

# **Constitutional Interpretation: Lessons From the American Experience**

*by Roger Pilon, Ph.D., J.D.*

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## Conference on the “Current Trends of the Constitutional Development”



Date: 3 October 2013

Place: Eötvös Loránd University, Faculty of Humanities, Assembly Hall  
(1088 Budapest, Múzeum Krt. 4.)

Registration: [regisztracio@szazadvég.hu](mailto:regisztracio@szazadvég.hu)

### Program:

9:30-9:45 **Opening and welcome**

9:45-10:15 **Opening keynote speech**  
**Roger Pilon**, Director, Center for Constitutional Studies, CATO Institute

### Coffee Break

### Roundtables

*I. Roundtable:*

10:35-12:00 **Europe vs. nation**  
**Bertrand Mathieu**, Professor, Université de Paris Panthéon-Sorbonne;  
President, Association Française de Droit Constitutionnel  
**László Trócsányi**, Professor, University of Szeged; Ambassador of Hungary to Paris  
**Pierre Delvolvé**, Professor, Université de Paris Panthéon-Assas  
**Pál Sonnevend**, Vice-Dean, Eötvös Loránd University  
**Paul Zimmerman**, Deputy Director for International Affairs, Federalist Society (tbc)  
*Moderator: András Mázi* Senior research fellow, Századvég Foundation

### Lunch

*II. Roundtable:*

12:45-14:15 **Rethinking the institutional structures**  
**Osztovits András**, Associate Professor, Károli Gáspár Protestant University; Judge, Curia  
**Federico Montalvo**, Professor, Universidad Pontificia de Comillas  
**András Varga Zs.**, Professor, Dean, Pázmány Péter Catholic University  
**István Stumpf**, Associate Professor, Eötvös Loránd University; Judge, Constitutional Court  
**Paul Behrens**, Professor, University of Edinburgh  
*Moderator: Vajk Farkas* Senior research fellow, Századvég Foundation

14:15-14:25 **Closing speech**

# Constitutional Interpretation: Lessons From the American Experience

*by Roger Pilon, Ph.D., J.D. \**

## I. Introduction

I've been invited to keynote this conference on constitutional interpretation by offering my thoughts on the American experience on the subject, the hope being that I might be able to draw a few lessons from that history for constitutional interpretation in other nations, in Europe in particular, and especially in the context of the European Union. Perhaps because America, although one of the world's youngest nations, enjoys the oldest written constitution still alive, there is hope that there are lessons to be drawn from the experience—and doubtless there are.

But I would caution that we Americans, especially over the past century, have had intense struggles over how properly to interpret and apply our Constitution. As a result, we live today under something called “constitutional law”—not to be confused with the Constitution itself. In fact, one of the great difficulties the Supreme Court of the United States has had over the past 75 years is squaring that “law” with the text, structure, and original understanding of the document. Indeed, it may be helpful—right now, at the outset—to pose the question that will take us to the heart of my remarks: How can a document whose principal author, James Madison, told us authorized only limited powers—powers that were “few and defined,” he said in *Federalist* 45—be read today as authorizing all but unlimited power? Over the past 200 and more years the Constitution has not materially changed, yet over the last 75 years we have gone from limited to effectively unlimited government.

Not surprisingly, the answer lies in politics. And so a central theme of these remarks will be that law at its best aims to structure and discipline politics, but if it fails in that, politics can undermine law. That, precisely, is what has happened to a substantial extent in America. It is crucial, therefore, to be clear about the relationship between politics and law—about how the two go together in a principled way. That requires appreciating not only the role, ultimately, of independent judges in keeping politics from undermining law but, even more, the importance of their having at hand, to be applied, the kind of law that in fact does structure and discipline politics. In short, politics gives us positive law, but for that law to be able then to discipline politics, it must be a law suited to that end. The issues are thus substantive, in the end, not procedural.

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## II. Preliminary Considerations

Before I develop those issues more fully, a few preliminary remarks are in order, most of which point to the limits we face in drawing lessons for Europe from America's experience with constitutional interpretation. First, unlike in most European nations, in America we do not have a parliamentary system but a republic with power *divided* between a federal government and 50 state governments and *separated* among three independent branches of the central government. Of particular importance, the president does not arise from the legislative branch, as in England and elsewhere, but is indirectly elected by all of the people through the Electoral College, and elected for a set term. Thus, our president is somewhat further removed from legislative and party politics than he would be under a parliamentary system. And our courts, with Supreme Court justices enjoying lifetime tenure, are removed altogether, at least in principle.

Second, in significant respects America's history, especially at our conception, is very different from the far more complex histories of today's European nations. (That I had to say "*today's* European nations" is itself significant.) We were fortunate, for example, to have come into being as a separate nation with something of a "clean slate" in hand, as is implicit in our founding document, the Declaration of Independence. It may not have been an "immaculate conception" as in the state-of-nature tradition, but it was not far from that. Of particular importance in that regard, we entered the world stage at a point in time, the late eighteenth century, when the ideas of classical liberalism filled the air. As will be discussed shortly, both the Declaration and the Constitution are grounded in state-of-nature theory, in the natural rights branch of natural law, and in liberty. Indeed, our problem today is that those ideas still infuse our founding documents, yet much of our law, reflecting the very different ideas of later centuries, often runs just the other way.

Third, unlike so many other nations, America was blessed at the outset not to have had a single or dominant religion but several, which meant that if peace were to reign, religion had to be a free private affair. To be sure, there were religious "establishments" in some states—the last in Massachusetts until 1836—and religious strife was not unknown even after the Constitution was ratified. But the principle at issue—that religion and government needed to be separated for the benefit of both—was understood and, more important, understood to be generalizable to most of life, including especially economic life, our main daily business. Thus, there is a presumption *against* government at the core of our being, and that distinguishes us from much of the rest of the world. In principle, at least, we turn to government as a last, not as a first, resort.

Fourth, in reflecting on the problems and perils of constitutional interpretation one must bear in mind that the undertaking is not an exact science. It entails trying to understand often imprecise, sometimes deliberately imprecise, language—and for this conference the difficulties of translation only complicate that problem. As is well known, terms in one language may not translate exactly into another. But of course interpretation also entails trying to understand often unclear, sometimes conflicting, intentions. And applying the law that is discerned through the process will often require considering practical and even political matters that were either

unanticipated by the document's drafters or that, under the circumstances, must be taken into account, even though they lie beyond the document.

Fifth, and closely related, when weighing history in the balance, it is important to distinguish what a passage means from how it was read and applied in the past. Many of us in America are of the view, for example, that our Constitution is rather better than it has been read to be at various times in our history, when such phrases as "due process of law" and "equal protection of the laws" were read and applied more narrowly, sometimes for practical and political reasons, than the document itself, read naturally, would require. This caution is not about the rightly criticized "living constitution"—the idea that the Constitution is an empty vessel to be filled by transient majorities or willful judges—but about recognizing the practical limits of judging and about the need, in particular, to avoid elevating precedent, so useful in *statutory* interpretation, beyond its limited role in *constitutional* interpretation.

Finally, a few words about the subject underlying constitutional interpretation, judicial review, whether practiced by a supreme court, as in America, or by a constitutional court, as found often in Europe. Although common law judging and the judicial enforcement of statutes had long been known and practiced, judicial review—the power of courts to declare legislative acts and executive actions unconstitutional and hence null and void *ab initio*—was largely unknown prior to the late eighteenth century.<sup>1</sup> Yet it is implicit in a written constitution like America's, which authorizes three branches—legislative, executive, and judicial—each defined functionally. If that were not enough to establish the power, Alexander Hamilton discussed it explicitly in *Federalists* 78-83. And in the seminal 1803 case of *Marbury v. Madison*<sup>2</sup> the Supreme Court expressly assumed for itself and thus secured the practice of judicial review—described by the Court as the power to say what the law is—and thus the power of engaging in constitutional interpretation toward that end.

But the power of judicial review, because it is broader than earlier understandings of judicial power, requires courts to employ more than ordinary canons of statutory construction. More deeply, they often have to come to grips with and invoke the moral and political principles that stand behind a constitution. That is especially true with the American Constitution, which is relatively short as constitutions go, employs often broad language, and derives that language from principles first set forth in the Declaration. Without repair to those principles, the document cannot be interpreted properly.

With those preliminary considerations in mind, let me now summarize the discussion that follows. If our aim is to trace the course of constitutional interpretation in America, we need to begin with a discussion of the Constitution itself. But before that, we need to lay out the theory

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<sup>1</sup> Yet Edward Corwin tells us that we find something strikingly like judicial review in Cicero's discussion of "a Roman practice to incorporate in statutes a saving clause to the effect that it was no purpose of the enactment to abrogate what was sacrosanct or *jus*...[m]ore than once we find Cicero, in reliance of such a clause, invoking *jus* against a statute." Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, (pts. 1 & 2), 42 HARV. L. REV. 149 at 159-60, 365 (1928-1929); Lord Coke's 1610 decision in *Dr. Bonham's Case*, thought by some to be *dictum*, was not only a case of judicial review but was not unknown to America's Founders. *Id.* at 367ff. See generally John Yoo and Saikrishna Prakash, *The Origins of Judicial Review*, 70 UNIV. CHI. L. REV. 887 (2003).

<sup>2</sup> 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).

that stands behind the document, for the United States Constitution is more than a document of positive law. As just noted, it reflects the rich natural rights theory that we find outlined in the Declaration. Thus, it is with that theory that we must begin, after which we will locate it within the document itself.

That will give us the foundation for a brief historical tour of constitutional interpretation in America, touching simply on those points that are most relevant for understanding how we went, again, from liberty to Leviathan, and all under a constitution designed for liberty that has little changed over its existence. In a nutshell, for 150 years, for the most part, our officials, including our judges, understood and acted in accordance with the “higher law” background of the Constitution—not always expressly, but at least in practice. As a substantive matter, they understood that the Constitution authorizes only limited government, and they abided by those limits, mostly.

Beginning late in the nineteenth century, however, with the rise of Progressivism, we saw a gradual shift in the climate of ideas. Whereas the founding and subsequent generations had thought of government as a “necessary evil,” Progressives saw it as an engine of good, an instrument to solve countless social and economic problems. During the early decades of the twentieth century the courts resisted the Progressives’ political activism, for the most part. But things came to a head during the New Deal when President Franklin Roosevelt, following the landslide election of 1936, threatened to pack a recalcitrant Supreme Court with six new members—a blatant political move. The scheme failed, but the Court got the message. It began reading the Constitution as never before, turning it from a shield against power into a sword of power. With the constitutional floodgates opened, federal, state, and local power poured through, giving us the modern executive state we have today. In the process, the Court has developed novel theories of constitutional interpretation and judicial review having little to do with the Constitution itself, much less the theory behind it. That has led to competing charges of “judicial activism” and “judicial abdication,” with politics trumping law in a wide area meant originally to be off-limits to politics—meant to be private—but under the rule of law. Let us now look at this theory and history more closely, starting with an account of the moral, political, and legal theory that stands behind the Constitution.

### **III. The Original Design**

#### **First Principles**

Since the American system of government rests on an intimate connection between the philosophy Thomas Jefferson first outlined in the Declaration of Independence in 1776 and the institutions of government the Framers established 11 years later in the Constitution, we must begin with a discussion of the higher law behind the Declaration.

**The Moral Order.** The famous passage that begins, “We hold these Truths to be self-evident,” which ever since has inspired countless millions around the world, reduces to its essence the theory of natural rights—the idea that there is a higher law of right and wrong, described by rights and correlative obligations, from which to derive the positive law and against which to criticize that law at any point in time. Grounded in reason (“self-evident truths”), not in

theological or other more particularized considerations, the passage proceeds from a theoretical state of nature: to avoid circularity, that is, government and governmental powers, which must be justified, are excluded from the outset and introduced only after the moral order is first set forth, in accordance with which government and its powers must be justified.

In describing that moral order, the argument opens with a premise of equality, which it defines with reference to rights to life, liberty, and the pursuit of happiness. The premise thus invokes a rule of parsimony: it is the simplest premise, implying that the burden is upon anyone claiming superior rights and hence invoking a more complex premise of unequal rights to make good on that claim, failing which the simpler premise of equal rights is presumed. Moreover, by defining equality with reference not to values, virtues, or other moral notions but only to rights, we have that category of moral notions—rights and correlative obligations—that lends itself especially to defining enforceable legal relationships. Finally, notice that in the right to pursue happiness there is an implicit distinction between rights and values: each of us has an objective right to pursue his subjective values, however disvalued by others, provided only that we respect the equal rights of others to do the same. Thus, as against moral skeptics we can make justified moral claims concerning our rights; and as against moral dogmatists we can justifiably claim to be free to pursue whatever values we wish.<sup>3</sup>

For John Locke, the philosopher on whose shoulders Jefferson stood, all rights were reducible to property—broadly understood as “lives, liberties, and estates.”<sup>4</sup> Thus, right violations amount to *takings* of things that belong free and clear to others. But that world of common law strangers, obligated only to leave each other alone, can be changed in two morally relevant ways: by parties committing torts or crimes (intentional torts); or by their entering into contracts. When those events happen, the general relationships in which the relevant parties stood as strangers become special relationships, pertaining to those parties alone. General rights and obligations are thereby alienated; special rights and obligations are brought into being. Thus does the world of moral rights and obligations change over time due to the events that take place in time.<sup>5</sup>

That much, in barest outline, constitutes the foundation of the theory of natural rights, resting on property and contract as the two basic rights. In more fully fleshing out the theory, reason will take us a good ways, but not all the way. Eventually we have to turn to values to complete the theory. That is clear in four areas especially: nuisance, endangerment, remedies, and enforcement. Reason cannot tell us how much noise we can make or how much particulate matter we can put into the air before we violate our neighbors’ rights of quiet enjoyment; or how much risk we can put our neighbors to; or what a life or a limb is worth if we’ve taken it; or what process is due once rights have been violated. To answer those questions we have to make value judgments, about which reasonable people can have reasonable differences. If we cannot agree about those values when agreement is required, not only will we not fully know what rights and

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<sup>3</sup> Roger Pilon, *A Theory of Rights: Toward Limited Government* (1979) (Ph.D. dissertation, University of Chicago) (discussing more fully the epistemological foundations of the theory of rights).

<sup>4</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT: SECOND TREATISE OF GOVERNMENT* 123 (Peter Laslett ed., Cambridge Univ. Press 1965) (1690).

<sup>5</sup> On general and special relationships, see H.L.A. Hart, *Are There Any Natural Rights?* 64 *PHIL. REV.* 175 (1955).

obligations we have but justice will not be fully achieved—indeed, life in this state of nature will likely be, as Thomas Hobbes famously put it, “solitary, poor, nasty, brutish, and short.”

To address such “inconveniences,” as Locke said, prudence advises us to leave the state of nature and enter into civil society where institutions may be established to address and resolve our differences, precisely what Jefferson does next. But before we leave it, we should note that state-of-nature theory is crucial not simply for avoiding circularity regarding the justification for government but because it helps us to determine, as much as possible, which questions belong in the realm of reason, to be adjudicated by courts, and which in the realm of will, to be decided mainly by legislatures or administrative agencies. Over some 500 years the old common law judges adjudicated controversies between neighbors and, in time, between subjects and king, relying mainly on reason and custom, itself resting on reason and experience.<sup>6</sup> In so doing they crafted the theory of rights that now stands behind the United States Constitution. Reduced to its essence, that theory tells us that we may not take what belongs to another, that we must keep our promises, and that we must right our wrongs—property, contract, and remedies, the three great branches of the common law—and otherwise we must be left free to plan and live our own lives. Reason of course can tell us much more about those matters, as just outlined, but we also need will to complete the picture.

**The Political and Legal Order.** Will, or consent, is the “big bang” that converts natural law into positive law—and fortunate is the nation whose constitutional framers look to the higher law when crafting positive law. To a large extent, America’s Founders and Framers did that, with one great exception, about which more below. For the moment, however, political legitimacy, as grounded in consent, is our main concern. And it turns out that such legitimacy is not easy to achieve—in fact, is impossible to achieve. But despair not, because there is a lesson in that.

Having set forth the moral order, Jefferson turned next to the political and legal order the moral order implied, writing simply, “That to secure these Rights [the rights we have just outlined], Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.” Notice first that in taking up the question of governmental legitimacy, our natural rights are presupposed; and second that government is twice limited: by its ends—to secure our rights; and by its means—its powers, which must be consented to if they are to be just. Reason, justifying our rights, and will, justifying government’s powers, are there combined.

But there is a problem with the consent requirement. We are here up against the basic question of political philosophy: If the individual and the right of individuals to rule themselves, and themselves alone, are primary, by what right does one man have power over another? In other words, how can we move—legitimately, without violating the rights of anyone—from self-rule to collective rule? The answer classical liberals offer is through consent. Those who consent cannot be heard to complain. Thus, with any given polity, unanimity will answer the question.<sup>7</sup>

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<sup>6</sup> “The notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law.” Corwin, *supra* note 1, at 171.

<sup>7</sup> As an indication of how seriously America’s Framers took consent, at least as among the states, the Constitution’s Ratification Clause, in Article VII, reads: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution *between the States so ratifying the Same*” (emphasis added). In other words, if the 10<sup>th</sup> through 13<sup>th</sup> states had not consented, they would not have been bound by the new Constitution.

But rarely if ever do we have unanimity, which is why democrats offer majoritarianism next. That won't work either, of course, since there is no moral magic in the numbers, whether the majority is 50% plus 1 or 100% minus 1, not if the individual counts. Classical liberals like Locke understood that, which is why they fastened on the social contract: In the original position we agree unanimously to be bound thereafter by the majority or by some other fraction of the whole. That answer works in all manner of *private* associations, which we join voluntarily, but with government it solves the problem only with respect to those in the original position or those immigrants who come later and take an oath to be bound. It cannot bind the generations who follow those who consent originally. The democrat's last refuge, therefore, is the argument from "tacit" consent: "You stayed, therefore you're bound." But that won't work either, because it amounts to the majority putting the minority to a choice between two of its entitlements—its right to stay where it is, and its right not to be bound by the majority, precisely what the majority must demonstrate on pain of circularity. Like the mugger—"Your money or your life"—the majority is saying "Come under our rule or leave."

The principle that follows from this exercise is profoundly important. Although rule by the consent of the governed was a major advance in political thought and human history, it is not the final word on political legitimacy, as too many democrats seem too often to believe. There is, rather, a deeper principle: Because the consent requirement, the classical foundation of political legitimacy, cannot be satisfied as a practical matter, there is an air of illegitimacy that surrounds government *as such*. Unlike voluntary private associations, government is a *forced* association. It follows, therefore, that one wants to do as little as possible through government where whatever is done will infringe on the rights of those who want no part of the matter, and as much as possible in the private sector where it can be done voluntarily and hence in violation of the rights of no one. What this amounts to—and this is crucial—is a presumption against doing things through government and a heavy burden on those who would urge otherwise to show why their proposal should not be left to the free private sector.

It is in this fundamental sense, then, that government can be said to be a "necessary evil," as America's Founders in fact said—"necessary" to overcome the practical problems of self-rule in the state of nature, but "evil" since the consent requirement cannot be deeply satisfied. That does not mean, of course, that we can say nothing more about political legitimacy. At the broadest level, for example, we can say that the more responsibilities a government takes on, the more it is likely to be, and to be seen as, illegitimate—witness those governments that control virtually every aspect of human affairs. At the same time, there is a tricky issue here: What do we say about governments of that kind that also enjoy wide consent among their citizens? Clearly, there is a complex trade-off between the political consent evidenced in such regimes and the liberty of those other citizens who wish to be no part of the collective undertakings. The most we can say, perhaps, whether it is economic production that is collectively undertaken, or health care, education, religion, or whatever, is that those individuals who want no part of it are to that extent unfree. And that is no small matter. It is, in truth, the classic problem that has ever plagued democracies, the tyranny of the majority. And the only answer for it, as America's Founders understood, is to limit the matters over which the majority may rule, as we will soon see.

But we can say still more, systematically, about political legitimacy by distinguishing three basic kinds of government power: the police power, the eminent domain power, and the

redistributive power. The police power is the “executive power,” as Locke called it, that each of us has in the state of nature to secure his rights. It is the main power we yield up to government when we enter into civil society, asking government to exercise it on our behalf. It includes the power to define our rights more precisely as by enacting regulations pertaining, for example, to nuisances, risks, remedies, and enforcement as discussed above, plus the power to secure those rights, as its name implies. As such, therefore, this power is largely legitimate since we all had it in the state of nature. The only ones who can be heard to complain are those who would prefer to be their own legislators, policemen, judges, jailers, and so on. Save for the reserved right of self-defense, we force those people, doubtless rare, to accept such public services or to leave. That is the limited sense in which the police power, kept to its central functions, can be said to be illegitimate.

Also included in the police power, however, is a power that would not, strictly speaking, be found in the state of nature, namely, the power to compel the collective provision of “public goods,” defined narrowly, as economists do, as goods that exhibit two distinct aspects, “non-excludability” and “non-rivalrous consumption”—law enforcement, national defense, certain kinds of infrastructure, and clean air and water are examples. Provision of such goods, as those examples illustrate, are mainly aspects of the power to secure our rights—hence they are included under the police power. But compulsion for their collective provision arises because of the “free-rider” problem. If only some members of society were willing to pay to provide such goods—as is likely, absent compulsion—others cannot be excluded from enjoying the benefits (non-excludability), nor does the enjoyment by one leave any less for others (non-rivalrous consumption). But if only some were willing to pay, we would have a free-rider problem and the goods would likely not be produced. Accordingly, thus narrowly defined, unlike such private goods as food, clothing, shelter, education, health care, and the like—which would be produced privately, there being no free-rider problem connected with their production—public goods fall into a special category requiring public provision. The relative legitimacy of the power to compel the collective provision of such goods stems, however, from the power’s close connection to the police power that each of us enjoys in the state of nature.

By contrast, the eminent domain power—the power of government to condemn private property for public use provided that just compensation is paid—is more problematic since none of us would have such a power in the state of nature. Thus, unlike with the police power, we would have no such power to yield up to government in the original position. Moreover, there is no free-rider problem here (although there is a monopoly hold-out issue, but that is unrelated to the police power). If we assume that the requirements set forth in the power are satisfied in any particular application, its legitimacy, such as it may be, rests on two grounds. First, “we” gave government that power in the original position, as is illustrated by the Takings Clause in the Fifth Amendment of the United States Constitution. Resting on consent, however, that rationale is weak, as we saw above. And second, the power is “Pareto optimal,” as economists say, which means that at least one person is made better off by its exercise (the public, as is evidenced by its willingness to pay the owner the compensation), and no one is made worse off (here, the owner from whom the property is taken, assuming he receives just compensation, which as we will see below he rarely receives under current American law). On balance, then, the eminent domain power is less legitimate than the police power.

But the third great power of government, the redistributive power, enjoys no legitimacy whatever from the theory of natural rights. Yet today it is the power that most governments exercise most of the time. The redistributive power takes two forms, material and regulatory. Through their power to tax beyond that needed to support the police power, governments redistribute wealth from A to B. And through their power to regulate beyond that needed to flesh out our rights and administer their police power, they prohibit A from doing what he would otherwise have a right to do and require him to do what he would otherwise have a right not to do, all for the benefit of B. Obviously, none of us would have a right to do either of those things in the state of nature. Nor does the fact that a majority may vote to take from A to give to B add a shred of legitimacy to the power. If it is wrong for A to take from B, whether for himself or to give to another, it is just as wrong for A and C to take from B. One thinks, in this connection, of helping the poor or of Good Samaritanism, which is the welfare state writ small. In the modern world, however, redistribution is as likely to go in the other direction, from the politically less well-connected to those better-connected, as public choice economists have demonstrated over so many domains. Whatever direction the redistribution takes, however, the principles are the same: taking is wrong; and charity is virtuous only when voluntary, not when forced.

Starting from a theoretical state of nature, then, we can unfold the vision that was only outlined by Jefferson in those famous phrases in the Declaration of Independence. In abstract, it is a world in which each of us is free to pursue happiness as he thinks best, to chart a course through life, alone or, most likely, in voluntary association with others, even though some may disapprove of the courses we take, provided only that we respect the rights of others to do the same. Each of us is free to make as much or as little of himself as he wishes. (Natural rights theory, unlike the older natural law from which it emerged, leaves it to the individual to decide what is “natural,” what is “good.”) And government is instituted to secure those rights and to do the few other things we may have authorized it to do. That is the moral, political, and legal vision the Framers took with them 11 years later when they met again in Philadelphia in 1787 to draft a Constitution to replace the inadequate Articles of Confederation.

## **Instituting the Vision**

An ideal vision is one thing. Implementing it in the real world quite another. As we have just seen, political legitimacy grounded in consent is ultimately illusive, which means that the move from individual self-rule in the state of nature to collective rule in civil society, made necessary for practical reasons, puts us in a second-best world from a moral perspective, even as it illuminates the presumptions and burdens of proof that should guide us through that world. And we have also seen that there are gradations of legitimacy in that second-best world, which is important to take into account going forward. As an initial matter, however, it is the consent of constitutional ratification—the “big bang,” as noted above—that gets a polity defined by its constitution off the ground, establishing that constitution as positive law in the process, and imparting such legitimacy to that law as can be imparted by the always imperfect process of ratification. That is the best we can do in the real world, and it is far better than a world in which the original consent of ratification is lacking.

But imperfect though ratification may be—in late 18<sup>th</sup> century America the franchise was limited, but wide for the time—the consent manifest by the process is only one ground of

legitimacy. The other ground is substantive: Just what did the ratifiers consent to, and was that law itself legitimate, substantively? In particular, did it respect the rights of those living under it? To address those questions as they pertain to the United States Constitution I will outline the document's structure and examine its text insofar as is necessary to illustrate how it was originally understood. After all, as a compact among those who draft and ratify it, for the benefit of themselves and their posterity, a constitution must be presumed to reflect what those drafters and ratifiers wanted to accomplish through it, making it important, for purposes of constitutional interpretation, to try to understand what that is. Of course, if a constitution is so lean that it can mean whatever succeeding generations want it to mean—reflecting, perhaps, the momentary will of ever-changing majorities, thereby inviting the tyranny of the majority—there is little point in having one.

When the Framers gathered in 1787 the 13 states that comprised the United States were largely autonomous—loosely associated under the Articles of Confederation, which provided for a very weak central government. Such government as there was took place almost entirely at the state level. Among other things, Revolutionary War debts remained unpaid. And local uprisings were sometimes more than local officials could handle. But two issues loomed especially large. Surrounded on three sides by European powers greater than our own, we lacked a national government up to the task of handling foreign affairs, from commerce to war. In addition, states had erected tariffs and other measures to protect local interests from out-of-state competitors, all of which was leading to the breakdown of free commerce among the states.

Notwithstanding those difficulties, there was hardly unanimity at the Constitutional Convention in Philadelphia over that long hot summer. Federalists who wanted a stronger central government struggled with anti-federalists who were wary of the project. In the end, after many compromises, the federalists prevailed. But as a reading of the *Federalist Papers* reveals, to say nothing of the writings of the anti-federalists, neither side stood for the kind of expansive government we think of and have today. One might say, with truth, that the federalists stood for limited government, while the anti-federalists stood for even more limited government. In fact, in that regard, it should not go unnoticed that the Preamble of the Constitution starts exactly as the Declaration did, in the state-of-nature: “We the People, [for the purposes that follow], do ordain and establish this Constitution.” In other words, all power rests with the people. They bring the new federal government into being. They give it its powers. The government does not give the people their rights. They already have those rights, in the exercise of which they create and empower the government.

Stated most generally, then, the main question facing James Madison, the Constitution's principal author, was how to draft a document authorizing a government that was strong enough to do the few things we wanted it to do yet was not so extensive or powerful as to violate our liberties in the process. Drawing on Locke and especially on Baron de Montesquieu, Madison first divided power between the new federal government and the states, leaving most power with the states, including the general police power, the main and most legitimate of government's powers. Then he separated power among the three branches of the federal government, each defined functionally, pitting power against power as a check on power.<sup>8</sup>

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<sup>8</sup> The most important and famous statements of this strategy will be found in THE FEDERALIST NOS. 10 and 51 (James Madison).

From there we see further grants of and then checks on power. A bicameral legislature, each chamber differently constituted with members serving terms of different lengths; a unitary executive with the power to veto legislation presented to him, and a congressional power to override such a veto by a supermajority vote in each chamber; an independent judiciary with the power to check the other branches and, more fully later, the states; and periodic elections to fill the offices set forth in the document—all of that and much more to both empower and then check the new federal government.

Notice, however, that there was no bill of rights, with which most European constitutions today begin. That came later. There is a reason for that, and it is absolutely essential to appreciate it if one is to understand the American Constitution. The focus of the Framers was not on rights but on *powers*. Proceeding from state-of-nature thinking, they understood that if power were limited, their rights would not be threatened, for where there is no power, by definition there is a liberty: Thus *the doctrine of enumerated powers*—the very foundation of the Constitution—the idea that the people have delegated only certain limited powers to the federal government, the balance remaining with the states or with the people themselves, never having been given to either level of government. Beyond the Preamble, we see the doctrine in the very first sentence of Article I: “All legislative Powers *herein granted* shall be vested in a Congress, ....” (emphasis added) By implication, not all legislative powers were “herein granted.” In fact, we find the main such powers in Article I, section 8—and only 18 are there to be found, each concerning a limited subject. And when a bill of rights was added in 1791, the Tenth Amendment, the last member—the last documentary evidence of the original understanding—states the doctrine of enumerated powers expressly: “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 other words, the Constitution establishes a government of delegated (by the people), enumerated (in the document), and thus limited powers. The doctrine of enumerated powers, not the Bill of Rights, was meant to be the main restraint on overweening government. And that is the key to understanding how we got to where we are today, because that is the doctrine the New Deal Court eviscerated 150 years later, in 1937, to make way for the massive government programs that would follow.

Before we get to that, however, several other matters need to be addressed, including the Bill of Rights. After the Constitution was completed and sent out to the states for ratification it became clear that it would not be ratified unless a bill of rights were added—for extra caution. But there was resistance to adding such a bill, and on two main grounds: a bill of rights was unnecessary, it was said; and adding one would be dangerous. Why, asked Hamilton, “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?”<sup>9</sup> Notice what Hamilton was saying: a bill of rights is unnecessary because, again, the doctrine of enumerated powers is our main protection. Moreover, Hamilton, James Wilson, and others added that a bill of rights would be dangerous. Why? Because we have, in principle, an infinite number of rights, which means that we will never be able to list more than a few. But by ordinary principles of legal construction (*expressio unius est exclusio alterius*), the failure to include all members of a category for protection will be read as implying that only those that are included are meant to be protected.

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<sup>9</sup> THE FEDERALIST NO. 84 (Alexander Hamilton).

Once again, then, it was the doctrine of enumerated powers that was foremost in the Framers' minds, not a bill of rights. When it became clear, however, that a bill would have to be added if the Constitution were to be ratified, it was necessary to address that second objection. Madison did so when he drafted a bill of 12 amendments in the first Congress, in 1789, 10 of which would eventually be ratified and added to the Constitution in 1791 as the Bill of Rights. His answer to the objection took the form of the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Thus, the debate that led up to the Ninth Amendment, together with the text of the amendment, make it clear that both enumerated and unenumerated rights were meant to be protected. Indeed, given that history and text it is hard to imagine that it could be otherwise. After all, we cannot "retain" what we do not first have to be retained. Yet whether unenumerated rights were meant to be protected is a live question today, as we will soon see.

The Bill of Rights was thus an afterthought, but on balance probably a good one, because it states expressly what is not to be done—marking those abuses, in light of recent history under English rule, that were foremost in the Framers' minds. (Note too the character of the rights: in one way or another they all concern liberty, not the welfare rights we find in so many European bills.) Still, it is doubtless no accident that the Bill of Rights concludes with the Ninth and Tenth Amendments, because they recapitulate the philosophy of government that was first set forth in the Declaration of Independence. We have a vast sea of rights, the Ninth Amendment tells us, both enumerated and unenumerated alike. The Tenth Amendment, by contrast, points to islands of power: the federal government has only those powers that are enumerated in the document.

Thus, the vision of liberty through limited government that emerged from the Declaration emerges from the Constitution as well—a national government less limited than the one we had under the Articles of Confederation, to be sure, but nothing like the one we see today, for sure. Madison summed it up succinctly in *Federalist* 45:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The power to deal with foreign affairs was now vested mostly in the president, who is also the commander in chief of the armed forces. And Congress was granted the power to regulate interstate commerce—to make it "regular," especially by preempting state regulations interfering with free trade among the states. Thus, the two major problems that brought the Framers back to Philadelphia in the first place were addressed by the new Constitution. When Benjamin Franklin emerged from the Constitutional Convention on the final day of deliberation, a woman he met asked him, "Well Doctor, what have we got, a republic or a monarchy?" "A republic," he answered, "if you can keep it." We have kept it, but it looks today very little like the republic the Framers gave us.

## Completing the Constitution

Before we examine how a republic dedicated mainly to liberty became one dedicated to providing its citizens with all manner of goods and services, at the expense of liberty, it will be useful to consider whether the few amendments that have given us the Constitution we have today are the source of that change. The original Constitution, even after the Bill of Rights was added in 1791, was not perfect, of course—what constitution is? Realizing that the document might have to be amended from time to time, the Framers provided for that; but as with so much else about the document, the amendment process was designed to ensure that changes would be made only after due consideration. Thus, Article V provides that two-thirds of both Houses are needed to propose an amendment (an alternative route through state legislatures has never been followed), and then the legislatures of three-fourths of the states are needed to ratify the proposed amendment. Given the difficulty of amending the Constitution, it is no surprise that, after the first 10 amendments that comprise the Bill of Rights were added, only 17 amendments have since been added, and one of those was later repealed.

Unlike the original 10 amendments, most of the later ones concerned technical changes relating, for example, to state sovereign immunity, the methods of electing the president and vice-president, their terms of office, the incapacity of a president, changes in the salaries of members of Congress, and so forth. There are exceptions, however. Thus, the disastrous prohibition of alcohol was imposed by the 18<sup>th</sup> Amendment, which the 21<sup>st</sup> Amendment repealed. The 19<sup>th</sup> Amendment extended the franchise to women, which many states had already done, and the 26<sup>th</sup> Amendment lowered the voting age to 18. Two Progressive Era amendments, both added in 1913, made important changes that many believe contributed indirectly to the growth of government. The 16<sup>th</sup> Amendment instituted the federal income tax. And the 17<sup>th</sup> Amendment provided for the direct election of senators by the popular vote in each state rather than, as under the original Constitution, by the members of each state's legislature, thereby somewhat diminishing the role of the states as states in national politics.

The most important of the subsequent amendments, however, were those that followed America's Civil War. The cardinal sin of the Constitution was of course its oblique recognition of slavery, which was done to ensure initial unity between the Northern and Southern states. The Framers knew that slavery was inconsistent with their founding principles. They hoped it would wither away over time. It did not. It took the bloodiest war in our history to end slavery, nearly nine decades after the Founders had declared to "a candid World" that all men are created equal. The 13<sup>th</sup> Amendment accomplished that in 1865. And in 1870 the 15<sup>th</sup> Amendment extended the franchise to the freed male slaves.

But it was the 14<sup>th</sup> Amendment, ratified in 1868, that made the most far-reaching change to the original Constitution by applying the Bill of Rights and more against the states—a change that continues to vex the courts and the country today, as we will see. From the Constitution's outset, the Bill of Rights applied only against the federal government, the government created by

the document to which it was appended, as the Supreme Court later affirmed in 1833.<sup>10</sup> Had it been otherwise, had the states been bound by the guarantees of the Bill of Rights, it is all but certain that there would have been no union.

After the Civil War ended, however, recalcitrant Southern states began enacting the so-called Black Codes, which denied a vast array of rights to the newly-freed slaves, reducing them in many cases to a state of near bondage. In response, Congress passed the Civil Rights Act of 1866, enacted to protect “the natural rights of man,” as members of the 39th Congress said in so many ways during their debates. But there were two problems with that effort. First, what one Congress enacted a later Congress could as easily repeal. And second, there were serious doubts as to whether Congress had the authority, under the doctrine of enumerated powers, to enact such a statute against the states.

As a result, the 14<sup>th</sup> Amendment was proposed, sent out to the states, and ratified. Under section one of the amendment national citizenship is defined. Then three fonts of rights are set forth: “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.” As is clear from the debates surrounding passage of the amendment, both in Congress and in the state ratifying conventions, it was meant to protect our natural rights, our common law rights, and our rights as citizens of the United States. At last, the Constitution was “completed.” The ideals and principles of the Declaration, including equality, were now incorporated in the document.<sup>11</sup>

Once the states were brought more fully under the federal Constitution through the Civil War Amendments, and the project that had begun with the Declaration of Independence could be thought of as completed, individuals could go directly into federal courts to bring suits against their own states. In addition, Congress was empowered by section five of the 14<sup>th</sup> Amendment to enact legislation to enforce the guarantees of section one. States were still free to attend to their own affairs under their state constitutions, of course. But their citizens, as citizens also “of the United States,” could now appeal to the federal government if their state was violating their rights as guaranteed under the *federal* Constitution. Thus, the Civil War Amendments expanded federal power, but only to check states—to prevent states from abusing their own citizens—not to provide goods or services or do anything beyond that.

Stepping back from these 17 amendments, in fact, it is plain that none has expanded the powers of the federal government to do more than ensure our liberty. In particular, the 18 powers or ends of Congress that are enumerated in Article I, section 8 of the Constitution remain today as limited as they were when the Constitution was first ratified. No amendment gave Congress the power to enact a massive retirement program or, more recently, the even more massive health insurance scheme known today as “Obamacare.” No amendment authorizes Congress to involve itself in education, or housing, or public radio and television, or the arts, or any of the thousand

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<sup>10</sup> *Barron v. City of Baltimore*, 32 U.S. 243 (1833).

<sup>11</sup> See Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights, and Fourteenth Amendment*, 66 TEMP. L. REV. 361 (1993).

and one other matters that the federal government insinuates itself into today. The Constitution itself remains essentially the charter for liberty under limited government that it was when Americans began living under it in 1789 and then amended it after the Civil War.

## Politics and Law

Finally, I noted early on that America's move from liberty to Leviathan, notwithstanding our Constitution dedicated to liberty, could be explained largely by politics. Now that we have the completed Constitution and its background theory of legitimacy at hand, it would be useful for understanding how politics brought that radical change in government about to reflect briefly on the relationship between politics and law that the Constitution contemplates.

In a limited constitutional republic such as America's, the relation between politics and law is set, for the most part, by law—by the law of the Constitution. The Constitution became law through politics, of course, through the political act of ratification, which reflects the will of the founding generation, albeit will grounded ideally in reason and experience. As amended by subsequent acts of political will, the Constitution authorizes the political branches to act pursuant only to their enumerated powers or ends. Moreover, it further limits the exercise of those powers and the powers of the states either explicitly or by recognizing, with varying degrees of specificity, rights retained by the people. And, by fairly clear implication, made explicit in the *Federalist* and shortly thereafter in *Marbury v. Madison*, the Constitution authorizes the judiciary to declare and enforce that law of authorizations and restraints consistent with the document itself.

Thus, the scope for “politics”—understood as will or the pursuit of individual or group interests through public or political institutions—is *limited*. The people may act politically to fill elective offices, consistent with the Constitution's electoral provisions. Those officers may in turn act politically to fill non-elective offices such as cabinet or lower posts. But once elected or appointed, those officials may act “politically”—may pursue discretionary policies—only within the scope and limits set by the Constitution. In particular, not everything in life, as we have seen, was meant to be subject to political or governmental determination. In fact, *most* of life was meant to be *beyond* the reach of politics, yet under the rule of law. In a word, the Constitution does not say, “After periodic elections, those elected may do what they wish or pursue any end they wish or any end the people want.” On the contrary, it strictly limits, by law, the scope of politics. And it falls ultimately to the judiciary, the nonpolitical branch, to declare what the Constitution says that law and those limits are, thereby securing the rule of law.

The aim in all of this, then, is to constrain the rule of man—and politics—by the rule of law. The Framers understood that legitimacy, to the degree it is possible, begins with politics, with the people. Thus, “We the people . . . do ordain and establish this Constitution.” But once ratification—the initial political act—establishes the rule of law, that law constrains politics thereafter, at least in principle. And ultimately, if necessary, it is the nonpolitical judiciary that interprets and enforces that law. It is essential, therefore, that the judiciary act nonpolitically—not from will or interest but from reason, according to law, consistent with the first principles of the system. If it does not, then to that extent the rule of law is undermined and politics trumps law.

## IV. From Liberty to Leviathan

At last we are in a position to sketch the history of the American Constitution as it concerns the main issue before so many nations today, the growth of government—the kind of government that in many advanced nations, including America, is consuming and controlling ever more economic production, leading to massive national deficits and debt in the process. Although forces urging a transition toward larger government could be found in America from the beginning, they were largely resisted, as noted earlier, until the onset of Progressivism late in the 19<sup>th</sup> century. And it was not until late in the 1930s, during the New Deal era, that the transition was institutionalized through a politically inspired reading of the Constitution. Let me first outline very briefly the political aspects of that history, to establish a context, then look more closely at the underlying legal decisions.

### The Political Forces

**Pre-Progressivism.** It must be remembered that in the late 18<sup>th</sup> century the American experiment in limited government, resting on the will of the people, was novel and uncertain—by no means foreordained to succeed. And almost from the start the divisions that were seen in the Constitutional Convention emerged again in the new government. The forces for a stronger, more secure national government were led by Treasury Secretary Alexander Hamilton, supported to a substantial extent by President George Washington. Secretary of State Thomas Jefferson joined by James Madison as a member of the House of Representatives from Virginia, led the faction that resisted expanding federal power.

An early example of the struggle can be seen in 1791 when Hamilton sent Congress his “Report on Manufactures,” a national industrial-policy scheme that included subsidies for manufacturers drawn from tariffs on imported goods. Although Hamilton eventually prevailed in getting Congress to impose moderate tariffs, Congress rejected the subsidies, fearing they would lead to corruption and sectional favoritism.

Proposals for redistributive schemes of one kind or another would be a constant in our history, but until the New Deal they were largely resisted. Thus, in 1794 Madison was faced with a bill for the relief of French refugees fleeing to Baltimore and Philadelphia from an insurrection in San Domingo, whereupon he rose on the floor of the House to declare, unremarkably, 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.”<sup>12</sup> And in 1884, 100 years after the Constitution was written, President Grover Cleveland would veto a bill appropriating the paltry sum of \$10,000 to buy seeds for Texas farmers suffering from a drought. “I can find no warrant for such an appropriation in the Constitution,”<sup>13</sup> his veto message said.

To be sure, inroads on the principle that Congress had no such redistributive power were to be found. Thus, there were gifts of federal land for canals and later on for railroads, gifts of

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<sup>12</sup> 4 ANNALS OF CONG. 179 (1794).

<sup>13</sup> 18 CONG. REC. 1875 (1887).

proceeds from the sale of such lands, and, by early in the 20<sup>th</sup> century, gifts from the Treasury itself for agricultural colleges and other such ventures.<sup>14</sup> But more often than not the pattern was one of political resistance to such practices—and on constitutional grounds. As late as 1935, for example, when the Social Security bill was being debated in Congress, Rep. Allen Treadway of Massachusetts remarked, “The federal government has no express or inherent power under the Constitution to set up such a scheme.”<sup>15</sup> And Louisiana’s Sen. Huey Long said, “Everyone doubts the constitutionality of the bill. Even the proponents of the bill doubt it.”<sup>16</sup> (Yet he supported it all the same, populist that he was.)

In sum, members of the *political* branches read the Constitution’s doctrine of enumerated powers as limiting their authority. Thus, bills encouraging *ultra vires* actions often never got out of Congress; and if they did, presidents would veto them; and if that failed, courts would act to block unconstitutional measures—not entirely, again, but enough such that one could say that there was a constitutional ethos at work to check the growth of government. The *Zeitgeist*, for the most part, was one of respect for constitutional limits.

**Progressive Social Engineering.** But that ethos came under attack with the rise of Progressivism, which along with populism is key to understanding the transition to modern expansive government. Progressives came from both the Republican and the Democratic Parties and of course from the small Socialist and Progressive Parties as well. Schooled in the elite universities of the Northeast, they looked to Europe for political ideas: to Bismarck’s welfare state especially, and to British utilitarianism, which had replaced natural rights theory with the idea that policy and law should be justified not by whether they secure rights but whether they provide the greatest good for the greatest number. The Progressives were social engineers. “No person who is interested in social progress can long be content to raise here and there an individual,”<sup>17</sup> wrote Frank Dekker Watson in 1922, then director of the Pennsylvania School for Social Service. Indeed, he commended the ongoing “crowding out” of private by public charity, conducted by “professionals,” for only so would “public funds ever be wholly adequate for the legitimate demands made upon them.”<sup>18</sup>

Progressive social engineering took many forms, but its often utopian efforts at changing the world focused mainly on the political branches, on legislative ordering and bureaucratic management. Its aim was to replace judge-made common law, which established the legal framework within which individuals and organizations pursued their own private interests, with statutory law, enacted by legislatures and then fleshed out by administrative agencies in the executive branch. Unlike common law, grounded in reason and custom, legislation of the kind Progressives championed reflected the policy preferences of the majority or, more realistically, of those best situated to influence the political system. Thus the shift from law grounded in principle to law as policy, from reason to will, and to the politicization of law—precisely what the Constitution sought to avoid, for when all is politics nothing is law.

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<sup>14</sup> See generally CHARLES WARREN, CONGRESS AS SANTA CLAUS (1932).

<sup>15</sup> 79 CONG. REC. 5,530 (1935).

<sup>16</sup> 79 CONG. REC. 9,531 (1935).

<sup>17</sup> FRANK DEKKER WATSON, THE CHARITY ORGANIZATION MOVEMENT IN THE UNITED STATES: A STUDY IN AMERICAN PHILANTHROPY 332 (1922).

<sup>18</sup> *Id.* at 398-99.

In the early decades of the 20<sup>th</sup> century the Progressive zeal for change through political action unfolded in ever wider areas of life. Much of it focused on economic affairs, of course. Yet for all their efforts in the name of the “little guy,” what Progressives accomplished in the end was “the substitution of state-monopolies and cartels for competitive markets,”<sup>19</sup> as legal theorist Richard Epstein has ably demonstrated, because they “thought they could tell a good monopoly from a bad one.”<sup>20</sup> And why not? After all, they undertook their mission through the largest monopoly of all, government. As noted earlier, whereas the founding generation and many that followed saw government, in the classical liberal tradition, as a necessary evil, Progressives saw it as an engine of good, an institution able and even authorized to solve all manner of social and economic problems.

At times that hubris reached deeply disturbing lengths. One appalling example, inspired by the modern “science” of eugenics, was a push to improve our genetic pool by sterilizing those thought to be insufficiently intelligent—promoted by such luminaries of the day as the presidents of Planned Parenthood and Stanford University. Ruling for Virginia in a 1927 “sweetheart suit” brought against the state statute that authorized the practice, the sainted Justice Oliver Wendell Holmes concluded (in)famously that “Three generations of imbeciles are enough.”<sup>21</sup> There followed across America some 70,000 sterilizations.<sup>22</sup>

**Politicizing the Court—and the Constitution.** None of this should have been possible under the Constitution as written and later amended. But with Progressives often manipulating the era’s populism, the shift in the climate of ideas was taking a toll on our understanding of the Constitution. Some saw the document simply as an impediment to “progress,” calling for it to be amended. Others saw it as a malleable instrument for achieving their political goals, if only the right justices were in place to reconceptualize the document.<sup>23</sup>

Things came to head with the arrival of the New Deal as Progressives shifted the focus of their political activism from the states to the federal government. Seizing the opportunity afforded by the Depression, the administration of President Franklin Roosevelt began pushing massive expansions of federal power through Congress. But when those programs reached the Supreme Court, the nine old men, as they came to be called, stood athwart the administration’s agenda. Shortly thereafter the crisis came when Roosevelt, following the landslide election of 1936, unveiled his notorious Court-packing scheme, his plan to pack the Court with six new members. The scheme backfired, creating a national uproar with Congress refusing to go along. Nevertheless, the Court got the message. What followed was the famous “switch in time that saved nine.”

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<sup>19</sup> Richard A. Epstein, *The Monopolistic Vices of Progressive Constitutionalism*, 2004-2005 CATO SUP. CT. REV. 11, 18 (2005).

<sup>20</sup> *Id.* at 15.

<sup>21</sup> *Buck v. Bell*, 274 U.S. 200 (1927).

<sup>22</sup> See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT*, ch. 1 (1995); Stephen Jay Gould, *Carrie Buck’s Daughter*, NATURAL HISTORY, July 1984, at 14.

<sup>23</sup> For a discussion of the debates between the two camps within the Roosevelt administration, see Leuchtenburg, *supra* note 22, ch. 4.

The switch began with two 1937 decisions. Without benefit of constitutional amendment the Court eviscerated the very foundation of the Constitution, the doctrine of enumerated powers, the main restraint on Congress's power. In *Helvering v. Davis*,<sup>24</sup> challenging the retirement provisions of the Social Security Act, the Court turned the Constitution's General Welfare Clause on its head, thus opening the floodgates for the modern redistributive state. And in *NLRB v. Jones & Laughlin Steel Corp.*,<sup>25</sup> challenging the compulsory bargaining provisions of the National Labor Relations Act, the Court turned the Commerce Clause on its head, opening the door for the modern regulatory state. Congress was thereafter no longer limited to those powers and ends authorized in Article I, section 8 of the Constitution. Its agenda was bound only by its internal politics.

But one could still assert one's rights against those powers, so a year later, in (in)famous footnote four of *United States v. Carolene Products Co.*,<sup>26</sup> the Court addressed that impediment by bifurcating the Bill of Rights and setting forth a bifurcated theory of judicial review. If a law implicated "fundamental" rights like speech, voting, and, later, certain personal liberties, the Court would apply "strict scrutiny," which meant that the government would have to have a compelling reason to justify the law and the means it chose would have to be narrowly tailored to serve that end. In all likelihood the law would be found unconstitutional. By contrast, if a law implicated "nonfundamental" rights like property, contract, or the rights we exercise in ordinary commercial relations, the Court would apply the "rational basis" test, which is no test at all: As long as the legislature—federal, state, or local—had some conceivable reason for enacting the statute, that was good enough for the Court. Property rights and economic liberties were thus reduced to second-class status at best—by a theory of judicial decision-making that had no basis whatever in the Constitution, a theory that was crafted to make the world safe for the programs of the New Deal. Indeed, the very decision about what rights are and are not "fundamental" is political. Thus, not only the Constitution but the courts themselves were politicized.<sup>27</sup>

Finally, with a surfeit of legislation now pouring through, Congress could no longer deal with the details, so in 1943, in *National Broadcasting Co. v. United States*,<sup>28</sup> the Court threw out the non-delegation doctrine, thus upholding the growing practice in Congress of delegating ever more of its legislative power to the many administrative agencies it was creating—well over 300 such agencies today. Here again, as with the doctrine of enumerated powers, it was the very first sentence of Article I that was at issue: "All legislative Powers herein granted shall be vested in a Congress, ...." (emphasis added) There followed the modern executive state where most "law making" now takes place—the regulations, rules, guidance, and such of modern "administrative law." In that murky area of our law we find varying doctrines of judicial deference to agency decision-making, all of which, again, politicizes the law.<sup>29</sup>

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<sup>24</sup> 301 U.S. 619 (1937).

<sup>25</sup> 301 U.S. 1 (1937).

<sup>26</sup> 304 U.S. 144 (1938). For a devastating critique of the politics behind the *Carolene Products* case, see Geoffrey P. Miller, *The True Story of Carolene Products*, SUP. CT. REV. 397 (1987).

<sup>27</sup> I discuss some of the problems in modern scrutiny theory in Roger Pilon, *Foreword*, in 2002-2003 CATO SUP. COURT REV., vii (2003).

<sup>28</sup> 319 U.S. 190 (1943).

<sup>29</sup> See ROBERT A. LEVY & WILLIAM MELLOR, *THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM*, ch. 4 (2008).

## The Supreme Court's Decisions on Powers

**The General Welfare Clause.** With that brief political history and legal outline as background we can now look a bit more closely at how the Court went about creating modern “constitutional law,” starting with the General Welfare Clause, the first of Congress’s 18 enumerated powers or ends. In brief, the clause grants Congress the power to tax and spend for the general welfare of the United States. Stated fully:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

Although referred to most often as the General Welfare Clause—because that label focuses on the *objects* for which Congress may tax and spend—it is also called, depending on the context, the Taxing Clause (or power) and the Spending Clause (or power). In its 1937 *Helvering* decision the Court turned the clause on its head when it upheld the old-age assistance provisions of the Social Security Act.

As it happens, the meaning of the clause was hotly debated early in the nation’s history. Hamilton believed that Congress had an *independent* power to tax and spend for the general welfare, the only possible limitation coming from the word “general”—arguably, Congress could not tax and spend for particular or local interests. That reading could not possibly be right, said Madison, Jefferson, and most others, for since money can accomplish anything, then if Congress wanted to do something it was not authorized to do, it could simply say that it was taxing and spending “for the general welfare” and make an end-run around the doctrine of enumerated powers. Indeed, what was the point of having enumerated Congress’s other powers, they added, if Congress could do whatever it wanted under this sole power? The “general welfare of the United States,” they concluded, is simply a general heading that is defined and served by the *specific* grants of power that follow in Article I, section 8, in furtherance of which Congress may tax and spend.<sup>30</sup>

For nearly a century and a half, as noted earlier, the political branches mostly rejected the expansive Hamiltonian view of the General Welfare Clause. But because the Court has held that ordinary taxpayers do not have standing to bring suits challenging congressional spending decisions, there was no legal ruling on its meaning until 1936 and *United States v. Butler*.<sup>31</sup> In that decision the Court found the New Deal’s Agricultural Adjustment Act unconstitutional because it invaded the reserved powers of the states. But in so deciding the Court came down on

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<sup>30</sup> Here is Madison: “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, 357 (Gaillard Hunt ed., 1906); see also THE FEDERALIST NO. 41 (James Madison). For Jefferson, see Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), in 10 WRITINGS OF THOMAS JEFFERSON 90, 91 (Paul Leicester Ford ed., 1899).

<sup>31</sup> 297 U.S. 1 (1936).

Hamilton's side regarding the meaning of the clause: Congress "has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States," the Court said. "It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."<sup>32</sup>

But that language was *dictum*—irrelevant to the ruling in the case. Accordingly, it had no legal force. A year later, however, the Court invoked that *dictum* as the foundation for its holding in *Helvering*. Thus does *dictum* later become law. Writing for a 5-4 Court majority, Justice Benjamin Cardozo said:

Congress may spend money in aid of the 'general welfare'... There have been great statesmen in our history who have stood for other views... The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event... The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.<sup>33</sup>

Yet here, and in a companion case challenging the unemployment provisions of the Social Security Act, *Steward Machine Co. v. Davis*,<sup>34</sup> the Court's rationale was pure policy and politics, devoid of any constitutional analysis: "It is too late today for the argument to be heard with tolerance that in a crisis so extreme [as the Great Depression] the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare,"<sup>35</sup> the Court said in *Steward*. And citing *Steward*, it said in *Helvering*: "Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. . . . But the ill is all one or at least not greatly different whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it."<sup>36</sup> Thus did the General Welfare Clause become a vehicle through which Congress could tax and spend for any end it wished, the doctrine of enumerated powers notwithstanding.

There things have stood ever since. Only a year ago, however, in its complex and much mooted Obamacare decision, *National Federation of Independent Business v. Sebelius*,<sup>37</sup> the Court revisited parts of its New Deal jurisprudence. As the decision pertained to the spending power, 26 states had sued the federal government, claiming that Congress had exceeded its authority under that power by coercing them to expand their Medicaid roles—for which they would be reimbursed by the federal government, at least for a period of years—failing which they would lose all of the federal Medicaid funding they now receive.

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<sup>32</sup> *Id.* at 65-66.

<sup>33</sup> *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

<sup>34</sup> 301 U.S. 548 (1937).

<sup>35</sup> *Id.* at 586-87.

<sup>36</sup> *Helvering*, 301 U.S. at 641.

<sup>37</sup> 567 U.S. \_\_\_\_ (2012).

The Court held, essentially on Tenth Amendment grounds, that Congress's "offer" to the states—"Increase the number of your citizens eligible for Medicaid or we'll withdraw the money we now give you"—put states to a Hobson's choice and so was coercive. Thus, the decision did not go to the core question of whether Congress could tax and spend for the Medicaid scheme. Rather, it raised only the question of whether, under this "federal-state partnership" (often called "cooperative federalism"), Congress could use the immense taxing power the 16<sup>th</sup> Amendment's income tax affords it to effectively coerce states into doing its bidding. Since *Butler* and *Helvering*, grants to the states have grown exponentially such that, as of 2010, they amount to \$608 billion or 37.5% of state and local government expenditures. That gives the federal government tremendous leverage over state and local affairs. Here, the "strings attached" to that federal funding of federally induced state programs reached the point of coercion. The decision is a step in the right direction, but the Court has a long way to go before it reaches the core issue.

**The Commerce Clause.** The second clause the New Deal Court turned on its head as it was eviscerating the doctrine of enumerated powers concerns the power of Congress, in relevant part, "To regulate Commerce among the several States." Here the history is crucial. As noted earlier, under the Articles of Confederation states had begun erecting tariffs and other such measures to protect local merchants and manufacturers against competition from out-of-state interests, and that was leading to the breakdown of free trade among the states. Addressing that problem was one of the main reasons in the first place for having a new constitution. The purpose of the clause, therefore, was to promote free trade among the states—to make such trade "regular." As gravity "regulates" the motions of the planets—something an 18<sup>th</sup> century cosmologist would be sure to understand—so too Congress would "make regular" commerce among the states.<sup>38</sup>

That, in fact, was how the clause was applied, if not read, in the first great Commerce Clause case, *Gibbons v. Ogden*,<sup>39</sup> in 1824. Writing for a unanimous Court, Chief Justice John Marshall took pains in the first third of his opinion to say that both constitutions and statutes decided under them must be read *functionally*. But unfortunately, when he applied his general interpretive principles in the balance of the opinion he focused on the meanings of the terms "commerce" and "among," giving short shrift to "regulate," where the functional issue is to be found. As a result, our Commerce Clause jurisprudence has been colored ever since by that too-narrow focus, with decision after decision trying to discern just what activities were to be subsumed under "commerce" and whether that commerce was internal to a state and therefore immune from federal regulation or "among" states and therefore subject to regulation.

Thus, here, unlike with the General Welfare Clause, there was no standing impediment to a party's bringing a suit contending that a federal regulation exceeded Congress's power under the Commerce Clause. Given the focus just noted, however, it is no surprise that there was a slow expansion of Congress's power under the clause, although it was not until the 20<sup>th</sup> century that the bite of the expansion started to be felt. In the seminal year of 1937, that bite turned the clause effectively on its head. In *Jones & Laughlin* a 5-4 Court held that Congress's power to

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<sup>38</sup> See, e.g., Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); THE FEDERALIST NO. 42 (James Madison).

<sup>39</sup> 22 U.S. 1 (1824).

regulate interstate commerce entailed the power to compel employers to engage in collective bargaining with their employees because the strikes that might otherwise occur “affected” interstate commerce. Thus, although the labor relations at issue were neither “commerce” (i.e., trade) nor “among” states, the Court held essentially that Congress had the power under the Commerce Clause to regulate anything that “affects” interstate commerce—which in principle is everything. Thus did the Commerce Clause become a vehicle through which Congress could regulate anything and everything for any reason at all.

Five years later, in *Wickard v. Filburn*,<sup>40</sup> the commerce power reached what many consider its zenith when the Court held that Congress’s power to regulate interstate commerce allowed it to authorize a fine for a farmer who grew more wheat than allowed under a revised Agricultural Adjustment Act, even though the wheat in question never left the farm, much less entered into interstate commerce. Enacted during the Depression in an effort to keep the supply of wheat low and the income of farmers high, the Act reflected the impoverished economic understanding of the Roosevelt administration. But the Court’s reasoning was little better. Ignoring, among much else, the possibility of substitute goods, it argued that the excess wheat farmer Filburn grew was wheat he otherwise would have bought on the market. Thus, the act of growing excess wheat “in the aggregate” affected interstate commerce, the Court said. It followed that nothing was beyond Congress’s power to regulate.

But in 1995, for the first time in 58 years, the Court found that Congress had exceeded its power to regulate interstate commerce when it enacted the Gun-Free School Zones Act of 1990. “We start with first principles,” wrote Chief Justice William Rehnquist, speaking for the Court’s 5-4 majority in *United States v. Lopez*. “The Constitution creates a Federal Government of enumerated powers.”<sup>41</sup> Simple and direct constitutional language like that had not been heard in Washington in years. “To uphold the Government’s contentions here,” Rehnquist continued, alluding to *Wickard*, “we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”<sup>42</sup> Congress was not regulating commerce, he concluded. It was regulating guns at school, and that was the business of the states, not of the federal government.

In a similar decision five years later, *United States v. Morrison*,<sup>43</sup> the Court again found that Congress had exceeded its Commerce Clause authority when it enacted the section of the Violence Against Women Act of 1994 that gave victims of gender-motivated violence the right to sue their attackers in federal court. And here again it was Rehnquist writing for the Court’s 5-4 majority: Noting that Congress was taking over “areas having nothing to do with the regulation of commercial activities,”<sup>44</sup> he wrote that “it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”<sup>45</sup>

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<sup>40</sup> 317 U.S. 111 (1942).

<sup>41</sup> 514 U.S. 549, 552 (1995).

<sup>42</sup> *Id.* at 567.

<sup>43</sup> 529 U.S. 598 (2000).

<sup>44</sup> *Id.* at 611.

<sup>45</sup> *Id.* at 613.

It is important to keep these recent decisions in perspective, however. As in *Lopez*, here too the decision changed little on the ground since the individuals challenging the federal statutes were still subject to *state* regulations. Moreover, even concerning the federal government, the decisions merely chipped at the edges of today's vast commerce power. And as if to emphasize that, in another five years the Court would reverse course: In *Gonzales v. Raich*<sup>46</sup> the Court held that the federal Controlled Substances Act, resting purportedly on the commerce power,<sup>47</sup> prohibited a woman from using medicinal marijuana, the only substance that would relieve the pain from which she was suffering, even though she was using it under her doctor's orders and consistent with California state law, and even though she grew the marijuana herself and it never entered into commerce, much less interstate commerce.

Still, *Lopez* and *Morrison* are important if only because they have revived the doctrine of enumerated powers and have asserted anew the division of powers between the federal and state governments. In fact, those decisions came to the fore again only last year in that part of the celebrated Obamacare decision<sup>48</sup> that dealt with the government's claim that Congress was authorized under its commerce power to require designated individuals to buy specified health insurance policies or pay a fine for failing to do so—the so-called individual mandate. The Court held that Congress could not compel individuals to *engage* in commerce so that it might then *regulate* that commerce. Under its power to regulate *ongoing* commerce, Congress had never until now been so brazen as to try to order individuals to *engage* in commerce. It is no small matter that the Court blocked that move—although it allowed the individual mandate, dubiously, under Congress's *taxing* power—or that it blocked a further encroachment on state sovereignty in *Lopez* and *Morrison*. But as with the brake it imposed in the Obamacare decision regarding Congress's spending power,<sup>49</sup> the Court has a long way to go before it gets back to the heart of the matter—to reading the commerce power functionally, as authorizing Congress simply to ensure a free national market.

**The Necessary and Proper Clause.** The last of Congress's 18 enumerated powers grants Congress the *means* for carrying into execution its other powers:

The Congress shall have Power To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

As such, this clause is sometimes mistakenly thought to *expand* the areas or subjects over which Congress may legislate. Interpreted and applied properly, it does not. Rather, it simply grants Congress the means to “carry into execution” the powers or ends already granted to it and to other departments and officers of the federal government.<sup>50</sup>

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<sup>46</sup> 545 U.S. 1 (2005).

<sup>47</sup> See Roger Pilon, *The Illegitimate War on Drugs*, in AFTER PROHIBITION 23 (Timothy Lynch ed., 2000).

<sup>48</sup> *NFIB*, 567 U.S. \_\_\_\_ (2012).

<sup>49</sup> See *supra* note 37 and accompanying text.

<sup>50</sup> THE FEDERALIST NO. 44 (James Madison); Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. Rev. 745 (1997); Gary Lawson & Patricia B. Granger, *The Proper Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267 (1993).

Doubtless such means or instrumental powers were already implicit in the “foregoing” enumerated powers—the power “To establish . . . post Roads” implies, after all, the power at least to name and perhaps even to build such roads (that distinction was debated in the nation’s early years). But the Necessary and Proper Clause made it explicit that Congress had not simply final but instrumental powers. Thus, consistent with the doctrine of enumerated powers, laws enacted pursuant to this power must afford actual means calculated to execute one of the enumerated powers or ends or one of the powers vested in one of the other departments or officers of the government. Laws that lack that connection cannot be justified under the clause. Moreover, only such powers as are “necessary and proper” are authorized.

Nevertheless, in the first great case interpreting this clause, *McCulloch v. Maryland*,<sup>51</sup> Chief Justice Marshall gave a broad reading to the word “necessary.” Unless inconsistent “with the letter and spirit of the constitution,” he wrote, the clause allows any law that is “appropriate,” “plainly adapted to [the] end,” and “really calculated to effect any of the objects intrusted to the Government.”<sup>52</sup> Perhaps that reading is “appropriate”—it allows Congress discretion in choosing among alternative means—but it does water down somewhat the force of “necessary.” If the Framers had wanted to say “appropriate,” they could have. They did not. Regarding the word “proper,” here “the spirit of the Constitution” comes into play. Thus, Congress cannot employ means that are inconsistent with federalism or separation of powers principles. Nor can the means Congress employs violate rights retained by the people. In its enumerated powers rulings, especially concerning the Commerce Clause, the Court has often been unclear about the role of the Necessary and Proper clause in the ruling. The clause remains, therefore, a source of confusion as the Court faces challenges to unceasing efforts to expand federal power.

## The Supreme Court’s Decisions on Rights

Our main concern thus far has been with the growth of American government and governmental powers beyond their constitutional bounds, producing the economic inefficiencies, dislocations, and uncertainties we see today in nearly all advanced nations. But in the American context that focus on limiting *power* rather than on asserting *rights* stems not only from such economic concerns but from the very structure of the Constitution—which was designed with those concerns in mind. America’s Founders believed that if power were limited mainly to protecting rights—and most of that power was at the state level—people would be free to plan and live their own lives and the economy would be disciplined accordingly, with most economic decisions being made at the lowest possible level, not by a central government. Thus, with the focus on limiting *power*, the Bill of Rights was an “afterthought,” as Justice Antonin Scalia has aptly described it. And when a bill of rights was added, its focus was almost entirely on freedom from government interference with private affairs, not on the government’s provision of goods and services, save for those pertaining to the securing of our rights through enforcement and court proceedings.

Not surprisingly, therefore, while there were legal challenges to expansions of federal power during the 19<sup>th</sup> century, there was not a lot of rights litigation as we think of it today, at

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<sup>51</sup> 17 U.S. 316 (1819).

<sup>52</sup> *Id.* at 421, 423.

least at the federal level, and for two main reasons. First, as mentioned earlier, the Bill of Rights did not apply against the states, where most government took place, until after the Civil War. And second, the federal government remained relatively limited. Thus, it was no surprise either that as both federal and state government started to expand, so too did rights litigation since that expansion brought with it ever greater governmental interference with our liberties.

Not only is it the case, therefore, that the more missions government takes on, the more it will violate the rights of those dragooned into such collective undertakings, as we saw earlier, even when those missions are constitutionally authorized, to say nothing of when they are not. But in addition, whether the missions are or are not authorized, even those people who may want to have government take them on are at risk of having their rights violated by the various *means* the missions entail. More government means more potential clashes between government power and individual liberty. That is the essential and inescapable baseline about government.

In truth, however, despite the American Constitution's dedication to liberty under limited government there has never been a "golden age" of liberty in America. At different times different rights have been respected—and disrespected. The rights of African-Americans are certainly better protected today than they were 100 years ago, to say nothing of 200 years ago. So too, in the main, is freedom of speech and due process as courts have better defined and protected those rights over the years. But property rights and economic liberties are less well protected under the modern redistributive and regulatory state, even as they remain protected under the Constitution, properly read.

Because this subject is so large—there being, as we saw earlier, an infinite number of rights—I will confine the discussion to just two matters, the Court's treatment of property rights, limited to a few cases concerning real property, and its treatment of the ever-difficult subject of unenumerated rights.

**Property Rights.** In his famous 1792 *National Gazette* article entitled "Property," James Madison wrote that "as a man is said to have a right to his property, he may be equally said to have a property in his rights"—echoing John Locke's insight that all rights can be reduced to property, broadly understood as "Lives, Liberties, and Estates." Stated most generally, at common law individuals had a right to acquire, use, and dispose of property; and if anyone objected to a particular use, as grounded in nuisance or endangerment, for example, the burden was upon him to prove that misuse. Thus, the *sic utere tuo ut alienum non laedas* principle determined the result—use your property so as not to harm another, where "harm" is defined basically as taking what belongs free and clear to another. Madison took it as axiomatic that the purpose of government was to protect property, thus understood.

The American Constitution does not protect property rights expressly, but it clearly does so by implication. The Fifth and Fourteenth Amendments prohibit the federal and state governments, respectively, from depriving any person of life, liberty, or property without due process of law. And the Fifth Amendment's Takings Clause, which has been held to be incorporated against the states through the Fourteenth Amendment, provides, "nor shall private property be taken for public use without just compensation." That is the law. What has become of it is quite another matter.

Progressivism brought two main changes to this legal order. First, as the Takings Clause stipulates, the government's use of eminent domain to condemn and take title to private property for a "public use"—for a military base, a highway, a post office, or the like—is constitutional as long as the owner receives just compensation for the loss of his property. But as federal power grew after the demise of the doctrine of enumerated powers, and state and local power grew with ever-more expansive readings of the police power under Progressivism and following the *Carolene Products* decision, the scope of "public use" grew as well. It is one thing to compel the transfer of a title from a private party to the public for a truly *public* use—and even to transfer titles to other *private* parties, like utilities or telephone and cable companies, where subsequent use is open to the public on a nondiscriminatory basis, often with regulated rates of return, thereby enabling the public to take advantage of the relative efficiencies of private ownership. It is quite another thing to condemn whole neighborhoods under a "blight" rationale, as is often done today, to say nothing of transferring titles to private parties in the name of "economic development."

Yet those rationales for using the power of eminent domain have been upheld by the Court—the economic development rationale most recently in the infamous case of *Kelo v. New London, Connecticut*.<sup>53</sup> There, the Court read "public use" to mean "public purpose." "Public purpose" is much broader, of course, than "public use." The main "public purpose" the city of New London advanced for condemning the homes of Susette Kelo and her neighbors and transferring title to a private developer was to provide jobs and a greater tax base due to the upscale development the developer planned for the site. Among other things, the Pfizer pharmaceutical company was scheduled to relocate there. Not surprisingly, these kinds of cases are rife with political machinations and political promises that rarely materialize. In fact, in this case market conditions changed, the developer was unable to find financing, Pfizer changed its plans, and the land today lies vacant, generating no tax revenue at all for the city—a fitting end.

But the demise of the "public use" restraint in the Takings Clause is only part of the problem. Even when property is condemned for a genuine public use, rarely does the owner receive "just compensation" as the Takings Clause requires. Instead, he ordinarily receives market value. Obviously, in most cases the property is worth more to the owner than the price it would fetch on the market, as evidenced by the fact that he does not have his property on the market. In reality, the compensation that would be just is the amount that would leave the owner indifferent as to whether he keeps the property or receives the compensation.

The second basic change that Progressivism brought about involved, eventually, what are called regulatory takings—but you have to get to court first before you can bring suit for such a taking, and that is no small matter. As social engineers—planners—Progressives sought to regulate the ways in which owners could use their property. That meant reversing the common-law presumption that favored free use. No longer would that be the rule, with the burden to justify restricting use resting with the complainant. Instead, increasingly one could use or change uses of one's property only after obtaining a permit from some planning board—often from more than one such board. One would not have to get a permit before speaking or writing, of course,

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<sup>53</sup> 545 U.S. 469 (2005).

but today you do before you develop your property. Thus have property rights become like “poor relations” in the Bill of Rights, as Chief Justice Rehnquist once famously put it.<sup>54</sup>

Over the years the permitting process has grown ever-more lengthy, costly, and onerous for those who want to develop or change the use of their property. The Court’s “ripeness” test keeps complaints against states and localities, where most permitting restrictions arise, out of federal court until all administrative remedies have been exhausted. But exhausting those remedies often means clearing vague and ever-changing administrative hurdles erected by local regulators opposed to any change. And under the Court’s test, until an agency issues a final denial, it cannot be sued. Once the owner does obtain a final denial, however, if he is not exhausted financially and emotionally by then he must go to state court to seek compensation for the taking of his property, albeit under a regulatory takings regime that is anything but favorable. But if wrongly denied compensation by the state court, he will find that he is denied federal court review on the merits by the federal Full Faith and Credit Act. And that is just a summary of the procedural problems owners face under American law today.<sup>55</sup>

If the owner is eventually able to surmount those procedural hurdles, however, he will find a substantive law that is stacked against him. He will prevail in getting compensation if there has been an actual physical invasion by the government. And he may win if there is no “essential nexus” between a legitimate governmental interest and the permit condition. Thus, a permit designed to ensure that safety conditions are met before building commences cannot demand that the owner give the government a public easement across his property as a condition for granting the permit. In a great range of permit denials, however, the government is trying simply to obtain a “free” good for the public—a lovely view running over the owner’s property if it remains undeveloped, wildlife habitat the property affords, historic preservation, and the like—but it does not want to pay for that good by giving compensation to the owner for the loss in value he suffers. Rather than raise taxes to pay the compensation due the owner, officials say, better that the good be obtained “off-budget.” When such goods are “free,” the demand for them, of course, is infinite. Thus is explained the growth in the demand for such regulatory goods.

The case of *Lucas v. South Carolina Coastal Commission*<sup>56</sup> illustrates this issue—though it was a rare 5-4 win for the owner. In 1986 David Lucas, a South Carolina developer, paid nearly a million dollars for two parcels of land on the outer-banks near Charleston, South Carolina. He planned to build a home for himself on one and a home to sell on the other. There were already homes between and on either side of his parcels. Shortly thereafter, however, the state legislature passed its Beachfront Management Act, the purpose of which was to promote tourism and to preserve certain flora and fauna. But for Lucas the effect was devastating: The Act prohibited him from doing anything with his property, rendering it nearly worthless. He sued the state for taking his otherwise legitimate uses. He won in the state trial court, but lost in the state Supreme Court. Fortunately, the U.S. Supreme Court granted *certiorari*, heard the case, and reversed the South Carolina Supreme Court.

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<sup>54</sup> *Dolan v. City of Tigard*, 512 U. S. 374, 392 (1994)

<sup>55</sup> See generally STEVEN J. EAGLE, *REGULATORY TAKINGS* (2012).

<sup>56</sup> 505 U.S. 1003 (1992).

But in his opinion for the Court's majority, Justice Scalia held that the reason Lucas was entitled to compensation was because the state statute wiped him out, reducing the value of his property to nearly nothing. In most such contexts, however, the statute does not do that. It prohibits otherwise legitimate uses but reduces the property's value by something less than 100%. In those cases, under Scalia's categorical rule, the owner would get nothing. When Justice John Paul Stevens pointed this out, Scalia responded characteristically, "Takings law is full of these 'all-or-nothing' situations."

The problem here and throughout our ad hoc regulatory takings law is that the analysis starts at the wrong end. Scalia has used the magnitude of the loss not to determine a remedy, as one would expect, but to determine the prior question—whether a taking has occurred in the first place. Because a "wipe-out," leaving the owner with an empty title, is tantamount in effect to taking the underlying fee itself, it constitutes a taking, Scalia appears to believe. But "property" is defined by more than the underlying fee. As Madison saw, a man can be said to have "a property in his rights," including his rights of use over the property. Property is both the fee and all of the legitimate uses that go with it, which in all other areas of the law can be divided, leased, bequeathed, and so on. In the classic metaphor, property is a "bundle of sticks." Take one and you've taken something that belongs to the owner, for which compensation is required (beyond a *de minimus* loss). A taking arises when the *first* stick is taken, not only after the last one is. But there stands our regulatory takings law today.

Not surprisingly, this confusion is a concomitant of the modern regulatory state, and it arises in many regulatory contexts where one person is prohibited from doing something he would otherwise be free to do or required to do something he would otherwise be free not to do, all for the benefit of another—except that here it is for the benefit of a whole people. We have here the welfare state turned on its head, with the public enjoying the benefit of the good thus acquired and the costs falling on one or a few individuals. And we see this especially in the realm of environmental goods—not the prevention of environmental *harms*, which is perfectly legitimate under the theory of rights, but the provision of environmental *goods* like those just mentioned. In fact, many environmental zealots are quite honest about it: They admit that they (or the public) cannot afford, or are not willing to pay for, all the goods they want. So they take them, like common thieves.<sup>57</sup>

**Unenumerated rights.** If there is jurisprudential confusion in America regarding that most basic and arguably clearest of rights, property, *a fortiori* there is when we come to those most elusive of rights, those that are not enumerated on any parchment. Here again is the Ninth Amendment, which speaks to such rights: "The enumeration in the Constitution of certain rights shall not be construed to *deny* or *disparage* others *retained* by the people." (emphasis added) Scholars have expressed various views about the meaning and force of that amendment.<sup>58</sup> Yet it takes no little imagination to believe that it means anything other than what it plainly says. You

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<sup>57</sup> I have discussed the general subject of property rights more fully in Roger Pilon, *The Constitutional Protection of Property Rights: America and Europe*, American Institute for Economic Research, 2008.

<sup>58</sup> See, e.g., *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (Randy E. Barnett ed., 1989).

cannot “retain” what you do not first have to be retained. To believe otherwise is not only to ignore the logic of the construction but to deny and disparage the rights you retain.

Are we to believe that, prior to the addition of the Bill of Rights, Americans had *no* rights against the federal government save for those few mentioned in the original Constitution—as the denial of unenumerated rights, conjoined with the denial’s affirmation of enumerated rights, would imply? (“At last, now that we have a Bill of Rights, we have a few more rights against the federal government.”) “No, we are not to believe that,” it will be answered, “because the doctrine of enumerated powers implied that we had rights against the federal government. Had that federal government tried to restrict, say, our right to speak,” the answer continues, “we could have replied, ‘You have no power to do that,’ as Hamilton, Wilson, and others argued, the implication being that we had a right to freedom of speech, even though it was nowhere enumerated.” Well if that is so, if we had those unenumerated rights *before* the Bill of Rights was added, are we to believe that we *lost* them once it *was* added? That strains credulity to the breaking point. Why would we have added a few *enumerated* rights if it meant losing far more *unenumerated* rights?

Those retained unenumerated rights, moreover, are *recognized* by the Constitution itself, through the Ninth Amendment, which instructs all who take an oath to uphold the Constitution, including judges, not to construe the prior enumeration as either denying or disparaging those retained rights. In other words, the enumeration of certain rights is *not* to be read as implying that those unenumerated rights we enjoyed prior to the addition of the Bill of Rights—enjoyed by implication of the doctrine of enumerated powers—are no longer to be had. They *are* to be had and enjoyed, even though it was impossible to have enumerated them all.

As for just what unenumerated rights we retained, they must be those natural rights that we never gave up when we left the state of nature and constituted and reconstituted ourselves, and those we had as Englishmen and as citizens of our own states and of the United States that are not inconsistent with our natural rights. Meanwhile, the Fourteenth Amendment, as its authors and ratifiers repeatedly said, was meant to incorporate against the states not only the Bill of Rights but our common law rights and our natural rights as well. It is thus incontrovertible, I submit, that the Constitution was meant to protect enumerated and unenumerated rights alike.

And over the years the Supreme Court has in fact protected unenumerated rights. In 1905, for example, in *Lochner v. New York*,<sup>59</sup> the Court upheld the freedom of contract, a right that is arguably protected by the original Constitution’s Contracts Clause, but one that was vigorously denied by Progressives then and ever since. In 1923, in *Meyer v. Nebraska*,<sup>60</sup> the Court ruled unconstitutional a state statute providing that “No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language,” and forbidding foreign language instruction for children below the ninth grade. Thus, the Court upheld an unenumerated right of parents to teach their children a foreign language and in a foreign language. And in the same vein, in 1925, in

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<sup>59</sup> 198 U.S. 45 (1905).

<sup>60</sup> 262 U.S. 390 (1923).

*Pierce v. Society of Sisters*,<sup>61</sup> the Court upheld the right of parents to send their children to non-governmental schools, thus overturning an Oregon statute that denied that right.

More recently, in 1965, in *Griswold v. Connecticut*,<sup>62</sup> the Court overturned a statute that criminalized the sale and use of contraceptives. In 1967, in *Loving v. Virginia*,<sup>63</sup> the Court found that state's anti-miscegenation statute violated the 14<sup>th</sup> Amendment's Equal Protection Clause, thus upholding the right to marry someone of another race. And in 2003, in *Lawrence v. Texas*,<sup>64</sup> the Court overturned a law criminalizing homosexual sodomy.

In all of those cases, notice, it was a state statute that was overturned under the 14<sup>th</sup> Amendment's Due Process Clause or Equal Protection Clause or both. But federal statutes too are often overturned under the Fifth Amendment's Due Process Clause, which has been read to entail an equal protection principle. Thus, just last June, in *Windsor v. United States*,<sup>65</sup> the Court found, on both due process and equal protection grounds, that the federal Defense of Marriage Act was unconstitutional, thereby establishing the right of same-sex couples married under the laws of their state to be eligible for a wide range of federal benefits available only to married couples.

As those and many other such decisions show, the Court over the years has "found" unenumerated rights "in" the Constitution. It did so, mostly, under the Fifth and Fourteenth Amendment's Due Process Clauses, but not without objections. After all, those clauses prohibit the government from depriving a person of life, liberty, or property without due process of law, which implies that a person *may* be so deprived *with* due process of law. But does the process that is due offer any *substantive* protection beyond the protection of procedural rights? Or is it simply the case that whatever the substantive law may be, whether judge-made or statutory, it must be applied consistent only with procedural guarantees? If the latter, then the cases above were wrongly decided, because the legislatures had spoken clearly in each case, saying that the plaintiff did *not* have the rights the Court eventually found. If the former, however, if the Due Process Clauses can be read to provide not just procedural but substantive protection as well, then we have what has come to be called "substantive due process," which many conservative jurists in America have called a contradiction in terms and an oxymoron.<sup>66</sup>

**Interlude—Recent History.** This brings us to the confused state of things in American constitutional jurisprudence today, but the account of that confusion requires some recent history. After the constitutional revolution of 1937-38, American liberals—not to be confused with European liberals—came to dominate American politics even more than their Progressive parents had, and they would continue to do so for decades to come. Thus, the Supreme Court, fully staffed by Roosevelt appointees by 1945, increasingly deferred to the political branches and the states, allowing government at all levels to expand, unshackled as it now was from most constitutional constraints. In the 1950s, however, especially after former California Governor

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<sup>61</sup> 268 U.S. 510 (1925).

<sup>62</sup> 381 U.S. 479 (1965).

<sup>63</sup> 388 U.S. 1 (1967).

<sup>64</sup> 539 U.S. 558 (2003).

<sup>65</sup> 570 U.S. \_\_\_\_ (2013).

<sup>66</sup> See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31-32 (1990).

Earl Warren became Chief Justice, the Court grew more active, and rightly so as civil rights cases challenging Jim Crow segregation in the South filled more of its docket.

But the docket was filled with more than civil rights cases. Increasingly it reflected the political agenda of the liberal elites in the universities, the foundations, the media, and elsewhere. And it led eventually to a backlash from a small but growing conservative elite, especially after the Court's highly controversial 1973 abortion decision, *Roe v. Wade*.<sup>67</sup> Conservative critics charged the liberal Warren and Burger Courts with "judicial activism," with ignoring the law in favor of the values of the elite—and, in particular, with finding "rights" in the Constitution that were nowhere to be found. They demanded "judicial restraint," especially concerning "substantive due process," and deference to the political branches—the very branches, be it noted, that since the New Deal had given the nation the Leviathan against which small-government conservatives were otherwise railing.

But as conservatives grew stronger politically and, in time, more numerous on the Court, the charge of "judicial activism" would be made increasingly by liberals. In either case, however, whether lodged by liberals or, more often, by conservatives, the charge revealed a conception of the Constitution that was at considerable distance from the document itself. In particular, both liberals and conservatives ignored the demise of the doctrine of enumerated powers, the very foundation of the Constitution—a "lost cause," conservatives said, until fairly recently; and a good loss, said liberals. Joined on that point, the two camps differed mainly on the rights side of the Constitution. From not unwarranted fear about rights activism—about the Court's finding "rights" nowhere to be found—conservatives urged the Court to enforce only those rights that were clearly *in* the document, thus ignoring our unenumerated rights. Liberals, by contrast, continued to urge the Court to enforce rights that reflected "evolving social values"—as understood by liberal elites, of course—ignoring in the process such core constitutional rights as property, contract, and economic liberty.

Thus did we arrive at modern "constitutional law"—not to be confused with the actual Constitution—all stemming from the New Deal constitutional revolution. But that state of affairs led in turn to the emergence in the late 1970s of a third school of thought, crafted by classical liberals—or libertarians, as we are better known in America.<sup>68</sup> Calling on the Court to restore the actual Constitution, as amended, we urge a slow revival of the doctrine of enumerated powers—as a practical matter the massive modern welfare state cannot be rolled back overnight—and for the protection of both enumerated and unenumerated rights, neither ignoring rights that were meant to be protected, whether enumerated or not, nor inventing rights out of whole cloth.

As noted above, over nearly two decades now the Court has in fact revisited the doctrine of enumerated powers, reviving it at the margins, at least, much to the dismay of contemporary liberals who in response have charged the Court majority with "judicial activism." (The 1995 *Lopez* decision put a slight brake on 58 years of precedent, a precedent that itself overturned 150 years of largely faithful constitutional interpretation!) And for a longer period, and more often, the Court has been finding a variety of legitimate unenumerated rights, as also illustrated above. But it has never developed a satisfactory theory of the matter, a theory to help it identify

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<sup>67</sup> 410 U.S. 113 (1973).

<sup>68</sup> See Roger Pilon, *On the Origins of the Modern Libertarian Legal Movement*, 16 CHAP. L. REV. 255 (2013).

legitimate from illegitimate rights, thus leaving itself open to the charge—from liberals and conservatives alike, depending on the right thus found—of making it up for little more than political reasons.<sup>69</sup>

**Unenumerated Rights Again.** The method the Court has employed for discerning such rights was articulated by Chief Justice Rehnquist in *Washington v. Glucksberg*:<sup>70</sup>

Our established method of substantive due process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition” (“so rooted in the traditions and conscience of our people as to be ranked as fundamental”), and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Second, we have required in substantive due process cases a “careful description” of the asserted fundamental liberty interest. Our Nation’s history, legal traditions, and practices thus provide the crucial “guideposts for responsible decisionmaking” that direct and restrain our exposition of the Due Process Clause. As we stated recently, the Fourteenth Amendment “forbids the government to infringe . . . ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”<sup>71</sup>

Several points are to be drawn from that passage. First, note that Rehnquist, drawing more from precedent than from theory, is accepting the idea that the Due Process Clauses, whatever the implications of their wording, offer more than mere procedural guarantees: They provide substantive guarantees, a point that in practice has been largely true since Magna Carta’s clause 29. Second, he speaks of “fundamental” rights, echoing the New Deal Court’s bifurcation of rights in *Carolene Products* and implying that nonfundamental rights are *not* to be protected under the clauses, thus inviting the Court to make inherently value-laden judgments about which rights are and are not “fundamental.” Third, and most important, if the rights to be protected are limited to those that are “deeply rooted in the Nation’s history and tradition” it is hard to see how several of the decisions listed above were justified: Indeed, anti-miscegenation and anti-sodomy laws, to take just two examples, were long-standing in our history. This amounts to allowing history and the limits it imposes by way of precedents to trump a better text, a text that might later bear fruit under more favorable circumstances. Finally, while it is true that rights and liberties must be carefully described, that should come first in the analysis, not second. Only so will we know, precisely, what is being asked of the Court.

What is striking about this approach to discerning unenumerated rights, however, is what it misses. Notice that it focuses on the right in question and its description—as though a right were a kind of free-standing claim. But rights are *relationships*, between right-holders and correlative obligation-holders. To have a right to sell contraceptives, say, or to marry someone of another race is for third parties to have an obligation not to interfere with those actions—and, by

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<sup>69</sup> For a fuller discussion of these issues see Roger Pilon, *Lawless Judging: Refocusing the Issue for Conservatives*, 2 GEO. J. L. & PUB. POL’Y. 5 (2001).

<sup>70</sup> 521 U.S. 702 (1997).

<sup>71</sup> *Id.* at 720-21 (internal citations omitted).

implication, to demand a justification from anyone who would claim a right to interfere. In other words, the analysis of rights and right claims *begins* by presuming noninterference—or liberty. It is *interference* that must be justified, not liberty. One can justify interfering with someone who is about to commit a murder—about to interfere with a third party’s liberty; one cannot justify interfering with someone who is simply *exercising* his liberty.

Thus, the simple fact about each of the examples above in which the Court found an unenumerated right is that in each case the statute found to be unconstitutional was interfering with the liberty of the plaintiff while protecting the rights of no one. The statute was simply expressing the “morals” (not to be confused with morality) of a portion of the community—that portion that was opposed to private education or contraceptives or inter-racial marriage or private consensual sodomy, or something else. In sum, the discernment of unenumerated rights turns out to be simpler than the Court has imagined: Just ask whose rights the statute protects. If it turns out to be no one’s, while at the same time the liberty of the plaintiff is being restricted, then there is likely little justification for upholding it.

## V. Lessons From the American Experience

This canvas of the American experience with constitutional interpretation has focused, not without reason, on the most pressing issue facing advanced democracies today—how to restrain the seemingly inexorable but ultimately unsustainable growth of government. That is not a new concern. In 1788, writing from Paris, Thomas Jefferson observed that “The natural progress of things is for liberty to yeild [sic], and government to gain ground.”<sup>72</sup> But while the concern of America’s Founders was to preserve their liberties, the concern today of so many Americans—and Europeans too—is to preserve their middle-class entitlements, even as they avert their eyes from the implications of the growth of Leviathan.

What we would see if only we would look is the Hobbesian war of all against all, with contributors to the common pot growing fewer and takers from it growing more numerous. America’s Social Security scheme began life with 16 contributors for every recipient. It is now below 3 to 1—and the demographic handwriting is on the wall. We have one major and several lesser cities in actual bankruptcy today, along with counties in the same situation and states staring at bankruptcy. After the last decennial census was taken in 2010 our largest state, California, did not get a new seat in the House of Representatives for the first time in its history—because nearly as many people left the “Golden State” over the previous decade as entered. And due to the state’s growing taxation and regulation, it is the tax payers, for the most part, who are leaving the state and the tax takers who are entering. What cannot go on perforce will not.

Again, this is not an American problem alone. In fact, we have avoided the problem of undisciplined politics longer than most other nations, owing probably to the constitutional constraints we have had, which have not only been in place longer than in most other nations but are rather different than those found elsewhere. So what lessons can be learned from this experience? Let me say just a bit here about the most important lesson, then return to it at the

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<sup>72</sup> Letter from Thomas Jefferson to Edward Carrington, Paris (May 27, 1788).

end: When all is said and done, the climate of ideas—the *Zeitgeist*—will determine nearly everything in a democracy.

As noted earlier, one of the main functions of a constitution is to secure and preserve political discipline, but that discipline must also be found in the souls of the people. Lord Acton was right: Power tends to corrupt; absolute power corrupts absolutely. Americans began with a healthy suspicion of government—with a strong presumption *against* government. We seemed to understand intuitively the connection between government power and corruption, on one hand, and centralized power and inefficiency, on the other hand—an insight that would later be explained more technically by Austrian and public choice economists. Unfortunately, the belief that government can solve the problems of life, all the evidence to the contrary notwithstanding, seems to be deeply rooted in our tribal past and not easily extinguished.

On a more practical level, the division of powers between the federal and the state governments has served America well, as is evidenced by the fact that as that “arms-length” relationship (“competitive federalism”) started to evolve into a closer relationship (“cooperative federalism”) after the 16<sup>th</sup> and 17<sup>th</sup> Amendments were ratified in 1913, the discipline that attended the former began breaking down. Today, states are less jealous of their independence than solicitous of federal largesse, making them increasingly dependent, not loci of power to oppose federal encroachments.

There are lessons here for those in the European Union, of course.<sup>73</sup> As we saw, at the Constitutional Convention it was decided to give Congress the power to “regulate,” or “make regular,” commerce among the states. That worked, in the main, for 150 years, until pressure to read the word “regulate” more broadly brought on the modern regulatory state. European integration started out with free market principles in mind—breaking down barriers to commerce—but it has evolved into much more. There is a delicate balance to be struck in this, but it has to be informed by a clear understanding of the goal of integration or centralization. The limited goal of America’s Framers—breaking down state barriers to free trade—reflected the insight that efficiency is achieved *not* through central planning but just the opposite, by leaving as many decisions as possible to be made at the lowest level possible, where the most particular knowledge is to be found—again, an insight later explained more fully mainly by the Austrian economists. As a corollary, that principle does not change as society and the economy grow more complex. On the contrary, it is then, especially, that centralization fails.<sup>74</sup>

But if pitting power against power is important *among* sovereigns, it is equally important *within* a sovereign entity. Thus, the separation of powers along functional lines is crucial, as *The Federalist* explains so often and in such detail. But for that to work, each branch must exercise its power. A Court cowed by Roosevelt’s Court-packing scheme simply relinquished its power—or, more accurately, rationalized it away by concocting a theory of the Constitution that enabled it to abdicate its authority and responsibility under the Constitution. The deference to the political branches and the states that followed was fairly an invitation to them to do as they wished, which they did.

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<sup>73</sup> See THIERRY BAUDET, *THE SIGNIFICANCE OF BORDERS: WHY REPRESENTATIVE GOVERNMENT AND THE RULE OF LAW REQUIRE NATION STATES* (2012); VÁCLAV KLAUS, *EUROPE: THE SHATTERING OF ILLUSIONS* (2011).

<sup>74</sup> See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (2006).

Again, perhaps unique among constitutions—I am not a student of all or even many of them—is the American Constitution’s doctrine of enumerated powers, which is the document’s foundation and the explanation of its legitimacy. Reversing the age-old maxim that all power that is not reserved is given, the Constitution’s premise is, all that is not given is reserved. That puts the focus on what is given, and the burden on government to show that in fact it has the power it purports to have been given, failing which the people are free. It is difficult to overstate the importance of that starting point, that presumption. In fact, it is no accident that it was the first thing the Progressives attacked once they were in a position to do so.

A corollary, of course, is the need in the end to understand the theory of rights, because if the government *does* make good on its claim to have a power, that power must be exercised consistent with our retained rights, which can never be enumerated more than illustratively, dependent as they are for their definitions on myriad factual particulars. But those particulars are not the issue, ultimately; rather, as we saw above, it is the theory of the matter that in the end must be grasped. As natural rights theory came to be supplanted by will-based legal positivism, that understanding grew increasingly faint, and confusion ensued.

That brings us back to the importance of the climate of ideas, to Jefferson’s insight about “the natural progress of things,” and to the central problem of government growth, a problem inherent in democracy itself. That problem was not unknown to America’s Founders, of course. *The Federalist* is replete with discussions about it, and about the need to establish institutional checks on that “natural progress of things.” Was it ever better said than by Madison in *Federalist* 51?

But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. 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.

Today, we govern as if men *were* angels, with the government, accordingly, controlling neither the governed nor itself. Indeed, it feeds the appetites of the governed—and of itself—and the indiscipline and disarray are everywhere.

It is difficult not to be cynical, because that dynamic, which public choice economists have documented in so many domains, is self-perpetuating. For a brief time recently it seemed that the new Tea Party movement in America grasped the nature of the problem, as evidenced by the signs many of its marchers carried: “We Want Less!” (When was the last time we saw people marching to Washington demanding less?!) And even the more recent but generally clueless “Occupy Wall Street” rabble seemed briefly to be responding to an elemental truth about the modern dilemma—that the more we seek our salvation through government programs, the more the “one-percent” who know how to manipulate those programs to their own advantage will do so. (Nothing wrong with that: Self-interest makes the world go ’round. The problem is with the laws we enact that enable and even encourage the well-connected to benefit at the expense of the

rest) The Tea Party movement is still a work in progress. The Occupy crowds, like sheep heading for slaughter, are the foot-soldiers of the one-percent they blindly facilitate, then march against.

If this sounds like politics, not constitutionalism, it is. Recall that I said at the outset that the answer to why we have moved from liberty to Leviathan lies in politics. No constitution is or can be self-enforcing. As this brief history has shown, the Founders and Framers gave Americans a Constitution that did a fairly good job of keeping the rule of law in place for 150 years, preserving in the process a vast private sector and a small, focused public sector. Constitutional discipline was found in the *political* branches, not just in the non-political branch, the judiciary. But when that began to erode it was only a matter of time before it eroded in the courts, too. After all, judges and justices are appointed and confirmed by the political branches.

The Framers tried to structure relationships in a way that balanced both political and non-political forces. And given that they were writing essentially on a clean slate, they did strikingly well. But the key to the decline of their project—I hesitate to say “demise”—rests in the realm of ideas.<sup>75</sup> In a word, Progressives simply rejected the Framers’ vision. Here is an August 1900 editorial from the editors of *The Nation*, before it became an instrument of the modern Left as it is today, lamenting the decline of classical liberalism. Entitled “The Eclipse of Liberalism,” the editors first survey the decline in Europe, then write that in America, too, “recent events show how much ground has been lost. The Declaration of Independence no longer arouses enthusiasm; it is an embarrassing instrument which requires to be explained away. The Constitution is said to be ‘outgrown.’”<sup>76</sup>

There, in a nutshell, is the vision that picked up steam through the administrations of Theodore Roosevelt and, especially, Woodrow Wilson, reaching fruition institutionally once Franklin Roosevelt came to power, following the feckless Hoover administration. Here is FDR writing to the chairman of the House Ways and Means Committee in 1935: “I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation.”<sup>77</sup> And here is Rexford Tugwell, one of the principal architects of the New Deal, reflecting on his handiwork some thirty years later: “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.”<sup>78</sup> They knew exactly what they were doing—turning the Constitution on its head. The New Deal decisions, to put it plainly, stripped the Constitution of most of its structural and substantive restraints on government. *That’s what they were meant to do*, to clear the way for the New Deal programs. That is the legacy we live with today.

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<sup>75</sup> See Richard M. Weaver, *IDEAS HAVE CONSEQUENCES* (1948).

<sup>76</sup> *The Nation*, Aug. 9, 1900, p. 105.

<sup>77</sup> 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).

<sup>78</sup> Rexford G. Tugwell, “A Center Report: Rewriting the Constitution,” *Center Magazine*, March 1968, at 20. This is a fairly clear admission that the New Deal was skating not simply on thin ice but on no ice at all. For comments from the other side, 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, *Commerce Clause*, *supra* note 38, at 1388: “I think that the expansive construction of the [commerce] clause accepted by the New Deal Supreme Court is wrong, and clearly so.”

When the climate of ideas changes that radically, when the Constitution is dismissed that easily, there is not a lot that can be done to save it—except to try to change the *Zeitgeist*. At this late date, when so many have grown dependent on a vast array of government programs, the Court can only chip away at the edges of Leviathan or, more important, say “No further,” as it did in several parts of its Obamacare decision a year ago. The heavy lifting will have to be done by the political branches—the very branches that propelled us into this situation. That speaks volumes about how difficult it will be to check this spiral, as we see when we look around the country at states, cities, and counties caught up in it, staring bankruptcy in the teeth. But the political branches, of course, are us. In the end, therefore, we have no one to look to but ourselves. Politics gave us the constitutional decline that enabled the massive government we labor under today. Politics is what we have left to reverse that course.