Duties of Care and the Constitution: A Negligence Model of Individual Rights

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I. INTRODUCTION

"Arcane" might well be the adjective most frequently used to describe to law students bodies of law that touch on constitutional interpretation. Individual rights jurisprudence is certainly no exception. In fact, grappling with theories about overarching themes, ideologies, and agendas is perhaps a more daunting challenge to the student of individual rights law than is learning the black letter law itself. Academics often think of this body of law as quite malleable and responsive to the normative views of Justices on the Supreme Court, and theories couched in terms of political agendas and ideological biases are frequently offered to explain the direction in which individual rights jurisprudence is moving.[1] None of these explanations, however, contemplates the type of interdisciplinary approach that a negligence model of individual rights law would suggest, and few offer rational explanations for the seemingly incoherent divergences one finds in this area of law. This Note seeks to do both.

The source of confusion at its most fundamental level that this Note, or any other individual rights theory, must hurdle is quite simply that the individual rights and liberties defined in the Bill of Rights and subsequent amendments do not mean what they say. As the Supreme Court has put it (at least in the case of the Sixth Amendment), "to read th[e seemingly mandatory] language [of certain amendments] literally, it would require"[2] unintended and extreme results.

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1. *See, e.g.*, Jed Rubenfeld, *The Anti-Anti-Discrimination Agenda*, 111 YALE L.J. 1141, 1141 (2002) (noting that "[p]eople are pretty sure there is something going on in constitutional law these days, but they don't know what it is"). *But see* Muller v. Oregon, 208 U.S. 412, 420 (1907) ("Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in *unchanging form* limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.") (emphasis added).

2. Ohio v. Roberts, 448 U.S. 56, 62-63 (1980) (stating that the Sixth Amendment language that "the accused shall enjoy the right . . . to be confronted with the witness against him" cannot be read literally); *see also* Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (noting that Sixth Amendment rights are "not absolute and may . . . bow to accommodate other legitimate interests"). *But see* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971) (stating that the Fourth Amendment "guarantees to citizens of the United States the *absolute right* to be free from unreasonable searches and seizures") (emphasis added). Note that in *Bivens* the reasonableness qualifier imposed by the Fourth Amendment itself serves as a substitute for the Court's reading of various non-absolute stan-

Moreover, these individual rights as defined in the Constitution contain no judicially manageable standards with respect to determining how literally the language can be read. Thus, whatever the legitimacy of the Court's interposition of standards (and regardless of the legitimacy of the sources of those standards—text, tradition, historical references that perhaps shed light on "original intent," and so forth), those standards seem inherently politically and ideologically weighted for two reasons. First, different standards have led to an allocation of disparate levels of scrutiny for the several individual rights and for the various classes of individuals among which the Court differentiates, such as among racial groups. Second, those various standards have tended to change over time, as exemplified by the evolving level of scrutiny applied to classification by gender over the last thirty years. Although these two facts about inconsistent judicial standards are referenced frequently in theories that explain individual rights law in terms of political and ideological judgments made by unelected judges, I argue that these observations can be understood as a means of rationalizing the following basic philosophical tenet: it makes no sense to hold a governmental actor accountable in the form of prospective relief for an alleged harm that is not reasonably foreseeable.[3] This is the foundation of a negligence model of individual rights law.

Building upon this foundation, the negligence model asserts that one important way to view individual rights is from the perspective of governmental obligations. Subsequent discussion will reveal that the negligence model defines the scope of individual rights by reference to a governmental duty to avoid taking any action having a reasonably foreseeable risk of harm to the means by which a citizen performs certain duties and functions she owes to society.[4] In this manner, the negligence model takes the novel approach of defining the

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dards into constitutional provisions. Additionally, although elaborate discussion of the Fourth Amendment prohibition of unreasonable searches and seizures is beyond the scope of this Note, it is certainly amenable to the duty of care analysis. The impetus for such analysis lies in the recognition that protection from unreasonable searches and seizures is necessary to prevent governmental organs from compromising the degree of privacy necessary to the individual who organizes a radical campaign, political or otherwise, that happens to be despised by incumbent political leaders. A proper understanding of the fundamental underpinnings of our democratic republic suggests that such an individual, in so exercising a controversial political voice, may well be performing a civic function. *See infra* text accompanying notes 23-25 (describing civic functions).

3. Although the model set forth in this Note speaks in terms of duties owed by government and is certainly subject to politically and ideologically charged critique, the point of the model is to make transparent a rational means of understanding the various judicially crafted standards and disparate levels of scrutiny without resorting to the language found surrounding the judicial restraint/judicial activism divide. The fiscal conservative will likely be concerned that imposition of affirmative duties on government can lead to "implicitly imposed . . . massive [financial] obligations." Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1981) (speaking in the context of beneficiary enforcement of public law); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36-37 (1973) (indicating the Court's clear concern with forcing changes in "spending levels"). While the model does not remove all political elements (fiscal considerations, for instance), I do not mean to argue for judicially imposed duties on government that would result in increasingly liberal spending or development of expensive administrative programs.

4. *See infra* notes 16-31 and accompanying text.

scope of individual rights by reference to a certain formulation of the government's obligations. However, the negligence model departs in certain respects from scholarship suggesting that the government ought to ensure the preconditions of effective citizenship. In essence, this Note will provoke the reader to think about rights in a unique way. Rights are to be seen, in a negligence model, as derivatives of duties that individuals owe to, and functions individuals carry out in, a larger community. Precisely, rights are to be viewed as duties imposed upon the government to take care that means of accomplishing individual duties and functions that benefit the larger community are not harmed.

By way of comparison, traditional rights theory discusses individual duties, if at all, as derivatives of preexisting rights rather than as definitional elements of the rights themselves. The scope of such preexisting rights is confined only by reference to abstract notions such as freedom and equality. For example, both Ronald Dworkin and Cass Sunstein suggest that rights are morally justified and must be afforded by the government irrespective of duties that may be owed by citizens. Dworkin specifically addresses the relationship between governmental obligations and effective citizenship in his book, *Freedom's Law*, where he suggests that "the citizens of a political community govern themselves, in a special but valuable sense of self-government, when political action is appropriately seen as collective action by a partnership in which all citizens participate as *free and equal partners*."[5] In other words, Dworkin asserts that it is the sovereign's obligation to "treat all those subject to its dominion as equals, that is, with equal concern."[6] Although he acknowledges the communitarian objection to the liberal emphasis on individual rights that "neglects the responsibilities that people owe to community,"[7] he assumes that such criticisms take the view that responsibilities are derived from preexisting rights. While this assumption has been true traditionally, the negligence model asserts that rights are derived from preexisting duties and social functions. Thus, when Dworkin postulates that the Constitution requires that collective decisions reflect the views of all members of society with equal concern by providing all individuals the power to participate in community governance,[8] the negligence model responds by asserting that the government is only obligated to provide the power of participation when an existing social or civic function related thereto has been identified. Similarly, when Dworkin asserts that society must provide certain tools for effective citizenship without imposing rules other than moral re-

5. Ronald Dworkin, *The Partnership Conception of Democracy*, 86 CAL. L. REV. 453, 453 (1998) (emphasis added).

6. Ronald Dworkin, *Do Values Conflict? A Hedgehog's Approach*, 43 ARIZ. L. REV. 251, 251 (2001).

7. *Id.* at 252.

8. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 1-38 (1996).

straints on behavior harmful to others,[9] the negligence model responds by suggesting that maybe society only provides those tools in contexts where they foreseeably will be utilized so as to constitute effective citizenship, however that term is ultimately defined.

Similarly, Cass Sunstein defends a conceptualization of rights under an anticaste principle, which "forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic"[10] inequality in rights treatment that is not justified from a moral point of view. Sunstein thus suggests that rights are afforded without reference to duties or functions of individual citizens, and, to the extent such duties or functions may exist, they are derivatives of preexisting rights. Under Sunstein's model, failure to perform any such derivative duties does not constitute moral justification for systematically unequal treatment. As with Dworkin's conception, however, these arguments fail to place the defining scope of rights into a framework that is functional without resorting to amorphous notions of moral justification. The negligence model, while having its own ambiguities, refuses to look at moral justifications to legitimate the government's unequal treatment of some citizens. Rather, as will be illustrated, the negligence model justifies unequal treatment so long as unequal functions or duties are expected, and contextual norms provide the framework for ascertaining those expectations, at least in ex post analysis.

Amy Gutmann gets as close as any rights theorist to the negligence model conception of the relationship between rights and duties. Within the context of religious freedom, she suggests that the relationship between rights and duties is one of "two-way protection."[11] "[T]he right of religious citizens to advance political arguments in terms that are religiously based carries with it a responsibility . . . to strive for reciprocity."[12] Again, Gutmann derives the responsibility to strive for reciprocity from the preexisting right. The negligence model, on the other hand, suggests that, if Gutmann's identified responsibility is taken to be the social or civic function that makes religious freedom good for society (which is by no means the claim), then, whenever society silences religious speech that does not accomplish reciprocity in public discourse, society should not be expected to foresee or prevent any compromise of religious freedom (since the exercise thereof is not undertaken to advance the greater social good).

Dworkin, Sunstein, and Gutmann each advance rights theories consistent

9. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 211-85 (2000).

10. Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994).

11. Amy Gutmann, *Religious Freedom and Civic Responsibility*, 56 WASH. & LEE L. REV. 907, 908 (1999).

12. *Id.*

with the traditional focus upon what individuals ought to do with the rights that government has a duty to afford them, but a fundamental method of understanding the scope of the rights themselves is lost with this approach. By deriving the limit to rights from what individuals ought to do with them, the traditional approach engages in an analytically hazier business than establishing a standard by which to gauge the scope of the governmental duty that gives rise to the right. For purposes of the negligence model, the ultimate goal is to understand the precise scope of government's duty to protect rights. The answer, says the negligence model, lies in the aforementioned philosophical tenet—it makes no sense to hold a governmental actor accountable in the form of prospective relief for an alleged harm that is not reasonably foreseeable—and this is best understood by analogy to tort law. However, because the rights at issue are individual, the negligence model must concern itself with the foreseeability of harm to the individual's means of carrying out her social or civic function—i.e., her package of broadly defined morally or legally imposed duties to the greater society—rather than foreseeability of harm to the collective directly.[13]

The task of molding all relevant pieces of individual rights law into a negligence model form far exceeds the scope of this Note. Thus, this Note will discuss, sometimes briefly, various landmark cases and doctrines from a variety of segments of individual rights law in the hope of providing a broad framework for thinking about individual rights questions in terms of the negligence model. This Note in no way purports to offer a "better" or "best" way to look at individual rights jurisprudence. Rather, my desire is to provide a unique lens through which to view individual rights law; to provide an additional analytical tool to add to a vast array of such tools that presently exist in individual rights scholarship. In particular, by speaking in terms of duties owed by the government, the negligence model makes transparent a rational conceptualization of the Supreme Court's jurisprudence without resorting to language surrounding the judicial restraint/judicial activism divide. This transparency that a negligence model analysis lends to the study of cases, especially those that have fallen into disrepute, is a tremendous strength of the model because it identifies some of the unspoken normative assumptions that underlie the justification of those holdings.

These strengths notwithstanding, some of the Supreme Court's current jurisprudence, particularly in the context of affirmative action,[14] does not fit the model without significant molding. Yet, "one reason to come up with new theoretical terms is in order to manipulate them."[15] Where appropriate, this Note

13. *Cf.* DAVID LYONS, RIGHTS, WELFARE, AND MILL'S MORAL THEORY 47-79 (1994) (discussing John Stuart Mill and the notion that collective utility may be a primary criterion for determining right and wrong).

14. *See infra* notes 64-74 and accompanying text.

15. E-mail from Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment, Yale Law School (Nov. 1, 2001, 08:52:25 EST) (on file with author).

will undertake and clearly identify such manipulation.

The Note begins by setting forth the framework of the negligence model. Part II discusses tort doctrine that is useful in understanding individual rights law under a negligence model. Part III applies the model to equal protection cases, including racial discrimination, affirmative action cases, and non-suspect classifications like sexual orientation. Part III concludes with an application of the negligence model to the shifting scrutiny pertaining to sex discrimination, which is taken up at the end of the equal protection discussion because of its distinct emphasis on evolutionary patterns in doctrine. Part IV briefly discusses due process cases, with an emphasis on economic due process and abortion rights. Finally, Part V considers the heightened scrutiny applied in free speech cases and reasons for this unique treatment. The point of departure for each analysis lies in a thorough understanding of negligence and duties of care.

II. FRAMEWORK OF THE NEGLIGENCE MODEL

Laying the framework for a negligence model of individual rights law begins with a proper understanding of tort law.[16] For purposes of this model, I will begin with the familiar tort case of *Palsgraf v. Long Island Railroad.*[17] In *Palsgraf*, then-Judge Cardozo held that a negligent act with respect to a particular individual that directly resulted in bodily harm to a different individual "was not a wrong in its relation to the" latter.[18] In fact, *Palsgraf* equates the proximate cause question to that of the existence of a duty of care with respect to a particular class of plaintiffs.[19] In other words, injury is not sufficient to constitute a wrong. Rather, there must be a foreseeable risk of invading the legally recognized rights of the class of citizens that is harmed. That is, negligence, being the breach of a duty of care, only exists when a duty of care is owed to a

16. Although this Note asserts that a duty of care view of tort law is "proper" in the context of developing the negligence model of individual rights law, I mean to pass no judgment on what constitutes a proper view of tort law in and of itself. *Compare* Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972) (stating that liability is best assigned to the party "in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made")(emphasis omitted) *and* GUIDO CALABRESI, THE COSTS OF ACCIDENTS 26-31 (1970) (setting forth a rich analysis of a transaction cost understanding of tort law), *with* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE (2001) (constructing an epistemic argument for understanding tort law as a conception of corrective justice).

17. 162 N.E. 99 (N.Y. 1928). The plaintiff in *Palsgraf* had been standing on a train platform when another man ran to catch a departing train and leapt for the train. The man dropped a package of fireworks as a guard pulled him into the train. The package exploded, causing station scales to fall and strike the plaintiff.

18. *Id.* at 99.

19. *Id.* at 511 ("The *Palsgraf* decision calls into question the relationship between the duty of care and proximate causation. When a defendant has no notice of the dangerous conditions created by a third party, it may be said that there is no negligence at all."). However, some scholars read *Palsgraf* to address proximate cause as a question separate from the question of negligence. *See, e.g.*, RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 501-11 (7th ed. 2000) (placing the case in its discussion of proximate cause).

particular class of individuals. A corollary to this proposition is that society will not assign a duty to a potential defendant to guard against a harm to a class of individuals when the risk of the harm is not reasonably foreseeable, because the defendant simply cannot guard against that which is unforeseeable. Moreover, Cardozo notes that certain actions are so risky as to broaden the class with respect to whom harm is reasonably foreseeable to the point of "impos[ing] a duty of [care] not far from" being owed to the whole world.[20] Since the negligence model of individual rights law speaks of individual rights in terms of duties owed to particular classes, the foregoing propositions constitute the fundamental principles that permit the Court to treat different classes of rights and different classes of individuals differently.

The negligence model of individual rights speaks in terms of duties of care owed by "someone" to a specific class of "somebodies." Therefore, it is necessary to convert conventional rights rhetoric into duty language.[21] I will begin this conversion of rhetoric by borrowing from communitarian descriptions of the relationship between the state and its citizen. The most basic proposition underlying this relationship is that the citizens' performance of certain duties is a prerequisite for the proper functioning of the state. In fact, the health of a society is largely based on its networks of trust and civic obligation.[22] Thus, the Supreme Court has indicated correctly that the government has no duty to create incentives for "the performance of a public duty it is already owed."[23]

Moreover, it is clear that the state does, and must, provide its citizens with rights, which are often described in terms of individual freedoms and liberties. The question then arises, why does the Constitution, in providing such individual rights, impose upon the government duties to provide freedom for individuals to engage in certain behavior such as political expression,[24] which might not, in the strictest sense, be considered a mandatory civic obligation? The answer, under the negligence model, is that the Constitution does not create pure freedom for any behavior, but merely provides the means for exercising what I

20. *Palsgraf*, 162 N.E. at 100 (citing Jeremiah Smith, *Tort and Absolute Liability—Suggested Changes in Classification II*, 30 HARV. L. REV. 319, 328 (1917), and 1 THOMAS ATKINS STREET, FOUNDATIONS OF LEGAL LIABILITY: A PRESENTATION OF THE THEORY AND DEVELOPMENT OF THE COMMON LAW 77-78 (1906)). Although Cardozo was referring to absolute liability, which this Note does not consider explicitly, the principle is important to the model insofar as it suggests that activities potentially involving certain types of harm (to be defined as compromises in the means of exercising civic functions), potentially restricting the type of free political speech vital to the legitimacy of a democratic republic for example, may require the imposition of broader and more stringent duties of care.

21. *See* John Gardner, *Obligations and Outcomes in the Law of Torts*, *in* RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ ON HIS EIGHTIETH BIRTHDAY 111, 111 (Peter Cane & John Gardner eds., 2001) ("[T]here is nothing that counts as the *violation* of a right other than a failure to perform (one or more of) the obligations that it grounds.").

22. *See generally* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (discussing notions of "social capital").

23. *See* Hurtado v. United States, 410 U.S. 578, 588 (1973) (referring to the mandatory civic duty of testifying as a material witness).

24. *See* U.S. CONST. amend. I.

will call *civic functions*, which are those mandatory and permissive duties that certain members of a democracy must perform in order for it to function properly (including those things traditionally considered mandatory civic obligations).[25] In other words, the Constitution, insofar as it embodies provisions of individual rights, actually imposes upon the government and its agents a duty to take care that the means of performing civic functions, which in turn are duties owed by individuals to the state, are adequately protected.[26] Here we have the basis for transforming rights rhetoric into duty talk.[27]

Having laid the foundation, there still remains the matter of properly explaining the notion of civic functions and distinguishing it from traditional understandings of civic obligations. Civic functions under the negligence model are not limited to mandatory civic duties such as jury duty or military service under the draft. Rather, to accommodate spectrums of individual rights standards (defined in terms of duties) that permit variation across classes of individuals and rights and over time, civic functions must entail all of those mandatory and permissive duties that certain members of a democracy must perform in order for a governed society, considering all contemporary circumstances, to function properly. Thus, civic functions include those duties we, as members of a governed society, feel socially, morally, or politically obligated to perform. Civic functions also encompass those duties about which we recognize the need for someone to feel socially, morally, or politically obligated to perform. For example, they include those duties, perhaps voting or publicly voicing one's politically or morally based support for a judicial nominee, that give the performer a "warm glow," those duties that if made mandatory or compensated would make the performer "feel like [he has] prostituted [himself]."[28]

Thus having transformed rights rhetoric into duty speech, it makes sense to acknowledge the viability of rights as protections only insofar as they protect

25. Thus, for example, considering society and its contemporary circumstances, something as unduty-like (in a conventional sense) as maintaining a healthy and *private* family life may be a civic function if the normative argument prevails that such is necessary for the rearing of socially and politically productive offspring.

26. On first glance, *Hurtado* may seem to problematize this proposition insofar as it imposes a mandatory civic duty on a non-citizen. *See Hurtado*, 410 U.S. at 579, 588. However, upon consideration of the equal protection line of cases that extend certain rights to non-citizens, it becomes apparent that *Hurtado* actually strengthens the proposition that the scope of rights owed by a state might be defined by reference to the scope of duties owed by the individual, and vice-versa.

27. Note that this conversion of rights rhetoric into duty speech is analogous to arguments suggesting that, within a governed society, individual freedom can only be achieved by mutual restraint. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1248 (1968) ("When men mutually agreed to pass laws against robbing, mankind became more free, not less so . . . . [O]nce they see the necessity of mutual coercion, they become free to pursue other goals."). For a comprehensive discussion of the importance of various forms of "'law-talk' that shape conversations within and concerning [constitutional] law," see generally J.M. Balkin & Sanford Levinson, *Constitutional Canons and Constitutional Thought*, *in* LEGAL CANONS 400, 402 (J.M Balkin & Sanford Levinson eds., 2000). Consistent with the Balkin and Levinson discussion, this Note seeks to provide a new perspective that the various audiences for whom "canon[s are] constructed" can use to evaluate those canons. *See id.*

28. Robert C. Ellickson, Lecture at Yale Law School (Feb. 5, 2002).

the means necessary for performing a civic function. For instance, one might say that a certain minimum level of education is necessary for effective voting or service as a juror and thus accord a right to limited education.[29] As such, rights become no more than duties of care imposed upon government and its agents to prevent certain harms to classes the risk of which is reasonably foreseeable.[30] Those harms, in turn, can be defined as compromises to the means of performing civic functions.[31] In other words, if one considers rights as derivations of the mandatory and permissive obligations of citizenship (civic functions), governmental organs will only be expected to foresee potential obstructions to rights that are exercised in a way conducive to carrying out such individual civic functions (I call this the performance of civic functions). The duty of care the Constitution places on government, as interpreted by the Court, is to prevent foreseeable risks, and the only risks foreseeable are those that obstruct the performance of civic functions. The Court's vocabulary for discussing this duty includes such terms as "rational relations," "intermediate scrutiny," and "strict scrutiny."

III. EQUAL PROTECTION ANALYSIS

The equal protection line of cases evidences great amenability to a negligence model of individual rights jurisprudence. While racial classification, affirmative action, non-suspect classifications, and intermediate scrutiny cases are all relevant, an introductory discussion of one particular equal protection case will provide the proper motivation for subsequent discussion. In fact, Justice Powell's interpretation of the Equal Protection Clause in *San Antonio In-*

29. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (suggesting that, although there is no fundamental right to education generally, there may be a fundamental right to "an opportunity to acquire the basic *minimal skills* necessary for the enjoyment of the rights of speech and of *full participation in the political process*") (emphasis added).

30. Reasonable foreseeability language, while not often employed in cases construing the scope of individual rights, is widely used in cases involving constitutional torts. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) ("[A] qualified immunity [defense will] be defeated if an official '*knew or reasonably should have known* that the action he took . . . would violate the constitutional rights of the [plaintiff] . . . .'") (citation omitted). Note that the quote from *Harlow* is suggestive of duties owed to particular classes of potential plaintiffs, which parallels *Palsgraf*'s rationale.

31. Considerable support for the Court's unmentioned sensitivity to this particular type of harm when it qualifies as a breach of a duty owed by the government can be inferred from *Federal Election Commission v. Akins*, 524 U.S. 11 (1998). The plaintiffs in that case, a group of voters seeking to compel the FEC to treat an organization as a political committee and enforce applicable disclosure requirements, overcame the generalized grievance hurdle to standing largely because of the civic-function-nature of the right to information at issue in the case. *See id.*, at 24-25 ("[T]he informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."). A comparison with *Allen v. Wright*, 468 U.S. 737 (1984), reveals the significance of the Court's emphasis on the political nature of the "right" in *Akins*. At its broadest, *Allen v. Wright* might stand for the proposition that standing will generally be denied for breach of a duty owed to the general public (as opposed to a particular class), especially when it takes any degree of creativity to trace the alleged harm to the breach. *See id.*

dependent School District v. Rodriguez[32] mirrors precisely the nature and thrust of a negligence model of individual rights. Although couched in terms of "fundamental rights," *Rodriguez* holds that an equal protection violation exists under a state sponsored regime of disparate funding of public schools only if it can fairly be said that "the system fails to provide each child with an opportunity to acquire the *basic minimal skills* necessary for the enjoyment of the rights of speech and of *full participation in the political process*."[33] If it can be fairly said that disparate treatment in a state-sponsored system of education does lead to these results, then harm to the means of performing civic functions (which include participation in the political process) will be reasonably foreseeable, thereby defining the duty of care for state actors with respect to the prejudiced class.[34] Moreover, the *Rodriguez* Court explicitly stated that "the Equal Protection Clause does not require absolute equality or precisely equal advantages,"[35] which, although nothing more than a truism, is among the elements that motivate the discussion of the negligence model.[36]

The Court's equal protection jurisprudence involves many more standards than those at issue in *Rodriguez*, and it remains to be seen just how such standards as the rational basis doctrine, and intermediate and strict scrutiny fit into the negligence model. As a general proposition, under equal protection precedent, statutes that directly impair the exercise of a civic function (like voting) or that discriminate against groups or classes that have been prevented from exercising civic functions in the past—such as race-based suspect classifications[37]—are subjected to strict scrutiny,[38] while non-suspect classifications must merely have a rational basis to pass constitutional muster.[39] In this respect, the dependence of heightened scrutiny (or of the existence and scope of a duty of care on governmental agents) upon prior treatment of classes provides for evolution over time of duties of care and thus of the level of scrutiny applied under the negligence model. The reader will note that if the negligence

32. 411 U.S. 1 (1973).

33. *Id.* at 37 (emphasis added).

34. *But cf.* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 857 (4th ed. 2000) (stating, in its discussion of *Washington v. Davis*, 426 U.S. 229 (1976), that the Equal Protection Clause requires "the most stringent test of intention," and questioning why a negligence standard should not apply).

35. *Rodriguez*, 411 U.S. at 24 (footnote omitted).

36. *See supra* text accompanying notes 2-3.

37. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

38. To speak in terms of the reasonable foreseeability of risks of harm, the Court recognizes that certain discrimination has a high risk of impairing the exercise of civic functions if, for example, there is past history of such discrimination or if the statute overtly states the risk of discrimination against exercise of civic functions. As a result, the Court will hold those statutes to strict scrutiny, which is usually fatal. *But see* Adarand Constructors v. Pena, 515 U.S. 200 (1995) (O'Connor, J.) (applying strict scrutiny to a racial classification that benefits minorities).

39. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (holding that "legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose").

model is properly applied with regard to defining minimal constitutional standards of care, then a past history of deprivation of the means of exercising civic functions should not exist with regard to any class. The response lies in evolving social and political norms that inform the Court regarding the degree of reasonable foresight to be expected of government.[40]

Since the history of the Court's treatment of racial classifications provides an outstanding illustration of the way in which evolving norms change reasonable foresight expectation, the equal protection discussion below begins with an analysis of racial classifications. Affirmative action, being closely related to racial classifications and representing another step in the evolutionary process, is discussed immediately after racial classifications. Next, non-suspect classifications are analyzed. Finally, rounding out the various levels of scrutiny applied by the courts, this Note closes its equal protection discussion with an analysis of intermediate scrutiny, distinctly emphasizing the application of the negligence model to the evolutionary process of shifting levels of equal protection scrutiny.

A. *Racial Classifications*

The modern Supreme Court applies its most stringent equal protection scrutiny to many racial classifications. However, the Court has been far more deferential in prior eras. The following discussion emphasizes, in terms of the negligence model of individual rights, three landmark cases in the evolution of equal protection jurisprudence in the areas of overt racial discrimination and discriminatory effects.

The path from *Plessy v. Ferguson*[41] to *Brown v. Board of Education*[42] illustrates the evolving foreseeability of risk of harm to the means of exercising civic functions with respect to well-defined classes of individuals. In *Plessy*,

40. Recall that the negligence model does not do away with these issues that often form the basis for theories of less precisely structured constitutional jurisprudence, but merely seeks to offer a model which rationalizes the seemingly arcane array of cases that may or may not rely upon social or political norms in some form or another. *See supra* notes 1-3 and accompanying text.

41. 163 U.S. 537 (1896). Prior to the adoption of the Thirteenth and Fourteenth Amendments, under which *Plessy* was decided, Chief Justice Taney ruled in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 451 (1857), that even if a black person could properly sue in federal court, "the right of property in a slave is distinctly and expressly affirmed in the Constitution," and that statutes compromising this right would be struck down. However, the Court ultimately decided that Scott, as a black person, was not a state "citizen" and therefore did not have standing to sue. *Id.* at 407. This holding illustrates and is *analytically* "justified" under the negligence model by the view that slaves were expected to perform virtually no independent civic functions. Thus, it would take a tremendous showing to demonstrate a constitutional wrong stemming from a harm to the means of exercising civic functions, or that such risk could reasonably have been foreseen. Here, the assumption that slaves contributed little civic function value underlying the negligence model analysis, not the negligence model itself, *analytically* "justifies" the result in *Plessy*. In this way, the negligence model demonstrates its strength in identifying the often hidden assumptions that underlie the justification of problematic holdings. Of course, I do not assert that such an underlying assumption is legitimate or *morally* justifies the result in *Plessy*.

42. 347 U.S. 483 (1954).

the Court held that a "statute which implies merely a legal distinction between the white and colored races has no tendency to destroy the legal equality of the two races" and therefore does not violate the Thirteenth Amendment.[43] Most scholars today take issue with this rationale, even when considered from the perspective of then-contemporary social and political circumstances, and perhaps even more so under those conditions. In any event, although many would prefer the ring of Justice Harlan's "color-blindness" approach,[44] Justice Brown's opinion in *Plessy* sounds in civic function talk that is consistent with the negligence model. In particular, Justice Brown emphasized that "separate but equal" laws create distinctions that amount to "social, as distinguished from political" inequalities.[45] One might read *Plessy* as recognizing that no civic benefit could be had at the time from commingling the races in certain social settings under then-contemporary circumstances and norms—for example, great tension and potentially violent confrontations from what may have been seen by many as forced commingling. Under this view, no harm to the performance of either race's civic functions was reasonably foreseeable to governmental actors imposing separate but equal classifications.[46] Thus, with respect to the Fourteenth Amendment, the Court applied rational basis scrutiny to separate but equal racial classifications.[47]

From *Plessy*, the road to *Brown* is often described in terms of chipping away at the separate but equal doctrine.[48] A discussion of the cases[49] that un-

43. *Plessy*, 163 U.S. at 543.

44. *Id.* at 559 (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.").

45. *Plessy*, 163 U.S. at 544.

46. *Cf.* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 41 (2d ed. 1998) ("The Justices [in *Plessy*] were not approving of apartheid, but merely saying that the Constitution did not clearly prohibit this form of state action.").

47. *Plessy*, 163 U.S. at 550 ("So far . . . as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute . . . is a *reasonable regulation*, and with respect to this there must necessarily be a large discretion on the part of the legislature.") (emphasis added). *Cf.* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) ("[M]uch which will seem unconstitutional to one man . . . may reasonably not seem so to another . . . the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice.").

48. *See generally* HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 342-46 (7th ed. 1998).

49. *See* McLaurin v. Oklahoma State Regents for Higher Ed., 339 U.S. 637 (1950) (holding unconstitutional the maintenance of segregated classrooms and libraries in a graduate program at a state university); Sweatt v. Painter, 339 U.S. 629, 634 (1950) (holding that maintaining a separate state law school for black students was unconstitutional, in part because it compromised the students' ability to study with racial groups that will make up the bulk of "lawyers, witnesses, jurors, judges and other officials"); Shelly v. Kraemer, 334 U.S. 1 (1948) (holding that, under the Fourteenth Amendment, no court could enforce a racially restrictive property covenant); Sipuel v. Bd. of Regents, 332 U.S. 631 (1948) (striking down state failure to educate black citizens); Korematsu v. United States, 323 U.S. 214, 216 (1944) (stating that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect"); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (holding that inability to attend a particular state law school, even though that state would provide financial aid for the student to attend an out of state law school, was on its face unequal); *cf.* Buchanan v. Warley, 245 U.S. 60 (1917)

dercut the separate but equal doctrine and ultimately led to its death is relevant to the negligence model. Yet, even more important are the changes in social and political environments that led to the heightened awareness of risks that might jeopardize African Americans' ability to carry out their increasingly recognized civic functions.

The shift toward a recognition of African Americans' civic functions probably began with the migration of blacks out of the South, "the core of racial discrimination . . . on both the public and private level."[50] Recognition of African American contributions could not occur in places that sometimes barely recognized them as human beings. World War II was also of utmost importance since its onset "witnessed many blacks fighting side by side with whites and saw increasing migration of blacks northward,"[51] and led to heightened awareness of the African American contribution to the United States. Specifically, President Truman, aware of the military contributions of African Americans during World War II, banned "'separate but equal' recruiting, training, and service in the armed forces."[52] Truman, also recognizing the workplace contributions of African Americans, issued executive orders aimed at eliminating racial employment discrimination.[53] These executive actions evidenced a growing recognition of the African American need for and ability to perform civic functions in the form of military service and gainful employment.[54]

As this history suggests, the 1940s and early 1950s saw a heightened awareness of the equality of African Americans' civic functions to those performed by white Americans. As a result, *Brown* can be read as a (perhaps lagging) judicial response to the shift in foreseeability of harm to the exercise of African Americans' civic functions (and other underrepresented races). *Brown* overruled *Plessy* and stated that "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal education opportunities."[55] The Court drew on language from *McLaurin v.*

(invalidating a state law requiring segregation in residential communities in order to prevent cross-breeding); Guinn v. United States, 238 U.S. 347 (1915) (striking down under the Fifteenth Amendment a state literacy test with a grandfather clause used as a prerequisite to voting).

50. ABRAHAM PERRY, *supra* note 48, at 333 (citing U.S. DEP'T OF COMMERCE NEWS 5 (Oct. 23, 1970)).

51. *Id.*

52. *Id.* at 334 (citing Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948)).

53. *E.g.*, Exec. Order No. 10,308, 16 Fed. Reg. 12,303 (Dec. 6, 1951); Exec. Order No. 9980, 13 Fed. Reg. 4311 (July 28, 1948).

54. While a comprehensive analysis of the history that gave birth to a general and growing awareness of African American civic, political, and moral responsibilities is beyond the scope of this Note, the foregoing sketch of some of that history demonstrates the proposition that shifting norms and social structures can outline changes in civic functions of particular classes, and thus may lead to reconceptualizations of the foreseeability of risks of constitutional harms to those classes.

55. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); *see also* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding the same under the Fifth Amendment as it governs in the District of Columbia).

Oklahoma State Regents[56] that emphasizes the student's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[57] Recall that the later *Rodriguez* case similarly emphasized the need to "provide each child with an opportunity to acquire the *basic minimal skills* necessary for the enjoyment of the rights of speech and of *full participation in the political process*."[58] The language in *Brown* may be understood as defining the scope of the state's duty to provide certain minimal means of performing civic functions (such as political participation and gainful employment) with respect to underrepresented classes.

In addition to the kind of overt discrimination in *Brown*, the Supreme Court has entertained discriminatory effects arguments by individuals who claim to have been discriminated against by the application of an ostensibly race-neutral statute. Within the context of modern racially discriminatory impacts, if a discriminatory effect is incidental and not purposeful, the Court may find that the risk of discrimination was not foreseeable to the governmental body, and thus will not subject the statute to strict scrutiny. For example, *Washington v. Davis*[59] upheld the use of a personnel test that operated to reject a disproportionate number of African-American applicants to the District of Columbia police department.[60] The Court noted that an official act does not trigger strict scrutiny under the Equal Protection Clause "*solely* because it has a racially disproportionate impact."[61] Given the Court's emphasis on the rationality of testing verbal skills for a "job [that] requires special ability to communicate orally and in writing,"[62] *Davis* can be read for the proposition that when government seeks to employ high caliber public servants (who in a sense undertake to perform a level of heightened "civic function" themselves), it may employ reasonable methods of separating the wheat from the chaff. In other words, given the nature of the task at hand, the Court recognizes that it is not reasonable to impose a duty to foresee and prevent risk of harm to even suspect classes because government could not function properly if it were under a duty to foresee all disparate impacts totally unrelated to the governmental objective at issue.[63] The

56. 339 U.S. 637 (1950).

57. *Brown*, 347 U.S. at 493 (citation omitted).

58. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (emphasis added).

59. 426 U.S. 229 (1976).

60. The court below held the statute unconstitutional because a far greater proportion of African Americans than whites failed the personnel test and the defendants had not shown the test to be an adequate measure of job performance. Davis v. Washington, 512 F.2d 956 (1975).

61. *Id.* at 239.

62. *Id.* at 246.

63. Note that this argument parallels the reasons for imposing a *reasonable* duty of care upon defendants in tort suits. Forcing such individuals or entities to foresee remote risks would halt the proper functioning of everyday life. *Cf., e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting the argument that the Baldus study findings of disparate death penalty sentences for defendants charged with killing white victims as opposed to blacks should trigger heightened scrutiny). With respect to *McCleskey*, note the degree of attenuation to which one would have to go to argue that a disparate impact in the sentenc-

apparently inconsistent treatment of the minority groups in *Plessy*, *Brown*, and *Davis* is thus reconciled by an analysis of the evolving foreseeability of risk of harm to the means of exercising civic functions. This method of reconciliation permits the use of a single framework, the negligence model, to explain diametrically opposed cases (*Plessy* and *Brown*) by simply substituting the foreseeability variable.

B. *Affirmative Action*

Since tort law imposes duties of care that vary depending upon the victim's situation and the foreseeability of harm to the class of similarly situated victims, if the foreseeability of constitutional harm to a particular class increases, courts must revisit the government's duty under a negligence model. At times this may arguably require affirmative action.[64] Once applied, the negligence model is useful in understanding this area of constitutional law because it explains the rationality of treating various classes favorably to limited extents that vary based on time, location, and other factors. Nevertheless, the application of the negligence model to affirmative action case law requires significant molding. For this reason, after setting forth a theoretical background, I limit the discussion of affirmative action case law to a single illustrative case and suggest that the negligence model, while providing a unique and valuable lens through which to view the existing jurisprudence, is perhaps best reserved for arguments advocating for change in the existing law.

The argument that there is a *need* to treat different groups differently, or even the same groups differently in times of changed social and political context, is not novel. However, most discourse on this issue stems from an assumption that there is an ideal and constant moral duty, however defined, to treat groups equally (either in the sense of equal opportunity or equal result), and changes in the actual course of treatment reflect only the changed circumstances and not changed duties of equal treatment. For instance:

> Those who carry the civil rights vision to its ultimate conclusion see no great difference between promoting equality of opportunity and equality of results. If there are not equal results among groups presumed to have equal genetic potential, then some inequality of opportunity must have intervened somewhere, and the question of precisely where is less important than the remedy of restoring the less fortunate to their just position.[65]

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ing of a *convicted murderer* with respect not to the convict herself, but her victim, presents a reasonably foreseeable risk of harm to the convict's means of exercising her civic functions.

64. A thorough understanding of the place for affirmative action programs in the negligence model is another note topic in and of itself.

65. THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 42 (1984). *But see* Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) (Powell, J.) (noting that broadly stated societal discrimination is too malleable a "concept of injury that may be ageless in its reach into the past," thus implying that the question of how the inequality occurred is extremely important because it demonstrates the concreteness of the injury). *See generally* Patricia Williams, Comment, Metro Broadcasting, Inc. v. FCC: *Regrouping in Singular Times*, 104 HARV. L. REV. 525, 542 (1990) (noting the criticism of af-

In a negligence model, however, the question of "precisely where" is vitally important because it defines the degree of changed foreseeability of constitutional harm and thus defines the scope of change in the underlying *duty* itself. Therefore, social and political context, although vitally relevant, is relevant only because of its precise nexus with foreseeability of harm, and thus the definitional duty itself. The following case discussion will illuminate this point. [66]

The Supreme Court in *City of Richmond v. J.A. Croson Co.*[67] disallowed a city council plan requiring general contractors working on city contracts to subcontract thirty percent of the contract to businesses owned and controlled by minority group members, defined as "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."[68] Although the plan purported to remedy the effects of prior discrimination, "[t]here was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated."[69] The Court noted that the states have no affirmative power under the Fourteenth Amendment and must accordingly undertake remedial measures only if "in *accordance* with" the Equal Protection Clause.[70] It further stated that "if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, [clearly] the city could take affirmative steps to dismantle such a system."[71] The problem with this plan, according to the Court, was the lack of any connection with an identifiable history of wrongdoing.[72]

The negligence model views the problem with the affirmative action program in *Croson* similarly. Assuming the facts and discussion of the case, the lack of an identifiable history of wrongdoing signals a lack of concrete and

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firmative action programs designed to foster a sense of equality that "a corrupt system of favoritism seesawing between 'the deserving' and 'the preferred,' caters to an assumption that those who are included by the grace of affirmative action systems are therefore *un*deserving"). The Supreme Court's treatment of affirmative action by state actors undercuts the view of those civil rights advocates noted by Sowell, thus suggesting that something else is going on in the Court's jurisprudence. In fact, "the Supreme Court's willingness sometimes to allow affirmative action by state actors has been premised upon a backward-looking approach, justifying affirmative action as a remedy for past discrimination against African Americans; the Court has treated past discrimination very narrowly." FARBER ET AL., *supra* note 46, at 244 (citing PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991)).

66. This affirmative action discussion speaks of action by state actors, and this language, by virtue of the negligence model's structure, must be transformed into duty talk. *See supra* text accompanying notes 21-27. Therefore, I tread lightly because I do not wish it to be interpreted that the negligence model necessarily supports expanding the welfare state or imposing any additional significant fiscal burdens on the government. In fact, the model, insofar as it speaks of requiring a *minimum* means for the exercise of civic functions, as in the *Rodriguez* case, *see supra* note 58 and accompanying text, might well be read for the opposite proposition.

67. 488 U.S. 469 (1989).

68. *Id.* at 487 (O'Connor, J.) (citation omitted).

69. *Id.* at 480.

70. *Id.* at 490 (emphasis added).

71. *Id.* at 492.

72. *Cf. supra* note 65 and accompanying text.

substantial change in the foreseeability of risk of constitutional harm with respect to the city's minority groups. Because the Court required the remedial scheme to be made *according* to the Equal Protection Clause, the Court essentially held that the city had not rationalized an increased duty of care—particularly not one placed on independent contractors—since it had not shown any concrete increase in foreseeability with respect to risk.[73] Here, because the duty is placed on a private subcontractor, it makes sense to presume such schemes invalid unless the standards of the negligence model are met by demonstrating changes in foreseeability of harm prior to imposition of the heightened standard. In a sense, it is something of a reverse approach, but one that Justice O'Connor supports by mentioning the political majority African Americans held on the city council.[74] As this application of the negligence model to *Croson* illustrates, foreseeability of harm is at least partially derived from social and political context, thereby rationally justifying the favorable treatment of certain classes to a limited extent based on time, location, and other factors.

C. *Non-Suspect Classes*

With respect to statutes that potentially discriminate against non-suspect classes, such as those defined by mental illness[75] and sexual orientation,[76] the Court applies a relaxed rational basis standard, which requires only that the classification bear some rational link to a legitimate governmental objective. Since the government can raise any legitimate objective when defending against a rational basis challenge, challenged statutes are rarely overturned. However, in exceptional cases, the Court departs from its typical deference to find statutes devoid of any sufficiently rational nexus to a legitimate governmental objective. As discussed below, the negligence model explains both the typical deferential and the more stringent versions of rational basis review in terms of the risk of impairing the performance of non-suspect classes' civic functions. Deferential rational basis review suggests that the Court does not perceive substantial risk, while more stringent rational basis review might mark the beginning of a shift in judicial views of the duties owed to and from certain

73. This case also presents difficulty under the negligence model because the civic function of productive work has a tenuous connection to obtaining government contracts. However, this speaks to the foreseeability of the risk of compromising the means by which one performs such a civic function. This interpretation cuts against the negligence model insofar as the case held for J.A. Croson Co., a non-minority contractor, but for the negligence model in that the invalidity of the affirmative action program rested on its inconsistency with the objectives of the Equal Protection Clause.

74. *J.A. Croson Co.*, 488 U.S. at 495. Since the negligence model stresses the ability to perform civic functions, including the exercise of political voice, the minority group's political majority counsels against finding heightened foreseeability of harm.

75. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985) ("To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.").

76. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that criminalizing homosexual sodomy because of its immorality is constitutional under rational basis review).

non-suspect classes. The following discussion focuses upon a single case, *Romer v. Evans*,[77] the majority and dissenting opinions of which illustrate duty-based rationales for both the deferential and more stringent versions of rational basis review.

Under the negligence model, subjecting non-suspect classes to deferential rational basis review evidences the Court's view that governmental bodies do not owe any extra duty of care to such particular classes[78] because the risk to these classes of obstructing the exercise of civic functions is unforeseeable (or quite low). For instance, Justice Scalia's dissent in *Romer v. Evans*,[79] which would have upheld a provision of the Colorado Constitution that prohibited the adoption or enforcement of any statute, regulation, or policy that accords minority or protected status to the homosexual class on the basis of homosexual behavior or relationships, placed considerable emphasis on the view that "those who engage in homosexual conduct tend to . . . have high disposable income [and] possess political power much greater than their numbers."[80] In other words, the dissent in *Evans* seems to acknowledge that if persuaded that a certain class is shown to adequately perform civic functions such as exercising significant political power without special governmental protection, the dissenters may not see fit to impose on governmental agents any extra duty of care.

The majority in *Evans* employed a more stringent version of rational basis review to strike down the state constitutional provision, because the majority thought that the provision was irrational and motivated by animus. This use of what has been called "rational basis with teeth"[81] might, under a negligence model, *analytically* suggest the beginning of a shift in the Court's view on duties owed to and from the homosexual class.[82] However, for the time being, the only plausible negligence model application to the area of deferential homosexual class equal protection jurisprudence[83] demonstrates that the Court, possibly for reasons similar to those evidenced in Justice Scalia's dissent in *Evans*,

77. 517 U.S. 620 (1996). Note that *Evans* is only one case in a large and complex body of law.

78. Recall Cardozo's discussion of foreseeable risk to particular classes in tort law. *See supra* notes 16-20 and accompanying text.

79. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

80. *Id.* at 645-46.

81. *See generally* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1383, 1405-06 (2000) (identifying "*Evans*' more scrutinizing version of rational basis" and suggesting that the Court, while being informed by social norms, can also push those norms in a "step-by-step" fashion so long as the appearance of giving a "promotion" to a particular class is limited). Professor Eskridge distinguishes rational basis with teeth from general rational basis scrutiny under the Equal Protection Clause, under which "[s]peculative thinking . . . satisfie[s]" the test. *Id.* at 1383.

82. I make no moral judgment in this Note about the types of civic functions that should be expected from or permitted of the homosexual class. Rather, my purpose in discussing this topic is merely to address a case that illustrates a tension between the majority and dissenting positions as it relates to the normative assumptions underlying a negligence model interpretation.

83. *See supra* notes 76-78 and accompanying text.

has determined that the risk of harm to the performance of civic functions is relatively small with respect to the homosexual class.[84]

D. *Intermediate Scrutiny*

Intermediate scrutiny suggests a shift in the Court's jurisprudence regarding duties of care to classes of individuals that are increasingly taking on more civic functions. However, note that the Court's response is often delayed. For instance, in an 1874 case dealing with voting rights, the Supreme Court held that states were not prohibited from leaving "that important trust to men alone."[85] Under a negligence interpretation, this decision is a reflection of the negligible role the Court perceived women to have in the exercise of civic functions.[86]

Beginning with the Nineteenth Amendment in 1920, the twentieth century brought significant normative changes regarding the civic functions women could, and should, perform.[87] In 1973, the Court recognized that it could no longer apply rational basis review to sex discrimination in the face of increasing social and political recognition of women's civic functions. In *Frontiero v. Richardson*,[88] Justice Brennan concluded that "classifications based upon *sex*, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to *strict judicial scrutiny*." [89] Of course, Justice Brennan's opinion in *Frontiero*, which did not garner a majority of votes, did not stand the test of time.

After struggling with the appropriate level of scrutiny for sex discrimination cases, the Court adopted a middle ground. As stated by Justice Ginsburg in *United States v. Virginia*,[90] intermediate scrutiny requires the "State [to] show

84. Another possible interpretation is that the Court does not consider homosexuals to owe the same civic functions as other citizens and individuals. By way of comparison, under *Cleburne* it might be argued that the lack of any substantial scrutiny on the part of the Court for classifications relating to mental soundness is due to the lack of similar civic functions expected of the mentally impaired as compared to other individuals. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

85. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874).

86. *Cf.* Radice v. New York, 264 U.S. 292 (1924) (approving of a law prohibiting certain nighttime work); Muller v. Oregon, 208 U.S. 412, 421 (1908) (upholding a law setting maximum work hours for women on the grounds that they are more physically suited to such things as "the performance of maternal functions," which places them "at a disadvantage in the struggle for subsistence," and therefore need special "protection"). The modern Court has criticized this approach. *See* United States v. Virginia, 518 U.S. 515, 550 (1996) ("[G]eneralizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.").

87. For instance, the Equal Pay Act of 1963 § 3, 29 U.S.C. § 206(d) (1994), forbidding pay discrimination on the basis of sex, embodies the political view that women could and ought to be productive in the marketplace, and thus their means of performing such a civic function ought not be compromised. *See also* Civil Rights Act of 1964 tit. 7, § 703, 42 U.S.C. § 2000e-2(a) (1994) (disapproving of sex discrimination in certain contexts).

88. 411 U.S. 677 (1973).

89. *Id.* at 688 (Brennan, J.) (emphasis added).

90. 518 U.S. 515 (1996).

at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."[91]

The negligence model suggests that this shift in scrutiny over time reflects an increased awareness of the civic functions that women perform and thus the foreseeability of harm to the means of performing them. The jurisprudence surrounding this particular shift in foreseeability reflects two points of interest regarding the negligence model. First, the Court's attempts to redefine the scope of the duty by applying a new level of scrutiny may require some fumbling and experimentation, as evidenced by the Court's plurality opinion in *Frontiero* and subsequent failure to follow Justice Brennan's application of strict scrutiny.[92] Second, the Court's acknowledgement of changed foreseeability may lag behind changed norms. In the case of women, the Court took a considerable amount of time to acknowledge the heightened level of civic functions women perform. Moreover, of considerable interest, the negligence model may suggest that perhaps, by currently standing in a middle ground, the Court's jurisprudence in this regard is still evolving as women are recognized to carry on greater and greater levels of such civic functions, in both political and social contexts.

IV. DUE PROCESS ANALYSIS

Much as with equal protection jurisprudence, "courts [have traditionally been viewed as using] the concept of substantive due process to review the ability of government to restrict the *freedom* of action (regarding life, liberty, or property) of all persons."[93] Yet a restriction of a freedom is no more than a breach of the duty that grounds the freedom.[94] Thus, we must again resort to duty talk to fully comprehend the Court's due process jurisprudence, making the negligence model a wonderfully appropriate lens through which to understand the doctrine.

Since substantive due process talk generally brings thoughts of judicial activism and the *Lochner*[95] era, I begin with language from a case decided by the

91. *Id.* at 533 (citation omitted). The Supreme Court adopted the intermediate scrutiny test twenty years before *United States v. Virginia*. *See* Craig v. Boren, 429 U.S. 190 (1976) (adopting intermediate scrutiny for the first time). *Craig* involved a state law that prohibited the sale of certain beer to men less than twenty-one years of age and women under eighteen. The statute was challenged on equal protection grounds. The Court fashioned the intermediate scrutiny test to strike down the statute. The Court's adoption of intermediate scrutiny for sex discrimination cases in a case brought by a man is certainly noteworthy. However, the potentially anomalous nature of this circumstance is mitigated by the fact that the Court began contemplating forms of heightened scrutiny for sex discrimination in *Frontiero*.

92. *Supra* text accompanying notes 888-899.

93. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 382 (5th ed. 1995) (emphasis added).

94. Gardner, *supra* note 21, at 111.

95. *See generally* Lochner v. New York, 198 U.S. 45 (1905) (striking down a health statute under

Lochner Court. Striking down a statute that required school teachers to teach only in English, *Meyer v. Nebraska*[96] states that the liberty protection embodied in the Due Process Clause of the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right . . . to enjoy those privileges long recognized at common law as *essential to the orderly pursuit of happiness by free men.*"[97] In other words, the Due Process Clause was said to protect the means of carrying out those activities (such as engaging in economically productive work, raising a family, acquiring knowledge necessary to exercise political voice, etc.) essential to the fulfillment of the civic functions that support a democratic society. Thus, due process analysis and the changes associated therewith can be seen as inquiries into the foreseeability of harm to the means of accomplishing such civic functions.[98]

A. *The Rise and Fall of Economic Due Process*

The *Lochner* Court's activism has long since been abandoned, and under the negligence model the question remains what changes in foreseeability are attributable to this shift in attitude. *Lochner* itself, decided at the turn of the twentieth century, promoted a laissez-faire theory of economics in its decision to render the state powerless to regulate maximum workweek hours for bakers and, by extension, to others.[99] In fact, "[i]n the early part of the twentieth century, the Due Process Clause was wielded by the Court to strike down state laws that, in its estimation, arbitrarily, unreasonably, and capriciously interfered with the rights of life, liberty, and property."[100] It has been said that "[b]y embracing the notion of substantive due process, the *Lochner* Court assumed

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which a bakery proprietor had been convicted that limited the number of hours an employee could work in a bakery). *Lochner* applied substantive economic due process in its prime, and the associated period of court history is marked by judicial activism cloaked in substantive due process review.

96. 262 U.S. 390 (1923).

97. *Id.* at 399 (emphasis added); *see also* Palko v. Connecticut 302 U.S. 319, 325 (1937) (describing due process protection as a protection of those rights "implicit in the concept of ordered liberty"); Holden v. Hardy 169 U.S. 366, 389 (1898) (describing protected due process rights as "certain immutable principles of justice which *inhere in the very idea of free government* which no member of the Union may disregard") (emphasis added).

98. As it would be impossible to discuss any substantial number of the procedural and substantive due process contexts in which the negligence model might shed considerable light in this Note, no such attempt is made. One such context of particular interest involves prisoners' due process rights. Although a thorough discussion simply cannot be undertaken in this Note, it is interesting that the Court has applied a significantly relaxed scrutiny in certain prison cases that deny that the *negligence* of government actors resulting in bodily injury amounts to a deprivation of constitutionally protected liberty. *See* Daniels v. Williams 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986). Here, the negligence model would suggest that the outcomes are consistent with the notion that we do not expect much in the way of civic functions from prisoners, and thus foreseeability of harm is small.

99. *Lochner*, 198 U.S. at 74 (Holmes, J., dissenting); *see also* Allgeyer v. Louisiana, 165 U.S. 578 (1897) (invoking economic due process); Mugler v. Kansas, 123 U.S. 623 (1887) (utilizing economic due process); Wynehamer v. People, 13 N.Y. 378 (1856) (invalidating a prohibition law on grounds that it interfered with economic freedom).

100. RALPH A. ROSSUM & G. ALAN TARR, 2 AMERICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS AND SUBSEQUENT AMENDMENTS 77 (5th ed. 1999).

the very role that Justice Miller had warned against in *The Slaughterhouse Cases*: it became a 'perpetual censor,' reviewing the reasonableness of state efforts at economic regulation."[101] While these criticisms of the Court's activism are easy to make ex post, one must remember the social and political context of rapid industrial growth and the importance of free markets to that growth. It is plausible that, taking personal contribution to the enhancement of efficient markets as a civic function, significant and varied state-by-state economic regulation could reasonably have been seen to pose a substantial risk to the exercise of that civic function. The negligence model suggests that the *Lochner* Court may not have been overly active in light of the norms at the time.

In any event, the *Lochner* approach has been abandoned in a time in which efficient markets are well established.[102] As we have seen in other contexts, the negligence model suggests that the reason for this shift lies in the foreseeability of risk of harm. In this case the change in foreseeability differs inasmuch as it stems from a change in the underlying civic function itself. As efficient markets in the United States have long been established and appear stronger than ever,[103] the civic function of contributing to the creation and maintenance of such markets by engaging in free contract, competitive work, and the like may have lessened over time. Here again, norms inform foreseeability, and in this case, duties owed by the citizenry (as opposed to duties owed by the government) have changed.

B. *Abortion*

The abortion cases, and in particular *Roe v. Wade*[104] and *Doe v. Bolton*,[105] are of particular analytical interest under a negligence model because they illuminate the dynamic nature of the relationship between norms and the foreseeability of constitutional harm. In holding on due process grounds that a woman has a "fundamental rights" interest in the decision to terminate a pregnancy, the Court set forth a "definitive statement about abortion rights" rather

101. *Id.* at 84; *see also* The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873) (setting forth Justice Miller's warning).

102. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

103. For an illustration of lawmakers' increasing acceptance of the notion of efficient securities markets, consider that the Securities Acts of 1933 and 1934 generally require disclosure of material information, a method of investor protection that cannot work effectively unless markets absorb that information efficiently. *See generally* Securities Act of 1933, 15 U.S.C. § 77a-aa (2000); Securities Exchange Act of 1934, 15 U.S.C. § 78a-mm (2000). In fact, efficient markets have become so well-established that the Supreme Court has relied on the efficient market hypothesis to adopt its fraud-on-the-market theory of liability for certain securities law violations. *See* Zachary Shulman, Note, *Fraud on the Market Theory After* Basic, Inc. v. Levinson, 74 CORNELL L. REV. 964, 965 (1989).

104. 410 U.S. 113 (1973).

105. 410 U.S. 179 (1973).

than "follow[ing] its own example in the contraception cases [by trying] to establish a dialogue with the legislatures" first.[106] In fact, when those decisions came down,

> [A]bortion law was already in a state of flux and change throughout the several states of the nation. Liberalization of state abortion laws, as the Court's opinion [in *Roe*], written by Justice Blackmun, recognized, had been well under way for some time. However, a well-organized, highly vocal 'right-to-life' movement had begun to succeed in either delaying or reversing that tide, and criminal abortion statutes remained on the books of many a state.[107]

Thus, given the social context—one of controversy and shifting tides—it is intriguing that the Court did in fact hand down a definitive statement rather than engage in a dialogue with legislative bodies. As discussed below, this action suggests that the definitive statement itself may be viewed as an attempt to mold norms.[108]

Until now, we have observed the ways in which changing norms bring about shifting duties of care by virtue of their influence over the foreseeability of risks that might compromise certain classes' ability to perform civic functions. In the case of abortion, we see exactly the opposite. Under a negligence model interpretation, *Roe* asserts the foreseeability of potential harms to the means of carrying out a woman's civic functions, whether they be performing work in the economy, raising children in stable homes, or obtaining education necessary to exercise a political voice. The Court finds that the foreseeability of such harms is substantial enough to require a compelling state interest, which the Court decides does not exist until the point of viability.[109] The Court's definitive statement simply asserts the fact of foreseeability of constitutional harm without addressing the complexity of the norms. This attempt to influence those norms seems to have had some impact, as a woman's fundamental rights interest in terminating an unwanted pregnancy becomes (at least debatably) more and more rooted in privacy and due process jurisprudence, yet the lack of a comprehensive and uniform rationale for the right may reflect the fact that the issue of foreseeability as a matter of social norms remains controversial.[110]

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106. FARBER ET AL., *supra* note 46, at 500. *See generally* Poe v. Ullman, 367 U.S. 497 (1961) (ducking the controversial contraception issue in favor of establishing a dialogue with legislative bodies prior to rendering a definitive statement). The Court took up the contraception issue four years later in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding a Connecticut anti-contraception statute unconstitutionally overbroad).

107. ABRAHAM & PERRY, *supra* note 48, at 426.

108. *See infra* text accompanying notes 109-110.

109. I make no moral judgment in this Note about whether a pregnant woman ever has a civic function interest sufficient to justify extinguishing an unborn child's life. Rather, my purpose in discussing this topic is merely to address a case that illustrates the tension that arises when the Court moves forward in the face of society's normative uncertainty.

110. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (recognizing the stability of the right, yet evidencing considerable difference of opinion as to rationale among the Justices, particularly with respect to the trimester system set forth in *Roe*). Many scholars seem to disagree that the right to abortion has become rooted in the Court's privacy and due process jurisprudence, noting that the past thirty years have marked a retreat from *Roe*. *See, e.g.*, Walter Dellinger &

Whatever the case, the abortion cases are analytically intriguing inasmuch as they reflect the dynamic interaction of norms, foreseeability of constitutional harms, and definitive statements by the Court in the face of tremendous normative uncertainty.

V. FREEDOM OF SPEECH

While elaborate analysis of free speech problems arising under the negligence model is beyond the scope of this Note, the following discussion sketches the contours of a negligence model of free speech jurisprudence. After identifying the ways in which free speech cases stray from duty of care reasoning, a theoretical reconciliation of the apparent divergence is offered. The discussion then turns to the application of the negligence model to two obscenity cases that illustrate the propositions of the theoretical argument.

Upon initial inspection, the free speech line of cases seems to stray from the duty of reasonable care analysis because it demonstrates a strong presumption of unconstitutionality for obstruction of speech that is often not related to any civic function. For example, burning an American flag can hardly be seen as an obligation or civic duty of any sort, but the Court held that such conduct was "sufficiently imbued with elements of communication" and could not be prohibited by the state, concluding that "government may not prohibit the expression of an idea simply because society finds the idea itself offensive."[111] With respect to additional forms of speech and expressive conduct that appear far removed from civic functions, the Court has found that an underinclusive prohibition on hate speech is unconstitutional because it constitutes viewpoint discrimination,[112] that libel against a public figure is not actionable without a showing of actual malice,[113] and has generally set a difficult standard for showing that expression is obscene (and thereby exempted from First Amendment protection).[114] In sum, the free speech cases pose difficult problems for the neg-

Gene B. Sperling, Webster v. Reproductive Health Services*: Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83, 83 (1989) (suggesting that the Court has retreated so far as to divest the right to abortion of fundamental right status). While the retreat is undeniable, the existence of a right to abortion for the past thirty years has caused the concept of such a right to take root as an integral part of judicial doctrine. *E.g. Casey*, 505 U.S. at 912 (Stevens, J., concurring in part and dissenting in part) (suggesting that *Roe* has become "an integral part" of the Court's jurisprudence). I do not, however, mean to in any way assert that the "rootedness" of the abortion right is a good thing.

111. Texas v. Johnson, 491 U.S. 397, 406, 414 (1989) (internal citation omitted).

112. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

113. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (defining a statement made with "actual malice" to be a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not").

114. *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973) (setting forth the test under which regulation of obscenity must be limited to "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value" when viewed from the perspective of "the average person, applying contemporary [local] community standards") (internal citations omitted); *see also* Roth v. United States 354 U.S. 476, 488, 498 (1957) (holding that obscenity is not protected by the First

ligence model as it has been discussed thus far in this Note.

However, the free speech line of cases can be reconciled with the duty of care analysis by analogizing free speech jurisprudence to the doctrine of *res ipsa loquitur* in tort law. *Res ipsa loquitur* is applied in tort suits where the fact of a particular injury (being struck by a barrel, for example) in and of itself suggests that the harm was caused by a particular party's negligence (in the case of barrels stored in a warehouse, the negligence of the warehouse owner in handling the barrels).[115] Similarly, because free speech is so vital to the performance of civic functions,[116] even to the point that the freedom of speech may itself be considered a definitional element of "democratic America,"[117] any governmental action that abridges the right to free speech may presumptively be considered a breach of the government's duty to protect the means for performing individual civic functions. In a sense, abridgement of speech does not ordinarily occur without the breach of the government's duty of care, and thus such an abridgement cannot typically be said to be beyond the scope of reasonably foreseeable harm (defined as an inappropriate compromise in the means of performing civic functions). In essence, the abridgement itself makes out a *prima facie* case for unconstitutionality.[118] The government can save a statute that infringes on free speech only by showing that the statute does not, and could not, interfere with the exercise of civic functions tied to free speech. Thus, the Court allows for abridgment of obscene material, libel with reckless disregard for the truth, and hate speech, but not without a rebuttal of the presumption of unconstitutionality by the government.

Obscenity cases in particular illuminate the burden-shifting feature of free speech jurisprudence that resembles *res ipsa loquitur*. With respect to obscene material, the *Miller v. California* standard demonstrates the burden on government to rebut the presumption of unconstitutionality.[119] To successfully invade an individual's speech rights on obscenity grounds, the government must convince the trier of fact "applying *contemporary* community standards" that the

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Amendment, but rejecting the "tend[s] to deprave or corrupt its [audience]" test, under which any material that appeals predominantly to "prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion" would fall outside of the scope of First Amendment protection) (internal citation omitted).

115. *See* Byrne v. Boadle, 159 Eng. Rep. 299 (Ex. 1863).

116. *See, e.g.*, Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 301-02 (1941) (Black, J., dissenting) ("Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death."); Whitney v. California 274 U.S. 357, 375 (1927) (Brandeis & Holmes, J.J., concurring) (stating that "public discussion is a political duty").

117. ABRAHAM & PERRY, *supra* note 48, at 153 ("[The] underlying philosophy [of free speech] is ingrained in the body politic's notion of what democratic America means.").

118. *Cf.* RESTATEMENT (SECOND) OF TORTS § 328D (1965) ("It may be inferred that harm . . . is caused by negligence of the defendant [if the type of harm] ordinarily does not occur in the absence of negligence[, and, among other things,] the indicated negligence is within the scope of the defendant's duty to the plaintiff.") (setting forth a concise statement of *res ipsa loquitur*).

119. 413 U.S. at 24..

sexual material is "patently offensive" and "lacks serious literary, artistic, political, or scientific value."[120] This standard resembles *res ipsa loquitur* inasmuch as it reveals the Court's tendency to find that the risk of harm to the means of exercising civic functions in prohibiting speech is reasonably foreseeable and, therefore, makes out a *prima facie* case. It is also significant that the Court emphasizes contemporary standards for permitting the invasion of speech rights. Although common sense suggests the need for such a standard apart from the negligence model, one of the negligence model's goals is to explain why it might make sense to some in a duty model to permit evolving standards over time.[121] The contemporary community standard might then be seen as a reflection of the Court's perception of frequent and identifiable variations in the scope of the government's duty to protect against foreseeable harms to the free speech means of performing civic functions. This is particularly plausible when one realizes that the Court's standard accounts for variations in the strength of the speech right (which is a mirror of the duty owed) across spectrums of time and of local communities (which are themselves classes).

Another important obscenity case is *Paris Adult Theatre v. Slaton*,[122] in which the Court rejected the notion that consenting adults have a First Amendment right to purchase obscene material. The Court permitted a state legislature to assume that such materials were harmful to the public on the basis of "[t]he sum of experience," even in the absence of "conclusive evidence or empirical data."[123] This position is a relaxed standard in terms of the findings required prior to legislative action, particularly in the context of such fundamental rights as free speech. However, the relaxed standard makes perfect sense upon recognition that the purchase of obscene materials is counterproductive to contemporary notions of performing civic functions. In fact, as the Court notes, "there is at least an arguable correlation between obscene material and crime."[124] Thus, the negligence model suggests that, in the context of genuinely obscene material, virtually no significant duty should rest upon government to protect such "speech" precisely because no harm to means of performing civic functions is reasonably foreseeable, the absolute language of the right itself notwithstanding.[125] Even in cases where this absence of risk to the exercise of civic functions is less clear, the foregoing discussion illustrates that the free speech line of cases can be understood in a negligence model context by analogizing to *res ipsa loquitur*.

120. *Id.* (emphasis added) (internal citation omitted).
121. *See supra* text accompanying notes 2-3.
122. 413 U.S. 49 (1973).
123. *Id.* at 63.
124. *Id.* at 58.
125. *See* U.S. CONST., amend. I.

VI. CONCLUSION

The civic function analysis of the rights of citizenship provides a solid understanding of those rights themselves and of the duties and obligations owed by the government to its citizens. The negligence model also explains the Court's departure from the absolute commands of the Constitution by allowing abridgement of rights in appropriate cases. One wonders if the same might be achieved by adhering to the seemingly explicit absolute commands of the Constitution, but permitting the Court some leeway in characterizing the rights specifically in terms of the civic functions that define them. This approach may account for changes over time that amend or create functions of citizenship and harmonize the Court's individual rights jurisprudence, under which it must currently apply varying levels of scrutiny to obtain the same result (or so would suggest the negligence model).

In any case, the negligence model provides a new perspective from which to view individual rights problems, explain seeming inconsistencies in current jurisprudence, and advocate for reform. Although the model itself involves malleable standards, it makes the underlying assumptions—such as expectations of performance of civic functions among classes and views on foreseeability of harm—clear and arrives at a logically forced conclusion based on those assumptions. This model provides a means of incorporating various doctrines into a common framework without resorting directly to speculation about judges' and courts' ideological views and activist application of those views in arriving at an outcome. Although such views certainly inform the underlying assumptions about civic functions of classes and the foreseeability of risk to the means of performing those functions, those assumptions must be made clear in order to proper apply the negligence model. The negligence model is thus a helpful scholarly tool for understanding and critiquing doctrines.