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## Public Privacy (Self-Government)

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the work from which I obviously borrow – although, especially in this regard, I do not mean for this essay to be a definitive account.

A.

I take as my point of departure the first paragraph of Justice Kogan's dissent in *City of North Miami v. Kurtz*:

As the majority itself notes, job applicants are free to return to tobacco use once hired. I believe this concession reveals the non-smoking policy to be rather more of a speculative pretense than a rational governmental policy. Therefore I would find it unconstitutional under the right of due process. See *Department of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991).<sup>4</sup>

In *Kurtz*, the Florida Supreme Court upheld the constitutionality of an administrative regulation adopted by the City of North Miami that required all job applicants to sign an affidavit stating that they had not used tobacco for a period of at least one year immediately preceding their application for employment.<sup>5</sup> Applicants who refused to supply the affidavit would not be hired. Justice Overton, writing for a majority of the court, held that the rights of privacy recognized by Florida and United States constitutional law did not cover this case, and that therefore the regulation was lawful.<sup>6</sup>

Justice Kogan did not disagree directly with the majority's privacy analysis – but he did think that it was "troublesome."<sup>7</sup> His specific concern was that a "slippery slope" would result: "[I]f governmental employers can inquire too extensively into off-job-site behavior, a point eventually will be reached at which the right of privacy . . . clearly will be breached."<sup>8</sup> For example, Kogan thought, inquiry into "lawful sexual behavior" or "plans for procreation" might violate the privacy right; "any governmental effort to identify those who might eventually suffer from cancer or heart disease" would be similarly invalid.<sup>9</sup>

B.

There are difficulties in the majority's approach in *Kurtz* evident even within the terms of the case itself. Justice Overton concluded that the North Miami regulation is not inconsistent with the right of privacy protected by Article I, section 23, of the Florida Constitution.<sup>10</sup> The

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4. *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1029 (Fla. 1995)(Kogan, J., dissenting).

5. *See id.* at 1026 (summarizing regulation).

6. Justice Shaw joined Justice Kogan's dissent. *See id.* at 1029.

7. *Id.*

8. *Id.*

9. *Id.*

10. Article I, section 23 states: "Every natural person has the right to be let alone and free

crucial question, it seemed, was whether Ms. Kurtz "has a legitimate expectation of privacy."<sup>11</sup> She did not.

In today's society, smokers are constantly required to reveal whether they smoke. When individuals are seated in a restaurant, they are asked whether they want a table in a smoking or a non-smoking section. When individuals rent hotel or motel rooms, they are asked if they smoke so that management may ensure that certain rooms remain free from the smell of smoke odors. Likewise, when individuals rent cars, they are asked if they smoke so that rental agencies can make proper accommodations to maintain vehicles for non-smokers. Further, employers generally provide smoke-free areas for non-smokers, and employees are often prohibited from smoking in certain areas. Given that individuals must reveal whether they smoke in almost every aspect of life in today's society, we conclude that individuals have no reasonable expectation of privacy in the disclosure of that information when applying for a government job.<sup>12</sup>

The question of expectations is a familiar one in Florida privacy law.<sup>13</sup> But it seems to suppose that disclosure really was the issue in *Kurtz*. Ms. Kurtz, however, wanted to work for North Miami. She presumably objected to the city requirement not because she wanted to keep her smoking secret, but because she did not want to be put to the choice of either quitting smoking and waiting a year or lying about her smoking history.<sup>14</sup> Her argument, we might think, was at bottom a claim that whether or not she smoked off-work was her choice.<sup>15</sup> Constitutional analysis, therefore, should address whether privacy protection encompasses the decision to smoke or not smoke tobacco. Perhaps the willingness of smokers to identify themselves, and to abide by smoking segregation and no-smoking rules, are indicators that the smoking decision is not one that, "in today's society," individuals might reasonably expect they would make for themselves.<sup>16</sup> Overton's examples, how-

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from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." Fla. Const., art. I, § 23.

11. *Kurtz*, 653 So. 2d at 1028.

12. *Id.*

13. See, e.g., Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U. L. REV. 671, 742 (1978). For thoughtful discussion of some of the intricacies of expectations analysis, see Joseph Beatty, Case Comment, *Constitutional Law: Is the Expectation of Privacy Under the Florida Constitution Broader in Scope Than It Is Under the Federal Constitution?*, 47 FLA. L. REV. 287 (1995).

14. "Kurtz told the interviewer that she was a smoker and could not truthfully sign an affidavit to comply with the regulation." *Kurtz v. City of North Miami*, 625 So. 2d 899, 900 (Fla. 3d DCA 1993), *quashed*, 653 So. 2d 1025 (Fla. 1995).

15. The district court of appeal analyzed the case in these terms. See *id.* at 902-03.

16. "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy

ever, do not in truth show shared responsibility for smoking choices "in almost every aspect of life." Restaurant use, hotel stays, and car rentals are more or less marginal activities. In any case, as with no-smoking rules at work, no-smoking and smoking segregation rules in places of public accommodation at most require individuals to limit smoking for short periods of time – much less than a year.<sup>17</sup> It also might matter that North Miami is a government entity as well as an employer. As Justice Overton himself noted, Article I, section 23, singles out government agencies – "governmental intrusion" – as bearers of the constitutional obligation to respect privacy.<sup>18</sup> Whatever the situation elsewhere "in today's society," within government, circumstances might be supposed to be different.

North Miami, of course, was also bound to respect federal constitutional protections of privacy. The *Kurtz* majority thought, however, that "the federal constitution's implicit privacy provision extends only to such fundamental interests as marriage, procreation, contraception, family relationships, and the rearing and educating of children."<sup>19</sup> Smoking was not equivalently "fundamental." Again, it is easy to raise questions. Justice Overton characterized federal law in terms derived from then-Justice Rehnquist's majority opinion in *Paul v. Davis*.<sup>20</sup> Other Justices of the United States Supreme Court have, at least sometimes, proceeded on the assumption that the federal privacy right extends beyond questions of intimate association. The often-cited majority opinion of Justice Stevens in *Whalen v. Roe* supplies one example.<sup>21</sup> In *Cruzan v. Director, Missouri Department of Health*,<sup>22</sup> now-Chief Justice Rehnquist himself agreed, at least for purposes of the case at hand, that "the United States Constitution would grant 'a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition' – a privacy right plainly not put in 'family' terms."<sup>23</sup> Justice Overton thus possessed

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surrounding the marriage relationship." *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 930 (1973).

17. See Beatty, *supra* note 13, at 294 n.66.

18. See *Kurtz*, 653 So.2d at 1028.

19. *Id.*

20. 424 U.S. 693, 713 (1976).

21. See *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977). But see Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U. L. REV. 631, 681 (1977) (*Whalen* "represents no substantial change" in scope of federal right of personal choice).

22. 497 U.S. 261 (1990).

23. *Id.* at 279; see also *Washington v. Harper*, 494 U.S. 210 (1990) (recognizing "liberty interest" in refusing administration of psychotropic drugs). Arguably, while divided as to the result in the case, a majority of the Justices in *Washington v. Glucksberg*, a "right to die" case decided after *Kurtz*, agreed in concluding federal constitutional protection of private choice extended to at least some matters other than intimate association. 521 U.S. 702 (1997).

at least some leeway in stating federal law and might have explored the matter of "fundamentality" at more length. The decision to smoke cigarettes is plainly fundamental in the sense that it has obviously serious consequences and, once made in favor of smoking, is not easy to reverse.<sup>24</sup> If these are not relevant earmarks, further explanation would appear to be in order.

As though attempting to moot criticism, Justice Overton argued that, in any event, North Miami could show a compelling interest in reducing health care costs.<sup>25</sup> The issue, however, is not the value of savings as such, but whether savings should come at the expense of individuals who choose to smoke off-work. Usual less restrictive alternative questioning would have put North Miami to the task of showing at least that no other obvious way of delimiting the applicant pool would have achieved similar savings.<sup>26</sup> The *Kurtz* majority emphasized that individuals were free to return to smoking off-work once they were hired.<sup>27</sup> But this amelioration – which presumably reduces the expected cost savings at least somewhat – cannot vindicate the use of the smoking category in the first place.

### C.

Justice Kogan believed that *Kurtz* was better understood as a due process case, of a piece with the Florida Supreme Court's decision in *Real Property*. *Real Property* resolved a facial challenge to the constitutionality of the Florida Comprehensive Forfeiture Act.<sup>28</sup> The Act, in essence, authorizes state attorneys to obtain from circuit courts orders declaring real property used in the commission of felonies to be forfeited. Justice Barkett, writing for a unanimous Florida Supreme Court, held that the Act did not, as written, contravene due process requirements if its brief descriptions of forfeiture actions were understood to incorporate, however implicitly, due process norms. The opinion, very much in the manner of an administrative gloss, supplied the missing required terms. *Real Property* is plainly good work. But what does it have to do with *Kurtz*?

It is useful to begin comparatively. Chief Justice Rehnquist, writing the nominal majority opinion of the United States Supreme Court in

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24. The question of reversibility is emphasized in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). It would not have been difficult, therefore, to distinguish questions of personal autonomy involving hairstyles, for example. See *Kelley v. Johnson*, 425 U.S. 238 (1976).

25. See *City of N. Miami v. Kurtz*, 653 So.2d 1025, 1028-29 (Fla. 1995).

26. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 229 (1982).

27. *Kurtz*, 653 So.2d at 1029.

28. Fla. Stat. §§ 932.701 - 932.704.

*Bennis v. Michigan*<sup>29</sup> in 1996, declared that "longstanding practice" prevented close analysis of the question of whether a co-owner of an automobile which was used in the commission of a crime and declared forfeit to the state was deprived of property without due process of law within the meaning of the Fourteenth Amendment of the United States Constitution.<sup>30</sup> There was, Rehnquist acknowledged, "in the abstract . . . considerable appeal" to the argument that it was "unfair" to "relieve[ ] prosecutors from the burden of separating co-owners who are complicit in the wrongful use of property from innocent co-owners."<sup>31</sup> Nonetheless, he concluded, "the cases authorizing actions of the kind at issue are 'too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.'"<sup>32</sup> *Bennis* is a very different case from *Real Property*. An automobile is personal property.<sup>33</sup> The innocent-owner defense is expressly recognized in the Comprehensive Forfeiture Act.<sup>34</sup> Against the backdrop of Florida's constitutional law, however, what is perhaps most striking is the evident conclusion of the United States Supreme Court that forfeiture actions are "governed more by history than by constitutional logic."<sup>35</sup> In *Real Property*, it is clear, Justice Barrett worked within a very different due process jurisprudence.

The gist of Barrett's approach lies in this passage:

Just as we recognize the significance of the interests of property owners and lienholders, we also recognize that the state has substantial interests in restraining the use of potentially forfeitable property to punish criminal wrongdoers; to seek retribution for society; to deter

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29. 516 U.S. 442 (1996).

30. *Id.* at 1001.

31. *Id.*

32. *Id.* (quoting J.W. Goldsmith Jr. in *Grant Co. v. United States*, 254 U.S. 505, 511 (1921)).

33. See Department of Law Enf. V. Real Property, 588 So. 2d at 957, 965-66 (Fla. 1991) (defining different procedures for cases involving forfeiture of personal property).

34. Fla. Stat. § 932.703(2).

35. *City of Miami v. Kershbro, Inc.*, 717 So.2d 601, 604 (Fla. 3d DCA 1998). The use of history as a justification for forfeiture law was powerfully criticized in Tamara Piety, Comment, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911 (1991), published just prior to *Real Property*. In fact, close reading of Chief Justice Rehnquist's opinion in *Bennis*, along with the concurring opinions of Justices Thomas and Ginsburg, shows considerable effort to leave open the possibility of reading *Bennis* narrowly. See *Bennis*, 116 S. Ct. at 1000 (hypothetical case left for future); *id.* at 1001 (emphasizing judicial discretion within Michigan process); *id.* at 1002-03 (Thomas, J., concurring) (easy case on its facts); *id.* at 1003 (Ginsburg, J., concurring) (Michigan supreme court "stands ready to police exorbitant applications"). At least with regard to forfeitures ordered as punishment in federal criminal proceedings, the United States Supreme Court has held the Excessive Fines Clause of the Eighth Amendment sets a proportionality limit on property subject to forfeiture which is not itself a means used in performing the crime triggering prosecution. See *United States v. Bajakajian*, 524 U.S. 321 (1998). Language in the *Bajakajian* majority (a 5-4 decision) indicates the proportionality standard would also apply in civil forfeiture proceedings, which are in part punitive. See *id.* at 2035 n.6.

continued use of the property for criminal activity; to remedy the wrongs done to society; and to compensate the state for its law enforcement services. . . However, the means by which the state can protect its interest must be narrowly tailored to achieve its objective through the least restrictive alternative where such basic rights are at stake.<sup>36</sup>

“Just as we recognize . . . , we also recognize. . .” Property rights of individuals and the law enforcement concerns of government are equally constitutionally significant. There is no priority in principle. With respect to outcomes, therefore, we should be agnostic. Due process requires only that the statutory scheme acknowledge this indifference. But, it turns out, much follows. Legislation must avoid overbreadth and address only the problem which provokes it.<sup>37</sup> Prosecutors enforcing the statutory program must respect a remedial hierarchy. They cannot seize seemingly forfeitable property on the basis of a probable cause warrant obtained ex parte if other effective ways of restraining disposition of the property are available – lis pendens, restraining orders, etc.<sup>38</sup> Whenever possible, there must be notice and prior hearing.<sup>39</sup> Prosecutors ultimately must offer clear and convincing evidence that property has been put to use in criminal activity.<sup>40</sup> It is, however, enough for individuals – “innocent” holders of property rights – to establish by a preponderance of the evidence that they had no knowledge of even convincingly-shown criminal activity in order to immunize their interests.<sup>41</sup> The security of

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36. *Real Property*, 588 So.2d. at 957.

37. Justice Barkett, again writing for a unanimous Florida Supreme Court, subsequently declared invalid under *Real Property* a Florida statute authorizing seizure of aircraft equipped with fuel tanks not approved by the Federal Aviation Administration:

On its face, section 330.40 automatically converts every aircraft with nonconforming fuel tanks, whether airworthy or not, and whether involved in criminal activity or not, into contraband subject to forfeiture. . . . Here, as we have said, Anacaola's aircraft was parked; the sheriff did not allege that the airplane had been, was being, or was about to be used in the commission of a felony. . . . As the trial court noted, the legislature has available many other less restrictive means to assure compliance with FAA regulations. And in the event that an aircraft is being used as a criminal instrumentality, the forfeiture act already provides for forfeiture of such aircraft.

*In re Forfeiture of 1969 Piper Navajo*, 592 So. 2d 233, 236 (Fla. 1992).

38. See *Real Property*, 588 So. 2d at 964-65; see also *Ruth v. Department of Legal Affairs*, 684 So. 2d 181 (Fla. 1996) (finding no forfeiture of property, only equitable decree as between defendant and government, if no in rem jurisdiction).

39. See *Real Property*, 588 So. 2d at 965-67. See, e.g., *Byrom v. Gallagher*, 609 So.2d 24 (Fla. 1992).

40. See *Real Property*, 598 So. 2d at 967. In federal civil forfeiture proceedings, notably, prosecutors need to show only probable cause to believe property is subject to forfeiture. It is then the burden of property owners to establish, by a preponderance of the evidence, that no crime in fact occurred, or that the property at issue lacked a sufficient connection with the crime. See David Pimental, *Forfeiture Procedure in Federal Court: An Overview*, 183 F.R.D. 1, 15 (1999).

41. See *Real Property*, 598 So. 2d at 967.

property rights is a primary procedural concern even though property rights are regarded as existing at risk, vulnerable to forfeiture depending on how they are put to use, therefore always substantively qualified.

D.

However ingenious, how does the *Real Property* due process methodology work in the *Kurtz* context? Ms. Kurtz was just a job applicant. She had no entitlement – not even a substantively qualified one – to a North Miami job.<sup>42</sup> She might have argued that she had a kind of “lottery ticket” right: a right to a fair chance to “win” a job.<sup>43</sup> This argument in the end leads to a discussion of whether restricting the North Miami applicant pool to nonsmokers is constitutional. Kurtz would claim, much as she would if the issue were privacy, that she was free to choose for herself whether to smoke tobacco off-work. In due process terms, she would be asserting the existence of a constitutionally-recognized liberty interest. But why does this particular choice come within constitutional “liberty”? Ultimately, I will conclude that the idea of “due process of law” itself is intertwined with a relevant conception of liberty, captured in the phrase “self-government,” pointing towards a way of analyzing the *Kurtz* case (and many other “privacy” cases). I begin, however, by examining the idea of the right to choose as it has figured in privacy discussions.

Does the right to choose whether to smoke tobacco have anything in common with rights of individual choice already acknowledged as encompassed within the right of privacy? Privacy rights often are explained by referring to notions of “self-determination” or “personal autonomy.”<sup>44</sup> Choices are left private because they are in some sense “too personal” to be treated otherwise. Increasingly, however, at least in academic writing, the obvious question-begging encoded in the conclusion “too” and the equally obvious difficulty inherent in any theory of “self” or “personality,”<sup>45</sup> prompt efforts to begin from a reversed per-

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42. *Cf. Lite v. State*, 617 So. 2d 1058, 1060 (Fla. 1993) (finding *Real Property* forfeiture analysis inapposite regarding termination of driver's license since license is a “privilege”).

43. The right would not be a right to a municipal job, or a right to a chance of some somehow set probability, but simply a right to the same chance as all other applicants. *Cf. Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (holding an interest in competing on “equal basis” for government contract sufficient to establish standing).

44. *See Guardianship of Browning*, 568 So. 2d 4, 9 (Fla. 1990); *Krischer v. McIver*, 697 So.2d 97, 111, 113 (Fla. 1997) (Kogan, C.J., dissenting). *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 615 (1984) (“ability to define . . . identity . . . is central to any concept of liberty”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1312 (2d ed. 1988) (right of privacy protects against “governmental invasion of personality”).

45. It may be that the very notion of the “self” is too analytically fragile to support much analysis. *See DEREK PARFIT, REASONS AND PERSONS* (1984). The problem also lies, at least in



spective. Constitutional respect for personal choice follows from a theory of government rather than a theory of self—"public privacy," as it were.<sup>46</sup>

Thus, in a famous pathbreaking article, Jed Rubenfeld argues that the right of privacy should be understood as constitutional protection against "creeping totalitarianism."<sup>47</sup>

Privacy takes its stand at the outer boundaries of the legitimate exercise of state power. It is to be invoked only where the government threatens to take over or occupy our lives – to exert its power in some way over the totality of our lives.<sup>48</sup>

What government does reveals what privacy is. The problem posed by government prohibition of a woman's right to choose abortion, for example, is readily identifiable in Rubenfeld's terms – the positive effect of the prohibition is to put pregnant women in a state of "forced motherhood."<sup>49</sup> James Fleming, in another prominent effort, begins with requirements of constitutional governance, suggesting that individual rights protected in American constitutional law are either rights like free speech or equal protection, rights presupposed by "deliberative democ-

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part, in the fact that individual choices are often choices about associations and commitments. To see the value of the choice solely in terms of its freedom, and not also in the content of the associations or commitments, seemingly skews judgment. Michael Sandel makes this argument forcefully:

"[T]reating persons as freely choosing, independent selves may fail to respect persons encumbered by convictions or life circumstances that do not admit the independence the liberal self-image requires. In different ways, the sabbath observers in Connecticut, the victims of racial defamation in Chicago, the Holocaust survivors in Skokie, the feminists against pornography in Indianapolis, the homosexuals denied privacy in Georgia, and the traditional mothers and homemakers impoverished by divorce are all situated selves with good reason to resist the demand to bracket their identities. . . ; their concerns cannot be translated without loss into . . . voluntarist, individuated terms. . . ."

MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENTS: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 116 (1996). For Sandel's earlier development of this idea, see MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 175-83 (1982); see also JOSEPH RAZ, *THE MORALITY OF FREEDOM* 198 (1986).

46. I do not mean to suggest that defenders of individual autonomy ignore government. "[T]he Constitution's is not a totalitarian design, depending for its success upon the homogenization or depersonalization of humanity." *TRIBE*, *supra* note 44, at 1308. But the key within this perspective is "the nature of the right being asserted." *Id.* at 1307. It is because "personhood . . . is sufficiently one's own" that it may "be deemed fundamental in confrontation with the one entity that retains a monopoly over legitimate violence — the government." *Id.* at 1305-06.

47. Jed Rubenfeld, *The Right of Privacy*, 102 *HARV. L. REV.* 737, 784 (1989).

48. *Id.* at 787.

49. *Id.* at 788. Prohibiting abortion "shapes women's occupations and preoccupations in the minutest detail; it creates a perceived identity for women and confines them to it; and it gathers up a multiplicity of approaches to the problem of being a woman and reduces them all to the single norm of motherhood." *Id.*

racy,” or rights securing “deliberative autonomy,” Fleming’s interpretation of the right of privacy – rights of conscience and association.<sup>50</sup> Deliberation – what we demand of representative democracy – is also precisely the capacity possessed by individuals that we should protect. “If persons do not have the freedom to deliberate about and make such decisions, they are not free.”<sup>51</sup>

Plainly, Rubenfeld and Fleming do not suggest bases for bringing the decision whether or not to smoke tobacco within the terms of a privacy right. Denying access to a government job is not the same thing as an order not to smoke if other jobs are available free from the no-smoking condition. In any case, a smoking ban – even if compliance would be extremely difficult – is not an exercise of government “power . . . over the totality of our lives.” Even more obviously, smoking is hardly a matter of conscience or association.

The literal implications of the Rubenfeld and Fleming formulations are not the point, however. “Creeping totalitarianism” is a fine phrase but it supplies at best an awkward analytics. Proscription of abortion is mandatory motherhood only close up. If we suppose that women also have a right to choose to use contraception, is it so clear that government is conscripting women to be breeders? Would a ban on contraception, given the chanciness of pregnancy, be tantamount to conscription? So too, although it is clear that freedom of conscience and association are prerequisites for autonomy, there are also obviously others – for example, necessary quanta of health and economic well-being. Limiting autonomy to “deliberative” matters is not an easy restriction to understand. Are individual freedoms of conscience and association prerequisites of “deliberative democracy”? It is unclear why participation in political life necessitates personal control over child-bearing decisions, for example. Parents vote and hold public office routinely. But if “deliberative autonomy” is important independent of political process, it must be because deliberation is valuable for its own sake. Conscience and association are not all that autonomy requires, but they are, it may be supposed, principal subjects of personal deliberation. We know, however, that matters of conscience and choice of intimate (or even political or business) associates are often not exclusively subjects of reasoned judgment – matters also, for example, of faith, hope, and love. Does it make sense, therefore, to think of these choices as matters of “deliberation”?<sup>52</sup>

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50. See James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1 (1995). “Deliberative democracy” is supposed to summarize theories of representative government and linked constitutional rights like those put forward by John Hart Ely and Cass Sunstein.

51. *Id.* at 33.

52. For Professor Fleming’s response to questions of this sort, see *id.* at 33-36.

The problem, we may think, is the need Rubinfeld and Fleming feel to define their ideas of privacy in terms that are ultimately decisive. They acknowledge, however obliquely, the possibility that countervailing considerations might block protection of privacy rights.<sup>53</sup> But the terms within which the privacy right itself is put, in both cases, are not at all tentative – plainly mean to be preemptive. This is not, obviously, the approach of Justice Barkett in *Real Property* – property rights figure mostly at the threshold, as a starting point (or motivation) for a larger inquiry. The decisiveness that Rubinfeld and Fleming attempt to build into their accounts of privacy, and therefore the reciprocal close scrutiny that their accounts trigger, is not required by their own entirely correct shared premise. It is surely true that constitutions drafted on the assumption of popular sovereignty cannot, if that assumption is to be meaningful, leave governments entirely free to fix as they see fit the beliefs and agendas of the people who are declared to be sovereign.<sup>54</sup> Popular sovereignty obtains, therefore, only if legislative jurisdiction is in the end not exhaustive – that is, only if it co-exists with some non-trivial and nonaccidental regime of self-government. Hobbes, it must appear, was wrong.<sup>55</sup> Co-existence, however, does not require mutual

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53. See, e.g., *id.* at 45-46; Rubinfeld, *supra* note 47, at 793-94.

54. It is easy to associate government efforts to manage individual preferences with ancient regime absolutism and early modern conceptions of the “police” state, and therefore link notions of self-rule with resistance to kingly overweening. See, e.g., DANIEL GORDON, *CITIZENS WITHOUT SOVEREIGNTY: EQUALITY AND SOCIABILITY IN FRENCH THOUGHT 1670-1789*, 9-24 (1994) (“The Well-Policed State”); QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* 59-99 (1998) (“Free states and individual liberty”). By referring to images of “totalitarian democracy” and the like, we might “fast forward” through the French Revolution into the apocalyptic middle of the twentieth century. See generally, J.L. TALMON, *THE ORIGINS OF TOTALITARIAN DEMOCRACY* (Norton ed. 1970). But constitutional thought as such, early and late, has also recognized a part properly to be played by government management of preferences (sometimes through the constitutional project itself.) Counter-reformation constitutional theory is especially provocative in this regard. See QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE AGE OF REFORMATION* 133-73 (1978). On the *Carolene Products* strain of constitutional theory as preference definition, and therefore preference management, see PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* 167-70 (1992). Within American constitutional jurisprudence in particular, though, there is a recurring counter effort to preserve the possibility of an individual point of view meaningfully independent of government manipulation. It is not just prominent constitutional guarantees of freedom of religion that are pertinent here. The equally notable Warren Court effort to isolate the definition of election districts from legislative efforts to preserve a status quo are also relevant. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). So too, and perhaps startlingly, the ideas of popular sovereignty and individual independence, and the problem of government manipulation, also substantially organize *Miranda v. Arizona*, 384 U.S. 436 (1966), Chief Justice Warren’s attempt to supply constitutional premises for a democratic “police” state.

55. “The greatest liberty of subjects, dependeth on the silence of the law. . . . In cases where the sovereign has prescribed no rule, there the subject hath the liberty to do, or forbear, according to his own discretion. And therefore such liberty is in some places more, and in some less as they that have the sovereignty shall think most convenient.” THOMAS HOBBES, *LEVIATHAN* 165-66 (M.

exclusivity, some pre-set division of labor. It is enough that the legislative jurisdiction of government is incomplete, that it is sufficiently punctuated or broken up by acts of individual decision. A constitutional description of rights need not be definitive; need not pick out only rights which seem self-evident, always or almost always worthy of enforcement.<sup>56</sup> If it results often enough in the defeat of government claims of jurisdiction, a Barkett-like theory of the right to choose, an account of rights supposed to trigger open-ended inquiry, is therefore an available alternative.

The key, I think, lies in an account of popular sovereignty and law in terms that treat self-rule not *simply* as the origin of representative legislatures, through systems of election, free debate, and the like, but *complexly*, as a coincident form of legislation itself.<sup>57</sup> Frank Michelman, in writing that also undergirds the Rubinfeld and Fleming efforts, provides a provocative point of departure for this revised description. "In Kantian terms we are free only insofar as we are self-governing, directing our actions in accordance with law-like reasons that we adopt for ourselves, as proper to ourselves, upon conscious, critical reflection on our identities (or natures) and social situations."<sup>58</sup> A few pages later, he observes: "[F]reedom-through-citizenship is a juristic as well as a civic idea."<sup>59</sup> Michelman himself means to build a model of individual choice founded on adjudication.<sup>60</sup> His aim, here and in later

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Oakeshott & R. Peters, eds. 1962) (1651); *see id.* at 162-63 (in principle, no difference between monarchical and popular commonwealths with respect to extent of freedom). *See also* PHILLIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 37-50 (1997).

56. We might think of constitutional schemes as exercises in either apologetics or opposition. In the first respect, constitutional descriptions of governmental arrangements and individual guarantees function as depictions of state of affairs worth achieving or preserving. In the second respect, constitutional descriptions serve to identify – directly or indirectly – hazards or evils. *Cf.* JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 15-19 (1990) (justice and injustice as important different starting points). Popular sovereignty is, within constitutional apologetics, a stand-in for some positive conception of democracy ("We, the People"), often understood as both the beginning and end of the enterprise. Within oppositionist constitutional thinking, popular sovereignty is simply an explanation for why government action can claim no presumption of legitimacy, why skepticism in the face of government action is always in order. Skepticism becomes, or rather constitutional law attempts to make it become, that which government confronts, that which individuals expect to bring to bear (at least initially). If so, legislative jurisdiction must be incomplete, put at risk by the constitutional scheme. This essay, thus, is written in oppositional terms. Actual constitutions, of course, as well as accompanying bodies of constitutional law, are mixes of apologetic and oppositional elements.

57. Self-rule becomes, therefore, a commonplace phenomenon not reserved for historically extraordinary moments.

58. Frank Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4, 26 (1986).

59. *Id.* at 28.

60. Situated practical judgment seems always to involve a combination of something general with something specific, endorsement of both a general standard and a specific application, or of both a general value and a specific means to its effectuation. Judgment mediates between the

writing, is to vindicate a distinctively democratic conception of public life, to insist upon a popular sovereignty, a self-government, that opens usual institutions of government to individuals and their concerns – “the full blast of sundry opinions and interest-articulations in society, including everyone’s opinions and articulations of interests.”<sup>61</sup>

Individual rights as such appear to function mostly as means of instituting and protecting democratic public life. Thus, for example, “the privacies of personal refuge and intimacy,” like property rights, are said to “underpin[ ] the independence and authenticity of the citizen’s contribution to the collective determinations of public life.”<sup>62</sup> But the idea that “self-governing” is “law-like” or “juristic,” that “self-rule and law-rule . . . amount[ ] to the same thing,”<sup>63</sup> may be put to a second use as well. Individual decisions as such might be literal acts of self-government, jurisprudential instances as it were, constitutionally of a piece with acts of legislators, administrators, or judges; constitutionally protected because democratic life encompasses more than just the public processes of official institutions of government.<sup>64</sup> To make sense of this variation, of course, we need a closer account of self-government, a better sense of its jurisdiction (as it were). We need, again to borrow Michelman’s terms, a better sense of which features of “law-rule are pertinent to a concrete conception of “self-rule.”

In this regard, we might make use of some of the results of the work of Joseph Raz, and treat self-government, like law proper, as crucially caught up with the notions of norms and authority. A norm is an exclusionary reason – its content, for its adherent, substitutes for further deliberation.<sup>65</sup> Law claims authority insofar as it claims to be authoritative, to state norms and thereby to preempt independent decision by its

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general standard and the specific case. In order to apply the standard in the particular context before us, we must interpret the standard. Every interpretation is a reconstruction of our sense of the standard’s meaning and rightness. This process, in which the meaning of the rule emerges, develops, and changes in the course of applying it to cases is one that every common law practitioner will immediately recognize. *Id.* at 28-29.

61. Frank Michelman, *The 1996-97 Brennan Center Symposium Lecture*, 86 CAL. L. REV. 399, 425 (1998) [hereinafter Michelman, *Brennan Lecture*].

62. Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1501.

63. *Id.* at 1501.

64. “Although one encounters the notion of competencies most frequently when discussing the judicial resolution of conflicts between levels of government, the notion is no less relevant when discussing the resolution of conflicts between private and public authority, and even when considering the resolution of conflicts between alternative private decision-makers.” Laurence H. Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 13 (1973). For arguments that theories of justice – the theory of John Rawls in particular – should address individual decision-making, see Liam Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFF. 251 (1998); G.A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 PHIL. & PUB. AFF. 3 (1997).

65. See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 39 (2d ed. 1990).

subjects.<sup>66</sup> Self-government, it now appears, may be understood to be especially concerned with the decisions that individuals make that they regard as exclusionary or preemptive – that, once made, they know will likely substitute for and thus block decisionmaking anew. Self-government is not equally implicated in all individual decisions – which are of course preemptive for the moment – but rather singles out those particular decisions that address recurring situations and that the individual sees as preemptive for the future, excluding renewed attention to issues or questions when the situations indeed recur.<sup>67</sup>

This account possesses obvious constitutional affinities. It supplies a basis for describing the inter-relation of two important notions that otherwise appear to be only historically co-incident (at least in Anglo-American political theory) – Harrington's retrieval of the Roman image of "law's empire," the precursor of the formula "government of laws," and the emphasis in the writing of various English revolutionary theorists upon the double sense of "self rule," the co-existence of "free state" and "free people."<sup>68</sup> A free state, it seemed to Hobbes and his successors, is not necessarily a state in which individuals are free, even if under a government of laws. Legislative jurisdiction might be complete. A republic, then, would differ little, with regard to individual freedom, from say Byzantium.<sup>69</sup> If the idea of the rule of law, however, is understood in terms that include an acknowledgement of individual self rule, the difference between "law's republic" and "law's empire" becomes articulable. This compound conceptualization, moreover, is neatly

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66. See JOSEPH RAZ, *AUTHORITY, LAW, AND MORALITY*, IN *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 211-20 (1994).

67. In Raz's terms, self-government refers to those decisions that an individual makes that he or she later treats as "second-order." See RAZ, *PRACTICAL REASON*, *supra* note 65, at 39-40, 71-73.

Limiting self-government to preemptive decisions does not suppose, I think, that decision that may be readily revisable – for example, opinions about unfolding political events — are not important and do not warrant constitutional protection. These decisions do not acquire their importance from their authoritative effect, however, and thus are not acts of individual sovereignty. The reasons for constitutional protection must trace to other constitutional commitments.

Preemptive decisions do not encompass only those decisions in which *all* options are *each* preemptive. The individual acts legislatively, as it were, in deciding either to pre-empt or not pre-empt. It is, in other words, the *situation* of deciding whether to foreclose future considerations, and not the substance of the decision, that is of first constitutional interest.

68. QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* 59-99 (1998).

69. "There is written on the turrets of the city of Lucca in great characters at this day, the word LIBERTAS; yet no man can thence infer, that a particular man has more liberty, or immunity from the service of the commonwealth there, than in Constantinople." HOBBS, *supra* note 55, at 162. With respect to Byzantine legislative jurisprudence, Hobbes states what appears to be still the prevailing view, at least as to aspiration. See, e.g., Maria Theres Fögen, *Legislation In Byzantium: A Political And Bureaucratic Technique*, in *LAW AND SOCIETY IN BYZANTIUM: NINTH-TWELFTH CENTURIES* 53-70 (Angelici E., et al., eds., 1994).

accomplished, in form at least, by the proposition that “no person shall be deprived of life, liberty, or property without due process of law.” Life, liberty, and property are sometimes matters of governmental disposition and sometimes not. “Due process of law” – repeatedly invoked and brought to bear – generates the distribution. With respect to substance, finally, the notion of self-government owing to Raz comes into play. Inset into the particular *Real Property* due process analytic, we will see, the effort to identify matters of self-government initiates an interplay likely capable of fracturing legislative jurisdiction, of therefore affording a means within constitutional law for marking the significance of popular sovereignty.

### E.

Recognition of self-government marks as problematic, as matters for investigation,<sup>70</sup> acts of government that prevent or otherwise disrupt those choices that individuals make or might make for themselves that the individuals would regard as dispositive, as preempting reconsideration notwithstanding continuing relevance.<sup>71</sup> The decision whether or

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70. Acts of government not implicating privacy as I define it here would be subject only to ordinary rational basis review, unless such acts cut across other constitutional commitments.

71. Because I attribute a particular meaning to the term “self-government,” it may be useful to note some related but nonetheless different notions. Self-government sometimes carries associations of participatory democracy, images of individual participation in public political action of some form or another. See, e.g., RICHARD D. PARKER, “HERE THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO (1994). In contrast, I take self-government to refer to the individual as such, treat government as the individual’s effort to organize the self. For an exemplary – and especially vertiginous effort of this sort, see WAI CHEE DIMOCK, *EMPIRE FOR LIBERTY: MELVILLE AND THE POLITICS OF INDIVIDUALISM*, 3-41 (1989). Self-government, however, is also not just another version of “self-authoring” or “self-fashioning” – prominent characterizations of autonomy. See, e.g., STEPHEN GREENBLATT, *RENAISSANCE SELF-FASHIONING* 2, 6 (1980). It seems to be an important part of the point of such interpretations of autonomy that the freedom recognized is open-ended. See KAHN, *supra* note 54, at 156. No particular subset of all possible individual decisions is marked out as especially relevant (although such limitations may originate, as in Raz’s account, in social forms, see RAZ, *FREEDOM*, *supra* note 45, at 307-13). If self-government has political overtones, they are concern matters of “exit” not “voice.” See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970). Thus they differ substantially from “the political conception of the person” put forward by John Rawls, which treats as primary the ideas of cooperation generally and the public presentation of beliefs in particular. See JOHN RAWLS, *POLITICAL LIBERALISM* 29-35, 299-304 (1993); *id.* at 243-44 n.32 (analysis of right to abortion). Finally, there are plainly affinities linking self-government as I use it here and the use to which Nikolas Rose puts it: “To the extent that we are governed in our own name, we have a right to contest the evils that are done to us in the name of government, a right that we acquire . . . at the point of convergence of parties of government themselves.” NIKOLAS ROSE, *POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT* 284 (1999). Indeed, I will argue that self-government within the *Real Property* frame precisely organizes “a complex field of contestation,” *id.* at 275, a sequence of assignments that “positively value . . . strategies, tactics, and practices that enhance human beings’ capacities to act” and “correlatively . . . subject all that reduces such capacities to critical scrutiny.” *Id.* at 97. But there are two important differences.

not to become pregnant, to bear and raise a child, is a decision of this sort, and thus decisions about contraception and abortion implicate self-governance. Decisions about whom to marry, or about which family members constitute immediate family, or about how to educate children are plainly analogous. Rights acknowledged in the central line of Florida privacy cases, therefore, would also plainly serve as at least initial triggers of the self-government inquiry.<sup>72</sup>

These easy cases for self-government scrutiny are notably heterogeneous in one respect. The reasons why decisions are not readily reconsiderable, are therefore to be treated as authoritative, are varied: sometimes in important part biological, sometimes moral consequences of reliance by others, sometimes institutional. For purposes of judging the relevance of the right of self-government, it should not matter, for example, whether decisions as between heterosexual or homosexual modes of intimacy are genetically biased.<sup>73</sup> The crucial question, rather, is whether such decisions are akin to commitments, fix ways of life which (once begun) are not readily revised – even if free of genetic governance, and if therefore “fixed” mostly for social or cultural reasons.<sup>74</sup> In an important sense, the decision that North Miami burdened in *Kurtz* — whether or not to smoke tobacco — is also similar. Because of the effects of tobacco use, the decision, once made, is not easily revisited. Why should it matter that the decision to smoke is preemptive at least in part for physio-chemical rather than, say, psychological or moral

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Rose starts with and elaborates at length an idea of “freedom as it is instantiated in government,” as “the problem space within which contemporary rationalities of government compete.” *Id.* at 65, 94. In this essay, however, freedom as self-government is deployed first “as a formula of resistance,” as key to a politics of “contestation,” *id.* at 65. It is “a relational and contextual practice that takes shape in opposition,” WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 6 (1995). Thus it marks government itself as “the problem space.” Government, as I use it, does not immediately take on the encompassing, Foucauldian scope that Rose gives it; rather, consistent with seventeenth century revolutionary usages, see SKINNER, *LIBERTY BEFORE LIBERALISM* *supra* note 68, government is just the complex of law generating institutions in the strict sense, whose “assemblages,” ROSE, *supra*, at 276, are subject to breaking apart. Within this narrowed usage, the presiding inspirational figure becomes Certeau not Foucault: “tactics” disrupt “strategies,” resisting individuals throw up “interior castles.”

72. See, e.g., *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989).

73. I discuss *infra* how ultimate conclusions about self-government might be reached, using the right to choose abortion as the principal example. See Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

74. The decisive consideration, thus, is not sexual intimacy as such or its particular details, but the further fact of whether or not this intimacy is bound up with a form of life. See also note 45 *supra*. The Florida Supreme Court decisions upholding statutory rape laws are explainable, I think, in these terms. See, e.g., *J.A.S. v. State*, 705 So. 2d 1381 (Fla. 1998); *Jones v. State*, 640 So. 2d 1084 (Fla. 1994). *B.B. v. State*, 659 So. 2d 256 (Fla. 1995), is probably best understood, as Justice Kogan suggested, on page 260 of his concurrence as concerned with legal equality.



reasons? The individual, at the time of decision, will likely regard the decision as dispositive for the future.

A right of choice in matters of self-government does not reduce to tests of "importance" or "significance" as such. The right to assisted suicide, to request others to help terminate one's life, involves a matter of always extraordinary consequence. It may not, however, be a question of self-government in every case. From the perspective of government, if government bans assisted suicide, individual choice is legally preempted. But from the perspective of the individual, were the individual free to choose, the choice to terminate one's life resists ready characterization. Resolution once and for all occurs not because the individual will hereafter treat the decision as authoritatively settled, but because the individual deciding is "in the hereafter" – no longer present to abide by (or reconsider) the decision. Self-government posits continuing existence; decisions to die, of course, contemplate otherwise. The opportunity to decide whether *not* to request termination of one's life may present itself repeatedly; if so, a choice in one instance not to request termination would leave open later renewed consideration of the matter. There could be, however, circumstances in which an individual confronts a likely last chance – surgery or other intensive courses of treatment might present a real risk of triggering a vegetative state. If so, a decision not to request termination would have preemptive long-term effects, and would therefore be a matter of self-government. And thus, derivatively and only in these circumstances, a decision (conditionally, presumably) to request termination would also be subsumed.<sup>75</sup>

But what of decisions by individuals or their agents to refuse or withdraw consent to medical treatment? In *Browning* and *Dubreuil*, cases in which refusal plainly put life at risk, the Florida Supreme Court stated that the constitutional right of privacy includes "the right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one's health."<sup>76</sup> Some decisions about medical treatment fix – or at the time appear to fix – long-term consequences, and therefore fit within the self-government account. The current understanding of the right of privacy is plainly more encompassing. We might wonder, however, whether discussion of privacy was actually required to explain constitutional protection of a right to refuse medical treatment. Common law torts jurisprudence holds that medical treatment ordinarily presupposes patient consent.<sup>77</sup> Common law agency

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75. This distinction does not appear to have been considered (one way or another) in the case law so far. See, e.g., *Krischer v. McIver*, 697 So. 2d 97 (Fla. 1997).

76. *Guardianship of Browning*, 568 So. 2d 4, 11 (Fla. 1990); accord., *In re Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993).

77. See *Browning*, 568 So. 2d at 10.

doctrines recognize a general power possessed by individuals to authorize surrogates to act on their behalf. The Florida constitutional guarantee of legal equality<sup>78</sup> should regulate the ability of the state legislature or courts to limit consent requirements without sufficient reason.<sup>79</sup> The right to refuse medical treatment therefore acquires a constitutional setting independent of either privacy or self-government notions.

#### F.

Individuals themselves should make decisions which have long-term consequences for themselves. We can appreciate why individuals would want this opportunity. The reasonableness of the proposition, however, does not in and of itself establish that individuals, in all circumstances, indeed ought to be able to make long-term choices, especially if the decisions also have consequences for others. We may suspect that most matters of long-term significance have, in one way or another, consequences for others. Within the *Real Property* framework, consistently with this backdrop, the claim of right is only one element. The reasons for government action restricting or nullifying individual decision-making are equally relevant.

Examined closely, *Real Property* appears to raise difficult issues, both within the field of its original application and with respect to its extension encompassing a due process right of self-government. This is the gist of Justice Barkett's conclusions: If prosecutors can show, by clear and convincing evidence, that property was put to use for criminal activity the property forfeits to the state, terminating all rights to the property of individuals who are unable to show, by a preponderance of evidence, their ignorance of the property's criminal use. If property is put to criminal use, why should the ignorance of the owners protect their rights? In connection with rights to real property, it is easy to imagine rights holders who would in fact not know what was going on – mortgage holders or landlords, for example. Why not, however, impose a duty to monitor, put such rights holders to work in the crime control effort? It seems harder still to make sense of the *Real Property* formula in connection with rights of self-government, since rights holders themselves will typically be initiators of the activity that provokes the state's concern. Is ignorance here in any sense a relevant notion?

Ignorance per se may not be the immediate issue. State of mind is often an inference from circumstances – and, especially in the case of organizations, a more or less figurative conclusion. Mortgage holders

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78. Fla. Const., art. I, § 2.

79. Enforcing legal equality sets aside the question of whether the general rule that battery is wrongful without consent is itself constitutionally required.

and landlords – if that is what they really are – are engaged in conduct other than that which triggers government intervention (so we assume). The purpose of forfeiture, after all, is not to capture criminal property, but to deny individuals who engage in criminal activity access to property as part and parcel of that activity. Rights holders establish ignorance by establishing that their activities, vis a vis property at issue, are separate from criminal uses of the property. We might suppose that individuals claiming rights of self-government could also show that the project within which choice matters for them – there must be some such project or the notion of long-term consequences would be beside the point – is similarly distinct from the consequences that supply reason for government intervention. Individuals take into account effects on themselves. This is not necessarily selfishness as such, but simply preoccupation with whatever matters for them. Government, by contrast, might be understood to adopt a perspective attentive to consequences that are independent of, or more complicated than, the individual's own concerns.<sup>80</sup> If these conditions hold, an individual claiming a right to choose could meet the *Real Property* ignorance test by showing that the choice at issue is part of a project, a set of concerns or aims, that does not substantially overlap pertinent government concerns or aims. The applicability of the right positions the individual to demonstrate that, more likely than not, ordinarily pressing government worries are inapposite in the circumstances.<sup>81</sup>

This account supposes that the government cannot simply identify the particular choice as such – instead of its attendant consequences – as the reason for prohibition.<sup>82</sup> Within federal constitutional law, that option is not ordinarily available to Congress (or to its defenders) because federal statutes must be describable in terms which refer to the Article I, Section 8, legislative agenda – figure as “means” to constitutional “ends.”<sup>83</sup> Florida constitutional law, we might think, recognizes a

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80. Within these terms, it is enough that the government concerns are sufficiently distinct. They might reflect some altogether impartial “public” interest, the interests of particular other individuals, or a mixed agenda. The propriety of particular versions of these alternatives may be, of course, the subject of other parts of constitutional law.

81. Alan Michaels derives constitutional requirements of “innocence” – obligations of government to show that burdened individuals act knowingly or at least carelessly – from the existence of background constitutional rights. Absent proof of intent or negligence, the conduct triggering sanction would fall within the scope of a constitutional right. This analysis, plainly, supposes a notion of decisive rights. Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 877-78 (1999). In the *Real Property* setting, in contrast, “constitutional innocence” originates in doubt about government reasons for acting, doubt which is authorized by the relevance of the threshold right.

82. See generally ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* 84-105 (1989).

83. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

similar subject matter restriction on legislative jurisdiction, in the form of the familiar preoccupations of the police power, and therefore requires a similarly instrumental rationalization.

G.

The two parts of the *Real Property* formula are simply reversed accounts of the underlying idea of forfeiture. Forfeiture, we can therefore see, incorporates two counter-propositions. Rights are forfeit if the projects defining their exercise (or defined by their exercise) address matters government identifies as wrongful. Rights, it appears, are conditional upon government definitions of wrongfulness. Rights prevail, even if the consequences of their exercise are properly matters of government concern, if the terms within which rights are framed or exercised happen not to include such government matters. Government objectives, it appears, are conditional upon individual definitions of right. The opposed tendencies of these propositions are not reconciled or otherwise managed by the notion of forfeiture itself they only illuminated. *Real Property*, however, plainly presupposes some sort of mediating mechanism if its formula is supposed to point, in particular cases, in the direction of particular conclusions.

It is not sufficient, presumably, to treat specific applications of the formula as random results of the interaction of two plausible propositions – something like a coin toss.<sup>84</sup> Both individual rights and governmental concerns are depicted, within Justice Barkett's account, as of equal significance, but also as threshold matters: we need not (or so I have supposed) elaborate in isolation the substance of such rights and concerns past the point of initial plausibility because the real work of investigation and justification will come in the course of gauging interaction. An account like Barkett's would therefore abandon any claim to yield persuasive conclusions if result-generating is labeled as ad hoc. For much the same reason, we might also wish to resist Cass Sunstein's recent suggestion that difficult-to-resolve conflicts of individual rights and government concerns should ordinarily be resolved in ways that minimize the substantive engagement of adjudicators.<sup>85</sup> "Breyerian thickets"<sup>86</sup> cannot be regarded as only occasional, and therefore avoidable, phenomena within an account that begins precisely by putting in conflict individual claims and government objectives. Matthew Adler's

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84. Cf. Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 40-43 (1987).

85. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

86. See *Denver Area Educ. Telecom. v. FCC*, 518 U.S. 727, 742 (1996)(opinion of Breyer, J.).

description of constitutional rights as “rights against rules” is more helpful insofar as it emphasizes the interaction of particular claims of right and reasons for government action.<sup>87</sup> For his purposes, however, Professor Adler finds it sufficient to stop short, to show only that usual judicial characterizations of rights take the form of tests of the adequacy of government reasons for action. What counts as an “overriding reason” is a question he is prepared to leave “open to debate,” simply a matter of “fleshing out” implications of his “derivative account” of constitutional rights.<sup>88</sup>

Justice Kogan’s dissent in *Kurtz* suggests something of the form of what might follow next – the form of the “debate” that Adler supposes. Kogan distinguishes between “speculative pretense” and “rational governmental policy.”<sup>89</sup> He worries about “a ‘slippery slope’ problem” and also the problem of a “poor fit between the governmental objective and the ends actually achieved.”<sup>90</sup> But he also acknowledges that the “right” government action would be constitutional. “If the federal government, for instance, chose to regulate tobacco as a controlled substance, I have no trouble saying that this act alone does not undermine anyone’s privacy right.”<sup>91</sup> These phrasings, of course, are hardly idiosyncratic. For example, Justice Barkett in *Real Property* similarly declares that state interests must be “narrowly tailored.”<sup>92</sup> Indeed, we all know, terms like these are in common use in constitutional law generally (this is Professor Adler’s starting point.) Even a glance at his actual language, however, reveals that Justice Kogan (and Justice Barkett as well as seemingly every other judge) is interested not so much in “rights against rules” as in *characterizations of rights* as against *characterizations of reasons for government action*. Adjudication is, quite literally, a “language game.”<sup>93</sup> It is, as well, a game which makes use of a particular feature of language that, again we all know, is especially prominent in, indeed perhaps constitutive of, legal language generally — the ready availability of multiple terms capable of identifying any given phenomenon.<sup>94</sup> This redundancy allows a particular course of action, for exam-

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87. Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998).

88. *Id.* at 6, 107.

89. *City of Miami v. Kurtz*, 653 So. 2d at 1025, 1029 (Fla. 1995).

90. *Id.*

91. *Id.*

92. *Department of Law Enf. v. Real Property*, 588 So. 2d at 957 (Fla. 1991).

93. Cf. Jaako Hintikka & Gabriel Sandu, *Game-Theoretical Semantics*, in *HANDBOOK OF LOGIC AND LANGUAGE* 361-410 (Johan van Benthem & Alice ter Meulen eds., 1997).

94. This nominal pluralism is sometimes seen as problematic. From this perspective, it is addressed as “indeterminacy” or the “level of generality” puzzle, as a kind of cloud constitutional analysis should work to dispel. See LAURENCE TRIBE & MICHAEL DORF, *ON READING THE*

ple, to be described in sometimes entirely different terms as either an individual choice or a public problem. Similarly, it is this redundancy that allows the same course of action to be identified in terms which group it with many other, putatively similar courses of action, or in terms which mark the course of action as individual or unique. These possibilities – or rather, their handling or mishandling – create the risks of slippery slopes and misfits to which judges refer.<sup>95</sup>

The *Real Property* formula defines one such legal language game, as equally apt for testing liberty to self-govern as the priority of property rights. An individual offers an account of the long-term structuring consequences of a particular choice (with respect to at least one of the options presented by the choice). The government may counter by suggesting that this choice is subsumed within a larger class of options that are relevantly equivalent but are not precluded by the government action at issue. The government for its part contends that the choice in question has distinctive effects that are properly matters of public interest. The individual may, in turn, disaggregate the category or generalize it, showing in either case that other activities, that are not similarly matters of individual long-term choice, produce like consequences, and are therefore alternative targets for regulation. Finally, the individual may describe the matter subject to choice in terms designed to suggest the irrelevance (for the individual) of the aspects of the matter that prompt government involvement. The government might then attempt to show that the point of the choice for the individual in fact suggests an incriminating overlap.

Easy cases occur when one or the other participant is unable to

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CONSTITUTION (1991). For an effort, as here, to make use of indeterminacy as part of the substance of constitutional argument, see Michelman, *Brennan Lecture*, *supra* note 61.

95. There are, in principle, at least two types of characterization games implicit in constitutional jurisprudence generally. The first – which starts with the idea of taxonomy – supposes sequences of opposed categories (say, subjects of liberty of contract and subjects of legal regulation) and seeks to classify particular acts under one or the other heading. An argument in favor of a given explanation fails if within its terms so many acts would be classified similarly that the organizing idea of taxonomy would therefore lose meaning. Justice Peckham's opinion in *Lochner v. New York*, 198 U.S. 45 (1905), illustrates especially well the form of argument within a taxonomic characterization game. A second game starts with the idea of overlap – particular acts may well be plausibly described as, say, exercises of individual freedom and subjects of legislative concern. There is no set legislative agenda or regime of personal freedom. The question, rather, is whether which of the competing accounts captures better the attributes of the particular act or acts at issue. If an account is as easily understood as referring to other acts, it loses salience (at least in the face of a competing account) as a governing account of the act in question. Chief Justice Hughes' opinion in *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934), is perhaps the best exemplar of overlap analysis, depicting insistence upon contract rights as itself the "emergency" to which a legislative mortgage moratorium responds. The characterization game that I associate with *Real Property* is one of this second type – an overlap game.

offer either an initial characterization or a counter argument. If both participants frame and critique (through however many iterations), burden of proof rules become decisive. If the individual has not made a plausible case for characterizing the choice as one of long-term consequences, the government prevails. Otherwise, if the government fails to show that the choice presents a distinct public problem, or if the individual plausibly establishes that her or his activities do not require the individual to address the issues provoking the government, the individual prevails.

The play of argument, it should be apparent, turns not just on the relative generality of competing descriptions, but on differences in the content of descriptions attributable to the alternative standpoints. The precise orientation of points of view may therefore prove significant. Consider, for example, the familiar question of a woman's right to choose whether or not to obtain an abortion. The individual would claim self-government. The state might counter by asserting an interest in the life of the fetus. The woman invoking the right would, presumably, be pregnant – the choice and the consequences of the possible courses would be, for her, immediately and concretely real. "Having an unwanted child can go a long way toward ruining a woman's life."<sup>96</sup> In contrast, legislation prohibiting abortion, because of its general form, addresses all women (within the jurisdiction) who become pregnant.

Absent abortion, a very large percentage of all conceived fetuses would be born alive. But it is also necessary to take note of the likelihood that any given pregnant woman – any one woman identified only as a member of the population of all pregnant women – would choose to have an abortion. Justification of the legislation, therefore, must include and defend the particular likelihood supposed. (In the United States at present about one in four of all pregnant women choose abortion.) Whatever protection legislation might afford the lives of fetuses must also be adjusted to reflect the likely number of illegal abortions that would occur notwithstanding the legislation. If the risk of abortion for any one fetus, in the end, appears to be relatively low (this would be the subject of argument), and thus the added protection is correspondingly limited, then the legislation, given its aim of protecting life, may become vulnerable to less restrictive alternative analysis. All sorts of government acts and refusals to act increase risks of death in small increments for all individuals within the jurisdiction (just as other government acts and refusals to act slightly reduce risks of death.) It becomes difficult, therefore, for government to claim any distinctive concern with respect to "background" changes in life chances for conceived fetuses in partic-

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96. Ely, *supra* note 16, at 923.

ular. Changes in a relatively small number of government policies might increase protection of life just as much as prohibition of abortion.<sup>97</sup> The lives protected might not be those of fetuses. But at the level of abstraction at which anti-abortion legislation proceeds, it is not easy to understand how defenders of the legislation could discern a defensible preference for fetal life as opposed to other human life. (Anti-abortion laws typically – and tellingly for present purposes – include an exception for abortions necessary to save the life of the pregnant woman.)

If the legislation is read to address only women who are pregnant and whose conceived fetuses are viable, the analysis changes dramatically. It is now the claim of the right of self-government that becomes vulnerable. Such women, it may be supposed, are not clearly set in their views about maternity – why otherwise would they wait so long to seek an abortion?<sup>98</sup> If so, it may not be sufficiently persuasive for them to claim that (for them) maternity marks a dramatic (and therefore authoritative) change in life. The individuals claiming the right to choose abortion would need to point to either late-developing circumstances such as newly-discovered health risks or extenuating reasons for hesitancy. Otherwise, relatively abstract and attenuated legislative concerns would stand uncountered. It might also be argued, on behalf of the legislation, that women who assert the right to choose abortion post-viability are ambiguously situated. The grim possibility cannot be immediately excluded that the reason for their choice is precisely counter to the reason for legislation – that the women now choose abortion precisely for the purpose of terminating human life. Again, to be plausible, the claim of the right to self-government would require special explanation.

#### H.

The game framework straightforwardly expresses *Real Property's* agnosticism. At the outset, no priority attaches to either the substance of individual choices (so long as they pertain to long-term matters) or government concerns. Constitutional inquiry need not proceed in parallel with political and moral argument – which in the case of abortion, for example, tends to begin with either an asserted hierarchy of values or a claim of irreconcilable conflict.<sup>99</sup> The game framework also summarizes aptly the logic of argument that we would expect to unfold in a

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97. See also RONALD DWORKIN, *LIFE'S DOMINION* 115-16 (1993) (comparing desensitizing effects of abortions, executions, and failures to reduce infant mortality).

98. "In almost all cases, a woman knows she is pregnant in good time to make a reflective decision before the fetus is viable." *Id.* at 169; see also *id.* at 151 ("no reason why government should not aim that its citizens treat decisions about human life and death as matters of serious moral imprudence").

99. See generally LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990).



case like *Kurtz*. Government might counter the individual claim that smoking is a decision preemptive of reconsideration (easy reconsideration, anyway), and therefore properly a matter of personal choice. Nicotine ingestion can occur in other ways, thus discouraging or banning smoking leaves the individual with equivalent options: the smoking decision as such is not decisive after all. Or as we have noted already, the individual might argue, against the government justification of reducing insurance costs, that alternative partitions of the applicant pool would yield similar savings.

Does the game framework supply an independent basis for valuing the end-result of the interaction? This becomes an important question precisely to the degree that constitutional analysis departs from modes of argument otherwise used to address a question at issue. (Again, the contrast with usual abortion debate supplies the most obvious example.) In part, we might think, the game justifies itself just because it takes seriously *both* individual rights (of property and self-government) and government agendas. The text of the Florida Constitution in various ways also recognizes both (however obliquely with regard to government agendas). The due process clause in particular, we have already seen, seems to suppose the possibility of limitations of liberty and property either conforming to or departing from due process.<sup>100</sup> The medium of the game — its origin in the richness of legal language — suggests that adjudication structured in this way is not only “constitutional” but “law.”

But it is the burden of proof rules, finally decisive for purposes of analysis, that must carry the most normative weight. The *Real Property* formula, notwithstanding its doubleness, manifestly incorporates an asymmetry. Individuals succeed in showing that a choice is indeed a matter of self-government, or as well a matter of “constitutional innocence,” if support for their assertion (insofar as facts are in dispute) satisfies the *preponderance* test. The government, however, can establish that a free choice has adverse public results only if evidence is *clear and convincing*. This difference, we can readily see, supplies the game with its dynamic. It pushes the one side (government) to pick a characterization of its concerns about the individual’s choice which will seem manifestly pertinent — to fix an initial level of generality. The individual in turn may seek to recharacterize her or his choice more abstractly or more specifically than the government did, or dissect the relevance of the government concerns; the government may respond; the iteration proceeds.

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100. Limitations consistent with due process, of course, might nonetheless infringe some other constitutional provision.

There is no reason functionally, though, if the point is simply to propel the inquiry, why the greater burden could not be borne by the individual.

Substantively, however, as a matter of constitutional law, placing the greater burden on government obviously expresses and gives concrete meaning to popular sovereignty, surely a "value the [c]onstitution marks as special."<sup>101</sup> Individuals are prior to government; therefore, it is government action that requires added justification at the margin. The *Real Property* formula, therefore, not only resonates with constitutional texts and works through to its conclusions precisely within familiar resources of legal language, but also instantiates an originating premise of the constitutional project at large. It is, it seems, the very model of constitutional law.

### I.

Would Justice Barkett recognize all of this as her handiwork? Would Justice Kogan think that these were the propositions that he was signaling should be brought to bear?

In his dissent in the assisted suicide case, *Krischer v. McIver*, Justice Kogan included this footnote:

It is important to distinguish this broader concept of "ordered liberty" from the narrower "liberty interests" protected by due process, with their different contexts and contrasting burdens of proof. Compare *Department of Law Enforcement v. Real Property*, . . . (due process guarantees inherent fairness; government can infringe property rights only upon clear and convincing evidence) with *In re Browning*, . . . (privacy guarantees personal autonomy; state can justify infringements only for "compelling" interest enforced through least intrusive means).<sup>102</sup>

The compelling interest requirement, in Kogan's view, reflects a commitment "of the Justices and judges of Florida . . . to guarantee and enforce . . . basic rights."<sup>103</sup> We might wonder whether this reading is accurate. It is not just the manifestly conclusory assertion of compelling interest in the majority opinion in *Krischer* itself. Other privacy cases also show that, at least sometimes, references to compelling interest are as much or more means of asserting the priority of state authority vis a vis claims of individual right. This ambivalence is evident from the outset in Florida's privacy jurisprudence, appearing indeed as an organizing theme in now-Judge Cope's still-extraordinary account of the 1977

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101. Ely, *supra* note 16, at 949.

102. *Krischer v. McIver*, 697 So.2d 97, 113 n.18 (Fla. 1997). Kurtz, Kogan must have thought, was not really a privacy case at all – plainly he distinguished between the *Real Property* due process inquiry and privacy right enforcement as such.

103. *Id.* at 111.

drafting history of the privacy right.<sup>104</sup> There are, of course, individual rights that Florida courts treat the Florida constitution as strongly protecting.<sup>105</sup> But the compelling interest test does not appear to be either necessary or sufficient to the task.

Substituting the due process interplay of *Real Property* for the privacy right compelling interest formula, therefore, may not represent a reduction in the actual level of protection of individual rights. *Real Property* is inconsistent, obviously, with the idea of "basic rights" in one sense. Rights are not definitive; once understood to be relevant, they do not "trump," do not just because of their relevance decide matters. Rights if relevant, however, are "basic" in the sense of serving as starting points; initiate a comparative exercise, a process of testing salience that may result in either the enforcement of rights or recognition of government authority. Because the interaction of claims of public concern and claims of individual right is the organizing preoccupation of the *Real Property* approach, the fundamental fact of the Florida constitutional scheme (indeed, all American constitutions) might be acknowledged more often than obscured – government and self-government are both constitutional commitments, each a critique of the other, neither therefore beyond question.

In one important respect, of course, a shift in emphasis from the right of privacy to the right of self-government would seem to be radical indeed. Explicit constitutional protection of privacy is a distinctive – and often applauded – feature of the Florida constitution. The idea of privacy, however, has had to be forced; has had to be rather arbitrarily redefined by Florida courts and commentators to make it cover the claims that come easily within the idea of self-government. Privacy in its ordinary sense – privacy per se – is not associated so much with choice (except with regard to waiver) as with secrecy, nondisclosure, or anonymity. It was, we all know, privacy carrying these latter associations that Brandeis and Warren sought to protect; it was *this* privacy that then-Chief Justice Overton invoked in urging constitutional protection at the revision proceedings in 1977.<sup>106</sup> Privacy per se has sometimes been a subject of Florida supreme court opinions.<sup>107</sup> The depth and extent of its legal protection seem, perhaps especially at this moment, to be salient questions.<sup>108</sup> A constitutional jurisprudence of privacy actually concerned with privacy might, therefore, be an idea whose time has come.

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104. See Cope, *supra* note 13.

105. See, e.g., *Tramel v. Stewart*, 697 So. 2d 821 (Fla. 1997); *Butterworth v. Caggiano*, 605 So. 2d 56 (Fla. 1992)(constitutional homestead protections bar forfeitures).

106. See Cope, *supra* note 13.

107. E.g., *Post-Newsweek Stations v. Doe*, 612 So. 2d 549 (Fla. 1992).

108. See generally Thomas Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFF. 3 (1998).