

**LAWLESS JUDGING: REFOCUSING THE ISSUE  
FOR CONSERVATIVES\***

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The question for this Federalist Society symposium is “Lawless judging: Do we know it when we see it?” The short answer is “Yes—but only if we’re clear about the law.” And therein, too often, lies the problem, whether the charge of lawless judging comes from the Right or the Left.

No student of the law can doubt that there is lawless judging. There always has been, which is why we have appellate review, even if review sometimes only exacerbates the problem. And no one can doubt either that with the increasing politicization of the law over the course of the 20th century we have seen an increase in lawless judging. Setting aside judicial decisions plainly driven by ideology, that is, our move from reason based common law to will based, value-laden statutory law all but ensures an increase in value-laden judging, which often appears to be lawless, and frequently is.

But if the charge of lawless judging in a given case is true, that is a function, again, of what the law is. Before making such a charge, therefore, we should be clear about the law. Yet all too often those who cry “judicial activism” are not. In fact, their complaint is often rooted more in politics than law—ironically, the very charge they level against the decisions of the judges they criticize.

For many years now the complaint has come primarily from conservatives, long obsessed with what they see as liberal judicial activism, especially when judges overturn popular legislative measures. And there is considerable evidence to support the complaint. More recently, however, it is liberals who have complained about judicial activism, particularly as the

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Rehnquist Court has ruled in areas as diverse as federalism, property rights, and affirmative action.<sup>1</sup>

So what is going on here? Is it all a matter of whose ox is being gored? To some extent it is. But underlying the competing claims there are also profound differences in jurisprudential worldview at play. That is the issue I want to try to bring out, if only in outline. I will do so primarily in the constitutional context, first with respect to federal issues, then state issues. And I will focus mainly on the conservative complaint, not simply because this is a Federalist Society symposium but because, unlike so many modern liberals, conservatives purport to take the Constitution, and the role of judges under it, seriously. They are to be commended for that. But at the same time they need to be sure that they have their law right before they go after the judiciary. The courtroom, after all, is often the only institution that stands between us and the barbarians, however garbed those barbarians may be. We should be cautious, therefore, about undermining its foundations.

### The Conservative Complaint

Perhaps no conservative has been more outspoken in his criticism of “judicial activism” in recent years than my colleague in this symposium, Professor Lino Graglia. Giving the issue its most political cast, Graglia writes, [the] thing to know to fully understand contemporary constitutional law is that, almost without exception, the effect of rulings of unconstitutionality over the past four decades has been to enact the policy preferences of the cultural elite on the far left of the American political spectrum.<sup>2</sup>

“That is exactly right,” says Judge Robert H. Bork of that observation in his recent best-seller, *Slouching Towards Gomorrah*, “and the question is what, if anything, can be done about it.”<sup>3</sup>

The bitter confirmation battle that followed Judge Bork’s unsuccessful Supreme Court nomination in 1987 had a way of concentrating the issue for many, of course. Still, the issue has been in the air since the 1950s, covering subjects as various as civil rights, apportionment, federalism, speech, religion,

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<sup>1</sup> See, e.g., Peter M. Shane, *In Whose Best Interest? Not the States'*, WASH. POST, May 21, 2000, at B5; Abner Mikva, *Court Clucking: The justices' renewed enthusiasm for limiting Congress' power recalls the bad old days of Schechter Poultry*, LEGAL TIMES, Jan. 31, 2000, at 54; cf. Roger Pilon, *They're Back: The Rehnquist Court is returning to constitutional principles that the New Deal Court had simply pushed aside*, LEGAL TIMES, Feb. 14, 2000, at 78.

<sup>2</sup> Lino Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 298 (1996).

<sup>3</sup> ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 114 (1996).

abortion, education, criminal law, civil and criminal procedure, and much else. And in each case the complaints from conservatives have been essentially the same.

Speaking at the Federalist Society's convention marking the 10th anniversary of its Lawyers Division in November 1996, for example, Senator Orrin Hatch, chairman of the Senate Judiciary Committee and co-chairman of the Board of Trustees of the Federalist Society, summarized the issue from his perspective:

What is at stake ... is nothing less than our right to democratic self-government as opposed to ... "Government by Judiciary." For when we commission judicial activists who distort the Constitution to impose their own values, policy preferences, or visions of what is just or right, we are in effect sacrificing our ability to govern ourselves through the democratic political processes to the whims and preferences of unelected, life-tenured platonic guardians.<sup>4</sup>

Judges "must *interpret* the law, not legislate from the bench," Hatch continued. "A judicial activist, on the left *or* the right, is not, in my view, qualified to sit on the federal bench."<sup>5</sup>

A few months later, Senator John Ashcroft, chairman of the Constitution Subcommittee of the Senate Judiciary Committee, told the Conservative Political Action Conference at its annual meeting that it was time "to take a broader, comprehensive look at the alarming increase in activism on the court."<sup>6</sup> Asking what we can do to put an end to "judicial tyranny," Senator Ashcroft called for rejecting "judges who are willing to place private preferences above the people's will."<sup>7</sup>

Not to be outdone by the Senate, on March 11, 1997, House Majority Whip Tom DeLay told editors and reporters at the *Washington Times* that "as part of our conservative efforts against judicial activism, we are going after judges" and are "right now" writing articles of impeachment.<sup>8</sup> Those sentiments were echoed two days later by Rep. Bob Barr of the House Committee on the Judiciary when he appeared on CNN's "Crossfire."

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<sup>4</sup> Senator Orrin Hatch, Remarks Before the Federalist Society's 10th Anniversary Lawyers Convention (speech released Nov. 15, 1996), *available at* <http://www.senate.gov/~hatch/speeches/speech001.html>.

<sup>5</sup> *Id.* (emphasis in original).

<sup>6</sup> Senator John Ashcroft, *Courting Disaster: Judicial Despotism in the Age of Russell Clark* (Mar. 6, 1997) *available at* <http://www.heritage.org/library/categories/govern/h1580.html>.

<sup>7</sup> *Id.*

<sup>8</sup> Ralph Z. Hallow, *Republicans out to impeach 'activist' jurists*, WASH. TIMES, Mar. 12, 1997, at A1; *see also* Katharine Q. Seelye, *House G.O.P. Begins Listing a Few Judges to Impeach*, N.Y. TIMES, Mar. 14, 1997, at A24.

That flurry of conservative activity on the judicial activism front in the early days of the 105th Congress led to congressional hearings at which both Professor Graglia and I testified,<sup>9</sup> but nothing came of them. Nevertheless, the issue remains, especially among conservatives, as witness this symposium.

### The Conservative Constitutional Vision—and Its Problems

Nowhere is the constitutional vision underlying the conservative complaint about judicial activism more succinctly stated, perhaps, than in Judge Bork's *The Tempting of America*, the thoughtful tome Bork wrote following his unsuccessful nomination for the High Court. Invoking what he calls "the Madisonian dilemma," Bork writes that America's "first principle is self-government, which means that in *wide areas* of life majorities are entitled to rule, if they wish, simply because they are majorities." Its second principle, he continues, is "that there are *some* things majorities must not do to minorities, *some* areas of life in which the individual must be free of majority rule."<sup>10</sup>

Unfortunately, Bork has the Madisonian vision exactly backward. To be sure, the Founders, including Madison, stood for self-government—as against government by some fraction of the people, including a king. That was their first *political* principle. But their first *moral* principle—the reason they instituted government at all—was individual liberty, as the Declaration of Independence makes plain for "a candid world" to see. Indeed, the Founders did not throw off a king only to enable a majority to do what no king would ever dare. Instead, they instituted a plan whereby in "wide areas" individuals would be free simply because they were born free, while in "some" areas majorities would be entitled to rule not because they were inherently so entitled but because they were authorized to do so under a constitutional design. That gets the order right: individual liberty first; self-government second, as a means toward securing that liberty.<sup>11</sup>

The most inspiring articulation of those principles is found in the Declaration, of course, but the principles are carried over to the Constitution as well, as we will see in a moment. In the Declaration the Founders set forth their philosophy of government. Grounded in reason, in certain "self-evident" truths, the Declaration starts with a premise of moral equality—"All Men are created

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<sup>9</sup> *Judicial misconduct and discipline: Hearings before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 105th Cong. (1997). My testimony can be found at <http://www.cato.org/testimony/ct-rp051597.html>.

<sup>10</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 139 (1990) (emphasis added). I reviewed Bork's book, together with CASS R. SUNSTEIN'S *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE*, in Roger Pilon, *Constitutional Visions*, REASON, Dec. 1990, at 39-41.

<sup>11</sup> Roger Pilon, *On the First Principles of Constitutionalism: Liberty, Then Democracy*, 8 AM. U.J. INT'L L. & POL'Y 531-49 (1992-93).

equal”— then defines that equality with reference to our rights to “life, liberty, and the pursuit of happiness.” We all have rights to pursue happiness as we wish, provided we respect the equal rights of others to do the same. There, in a nutshell, is the nation’s fundamental moral principle. That it happens also to be the foundation of the classic common law, rooted in “right reason,” is no accident.<sup>12</sup> The common law flowed from two basic rights: property, broadly understood as “lives, liberties, and estates,” as John Locke put it;<sup>13</sup> and contract, which describes how people come together legitimately. Those principles define moral relationships among individuals and, by implication, between individuals and any government they may create.

Because the moral order comes first, only after they had set forth that order did the Founders turn to government. And there too they were clear: government is instituted to secure our rights—that is its purpose. And it gets its *just* powers from the consent of the governed. Government is thus twice limited: by its end, to secure our rights; and by its means, which require our consent if they are to be legitimate.<sup>14</sup>

The moral and political vision that flows from the Declaration of Independence, then, is one of individual liberty. People are born free, with a right to plan and live their lives free from the interference of others, including the government. Government is instituted for the limited purpose of securing the right to be free; but that very right limits the powers of government to those that are derived from the consent of the governed. Thus, the Founders envisioned a world of free people and institutions—a vast sea of private activity—with a government of limited powers, dedicated to securing that freedom. It remained to institute that vision in law. To a large extent the founding generation did that at the state level through their various state constitutions. They did it at the federal level some 11 years later when they drafted a new constitution for the nation.

### **A Constitution for Limited Government**

The true Madisonian dilemma, therefore, was not to find islands of liberty within a sea of majoritarian rule, as Bork contends, but to devise a government at

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<sup>12</sup> EDWARD S. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 26 (1955) (“The notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law.”).

<sup>13</sup> John Locke, *Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT*, § 123 (Peter Laslett ed., 1965).

<sup>14</sup> I have discussed the theory of the Declaration of Independence more fully in Roger Pilon, *The Purpose and Limits of Government*, in *LIMITING LEVIATHAN* 13-37 (Donald P. Racheter & Richard E. Wagner eds., 1999), reprinted as *The Purpose and Limits of Government*, *Cato’s Letters* no. 13 (1999). See also SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* (1995).

once strong enough to secure our rights against domestic and foreign oppression yet not so powerful or extensive as to be oppressive itself. As Madison said in *Federalist No. 51*: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.” Toward those ends, the Founders devised an extraordinarily thoughtful system of checks and balances: the division and separation of powers; a bicameral legislature, each house differently constituted; an independent judiciary, with power to review the actions of the political branches; periodic elections, with a franchise wide for its day; and, shortly thereafter, a bill of rights, to mention but a few.

But the basic protection against overweening government took the form of the doctrine of enumerated powers. The best way to restrain power, the Founders believed, was to give it sparingly in the first place. Thus, they left most power with the states or, still more, with the people. In *Federalist No. 45*, Madison put it simply: the powers of the federal government were to be “few and defined.” That is hardly a government in which majorities are entitled to rule in “wide areas of life,” as Bork would have it.

The place and importance of the doctrine of enumerated powers is borne out by the plain language of the document. The Preamble of the Constitution, echoing the Declaration, makes it clear that all power rests with the people, who “do ordain and establish this Constitution.” Then the very first sentence of Article I reveals the doctrine: “All legislative Powers *herein granted* shall be vested in a Congress . . .” By implication, not all powers were “herein granted,” as the rest of the document indicates, especially Article I, section 8. And that point is recapitulated, as if for emphasis, in the final documentary statement of the founding period, the Tenth Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” In sum, the Constitution establishes a government of delegated, enumerated, and thus limited powers.<sup>15</sup>

## **At the Federal Level**

### *Powers*

But is that not what conservatives believe? Fortunately, many increasingly do, including some on the Supreme Court. That was driven home most strikingly in recent years in 1995, when the Court, for the first time since the New Deal,

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<sup>15</sup> I have discussed the theory of the Constitution more fully in Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507 (1993) and Roger Pilon, *On the Folly and Illegitimacy of Industrial Policy*, 5 STAN. L. & POL'Y REV. 103 (1993).

found that Congress had exceeded its authority under the Commerce Clause by enacting the Gun-Free School Zones Act of 1990.<sup>16</sup> In *United States v. Lopez*, Chief Justice William Rehnquist, writing for the Court, put in plainly: “We start with first principles. The Constitution establishes a government of enumerated powers.”<sup>17</sup> And since that decision was handed down, the Court has only reaffirmed the principle, even if its applications are still at the margins.<sup>18</sup>

All of which brings us to the heart of the problem, at least at the federal level. Since 1937, when the New Deal Court effectively eviscerated the doctrine of enumerated powers following President Franklin Roosevelt’s infamous Court-packing threat,<sup>19</sup> we have been living under a “democratized” Constitution of a kind that Bork envisions. Yet no serious scholar seriously believes that the Constitution authorizes all the government we have today.<sup>20</sup> Most will admit, if pressed, that the New Deal Court essentially rewrote the Constitution, without benefit of amendment, to make the world safe for the programs of the Roosevelt administration—redistributive and regulatory programs that have only expanded exponentially in the years since. Indeed, even many of those who were active in promoting the New Deal revolution recognized its unconstitutionality.<sup>21</sup>

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<sup>16</sup> 18 U.S.C. § 922(q) (1988 ed., Supp. V).

<sup>17</sup> 514 U.S. 549, 551 (1995).

<sup>18</sup> E.g., *United States v. Morrison*, 120 S. Ct. 1740 (2000); *Jones v. United States*, 120 S. Ct. 1904 (2000).

<sup>19</sup> See, e.g., ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 487-500 (6th ed. 1983); MERLO J. PUSEY, *THE SUPREME COURT CRISIS* (1937).

<sup>20</sup> See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (“the post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987) (“I think that the expansive construction of the [commerce] clause accepted by the New Deal Supreme Court is wrong, and clearly so.”) Even Harvard Law School’s Lawrence Tribe has written recently that “[t]he Court’s application of its substantial effect and aggregation principles in the period between 1937 and 1995, combined with its deference to congressional findings, placed it in the increasingly untenable position of claiming the power to strike down invocations of the Commerce Clause, while at the same time applying a set of doctrines that made it virtually impossible actually to exercise this power.” LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 816 (2000).

<sup>21</sup> Thus, in 1935 President Roosevelt wrote to the chairman of the House Ways and Means Committee, “I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation.” Letter from Franklin D. Roosevelt to Rep. Samuel B. Hill (July 6, 1935) in 4 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 91-92 (Samuel I. Rosenman ed., 1938). And three decades later, Rexford G. Tugwell, one of the principal architects of the New Deal, could be found writing, “To the extent that these new social virtues [i.e., New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them.” Rexford G. Tugwell, *A Center Report: Rewriting the Constitution*, CENTER MAGAZINE, March 1968, at 20. That is a fairly clear admission that the New Deal was skating not simply on thin but on no constitutional ice at all. At the least, statements like those stand in stark contrast with presidential statements like that of President Grover Cleveland,

To briefly review the particulars, the General Welfare Clause of Article I, section 8, the font of the modern redistributive state, was written to restrain Congress's power to spend for enumerated ends,<sup>22</sup> not to be an independent source of power to spend for the general welfare, its role today.<sup>23</sup> Likewise, the Commerce Clause, the font of the modern regulatory state, was meant primarily to restrain state protectionist measures that interfered with interstate commerce,<sup>24</sup> not to be a power to regulate anything that "affects" interstate commerce, its role today.<sup>25</sup> What the New Deal Court did was turn those two shields into swords. To appreciate how far off the mark the modern readings are, one need only notice

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who in 1887, 100 years after the Constitution was written, vetoed a bill for the relief of Texas farmers suffering from a drought by saying, "I can find no warrant for such an appropriation in the Constitution [...]". 18(2) CONG. REC. 1875 (1887).

<sup>22</sup> As South Carolina's William Drayton put it on the floor of the House 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! [...] 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 REG. DEB. 1632-34 (1828).

Madison made a similar point on several occasions. *See, e.g.*, James Madison, *Report on Resolutions*, in 6 THE WRITINGS OF JAMES MADISON 357 (Gaillard Hunt ed., 1900) ("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.") (emphasis in original).

And Jefferson also addressed the issue. *See, e.g.*, Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817) in WRITINGS OF THOMAS JEFFERSON 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 had not unlimited powers to provide for the general welfare, but were restrained 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 purpose for which they may raise money."). *See generally* CHARLES WARREN, CONGRESS AS SANTA CLAUSE: OR NATIONAL DONATIONS AND THE GENERAL WELFARE CLAUSE OF THE CONSTITUTION (reprint 1978) (1932).<sup>23</sup> *United States v. Butler*, 262 U.S. 1, 65-66 (1936); *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

<sup>24</sup> That in fact is how the Court read the clause in its first great Commerce Clause case, *Gibbons v. Ogden*, 22 U.S. 1 (1824). As Justice William Johnson wrote in his concurrence, "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Id.* at 231. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, *supra* note 20; Brief of Amicus Curiae Cato Institute, *Jones v. United States*, 120 S. Ct. 1904 (2000), available at <http://www.cato.org/pubs/legalbriefs/jvsusa.pdf>.

<sup>25</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 619 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942).

that if they were right, there would have been no point in enumerating Congress's other powers, for Congress could do virtually anything it wanted under those two powers alone.<sup>26</sup>

### *Rights*

But the Court was not yet through with its rewrite of the Constitution. Having eviscerated our first line of defense against overweening government, the doctrine of enumerated powers, the Court went a year later against our backup defense, the Bill of Rights, bifurcating those rights in the notorious *Carolene Products* case.<sup>27</sup> In footnote four of that case the Court distinguished two kinds of rights: "fundamental," like speech and voting, which are central to democracy; and "nonfundamental," like property and contract, which arise in "ordinary commercial transactions."<sup>28</sup> The Court thereafter would give measures implicating the former "strict scrutiny," which means that most would be found unconstitutional; by contrast, measures implicating the latter would be given minimal scrutiny, which means that most would be found constitutional. The Constitution was thus "democratized." Majorities, armed with redistributive and regulatory powers, and unrestrained by minority rights, could now turn to government to solve an endless array of personal problems, from retirement security, to health care, to day care, and on and on.<sup>29</sup> The floodgates were at last opened for the modern welfare state to pour through.

Thus, unlike the Founders' vision of constitutionally limited government, the New Deal Court's vision was one of essentially unlimited federal power, restrained only by "fundamental rights" relating mostly to the democratic process. Under that vision, judges would no longer be policing federal power or

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<sup>26</sup> That point was noted by Justice Clarence Thomas in his *Lopez* concurrence. "Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself) would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct." *United States v. Lopez*, 514 U.S. 549, 589 (1995) (Thomas, J., concur.). See also Pilon, *Industrial Policy*, *supra* note 15, at 110; Drayton, *supra* note 22.

<sup>27</sup> *United States v. Carolene Products*, 304 U.S. 144 (1938).

<sup>28</sup> *Id.* at 152. For a devastating critique of the politics behind the *Carolene Products* case, see Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397.

<sup>29</sup> It is misleading, of course, to speak of majoritarianism as if popular majorities actually determined the outcomes of most legislative issues. As both decision theory and the Public Choice school of economics have shown, the workings of modern democracies are pale imitations of the models assumed in high school civics texts, to say nothing of conservative jurisprudential tracts. See, e.g., KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2nd ed. 1963); William Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432 (1980); and the classic by JAMES BUCHANAN AND GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1982).

nonfundamental rights. In cases challenging the scope of such power or the bearing of such rights, they would exercise “judicial restraint” and “defer” to the political branches. Courts would have jurisdiction, in effect, only if fundamental rights were at issue. Absent that, “the people” would rule.

### *New Deal Conservatives*

But is that not precisely the vision that conservatives like Bork, Hatch, and Graglia have urged. Recall Bork’s description of the Madisonian dilemma: “in *wide areas* of life majorities are entitled to rule, if they wish, simply because they are majorities;” but “there are *some* things majorities must not do to minorities, *some* areas of life in which the individual must be free of majority rule.” For years, countless conservatives, obsessed with “judicial activism,” have bought into the New Deal’s constitutional vision, both its powers and its rights visions. Indeed, when Bork was asked at the November 1999 Federalist Society Lawyers Division convention about the Rehnquist Court’s recent efforts to revive the doctrine of enumerated powers, which liberals have dubbed “judicial activism,”<sup>30</sup> he responded by calling the efforts a “lost cause.” Does that mean he opposes them? Or was he making simply a practical observation? Modern conservatives may have bowed to the New Deal as a practical matter. But they cannot then say that their view is faithful to the Constitution—much less claim to be “originalists.”

Whatever Bork’s view on the substance of the matter, his present posture is due primarily, of course, to the Court’s behavior in the years since the New Deal revolution took place. Until very recently, the Court has continued to be restrained in policing federal powers. On the rights side of the equation, however, things have been very different. Drawing on the bifurcated theory of rights that emerged from *Carolene Products*, liberals on the Warren and Burger Courts especially have often been anything but restrained. Over the years, judicial activists have expanded the list of “fundamental rights,” often finding rights that were nowhere to be found in the Constitution, even among our unenumerated rights. Yet they have continued to ignore “nonfundamental rights” like property and contract, which were plainly there to be found.<sup>31</sup> But that “lawless judging”—

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<sup>30</sup> See note 1, *supra*.

<sup>31</sup> For a defense of that conduct, see William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, Address at Georgetown University, Text & Teaching Symposium (Oct. 12, 1985), reprinted in 27 S. TEX. L. REV. 433 (1986). I have criticized those views in Roger Pilon, *Symposium: Remembering and Advancing the Constitutional Vision of Justice William J. Brennan, Jr.: Brennan’s Approach to Reading and Interpreting the Constitution*, 43 N.Y.L. SCH. L. REV. 47-57, 72-74 (1999).

that is what it has been in many cases—does not excuse a call for lawless judging in the other direction.

To be sure, judges should not find rights that are not among the enumerated or unenumerated rights meant to be protected by the Constitution, thereby frustrating authorized democratic decisions; nor should they ignore rights that were meant to be protected, thereby allowing democratic decisions meant to be frustrated. But neither should they refrain from asking whether those democratic decisions are in fact authorized; or, if authorized, whether their implementation violates rights guaranteed by the Constitution, enumerated and unenumerated alike. Judges, in short, should be neither active nor restrained. Their responsibility, rather, is to discover the law and apply it.

To be clear about any of that, however, it is necessary, once again, to be clear about what the law is—both about what the scope of power is and about what rights we do and do not have under the Constitution. And here too many conservatives have been derelict. Not only have many essentially abandoned the doctrine of enumerated powers<sup>32</sup>—from fear that its revival might embolden judges to become too “active”—but many more have been outright hostile to talk of rights—given what the Court has done in the name of rights.

Indeed, a single, personal example will nicely capture the point. In 1992, just before the Court heard oral argument in *Lucas v. South Carolina Coastal Council*,<sup>33</sup> an op-ed of mine appeared in the *Wall Street Journal*,<sup>34</sup> urging the Court to find that the state of South Carolina had violated David Lucas’s Fifth Amendment rights when it denied him any compensation after prohibiting all uses of his property through regulations aimed at providing the citizens of South Carolina with various public goods. That, in fact, is how the Court eventually ruled—the Court’s five conservatives constituting the majority. But in the interim, my argument came under attack in a letter in the *Journal* from a well-known conservative, Gary McDowell,<sup>35</sup> then a Bradley visiting fellow at the Harvard Law School and long a friend of the Federalist Society. His charge was that I was urging the Court toward “judicial activism”—this, despite the Constitution’s explicit recognition of property rights.

McDowell’s more specific charge, however, was that the Bill of Rights—and the Fifth Amendment’s property guarantee, in particular—was of no avail against the states. We come thus to that curious mixture that has so colored conservative constitutionalism in recent decades. One is never quite sure whether

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<sup>32</sup> Many conservatives have also taken an expansive view of state powers, especially the police power, as discussed below.

<sup>33</sup> 505 U.S. 1003 (1992).

<sup>34</sup> Roger Pilon, *Property and Constitutional Principles*, WALL ST. J., Feb. 28, 1992, at A14.

<sup>35</sup> Gary L. McDowell, *Scratch a Libertarian: Voila! Judicial Activist*, Letters, WALL ST. J., Apr. 10, 1992, at A17.

it is “states’ rights” that drives such conservatives—and opposition, especially, to the so-called incorporation doctrine—or whether, more generally, it is antipathy toward the kinds of rights claims that might frustrate majoritarian rule—federal or state majorities alike. But in either case (or both), the issues manifest themselves in complaints about judicial activism, especially when judges find that constitutional rights frustrate state measures. Because those complaints arise so often in the context of judicial review of state actions, I will sketch the rights side of the conservative view in that context. It goes without saying, however, that most rights good against the states are good against the federal government as well.

### **At the State Level**

The issues here are complex and controversial, at least as they have unfolded over time. And again, I will barely sketch them.<sup>36</sup> The questions, however, come down to two: What are our rights under the Bill of Rights? And are they good today against the states?

The inclination of conservatives of the judicial restraint school is to minimize the rights guaranteed by the Bill of Rights, the better to restrain the power of judges and enhance the power of the political branches—including the states if they too are bound by the Bill of Rights. The problem with that view, however, is that it does not square either with ordinary canons of judicial interpretation or with the history and theory of the Bill of Rights or the Fourteenth Amendment—especially the Ninth Amendment and the Fourteenth Amendment’s Privileges or Immunities Clause, both of which conservative “originalists” simply ignore.

Taking the first of those issues first, there is always a measure of indeterminacy in finding rights “in” the Constitution.<sup>37</sup> To be sure, rights are mentioned in the Bill of Rights, and a few are mentioned in the original Constitution as well, but those rights are never really self-enforcing. In any given case or controversy, that is, even the clearest of rights must be interpreted with a view to the facts of the case if they are to be applied correctly and protected fully. When such rights are broadly defined in the text, the indeterminacy is greater, of course. Given that indeterminacy, which is simply a function of language and the infinite variety of potential applications, a judicial approach predisposed to

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<sup>36</sup> For a much more thorough treatment, see Kimberly C. Shankman and Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, Cato Policy Analysis No. 326, Nov. 23, 1998, available at <http://www.cato.org/pubs/pas/pa-326es.html>, reprinted in 3 Tex. Rev. L. & P. 1 (1998).

<sup>37</sup> See generally KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999).

minimize rights in deference to majority rule undermines the very purpose of a bill of rights. One could interpret the right to freedom of speech, for example, as protecting speech alone—or, more narrowly still, political speech alone—but that would hardly capture the rich varieties of speech that the idea entails. That does not mean that anything can count as “speech,” of course, but it does mean that judging requires good judgment.

Yet it is not as if that common sense point were not understood by the Founders. Indeed, it arose in the debate over whether there should even be a bill of rights. Those opposed to adding such a bill raised two main objections. First, a bill of rights was unnecessary. “Why declare that things shall not be done which there is no power to do?” asked Alexander Hamilton in *Federalist No. 84*. “Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?” Plainly, Hamilton thought that the enumeration of powers would be sufficient protection against oppressive government—indicating, again, the centrality of the doctrine of enumerated powers in the Founders’ minds. But the second objection goes to the problem of interpretation, which takes us in turn to the second issue noted above, the Ninth Amendment. Since no bill of rights could possibly list every right we have—our rights being infinite in principle, owing to the possibilities language allows—ordinary principles of legal interpretation would dictate that the enumeration of only certain rights will be construed as denying protection to rights not so enumerated.

That was a powerful objection. In fact, it explains why the Founders wrote the Ninth Amendment: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” What could the Founders have possibly meant by that amendment if not to put that objection to rest—to make it clear, beyond any doubt, that just because you do not find a right “in” the Constitution does not mean you do not have it? Indeed, we went for two years without a bill of rights—a period during which there were almost no rights “in” the Constitution. Did that mean that we had no rights against the federal government? Of course not. The Founders would have been appalled at any such contention. Yet it is implicit in the remark heard so often from conservatives that if a right is not fairly explicitly “in” the Constitution, we do not have it. Such is their concern about judicial activism that they abandon not only their originalism but their textualism (the Ninth Amendment) as well.<sup>38</sup>

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<sup>38</sup> See generally RANDY E. BARNETT, *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (1989). The issue of unenumerated rights (and incorporation, to be discussed next) came up in the Court’s most recent term in *Troxel v. Granville*, 120 S. Ct. 2054 (2000), in which the Court found that fit parents have a right to direct the upbringing of their children, a right that trumped the state law at issue, which authorized state judges to grant visitation rights to grandparents and others. Not surprisingly, Justice Antonin

Taking text and original understanding at face value, then, the Founders plainly meant to protect not only the rights they enumerated but the vast sea of unenumerated rights that were held by free people simply in virtue of being born free. This is not the place to catalogue those rights, much less explicate their foundations in both moral theory and the common law.<sup>39</sup> Suffice it to say that property, broadly understood as “lives, liberties, and estates,” and contract are the places to start—as common law judges at the time of the founding largely understood. Thus, at the federal level, the doctrine of enumerated powers was meant to limit the ends the federal government might pursue. Our rights, both enumerated and unenumerated, were meant to limit the means government might employ toward those ends.

At the state level, however, the issues were somewhat different. Any enumeration of powers, including a general police power, was a matter of state constitutional law. Moreover, the federal Bill of Rights was held by the Court in 1833 to apply only against the federal government, the government created by the document it amended.<sup>40</sup> Thus, citizens could not invoke their federal rights against state actions in most cases. That all changed after the Civil War, however, which brings us to the second question above, whether the rights protected by the Bill of Rights are good today against the states.

The Civil War Amendments were meant to radically change the relationship between the federal government and the states—not as radically as most modern liberals believe, but more radically than many modern conservatives believe. The Thirteenth Amendment ended the Constitution’s oblique recognition

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Scalia dissented, saying that, although the parental right was among the unalienable rights proclaimed by the Declaration and the unenumerated rights retained pursuant to the Ninth Amendment, that amendment’s refusal to deny or disparage such rights “is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.” *Id.* at 2074. Justice Scalia’s respect for the limits of his power would be more commendable, of course, were it better grounded and were the other branches (or the states) equally respectful of their own limits. Thus, when he goes on to say that “I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right,” he in effect defers, like Bork, to “the commitment to representative democracy set forth in the founding documents.” *Id.* (emphasis in original). But that implies that democratic majorities will define and enforce those unenumerated rights. Since rights, by definition, are asserted against majoritarian threats, Scalia’s position is tantamount to reducing the Ninth Amendment to a nullity. In fact, taken to its logical conclusion (e.g., Graglia), it constrains judges in interpreting even enumerated rights—indeed, it constrains judges period, taking us all the way back to *Marbury v. Madison*, 5 U.S. 137 (1803). On the question of which branch decides, *cf., e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997), in which the Court was not at all reluctant to reserve an unenumerated rule of constitutional construction for itself.

<sup>39</sup> I have discussed those issues more fully in Roger Pilon, *A Theory of Rights: Toward Limited Government* (1979) (unpublished Ph.D. dissertation, Univ. of Chicago).

<sup>40</sup> *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

of slavery. The Fifteenth Amendment prohibited states from denying or abridging the right to vote on the basis of “race, color, or previous condition of servitude.” And the Fourteenth Amendment, for the first time, provided all Americans with federal remedies against state violations of their rights. In other words, it “incorporated” the Bill of Rights against the states.

Many conservatives, seeming still to be fighting the Civil War, object to that understanding. Some say, for example, that the Fourteenth Amendment was never properly ratified, that it was rammed down the throats of the defeated southern states by radical Republicans during Reconstruction.<sup>41</sup> There is some truth to that. At the same time, ratification, resting on consent theory, is never a perfect business in practice, especially in the aftermath of war, which is why reason serves also as a foundation for legitimacy.<sup>42</sup> Indeed, the contention that the ratification of the Fourteenth Amendment did not conform perfectly to the requirements of Article V is a variation of the more general complaint that the southern states themselves were forced back into the union. And the contention depends for its force on the Constitution itself having been the product of immaculate conception, which we know was not the case. In an imperfect world, especially a war-ravaged world, the process that surrounded the adoption of the Fourteenth Amendment is probably the best we can expect.

But conservatives object also that the Fourteenth Amendment was meant simply to provide the freed slaves with rights that other Americans enjoyed prior to the adoption of the amendment.<sup>43</sup> If that were so, the amendment was curiously written. In relevant part, it reads:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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<sup>41</sup> See, e.g., Gene Healy, *Liberty, States' Rights, and the Most Dangerous Amendment*, 13 LIBERTY, Aug. 1999, at 13; Gene Healy, *Roger & Me*, 14 LIBERTY, Feb. 2000, at 46. Cf., Roger Pilon, *In Defense of the Fourteenth Amendment*, 14 LIBERTY, Feb. 2000, at 39; Roger Pilon, *I'll Take the 14th*, 14 LIBERTY, Mar. 2000, at 15.

<sup>42</sup> For a fuller discussion of the moral and political foundations of legitimacy, see Roger Pilon, *Individual Rights, Democracy, and Constitutional Order: On the Foundations of Legitimacy*, 11 CATO J. 373 (1992).

<sup>43</sup> See generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

One would expect conservative textualists to give the words “all persons,” “citizens,” and “any person” their normal significations. If the drafters of those words had meant them to refer only to “freed slaves,” they could have written that. Or they could have written the Fourteenth Amendment as they wrote the Fifteenth Amendment, which plainly prohibits states from denying freed slaves the same right to vote that others enjoyed. They did not write the amendment that way. Accordingly, we must take them at their word.

What the drafters did write was an amendment that clarified citizenship and then guaranteed all such citizens not the rights they enjoyed previously under state law, nor even federal protection of those rights, but rather *the privileges or immunities of citizens of the United States*, which *states* were thereafter prohibited from abridging. That is a very different thing, for it focuses attention not on state but on federal law—in particular, on the privileges or immunities of citizens of the United States. It focuses attention, that is, on the guarantees of the Constitution and the Bill of Rights, which until then were good only against the federal government but now would be good against states as well. Thus, the debate over “incorporation”—over piecemeal, case-by-case judicial recognition of particular parts of the Bill of Rights—is a distraction. Federal guarantees were incorporated *as a whole, at the time* the Fourteenth Amendment was ratified. It remained simply for judges to apply those protections as cases or controversies arose. They were not making new law. They were simply applying law that was made by those who ratified the Fourteenth Amendment, just as the founding generation made law when they ratified the original Constitution, which later judges would apply.

After the Fourteenth Amendment was ratified, therefore, the scope of federal guarantees against the states was meant to be the same as the scope of those same guarantees against the federal government. And the Privileges or Immunities Clause, as the debates surrounding the drafting and ratification of the amendment make clear, was meant primarily to bear that substantive burden. Those debates hark back especially to Justice Bushrod Washington’s 1823 explication of Article IV’s Privileges and Immunities Clause in *Corfield v. Coryell*,<sup>44</sup> long considered authoritative in both legal and popular opinion. The clause, Washington said, protected rights

which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.<sup>45</sup>

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<sup>44</sup> 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (no. 3230).

<sup>45</sup> *Id.* at 551.

Contending that it would be “more tedious than difficult” to enumerate those rights, Washington offered illustrative categories, such as “protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.”<sup>46</sup> But the drafters did not stop there. They went to Blackstone, to colonial charters, to the Declaration of Independence, and to learned treatises, all by way of showing that the Privileges or Immunities Clause was meant to incorporate the guarantees of the Bill of Rights, the common law, and the natural law—in a word, the rights of “citizens of all free governments.”<sup>47</sup>

Unfortunately, as we know, a bitterly divided Court, by a vote of five to four, effectively gutted the Privileges or Immunities Clause in 1873, barely five years after the Fourteenth Amendment was ratified. That decision, in the infamous *Slaughterhouse Cases*,<sup>48</sup> rendered the clause ever after “a vain and idle enactment”<sup>49</sup>—precisely as predicted by the *Slaughterhouse* dissenters. Thereafter, courts would try to do under the Fourteenth Amendment’s Due Process Clause the kind of substantive jurisprudence that was meant to be done under the Privileges or Immunities Clause. And when that eventually failed, for lack of serious judicial understanding of the underlying theory of rights, courts would turn to the even less substantive Equal Protection Clause. The result has been an erratic and often groundless Fourteenth Amendment jurisprudence that has pleased neither liberals nor conservatives, yet both oppose reviving the clause. Liberals today tend to favor the latitude judges now have. Conservatives fear revival will lead to still more judicial activism.

Thus, we find Graglia writing that the Privileges or Immunities Clause is “one of those blessed constitutional provisions that by being ignored has not caused a single bit of trouble.”<sup>50</sup> Meanwhile, Bork, claiming that the meaning of the clause is “largely unknown,”<sup>51</sup> poses a judicial caution: “[T]hat the ratifiers of the amendment presumably meant something is no reason for a judge, who does not have any idea what that something is, to make up and enforce a meaning that is something else.”<sup>52</sup> Professing such ignorance, he then adds, apparently without

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<sup>46</sup> *Id.* at 551-52.

<sup>47</sup> See Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights, and Fourteenth Amendment*, 66 TEMP. L. REV. 361 (1993).

<sup>48</sup> *Butchers’ Benevolent Association v. Crescent City Livestock Landing and Slaughterhouse*, 83 U.S. (16 Wall) 36 (1873).

<sup>49</sup> *Id.* at 96 (Field, J., dissenting).

<sup>50</sup> Lino Graglia, *Do We Have an Unwritten Constitution? The Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 83 (1989).

<sup>51</sup> BORK, *supra* note 10, at 39.

<sup>52</sup> *Id.*

irony, that the judicial evisceration of the clause in *Slaughterhouse* was a “victory for judicial moderation.”<sup>53</sup>

That is not jurisprudence. It is a flight from jurisprudence. It is ideology parading as law. No one who takes the Constitution seriously is asking judges to “make up and enforce” the law. If a judge does not know the meaning of a constitutional provision, he cannot responsibly ignore the provision as if it did not exist. The Ninth and Fourteenth Amendments meant something, as did the doctrine of enumerated powers. They continue to mean something. It is the responsibility of the judge to discover that meaning and to apply that law. Anything less is lawless judging.

### Conclusion

One of the great ironies of modern conservative jurisprudence is its claim to stand for originalism while simultaneously subscribing to the New Deal’s constitutional vision, which turned the original design on its head. That entails yet another irony: the New Deal Court’s democratization of the Constitution has led to the Leviathan that conservatives purport to abhor, yet their unwarranted call for judicial restraint strips the system of its natural defense against overweening government. Indeed, they claim that the proper place to resist expansive government is in the voting booth—the very institution that all too regularly gives us expansive government.<sup>54</sup> Understanding that tendency, the Founders gave us a written Constitution, and an independent judiciary to enforce it.

Conservatives, again ironically, have taken the short view. They have focused on judicial wrongs of recent years and in the process have failed to notice that our system, with a weakened judiciary, is a dangerous institution. One of the great achievements of the founding generation was the creation of an independent judiciary. Conservatives, especially, should be reinforcing that institution by helping it along in the right direction, not reducing its strength or stature. There has always been lawless judging, there will always be lawless judging. It is when there is no judging that we will have reason to fear.

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<sup>53</sup> *Id.*

<sup>54</sup> For a very recent example of this argument, see the majority opinion of Judge J. Harvie Wilkinson III in *Gibbs v. Babbitt*, 214 F.3d 483 (4<sup>th</sup> Cir. 2000), then contrast the dissent of Judge Michael Luttig.