderick T. Long, *Toward a Libertarian Theory of Class*, 15 SOC. PHIL. & POL'Y 303 (1998).

would indeed be a Pyrrhic victory for supporters of traditional welfare states who praise the rule of law. But there is room here for more than this polemic upshot. Let me explain.

If, as some writers have held, rights protected vital interests,[50] then there would be a potential for perfectionist[51] objections to individual choice. But there is an obvious tension between perfectionism and the rule of law. In allowing the use of state coercion to *lead* people's lives towards a good that they need not perceive as their own, perfectionism allows some people to *rule over* others. The rule of law is therefore best promoted by viewing rights, as other writers have suggested, as legal devices for the protection of choices.[52] On this view, welfare rights set the stage for minimally meaningful choices by awarding each individual *control* over certain resources—his welfare goods. Another rule-of-law-based reason to prefer a choice conception of rights is as follows: choices can be made mutually compatible by a system of non-conflicting rights—*i.e.*, rights defining non-overlapping jurisdictions over resources. By contrast, interests of different individuals often conflict with each other, there being no way to settle those conflicts other than by trading off the interests at stake. Such trade-offs presuppose assessments of the relative importance of each interest. The fact that such assessments are often controversial arguably renders interest theories of rights unfriendly to the rule of law.[53] One choice that an individual may want to make is

50. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 180-83 (1986).

51. Here, I use the word "perfectionism" broadly, including some views that are sometimes characterized as "paternalistic." There is a continuum from measures that force others to do certain things in their *perceived* interests to measures that force others to do certain things in their *objective* interests (*i.e.*, interests that the individual need not recognize as his own even under ideal circumstances, such as adulthood and possession of relevant information). Some writers call the former measures "paternalist," and the latter "perfectionist." The liberal tradition views rights as barriers against measures pertaining to the latter end of that continuum and extending as far as possible towards the former end. In encompassing all kinds of intentional restrictions on others' actions, my use of "perfectionism" is meant to reflect such rights-based concerns. *See, e.g.*, Christopher Wolfe, *Being Worthy of Trust: A Response to Joseph Raz, in* NATURAL LAW, LIBERALISM, AND MORALITY 131, 145 (Robert P. George ed., 1996) (attacking the "perfectionism" of Joseph Raz on the grounds that the doctrine is an "invitation to liberal tyranny").

52. Eric Mack makes much of rejecting what he calls "paternalism" (which roughly coincides with what I characterized as "perfectionism" *supra* note 51) in his objections to the interest theory of rights. Mack does not defend, however, a classical version of the choice theory, but rather what he calls the "jurisdiction" theory. For present purposes, we need not be concerned about the differences between these two theories of rights. *See* Eric Mack, *In Defense of the Jurisdiction Theory of Rights*, 4 J. ETHICS 71 (2000).

53. On the structure of a system of non-conflicting rights in the context of a choice theory, see STEINER, *supra* note 18. On the difficulties faced by interest theories attempting to yield rights capable of guiding conduct, see BARNETT, *supra* note 14, at 89-

to exchange, or even to give away, his welfare goods. Indeed, on nonperfectionist grounds, a negative income tax fares better than in-kind benefits, as money is paradigmatically instrumental to most desires and life plans. When it does not presuppose sheer disregard for people's perceived interests, insistence on the in-kind scheme seems intelligible only if one assumes that the needy do not know well enough where their interests lie or what those interests should be.

By the same token, there would be perfectionist opposition to the negative income tax scheme if it conferred a *transferable* right to welfare. The right's nonperfectionist rationale should allow welfare recipients to *waive* their benefits (perhaps in exchange for someone else's holdings). Indeed, consistent adherence to the nonperfectionist rationale should lead us to treat *shares in future negative tax transfers* as transferable themselves. The picture we are finally left with is that of a free market economy, whose starting point was the introduction of *transferable* negative income tax entitlements. The upshot is that, but for an *initial* redistribution, welfare rights cannot, consistently with the ideal of the rule of law, justify interference with the free market (including subsequent markets for welfare entitlements). Such interference has perforce to appeal to perfectionist considerations, which, as we have just seen, have no place in a perspective that views rights as barriers against domination by others.[54]

It might be charged that rejection of perfectionism is compatible with *paternalistic* interference with market-revealed preferences. There might well be autonomy- or welfare-based reasons to frustrate people's preferences, or even to forcibly change them. Preferences may be the outgrowth of distributions that shrink people's autonomy or welfare. There seems to be evidence that people's preferences are biased towards the status quo.[55] Notice that legal rules must prominently figure in a description of the status quo. This being so, legal rules cannot be non-circularly vindicated as instrumental to preference satisfaction: preferences themselves are significantly

94. *See also* JEREMY WALDRON, LIBERAL RIGHTS 204-06 (1993) (arguing that interest theories of rights normally engender conflicts of rights).

54. I argued above in this section that mutual advantage also leads to full transferability of rights.

55. Sunstein cites empirical evidence of the "endowment effect," whereby subjects are biased towards maintaining the status quo. Experimental economists and psychologists have found that individuals place higher values on goods or rights originally allocated to them than they otherwise would pay to acquire those same goods or rights in a secondary market. Logically, then, there can be no such thing as an "acontextual preference," and on such grounds, Sunstein advocates some measure of state activism in reshaping people's preferences. SUNSTEIN, *supra* note 42, at 166-70.

affected (distorted?) by legal rules. Can state interference with preferences be then justified by appeal to ideals of autonomy or welfare defined independently of the status quo? Is not such interference compatible with my rejection of coercing people into conceptions of the good that *their ideal selves* (*i.e.,* those whose preferences are undistorted by the status quo) do not ratify?[56]

These rhetorical questions leave my argument unscathed, though. There might indeed be good *autonomy* or *welfare* reasons for redistribution, but, as we saw, *rule-of-law* concerns call for, at most, *once-and-for-all* redistribution of alienable titles. Put another way, it is the *standing* redistributive powers of typical welfare states that undermine the rule of law—they put people's empirical selves at the mercy of rulers' (empirical) selves. It is in this spirit that I was toying with the idea of a *transferable* negative income tax: such a tax does not authorize the state to rectify market outcomes, as this is normally understood, but rather to bring about a once-and-for-all redefinition of property rights. Everyone would become entitled to a (positive or negative, as the case may be) share in future transfer payments. And everyone could sell such entitlements at whatever price anyone would be willing to pay for them. The rule of law would have thereby been made compatible with welfare rights not by conferring permanent redistributive powers to the state but rather by reassigning positions at the starting gate from which unhampered markets will work. The state would be bereft of all its apparatus of schools, hospitals, housing programs, and other sorts of in-kind redistribution.[57] In short, no recognizable welfare state can be justified along these lines.[58]

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56. This is not to suggest that legal rules, or other coercive means, are *necessary* in order to change preferences rooted in an indefensible status quo. Furnishing people with relevant information (*e.g.,* educational campaigns about the evils of addictive drugs) will sometimes suffice, and at a cheaper cost in terms of autonomy and welfare.

57. On similar grounds, guaranteed basic income may be preferable to traditional welfare. Such income should arguably be unconditional in order to minimize administrators' discretion. Indeed, it is ironic that unconditional basic income proposals have been advanced by authors (such as Robert Goodin and Philippe van Parijs) who see themselves as more hostile to markets than supporters of traditional welfare. Perhaps such hostility is due to the assumption that entitlements to basic income should be nontransferable. *See, e.g.,* Robert E. Goodin, *Social Welfare as a Collective Social Responsibility*, *in* SOCIAL WELFARE AND INDIVIDUAL RESPONSIBILITY 97, 123-25 (David Schmidtz & Robert Goodin eds., 1998); Philippe van Parijs, *Why Surfers Should be Fed: The Liberal Case for an Unconditional Basic Income*, 20 PHIL. & PUB. AFF. 101 (1991).

58. We need special arguments to deal with the mentally disabled, since they cannot make autonomous decisions such as those required by market exchanges. I cannot deal here with the moral and empirical issues involved in selecting the best way of looking after such people within a rule-of-law framework. Let me just note that once-and-for-all redistribution to their legal guardians may be the best option.

IV. INTEGRITY AND RULE FOLLOWING

I have offered so far several reasons why it is difficult to reconcile welfare rights with the rule of law—unless, perhaps, traditional welfare institutions disappear. We found that neither a constitution nor ordinary legislation can hope to eradicate wide discretion in defining and enforcing welfare rights. It might be thought, however, that those difficulties could be overcome if *the courts* followed rules. While, as I argued in Part III, legal welfare rights presuppose that the legislature either has discretionary powers or bestows discretionary powers upon the welfare bureaucracy, it might be argued that the courts might enforce welfare rights in a principled way, even in the absence of statutory provisions. A foray into Dworkin's theory of legal interpretation may again be helpful. Dworkin argues that in their capacity as public officials, judges are subject to political responsibility, which means that they ought to justify their decisions on grounds that they are prepared to invoke in relevantly similar cases. A judge ought to decide a case by applying the morally superior rule that accommodates all the relevant legal materials (the constitution, statutes, and precedents). In doing so, the judge realizes the ideal of "law as integrity"—that is, he treats citizens as belonging to a single community in which like cases receive like treatment.[59]

Can integrity deliver both welfare rights and the rule of law? The rule of law seems to be entailed by integrity because the latter obliges judges to accommodate cases under rules.[60] If, for example, a court ruled in case *C* that a defendant has to pay emotional, in addition to monetary, damages to the plaintiff, law as integrity creates a presumption that in future relevantly similar tort cases compensation should include emotional damages. This presumption may be overridden by other considerations. In a new case, *C**, law as integrity may authorize the judge to exempt the plaintiff from paying emotional damages, provided that the judge shows that both *C* and *C** fall under a principle that distinguishes the two cases. That principle may state, for example, that emotional damages should be compensated only if the emotional injury is detectable through a well-defined class of symptoms. The judge may then proceed to show that *C* and *C** differ in this regard, and may invoke this difference to

59. *See* DWORKIN, *supra* note 33, at 164-90.

60. Dworkin points out that one merit of integrity is that it "provides protection against partiality or deceit or other forms of official corruption" and makes "favoritism or vindictiveness" more difficult. *Id.* at 188.

ground his ruling against the plaintiff in *C**. Dworkin asserts that the two plaintiffs were not *treated differently*; rather, they were parties to *different cases*. According to Dworkin, integrity's ideal upshot is that at any time there exists a set of rules and principles that (a) accommodates all the cases brought to the courts in the whole history of the legal system, and (b) is justifiable by the best moral outlook. Judicial moral reasoning constrained by legal materials determines the content of current law. This comprises, then, the constitution, statutes, and precedents, all of them read in the light of the best moral theory.[61]

For present purposes, the relevant point is that judges ought to invoke welfare rights as long as they receive support from the best moral theory that fits legal materials. Is this consistent with the rule of law? The fact that judges committed with law as integrity are ultimately constrained by moral rules, including the rules of moral reasoning, induces an affirmative answer. Indeed, judges inspired by law as integrity seem to be doubly constrained: they ought to abide both by the fitness constraint and by moral rules. In any event, if Dworkin is right in that the fitness requirement itself has moral underpinning (*i.e.,* the value of community or of treating people equally[62]), then the idea that judges are *ultimately* bound by moral rules seems sufficient to place them under rules, thereby realizing the ideal of the rule of law. The upshot is that judges who are committed to law as integrity would, in upholding welfare rights, abide by the rule of law, provided that the best moral theory compatible with legal materials justifies such rights.

I have several objections to this picture. Recall that the point of the rule of law is to substitute rules for discretionary will as the ultimate source of legal duties. I take it that a sufficient condition of *X*'s *not* living under the rule of law is that someone else, *Y*, is authorized to manipulate *X*'s legal duties without such an authorization being itself subject to rules. Admittedly, there is a sense in which judges abiding by law as integrity do not manipulate people's duties—their rulings are constrained by the "fitness under background morality" requirement. But this is not enough to regard *citizens* as *subject to* the rule of law. Their legal duties, *understood as guides for action*, did not exist before the judge's decision invoking those duties. It is no

61. We should bear in mind that Dworkin asserts that integrity does not require consistency with past *opinions* but rather with past *decisions*. *See id.* at 247-48. This seems natural in a theory that requires judges to have recourse to the best moral theories consistent with *legal materials*.

62. *See id.* at 206-16.

reply to say that the judge invokes legal duties that, though perhaps unnoticed by the parties, existed at the time of the behavior now being assessed by him. The "fitness under background morality" requirement, no matter how plausible it may be as an element in the reconstruction of judicial practice, need not *guide* citizens. Indeed, timeless validity, which is arguably a necessary condition for fundamental moral principles, is neither necessary nor sufficient for rule *following*. It seems to make sense both to say that people may *follow provisional* rules, and to say that people whose behavior *conforms to* a timeless rule are not really *following* it. The point of the rule of law is precisely to substitute rule following for the rule of men. It requires *abiding by* (timeless or provisional) rules, *being guided by* them, and not merely *consistency with* them. An agent governed by the rule of law should (be able to) know the rules governing his actions at the time he decides what to do. One cannot possibly follow a rule one does not know. Insofar as integrity asks judges to create retroactive duties, it collides with the rule of law.[63]

But perhaps we should stretch our imaginations to see how integrity can bring welfare rights under the rule of law. This project can succeed if, and only if, the best moral theory that accommodates legal materials endorses welfare rights. If it were *evident* which moral theory was the best one, then reasonable citizens would have been guided by it when legal materials were indeterminate—they would have *predicted* that judges committed to law as integrity would apply that moral theory. Such an appeal to background moral theory would not be retroactive because, by hypothesis, agents could predict the application of the theory (here: a moral theory endorsing welfare rights) if a relevant case were brought to the courts. Moreover, it might appear that the fact that welfare rights are contestable tends to be innocuous in this scenario. Judges committed to law as integrity will abide by rules of precedent, and this in turn makes it likely that they will invoke a *subset* of the conceptions allowed by a contestable concept. Rules of precedent narrow more and more the range of conceptions of a given concept, thereby making legal solutions more and more predictable: as the number of precedents increases, the

63. This charge of retroactivity is consistent with accepting Dworkin's critique of what he calls "the semantic sting," namely the view that judges "create" law wherever legal materials are silent. *Id.* at 45-46. *Discovering* what the *right answer* is in a case about which legal materials are silent is consistent with the fact that the parties *lacked guidance* at the time when the facts of the case happened. For an account of law that stresses the function of legal rules as guides for action and derives from this a non-retroactivity requirement, see LON L. FULLER, THE MORALITY OF LAW 33-41 (rev. ed. 1969).

range of principles that fit those precedents shrinks. This process will be reinforced by the requirement to accommodate legal materials other than precedents. On these grounds, the prospects of subjecting welfare rights to the rule of law seem auspicious—all it would take is for judges to endorse law as integrity, and for citizens to be aware of this fact.

Yet, this argument overlooks the *first* decision in a line of precedents. By hypothesis, such decision could invoke welfare rights: we are assuming that the best moral theory upholds them. But then, the first judge in a line of precedents was free to choose among the various conceptions allowed by the concept of welfare rights. The argument expounded in Part III would apply to such decisions: contestedness fosters judicial discretion, and this undermines the rule of law.

It might be thought that the following maneuver could defuse this worry. We assumed that the background moral theory is evidently true. This entails that rational and well-informed prospective parties to a judicial case must have taken account of such a theory. Crucially, their rationality and knowledge must have led them to realize that conceptions of welfare rights are contestable. This being so, the sort of retroactivity involved in first-case judgments may not seem detrimental to the rule of law. Indeed, the first appeal to welfare rights would not be retroactive even if we were to relax the requirement that the background moral theory be *evidently* true or valid. It may suffice that it be *plausible* in order for the prospective parties to a legal dispute to be able to *count on* more or less probable rulings based on *any of the various conceptions* of the concept (here: "welfare rights") that the theory purports to account for. Presumably, this would make a practical difference with a scenario in which welfare rights played no role in judicial reasoning. Moreover, via the fitness requirement, integrity holds out hope of picking out a *certain* conception of welfare rights, even at the outset of a line of precedents: legal materials other than precedents may yield this happy result.

Perhaps some actual legal systems meet all of these conditions and so bring welfare rights under law as integrity. For it might be the case that the best moral theory compatible with legal materials, *including* precedents, currently mandates judicial decisions that would have been banned by *previously accepted* theories. We might speculate, for example, that the best background moral theory justifies both the pre-New Deal Supreme Court rulings on property rights and the post-New Deal rulings, even though the former largely upheld market rights and

the latter upheld a variety of restrictions on those rights, such as minimum wage laws. Why not think, then, that the Supreme Court upheld welfare rights all along, only under different factual circumstances (say, prosperity and depression)? We might try to substantiate this claim by showing that the rulings upholding market rights can be derived from a more basic endorsement of welfare rights in conjunction with certain factual premises. Such a picture may have practical consequences, for it provides current judges with reasons of integrity to start new lines of precedents. Most importantly, it is a picture that seems to narrow significantly the choice of contestable conceptions of welfare rights—after all, integrity requires that even long periods of pre-New Deal, free marketeer adjudication be accommodated.

I tend to believe, however, that the very fact that integrity asks judges to view legal materials in the best light raises tensions with the rule of law. On any ordinary understanding, the notion of "government by rules" must exclude the possibility of saying that a rule *R* governs someone when she could predict that legal officials will, in any but a negligible likelihood, *fail to* enforce *R*. Now the likelihood of such failings is precisely non-negligible when legal officials have to decide on the basis of contestable concepts. Each of the interpretive options that a contestable concept leaves open to the first-case judge is significantly likely to be chosen by him—otherwise the concept would not be contestable. This must be particularly so if judges behave in accordance with a theory like Dworkin's, which prioritizes fitness with legal *materials* over fitness with legal *opinions*.[64] So the fact that the prospective parties to a legal dispute *count on a limited range of future decisions*, each justified on a different conception of a certain value or principle, does not show that those parties are *governed by rules*. One can similarly *count on* a despot's decisions, if his decisions have a predictably limited range—a condition that is often met by despots, given what we know about their goals and beliefs.[65]

So, I am inclined to conclude that a judiciary committed to law as integrity is no safeguard against first-case assaults on the rule of law.

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64. *See supra* note 61.

65. Notice, also, that the argument in this paragraph is not the same as that presented in Part III. There I argued that welfare rights are contestable, and that contestedness cannot be reconciled with the rule of law. Here I argue that counting on decisions based on contestable concepts is not the sort of rule following that we have in mind when we praise the rule of law.

Again, viewing seemingly irreconcilable judicial trends (such as those instantiated by the pre- and post-New Deal Courts) as being responsive to legal integrity reflects little more than sheer speculation and hope. A defense of the consistency between a decision based on a contestable concept and the rule of law must show exactly how such concept is capable of justifying both trends. Perhaps this burden can be discharged some day, so the "first-case" worry may not be fatal to the "committed judiciary" argument. Yet I think the following worry is indeed fatal. I have been assuming that law as integrity motivates the judiciary. Such an assumption will be warranted only if a distinction between rule following and opportunistic behavior is tenable in the present context. I assumed that judges who endorse law as integrity meet a necessary condition for the rule of law: *they* follow rules. But suppose that, like most attorneys, judges manipulate legal arguments in order to achieve objectives other than legal truth or soundness—they primarily pursue things such as career improvement or fame. Let us also suppose that the achievement of such objectives is not conditional upon conveying moral truths or soundness in their opinions, and not even upon *trying* to produce true or sound opinions. If this were the case, would we say that they *follow* rules of moral deliberation, as something different from *using* them *rhetorically* to further their personal objectives? For many of us, the attorney epitomizes the instrumental use of legal rules. His overriding immediate goal is to *convince* the judge that the law is on his client's side.[66] He is not expected to view law as integrity *across his* cases. On the contrary, he is expected to invoke rules and principles that are at odds with others invoked by him in other cases, if this is conducive to winning his present case. The fact that he behaves in this way is indeed good evidence of his opportunistic use of legal reasoning, but we may well have independent evidence of his opportunism; we may know, for example, that his income is positively related to the number and importance of the cases he wins. Do we have evidence of *judicial* opportunism?

66. Of course, this goal need not be the same as the goal of constructing the *best* (as judged by an ideal Dworkinian judge) argument *for his side*. It may be worth noting that this comparative claim presupposes no commitment to an objectivist or realistic view of moral reasoning. Moral realism does entail that better and worse moral arguments are possible, but a legal (or moral) argument may be the best one due to its non-moral components. Thus, an attorney's argument may be improved upon in purely factual matters. A factual improvement or worsening is compatible with the purely moral aspects of distinct arguments being mutually incommensurable (perhaps because of the truth of moral skepticism).

To be sure, judges display much more consistent opinions across cases than attorneys do. Judges may well have an incentive to engage in sound legal reasoning. This claim does not strike me as farfetched—we can imagine that judges who were educated in, and internalized the intellectual values of a prestigious, intellectually honest academia would be sensitive to its public assessments of their rulings.[67] We can also speculate that nonelected, virtually irremovable judges will be relatively immune from the rent-seeking influences that arguably pervade legislation.[68] Such a setting offers, then, hope of judicial rule following. Judges will uphold welfare rights as long as the rules of moral deliberation lead them to. This being so, a decisive condition for placing welfare rights under the rule of law seems to be met: judges will uphold them in a principled way.

However, this account strikes me as overoptimistic, *even if* each judge happens to be a rule-following agent. A series of rule-following decisions may itself be the outcome of unprincipled decisions. Suppose that we are in the above happy scenario—that is, all along the courts have been adjudicating disputes by trying honestly to realize legal integrity. If the Dworkinian model holds, then such decisions would have been ultimately inspired by the rules of moral thinking. But notice that all of this is compatible with the judges' being appointed by politicians who were *not* morally motivated. Politicians may have had, for example, maximization of political power as their supreme goal. They might have appointed, among the *principled* candidates, only those who will further the achievement of the politicians' goals. In this way, the *whole sequence* of morally motivated judicial decisions will conform to a pattern whose best explanation has to refer to *someone else's (discretionary) will.* I suggest that we should look at the pattern, rather than at particular

67. On the pros and cons of academic influence upon legal doctrine and judges, see BARNETT, *supra* note 14, at 124-27.

68. Dworkin believes that "the political system of representative democracy [. . .] works better" at selecting policies, and hence at promoting the general welfare, than "nonelected judges, who have no mail bag or lobbyists or pressure groups, to compromise competing interests in their chambers." DWORKIN, *supra* note 36, at 85. This seems to me doubtful. If public choice analysis is correct in that legislation is disproportionally sensitive to well-organized and wealthy special interests, then the truth seems to be just the opposite. (For references to literature on rent seeking, see *supra* note 49.) A judiciary that is financially independent and free from electoral incentives and lobbying pressures seems to me more likely to develop a tradition of intellectually honest moral deliberation, given independent and prestigious academic institutions willing to scrutinize judicial behavior. And one need not be a utilitarian, a liberal, or an egalitarian to grant that honest moral deliberation is more sensitive to *general* welfare, personal autonomy, or equality, than lobbyists or pressure groups are.

decisions, when we assess whether the rule of law prevails. It is the rule of law's rationale that places the focus there: if we hate being subjected to another's will, we will hardly feel consolation in learning that someone manages to impose her will on us by carefully choosing the well-meaning individuals who will adjudicate our disputes.[69]

I conclude that law as integrity, even if the judiciary unexceptionably endorsed it, could not guarantee that welfare rights will be upheld in conformity with the rule of law.[70] It would be a fallacy of composition to infer that a sequence of decisions is bound by rules from the fact that each of those decisions is bound by rules. Opportunistic utilization of a judiciary committed to law as integrity is conspicuously facilitated if welfare rights meet the fitness requirement (*e.g.*, under constitutions explicitly providing for medical care rights). Since welfare rights are contestable, those who are in charge of judicial appointments (politicians or popular majorities, as the case may be) can safely choose from a wider range of candidates, each one endorsing a distinct conception of welfare rights. This being so, a sequence of principled rulings may greatly oscillate among various conceptions of welfare rights in ways that are traceable to *un*principled appointments. In this setting, citizens would not be subject to rules in the relevant sense here—*i.e.*, the sense that excludes being in the hands of another's discretionary will. Indeed, given the politicization of the process of judicial appointments, especially at the Supreme Court level, we have every reason to expect a great deal of opportunism behind the whole sequence of (principled) adjudication in welfare rights cases.[71]

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69. Bruno Leoni maintains that the rule of law requires long-run certainty of the law; he argues that otherwise we would not be able to carry out our life plans or even short-term businesses. *See* BRUNO LEONI, FREEDOM AND THE LAW 76-94 (3d ed. 1991). My contention in the text is different than, though compatible with, Leoni's. I claim that we may suffer from high legal uncertainty even if principled judges adjudicate disputes.

70. Recall that the fitness requirement mandates consistency with past *decisions*, not *opinions*. But what if consistency with *both* past decisions *and* opinions were required? Would not this maneuver counter the charge of opportunistic judicial appointments? It is difficult to tell; whether past opinions could be viewed later as partial developments of a single moral theory depends, among other things, on the generality and abstraction of those opinions (a few paragraphs above I speculated about these issues in connection with the Supreme Court before and after the New Deal). The more particular and concrete the opinions are, the more room there is for opportunistic selection of principled judges, for the chances that more general or abstract considerations accommodate such opinions are higher. In any event, a major appeal of the original Dworkinian account is lost in this reformulation: the Dworkinian account widens the range of background theories to which the judge may resort, and hence the *best* moral theory is more likely to belong to the judge's set of interpretive options.

71. Apart from differential contestedness and mutual advantage arguments of the sort already offered, there are structural features of market rights and welfare rights that render

V. AM I PROVING TOO MUCH?

Perhaps this is the place to address the following objection. Welfare rights are not the only contestable rights. The right to freedom of expression is conspicuously contestable too. Experts in American constitutional law disagree about what duties correlate with the right to freedom of expression and who the duty-bearers are. Political philosophers, being unconstrained by constitutional texts, hold even more radically different views on those matters. On the other hand, freedom of expression is widely seen as a paradigmatically classical liberal right. It arguably confers an immunity-right from governmental "abridgement" of freedom of expression, and so it seems comfortably placed within the ideal of limited government that is so central to the classical liberal tradition. Similar remarks apply to other rights (*e.g.*, the right to freedom of religion) characteristic of classical liberal bills of rights. One might wonder, then, whether the fact that such rights are contestable undermines the project of grounding classical liberal rights, as they are typically incorporated into constitutions, on their distinctive consistency with the rule of law.

Admittedly, such a project founders. Nevertheless, that is not the project that I am trying to pursue here. The contrast that exercises me is that between *market rights* and contestable rights such as welfare rights. I submit that this is the sort of contrast that should interest anyone eager to bring a system of rights under the rule of law. I am not claiming that classical liberal *constitutionalism* best realizes the rule of law, but rather that market rights, as articulated in classical liberal/libertarian *political philosophy*,[72] do. Such rights correlate with negative duties that, for the reasons offered in Parts III and VII, fit the rule of law.

What is, then, from the perspective of the rule of law, the status of the constitutional guarantees of freedom of expression ("Congress shall make no law [. . .] abridging the freedom of speech, or of the press"[73]) and other provisions typical of liberal constitutionalism? It might be thought that such provisions are innocuous to the rule of law because they correlate with governmental inability to legislate in

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the former much less amenable to manipulation than the latter. I shall expand on these issues in Part VII.

72. The rights presupposed by Robert Nozick provide a conspicuous modern illustration of the rights that I have in mind. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). I should emphasize, however, that nothing in my argument is intended to turn on particular justifications (natural-law-based, efficiency-based, etc.) of market rights.

73. U.S. CONST. amend. I.

certain domains. It is unclear, though, whether such a correlation entails market rights to expression. On its face, the constitutional text forbids government to *do* something—namely, "abridging" expression freedoms. But this cannot, on pain of circularity, be an argument for free markets in broadcasting, newspapers, etc., for government is bound to "abridge" such freedoms under any legal system, free-market or otherwise. For example, free-market rules allow the owners of a shopping center to exclude protesters; in so acting, the owners are exercising property rights *conferred* (regulated, enforced, etc.) *by* government. Saying that government "abridges" expression freedoms *only when* it curtails freedoms entailed by market rights (*e.g.,* in virtue of a new regulation) is no argument for market rights to expression. A non-circular understanding of "abridgements" of free expression requires comparisons between alternative regulations in order to assess which one will least "abridge" free expression.[74]

The fact that freedom of expression is contestable hinders such comparisons. It appears, then, that I am trapped in a dilemma: either my argument proves too much or it fails to distinguish between (a) forms of contestedness that are harmful to the rule of law and (b) those that can coexist with it. My argument may prove too much because my claim that welfare rights, being contestable, undermine the rule of law seems to imply that a constitutional guarantee of freedom of expression, being contestable too, must also undermine the rule of law. This may sound bizarre, given that such guarantees are widely regarded as bastions of the rule of law. Alternatively, my argument may fail to explain why, in apparent inconsistency with much of what I have said so far, the fact that the right to freedom of expression is contestable is harmless to the rule of law.

I am willing to endorse the dilemma's first horn. This seems too high a price to pay only if we believe that the linguistic resources by which we convey our commitments to values or rights ought to be engraved in the Constitution. But this belief is untenable. No conception of freedom of expression has definite implications for constitutional design: it is an open question what the best constitutional techniques are for promoting the things praised by each conception (personal autonomy, pluralism, public deliberation, check on despotism, etc.). There is no guarantee, in particular, that a First Amendment-like provision will best secure those good things. One

74. *See* SUNSTEIN, *supra* note 42, at 209-10.

major reason for skepticism here is that the conception of freedom of expression endorsed by statutes and judicial rulings need not be our preferred one. For example, we may value freedom of expression because we value pluralism in all domains of thought, regardless of the moral or aesthetic value of the expressed views. However, political authorities may, as a matter of interpretation of the First Amendment, choose to enforce a conception of freedom of expression based on personal autonomy, and proceed to ban various forms of hate speech that arguably give rise to feelings of humiliation that are detrimental to an autonomous life. Here our preference for pluralism will be thwarted in the name of a (plausible, though contestable) interpretation of the First Amendment. A different constitutional text may have been more successful in terms of delivering far-reaching pluralism. Suppose, for example, that we adopt the procedural approach to constitutional design suggested in Part III. If the argument there is sound, such an approach will yield a constitution upholding strong market rights. Suppose, further, that the free market maximizes pluralism; one reason for this may be that free markets allow individuals to spread any view by purchasing things (ink, paper, computers, etc.) whose suppliers are willing to sell for profit, rather than for ideologically-related reasons. Under these suppositions, we would be well advised to dispense with anything like the First Amendment (which, as we just saw, may thwart pluralism), and to instead adopt the market rights procedural approach. In short, while dispensing with explicit mentions of "freedom of expression" (or perhaps, to some extent, *due to* the absence of this contestable notion in the constitutional text) we would obtain all the good things that we try to convey through the rhetoric of freedom of expression.

The point can be generalized indeed to market rights themselves. Not all the constitutional provisions originally intended to uphold market rights will effectively guarantee them. Consider the Takings Clause of the American Constitution, which mandates that "private property [cannot] be taken for public use without just compensation."[75] For a long time, the courts read this clause as banning redistribution of private property rights. But is it textually farfetched to read this clause as entailing, say, that "not to furnish a basic level of subsistence" is a taking of another's (*i.e.*, a poor person's) property, thereby providing constitutional underpinnings to

75. U.S. CONST. amend. V.

welfare transfers?[76] Sunstein toys with the possibility of independently justifiable (though in my view notoriously contestable) theories of private property that confer to individuals property rights to resources up to a subsistence level, though he finally rejects such a reading of the Takings Clause on historical and pragmatic grounds.[77] I agree with Sunstein that the "subsistence level" interpretation is not obviously ruled out by the constitutional text, and also that the historical and pragmatic considerations that might be adduced against such an interpretation depend on theories of constitutional interpretation that are in turn controversial and need to be defended.[78] Sunstein's speculation is well taken as a warning against excessive optimism that substantive constitutional approaches to rights, even private property rights, can coexist with the rule of law by closing avenues to widely divergent plausible interpretations. The procedural approach outlined in Part III answers to this concern.

Discretion is compounded by the fact that substantive guarantees conflict with each other. Thus, the Takings Clause may be held to conflict with the Equal Protection Clause of the Constitution, according to which "[n]o State shall [. . .] deny to any person within its jurisdiction the equal protection of the laws."[79] When the latter is read as justifying affirmative action and various antipoverty programs, a conflict with market rights as here understood clearly arises.[80] It bears repeating (see Part I) that I am solely concerned with the question of how detrimental to the rule of law the governmental powers needed to settle such conflicts are: I am not taking sides with independent pros and cons of specific legislation. A constitution that remains silent on freedom of expression may be the best option, *given our rationale for valuing (what we attempt to convey through the concept of) freedom of expression.* Such rationale may be carried out best by a constitution that makes it in the interests of legislators to refrain from enacting legislation that is incompatible with our preferred conception of freedom of expression. My argument may seem to prove too much because, contrary to widespread beliefs, it suggests that First Amendment-like provisions undermine the rule of law. I submit that this may be too much only in an innocuous way, for it is rational to avoid *explicit constitutional guarantees* of a right

76. SUNSTEIN, *supra* note 42, at 153.
77. *See id.* at 153-56.
78. *See id.* at 93-94.
79. U.S. CONST. amend. XIV, § 1.
80. *See* SUNSTEIN, *supra* note 42, at 154.

whenever they are detrimental to having that *right* respected. The above procedural rules illustrate this idea, insofar as they provide political actors with incentives to uphold strong property rights, on the assumption that such rights will block governmental actions restricting the free flow of ideas.[81]

The upshot of all this is that the tensions between First Amendment-like provisions and the rule of law need not force us to abandon the hope of bringing under the rule of law the values underlying our rhetoric on freedom of expression. There is a gap between contestable *constitutional guarantees* of a right and *protection* of that right *under our preferred conception thereof.* It is no wonder, then, that one can consistently (a) acknowledge that First Amendment-like provisions are contestable, (b) embrace a certain conception of freedom of expression, and still (c) wholeheartedly support the rule of law. But then, the claim that my argument proves too much loses its polemic force. While the rule of law may well require a constitution lacking in First Amendment-like *provisions*, it need not require that the *right* to freedom of expression be jettisoned.

The point can be approached another way. We saw that the First Amendment is consistent both with the autonomy-based and with pluralism-based views on freedom of expression. Now, whether a certain conception of freedom of expression is correct depends not only on what "freedom of expression" means, but also on what "legislation that abridges" it means. The law of property generates distributions of property rights on tangible vehicles of expression: ink, paper, computers, etc. There is, then, a straightforward sense in which any legal system *secures and abridges freedom of expression in a distinctive way*—it distributes bundles of property rights on, and hence rights to exclude others from, means of expression. Since depriving some people from the possibility of expressing their views is virtually inevitable, it seems reasonable for supporters of freedom of expression to prefer legislation that will *minimize* its "abridgement." But then, state *intervention* in the markets for tangible means of expression may not be precluded, for minimization of curtailment of free expression might result from, say, regulation that facilitates access of the poor to the means of communicating their views to others. Such a policy might be grounded on a "positive freedom" conception of free expression; for example, it may aim at

81. For an economic argument in favor of the view that free markets promote pluralism, especially with regard to opportunities to criticize government, see MILTON FRIEDMAN, CAPITALISM AND FREEDOM 7-21 (1962).

helping everyone spread her own views.[82] Arguments based on other conceptions of freedom of expression can be advanced to reach, always on behalf of the First Amendment, a different distribution of freedoms of expression. For example, an argument from autonomy of the sort outlined above may justify a ban on hate speech, including that performed by poor people. I submit that such a variety of interpretive possibilities is hardly compatible with the rule of law. Government would have to possess wide discretionary powers to (a) select one conception of the right to freedom of expression, and (b) to allocate scarce communication resources in ways that will best realize that conception. Moreover, government would have to take sides in contestable issues that are internal to each conception. The pluralistic conception, for example, will force government to decide when a view is insufficiently spread, when it is relevantly different from widely known views, etc. Of course, causal contestedness (see Part III) will compound all the difficulties involved in such decisions. In short, it is hard to see what open, general, and stable rules can possibly underlie governmental decisions in this field.

There is no denying that First Amendment-like provisions may, under certain circumstances, promote autonomy, pluralism, or whatever good things we attribute to freedom of expression. This is arguably the case in the United States. Americans enjoy an extensive free market in the tangible goods used to express ideas (other than broadcasting frequencies and other modern-technology devices[83]). Also, there is a judicial tradition that takes the distribution of property rights brought about by this market as the baseline against which legislation is judged to "*abridge*" freedom of expression. One would expect in such a milieu that the ostensibly negative nature of the First Amendment will reinforce whatever role is played by the free market in the promotion of the values that we associate with freedom of expression. But these benefits are contingent: they turn on the existence of (a) a developed free market in the tangible vehicles of expression, and (b) a tradition of constitutional interpretation that

82. For examples of arguments along these lines, see ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS 322-27 (1982), and SUNSTEIN, *supra* note 42, at 198-231.

83. The argument for the role of private property in fostering pluralism may be extended to cover airwaves and, in general, means of expression that are not "tangible" in the sense assumed so far. *See* Thomas W. Hazlett, *The Dual Role of Property Rights in Protecting Broadcast Speech*, 15 SOC. PHIL. & POL'Y 176, 176-208 (1998) (arguing that property rights in the radio spectrum, in addition to property rights in electronic media, would foster diverse expression).

takes the speech freedoms entailed by such markets as immune to legislation. The procedural approach to market rights defended in this essay helps securing (a), and renders (b) unnecessary.[84]

The argument does not apply, however, to other classical liberal rights. Consider the right against police interrogation under the threat of torture. This right does not seem contestable: our judgments about what constitutes police torture widely overlap.[85] Notice, also, that this is a negative right, the correlative duty-bearers being policemen and other public officials; as I will argue in Part VII, negative rights are tractable under the rule of law. On the other hand, the right not to be interrogated by the police under the threat of torture is a substantive right, as opposed to procedural rules for political decision-making (I provide examples of the two types of rules in Part III). This, I argued, may give rise to tensions with the rule of law. It would nevertheless seem that the right against police torture epitomizes the sort of safeguards against discretionary power that characterizes the rule of law. Shall we conclude, then, that my defense of procedural rules for political decision-making does not hold across the board? Is it the case that the rule of law necessitates, after all, some substantive constraints on discretion? Indeed, it is hard to see how political procedural rules could prevent the police from torturing detained persons. No voting rule and no distribution of power between political units, to recall two major examples of procedural rules for political decision-making, are obviously instrumental in checking police

84. A strong tradition of pluralism and market rights may conceal the fragility of First Amendment-like provisions as safeguards of the rule of law. Article 14 of the Argentine Constitution provides that all inhabitants of the country have a right "to publish their ideas in the press without previous censorship." Article 32 provides that "the federal Congress shall make no law restricting freedom of the press." However, the Argentine history in matters of free speech (even under some freely elected administrations that arguably respected constitutional procedures for political decision making, which were similar to the American ones) would have certainly horrified justices on the American Supreme Court along its whole history. The private property procedural approach defended in this essay would have thwarted restrictions of pluralism in Argentina, and especially restrictions of opportunities to criticize the government—from regulations of the paper industry for "economic" reasons to takings of newspapers "for the common good" or for the sake of "national security." *See generally* CARLOS SANTIAGO NINO, FUNDAMENTOS DE DERECHO CONSTITUTIONAL 272-80 (1992) (providing a brief history of the Argentine Supreme Court doctrine on free expression). Skepticism about substantive protection of freedom of expression traces back to the Founding Fathers of the American Constitution. *See* James A. Montanye, *Freedom of Speech: Constitutional Protection Reconsidered*, 3 INDEPENDENT REV. 329 (1999).

85. Of course, vagueness will sometimes lead to disagreement (when do various sorts of inconveniences and discomforts imposed upon detained persons become torture?). However, as we saw in Part III, vagueness, at least within certain limits, need not be a significant threat to the rule of law.

brutality.[86] I submit that very basic civil liberties, such as those entailed by the concept of self-ownership, must indeed be guaranteed by substantive constitutional rules if the rule of law is to prevail. Let us see why.

Consider the following contrast between taxation, on the one hand, and some very basic civil liberties, on the other. Taxation typically leaves the taxpayer free to carry out his fundamental life plans. Indeed, individuals constantly redesign their strategies in view of the likely impact of taxation on their lives.[87] Within considerably broad limits, taxation does not prevent taxpayers from shaping their own lives, in a sense of "shaping" that excludes having one's life coercively led by someone else. Things would be very different if individuals lacked a (legal) right not to be tortured by the police.[88] Torture by the police, and other curtailments of basic civil liberties such as home invasion, stand in radical opposition to the rule of law, over and above objections from the standpoints of human dignity and other deeply entrenched moral ideals. What makes violations of such civil liberties so offensive to the rule of law is not the impairment of vital interests that they bring about—such impairment is usually involved in punishment, and punishment is surely compatible with the rule of law. Rather, we find arresting someone without judicial warrant, invading someone's home without a search warrant, and other violations of civil liberties so objectionable because they evince serious forms of domination of some people by others. They are objectionable forms of domination because, unlike (justified) punishment (and, for that matter, taxation), they are not *responses to* specified sorts of behavior. Nor are they *authorized in accordance with procedures* aimed at the prevention or punishment of crimes.

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86. *See* MUELLER, *supra* note 39, at 209-224, for a public choice argument for substantive guarantees of the right of habeas corpus and other core civil liberties. *Mutatis mutandis*, Mueller's line of reasoning may also ground a right not to be tortured by the police. Interestingly, Mueller advocates substantive constitutional provisions in these cases, even though, in line with much public choice literature, he generally favors procedural constitutional provisions.

87. The behavioral adjustments discussed in Part III illustrate the same type of phenomenon.

88. People surely have a right not to be tortured by *anyone*. Indeed, this right is involved in market rights to the extent that, as I characterized them in Part I, they include the right of self-ownership. But perhaps justifying a prohibition of the use of torture by the state requires something more than an appeal to market rights, even if (or perhaps because) we regard the protection of such rights as the primary task of the state. We can imagine situations in which the only means for the state to prevent violations of market rights is to torture someone (*e.g.*, in order to obtain information about imminent murders or robberies).

They are discretionary aggressions against vital interests, and as such, they affect by their very nature the rule of law. They *consist in* subjecting some people's fundamental interests, and thereby their whole lives, to another's discretionary will. While we may conceive of rule-governed taxation,[89] curtailment of basic civil liberties involves domination by others—it is *in itself* deeply hostile to the rule of law. It does not follow that there cannot be rule-governed torture (*e.g.*, to obtain information about accomplices). To that extent, it may coexist with the rule of law though it surely offends independent values and ought, all things considered, to be banned. But when curtailment of basic civil liberties is not governed by rules, the offense to the rule of law involved therein is compounded by the severe forms of domination that such curtailment evinces.

What follows from all this for the substantive/procedural safeguards issue? Basic civil liberties are essential components or manifestations of the right of self-ownership. As such, they are market rights, under the broad characterization offered in Part I. Nevertheless, basic civil liberties differ from other market rights in respects that matter to the form of constitutional protection they require. I suggested above in this section that a pluralism-based conception of freedom of expression will be best served by political procedures guaranteeing free markets in the tangible vehicles of expression, on the assumption that such markets will spawn pluralism. Here procedural rules circumvent the discretionary powers that a substantive protection of free speech would trigger. One crucial difference between freedom of expression and other basic civil liberties such as the right not to be tortured by the police is that the latter are largely conceptually uncontestable. Interpretive leeway is further limited because such liberties are by their very nature limits to governmental discretion. Moreover, causal contestedness does not affect such liberties; a general ban on torture, backed by severe punishment of violators, should arguably be at the center of efforts to eradicate such practices against basic civil rights. I submit that all of these features make substantive protection of such rights advisable, at least as long as we lack reliable theories of the political procedures that will best generate a self-enforcing system of basic civil rights.

89. If the argument offered in Part IV is sound, however, rule-governed *redistributive* taxation is hardly ever forthcoming, especially under typical welfare schemes.

VI. DEPENDENCE, CHARITY, AND WELFARE

Anyone who values the rule of law is thereby committed to rejecting dependence on the discretionary will of others, whoever they might be. He will object both to official and to nonofficial sources of dependence. Charity belongs to the latter. People whose basic needs are unmet depend upon private donors' proclivity to help them.[90] Accordingly, one common argument for welfare rights is that they circumvent the vagaries of the market for charity. In conferring upon the needy the status of legal right-holders, welfare institutions allegedly reduce their dependence on others' discretionary will.[91]

But how, exactly? Since welfare rights are contestable, determination of who gets what welfare benefits is open to a wide range of political decisions (see Part III above). Given a constitutional guarantee of a welfare right, it must be *optional* for legislators which conception of that right is to be reflected in legislation. But then, the legislature must be *authorized* to choose any of the (*ex hypothesi* plausible) conceptions of that right. This assertion rests on the reasonable assumption that it is permissible for a legislature to choose contestable means to protect constitutional rights when all available means are contestable. Of course, *after* legislation has upheld a particular conception of a welfare right, the state has the legal duty to grant certain benefits, but this is consistent with the claim that legislators were at liberty to choose that particular conception of the welfare right. Indeed, legislators are at liberty to choose among several contestable conceptions of a welfare right even if the

90. A related thought is that charity makes the recipient feel his dependence vividly; it makes him feel inferior. He receives from someone who has no incentive to give, other than, perhaps, her moral motivation. Such a sense of inferiority is prejudicial to the recipient's dignity. I shall not pursue this line of reasoning, since I am solely concerned here with whether and how dependence impinges on the rule of law. I do not consider how it affects other values, such as self-esteem and the *sense* of independence. For a discussion of how subjection to another's discretionary will affects one's self-esteem and sense of independence, see PETTIT, *supra* note 5, at 70-73.

91. There is a different notion of "dependence" that frequently appears in debates about welfare. According to that notion, I depend on others insofar as they are the only suppliers of resources that I vitally need. This notion of "dependence" plays a role in arguments *for* welfare from *dependence on the state*. For a discussion of such issues, see Goodin, *supra* note 57, at 116-144. The notion of "dependence" that I try to capture in the text allows us to say that I depend on another's charity even if she supplies me nothing, and even if she is not the only person who can supply me with things I need. Thus, when Sunstein advocates "social programs [meaning typical welfare state programs] designed to ensure that no one is dependent," he is using the same notion of "dependence" as I do. SUNSTEIN, *supra* note 42, at 137; *e.g.*, *id.* at 40-67 (advocating welfare programs). I hope the ensuing discussion in the text will make it clear that this is the relevant notion of "dependence" for the question of whether welfare rights are compatible with the rule of law.

constitution *compels* legislators to enact laws protecting welfare rights. That choice will determine who gets what benefits. This being so, it is hard to see how the dependence worry could ground a preference for welfare over charity.

I have been assuming a sense of "dependence" according to which the fate of a dependent individual is in the hands of discretionary decisions made by others. We may wonder if there is another construal of "dependence" that brings welfare rights and the rule of law into harmony. Suppose that the state somehow succeeded in helping the needy. How the beneficiaries were selected may indeed prompt the rule of law worries that I raised in Part III. Still, let us grant that some public officials are now *legally bound* to help *those* people. Such officials are thus coerced into helping them. We may now draw the following distinction between welfare and charity. In the market, the needy depend on others' *largesse*, whereas under constitutionally guaranteed welfare, and assuming generalized compliance with coercive rules, they only depend on *impersonal factors*. Once legal provisions for redistribution are in force, the only thing that stands in the way of accomplishing the welfare state's goals are impersonal factors, scarcity being of paramount importance among them. Such factors are impersonal not in a sense that excludes human intervention of any kind but in a sense that excludes human *design* of the *overall outcome*. Economics studies impersonal factors in this latter sense. When economists explain the equilibrium price in the market as the result of the forces of supply and demand, they are not denying (indeed, they are assuming) that such forces are constituted by human decisions. They do imply, however, that the equilibrium price is not the intended outcome of the buyers' and sellers' actions. It is this impersonal view of the market that is involved when economists explain the price as the outcome of market "forces." Receiving welfare benefits is contingent on like impersonal factors. Accordingly, if scarcity were to render the state unable to provide welfare to all those who are eligible for it, no one should be blamed for the shortage. This is so for the same reasons that, in a free market (at least in a competitive one), the buyer of a product cannot meaningfully blame other buyers for a rise in that product's price. When the welfare state fails to help the needy (enough), it is because of impersonal factors, in the sense just indicated, rather than a lack of largesse. Complex impersonal phenomena, such as the behavioral adjustments mentioned in Part III, must be cited in a full explanation of such failings. But lack of largesse is conceptually impossible given

our assumptions, since the state (or, if you like, its officials and the taxpayers) is (are) under the legal duty to help the needy. On this view, dependence on market largesse is inimical to the spirit of the rule of law, whereas dependence on the impersonal factors that are set in motion by the machinery of the welfare state leaves that spirit intact. It may be hoped that a similar argument holds also for legislators and bureaucrats who are constitutionally bound to implement a particular conception of a welfare right: their failing to achieve welfare goals would be attributable to impersonal forces as well. Whether the officials who are duty-bound to help the needy will be able to discharge their duties (and not be prevented from doing so by scarcity, for example) turns on the workings of impersonal forces.

Unfortunately, the requisite difference between the two types of dependence is illusory. It is true that the recipient of charity depends on a donor's uncoerced will, whereas the recipient of welfare depends on coerced performances by bureaucrats and taxpayers. But closer inspection reveals that the needy's dependence on *the market for charity* is of the same nature as their dependence on welfare *schemes*. Whether a given needy person will be a recipient of *charity as such*, as something different from charity provided by a particular donor, is contingent upon the workings of the market for charity. It is a function of how much charity donors will demand (*i.e.*, how much they will donate) given the implicit price of charity. As with any other price, the price of charity depends on how much money and other things (time spent filling out charity forms, for example) donors are willing and able to expend in order to "buy" a unit of charity.[92] Here, too, "market forces" will determine the (implicit) price of charity. But then, being a recipient of "charity as such" is as contingent on impersonal factors, in the present sense of "impersonal factors," as being a recipient of welfare is.[93] The economics of charity is the counterpart to the economics of welfare taxation and bureaucracy.

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92. Such a unit is the donor's subjective measure of her contribution to alleviate poverty. *See generally* GORDON TULLOCK, THE ECONOMICS OF WEALTH AND POVERTY (1986) (providing an economic analysis of charity).

93. Certain forms of charity are arguably public goods: they are most efficiently provided by collective arrangements that are non-rival and nonexclusive for its "consumers" —*i.e.*, charitable people. *See* ALLEN BUCHANAN, ETHICS, EFFICIENCY, AND THE MARKET 71-75 (1985). However, this possibility would hardly ground governmental powers to *redistribute, as something different from consensual procedures to secure those collective arrangements*. To the extent that welfare is really a public good, it benefits everyone and so a consensual political process of the sort outlined in Part III will supply it. For more specific examples of constitutional rules aimed at efficient levels of charity, see MUELLER, *supra* note 39, at 237-46.

It might be said that the foregoing assimilation of markets for charity to welfare schemes fails to capture an important difference between charity and welfare. A market consists in many particular agreements to buy and sell goods. Master-servant relationships may obtain in *each* of those agreements. Indeed, some writers have refused to characterize as "voluntary" those agreements where one of the parties has awful alternatives to accepting the other party's terms. Those writers argue that this is precisely the kind of plight in which workers find themselves in the free market. The controversy about whether wage offers are coercive revolves around this issue.[94] As against this objection, notice that the welfare recipient has by hypothesis an awful alternative if he decides to reject, or to give away, his welfare share. So, the absence of minimally attractive alternatives cannot serve to draw the requisite distinction between charity and welfare. The difference must lie elsewhere.

The upshot of all this is that the argument from dependence fails to show that welfare is friendlier to the rule of law than charity is. There are, of course, factual and legal differences between the two. While welfare transfer payments are mandatory for the welfare bureaucracy, charity is optional for donors. Welfare redistribution is typically much more opaque than charity is as regards who gives what to whom: it removes givers away from takers, leaving in the middle complex bureaucratic mechanisms. But none of these differences, or any other that I am aware of, allows us to distinguish welfare from charity in terms of dependence on others' discretionary will. I conclude, then, that a successful defense of the compatibility between the rule of law and legal welfare rights cannot appeal to differences in dependence between welfare recipients and recipients of charity.

Advocates of welfare might wish to invoke another notion of "dependence," a notion that would allow us to characterize the recipient of charity as distinctively dependent on others' moral motivation. Moral motivation is sometimes weak, and can usually be substantially reinforced by the threat of punishment. This is precisely the case with welfare bureaucrats: they provide under threat of punishment welfare goods to the needy. The sense of "dependence" which allows us to say that the welfare recipient is *not* dependent on

94. *See, e.g.*, Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD 440-72 (Sidney Morgenbesser, Patrick Suppes & Morton White ed., 1969); G. A. Cohen, *The Structure of Proletarian Unfreedom*, 12 PHIL. & PUB. AFF. 3, 3-33 (1983); HORACIO SPECTOR, AUTONOMY AND RIGHTS: THE MORAL FOUNDATION OF LIBERALISM 14-22 (1992).

the welfare bureaucracy may be therefore this: the welfare bureaucracy is not legally at liberty to help her or not. Even if welfare is on a par with charity regarding dependence on the above impersonal forces, charity renders the needy differentially dependent on another's *uncoerced will.* By threatening bureaucrats with legal sanctions, the welfare state leads their wills in the morally correct direction. Is not this in accordance with the rule of law's rationale—namely, to eradicate discretionary power?

If legal duties to help others foster their independence, then *enforceable* duties to carry out others' *charitable* decisions must do so as well. I may write a check in favor of some needy people; a bank has thereby become legally duty-bound to pay that check upon request. As a result of my largesse, others have legal duties to benefit those needy people. If the "threat of legal sanctions" argument were sound, then charitable check payments would foster the recipient's independence as much as welfare arrangements allegedly do. In both cases, some people are legally obliged to help the poor. Why, then, set in motion the welfare state machinery, instead of simply exhorting private donors to make out checks and the like?

It is no response to say that those who write the checks are legally at liberty to do so, whereas welfare bureaucrats are legally duty-bound to provide the benefits. Both banks and welfare bureaucrats are duty-bound as a result of others (donors and legislators, respectively) being at liberty to exercise certain legal powers to redistribute towards the poor. It is true that a constitution guaranteeing welfare rights purports to bind legislators. But then, and even ignoring the above argument that welfare rights license legislative discretion, the drafters of the constitution must be at liberty to exercise such redistributive powers. Somewhere in the legal hierarchy of the welfare state we will encounter the largesse that presumably gives rise to the present sort of dependence.[95]

95. Talk of the *legal* powers and liberties of constitutional framers may sound queer, for (original) drafters of a constitution are by hypothesis beyond an (ordinary) legal framework. We can nevertheless view them as behaving within a legal framework as long as we interpret broadly, though in a sense that is still relevant to rule-of-law issues, the Hohfeldian concepts introduced in Part II. Thus, we may conceive of a power-right to alter a legal situation as an ability to do so that need not be conferred by a (positive) legal rule. Recall, also, that one has a liberty-right to do something as long as one is under no duty either to do it or to refrain from doing it. So liberties presuppose no legal duties—indeed, they entail their absence. It is a vexed problem in the philosophy of law how to analyze more precisely ultimate powers or liberties. For elaboration of the idea that legal powers presuppose legal powers in others, and ultimately a waivable immunity, see STEINER, *supra* note 18, at 59-73.

It might be rejoined that private donors give away what is theirs, whereas legislators or

It would be beside the point to object that lawmakers are under special duties derived from their role, whereas no such duties constrain the activity of potential donors.[96] A legislature bound by a constitutional guarantee of welfare rights is, like a private donor, *at liberty* to give some things to some people—this follows from the fact that welfare rights are contestable. To be sure, there are typically some differences between the incidents involved in the economic powers of government and those associated with full ownership. For example, legislators may not use their power of eminent domain for their own (narrowly defined) benefit. Yet they share with private owners a feature that is crucial for present purposes—they have a power, but not a duty, to confer property rights on certain people. In short, both allot largesse to needy people. This is the only thing that should matter in assessing how dependent, in the present sense, welfare recipients and recipients of charity are. Of course, this conclusion is compatible with asserting that both legislators and private donors have a *moral* duty to use their legal powers to help the poor.

VII. NONINTERFERENCE, MARKET RIGHTS, AND THE RULE OF LAW

Is there anything special about the *negativity* of market rights that makes them preferable to positive legal rights from the point of view of the rule of law? We saw in Part II that market rights correlate with duties of noninterference with certain uses of things. Such duties are negative in that they tell people to refrain from doing certain things. More specifically, they are duties not to interfere with *rightful* uses of things as defined by the legal system. This entails that

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drafters of a constitution ought to administer an eminent domain as a public trust. *See also infra* note 96. The sense of "theirs" that is required by this objection entails that donors have no legal duty to give away their money. My giving away what is *mine* entails that my ex ante legal situation encompasses a number of "incidents," to use Honoré's term, of full ownership (claim-rights to exclusive use, immunity from expropriation, etc.). *See* Honoré, *supra* note 19. But notice that those incidents, which allow us to talk of the private donor's "largesse," are present in the welfare state as well: for conceptual reasons, government *has to* possess exclusive eminent domain over all the things subject to its redistributive powers. The assimilation of governmental "largesse" to a private right of ownership is a major theme in the classic article by Charles Reich, *The New Property*, 73 YALE L. J. 733 (1964), *reprinted in* LAW AND JUSTICE: CASES AND READINGS ON THE AMERICAN LEGAL SYSTEM 440 (Dale A. Nance ed., 1994). *See also* GEOFFREY BRENNAN AND JAMES BUCHANAN, THE REASON OF RULES 114-17 (1985) (providing a similar insight in the context of public choice theory).

96. The public trust and eminent domain doctrines in constitutional law may be thought to capture such duties, to the extent that such doctrines require compensation for certain uses of public property or for takings, respectively. *See* Richard Epstein, *The Public Trust Doctrine*, *in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS, *supra* note 39, at 315-33.

"noninterference" is a normative notion when we use it to explicate market rights.[97] A regime of market rights will surely allow (indeed, mandate) policemen to interfere with my plunging my knife into your belly without your consent. Various bundles of negative rights are imaginable, market rights being just one among them. For example, in a regime where everything is commonly owned in the sense that using anything requires permission from everyone else, all duties are negative because they require each individual to *refrain* from using anything without communal permission. In such a regime, we can naturally speak of the community having a "right" to everything (or, if we want to avoid the personification, of each individual having a right to veto any other's use of anything). If we were to describe this regime by saying that the community's property right correlates with everyone's duty not to interfere with the community's *rightful* control of everything, then we would be using a normative notion of "interference" that differs from the one used in the context of market rights.

There is, then, a gap between showing that negative rights prevail over other moral considerations and showing that a regime of market rights is legitimate. Negative rights underdetermine property rights regimes. Reasons of justice, fairness, wealth maximization, etc., would be necessary to justify a specific bundle of negative rights. For my part, I have offered in Part III a rule-of-law/mutual advantage argument for procedurally generated market rights. The question that

97. Sunstein makes essentially the same point when he objects to the view that government remains *inactive* as long as it leaves the market alone, whereas it *acts* as long as it modifies market distributions. *See* SUNSTEIN, *supra* note 42, at 68-92. Sunstein is correct in objecting to defenses of the free market and/or "limited government" that condemn government intervention in the market as "partial" —such defenses take for granted that current distributions are "natural" rather than the product of state activism (through courts and police) in protecting property rights. He observes that "the crucial factor is the law of property, which is of course built into those [*i.e.*, market] distributions, but which, perversely, is not treated as law at all." *Id.* at 71. It would be wrong, however, to claim that state activism, understood in this broad way, cannot possibly be legally constrained. The state may be *constitutionally constrained* to a specific type of activism—this is what advocates of limited government on rule of law grounds should in any event claim. This claim preserves whatever appeal the idea of "limited government" is intended to have and forestalls Sunstein's intimation that, since the state cannot help but be active, it should better be active against the free market. Unlike Sunstein's preferred reading of the Constitution (*i.e.*, a reading that justifies a state "activism" that is somewhat more hostile to the free market than the traditional welfare state is), the constitutional constraints that I am advocating rule out discretionary powers. To be sure, a state so constrained would be "partial," in Sunstein's sense of the word. But, for present purposes, this only shows that Sunstein's charge of "perversity" against certain "impartiality" arguments for the free market leaves untouched my thesis that market rights should enjoy a privileged place when the rule of law is our primary concern.

concerns me now is whether negative rights as such are distinctively friendly to the rule of law. Does the tension between welfare rights and the rule of law reflect a basic truth about the connection between negative rights and the rule of law?

As Loren Lomasky observes, everyone can simultaneously be a donor and a recipient of (normatively unqualified) noninterference.[98] Unlike scarce material resources, which can be enjoyed by some only at the expense of others, noninterference by others can be enjoyed by everyone at the same time, and everyone can provide others with noninterference at the same time. These claims are independent of the legal framework. Whatever the bundles of property rights over most external resources[99] (full ownership, communal ownership, mixed regimes, etc.), and however those bundles are distributed, noninterference with the exercise of *those* rights can be universal. No interpretive decision as to who may enjoy what at the expense of whom is needed, and so a potential for subjection to another's discretionary will is absent.[100]

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98. *See* Loren Lomasky, *Liberty and Welfare Goods: Reflections on Clashing Liberalisms*, *in* RIGHTS, EQUALITY, AND LIBERTY. UNIVERSIDAD TORCUATO DI TELLA LAW AND PHILOSOPHY LECTURES (Guido Pincione & Horacio Spector eds., 2000).

99. I say "*most* [rather than 'all'] external resources" to exclude normatively uninteresting cases of universal noninterference. For example, under comprehensive communal ownership it might be the case that virtually all things one wants to do (including, say, breathing the common air) will interfere with someone else's (*i.e.,* the community's) rights. Thus, if Mary vetoes anyone else's use of the air for breathing, and another person in turn vetoes Mary's use of the air for breathing, then universal suffocation will illustrate the general truth that noninterference can be universally provided and enjoyed. In such a case noninterference is universally provided because everyone refrains from breathing, and universally enjoyed because all right-holders, *i.e.,* all members of the community, suffer from no interference with their collective decision, under unanimity rule, to exclude others from the use of the common air. For related points, *see* G.A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY 92-115 (1995).

100. I assume the usual interpretation of market rights as providing agent-relative reasons not to interfere with another's use of his property. Each has a reason not to interfere *herself* with another's control over his market-generated resources, as something different from her having a reason to minimize the number and/or seriousness of such tokens of interference. The latter, agent-neutral interpretation of rights lends itself to causally contestable issues that the agent-relative view can normally avoid. The agent-neutral view seems to be assumed in usual conceptions of welfare rights. They are expressed in terms of aggregate goals (*e.g.,* maximization of the number of people inhabiting decent houses or enjoying minimally decent incomes) that everyone (government and citizens alike, under various redistributive arrangements) ought to pursue. Jeremy Waldron suggests that both negativity and agent-relativity account for the fact that "Nozickean" rights (*i.e.,* a version of what I term "market rights"; see *supra* note 72 and the accompanying text) precludes conflicts of rights, thereby eliminating (I add) a source of contestable prioritization of some rights over others. *See* WALDRON, *supra* note 53, at 203-06. I suspect that market rights and welfare rights would still differ in contestedness even if we equalized for agent-relativity the two types of rights (assuming that we could make sense, without violence to usage, of an agent-relative account of welfare rights). High indeterminacy would still surround the issue of what the duty-bearers

Things are different when it comes to welfare goods. A welfare recipient has acquired titles over a house, food, medical care, money, or whatever the welfare scheme has provided him. To be sure, everyone can discharge his duty not to interfere with the recipient's use of those things—this is but an instance of the general truth that everyone can simultaneously be both a donor and a recipient of noninterference with the exercise of legal property rights. It does not follow, however, that everyone can simultaneously be both a donor and a recipient of *things of those kinds* (let alone of particular things). Being needy people, welfare recipients cannot be donors of welfare goods. Indeed, given that such things are scarce, presumably many others cannot, either. Even though present-day productivity levels make it possible for everyone to enjoy basic amounts of welfare goods, this seems to be much more contingent than the fact that everyone could simultaneously refrain from interfering with another's use of certain things. Unlike rights to noninterference, welfare rights call for *decisions* as to who should provide what to whom. If my argument in Part III is sound, the discretion involved in such decisions is bound to upset the rule of law.

It might be thought that the foregoing is vitiated by the fact that I used a normative notion of "noninterference." We saw in the first paragraph of this section how this notion is in play in some accounts of market rights. The normative notion of "noninterference" entails that A interferes with B's use of x only if B has legal property rights over x. But whether B ought to have such rights requires moral justification. Crucially, among the issues that are relevant in that justification is whether some people have welfare rights. If they have such rights, then welfare transfer payments will not interfere with the taxpayers' use of *their* money, in the present, normative sense of "noninterference": by assumption, taxpayers have no right to retain that money. The objection would then be that in order to ascertain whether someone interferes with another's rights we have to know what such rights are and who the right-holders are. Rights to normative noninterference are therefore higher-level rights in the following sense: they presuppose answers to questions about the nature of those rights (*i.e.,* which Hohfeldian incidents those rights encompass) and who the right-holders are. But then, so the objection concludes, rights to normative noninterference are no real *alternatives* to welfare rights—they either *presuppose* welfare rights or their

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of agent-relative welfare rights are required to do.

absence. A regime of welfare rights can therefore be described in the language of rights to noninterference. The upshot would be that normative noninterference, when it remains undefined as to the first-level rights it presupposes, is insufficient to establish that market rights fit better the rule of law than welfare rights do.

This objection relies on an ambiguity between (a) "welfare rights" in the sense of claims to *noninterference with the use* of welfare goods (*i.e.,* goods acquired by virtue of welfare legislation) by their legal owners, and (b) "welfare rights" in the sense of claims to *be given* welfare goods. I had in mind the latter sense when I offered a Hohfeldian characterization of welfare rights in Part II. That is the sense that animates debates about the existence of welfare rights; it is also the sense that gives rise to the tensions with the rule of law that I have examined throughout this article. A welfare recipient possesses a legally defined bundle of rights over the welfare goods that she *already received.* She has claims to universal noninterference with her use of those goods within the boundaries defined by the law of property and contracts. (She may well have market rights over those goods, but this need not be so and in any event depends on the specifics of the bundles of rights conferred by the legal system.) Nothing I have said so far has questioned the compatibility between *those* rights and the rule of law—indeed, the once-and-for-all redistribution that I suggested in Part IV by way of an improvement on traditional welfare schemes was meant to take advantage of such compatibility. What I did question was that the rule of law could accommodate claims *to be given* welfare goods.[101] By contrast, *noninterference with (legally defined) uses of one's property* (including that property received from welfare schemes), being enjoyable and deliverable by everyone, poses no threat to the rule of law. In other words, it is positive not negative rights over welfare goods that cannot coexist with the rule of law. As far as I can see, however, the rule of law does not dictate by itself a specific bundle of negative rights. I argued in Part III that mutual advantage, which is arguably a minimal demand for political legitimacy, speaks in favor of market rights. Perhaps there is a way to show that mutual advantage is somehow in the spirit of the rule of law, but I shall not pursue this thought here.[102]

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101. Of course, *A*'s claim-right not to be interfered with in his use of *x* can coexist with *A*'s having no antecedent (non-contractually derived) claim-right to be given *x* in the first place. Such a situation pervades market-rights regimes.

102. Is there an interesting connection between mutual advantage and non-domination

VIII. THREE CONCLUDING CAVEATS

I shall conclude with three caveats. First, it was beyond my goal to show that legal welfare rights cannot be justified *all things considered.* Even if I am right in that actual welfare states cannot coexist with the rule of law, there might be *additional* considerations that render some scheme of welfare rights justifiable. I advanced no claim about the importance of the rule of law vis-à-vis other political ideals. A related remark is that I did not attempt to debunk welfare rights as such, *i.e.,* apart from their being in conflict with the rule of law. An overall case against welfare rights would presumably have to consider objections that were not part of my argument. Thus, while in Part VI I rejected several attempts at drawing a dependence-based distinction between welfare and charity, I did not discuss some features of welfare legislation that may place it at a lower moral rank than charity. For example, I did not adduce that, unlike private donors, legislators do not bear the social costs of welfare legislation personally, or that they usually reap political benefits from welfare legislation.

Second, I did not endeavor to defend a particular *response* to the fact that welfare rights are hostile to the rule of law, even if respect for the rule of law should be the overriding concern in institutional design. For suppose that those who can institute the rule of law (*e.g.,* the constitution drafters) have a moral duty to do so, all things considered. If my argument in this essay is sound, then such persons will (if they are rational, informed, and concerned about mutual advantage) establish political procedures that will in effect generate a regime of market rights. Suppose, further, that under such a regime some people end up in abject poverty through no fault of their own. Does it follow that no one has a moral duty to help those people? Surely not. A *moral* duty to *design* institutions under which we have no *legal* duty to do *x* does not logically entail that we are not *morally* at liberty to *do x*—this liberty concerns acts which differ from the acts enjoined by the duty to design such institutions. Even more, the fact that someone is in dire need *through his own irresponsible behavior* says nothing about what others' morally appropriate responses ought to be. Robert Goodin is surely right in asserting that the fact that welfare mothers did not act responsibly does not entail that we ought

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(see *supra* note 5 and accompanying text) through a Paretian, *i.e.,* non-worsening condition, reading of the Kantian injunction that we should not treat persons merely as means to our own benefit?

to sterilize them or let their children starve.[103] My own suggestion was (see Part IV) that once-and-for-all redistribution might be the best option for anyone who is committed both to welfare rights and to the rule of law. I should stress, in any event, that this essay called into question the idea that the traditional welfare state may coexist with the rule of law. If we believe that the rule of law is necessary for the legitimacy of a social order, we had better design *institutions* that effectively bar non-consensual redistribution, whatever our (or our government's) all-things-considered moral duties are *under* such institutions. This essay has dealt with the morality of institutional design, not the morality of particular acts (legislative, administrative, or private) under given institutions.

Third, and finally, nothing in my argument rules out the possibility that *welfare goods* might be best provided to all by a system of *market rights*. I did not take sides in the empirical issues of whether the free market is more efficient than state intervention at meeting basic needs, or whether the free market is more efficient than politics at meeting social demands for charity. My skeptical conclusions as to the prospects of bringing welfare rights under the rule of law should not be understood as implying that we face a choice between the rule of law and basic health services, age insurance schemes, or other welfare goods.

103. *See* Goodin, *supra* note 57, at 113.