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FREEDOM, RESPONSIBILITY, AND THE CONSTITUTION: ON RECOVERING OUR FOUNDING PRINCIPLES

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Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*

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America's quadrennial elections afford an opportunity not simply to take stock and look ahead but to ask more searching questions having to do with what we stand for as a nation. After the monumental changes that have taken place around the world over the past four years, such questions would seem especially fitting. Yet the national debate during our recent elections hardly touched those deeper issues. Driven not by principle but by policy, not by visions of who we are but by visions of what we want, we seem near century's end to be stuck in the rut of the welfare state, part free, part controlled, unable to see beyond our immediate concerns. Nor should that surprise, since the mundane interests the welfare state has brought into opposition compel us to that war of all against all that the classical theorists so well understood. And we are all the poorer for it.

Indeed, our political life today is dominated by the view, held by politicians and citizens alike, that the purpose of government is to solve our private problems, from unemployment to health care, retirement security, economic competition, child care, education, and on and on.[1] But having thus socialized our problems, our flight from individual responsibility does not end. For once we realize, however dimly, that social benefits require social costs—either taxes or regulations—we then seek to foist those costs upon the wealthy or the industrious. Yet that move has its limits—the rich and industrious can afford to leave, after all. So we try next to shift the costs of our appetites to our children in the form of the federal deficit. Tax and spend thus becomes borrow and spend as the flight from responsibility, and reality, continues.

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* This is a slightly revised version, with footnotes added, of chapter 2 of MARKET LIBERALISM: A PARADIGM FOR THE 21ST CENTURY (David Boaz & Edward H. Crane eds., 1993).

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1 *See* Robert J. Samuelson, *Clinton's Nemesis*, NEWSWEEK, Feb. 1, 1993, at 51.

To some extent, of course, the idea that the purpose of government is to solve the private problems of living has always been with us, but never have political and cultural conditions so encouraged it. In fact, recognizing that there would always be those who would be willing to relinquish responsibility for their lives to government authorities and institutions, and realizing the implications should that attitude ever command political respect, the founding generation tried to guard against that possibility by drafting a constitution for *limited* government. Over the years, however, the restraints set forth in that document have broken down, and with that breakdown has come the gradual demise of individual liberty and responsibility. If that trend is to be reversed, if we are to realize the potential that our founding principles permit, it is essential that we understand the forces that have been at work, the forces that have brought us from the vision of the founding generation to our current state of political conflict and paralysis.

I. THE ORIGINAL DESIGN: FROM THE DECLARATION TO THE CIVIL WAR AMENDMENTS

We are fortunate in America to have a philosophy, set forth in a series of documents, to which to repair to renew our first principles. That philosophy, stated succinctly in the Declaration of Independence, then more amply in the Constitution, the Bill of Rights,[2] and the Civil War Amendments,[3] can be seen as composed of two parts. First is the moral vision, the world of moral rights and obligations we all have prior to the creation of government, which we create government to secure. Second is the political and legal vision, the world of political and legal powers we authorize when we create government, which serve as the means of securing the moral vision.

Nowhere is that divide between the moral and the political more clearly seen than in the Declaration, whose seminal phrases have inspired countless millions around the world for more than two centuries. After placing us squarely in the natural law tradition—the "truths" that followed were held to be "self-evident," or truths of reason—the Founders set forth a premise of moral equality, which they defined with reference to our natural rights to life, liberty, and the pursuit of happiness. Only then did they turn to

2 U.S. CONST. amends. I-X.

3 U.S. CONST. amends. XIII-XV.

the second, the political or instrumental point—that to secure those rights, governments are instituted among men. And even then they added a moral qualification—that to be just, government's powers must be grounded in consent—making it clear that political power, to be legitimate, must be derived from moral principle. Thus, the moral vision must be drawn first, the political and legal vision second, as a derivation from the former.

A. *The Moral Vision*

As just noted, the moral vision begins in the natural law tradition, with the individual, not with the group, and with the moral equality of all individuals, defined by our equal rights to life, liberty, and the pursuit of happiness. The importance of that starting point cannot be overstated. By placing us in the natural law tradition, the Founders were saying that there is a higher law of right and wrong, grounded in and discoverable by reason, against which to judge positive law, and from which to derive positive law.[4] Without such a compass, positive law is mere will, the expression of the will of those in power. And mere will, whether of the king or of the majority, does not give law its legitimacy. Only principles of reason can do that.[5]

1. Moral Rights

In that higher law tradition, then, we proceed from a premise of moral equality—defined by rights, not values—which means that no one has rights superior to those of anyone else. So far-reaching is that premise as to enable us to derive from it the whole of the world of rights.[6] Call it freedom, call it "live and let live", call it, in the socialist planning context, the right to plan and live our own lives, the premise contains its own warrant and its own limitations.[7] It implies the right to pursue whatever values we wish—provided only that in doing so we respect the same right of

4 *See* EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955).

5 I have discussed the issue of legitimacy more fully in Roger Pilon, *Individual Rights, Democracy, and Constitutional Order: On the Foundations of Legitimacy*, 11 CATO J. 373 (1992).

6 *Cf.* ALAN GEWIRTH, REASON AND MORALITY (1978); Roger Pilon, A Theory of Rights: Toward Limited Government (1979) (unpublished Ph.D. dissertation, University of Chicago); DERYCK BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY (1991).

7 I have discussed these foundations and limitations in Roger Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171 (1979).

others. And it implies that we alone are responsible for ourselves, for making as much or as little of our lives as we wish and can. What else could it mean to be free?

The connection here between freedom and responsibility is especially important to notice. As the discussion throughout the founding period makes clear, freedom and responsibility were joined in the liberal mind in a thoroughly modern way. It was not, as an older way of looking at things had it (and as contemporary "communitarians" often imply),[8] that we enjoy our rights as grants or "privileges," which we retain only as long as we exercise them "responsibly." No, we have our rights "by nature." Thus, we alone can alienate them—through contract, for example, or by committing torts or crimes. The mere "irresponsible" exercise of rights, short of violating the rights of others, is itself a right. What else could it mean to be responsible for oneself?[9]

The discussion during the founding period also makes it clear that two rights serve as the foundation for all others—property and contract. Indeed, John Locke, whose thinking found its way to the heart of the Declaration, reduced all rights to property: "Lives, Liberties and Estates, which I call by the general Name, *Property*."[10] It should hardly surprise, upon reflection, that Locke and the American Founders would think that way. After all, to have rights to life, liberty, and the pursuit of happiness is to be "entitled" to those things, to hold "title" to them, and to be able to "claim" that others may not "take" them from us. As the very language of rights indicates, rights and property are inextricably connected: our property in our "lives, liberties, and estates" is what rights are all about. Thus, we discover what our natural rights are by spelling out the many forms the property we possess in ourselves and in the world can take, from life to liberty of action to freedom from trespass upon our person or property. Included among our natural rights, then, are both liberties (of action) and immunities (from the torts or crimes of others), both of which have property as their foundation. In general, whether in the area

8 *See, e.g.*, ALASDAIR C. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1981); *The Responsive Communitarian Platform: Rights and Responsibilities*, THE RESPONSIVE COMMUNITY, Winter 1991-92, at 4.

9 For a discussion of the connection between freedom and virtue, drawing upon ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1838), see Stephen Macedo, *Capitalism, Citizenship and Community*, SOC. PHIL. & POL'Y, Autumn 1988, at 113.

10 JOHN LOCKE, *The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT § 123 (Peter Laslett ed., 1960).

of expression or religion or commercial activity or privacy or whatever, we are free to enjoy what is ours except insofar as doing so prevents others from enjoying what is theirs.[11]

Broadly understood, then, property is the foundation of all our natural rights. Exercising those rights, consistent with the rights of others, we may pursue happiness in any way we wish. One way to do that, of course, is through association with others. We come then to the second great font of rights, promise or contract. (The rights we create through contract are not natural rights—we do not have them "by nature"—but like natural rights they are a species of moral right.) Through voluntary agreements with others we create the complex web of associations that constitutes the better part of what we call civilization. Here, the rights and obligations created are as various as human imagination allows, whether they arise from spot transactions or from enduring agreements creating institutions ranging from families to churches, clubs, corporations, charitable organizations, and much else.

2. Legal Recognition

In outline, then, this is the moral world—described by our moral rights and obligations, both natural and contractual—that we created government to secure. In fact, when we look to the Constitution, the Bill of Rights, and the Civil War Amendments, we find explicit recognition of those rights. The Fifth Amendment's Takings Clause recognizes the right to private property,[12] for example, as the Constitution itself recognizes the right to contract.[13] In the Fifth and Fourteenth Amendments we find that no one may be deprived of life, liberty, or property without due process of law.[14] (And by "law" the drafters could hardly have meant mere legislation or the guarantee would have been all

11 I have discussed these points more fully in Pilon, *supra* note 7; and Roger Pilon, *Property Rights, Takings, and a Free Society*, 6 HARV. J.L. & PUB. POL'Y 165 (1983). *Cf.* James Madison, *Property*, NATIONAL GAZETTE, March 29, 1792, at 175, *reprinted in* 6 THE WRITINGS OF JAMES MADISON, at 101 (Gaillard Hunt ed., 1906) ("In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.").

12 U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation").

13 U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

14 U.S. CONST. amend. V ("nor [shall any person] be deprived of life, liberty, or property without due process of law"); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

but empty.)[15] Similarly, the Thirteenth Amendment abolished at last the practice of slavery or involuntary servitude, making it plain that no one may own another, that each of us owns himself and himself alone.[16]

The Privileges and Immunities Clauses of both the Constitution[17] and the Fourteenth Amendment[18] hark back to our "natural liberties," as William Blackstone made clear.[19] Likewise, the Seventh Amendment's reference to and, by implication, incorporation of the common law[20] reminds us of Edward Corwin's observation that "the notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law."[21] The First Amendment's guarantees regarding religion, speech, the press, assembly, and petition;[22] the Second Amendment's recognition of the right to keep and bear arms;[23] the several guarantees in the Constitution and the Bill of Rights regarding criminal investigations and prosecutions;[24] and

15 *See* Roger Pilon, *Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY 183 (James A. Dorn & Henry G. Manne eds., 1987).

16 U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.").

17 U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States.").

18 U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

19 1 WILLIAM BLACKSTONE, COMMENTARIES *125-29; *see also* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 64 (1986).

20 U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

21 CORWIN, *supra* note 4, at 26.

22 U.S. CONST. amend. I.

23 U.S. CONST. amend. II.

24 For those protections contained in the Constitution itself, see U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. III, § 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").

For those contained in the Bill of Rights, see U.S. CONST. amend. IV (protection against unreasonable searches and seizures); U.S. CONST. amend. V (privileges against self-incrimination and double jeopardy and right to due process of law guaranteed); U.S. CONST. amend. VI (rights to speedy and public jury trial and to confront witnesses); U.S. CONST. amend. VIII (protections against excessive bail, excessive fines, and cruel and unusual punishment).

finally the Ninth Amendment's reminder that only certain of our rights are enumerated in the Constitution, the rest remaining unenumerated and retained,[25] are among the many indications, ranging over nearly one hundred years, of the kind of world earlier generations had in mind for government to secure.

That world, the moral vision the Founders first set forth, was one of private individuals standing in private relationships with one another, each with a right to make of himself as much as he wished and could, and each responsible for his choices and actions, good and bad alike. It was a world both static and dynamic. The minimal legal framework, designed to secure our rights and obligations, was static in the sense that it was derived from immutable principles of right and wrong, reflecting the human condition as such. Yet the Founders' world was fundamentally dynamic in that it allowed for—indeed, protected—the rich variety of human experience and experiment that we all know is possible under conditions of freedom.[26] That dynamism was expected to come from individuals, however, not from government. In particular, it was not government's responsibility to promote prosperity. Rather, that was the business of individuals, alone or in private association with each other.

It is especially important to notice too that the world the Founders envisioned was largely a world of private law, which enabled people to prosper or fail, protecting them only from the depredations of others. It was not a world of public law, especially public redistributive law, which could only encourage people to look to government both for prosperity and for protection from failure. No, the purpose of government, as the Constitution states, is to promote the *general* welfare—that is, the welfare of all—by establishing justice, ensuring domestic tranquility, and securing the blessings of liberty.[27] If government limited itself to those ends, individuals would be free, in their private capacities, to pursue their own welfare, for which they alone are responsible.

25 U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."); *see also* THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989).

26 *See* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 22-38 (1960).

27 U.S. CONST. pmbl.

B. The Political and Legal Vision

To secure that moral vision, a vision of individual liberty and individual responsibility, governments were created and government powers were authorized. Here, two closely related problems arose, one moral, the other practical.

1. The Limits of Consent Theory

The moral problem, which had its practical aspect, stemmed from the Declaration's consent requirement (captured with respect to the states in the Constitution's Ratification Clause)[28] that to be just or legitimate, power had to be derived from the consent of the governed.[29] Plainly, if we begin with the right of the individual to be free and hence to rule himself, and himself alone, the consent requirement is necessary, for the individual may be bound by the will of others only if he has agreed to be bound. The difficulty in meeting that requirement, however, is substantial. To begin, although unanimity does produce legitimacy, it is all but impossible to achieve. But when we resort to rule by the majority, even by a large majority, we do not get legitimacy because the minority, by definition, has not consented. Yet there are problems even when we combine majoritarianism with prior unanimous consent to be bound thereafter by the majority—the classic social contract approach: the people who agreed to the original contract were few in number; even then we would still need unanimity; and the problem of binding subsequent generations, which subsequent elections do not really solve, remains. Finally, the argument from "tacit consent"—those who stay are bound by the will of the majority—has the majority putting the minority to a choice between coming under its will or leaving, which begs the very question that needs to be answered.[30]

Those moral difficulties leave us with a pair of conclusions that were more or less understood by the founding generation. First, even democratic government has about it the character of a "necessary evil." Government is "necessary" to overcome the practical problems that surround the private enforcement of rights in its absence, problems that Locke and others had catalogued.[31] But it is "evil" insofar as the consent requirement cannot be deeply satisfied. Thus, while majoritarian democracy may be preferable to other forms of rule in that it enables the ruled to participate in the decision-making process,[32] in the end it is simply a process through which to decide, not a process that imparts legitimacy to the decisions that follow—as those in the minority are often the first to attest.

The second conclusion, or prescription, that follows from reflection on the moral difficulties that surround the creation of government stems from the realization that government, unlike a private organization, is a forced association. Given that character, it behooves us to do as little as possible through government and as much as possible in the private sector, the better to minimize the use of force. Thus, out of respect for the nature of government, at least, the founding generation sought to limit the power of this necessary evil, giving it only as much as would be necessary to accomplish its ends.

2. Limiting Power

Given those moral insights, the practical problem the Founders faced was to create a government that was at once strong enough to secure our rights yet not so strong as to violate those very rights in the process. Thus, they created a set of limited powers; but realizing that power tends to corrupt, they checked and balanced those powers at every turn. One such check, of course, was the electoral process. Yet that process was itself checked by everything from representative government to the indirect election of senators and presidents to the lifetime appointment of judges. At the same time, power was divided between the federal and the state governments, with most reserved to the states, where presumably it could be more immediately controlled by the people. Meanwhile, at the federal level, power was separated among the three branches, each of which had checks upon the others. The final check was the power of the judiciary to review the acts of the political branches and the states and rule them unconstitutional.

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28 U.S. CONST. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.").

29 THE DECLARATION OF INDEPENDENCE para. 2 ("deriving their just powers from the consent of the governed")

30 *See* ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM (1970).

31 LOCKE, *supra* note 10, §§ 13, 123-26, 159-60; *see also* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA pt. I (1974).

32 *See* Roger Pilon, *Human Rights and Politico-Economic Systems*, CATO'S LETTERS #4 (1988).

But the most important restraint, especially given the power of judicial review, was meant to be found in the central strategy of the Constitution, which made it clear that ours was to be an extremely limited government. First, the Constitution was a document of enumerated powers, meaning that the federal government was to have only those powers that were strictly enumerated in the text.[33] Second, the exercise of those powers was to be restrained by the Necessary and Proper Clause, which authorized Congress to exercise its limited powers only through laws that were necessary and proper for doing so.[34] And finally, the Bill of Rights was added to the Constitution, which together with the guarantees in the original document itself made it plain that the federal government was to be further restrained in the exercise of its enumerated powers by both enumerated and unenumerated rights.[35]

Thus, while the federal government was given enough power to govern, the Founders' idea of governing was extremely limited, especially when contrasted with the governing done by European governments at the time and our own government today. Indeed, given the limits the Founders placed on government, it is difficult to understand how anyone could argue that the Constitution authorizes the kind of expansive government we have today. In fact, honest observers who are at the same time friends of the modern welfare state readily admit that to get to where we are we had to turn the document on its head.[36] Others may wish to defend our present arrangements as constitutional.[37] The concern here will

33 *See, e.g.*, THE FEDERALIST NOS. 41-45 (James Madison) (stressing how the Constitution delegates to the federal government only those powers necessary for governance).

34 U.S. CONST. art. I, § 8, cl. 18.

35 *See supra* notes 20-34 and accompanying text.

36 *See, e.g.*, Rexford G. Tugwell, *Rewriting the Constitution: A Center Report*, CENTER MAG., Mar. 1968, at 18. According to Tugwell, a principal member of President Roosevelt's "Brain Trust," the "Constitution of 1787" was designed "to protect citizens from their government, not to define its duties to them or theirs to it." *Id.* at 19. The Supreme Court decisions that upheld the constitutionality of New Deal antipoverty programs were "tortured interpretations of a document intended to prevent them." *Id.*

37 Harvard Law Professor Laurence Tribe, for example, suggests that the requirements of certain constitutional liberties changed as America entered the industrial age. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 769 (2d ed. 1988) ("[T]he error of decisions like *Lochner v. New York* lay not in judicial intervention to protect 'liberty' but in a misguided understanding of what liberty actually required in the industrial age.") (footnotes omitted); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990); Lino A. Graglia, *Judicial Activism of the Right: A Mistaken and Futile Hope*, *in* LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 65, 66-67 (Ellen Frankel Paul & Howard Dickman eds., 1990) ("The Constitution places very few restrictions on the exercise of the federal government's enumerated powers . . . . As a result, examples of enacted law clearly in violation of the Constitution are extremely difficult to find.").

be more constructive—to trace some of the forces that led to the breakdown of constitutional restraints on the growth of government, the better to understand what must be done to recover those restraints and the principles they secured.

II. THE DEMISE OF PRINCIPLE, THE RISE OF POLICY

In 1948 Richard M. Weaver wrote a book entitled *Ideas Have Consequences*, the title and text of which captured well the power of ideas in human history.[38] In contrast, Karl Marx had pointed a century earlier to the importance of material forces.[39] Marx was right to remind us of that, but as his own influence bears witness, he underestimated the far greater power of ideas—sound and unsound ideas alike. Indeed, the ultimate defeat of the Marxist vision is a tribute to the force of superior ideas, which triumphed in the face of brute material and military force.

Still, we do not have a clear picture, nor is it likely that we ever will, of just how ideas and events interact over time—whether it is by their intrinsic force that ideas prevail, or fail to prevail, or by the consequences that eventually result from adhering to one set of ideas rather than another, or by some combination of the two. We have an intuitive understanding, to be sure, that "the climate of ideas" matters. But just how it matters is, well, another matter—and rather less than a science.

A. *The "Science" of Policy*

The rise of science, however, has had more than a little to do with the demise of the Founders' vision, which is all the more ironic since those men, products all of the Age of Reason and the Enlightenment, were steeped in the science of their day and hardly of the view that later "science" might undermine their creation. Their science, however, had a healthier sense of its limits and of the balance between the rational and the empirical than later science would have. Indeed, the Founders' science of man, although buttressed by empirical observation, was essentially a rational undertaking in its normative aspects.[40] Yet in time that moral

38 RICHARD M. WEAVER, IDEAS HAVE CONSEQUENCES (1948).

39 KARL MARX, THE COMMUNIST MANIFESTO (1848).

40 Although an empiricist in his epistemology, Locke was a rationalist in his moral

vision—uncertainly grounded in reason,[41] to be sure—would come under attack not simply from the skepticism that has been with us since antiquity but from skepticism armed with a new science of man. Reductionist (both theoretical and material) and empirical, this newer science would take as its task not the rational justification of principles of right and wrong but the empirical explanation of human behavior. Once we understood the forces of nature or nurture that made us behave as we did, the next step, of course, would be to devise social institutions to encourage desirable and discourage undesirable behavior.[42] Could social planning—indeed, social engineering—be far off?

1. From Natural Law to Utilitarianism

But first, a frontal attack on natural law would prepare the way. Although not well appreciated until the German philosopher Immanuel Kant took note of it later in the century,[43] the Scottish philosopher David Hume delivered perhaps the most telling blow to natural law in 1739 when he observed, almost in passing, that from descriptive propositions one could not derive normative conclusions,[44] a shot that went to the heart of the relatively primitive epistemology of the natural law theorists. More direct and conclusory in his attack was Jeremy Bentham, the father of British utilitarianism, who in 1791 intoned that talk of natural rights was "simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts."[45] Such attacks were not the stuff of the daily press, of course. Nevertheless, they slowly seeped into the climate of ideas, undermining in time the almost credu-

theory. LOCKE, *supra* note 10, § 6.

41 The foundation of Locke's moral theory, for example, involved an illicit move from "is" to "ought," *id.*, a move that David Hume would later note was all too common in moral reasoning. *See infra* note 44 and accompanying text.

42 These strains, found of course in Marx, reached fruition in the United States with the publication of John B. Watson's BEHAVIOR: AN INTRODUCTION TO COMPARATIVE PSYCHOLOGY (1914); *see also* B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971).

43 The most important of Kant's writings in this regard are IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON (Thomas Kingmill Abbot trans., 6th ed. 1909); IMMANUEL KANT, CRITIQUE OF PURE REASON (Norman Kemp Smith trans., 1929); IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (H.J. Paton trans., 3d ed. 1956); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (John Ladd trans., 1965).

44 DAVID HUME, A TREATISE OF HUMAN NATURE 469-70 (L.A. Selby-Bigge ed., 1888) (P.H. Nidditch ed., 1978).

45 JEREMY BENTHAM, *Anarchical Fallacies*, *in* 2 WORKS OF JEREMY BENTHAM 489, 501 (Richard Doyne ed., 1843).

lous faith that underpinned the Founders' vision and the institutions they created to secure it.

The central theme in the eventual breakdown of our structure of restraints, then, is the demise of the moral foundations of that structure and the rise of new rationales for political power. And what were those new rationales? As already noted, there was a growing faith during the nineteenth century and into the twentieth in the ability of science to solve social problems. That faith was buttressed by the rise of utilitarianism in moral theory, which looked not backward to principles of right and wrong but forward to conditions of good and evil, reduced to intersubjectively verifiable and hence to empirically quantifiable reports of pleasure and pain. Policy and law came to be justified, in this approach, not by whether they secured rights but by whether they produced the greatest good for the greatest number. Respect for property and contract might yield that result. Then again it might not, depending on the circumstances. Policy, including legal policy, would have to adjust to changing circumstances and to the emerging theories of the new policy science.

2. Progress

Material changes were taking place as well, of course. The nineteenth century saw the dawn of the Industrial Revolution in America and with it the growth of urbanization. Poverty, endless work, child labor, and unhealthy living conditions had been tolerable, presumably, when dispersed throughout rural America. When concentrated in urban America, and when contrasted with the conditions of the emerging entrepreneurial class, they became "social" problems. Naturally, such problems played directly into, and reciprocally with, the themes of the emerging social sciences. At century's end, in fact, the *Encyclopedia of Social Reform* could state with confidence that "almost all social thinkers are now agreed that the social evils of the day arise in large part from social wrongs."[46] Remedying such "wrongs" was clearly beyond the scope of private charity, administered by individuals who "suffered with" their recipients, making moral distinctions in the process.[47] What was needed, rather, was public charity, administered by "professional" social workers, for "no person who is interested in social

46 ENCYCLOPEDIA OF SOCIAL REFORM 270 (William D.P. Bliss ed., 1897).

47 *See generally* MARVIN N. OLASKY, THE TRAGEDY OF AMERICAN COMPASSION (1992).

progress can long be content to raise here and there an individual,"[48] wrote Frank Dekker Watson, director of the Pennsylvania School for Social Service. Indeed, Watson commended the ongoing "crowding out" of private by public charity, for only thus would "public funds ever be wholly adequate for the legitimate demands made upon them."[49]

3. Democracy and Good Government

Over the course of the nineteenth century, then, the climate of ideas gradually changed. In ethics, we moved from natural law to utilitarianism, with a brief return to natural law around the Civil War. In science, we moved from a conception of man as an autonomous being to one of man as determined by natural and environmental forces. Still, in a constitutional regime like ours, social workers armed with such theories and acting as "social engineers" could not simply impose "a divine order on earth as it is in heaven,"[50] as the president of the National Conference of Social Work wrote in 1920. Rather, in a government of, by, and for the people, that new order would have to come in some way, at least, from the people. Thus conceived, however, democracy would prove no restraint. On the contrary, ignoring its individualist roots in *self*-rule, imbued with the collectivist overtones of "the people," and treated operationally as majoritarianism, democratic theory dovetailed quite nicely with the new policy science. After all, if policy and law were justified not with respect to rights but only insofar as they promoted the greatest good for the greatest number, and if we could determine that they do that only empirically, then how better to do the utilitarian calculus than through the majoritarian process? By their votes the people will tell us which policies maximize their well-being.

Thus, by the Progressive Era, toward century's end, we had come to think of government not as a necessary evil, to be guarded against at every turn, but as a positive good—indeed, as an instrument of good, an instrument for doing good. Combining the force of law, viewed instrumentally, with the ambition of the new social sciences and the rationales of both utilitarianism and majoritarianism, government had come to be seen as an institu-

48 FRANK DEKKER WATSON, THE CHARITY ORGANIZATION MOVEMENT IN THE UNITED STATES: A STUDY IN AMERICAN PHILANTHROPY 332 (1922).
49 *Id.* at 398-99.
50 Owen R. Lovejoy, *The Faith of a Social Worker*, SURVEY, May 8, 1920, at 209.

tion through which to solve our social problems. Plainly, that was a fundamental shift in our thinking.[51] That shift, moreover, was not limited to social problems narrowly understood or to the political branches. When the common law courts began shifting in the middle of the nineteenth century from strict liability to a negligence standard in torts[52]—to make the world safe for industry—and Congress in 1890 saw fit to pass the Sherman Antitrust Act[53]—to restore "effective competition" to the market economy—those and countless other such measures were indications all of that fundamental shift: from government instituted to secure principle to government empowered to pursue policy. Just whose policy, and by what constitutional means, were questions that remained to be answered.

B. *Instituting the Shift*

It is one thing to have a shift in ideas—from a conception of limited government, instituted to secure rights, to a conception of expansive government, empowered to pursue policy—quite another to incorporate that shift through and in institutions that were designed precisely to restrain such a change. How, in short, can a limited government be turned into an expansive government when the constitution that authorizes the former not only contains no provision for the latter—save by amendment—but, to the contrary, contains provisions that explicitly restrict the creation of the latter?[54]

For more than two hundred years—albeit less frequently as the restraints have broken down—that question has confronted every person and every movement that has sought to expand the federal government. And for nearly three-quarters of that time, up until the New Deal, the constitutional restraints did largely hold. But as noted above, inroads on the original design were being made all along. The change in the climate of ideas was gradually taking its toll, first on the most political branch of government, the Congress, then on the second of the political branches, the

51 *See* ARTHUR A. EKIRCH, JR., THE DECLINE OF AMERICAN LIBERALISM (1955).
52 *See* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151, 152-53 (1973).
53 Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-36 (1988 & Supp. II 1990)).
54 *See supra* note 36.

executive, and finally on the branch that in principle is nonpolitical, the judiciary.

It is important to stress, however, how slow that change was in coming. Today, it seems almost quaint to recall that, for the better part of the nineteenth century, Congress actually debated about whether it had constitutional authority to do what some of its members wanted from time to time to do.[55] And when Congress did act along lines of dubious authority, presidents often vetoed those acts as unconstitutional.[56] Finally, those measures that did make it through both of the political branches had to withstand Supreme Court scrutiny, which was by no means assured. In short, unlike today, when the political branches all but assume their authority to expand government, which the courts have acquiesced in and now restrain only in limited domains (and sometimes themselves affirmatively assist), earlier officials in all branches took seriously their oaths to support the Constitution.

1. In the Political Branches

For our first one hundred years, in fact, the constitutional debate often never reached the rights side of the question—the side that dominates modern discussions—because the focus was largely on whether Congress (or the executive) had the power to undertake a given activity. An early example was a 1794 statute appropriating $15,000 for relief of French refugees who had fled to Baltimore and Philadelphia from an insurrection in San Domingo.[57] As the principal author of the Constitution, Virginia's James Madison remarked that he could not "undertake to lay his finger on that article of the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents."[58] In fact, so dubious was the authority for this act of charity that it was rewritten, still dubiously,

55 When Alexander Hamilton proposed that Congress charter the National Bank, for example, the ensuing debate pitting Hamilton and the Federalists against Madison and Jefferson concerned fundamental principles of constitutional interpretation. *See* DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY 447 (1991).

56 When Congress passed a bill extending the National Bank's charter in 1832, President Andrew Jackson vetoed the bill, challenging the Marshall Court's interpretation of the Constitution in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). *See* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1144-45 (James D. Richardson ed. 1897).

57 Act of February 12, 1794, 6 Stat. 13.

58 4 ANNALS OF CONG. 179 (1794).

to be part payment of loans earlier obtained from the French Republic.[59] Two years later, in 1796, a similar bill, for relief of Savannah fire victims, was defeated decisively, a majority in Congress finding that the General Welfare Clause afforded no authority for so particular an appropriation.[60] As Virginia's William B. Giles observed, "[The House] should not attend to what . . . generosity and humanity required, but what the Constitution and their duty required."[61]

The nineteenth century saw growing pressure on Congress to engage in a wide range of "general welfare" spending.[62] Almost as intense, however, was the opposition, from constitutional principle, to having such projects undertaken or even funded by the federal government. Thus, in 1817 President Madison vetoed a bill authorizing Congress not to *undertake* a public works project—for there was clearly no enumerated power to that end in the Constitution—but simply to *appropriate money for* that purpose under the General Welfare Clause.[63] Madison could find not even this limited a power, for as he had earlier written, "Money cannot be applied to the *general welfare*, otherwise than by an application of it to some *particular* measure conducive to the general welfare," and that particular measure must be "within the enumerated authorities vested in Congress."[64]

Nevertheless, the view that Alexander Hamilton had advanced, that Congress had a general welfare power to fund at least "national" projects, eventually triumphed when President Monroe endorsed it in 1822 as part of a veto message.[65] Still, efforts to have the federal government take the next step and actually conduct such projects were resisted by Presidents Jackson and Van Buren.[66] Indeed, throughout the nineteenth century we find presidents ranging from Tyler, Polk, Pierce, and Buchanan, before the Civil War, to Grant, Arthur, and Cleveland, after the war, standing athwart such efforts by Congress to expand its powers.[67]

59 *Id.* at 352.

60 6 ANNALS OF CONG. 1727 (1796).

61 *Id.* at 1724.

62 For a critical account of the growth of general welfare spending, see CHARLES WARREN, CONGRESS AS SANTA CLAUS (1932).

63 30 ANNALS OF CONG. 1060-61 (1817).

64 James Madison, Report on Resolutions, *in* 6 WRITINGS OF JAMES MADISON, *supra* note 11, at 341, 357 (emphasis in original).

65 39 ANNALS OF CONG. 1809 (1822).

66 WARREN, *supra* note 62, at 31.

67 *Id.* at 50-91.

Nor should it be thought that their vetoes were merely "political" and not principled. In 1854, for example, President Pierce was faced with a bill, championed by a luminary of the day, Dorothea Dix, that would have given as a gift to the states ten million acres of federal lands for the benefit of the indigent insane.[68] Faced with a distinction between donating land and donating general tax revenues (which would be the next target of public avarice), and with such congressional pleas as "Our forefathers left the hands of the Government unfettered to spend what it might choose for their benefit,"[69] Pierce stood his ground on both counts—and on principle as well.

> I cannot find any authority in the Constitution for making the Federal Government the great almoner of public charity throughout the United States. To do so would, in my judgement, be contrary to the letter and the spirit of the Constitution and subversive of the whole theory upon which the Union of these States is founded.[70]

Thirty-three years and many vetoes later, in 1887, President Cleveland would take a similar stand against a bill that would have appropriated $10,000 from general revenues to buy seeds for distribution to Texas farmers suffering from a drought.[71]

> I can find no warrant for such an appropriation in the Constitution; and I do not believe that the power and duty of the General Government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit. A prevalent tendency to disregard the limited mission of this power and duty should, I think, be steadfastly resisted, to the end that the lesson should be constantly enforced that, though the people support the Government, the Government should not support the people.[72]

It should not be thought, however, that Congress over the course of the nineteenth century simply rolled over to special interests, although that trend was gaining. In fact, throughout the century we see in Congress not simply the political but the constitutional debate as well. Thus, as late as 1887 we find Republican

68 *Id.* at 59-63.
69 CONG. GLOBE, 33d Cong., 1st Sess. 551 (1854) (speech of Senator Foot of Vermont in response to presidential veto of indigent bill).
70 *Id.* at 1061.
71 H.R. 10203, 49th Cong., 2d Sess. (1887).
72 18 CONG. REC. 1875 (1887).

Senator John J. Ingalls of Kansas decrying a measure to distribute moneys from the Treasury to the states to establish agricultural experiment stations.

> It illustrates the tendency of this class of agitators to demand the continual interposition of the National Government in State and local and domestic affairs, with the result, as I believe, of absolutely destroying the independence and freedom of individual conduct, and subverting the theory on which the Government is based and in the conduct of which hitherto it has reached such great results . . . .
>
> It is not desirable that uniformity of methods or results [among the States] should be obtained. . . . [I]t is the conflict of the contrariety of opinions in this country upon these subjects that results in the greatest good to the greatest number. It is the collision and contest between opposing ideas or views of contending localities that enable us to reach the highest results in the departments of activity and government.[73]

Notice how the language of utilitarianism had crept into the debate. More generally, notice how Ingalls's rationale, although in part constitutional, is grounded rather more in policy than in principle. Not only is "the greatest good to the greatest number" his criterion, but "great results" and "highest results" are his focus rather more than the inherent wrong of "continual interposition" in state, local, and domestic affairs.

As federal "interposition" increased, that shift from principle to policy would increase as well, not least because principle was being abandoned. Thus, we find South Dakota Senator Thomas Sterling objecting in 1914 that a proposal appropriating $4.5 million annually for states to give instruction in farm work and home economics "costs too much, and the Nation itself will in the end feel the enervating influence of such a policy."[74] In the same consequentialist vein, moreover, there was growing recognition, however faint, that federal programs were indeed moving us in the direction of the classic war of all against all. Thus, Senators Perkins and Works from California and Senators McLean and Brandegee from Connecticut inquired of this bill, perhaps rhetori-

73 18 CONG. REC. 724 (1887).
74 51 CONG. REC. 2578 (1914). Senator Sterling added: "The self-reliance, the self-sufficiency, the independence and the pride of the people of a State, out of which so much good has come in the upbuilding of a Nation, are involved, and, I think, menaced by the cooperative features of this bill." *Id.* at 2577.

cally, "Why should we expend the public money for the purpose of educating the farmers of this country any more than the mechanics?"[75] As if to meet that challenge and raise the stakes, Congress three years later appropriated $7 million annually to pay states for the training of teachers in agriculture, home economics, industrial subjects, and trade.[76] The answer to an objection based on unfair consequences, apparently, was not to return to principle—for there was no longer any principle to return to—but to expand the program to include some of those left out. That expansion, of course, never ends.

2. In the Courts

Thus it went for some 150 years, with discussion of principle gradually yielding to discussion of policy. But again, it is important to note how much of the discussion took place in the political branches. Not that the Supreme Court played no part at all; rather, its part was smaller than we might imagine today, largely because things less frequently got to the Court. The ambitions of Congress grew only slowly, and were often checked in that branch. Then when bills did get out of Congress, the executive branch was there to check them. What part the early Court did play, especially under Chief Justice Marshall, was largely one of securing its jurisdiction[77] and ensuring the authority of the federal government over that of the states[78]—although again, in a rather limited way by today's standards.

At the same time, it needs to be said that when the nineteenth-century Court was presented with claims not simply about powers but about rights as well, it was not always solicitous of the individual confronted by an assertion of public power. Just after the Civil War, for example, the Court considered a challenge brought by a number of New Orleans butchers to a Louisiana statute chartering a private slaughterhouse corporation as a mo-

75 *Id.* at 2573 (statement of Senator John D. Works of California).

76 Act to Provide for the Promotion of Vocational Education; To Provide for Cooperation with the States in the Promotion of such Education in Agriculture and the Trades and Industries; To Provide for Cooperation with the States in the Preparation of Teachers of Vocational Subjects; And to Appropriate Money and Regulate its Expenditure, ch. 114, 39 Stat. 929 (1917).

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

78 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 327 (1819) ("The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, any thing in the laws of any State to the contrary notwithstanding.").

nopoly within an 1,150-square-mile area.[79] The complaining butchers claimed that the effect of the statute was to prevent them from practicing their trade in the district and hence, among other things, to deny them their privileges and immunities contrary to the guarantees of the recently passed Fourteenth Amendment:[80] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[81] As noted earlier, the debate surrounding the adoption of the Fourteenth Amendment had made it clear that the right to pursue one's livelihood unfettered by such interference as the Louisiana statute interposed was at the core of those privileges and immunities that Blackstone had located in our "natural liberties."[82] Nevertheless, by a vote of five to four, a sharply divided Court found for the state, effectively removing the clause from the Constitution.[83]

As a harbinger of the Court's future jurisprudence, however, one line in the majority opinion in *Slaughter-House* stands out: "[S]uch a construction [as plaintiffs urge] . . . would constitute this court a perpetual censor upon all legislation of the States, on

79 Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

80 *Id.* at 51-55. The butchers argued that "[the Fourteenth Amendment] assumes that there were privileges and immunities that belong to an American citizen, and the State is commanded neither to make nor to enforce any law that will abridge them." *Id.* at 55.

81 U.S. CONST. amend. XIV, § 1.

82 *See supra* note 19 and accompanying text.

83 *Slaughter-House*, 83 U.S. (16 Wall.) at 82. The Court argued that the Privileges and Immunities Clause was not intended to protect the privileges and immunities of the citizens of the individual states, but only those of the citizens of the United States:

> Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

Id. at 74.

The dissent, arguing that the pursuit of one's livelihood was a fundamental right to which the Privileges and Immunities Clause extended, stated:

> And it is to me a matter of profound regret that [the statute's] validity is recognized by a majority of this court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated . . . . That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws.

Id. at 110-11 (Bradley, J., dissenting).

the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights . . . ."[84] Indeed, such a role, at least with respect to the federal government (prior to the Civil War Amendments), is precisely what Madison had in mind when he characterized the Court as the "bulwark of our liberties."[85] Its job is to stand astride the political branches, ensuring that their acts both proceed from authority granted them and are consistent with rights restraining them, failing either of which those acts must be found unconstitutional. If the Court cannot or will not be a "perpetual censor," it has no business engaging in judicial review because it has no business existing.

That single sentence, however, speaks volumes about the majority's misunderstanding of the Court's function, a misunderstanding that would emerge full-blown from the New Deal Court. The choice of the deprecating word "censor," for example, suggests a failure to appreciate how limited, yet crucial, the Court's power is. To be sure, it has the power to negate—to give the censor's "no." But the power to "nullify" is not the power to "(dis)approve" insofar as "approve" suggests a power to make value judgments. Rather, as the sentence continues, it is a power to decide merely whether the legislation is or is not "consistent" with the civil rights of citizens.[86] To do that, however, the Court must know what those civil rights are. And here, the ambiguity of the majority's formulation comes to the fore. For either the legislation is "on" the civil rights of the citizens, declaring in positive law just what those rights are, in which case it could never be inconsistent with "those rights" (unless the positive law were internally inconsistent). Or else the legislation is declaratory of the citizens' rights, but the rights it declares have some *independent* basis such that the legislation might "get it wrong" in its declarations, in which case "those rights" might indeed be inconsistent with the rights declared by the legislature.

Clearly, it was the latter scenario that the Founders, and the authors of the Fourteenth Amendment, had in mind when they derived our positive law from higher law—and especially when they spoke in the Ninth Amendment of retained rights. Subsequent legislators (or even courts) might get it wrong when they

84 *Id.* at 78.

85 1 Annals of Cong. 439 (1789) ("[I]ndependent tribunals of justice will consider themselves . . . the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive.")

86 *Slaughter-House*, 83 U.S. (16 Wall.) at 78.

set about declaring the law: they might declare that a right existed when in fact, by higher law standards, it did not; or they might authorize a power, as here, the effect of which was to extinguish a right that, by higher law standards, did exist. To determine those kinds of questions, however, the Court would have to know and understand the higher law. And that, precisely, is what the *Slaughter-House* majority refused to undertake, despite the impassioned yet reasoned example of the minority, arguing from "the natural and inalienable rights which belong to all citizens."[87]

During the early years of the Republic, courts had not been nearly as reluctant as the *Slaughter-House* majority was to proceed from first principles. Over our first thirty years, in fact, the Court turned often to both written and higher law to reach its decisions.[88] After that, however, the decline of natural law and the rise of alternative rationales undoubtedly took their toll on the judiciary,[89] the only branch that must justify its decisions in written opinions that are subject to the scrutiny of the world. As time went on, those opinions were grounded increasingly within the "four corners" of the written text, making little if any reference to the higher law that stands behind that text. The advantage of doing things that way, of course, is a certain intellectual security and objectivity: the Court can always point to the explicit language on which it grounds its opinion. That advantage can be deceptive, however, particularly if what emerges is a less than complete and hence misleading reading of the text, especially in its broad passages. In fact, the result too often is a narrow, clause-bound jurisprudence, reflecting nothing so much as the lack of an overarching, integrated theory of rights that gives content and order to the Constitution's broad language. Lacking such a theory, it is no surprise that the *Slaughter-House* majority could find in the text no right of the plaintiffs to ply their trade free from the monopoly restriction the state had created.

Notwithstanding the shortcomings of the *Slaughter-House* majority's narrow constitutional positivism, that approach has dominated our Supreme Court jurisprudence ever since, with selective exceptions during two periods—in the early decades of the twentieth century and during the Warren and Burger Courts more re-

87 *Id.* at 96 (Field, J., dissenting).

88 *See* Suzanna Sherry, *The Founder's Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1167 (1987).

89 *Id.* at 1176.

cently.[90] To understand how this jurisprudence and these jurisprudential shifts have affected the growth of government, it is useful to distinguish two constitutional avenues along which that growth has progressed. On one hand, an accelerating accretion of government programs instituted under a "general welfare" rationale—although usually not proceeding explicitly under that constitutional provision—has resulted in what today are massive transfers from taxpayers to individual recipients, as discussed above.[91] On the other hand, countless programs today attempt to accomplish the same welfare ends not by redistributing funds through the Treasury but by enacting regulations aimed at compelling private individuals and organizations to act in ways that are thought to be beneficial to other private individuals and organizations. The power of Congress to regulate commerce under the Commerce Clause of the Constitution is usually the rationale for this second set of programs,[92] which today are ubiquitous. The question arises, however: how could either of those two kinds of programs have been found to be constitutional under a Constitution that was designed to limit government to securing individual liberty?

3. The General Welfare Clause

As discussed earlier, wealth transfers that involve redistribution through the Treasury arose slowly, in the face of political opposition grounded in constitutional principle, and, in the end, without clear constitutional authority.[93] Although the General Welfare Clause of Article I, section 8, was the implicit, and sometimes the explicit, rationale for such programs, it was often not invoked by proponents who felt themselves constrained to some extent by Madison's interpretation of the clause: after all, why would powers have been enumerated if Congress could, under the General Welfare Clause, spend on virtually any project it deemed to be for the general welfare?[94] Thus, congressional spending during the nineteenth century often began under an enumerated power but then expanded to be, in effect, a general welfare expenditure. Sales of land under the Territorial Power Clause, for example, evolved into gifts of land for agricultural colleges,[95] then into gifts of proceeds from the sale of land,[96] and finally into gifts from the Treasury generally.[97] Similarly, with two early and small exceptions, not until 1867 were gifts of money to private citizens made, and these were justified chiefly under the war powers.[98] In 1874, however, gifts to flood sufferers were given under a theory of general wel-

90 For a defense of that narrow, clause-bound jurisprudence, see ROBERT H. BORK, THE TEMPTING OF AMERICA (1990). For a critical review, see Roger Pilon, *Constitutional Visions*, REASON, Dec. 1990, at 39.

91 *See generally* WARREN, *supra* note 62.

92 For a critical examination of the growth of the commerce power, see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

93 *See supra* notes 56-75 and accompanying text.

94 Madison wrote:

> Money cannot be applied to the General Welfare, otherwise than by an application of it to some *particular* measure conducive to the General Welfare. Whenever, therefore, money has been raised by the General Authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made.

James Madison, Report on Resolutions, *in* 6 WRITINGS OF JAMES MADISON, *supra* note 11, at 357; *see also* Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), *in* 10 WRITINGS OF THOMAS JEFFERSON at 90, 91 (Paul Leicester Ford ed., 1899):

> [O]ur tenet ever was, and, indeed, it is almost the only landmark which now divides the federalists from the republicans, that Congress has not unlimited powers to provide for the general welfare, but were to those specifically enumerated; and that, as it was never meant they should raise money for purposes which the enumeration did not place under their action; consequently, that the specification of powers is a limitation of the purposes for which they may raise money.

South Carolina's William Drayton echoed this stance in 1828:

> If Congress can determine what constitutes the General Welfare and can appropriate money for its advancement, where is the limitation to carrying into execution whatever can be effected by money? How few objects are there which money cannot accomplish! . . . What are the consequences? Congress can pass no law for the general advancement of religion, of learning, and of charity, wherever these laws are so framed as that they cannot be executed through the instrumentality of money, but Congress may pass laws for the erection and endowment of churches, colleges, and hospitals, because they could be carried into execution by the appropriation of money. Can it be conceived that the great and wise men who devised our Constitution . . . should have failed so egregiously . . as to grant a power which rendered restriction upon power practically unavailing?

4 CONG. DEB. 1632-34 (1828).

95 *See* Act Donating Public Lands to the Several States and Territories which may Provide Colleges for the Benefit of Agriculture and the Mechanic Arts, ch. 130, 12 Stat. 503 (1826) (codified as amended at 7 U.S.C. § 301 (1988)).

96 *See* Act to Amend and Act Donating Public Lands to the Several States and Territories which may Provide Colleges for the Benefit of Agriculture and the Mechanic Arts, ch. 102, 22 Stat. 484 (1883) (codified as amended at 7 U.S.C. § 304 (1988)).

97 WARREN, *supra* note 62, at 74-75.

98 *Id.* at 75-78 (citing Joint Resolution of March 30, 1867, 15 Stat. 28, which donated $50,000 to provide seed for southern and southwestern states after widespread crop failure).

fare, a precedent that was repeated seven times over the next thirty years.[99]

Thus, by small steps Congress moved from clear, to less clear, to no authority, creating limited programs that served later as precedents for more expansive programs. Background developments were not irrelevant to this evolution. Indeed, our changing conception of government only encouraged the process. Thus, as precedents accumulated, not only were constitutional questions replaced by policy questions but the idea of government as the engine of progress took on a life of its own.

What was especially distressing for constitutionalists, however, was the absence of any secure ground on which to raise a challenge, particularly after the Supreme Court decided in 1923 that neither citizens nor states had standing to sue to enjoin the Secretary of the Treasury from making such expenditures. Echoing the *Slaughter-House* majority, the Court in that case, *Frothingham v. Mellon*,[100] refused "to assume a position of authority over the governmental acts of another and co-equal department,"[101] leading Attorney General William D. Mitchell to observe in a 1931 speech to the American Bar Association that "no one has yet been able to devise a method" by which the constitutional validity of appropriations of the national funds may be presented for judicial decisions.[102]

Nevertheless, in 1937, in *Helvering v. Davis*,[103] a challenge based on the General Welfare Clause was presented against the New Deal's Social Security Act.[104] In that case, however, not only did the Court's majority follow a decision handed down a year earlier that had rejected Madison's understanding of the clause,[105] but in repeating its recent finding that the clause did serve as an independent source of power for Congress to tax and spend—thereby gutting the doctrine of enumerated powers—the majority went on to say that the Court would not itself get into the question of whether a given exercise of that power was for the

99 Act for the Relief of Persons Suffering from the Overflow of the Lower Mississippi River, ch. 125, 18 Stat. 34 (1874).
100 262 U.S. 447 (1923).
101 *Id.* at 489.
102 William D. Mitchell, *The Abdication by the States of Powers under the Constitution*, 17 A.B.A. J. 811, 811 (1931).
103 301 U.S. 619 (1937).
104 Ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301-1397f (1988 & Supp. II 1990)).
105 United States v. Butler, 297 U.S. 1, 65-66 (1936); *see supra* note 94.

general or for a particular welfare.[106] Shades again of *Slaughter-House*, with the Court deferring to the political branches. And with that, the Progressive Era's stream of welfare programs, especially under Presidents Roosevelt and Wilson, became a New Deal river.

4. The Commerce Clause

If attempts to restrain the growth of welfare transfers failed, attempts to restrain the growth of regulatory transfers fared no better. Here, however, the opportunity to litigate was greater since these transfers took place not through the power of Congress to tax but through its power to regulate. The regulations that today bestow benefits on some by regulating others—in areas ranging from transportation to manufacturing, employment, housing, discrimination, and on and on—constitute restrictions on the liberties of those others. Because they do, they can be challenged in the courts.

Once again, however, we have to determine first the source of whatever power Congress may claim, then examine the implications for individual rights. Unlike the welfare programs, these schemes purport to be based on an independent source of power. The Commerce Clause, unlike the General Welfare Clause, sets forth one of the enumerated powers of Congress, giving that branch the power "to regulate Commerce . . . among the several States."[107] On its face, the power would appear to be plenary, save for its limitation to "commerce," not other activities, and to commerce "among" the states, not within them. Unfortunately, both those limits are gone today, and the power is indeed all but plenary. Accordingly, we need to begin at the beginning, by placing the power in its historical setting.

There can be little doubt about the principal purpose of the Commerce Clause. Under the Articles of Confederation, state legislatures had become dens of special-interest legislation aimed at protecting local manufacturers and sellers from out-of-state

106 *Helvering*, 301 U.S. at 640. Thus, the Court refused to give operational force even to Alexander Hamilton's broader reading of the clause, which emphasized the restraint imposed by "general:" "The constitutional test of a right application [of the General Welfare Clause] must always be, whether it be for a purpose of *general* or *local* nature." Letter from Alexander Hamilton to George Washington (Feb. 23, 1791), *in* 3 THE WORKS OF ALEXANDER HAMILTON 445, 485 (Henry Cabot Lodge ed., 1903). Hamilton's relatively broader view is inconsistent, of course, with the general theory of enumerated powers. *See supra* note 94.
107 U.S. CONST. art 1. § 8, cl. 3.

competitors.[108] The result was a tangle of state-by-state tariffs and regulations that impeded the free flow of commerce among the states, to the detriment of all. Only a national government could break the logjam. Indeed, the need to do so was one of the principal reasons behind the call for a new constitution.

The Commerce Clause was aimed, then, at giving *Congress*, rather than the states, the power to regulate commerce among the states. Its purpose was thus not so much to convey a power "to regulate"—in the affirmative sense in which we use that term today—as a power "to make regular" the commerce that might take place among the states.[109] And in fact the so-called negative or dormant commerce power, which restricts states from intruding on federal authority over interstate commerce even when there has been no federal legislation in a given area, operates largely in that way.[110]

At bottom, then, the Commerce Clause was intended to enable Congress to break down state barriers, to prevent states from restricting the free flow of commerce among themselves. What has happened in litigation over the years, however, is not unlike what has happened with the Tenth Amendment. There, the principal purpose was to make clear that ours was a government of enumerated powers, the balance of power being "reserved to the states . . . or to the people."[111] Ignoring those final four words, the discussion, not unlike that over the Commerce Clause, has focused not on the substantive question—how freedom might be secured—but on the jurisdictional question—who should control, the federal or the state government. The assumption that one or the other government must control commerce goes all but unchallenged.

Yet once we think of the Commerce Clause as conferring not only a negative but an affirmative power to regulate, questions

108 *See* ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 109 (4th ed. 1970); FREDERICK DUMONT SMITH, THE CONSTITUTION: ITS STORY AND BATTLES 184-89 (1926).

109 *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1125 (1986).

110 *See* Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 570; William C. Waller, Comment, *The Dormant Commerce Clause and the Interstate Shipment of Waste:* Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources, 16 HARV. J.L. & PUB. POL'Y 294 (1993).

111 U.S. CONST. amend. X.

about how to limit the power come immediately to the fore. And noting that the power to regulate interstate commerce is one of Congress' enumerated powers only highlights the problem. For if that power becomes all but boundless, as it has, the doctrine of enumerated powers becomes an empty promise.

To see how that has happened, and how regulatory programs have grown over the years, we need to consider the issues in the abstract for a moment. More precisely, we need to analyze the relation between the purpose of the commerce power and its terms. Again, those terms limit Congress to regulating "commerce," not other activities, and commerce "among" the states, not within them. When Congress is further restrained by the original purpose of the clause, a four-part test emerges: To be justified under the Commerce Clause, a regulation must (1) facilitate the free flow of (2) interstate (3) commerce (4) without violating the rights of any party. Conditions 2 and 3 are those of the clause, of course. Conditions 1 and 4 stem from the purpose of the clause: When interstate commerce is free from governmentally imposed restraint, private parties are at liberty to make whatever agreements they wish, limited only by the common law. Thus, any regulation that facilitates the "free" flow of interstate commerce by restricting the rights of some in order to give benefits to others would not pass the test. That is not free but managed trade—trade managed for some other end.

Limited then to its original negative purpose, the commerce power is largely unproblematic because it functions only to prohibit state regulations that restrict the free flow of interstate commerce. To be sure, there could be too much federal prohibition. But the test would be whether the state regulation prohibited by the federal power does in fact restrict the free flow of interstate commerce. Similarly, an affirmative commerce power that executed certain police power functions would be unproblematic if it met the four-part test. Thus, a regulation that clarified rights in uncertain contexts or another that controlled the interstate shipment of dangerous goods would present no problems—provided, of course, that the police power specifications of such regulations were consistent with the underlying theory of rights.

What happens, however, if conditions 1 and 4 are eliminated? What happens, that is, if the commerce power is no longer restrained by its original purpose but by its two limiting terms alone? Can those terms bear the entire burden? Worse still, what happens if purposes other than the original purpose start driving

the interpretation of the clause? Suppose, for example, that we stop thinking of the clause as intended to facilitate the free flow of interstate commerce by ensuring economic liberty and start thinking of it instead as an instrument through which to pursue various social goals? That would open up a whole new set of possibilities for men and women of public vision, against whom parchment barriers alone, especially in the hands of a clause-bound Court, would provide little resistance.

Indeed, consider very briefly the expansion of the commerce power over railroads. Like so many other areas, the railroad cases are complicated by early government subsidies that encouraged patterns of development that probably never would have arisen from market forces alone.[112] Thus arose local railroad monopolies, which encouraged farmers and other shippers to demand and get state regulation of railroad rates.[113] Such regulation reaches far beyond a state's police power, of course, and should have been actionable as such; but it is hard to gainsay such controls where government subsidies created the monopoly in the first place (again demonstrating how one intrusion in the market leads to still others). When different states imposed inconsistent rates on the same interstate carriers, however, suit was brought. In 1886, in *Wabash, St. Louis & Pacific Railway v. Illinois*,[114] the Supreme Court held that only the federal government could regulate interstate railroad rates.[115] The following year the Interstate Commerce Act[116] was passed and so the federal government was now in the rate-making business—a quantum leap beyond making commerce "regular" among the states by removing state barriers.

The Supreme Court never questioned this rate-making function, of course, or tried to square it with the original purpose of the Commerce Clause. Its concern rather was jurisdictional—whether Congress or the states should set rates. Clearly, rate-making was within the *terms* of the Commerce Clause: It was "commerce" that was being regulated, not other activity, and commerce "among" the states, not within them. But just as clearly, this

112 *See* HARRY C. BARNES, INTERSTATE TRANSPORTATION: A TREATISE ON THE FEDERAL REGULATION OF INTERSTATE TRANSPORTATION AND COMMON CARRIERS 6-7 (1910); *see also* GABRIEL KOLKO, RAILROADS AND REGULATION (1965).

113 *See* TOSHUA BERNHARDT, THE INTERSTATE COMMERCE COMMISSION 3-5 (1923).

114 118 U.S. 557 (1886).

115 *Id.* at 577.

116 Ch. 104, 24 Stat. 379 (1887).

was an expansion of the commerce power well beyond its original purpose.

The expansion did not end there—and that is the lesson to be learned from the railroad cases, so difficult to gainsay in themselves—for once in the rate-making business, the Interstate Commerce Commission found reason to extend its reach. Thus, the line between interstate and intrastate regulation was breached in 1914 in the *Shreveport Rate Case*[117] when the Court found that Congress could extend "its control over the interstate carrier in all matters having . . . a close and substantial relation to interstate commerce"[118]—this to prevent discriminatory interstate/intrastate rates, yet another displacement of the original purpose of the Commerce Clause. And eight years later, in *Wisconsin Railroad Commission v. Chicago, Burlington & Quincy Railroad*,[119] the Court upheld the Transportation Act of 1920,[120] which replaced specific with comprehensive railroad regulation, helping to cartelize the industry by imposing comprehensive rate-of-return regulation. Thus, a constitutional clause aimed at facilitating the competition that arises from the free flow of commerce ended up being used to suppress competition. The new attitude was perhaps best captured by the *Chicago, Burlington* Court: "Congress in its control of its [sic] interstate commerce system is seeking . . . to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does."[121] Thus did "our" system become socialized. In effect, railroads were no longer private businesses but instruments of public policy.

But if the reach of the commerce power was expanding, so too, of course, were the rights of individuals receding. Thus, the Sherman Antitrust Act of 1890,[122] also passed under the commerce power, prohibited private parties from entering into contracts in restraint of trade. Shortly thereafter, the United States brought suit against the Joint Traffic Association, a combination of most, but not all, of the railroads that operated between Chicago and the Atlantic coast, charging that those companies had entered into a cooperative agreement with each other that was aimed at

117 Houston, E. and W. Texas Ry. v. United States, 234 U.S. 342 (1914).

118 *Id.* at 355.

119 257 U.S. 563 (1922).

120 Ch. 91, § 422, 41 Stat. 456, 488 (1920).

121 *Chicago, Burlington*, 257 U.S. at 589.

122 Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-36 (1988 & Supp. II 1990)).

shutting out competition.[123] No longer having a Privileges and Immunities Clause on which to rely—for the *Slaughter-House* Court's narrow reading of the clause (against the states) might now be used in reading the version that was in the Constitution itself—the defendants invoked their Fifth Amendment right to freedom of contract, but to no avail.[124] For the Court found that Congress had the power to pursue a policy of promoting economic competition,[125] the rights of contract notwithstanding. And failing to distinguish between private and public arrangements, it held that a private agreement did in fact prevent competition.[126] It is no small irony that twenty-four years later, when it upheld the Transportation Act of 1920, the Court would approve a public arrangement that truly did prevent competition in the railroad industry—by force of law.

5. The Decline of the Court

Notwithstanding its opinion in *Joint Traffic*, the late nineteenth-century Court was in the beginning of its "Lochner" era, so called for the Court's 1905 decision in *Lochner v. New York*,[127] upholding the challenge of a New York baker, on freedom of contract grounds, to a New York State statute limiting the hours that bakers might contract to work.[128] Over a series of cases, the Progressive Era Court withstood a number of efforts to gut the Constitution's economic guarantees in the name of public policy. But the opinions were uneven and never deeply grounded. It is as if the Court were searching for its place in a world that was moving inexorably toward public policy on all matters previously thought to be private.

The crisis came during the Depression, of course, when the political branches, driven by the mandates of 1932 and, especially, 1936, undertook the reordering of our political arrangements not by amending the Constitution but by ignoring it.[129] President Roosevelt's July 1935 letter to the House Ways and Means Committee speaks volumes: "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the

123 United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).
124 *Id.* at 559, 566-69.
125 *Id.* at 573.
126 *Id.* at 570.
127 198 U.S. 45 (1905).
128 *Id.* at 64.
129 *See supra* note 36.

suggested legislation."[130] When for a while the Court resisted the legislative avalanche,[131] Roosevelt early in his second term tried to pack its ranks with six additional members.[132] The ploy backfired on the surface, but the Court got the message, stepped aside, and let the modern era begin. With the Court's 1938 decision in *United States v. Carolene Products Co.*,[133] the foundations for our modern jurisprudence were laid. Thereafter the Court would essentially defer to the political branches in all matters pertaining to economic transfers and regulation. Only when "fundamental" rights were at stake would the Court's scrutiny be heightened.[134]

Thus freed from constitutional restraints, the political branches began to respond to all manner of interests, both general and special. Not surprisingly, the interests those interests pursued through public channels grew increasingly short term, and increasingly in conflict with one another.[135] Government, after all, is in most respects a zero-sum game (after administrative costs, the sum is negative); one man's gain is another man's loss. But the powers that prosper by the game have grown skilled at packaging it otherwise, at telling us that we can accomplish great things through government. And so, measure by measure, the war of all against all has expanded until the battles can no longer be ignored. Our

130 Letter from Franklin D. Roosevelt to Representative Samuel B. Hill (July 6, 1935), *in* 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 91, 92 (Samuel I. Rosenman ed., 1938).
131 *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating the Bituminous Coal Act of 1935); United States v. Butler, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) (invalidating the Frazier-Lemke Act); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935) (invalidating the Railroad Retirement Pension Act); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding the National Industrial Recovery Act ("NIRA") unconstitutional); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (invalidating the "hot oil" provisions of NIRA). For a general discussion of the Court's resistance to New Deal legislation, see ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 487-94 (1983); *see also* MERLO J. PUSSEY, THE SUPREME COURT CRISIS (1937).
132 *See* KELLY, *supra* note 131, at 494-500; *see also* PUSSEY, *supra* note 131.
133 304 U.S. 144 (1938).
134 *Id.* at 152 n.4. I have discussed the Court's *Carolene Products* jurisprudence more fully in Roger Pilon, *On the Foundations of Economic Liberty*, CATO POL'Y REP., July-Aug. 1989, at 6; and Roger Pilon, *Economic Liberty, the Constitution, and the Higher Law*, 11 GEO. MASON U. L. REV. 27 (1988); *see also* Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397.
135 *See generally* JAMES D. GWARTNEY & RICHARD E. WAGNER, PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS (1988).

flight from individual responsibility by now is well advanced. Yet we are powerless to change the reality that makes the flight so futile. Government will not, because it cannot, solve our problems. Our biggest problem today is our reluctance to recognize that.[136]

III. Recovering Our Principles

This brief review of the forces that have brought us from the vision of the founding generation to where we are today concludes with the jurisprudence of the New Deal because with that, quite simply, the constitutional game was over. Building slowly since the Civil War, the core idea of the new policy sciences, that government could and should be responsible for a wide range of "social" problems, came to the fore in the Progressive Era. Those used to thinking of liberalism as progressivism may find it sobering to reflect that in 1900, as the Progressive Era was getting under way, the editors of the *Nation* could observe in a piece lamenting the eclipse of liberalism that "[t]he Declaration of Independence no longer arouses enthusiasm; it is an embarrassing instrument which requires to be explained away."[137] With so fundamental a change in the climate of ideas, it remained only to institutionalize that change. After episodic resistance, the New Deal Court accomplished that at last—with alacrity on the part of some of its members, with reservations from others, who felt, rightly or wrongly, that they could no longer resist the political juggernaut. And so in 1938 the revolution was completed by the Court, the Constitution itself having changed by not a word.

A. *Constitutional Jurisprudence Today*

There has followed a jurisprudence that is all but inscrutable to the average American. Never mind that the *Carolene Products* case from which it flows involved a piece of blatant special-interest legislation,[138] the Court read the case as standing for pure democracy of a kind that it saw no need to review.[139] So it took itself largely out of the reviewing business, thus making the nation safe for democracy, which of course is majoritarianism, which of course is special-interest logrolling (for those willing to notice it).[140] Indeed, the reviewing function the Court reserved for itself

136 *See* Samuelson, *supra* note 1.

137 *Eclipse of Liberalism*, 71 NATION 105 (1900).

138 *Carolene Products*, 304 U.S. at 145-46 n.1.

139 *Id.* at 153-54; *see also* Miller, *supra* note 134.

140 *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGI-

would be concentrated thereafter not on ensuring freedom but on enhancing the democratic process: viewing the political arena as the essence of our republic, the Court would limit itself largely to ensuring the participation of all in that process.[141] Thus, voting and speech cases would find a receptive ear at the Court.[142] Cases complaining that the political process was restricting economic well-being would not.[143] And all who searched for the roots of this bifurcated jurisprudence in the text of the Constitution would be disappointed, for it was a product, pure and simple, of the vision of the Progressive Era, brought to fruition through the politics of the New Deal.[144]

As time has passed, we have seen this jurisprudence solidify: first, by the accumulation of a massive body of transfer and regulatory programs and, second, by the unwillingness of opponents of those programs to challenge them on constitutional grounds. Today, both liberals and conservatives alike essentially agree with the New Deal shift; their differences relate largely to the decisions that came from the Warren and Burger Courts in the 1960s and 1970s. During that period of "judicial activism," a "liberal" Court enlarged on the *Carolene Products* formula when it started resisting those outcomes of the political process that conflicted with "fundamental" rights[145] the Court was finding in the "penumbras" of the Constitution[146]—consulting not the classic theory of rights in

CAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); William Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432 (1980).

141 *See, e.g.*, Rogers v. Lodge, 458 U.S. 613 (1982); Williams v. Rhodes, 393 U.S. 23 (1968); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

142 For cases supporting an individual's voting rights, see generally Dunn v. Blumstein, 405 U.S. 330 (1972); Katzenbach v. Morgan, 384 U.S. 641 (1966); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Gray v. Sanders, 372 U.S. 368 (1963); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

For cases involving speech as it relates to the political process, see generally Buckley v. Valeo, 424 U.S. 1 (1976); Hess v. Indiana, 414 U.S. 105 (1973); Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367 (1968).

143 *See generally* Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

144 *See* EKIRCH, *supra* note 51.

145 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973) (expanding the doctrine of "fundamental rights").

146 Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (discussing the "penumbras" that emanate from the Bill of Rights).

this, as America's early courts had done, but "evolving social values."[147] Conservatives complained that it was curious that those values just happened to coincide with the values of America's emerging liberal elite.[148] Still, the differences between the two camps were confined largely to this relatively limited area of the Court's jurisdiction—liberals wanting the Court to frustrate majoritarian preferences in such areas as abortion, school prayer, the death penalty, and the rights of criminal suspects; conservatives wanting the Court to step aside and let majorities rule. In neither case has there been a serious challenge to the fundamental finding of the New Deal Court, that the political branches have far-reaching powers to regulate our lives, especially in the economic arena.[149]

Yet for all that, the nagging doubt that the New Deal Court got it seriously wrong remains—indeed, grows—as the scope of government expands. Consider, for example, the expansion of government's control over property owners, who today are all but unable to move without official permission.[150] The rights of property owners should not be difficult to determine: after all, the Fifth Amendment states plainly that private property shall not be taken for public use without just compensation.[151] In a given case, all a court has to determine is (1) whether a government action takes property for public use (by implication, there is no power to take for private use); (2) if so, whether the act is justified under the police power, which enables government to prevent people from using their property in ways that injure others; and (3) if not, whether just compensation has been paid.[152] Government is not prohibited by the Takings Clause from taking private property; it simply has to pay for the property it takes rather than

147 *See generally* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990) (discussing Scalia's opposition to the use of "evolving social values").

148 *See* BORK, *supra* note 90.

149 *See generally* ECONOMIC LIBERTIES AND THE JUDICIARY, *supra* note 15; STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION (1987); Roger Pilon, *On the Foundations of Justice*, INTERCOLLEGIATE REV., Fall-Winter 1981, at 3.

150 *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Pilon, *Property Rights*, supra note 11.

151 U.S. CONST. amend. V.

152 *See generally* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (evaluating what constitutes "public use"); United States v. 564.54 Acres of Land, 441 U.S. 506 (1979) (determining the measurement of "just compensation"); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (discussing the relationship between the police power and eminent domain). For a trenchant critique of the Court's takings jurisprudence, see Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1.

leave the costs of public policy to be borne by the individual property owner.

Naturally, the compensation requirement puts a crimp on the expansion of public policy: that, together with a concern for justice, is why the Founders put it in the Constitution. Not surprisingly, therefore, governments anxious to expand their power at no cost to the public have sought both to narrow the definition of "property" and to expand the scope of the police power—and over time the courts have acquiesced. Thus, in 1921, in *Block v. Hirsh*,[153] the Supreme Court was faced with a challenge to a wartime rent-control statute—a classic regulatory transfer, which keeps rents low for tenants by taking the rights of owners to charge market rates for their rental units.[154] Finding that "public exigency" outweighed any such property right, the Court ruled the controls constitutional.[155]

After seventy-one years and countless regulations, covering everything from zoning[156] to historic landmark preservation[157] to comprehensive land-use planning,[158] the Court revisited the takings issue in its last term in *Lucas v. South Carolina Coastal Council*.[159] The facts of the case were simple: the South Carolina legislature had passed a statute, aimed at providing a set of public goods ranging from scenic preservation to tourism to wildlife habitat, the effect of which was to deny Mr. Lucas his right to develop his property.[160] For a court willing to return to first principles, the case should have been easy. Since the uses denied Mr. Lucas in no way threatened others, the statute could not be justified under the police power; thus, as a taking requiring compensation, it remained only to determine the difference in the values of the

153 256 U.S. 135 (1921).

154 *Id.* at 153-54. *See generally* WILLIAM TUCKER, ZONING, RENT CONTROL, AND AFFORDABLE HOUSING (1991).

155 *Block*, 256 U.S. at 156.

156 *See, e.g.*, Yee v. City of Escondido, 112 S. Ct. 1522 (1992); City of Cleburne v. Cleburne Living Center, Inc. 473 U.S. 432 (1985); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

157 *See, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

158 *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

159 112 S. Ct. 2886 (1992); *see* Roger Pilon, *Property and Constitutional Principles*, WALL ST. J., Feb. 28, 1992, at A14.

160 *Lucas*, 112 S.Ct. at 2889-90.

land before and after the statute was enacted and to order the difference paid to Mr. Lucas.

Unfortunately, the Court was unprepared to reach so principled a solution. Instead, Justice Antonin Scalia, writing for the Court's majority, took note of the Court's "70-odd years" of regulatory takings jurisprudence in which "we have generally eschewed any 'set formula,' . . . preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.'"[161] Rather than jettison that jurisprudence, which Justice John Paul Stevens once called "open-ended and standardless,"[162] Scalia tried instead to draw upon it. Thus, he distinguished cases in which regulations deny "all economically beneficial or productive use of land"[163] from cases in which regulations leave some uses to the owner, noting that plaintiffs in the latter kinds of cases would not necessarily, even ordinarily, get relief.[164] Since Mr. Lucas' loss was nearly total, he should get relief on remand, Scalia concluded.[165] As for the millions of other Americans who suffer less than total losses at the hands of federal, state, and local regulators, "[t]akings law is full of these 'all-or-nothing' situations."[166] Indeed, failing completely to distinguish takings of rights from diminutions of value,[167] Scalia stretched for the Progressive Era rationale that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[168]

B. *Ideas Have Consequences*

Deference to government is thus by now deeply entrenched in a body of precedents—by no means economic precedents alone—that the Court appears quite unwilling to revisit, however constitutionally unwarranted they may be. In fact, then-Judge Scalia said as much in 1984 in a Cato Institute debate with Richard Epstein on the subject of judicial protection for economic liberty, although he grounded his unwillingness not simply on his

161 *Id.* at 2893 (citing Penn Central Transp. Co. v. New York City, 260 U.S. 393, 413 (1978)).
162 *First English*, 482 U.S. at 340 n.17.
163 *Lucas*, 112 S. Ct. at 2893.
164 *Id.* at 2892-93.
165 *Id.* at 2901-02.
166 *Id.* at 2895 n.8.
167 *See id.*
168 *Id.* at 2894 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

view that "the position the Supreme Court has arrived at [in rejecting substantive due process in the economic field] is good"[169]—about which he said nothing further as a matter of constitutional law—but primarily on misgivings about whether "activist" courts would do their job well.[170] On one hand courts might extend their activism beyond the economic arena, which deeply concerns Scalia; on the other hand they might find economic "rights" that are quite without foundation.[171] Those are not idle concerns, to be sure, but as Epstein observed in response, constitutional responsibility aside, they are no reason to defer to the political branches, where the risks of failure are at least as great.[172]

Judge Scalia went deeper in that debate, however, to observe that "a guarantee may appear in the words of the Constitution, but when the society ceases to possess an abiding belief in it, it has no living effect . . . . Even *Brown v. Board of Education*," he continued, "was only an elaboration of the consequences of the nation's deep belief in the equality of all persons before the law."[173] Because he could detect no "national commitment to most of the economic liberties generally discussed that would enable even an activist court to constitutionalize them," Judge Scalia concluded that to seek to develop that sentiment "by enshrining the unacceptable principles in the Constitution is to place the cart before the horse."[174] Thus, "the first step" is to recall society to that belief in the importance in economic liberty that the Founders shared—to create "a constitutional ethos of economic liberty."[175]

Setting aside Justice Scalia's larger point for the moment, "the economic liberties generally discussed" do not have to be "constitutionalized"—much less by an "activist" Court. They are *already in* the Constitution. They need simply to be recognized and enforced by a "responsible" Court—a Court responsible to the Constitution its members swear to uphold. That is not judicial

169 Antonin Scalia, *Economic Affairs as Human Affairs*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY, *supra* note 15, at 31, 33-34.
170 *Id.* at 35-36.
171 *Id.*
172 Richard A Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY, *supra* note 15, at 40.
173 Scalia, *supra* note 169, at 36-37.
174 *Id.* at 37.
175 *Id.*

activism. It is judicial responsibility. Moreover, it requires no "national commitment" for the Court to uphold the Constitution. Indeed, it took federal troops to enforce *Brown v. Board of Education*.[176] And more recently, when the Court decided in *United States v. Eichman*[177] that flag-burning was constitutional—a decision in which Justice Scalia himself concurred—there was hardly a national commitment behind that decision. No, the point of having a Court, as Madison said, is to have an institution that can serve as "the bulwark of our liberties."[178] To be such a bulwark, however, the Court must have both convictions and the courage of those convictions. Today, both are lacking. The climate of ideas has sapped the convictions that give life to the bare text of the Constitution. And when those convictions fail, courage goes with them.

Justice Scalia's larger point, then, that there is a deep connection between the climate of ideas and the capacity of the Court, cannot be ignored. The Court must do its job, to be sure, but it does not work in an intellectual vacuum. For too long, the climate of ideas in America has been molded by people and institutions that in many respects are profoundly out of step with our founding principles, principles that today are taking root in many other parts of the world.[179] Perhaps it is because those others have known personally the tragedy that befalls a people when it follows the path of public policy to its end that wisdom has at last set in. One would hope that in America we will not have to learn that lesson from experience alone.

And in this, we can take comfort from the fact that our Constitution is still intact, despite the damage we have done to its meaning. And the English language is still essentially what it was when the document was written. What has changed is our confidence in the ideas that stand behind that document and those words. And that is unnecessary and unwarranted. Indeed, much has been done in recent years to give force and foundation, to say nothing of clarity, to the belief of the founding generation in natural law.[180] But even absent that, what else is there but natural law? Only force. Yet to resort to force is to give up all pretense to legitimacy. That is not what either our political leaders or our people do. They all pretend to legitimacy. The job, then, is to get to the real foundations of legitimacy, and those can be found only in a higher law of natural rights.

It is the clarification of these ideas, then, that is the principal business ahead of us. That means showing, for example, that the business of government is doing right, not good, between which there is all the difference in the world. Few would doubt the sincerity of at least many of those who today call for government to do good. What is needed is repeated demonstration of how doing good for some by doing wrong to others is wrong. Yet it is just that wrong that constitutes the stuff of so much of our government today.

And these lessons must be raised in every public forum. Who cannot but be impressed by the *constitutional* arguments that characterized the debates in Congress in the last century? The courts are not the only forum for constitutional debate. Indeed, those arguments deserve to be heard everywhere because they are the arguments that define us as a people. Today, we are out of sympathy with our founding principles. Is it any wonder, when we are out of sympathy with our deepest selves, that there is trouble in the land? The time has come to recover those principles and to take personal responsibility for our lives. Nothing less will do, for nothing less will free us as a people.

176 347 U.S. 483 (1954).

177 496 U.S. 310 (1990).

178 *See supra* note 85.

179 *See generally* ECONOMIC REFORM IN CHINA (James Dorn & Wang Xi eds., 1990); and Symposium, *From Plan to Market: The Post Soviet Challenge*, 11 CATO J. 175 (1991-92).

180 *See supra* note 6; *cf.* JAMES F. HARRIS, AGAINST RELATIVISM: A PHILOSOPHICAL DEFENSE OF METHOD (1992); LOREN LOMASKY, PERSONS, RIGHTS AND THE MORAL COMMUNITY (1987); JAN NARVESON, THE LIBERTARIAN IDEA (1988); DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, LIBERTY AND NATURE: AN ARISTOTELIAN DEFENSE OF LIBERAL ORDER (1991).