# Village of Belle Terre v. Boraas: Property Rights, Personal Rights and The Liberal Regime

*By* WILLIAM V. FRAME* AND THOMAS J. SCORZA**

## Introduction

With increasing frequency, local disputes over zoning ordinances are raising divisive issues of profound constitutional importance.[1] These apparently simple disputes pose complex questions about such matters as the constitutional permissibility of economic discrimination, the extent of a community's control over its environment, and the power of a municipality to limit or even halt its own growth. At bottom, these questions challenge American jurisprudence, for they eventually touch the very nature of law in a liberal regime.[2] In the end, exclusionary zoning ordinances precipitate a modern version of the ancient conflict between individual and society.

However, the contemporary jurisprudential management of this old conflict has been surprisingly evasive, and markedly partial. On the one hand, the primary jurisprudential question of the extent of a liberal community's power over individual rights has been blurred by the distinction drawn between personal and property rights and by the

* Associate Professor of Political Science, Kenyon College.
** Assistant Professor of Political Science, Kenyon College.

1. Note, for example, the intensity of the debate even on the issue of constitutional standing to challenge exclusionary zoning ordinances in Warth v. Seldin, 43 U.S.L.W. 4906 (U.S. June 25, 1975).

2. "Regime," as it is used in this article, means the whole complex which is a political society — not only its constitution and laws, but the way of life followed by its citizens and the actual distribution of power and authority which lies beneath the laws. *See* L. STRAUSS, NATURAL RIGHT & HISTORY 135-38 (1953). The "liberal regime" is "the regime devoted to the principle that the purpose of government is the securing of the equal right of every individual to pursue happiness as he understands it." T. PANGLE, MONTESQIEU'S PHILOSOPHY OF LIBERALISM 1 (1973). The precise implication of this definition for the relationship between the individual and liberal society is the subject of this article.

corresponding claim that these rights differ in the extent to which they are entitled to constitutional protection. This claim and its attendant legal formulae have subsumed the basic jurisprudential question beneath technicalities and arbitrary judicial distinctions. Secondly, when the primary jurisprudential question *has* been touched, unstated philosophical premises have made it seem as if there is only one answer appropriate to liberalism: the individual must prevail over the society except when the rights of other individuals are directly threatened. Thus, the purported distinction between rights and the oversimplification of the character of liberalism have combined to remove from the forefront the fundamental issue, the conflict between individual and liberal society.

An examination of the Supreme Court's decision in the zoning case, *Village of Belle Terre v. Boraas*, will demonstrate the Court's reliance upon the distinction between personal and property rights. The dissenting opinion by Justice Thurgood Marshall in the case will evidence the influence of John Stuart Mill's conception of liberalism upon constitutional thinking. Finally, the alternate conceptions of liberalism contained in the jurisprudence of William Blackstone and John Marshall will place contemporary constitutional adjudication in high relief and suggest that the older liberal jurisprudence was both more profound and more direct in its confrontation with the perennial conflict between society and citizen.

## I. Village of Belle Terre v. Boraas

In *Village of Belle Terre v. Boraas*,[3] the Supreme Court sustained a zoning ordinance which restricts village land use to one-family dwellings and defines the word "family" to mean "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants." Further, the ordinance provides that "[a] number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."[4] The purpose of the ordinance is to prohibit any group of three or more unrelated persons from residing in any of Belle Terre's one-family dwellings. In particular, the ordinance is aimed at "communes" of three or more unrelated students from the nearby Stony Brook campus of the State University of New York.[5]

3. 416 U.S. 1 (1974).
4. *Id.* at 2.
5. New York Times, April 2, 1974, at 1, col. 2; *id.* at 18, col. 1.

The Belle Terre ordinance goes far beyond an attempt to guarantee the residential character of the village. By restricting land use to one-family dwellings and defining "family" so as to exclude all groups except traditional families and unrelated couples, the ordinance amounts to a regulation of the living arrangements *within* any village residential dwelling. In effect, the ordinance grants a preference both to traditional family units and to unrelated couples and penalizes groups of three or more unrelated persons. In totality, the ordinance presents an instance of a community's attempt to regulate the way of life of those who desire to be its residents. This particular use of the prosaic zoning power thus ultimately raises the most sublime questions concerning the relationship of the individual to a liberal society. In the end, the issue of the *Belle Terre* zoning case demands an investigation of the extent and limitations of a liberal society's power over the individuals who authorize and constitute that society. The issue of land use planning, no less than the issues, for instance, of community control over obscenity or abortion, may demand an examination of the fundamental nature of a liberal regime.[6]

The opinion of the Court in *Belle Terre* did not, however, proceed from such an examination. Speaking for a majority of seven, Justice Douglas was prepared to admit that the case brought to the Court "a different phase of local zoning regulations" than had been previously reviewed.[7] In *Village of Euclid v. Ambler Realty Co.*,[8] the Court had sustained the complex 1922 zoning ordinance of Euclid, Ohio, which had regulated land use, building height, and lot sizes and dimensions. There the Court had ruled against the Ambler Company's claim that the Euclid ordinance deprived the company of liberty and property without due process of law and denied it equal protection of the law by banning the more profitable industrial development of portions of a sixty-eight acre tract of company-owned land which fell within predominantly residential use districts. Since the legislative classifications of the various permissible land uses were "fairly debatable" but not "clearly arbitrary," the Court held that the regulation of land use was a proper exercise of the police power and could comprehend the exclusion of all industrial uses, whether or not dangerous or offensive, from certain areas.[9] Further, in *Berman v. Parker*,[10] the Court had sustained a land use project

6. For an examination involving the obscenity issue, *see* H. CLOR, OBSCENITY AND PUBLIC MORALITY (1969).

7. 416 U.S. at 3.

8. 272 U.S. 365 (1926).

9. *Id.* at 388, 395.

10. 348 U.S. 26 (1954). Justice Douglas was also the author of this opinion.

in the District of Columbia which attempted to eliminate "blighted areas" in that urban community. The Court there refused to limit the concept of the public welfare to health and safety, holding that the "values it represents are spiritual as well as physical, aesthetic as well as monetary."[11] Thus, prior to *Belle Terre*, the Court had held that municipalities may not only restrict land use to residential purposes but also may aim at the "spiritual" and "aesthetic" improvement of the community environment. Yet, however broad were the Court's interpretations of the permissible extent of land use regulation in *Euclid v. Ambler* and *Berman v. Parker*, neither case raised the issue of the permissibility of using the zoning or land use powers to regulate the *internal* arrangements of residences. Justice Douglas' admission that the Belle Terre ordinance is "different" thus somewhat understated the case. In fact, this understatement prepared the way for the majority to avoid the full dimensions of the problem posed by *Belle Terre*.

Justice Douglas and six of his colleagues held that the Belle Terre ordinance did not violate equal protection and the rights of association, travel, and privacy.[12] They did so by *denying* that the zoning ordinance affected any "'fundamental' right" or "any rights of privacy."[13] Hence, Justice Douglas observed:

> We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be "reasonable, not arbitrary" . . . and bears "a rational relationship to a [permissible] state objective."[14]

According to Justice Douglas, then, the ordinance exists in the area in which, under the so-called "double standard,"[15] the Court will give wide latitude to legislative discretion. Because according to Justice Douglas the ordinance deals with "economic and social" matters and not with "fundamental personal rights," the Court will respect the legislative discretion which opens Belle Terre to families and unrelated couples and closes the village to groups of three or more unrelated people. Since the regulation here is finally a regulation of property rights and not personal rights, Justice Douglas could endorse a very expansive conception of the

11. *Id.* at 33. Congress' power over the District of Columbia is the equivalent of the police power of a state. *Id.* at 31-32. *See also* District of Columbia v. Thompson Co., 346 U.S. 100, 108 (1953).

12. 416 U.S. at 7-8.

13. *Id.* at 7.

14. *Id.* at 8.

15. *See* H. ABRAHAM, FREEDOM AND THE COURT 8-28 (2d ed. 1972); P. FREUND, THE SUPREME COURT OF THE UNITED STATES 28-91 (1961).

police power. That power, he argued, "is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[16]

Unlike the "spiritual" and "aesthetic" public values spoken of in *Berman v. Parker*, the "family values" cited in *Belle Terre* necessarily reach into the privacy of the home and are not confined to the external community environment. In light of this fact, it is surprising to find Justice Douglas, who is noted for his broad civil libertarian views, not only joining the *Belle Terre* majority, but, in fact, writing the expansive majority opinion. Apparently, however, he had decided that his favorite environmental interests should prevail over his favorite libertarian interests.[17] In part, this decision by Justice Douglas was facilitated by the fact that the Belle Terre ordinance did not evidence an "animosity to unmarried couples" (*two* unmarried people could constitute a family), nor to larger unrelated groups on the basis of the sexual mix of the individuals in the groups.[18] However, the controlling constitutional factor for Justice Douglas was apparently his contention that the Belle Terre ordinance was a regulation of property and not of "fundamental" rights. Thus, he openly identified the appellees as the *owners* of a house in Belle Terre who had illegally leased to a group of six unrelated students, and he quickly passed over the fact that three of the students were also appellees.[19] Moreover, Justice Douglas returned at the end of his opinion to the issue of property rights when he insisted that the case had not become moot when the student appellees had moved out of their rented house. For Douglas, there remained a case or controversy because the issue concerned the rental value of the lessors' *property*, and the nature of the right involved easily settled the question for him. Quoting Justice Holmes, Justice Douglas asserted that the *Belle Terre* case could be decided on the simple ground that "property rights may be cut down, and to that extent taken, without pay."[20]

Justice Brennan dissented from the majority opinion on the ground that it was no longer clear that a case or controversy was presented.[21] He argued that the case, therefore, should be remanded to the district court

16. 416 U.S. at 9.

17. *See* Justice Douglas' nearly open advocacy of Vermont's "statewide land-use controls." *Id.* at 5 n.3.

18. 416 U.S. at 8.

19. *Id.* at 2-3.

20. *Id.* at 9-10, *citing* Block v. Hirsh, 256 U.S. 135, 155 (1921).

21. 416 U.S. at 10 (Brennan, J., dissenting).

to determine whether or not a cognizable case or controversy in fact continued to exist. The fact was that the tenant appellees had since vacated the Belle Terre house, and, according to Justice Brennan, "[t]he constitutional challenge to the village ordinance is premised *solely* on alleged infringement of associational and other constitutional rights of *tenants*."[22] Thus, whether there remained a case or controversy turned, for Justice Brennan, on the question of "whether the lessor appellees may attack the ordinance on the basis of the constitutional rights of their tenants."[23] Justice Brennan's technical dissent may conceal an agreement with Justice Douglas' major point, *i.e.*, that the property right of the lessors demands minimal protective court scrutiny. Indeed, in noting that the brief for the appellees "negates any claim that [the lessors] face economic loss," Justice Brennan clearly indicates that an economic injury to the lessors would be a constitutionally important factor only in establishing the lessor's standing to challenge the Belle Terre ordinance on the basis of their *tenants'* rights.[24]

Justice Marshall dissented on substantive grounds and would have held the Belle Terre ordinance unconstitutional as violative of the lessee students' "fundamental rights of association and privacy guaranteed by the First and Fourteenth Amendments."[25] In the process of registering his dissent, Justice Marshall openly stated what Justice Brennan's dissent had implied: "Had the owners alone brought this suit alleging that the restrictive ordinance deprived them of their property or was an irrational legislative classification, I would agree that the ordinance would have to be sustained."[26] For Justice Marshall, however, the case involved the "fundamental personal rights"[27] of the students, and thus even under a broadly interpreted zoning power, which he himself on the whole would defend,[28] the ordinance must pass the close scrutiny of the Court. Just as the Court did not and would not allow the use of zoning to enforce racial segregation, it should not, argued Justice Marshall, allow a zoning law to burden First Amendment freedoms. In particular, the Belle Terre ordinance "unnecessarily burdens appellees' First Amendment freedom of association and their constitutionally guaranteed right to privacy."[29] The selection of living companions needs to be protected as diligently as

22. *Id.* (italics in the original).
23. *Id.*
24. *Id.* at 11.
25. 416 U.S. at 13 (Marshall, J., dissenting).
26. *Id.*
27. *Id.* at 18.
28. *Id.* at 13-14, 17.
29. *Id.* at 15.

one's choice of political, economic or social associates is protected, and the selection of living companions involves a decision which "surely falls within the ambit of the right to privacy protected by the Constitution."[30] On these grounds, Justice Marshall could conclude:

> The instant ordinance discriminates on the basis of . . . a personal lifestyle choice as to household companions. It permits any number of persons related by blood or marriage, be it two or twenty, to live in a single household, but it limits to two the number of unrelated persons bound by profession, love, friendship, religious or political affiliation, or mere economics who can occupy a single home. Belle Terre imposes upon those who deviate from the community norm in their choice of living companions significantly greater restrictions than are applied to residential groups who are related by blood or marriage, and compose the established order within the community. The town has, in effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents.[31]

One need not agree with Justice Marshall's conclusion to realize that the Belle Terre ordinance is not limited to controlling such problems as the "density of population and the related problems of noise, traffic, and the like."[32] Indeed, the ordinance places no direct limitation on population density since traditional families of any size may reside in the village of Belle Terre, nor does it place a direct limitation on the number of automobiles. Also, the ordinance does not necessarily moderate rents by excluding large groups of unrelated renters, since it does not restrict the number of wage earners in permitted households.[33] The essence of the ordinance is its attempt to enforce the "familial character of the community."[34] While Justice Marshall apparently would accept even this latter goal as a legitimate governmental interest, he denied that there was any clear evidence that the familial character of Belle Terre "would be fundamentally affected" if the village "permitted a limited number of unrelated persons to live together" within its boundaries.[35] According to Justice Marshall, in the absence of such clear evidence, the ordinance cannot withstand constitutional scrutiny. It is not clear that the burden imposed by the ordinance is "necessary to protect a compelling and substantial governmental interest."[36] What *is* clear, however,

30. *Id.* at 16.
31. *Id.* at 16-17.
32. *Id.* at 19.
33. *Id.*
34. *Id.* at 20.
35. *Id.*
36. *Id.* at 18. Justice Marshall here construes this "compelling state interest" requirement to mean that if it is determined that a burden has been placed upon a "fundamental personal right," then "the onus of demonstrating that no less intrusive means will adequately protect the compelling state interest . . . is upon the party seeking

is that the ordinance "undertakes to regulate the way people choose to associate with each other within the privacy of their own homes."[37]

Justice Marshall's defense of alternative "lifestyles" against the zoning authorities' attempt to regulate "how they choose to live"[38] is not based on any explicit theoretical inquiry by him into the limitations of a liberal society's control over its individual citizens. However, the particular conception of the right to privacy contained in Justice Marshall's dissent (and in earlier Supreme Court decisions concerning privacy[39]) did receive full theoretical treatment in John Stuart Mill's *On Liberty*. Mill argued that the only worthy conception of liberty was one which entailed both an absolute individual freedom of speech and an individual freedom of action which was limited only by a prohibition against doing actual harm to others.[40] So understood, liberty demands a sphere of individual privacy beyond governmental or societal control, and in all conflicts between the public and the private spheres the burden rests upon the public sphere to prove that individual privacy is not being violated. The essence of Mill's argument is so similar to Justice Marshall's that the latter's dissent in *Belle Terre* can be viewed as a paraphrase of the argument in *On Liberty* that:

> [F]rom [the] liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others . . . .
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> . . . .
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> . . . As it is useful that while mankind are imperfect there should be different opinions, so it is that there should be different experiments of living . . . .[41]

However appealing may be reliance upon Mill and his "one very

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to justify the burden." *See also* Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

A less rigorous version of this "compelling state interest" requirement leads to "balancing" of community and individual interests. *See* Roe v. Wade, 410 U.S. 113, 152-53, 154-55, and 164-65 (1973).

Justice Marshall considers the even less rigorous "rational relation" test appropriate only for litigating issues concerning legislative regulation of property rights. *See* Belle Terre v. Boraas, 416 U.S. 1, 13 (Marshall, J., dissenting).

37. 416 U.S. at 17 (Marshall, J., dissenting).

38. *Id.* at 15.

39. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Stanley v. Georgia, 394 U.S. 557, 564-65 (1969); Griswold v. Connecticut, 381 U.S. 479, 483, 486 (1965). *See also* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

40. J.S. MILL, ON LIBERTY 16 (C. Shields ed. 1956) [hereinafter cited as MILL]. However, unlike Justice Marshall, Mill grounds this liberty in "utility" rather than "abstract right." *Id.* at 14.

41. *Id.* at 16, 68.

simple principle" which limits liberal government to interference with individuals only when it is necessary to prevent palpable injury to others,[42] the fact is that Mill's principle is filled with theoretical difficulties. In her recent study of Mill's *On Liberty*,[43] Professor Gertrude Himmelfarb has shown that the argument of *On Liberty* contradicts other liberal arguments advanced by Mill himself, arguments in which Mill had shown that there is no necessary inconsistency between proper *individual* liberty and societal enforcement of *common* notions of justice, standards of right conduct, and even perimeters of right opinion.[44] The contemporary Court, moreover, accepts only half of the argument of *On Liberty*, for Mill certainly did not propose in that work that threats to individual property rights automatically be given less scrutiny than threats to "personal rights."[45]

In sum, *Belle Terre* points to the complex theoretical question of the relationship between individual and society in a liberal regime. This question, however, was not treated by the Court for two related reasons. First, the majority justices based their decision upon the claim that the Belle Terre ordinance was finally a regulation of property, a kind of regulation to which the courts grant a "presumption of validity."[46] The majority view thus made unnecessary any inquiry into the proper extent of governmental control over an individual's *property* right: it is assumed and settled that the legislature has all but *carte blanche* power over private property when it is regulating within the scope of the police power.[47]

Secondly, Justice Marshall's substantive dissent is based upon the claim that, since the Belle Terre ordinance affects "fundamental personal rights," its proponents have the burden of demonstrating clearly that the ordinance is "necessary to protect a compelling and substantial governmental interest."[48] However, according to the assumptions which govern such a potential demonstration, there is an extremely narrow area of "compelling and substantial governmental interest," and so the

42. *Id.* at 13.

43. G. HIMMELFARB, ON LIBERTY AND LIBERALISM (1974) [hereinafter cited as HIMMELFARB].

44. *Id.* at 46-47, 77-80, 90-91, 106-08.

45. *See, e.g.*, MILL, *supra* note 40, at 115-16; HIMMELFARB, *supra* note 43, at 109-12.

46. *See* Aero Mayflower Transit Co. v. Carpentier, 167 F. Supp. 898, 902 (S.D. Ill. 1958).

47. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

48. 416 U.S. at 18 (Marshall, J., dissenting), *citing* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

burden is virtually impossible to bear. While the government has a clear interest in preventing palpable harm to its citizens, it has no justifiable interest in "how they choose to live."[49] A government's interest in the character of its community or the specifically moral condition of its citizenry presumably could seldom pass close constitutional scrutiny. Thus, in the end, Justice Marshall's dissent not only does not open the question of the relationship of the individual to the liberal regime, but it in fact *closes* the question by, as it were, *assuming* that an adequate answer has already been presented by one part of John Stuart Mill's position in *On Liberty*.

The majority and dissenting opinions avoided a complex theoretical issue by appeals to the same sterile formula. The real issue posed by the *Belle Terre* case was avoided while the justices tried to locate the ordinance in a scheme which asserts that the decisive fact of such constitutional adjudication is whether society attempts to regulate property rights or personal rights. Apparently, all of the justices are willing to accept almost any rational legislative regulation of property, but the attempt to regulate personal rights will run into rigid and unreceptive libertarian assumptions or "balancing" tests between "heavyweight" individual rights and decidedly "lightweight" societal interests.[50] The unfortunate result of this kind of adjudication is that the Court strips the law of the defensible and convincing theoretical base which is needed for the preservation of its standing in a liberal society.

## II. Blackstone on Property Rights, Personal Rights and Privacy

Improvement of this situation requires a rethinking of the purported dichotomy between property and personal rights and a return to a direct confrontation with the problem of the *individual's* relationship to liberal society. The contemporary Court's near-absolutizing of personal rights and downgrading of property rights has led to decisions which are as facile as those of an earlier Court, which made the property right sacrosanct and which held property to be virtually beyond public control.[51] The underlying issue has been ignored equally by either attempt

49. 416 U.S. at 15 (Marshall, J., dissenting); *cf.* Roe v. Wade, 410 U.S. 113, 153-54 (1973).

50. *But see* Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Clor, *Obscenity and the First Amendment: Round Three*, 7 LOYOLA L. REV. (LOS ANGELES) 207 (1974).

51. *See, e.g.*, Morehead v. New York *ex. rel.* Tipaldo, 298 U.S. 587 (1936); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Lochner v. New York, 198 U.S. 45 (1905);

to achieve a simplistic solution to a complex and perennial problem. When liberal society attempts to regulate *either* property or persons (*if* the two can be perfectly distinguished), the issue raised runs to the heart of liberalism itself and demands an understanding which is fully adequate to the theoretical questions presented.

To find such an understanding in the legal tradition itself, we must examine the formative period of modern constitutionalism—the period when a law shaped in the struggle between king and lords was refitted to regulate the new relationship between public power and private rights.[52] William Blackstone stood in the center of this period—after the legal profession had consolidated the resolution of the constitutional crisis of the seventeenth century, and before the Parliament was persuaded by the utilitarians to intervene decisively in the common law.[53] From this vantage point, Blackstone presented at Oxford in 1753 a series of lectures which were designed, as he wrote, to provide "an highly useful, I had almost said essential, part of [the] liberal and polite education" of the gentlemen and nobility of England, since such men "cannot, in any scene of life, discharge properly their duty either to the public or themselves, without some degree of knowledge in the laws."[54] In these lectures, Blackstone sought to devise a rationale for the law which was accessible to his students and which was consistent with both English jurisprudence and the emergent liberal regime.[55] The result, which includes a guideline for protecting the rights of personal liberty and private property as well as a conception of privacy, was presented in the four volumes of his *Commentaries on the Laws of England.* The *Commentaries,* as it turned out, were more influential in America than in England,[56] and constituted a major ingredient in the education of those who shaped American jurisprudence to the principles of the Constitution.[57]

Smyth v. Ames, 169 U.S. 466 (1898); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895); Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1875).

52. *See* C. McILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 123-46 (rev. ed. 1947).

53. *See* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 486 (2d ed. 1914). *See also* H. MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 244 (F. Pollock ed. 1963).

54. 1 W. BLACKSTONE, COMMENTARIES *6, 7 [hereinafter cited as COMMENTARIES].

55. *See* 1 *id.* *6, 145, where Blackstone refers to Montesquieu's *The Spirit of the Laws* and finds that its theoretical description of the liberal regime is consistent with the English constitution.

56. D. LOCKMILLER, SIR WILLIAM BLACKSTONE 169-90 (1938) [hereinafter cited as LOCKMILLER].

57. *See* R. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 6-7 (1968) [hereinafter cited as FAULKNER].

Blackstone drew a distinction between personal and property rights, but the result of his distinction is very unlike the result of the distinction between these rights which is made by the *Belle Terre* Court. Blackstone's distinction is based upon his presumption that each civil liberty has one of two origins: either it is a part of "that *residuum* of natural liberty" which survives the launching of civil society, or it is one of "those civil privileges" which the conventional or political order itself grants.[58] Thus, the three rights which compose essential civil liberty—personal security, personal liberty and private property[59] —can each be said to derive from either nature or convention. As it turns out, both of the personal rights are clearly natural, while the private property right, in its usual sense, is apparently conventional. The right of private property consists in "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[60] Despite the fact that "nothing . . . so generally strikes the imagination, and engages the affections of mankind,"[61] the right is not only secured by means available only in civil society, but private property itself, at least in its familiar forms, exists only in civil society:

> [T]here is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him: or why the occupier of a particular field or of a jewel, when lying on his death-bed and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him.[62]

Yet Blackstone does not conclude from this fact that the property right is inferior to the natural personal rights. Indeed, taken together, all three rights remain "absolute" or fundamental, for:

> as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.[63]

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58. 1 COMMENTARIES *129.

59. *Id.*

60. 2 *id.* *2.

61. *Id.*

62. *Id.* Blackstone's remarks here suggest the reason for his earlier qualified statement that the "original of private property is probably founded in nature." 1 *id.* *138.

63. 1 *id.* *129. The chapter in which Blackstone discusses the three rights is entitled, "Of the Absolute Rights of Individuals." 1 *id.* *121.

There are a variety of reasons why the conventional status of the property right does not lower its importance in relation to the natural personal rights of security and liberty. In the first place, it is not even generally true that the conventional order is simply inferior to the natural order. Thus, while natural liberty is "a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free-will,"[64] Blackstone nevertheless considers the part of this natural liberty jettisoned for the sake of civil society as well lost, for the "species of legal obedience and conformity" available in any ordered regime, including even tyranny, "is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it."[65] Indeed, the expenditure of part of natural liberty has purchased, in the case of England, "[a] land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the constitution."[66] Thus, the fact that the right to private property is rooted in the ordered regime rather than in nature does not in itself diminish the right in any way. Indeed, the ordered regime is more desirable than the savage part of the natural order, and perhaps it even is more desirable than the whole natural order, of which the savage portion seems to be a necessary part.

More positively, the conventional order may involve a justice which is in fact superior to natural justice. Thus, while discussing the right of personal security—a right which obliges public protection of life, limbs, body, health, and reputation[67]—Blackstone warns against the easy supposition that civil society will tolerate the securing of even such a natural right by natural rather than conventional or civil means. For example, the right to act in self-defense is properly restricted in civil society. Although it is "justly called the primary law of nature,"

> We must not carry this doctrine to the same visionary length that Mr. Locke does: who holds "that all manner of force without right upon a man's person, puts him in a state of war with the aggressor; and, of consequence, that, being in such a state of war, he may lawfully kill him that puts him under this unnatural restraint." However just this conclusion may be in a state of uncivilized nature, yet the law of England, like that of every other well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system; nor will suffer with impunity any crime to be *prevented* by death, unless the same, if committed, would also be *punished* by death.[68]

64. 1 *id.* *125.
65. *Id.*
66. 1 *id.* *6.
67. *See* 1 *id.* *129-34. *See also* 4 *id.* *176-219.
68. 3 *id.* *4; 4 *id.* *181-82 (emphasis in the original).

Further, the natural may depend upon the conventional for its very existence. Hence, the right of personal liberty—which, like the right of personal security is a "right strictly natural"[69] —is secured almost exclusively by the civil writ of *habeas corpus*, "that second *magna carta*, and stable bulwark of our liberties."[70] Only the patronage of civil society, in the form of the writ, provides an instrument for the protection of the natural right of personal liberty. Thus, not only may various civil conventions improve upon nature, but they may also allow the only means whereby the natural may survive. Again, the apparently conventional character of the private property right does not indicate its inferiority to the clearly natural personal rights of security and liberty.

Finally, the right to property leads directly to many public benefits. Unlike Locke, Blackstone does not celebrate private property as the chief provision of civil society and as the focus of man's natural passion for acquisition.[71] Neither does Blackstone celebrate property as the platform and opportunity for individual self-expression.[72] However, he regards a settled law protecting private property to be a necessary condition of civil peace,[73] and civil peace as the first condition of civil liberty.[74] Moreover, Blackstone points out that the security of private property brings to civil life still other benefits. Inheritance, for example, "has an evident tendency to make a man a good citizen and a useful member of society: it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections."[75] The proper performance of the duties, both civic and filial, which property ownership incurs requires a "liberal and polite education" which Blackstone supposes strengthens the commitment to liberty among the wealthy.[76] Finally, commerce contributes to the "universal

69. 1 *id.* *134.

70. 1 *id.* *137.

71. *See, e.g.*, J. LOCKE, TWO TREATISES OF GOVERNMENT 339-40 (P. Laslett ed. 1967), where Locke argues that "the increase of lands and the right imploying of them is the great art of government." *See also* 2 J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 208 (A. Fraser ed. 1959), in which Locke says that "where there is no property there is no injustice."

72. John Marshall supported this rationale of the property right because he was a much greater friend of "acquisitive individualism" than Blackstone. See *infra*, section III.

73. *See* 2 COMMENTARIES, *supra* note 54, at *10, where Blackstone argues that civilization requires an established law of inheritance to avoid "endless disturbances" over the property of the deceased.

74. *See* 1 *id.* *47-48.

75. 2 *id.* *11.

76. 1 *id.* *6-13.

good of the nation."[77] These incidentals thus combine with the earlier points to suggest that the "sole and despotic dominion" of the property owner performs a broad public service. The protection of this conventional private right guarantees public peace and civil liberty, contributes to national prosperity, and cultivates at least a modicum of patriotism.[78] There are no grounds for supposing that the property right requires, as a matter of principle, less protection than personal rights.

Of course, the theoretical importance of these equally fundamental individual rights to the edifice of liberty does not guarantee their protection.[79] The doctrine of parliamentary sovereignty, rather than constitutional supremacy, meant that English liberties could not be secured by a technical jurisprudence.[80] The real purpose of the lectures at Oxford was to make partisans of English liberty out of prospective legislators. To complete the task, Blackstone propounded a test which the Parliament might use to determine the propriety of legislation. He proposed that there are two kinds of activities which the law ought not to touch: those which are performed in private without witness, and those which neither advance nor injure the "common utility."[81]

The private activities that tempt legislatures to apply legal restraint are those which are considered base or wicked. But the temptation ought to be resisted where the activity is performed alone, because an action performed without witnesses cannot be adjudged in a proper English tribunal, and so a law touching such matters cannot be enforced by legal sanction. But if the action is witnessed, to say nothing of causing direct harm, it obliges legislative attention:

> For the end and intent of [municipal] laws being only to regulate the behavior of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though

77. 1 *id.* *126.

78. *See* 1 *id.* *6-11. This argument does not easily apply to the United States where property, from the beginning, meant commercial commodity rather than inheritance. *See* Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860*, 40 U. CHI. L. REV. 248 (1973).

79. *See* 1 COMMENTARIES, *supra* note 54, at *5-8, 36-37, where Blackstone points out the need for educating potential legislators and jurors about these individual rights.

80. *See* 1 *id.* *31-33. Here Blackstone condemns that form of legal knowledge which is gained by apprenticeship "at the desk of some skillful attorney, [and which is designed] to initiate [the apprentices] early in all the depths of practice, and render them more dexterous in the mechanical part of the business." 1 *id.* *32.

81. 1 *id.* *126.

> they be such as seem principally to affect himself (as drunkenness, or the like,) they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case. *Public* sobriety is a relative duty, and therefore enjoined by our laws; *private* sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction.[82]

This ground is not Mill's ground in *On Liberty*. Blackstone's test is simply consistent with the capacities of English courts for adjudication. Although it distinguishes the illegal from the wrong, it does not divorce them.[83] For Blackstone, a wrong action untouched by law remains wrong. Neither does his test widen the definition of "private" to include self-affecting actions by more than one person, and so it does not excuse them from legal cognizance because they are "victimless."[84]

The definition of privacy implicit here is very narrow, and consideration of the second half of Blackstone's legislation test indicates that his definition of the public interest is correspondingly broad. The exhortation against legal treatment of actions that neither advance nor prejudice the "common utility" indicates that few actions contemplated by the legislature would be censured by this test:

> [T]he statute of King Edward IV, which forbad the fine gentlemen of those times (under the degree of a lord) to wear pikes on their shoes or boots of more than two inches in length, was a law that savoured of oppression; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of King Charles II, which prescribes a thing seemingly as indifferent, (a dress for the dead, who are all ordered to be buried in woolen) is a law consistent with public liberty; for it encourages the staple trade, on which in great measure depends the universal good of the nation.[85]

This indicates how far the early conception of privacy is from that

82. 1 *id.* *124 (emphasis in the original).

83. Mill does not condemn private "wrongs." *See* MILL, *supra* note 40, at 99-100: "No person ought to be punished simply for being drunk; but a soldier or a policeman should be punished for being drunk on duty. Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty and placed in that of morality or law." Note that "morality" here is defined by the law, the jurisdiction of which is limited to actions palpably injurious to others or which threaten palpable injury to others.

84. *But cf.* Mill's statement, *id.* at 16-17: "The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, *or* mental and spiritual." (emphasis in the original).

85. 1 COMMENTARIES, *supra* note 54, at *126.

held by the present Court. Blackstone supposed that private behavior, as well as private welfare, is a legitimate concern of government in a liberal society, and privacy as a realm isolated from the public jurisdiction by an arsenal of private rights was unknown to him. Lifestyle was as much a subject of legitimate legislative investigation as property use—or as little. Indeed, the greatest threat to the liberal regime in Blackstone's estimation is the tendency among its friends to suppose that it has only one enemy.[86] In fact, the regime can be destroyed both by a romantic nostalgia for natural liberty and by too great a fear of natural liberty. Its legislators must try to keep a middle ground between anarchy and tyranny:

> [W]e may collect that the law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny: nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty: whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state of society, which alone can secure our independence.[87]

Blackstone's influence on the American jurisprudence formed to support the Constitution was immense. John Marshall and Joseph Story seem to quote or cite him at every turn on both substantive and prudential matters.[88] But the Americans were compelled to stray from his advice on account of certain innovations in liberalism accomplished by the American founding. This straying established a conception of privacy different from Blackstone's, but it did *not* found a distinction between the rights of person and property resembling that advocated by the present Court, nor did it lead to a conception of privacy identical to Mill's in *On Liberty*.

## III. John Marshall: Property, Privacy and the Public Good

At the center of the realm of privacy conceived in the jurisprudence

86. *See* 1 *id.* at *144-45, where Blackstone indicates that liberty is endangered both by "licentiousness" and by "submission."

87. 1 *id.* at *125-26.

88. LOCKMILLER, *supra* note 56, at 171; J. MARSHALL, AN AUTOBIOGRAPHICAL SKETCH 5 (1937) [hereinafter cited as MARSHALL]. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162-64 (1803); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 559-60 (5th Ed. 1891) [hereinafter cited as STORY].

of John Marshall lie Blackstone's three fundamental rights. But Marshall asserted a greater equality among them than had his English mentor. He identified them each unequivocally as of natural origin and gave them all the high status of natural rights.[89] Unlike Jefferson, Marshall did not take nature to be a beneficent and homogenous propensity, immanent in men, which would move them to nobility when liberated by democracy and conditioned by economic self-reliance.[90] He recognized natural rights as expressions of ineradicable human tendencies toward individualism which no conventional order could negate. "Those who know human nature, black as it is, must know that mankind are . . . attached to their interest . . . ."[91] The stability of civil society could be better assured by recognizing natural rights (and thereby limiting the scope of government) than by seeking to embarass self-interest as a motive for action. But Marshall knew that the kind of self-interest liberated by the republican order in America could not be relied upon to secure the regime itself. That required the patronage of statesmanship, the motive of duty, and the art of rhetoric.[92] Marshall's efforts in behalf of these qualities can be seen, paradoxically, in his defense of the natural rights of life, liberty and property.

Of the three rights, private property seemed to receive the most systematic attention from Marshall. He did not disparage the rights of personal security and personal liberty by this emphasis. Far from it. His attitude toward them has been described recently as "thoroughly modern,"[93] especially his celebration of the writ of *habeas corpus*,[94] and his insistence that the prosecution be held to high standards of proof and procedure in criminal cases.[95] But the property right occupies a special place in Marshall's jurisprudence. For him, it was *primus inter pares* of the liberties secured by the founding of the commercial republic in America. It was the highest of the natural rights whose recognition circumscribed that founding, and upon its protection depended the safety of the rights of person.[96]

89. FAULKNER, *supra* note 57, at 13-20.

90. *See, e.g.*, 1 THE PAPERS OF THOMAS JEFFERSON 126-34 (J. Boyd ed. 1950), in which Jefferson argues that the "great principles of right and wrong" are so obvious that the "whole art of government consists in the art of being honest." This view calls for a system of political and economic freedom which would require only the necessary minimum of government.

91. 3 ELLIOT'S DEBATES 562 (J. Elliot ed. 1836).

92. *See* FAULKNER, *supra* note 57, at 114-92.

93. *Id.* at 14.

94. *See, e.g., ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94-95 (1807).

95. *See, e.g.*, United States v. Burr, 25 F. Cas. 55 (C.C.D. Va. 1807).

96. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 134-35 (1810); 2 STORY, *supra* note 88, at 568-70.

Marshall supposed that the property right involves at heart the protection of contract. This doctrine of "vested rights" reflects Marshall's interest in identifying the natural right of property as a right of acquisition, rather than merely as a right to secure possession of occupied land or articles. The desire to acquire property is itself the natural form of the right, and the obligation of contract "results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it."[97]

Marshall did not smuggle this view into constitutional interpretation. He regularly cited the *Federalist Papers* and the Constitution itself to prove the centrality of the property right in the American regime.[98] But his jurisprudence does include an original effort to work out a view of the right that would reconcile private ambition and desire with the public interest. It is by considering this effort at reconciliation that we come closest to finding in Marshall's jurisprudence a general rule for guiding public interference with private rights.

In the widest political sense, Marshall believed that the recognition and enforcement of the property right in a commercial regime paradoxically answered the problem of republican government. The liberation of interest, and the arming of individuals with private rights, narrowed the jurisdiction of government in the American regime. But it did not diminish the need for legitimate social authority or public power. Precisely because interest is liberated in the American version of the liberal regime and is authorized as the guide of human actions, some means must be found in the regime to moderate passion and harmonize interests to prevent the anarchy which annihilates law, and hence liberty.[99]

It is true that passion may be moderated by education and harnessed to public ends by religion. But Marshall censured the "frenzy" and "destructive rage" which religious fervor had produced occasionally among the Puritans,[100] and praised instead the "solid safety and real security" enjoyed by Americans under the Constitution.[101] The first condition of that "solid safety and real security" was law, but the

97. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 346 (1827) (Marshall, C.J., dissenting).

98. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418-19 (1821); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 433-35 (1819); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135-37 (1810).

99. *See* FAULKNER, *supra* note 57, at 137-47.

100. *See id.* at 10.

101. *See id.* at 13.

maintenance of its authority in a regime which had liberated interest seemed to Marshall necessarily to require statesmanship, an art which was motivated by duty rather than interest, and guided by prudence rather than partisan passion. Marshall supposed that statesmen would appear very infrequently in the American regime, and he offered his *Life of Washington* as a rhetorical example that would partially fill this predicted void.[102]

But Marshall reserved a greater part of his concern for civic education to sponsor and advertise tracts that praised and explained the law of the American Constitution. He wrote to Story, of the *Commentaries*, "I have finished reading your great work, and wish it could be read by every statesman, and every would-be statesman in the United States."[103] In the same letter, he pointed to lawyers and judges as the critical audience for an education that went beyond the sheer mechanics of the law:

> The vast influence which the members of the profession exercise in all popular governments, especially in ours, is perceived by all, and whatever tends to their improvement benefits the nation.[104]

Marshall's interest in civic education was an attempt to blunt and transform the incipient tendency toward radical democracy in America. On the ground that republican government was one "of laws, and not of men,"[105] and that it was the very antithesis of that regime which the Jacobins had brought to power in France,[106] Marshall accepted for the judiciary the responsibility of vitalizing the principles of the American order. The American order had faced in a new way the primary problem of liberalism—the maintenance of the authority of that law which must manage the tension-ridden relationship between government and citizen, society and individual. Beginning without crown and aristocracy, and hence without parliament, Marshall supposed that America had made law itself the defender of liberty and, simultaneously, the definer of public power.[107] Maintaining authority for a law occupying such pivotal

102. Late in his life, he even undertook personally to edit and condense the work for use in the public schools. *Id.* at 146. *See generally* 2 J. MARSHALL, THE LIFE OF GEORGE WASHINGTON 500-03, 518-19, 527-32 (1930), where Marshall rhetorically transforms Washington into a model for aspiring politicians.

103. *Quoted in* FAULKNER, *supra* note 57, at 143-44.

104. *Quoted id.* at 143.

105. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

106. *See* FAULKNER, *supra* note 57 at 3, 10, 156, 169; *cf.* MARSHALL, *supra* note 88, at 13-15.

107. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 413-23 (1821); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403-06 (1819); *Ex parte* Bollman, 8

ground seemed to require a political foothold, and might have more easily been accomplished by Congress. But the disposition of the republic toward a less liberal democracy meant that jurisprudence, not legislative science, was to be the American bond of liberty and of order.[108]

The judicial recognition and enforcement of the property right provided a means of bearing this critical responsibility. Commercial affairs absorbed the greatest share of the energy and attention of American citizens. A jurisprudence that was disposed to protect the property right, and which recognized that it was the lynchpin of American liberty, would regularly touch public attention in the effort to reconcile private action with the requirements of the public order.[109] The power to touch commercial relations with authority "comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management . . . ."[110] The new Constitution was meant to restrain the political use of that power and obliged the judiciary to a special concern for precisely this matter. A jurisprudence guided by this obligation would, at least, invalidate those actions inconsistent with the social order which gave rise to them,[111] and, by means of the doctrine of implied powers, validate those actions consistent with constitutional purposes.[112] While the Court of the late nineteenth century intervened on behalf of property rights in order to erect a barrier between the private and public spheres,[113] Marshall's Court intervened on behalf of property to inject the public interest into the private sphere.[114] Marshall's intentions were to extend rather than to contract the conception of the public interest, and to moderate rather than to emancipate completely private interest. He derived these intentions from the regime and its founding, but he contrived and developed the instrument of this ruling in his jurisprudence.

U.S. (4 Cranch) 75, 125 (1807); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 176-80 (1803). *See also* 2 STORY, *supra* note 88, at 568-70.

108. See the argument for judicial supremacy in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-80 (1803).

109. *See* FAULKNER, *supra* note 57, at 219-30.

110. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 354-55 (1827) (Marshall, C.J., dissenting).

111. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-63 (1832); Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588-92 (1823).

112. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 341-42, 349 (1827) (Marshall, C.J., dissenting); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 412-25 (1819).

113. *See, e.g.*, Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895); Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1874); *cf.* Munn v. Illinois, 94 U.S. 113 (1876).

114. See text accompanying notes 97-99 *supra*.

Hence, the real service of such a jurisprudence is rendered by its ability to communicate those principles of republican government and liberty to public opinion. Marshall's opinions carefully reproduce the ground by which the conclusion was reached, to "preserve unbroken" the "chain of principles" which constituted the argument.[115] This was the critical statesmanlike function of jurisprudence for Marshall. Natural liberty was the source of the chief limitations upon the jurisdiction of the government in the American regime, and the preservation of liberty was the chief object of that government. The preservation of liberty required, at the very least, the preservation of the constitutional order. That meant restraining the chief natural passion—avarice—by educating and supervising commercial relations.

Marshall's understanding of the character of the liberal regime, and the central problem of legal authority, is the source of his jurisprudence. He derived that understanding from the same sources to which the founders turned—Locke, Montesquieu, Blackstone—and he authorized his interpretation of the Constitution for judicial purposes by reference to the *Federalist Papers*.[116] This understanding of the liberal regime did not divorce private from public, or the rights of person from those of property. Indeed, it was the complicated relationship between private and public, individual and society, that challenged the ingenuity and tested the statesmanship of Marshall, as Marshall supposed it had tested the statesmanship of Washington.[117] In all, he recognized that the liberation of private interest, protected by civil liberty, narrowed the jurisdiction of government, but did not diminish the need for legitimate public authority. The substitution of private interest for public direction as the guide for individual behavior did not signify the sacrifice of concern for the public good. Law, as the safeguard of liberty, needed authority against the forces of tyranny. Law, as the conciliator of private interest with public order and the public good, needed authority against the propensity of desire.

## IV. Conclusion

There is a profound difference between the jurisprudence of Black-

115. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 186, 222 (1824).

116. *See* 2 MARSHALL, *supra* note 102, at 148-50. (See also note 98 *supra*.)

117. 2 *id.* at 530: "In speculation, he was a real republican, devoted to the constitution of his country, and to that system of equal political rights on which it is founded. But between a balanced republic and a democracy, the difference is like that between order and chaos. Real liberty, he thought, was to be preserved, only by preserving the authority of the laws, and maintaining the energy of government. Scarcely did society present two characters which, in his opinion, less resembled each other, than a patriot and a demagogue."

stone or John Marshall, on the one hand, and the jurisprudence articulated and implied in the *Belle Terre* opinions. The jurisprudence of Justices Douglas, Brennan and Thurgood Marshall seems to have been derived largely from the liberalism of John Stuart Mill's *On Liberty*. That liberalism drives a wedge between the individual and society, and on the basis of one "very simple principle" proposes to manage the very complicated matter of individual-social relations in the liberal regime. The difference between the present Court and Mill is that the Court has driven a wedge through the realm of privacy itself, and simply removed property to the area of permissible governmental regulation. Beyond this, however, neither the Court nor Mill seems willing to regulate anything simply for the sake of the moral character of the community.[118]

In contrast, the jurisprudence of classical liberalism, as formulated by Blackstone or John Marshall, recognized and accepted the difference between the public and the private in the liberal regime. But although classical liberalism argued that the jurisdiction of the law should be narrowed, it did not abandon the notion that public morality or the public interest governs private interest. For neither Blackstone nor John Marshall did the law protect an entire realm of privacy cut off from public scrutiny or governmental concern.

Both Blackstone and John Marshall were apparently preoccupied with the right of private property. However, a close examination of this preoccupation cannot uncover a generic separation of the rights of person from those of property. For Blackstone, a settled law of private property was a condition of civil peace neither more nor less crucial than either personal security or personal liberty, and property itself, supported by a legal tradition that respected inheritance, encouraged the performance of civil duty. For John Marshall, property was the key natural right, and he supposed that individual self-interest molded by the attraction of acquiring it would be largely reconciled to the public interest by the dynamics of the commercial regime itself and by a jurisprudence attuned to the principles of that regime.

The separation of property from person as an integral aspect of private rights, and the relocation of property in the sphere of permissible public regulation, seems to have been an indispensable condition for driving a wedge between public and private. Property is not only secured by civil society, but human energy in its behalf is essentially

118. *Compare* Belle Terre v. Boraas, 416 U.S. 1, 15 (Marshall, J., dissenting) *with* MILL, *supra* note 40, at 13, 17 on the issue of the individual's right to choose how to live.

social. Only when the conception of privacy is narrowed by the removal of property from the sphere of privacy can one contrive an absolute defense of privacy. The persuasion of an earlier Court that property was absolutely private and beyond legitimate public cognizance could not and did not stand the test of experience, especially in the industrial order. But the rejection of that persuasion was accomplished by a reversal rather than a correction, a reversal which produced the other extreme. This reversal was guided by the same conviction—that liberalism divorces private from public and denies to those who act in the name of the regime the right to interfere in the realm of privacy or to mold private interest to the public good.

At base, the liberal regime is distinguished by the substitution of private self-interest for public direction as the moving principle of the order. This requires the creation of a certain realm of privacy furnished by civil liberties.[119] Although John Marshall's jurisprudence, following the opinion which prevailed at Philadelphia, reflects a deeper commitment to the civilizing power of commercial society itself on private interest than does Blackstone's, neither he nor any other of the influential founders supposed that this function could be adequately performed without governance.[120] Again, although the sacrifice of public direction for the inspiration of self-interest shrank the jurisdiction of government, it required the enlargement of public powers in what remained. This meant that the major responsibility for governance in the liberal regime fell upon law, for the constitutional limitations on government and harmful private action—which together constituted the primary dangers to liberty—meant to Blackstone and John Marshall that the only civil authority capable of touching the jurisdictions of both private and public is constitutional law. The dearest possession of that law, without which it would be prostrated by either tyranny or private passion, is its authority. Blackstone's *Commentaries* and John Marshall's opinions

119. As an indication of the narrow confines of the realm of privacy in the thought of the American founders, it should be noted that the founders did not admit even freedom of speech and press into the decisively private realm which was beyond public control. *See generally* L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960). The one apparent exception to this fact was James Madison, who came to regard the First Amendment as an absolute guarantee of freedom of political speech against federal government abridgment. *Id.* at 273-78. Yet even this Madisonian libertarianism, which the present authors would support, contains a conception of privacy which is emphatically more narrow than the autonomism of Mill's *On Liberty*.

120. *See* THE FEDERALIST No. 10 at 131 (B. Wright ed. 1961) (J. Madison): "The *regulation* of the various and interfering [property] interests forms the principal task of modern legislation . . . ." (emphasis added).

were meant to contribute both to the cultivation of the law's authority among its practitioners and to the broad popular dissemination of the wisdom of constitutional law. Both men meant to mold public sentiment and shape professional opinion. And both men advocated a jurisprudence which did not abdicate its responsibility for the governance of men.

We can conclude that supporters of this older jurisprudence would not respond to the *Belle Terre* case by appeals either to the supposed distinction between property and "fundamental" rights, or to the existence of an individual "right to privacy" beyond societal regulation. Indeed, the older constitutional jurisprudence would reject both appeals precisely because they involve merely legalistic formulae which are, in fact, extra-constitutional.[121] For a jurisprudence grounded in the Constitution, the Belle Terre ordinance would be regarded as a permissible regulation of both property and persons, a regulation which, within a limited area, attempts to govern the "quality of life"[122] or public morality of a liberal community. Stated negatively, the United States Constitution simply does not require that legislatures abandon the tasks of government at the threshold of a "right to privacy" which is vigorously advanced but constitutionally ill-founded. Stated positively, liberal legislatures have the power to regulate both property and persons according to the values[123] defined by the public interest, except where there are *specific* constitutional checks on the exercise of such legislative power. The Constitution and its principles are the only acceptable guides for both legislation and jurisprudence, and they alone provide the lines within which both legislative and judicial prudence must operate.

121. *See* Shapiro v. Thompson, 394 U.S. 618, 660-62 (1969) (Harlan, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 508-10 (1965) (Black, J., dissenting).

122. For a case holding that the interest of the public in the quality of life is a legitimate subject for state regulation, see Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973).

123. *See, e.g.*, Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); Berman v. Parker, 348 U.S. 26, 32-33 (1954). Compare Justice Douglas' support of societal values in these environment cases with his defense of individual values in the personal matter of abortion in Doe v. Bolton, 410 U.S. 179, 211 (1973) (Douglas, J., concurring).