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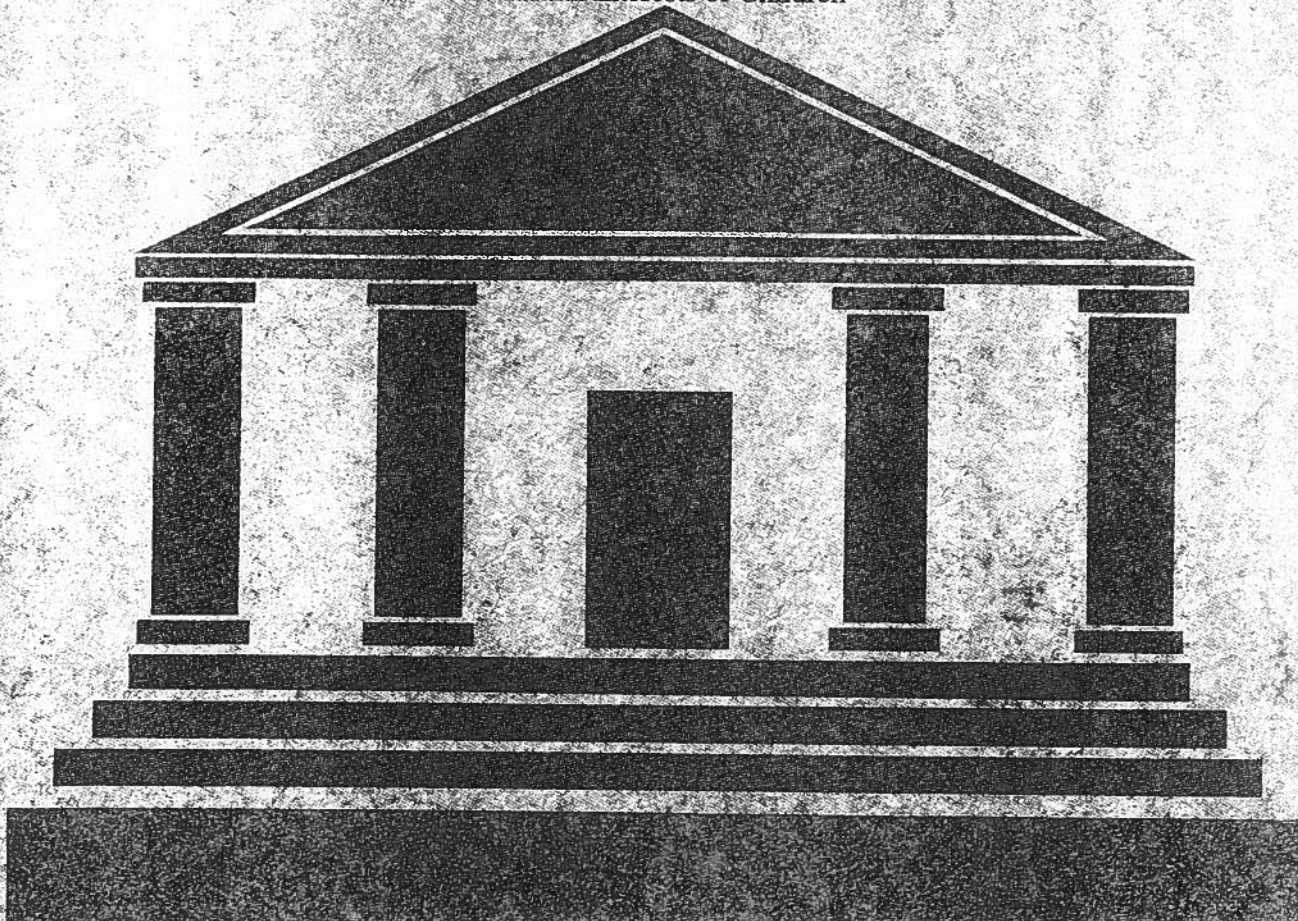
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INDUSTRIAL POLICY: INVESTING IN AMERICA

Featuring Steve Charnovitz, John Dankanyin, Lane Kirkland,
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On the Folly and Illegitimacy of Industrial Policy

by
Roger Pilon

Barely a month after taking office, President Clinton unveiled his bold new plan for a high-tech American industrial policy, "Technology for America's Economic Growth, A New Direction to Build Economic Strength."¹ A comprehensive program "to harness technology to drive economic growth and job creation,"² the plan is noteworthy for its tone alone. Gone is the strident, anti-business rhetoric of the pre-Reagan Democrats. In its place is the "market" language of the "new Democrats," the language of "competitiveness," of government playing "a key role helping private firms develop and profit from innovations."³

This concern for the efficiency of the market would be a breath of fresh air were it not for the fact that beneath the new rhetoric is the same old faith in government as the

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engine of human progress, the same uncritical belief in the ability of government to do the job—the *a priori* evidence of economic theory and the *a posteriori* evidence of economic history notwithstanding. Indeed, we are invited to believe that moving from the heavy-handed planning of the socialist state—which no one wants to repeat—to the enlightened "private-public partnerships" of the new industrial policy makes a difference.

Yet beyond the practical impediments that confront even a modest industrial policy lies a more

basic, and more important, question: Where, in America, is the constitutional authority for such a policy? When the authors of the Federalist Papers set forth their theory of enumerated federal powers,⁴ when Chief Justice John Marshall wrote in 1819 that "[t]his [federal] government is acknowledged by all to be one of enumerated powers,"⁵ and when President Grover Cleveland, some seventy years later, vetoed a piece of "industrial policy" legislation on the ground that he could find "no warrant for such an appropriation in the Constitution,"⁶ each was articulating the fundamental point that ours is a government of limited powers.

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Although some today would argue that we have pursued industrial policy from our inception—and there is just enough evidence for that view to save it from incredulity—the evidence to the contrary is overwhelming. What it shows, in a nutshell, is that industrial policy of a kind that has developed over the course of this century, which the Clinton team would substantially expand, was neither authorized by our founding generation nor practiced by succeeding generations. When it did finally emerge, moreover, industrial policy proceeded utterly without constitutional clothing. Indeed, the point was made by no less than Rexford Tugwell, a principal architect of the New Deal, when he wrote in 1968 that “[t]o the extent that these [New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them.”⁷

Under the Clinton Administration we may well go still farther down that “tortured” path—even as the rest of the world is moving away from government planning. But if we do, let us not pretend that the conscription of unwilling participants that attends our pursuit of industrial policy enjoys any legitimacy whatever. It is a policy devoid of principle—and quite out of place in a free society.

Toward demonstrating those points, I will first set forth something of the Clinton plan, then raise the by now well known problems that both economic theory and economic history tell us the plan must overcome—concerning which the plan’s supporters seem quite unaware. Second, I will outline the constitutional problems the plan faces, from which I will conclude that the plan is simply illegitimate. Finally, I will draw very briefly upon the principles at the core of the American vision to show how they alone constitute the foundation for a true industrial policy, a policy that can claim to be both legitimate and efficient. Not surprisingly, those principles, and the policy they entail, are the principles of a free, not a planned, economy.

THE CLINTON PLAN AND ITS PRACTICAL PROBLEMS

At least since Adam Smith published *An Inquiry Into the Nature and Causes of the Wealth of Nations*, in the same year that Thomas Jefferson penned the Declaration of Independence, we have thought of economies as being either free or unfree to one degree or another. In a largely free economy, private individuals and firms plan their own affairs and, in so doing, are at perfect liberty to hold or to exchange their various goods and services as they see fit. Absent any public plan for production or distribution, goods and services will be produced and distributed as if “by an invisible hand”⁸—the pattern at any point in time

reflecting the billions of decisions of millions of people to engage or not to engage in any particular exchange. Crucial to a system of free exchange, then, is a system of free prices, for as prices rise or fall they send signals to individuals and firms about scarcity and thus about whether to enter the market. Prices constitute the information people need and use as they make choices in that market.

By contrast, insofar as an economy is unfree, the relevant goods and services will be produced or distributed by the (usually) visible and coercive hand of government. However limited or varied government’s intrusion into the market, the general character of that intrusion is invariably the same: using the coercive powers available to it, govern-

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ment overrides the private decisions that individuals and firms would otherwise make, and the pattern of production and distribution that would otherwise result, and substitutes its own plan of production or distribution. The intervention is thus conscious and deliberate. And it is aimed at bringing about a pattern of production or distribution different than the pattern that would arise if individuals and firms were left free to plan their own affairs.

MR. CLINTON'S FATAL CONCEIT

Clearly, the Clinton industrial policy is an intervention of just this kind. Unhappy with the pattern of production and distribution that has resulted from our present arrangements—themselves hardly free⁹—Mr. Clinton proposes still further intervention. His most general ends or rationales include “a stronger economy, a cleaner environment, more competitive businesses, more effective government, better educational programs and technological leadership in critical fields.” Among his more specific ends and means are proposals to: “develop a national network of manufacturing extension centers to help small and medium-sized businesses gain access to technology; invest in applied R&D in fields such as advanced manufacturing, aerospace, biotechnology, and advanced materials; increase partnerships between industry and the national laboratories; develop a partnership with

the American auto industry to enable the development of a 'clean car,' creating jobs and protecting the environment; expand the Commerce Department's Advanced Technology Program to provide matching grants for industry-led R&D consortia; and develop a National Information Infrastructure and the 'information superhighway'.¹⁰

Presumably, little or none of that would get done if we left things to the free market. Left to their own devices, that is, individuals and firms would never—or would not soon enough—develop a national network of manufacturing extension centers, invest in applied R&D of the requisite kind, or build an information superhighway, to say nothing of a "clean car." If we, as a collective, want those things badly enough, we must bring them about through conscious government intervention and direction—through government planning. Thus, the choices that individuals and firms would otherwise make must be overridden if our national goals are to be achieved.

For all of its market rhetoric, then, Mr. Clinton's bold new industrial policy is at bottom indistinguishable from any other kind of national economic planning—whether the mild forms that took root in this country during the Progressive Era, the robust form that President François Mitterrand launched after he took office in France in the early 1980s, with disastrous results,¹¹ or the far-reaching forms that have characterized the socialist world, with tragic results. In each case, political leaders have presumed the national interest to be a function not of aggregate individual interests but of some pre-conceived pattern of desired outcomes—known, often, only to themselves. In each case, that pattern of outcomes has stood not in harmony with but in opposition to a substantial body of individual interests—which explains the need to implement the program through the coercive power of government rather than through the market. And in each case, political leaders have presumed their own ability to bring about their vision of the national interest through government coercion, notwithstanding the unintended consequences that invariably attend such efforts.

THE LESSONS OF ECONOMIC THEORY AND HISTORY

That "fatal conceit," as F.A. Hayek has called it,¹² is today alive and well in the White House, manifesting itself in everything from health care reform to plans for national service to high-tech industrial policy. In the case of industrial policy, however, the implications are especially troubling because they go to the very foundations of our economy. Indeed, as events over the century in Eastern Europe and beyond make clear, it is terribly easy to go down the road of planning but terribly difficult to return.

Nor can we pretend at this point in the century to be ignorant of the lessons on the subject from both economic theory and economic history.

What theory teaches, and has taught since Ludwig von Mises first published his classic statement on the point in 1920,¹³ is that in a planned economy planners are deprived of the very information they need to do their planning, namely, market prices, which contain information about ever changing tastes, technology, and resources. Absent such information, planners have no reliable crite-

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rior by which to plan the production and distribution of the millions of goods and services that constitute an economy—or, in the case of the Clinton industrial policy, the countless goods and services that fall under the policy's reach. Those insights of von Mises were later expanded upon by Hayek, who showed how markets produce order from apparent chaos, how they organize information coherently to produce highly efficient social systems, systems that no planner could possibly replicate through conscious effort.¹⁴

But if the von Mises and Hayek "impossibility theses" were not enough, during our most recent flirtation with systematic economic planning, when Senators Hubert Humphrey, Jacob Javits, and others introduced "The Balanced Growth and Economic Planning Act of 1975,"¹⁵ the Law and Economics Center at the University of Miami School of Law published a 1750-page compendium entitled *Catalog of Research Issues for Understanding Economic Planning*. Covering everything from the agricultural chemical industries to the yarn and thread mill industries, the volume is a catalog of "the more important issues that must be understood before national economic planning can be instituted."¹⁶ Yet the catalog's editors admit that their "prodigious effort [had] chipped away at what must still be merely the tip of a gargantuan iceberg."¹⁷ Indeed, one goes away from this tome realizing that only those who have thought little about the issue could possibly presume to plan an entire economy—or even a small corner of one.¹⁸

As for economic history, the wreckage of planned economies around the world speaks volumes not only about political hubris but, more importantly, about ruined

lives numbering toward century's end in the billions. Witnessing those ruins, perhaps no one has summed up the economic pronouncement on them better than a long-time friend of planning, self-described "left-centrist" economist Robert Heilbroner:

Here is the part that's hard to swallow. It has been the Friedmans, Hayeks, von Miseses, *e tutti quanti* who have maintained that capitalism would flourish and that socialism would develop incurable ailments. All three have regarded capitalism as the 'natural' system of free men; all have maintained that left to its own devices capitalism would achieve material growth more successfully than any other system. . . . *The farther to the right one looks, the more prescient has been the historical foresight; the farther to the left, the less so.*¹⁹

THE SEMATECH EXAMPLE

But it is not simply from the grand lessons of economic history that we learn to appreciate the failure of economic planning—of which industrial policy is, again, a seminal species. In fact, a recent example of that species—which many today tout as a success and, indeed, hold up as a model for the Clinton effort—is our own semiconductor industry consortium, SEMATECH. Created in 1987 to help the American semiconductor industry recover the share of the world chip market it had lost to the Japanese over the course of the 1980s, SEMATECH is a "public-private partnership" of twelve (originally fourteen) of the nation's largest semiconductor makers, receiving roughly half of its annual \$200 million budget from the Pentagon. Unfortunately, not only has SEMATECH misdiagnosed the problem but it has been no part of the solution.²⁰

The declining market share of American companies in the world chip market during the 1980s was in part a statistical artifact, traceable to currency fluctuations over the period and to the omission of American "captive producers"—companies like IBM that produce semiconductors for their own use but not for sale—from the figures indicating the decline. Yet even as the problem was overstated it was also misdiagnosed. Admittedly, American companies had seen a real decline in their share of the market for high-volume "commodity" chips—where efficient, vertically integrated Japanese companies had a manufacturing advantage—even as their share of specialized, "design-intensive" logic chips remained constant. Mistak-

enly believing, however, that competitiveness in the production of commodity chips was necessary to maintain competitiveness in the design-intensive market, SEMATECH devoted itself to pursuing incremental gains in manufacturing techniques for the former.

But in the meantime, technology did not stand still. Using new design tools, chip makers, including many young entrepreneurial companies unaffiliated with SEMATECH, were able to design new design-intensive chips at an unprecedented rate and at much lower cost.²¹ The result has been a substantial market shift away from commodity chips in favor of design-intensive chips—to the advantage of the smaller and more nimble American firms, such as Cypress Semiconductors, Cirrus Logic, and Altera, and the disadvantage of the lumbering, vertically integrated Japanese firms.²²

Yet none of this was predicted by the SEMATECH giants, which continue today to use their own and the taxpayers' money to fend off both domestic and foreign

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competitors—even as Robert Reich and other proponents of industrial policy condemn Silicon Valley start-up businesses for their "chronic entrepreneurship."²³ SEMATECH is a textbook example of the folly of industrial policy, yet we learn from Mr. Clinton's new high-tech plan that it will receive "continued matching funds"—indeed, that it "can serve as a model for federal consortia funded to advance other critical technologies."²⁴ Beneath the market rhetoric of the new Democrats, the old reality remains.

WHERE IS THE AUTHORITY FOR INDUSTRIAL POLICY?

The folly of industrial policy—the hubris of believing that we can plan an economy, or some part of one—is not what most troubles, however. For in a democracy, at least in principle, a policy failure will eventually be corrected or minimized once its consequences are sufficiently felt and its causes sufficiently understood. Until that happens, however, much damage will be done, not only to society as a whole but to specific individuals within society, which raises deeper questions about moral, political, and legal principle—questions about legitimacy. To be

legitimate, after all, government cannot operate simply as some grand social experiment. Government is an institution made necessary by the human condition. But that very condition sets limits on the institution: there are certain things government simply cannot legitimately do.²⁵

In the American context, those deeper issues, in a nutshell, are really quite simple. America was founded on a set of moral principles: that individuals matter, that they have rights to plan and live their own lives, and that the purpose of government is to secure those rights.²⁶ That much, at least, is the heart of our founding document, the Declaration of Independence. To give life to those principles, the founding generation drafted and ratified a constitution that authorizes a government of strictly enumerated powers, the exercise of which was to be further constrained by both enumerated and unenumerated rights. Search that document as you will, you will find in it no power to engage in "industrial policy," not least because such a power, as discussed below, would defeat the very purpose of the document—to authorize and institute a government to secure our individual rights.

Yet today that fundamental infirmity of industrial policy—that it proceeds without constitutional authority and against our rights—is all but unrecognized. My colleague, William A. Niskanen, put the point well in 1984 as a member of the President's Council of Economic Advisers: "The progressive erosion of the limits of the enumerated powers is one of the more serious problems of our democracy. The saddest comment on the recent debate on industrial policy is that this fundamental constitutional issue is no longer raised."²⁷

Let us raise and discuss the issue here, then, through a brief historical excursion, first through the world of ideas, then through the world of constitutional law, where those ideas have made their mark.²⁸

FROM INDIVIDUAL LIBERTY TO SOCIAL WELFARE

We begin, again, at the beginning, by noting that the American vision starts with the individual, not with the group. Moreover, it is guided by the idea that individuals have rights "by nature," not by government grant, and those rights may all be reduced to property and contract—"property" understood broadly to include "lives, liberties, and estates," as John Locke put it.²⁹ It is not for nothing that the Declaration sets forth that moral order first—an order in which individuals are free to pursue their own happiness—and only then sets forth the political/legal order—deriving the latter from the former. For the realm of politics and law is not an end in itself but simply a means of securing our moral rights. And that realm of moral rights is rooted in

reason, not legislative will; the function of the legislature, except at the margins, is simply to recognize and declare the moral realm, not to create it. Finally, because the individual right of self-rule is fundamental, consent must be the bedrock of political and legal legitimacy, as both the Declaration and the Constitution make clear.³⁰ At the same time, the practical limits of consent theory—and the problem of majoritarian tyranny in particular—were well understood by the founding generation, which is why they thought of government as a "necessary evil." Because government, at bottom, is a forced association, the founders understood that it was not only prudent but morally necessary to limit it as much as possible—to do as little as possible through government and as much as possible through the private sector—which is why they wrote a constitution in the first place.³¹

Unfortunately, that vision came under attack almost from the start. In 1791, for example, the father of British utilitarianism, Jeremy Bentham, wrote that talk of natural rights was "simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts."³² Throughout the nineteenth century and well into the twentieth, that skepticism gained ground on both sides of the Atlantic as natural law came to be replaced by the idea that government should concern itself not with the rights of the individual but with the greatest good for the greatest number—the view of the social engineer, which in American law has been called "pragmatic instrumentalism."³³ With the "social problems" that attended the rise of industrialism and urbanization following the Civil War, the ideas of the behavioral sciences, of democratic theory, and of German schools about "good government" grew increasingly influential.³⁴ As a result, our conception of government began to change fundamentally. No longer did we see government as a necessary evil, to be restrained at every turn. Instead, we started thinking of it as an instrument of good, an institution for solving "social" (often private) problems. Indeed, in 1900, at the dawn of the Progressive Era, the editors of *The Nation* could write, in a piece lamenting the eclipse of liberalism, that "[t]he Declaration of Independence no longer arouses enthusiasm; it is an embarrassing instrument which requires to be explained away."³⁵

That fundamental shift in the world of ideas—from a conception of government as a necessary evil, instituted to secure rights, to one of government as an engine of good, empowered to solve social problems—took its toll in the world of constitutional law, even as the Constitution itself remained unchanged. Little by little, the Constitution became an instrument not to authorize and

then restrain power but simply to facilitate it. In the case of industrial policy, however labeled or whatever the content, the question of whether there is a federal power to engage in such a policy arose early on. As Niskanen observes:

The American debate on industrial policy was first provoked by Hamilton's Report on Manufactures in 1791. . . . Hamilton argued that Congress had the power to pronounce upon the objects that concern the general welfare and that these objects extended to "the general interests of learning, of agriculture, of manufacturing, and of commerce." Madison responded sharply that "The federal Government has been hitherto limited to the specified powers, by the Greatest Champions for Latitude in expounding those powers. If not only the *means*, but the *objects* are unlimited, the parchment had better be thrown into the fire at once."³⁶

Hamilton lost that battle when his *Report* was shelved, but over time, of course, he won the war. Still, throughout the nineteenth century the push for a federal "industrial policy" was limited largely to protectionist tariffs, which might be justified under the congressional power to regulate commerce with foreign nations, and to general "internal improvements," which might be justified under a putative power to provide for the general welfare. (But see below on both of those rationales.) As late as 1907, in fact, the Supreme Court could write that:

[t]he proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in [,] the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. . . . This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment.³⁷

Indeed, it was not until the ideas of the Progressive Era gained constitutional recognition through the jurisprudence of the New Deal that the floodgates were opened, through which poured the kind of industrial policy we think of today. Nevertheless, the seeds for the demise of limited government—and the doctrine of enumerated powers in

particular—were sown much earlier.

FROM CONSTITUTIONAL AUTHORITY TO POLITICAL POWER

To understand those developments, it is essential to keep in mind the original strategy of the Constitution. That strategy, once again, was threefold. First, to establish a national government not of general but of enumerated powers, thus limiting the ends the government might pursue.³⁸ Second, to limit the means available to that government to those that are both "necessary and proper" for accomplishing any of its enumerated ends.³⁹ And third, to require the national government, even when acting pursuant to one of its enumerated powers, and limiting itself to means that are necessary and proper, to act in a way that respects the rights retained by the people, including rights not enumerated in the Constitution.⁴⁰

Plainly, anyone seeking consciously and deliberately to expand the scope of federal power would have been well advised to undermine each of those three sources of restraint by, first, expanding the reach of government's enumerated powers; second, weakening the restraint imposed by the Necessary and Proper Clause; and, third, minimizing the rights that otherwise restrained the operations of government.

That, precisely, is what has happened over the years. First, the powers of Congress to provide for the general welfare and to regulate commerce among the

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states⁴¹ have been read in a way that utterly eviscerates the doctrine of enumerated powers, transforming those powers from shields into swords. Second, in 1819, in the seminal case of *McCulloch v. Maryland*,⁴² Chief Justice John Marshall employed a logical sleight-of-hand to eviscerate any restraint the Necessary and Proper Clause might otherwise have imposed on the means available to Congress pursuant to exercising its enumerated powers. Finally, in interpreting the rights that are enumerated in the Constitution and its amendments, and implied through the Ninth Amendment, the Court over the years has shown itself to be essentially unwilling to develop anything approaching a systematic theory of natural rights of the kind that implicitly underpins our political order, producing instead a jurisprudence of rights that is episodic at best and incoherent at worst. Let us look at those issues in order.

Expanding the Ends of Government

To get a feel for how serious the founding generation was about the doctrine of enumerated powers, we need look only to the early congressional debates. In 1796, for example, a bill to relieve fire victims in Savannah, Georgia, was decisively defeated when a majority in Congress could find no constitutional authority for such an appropriation.⁴³ Declaring that "he did not think [the House] ought to attend to what 'the affairs of men' or what generosity and

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humanity required, but what the Constitution and their duty required,"⁴⁴ Virginia's William B. Giles was merely echoing the thoughts of James Madison who had noted two years earlier, regarding a similar bill,⁴⁵ that he could not "undertake to lay his finger on that article in the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents."⁴⁶

Indeed, throughout the nineteenth century the debate was largely over powers—over whether Congress had a particular power—not over whether any rights might stand in the way of such powers, as in the modern debate (when there is a debate at all). And that debate took place, for the most part, in or between the political branches, not in the courts.⁴⁷ It is almost quaint today to imagine a member of Congress questioning whether that body has the power to undertake some program. Yet that was the first question asked for most of the nineteenth century. Moreover, as Congress grew more emboldened to assert powers, the executive was not at all reluctant to veto those assertions. Thus, we find presidents ranging from Tyler, Polk, Pierce, and Buchanan, before the Civil War, to Arthur and Cleveland, after the war, standing athwart such efforts by Congress.⁴⁸ And more often than not the debate took place not on political but on constitutional grounds.

Although the early debate focused less on the Constitution's Commerce Clause, through which so much industrial policy today is pursued, than on its General Welfare Clause,⁴⁹ in either case the issue at bottom is the

same. As Madison put it regarding the latter:

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.⁵⁰

Contrary to Hamilton,⁵¹ that is, Madison, Jefferson, and others held that the General Welfare Clause was not an independent source of congressional power, to be restrained only by its exercise for the "general" welfare. Rather, it was an additional shield, aimed at ensuring that Congress's enumerated powers be exercised for the general and not for any particular welfare. Indeed, if Congress could spend on whatever it wished under the General Welfare Clause, provided only that it be "general," or regulate whatever it wished under the Commerce Clause, what would have been the point of enumerating Congress's powers?⁵² The enumeration of powers, which prior to the adoption of the Bill of Rights in 1791 was meant to be the principal restraint on national power, would have amounted to an empty promise.

Slowly, however, the General Welfare Clause did become an independent source of congressional power and, in time, even the qualifying "general" ceased to operate as a restraint on that power. Over the nineteenth century, congressional spending would often begin under an enumerated power but then expand to be, in effect, a "general welfare" expenditure. Sales of land under the Territorial Power Clause, for example, evolved into gifts of land for agricultural colleges,⁵³ then into gifts of proceeds from the sale of land,⁵⁴ and finally, especially in the twentieth century, into gifts from the Treasury generally.⁵⁵ Thus, by small steps Congress moved from clear, to less clear, to no authority, creating limited programs that served later as precedents for more expansive programs.⁵⁶

As the scope of welfare transfers grew, constitutionalists became increasingly distressed by the absence of any secure ground on which to raise a challenge, particularly after the Supreme Court decided in 1923 that neither citizens nor states had standing to sue to enjoin the Secretary of the Treasury from making such expenditures.⁵⁷ In

1936, however, the Court at last ruled on the power to spend for the general welfare, finding, with Hamilton, that the General Welfare Clause was indeed an independent source of congressional power,⁵⁸ thus eviscerating the doctrine of enumerated powers. And a year later the New Deal Court went even further in its deference to the political branches when it found that although “[t]he line must still be drawn between one welfare and another, between particular and general,” the Court itself would not draw that line. Rather, “[t]he discretion belongs to Congress”⁵⁹—the very branch that was redistributing from the Treasury with ever greater particularity. Not even Hamilton had called for that.⁶⁰

If Congress, acting under the commerce power, can regulate virtually anything, what was the point of having enumerated its powers?

Like the General Welfare Clause, the Commerce Clause has also been converted from a shield to a sword. There can be little doubt about the original purpose of the clause. Under the Articles of Confederation, state legislatures had passed a wide range of measures to protect local manufacturers and merchants from out-of-state competitors, thus impeding the free flow of commerce among the states, to the detriment of all.⁶¹ Only a national government could break the logjam. Indeed, the need to do so was one of the principal reasons behind the call for a new constitution.

The Commerce Clause was aimed, then, at giving Congress, rather than the states, the power to regulate commerce among the states. Its purpose was thus not so much to convey a power “to regulate”—in the affirmative sense in which we use that term today—as a power “to make regular” the commerce that might take place among the states by enabling Congress to preclude those state regulations that would otherwise impede the free flow of interstate commerce.⁶²

Unfortunately, that original purpose has been largely forgotten. Drawing upon Chief Justice Marshall’s expansive reading of the commerce power in 1824,⁶³ attention has focused not upon the substantive issue—the free flow of commerce—but upon the jurisdictional issue—whether states or the federal government should regulate commerce—the unquestioned assumption being that commerce must be regulated. Given that assumption, that choice between either federal or state regulation, and

the expansive readings the terms “commerce” and “among” permit, it is no surprise that once Congress started indulging its regulatory ambitions, toward the end of the nineteenth century, there was little standing in the way. In the case of railroads, for example, we went from a decision saying that only the federal government could regulate interstate railroad rates⁶⁴ to a statute putting the government in the rate-making business for interstate railroads⁶⁵ to a decision extending congressional power to intrastate rate-making⁶⁶ to a statute replacing specific with comprehensive rate-of-return regulation,⁶⁷ thereby helping to cartelize the industry.⁶⁸

Just as with the General Welfare Clause, then, the Commerce Clause has become less a shield against power—here, from the states⁶⁹—than a sword of ever-expanding federal power, enabling the national government, over time, to regulate all manner of inter- and intrastate commerce, manufacturing, and much else, all on the pretext that such activity “affects” commerce among the states.⁷⁰ And here too the result has been to utterly eviscerate the doctrine of enumerated powers. If Congress, acting under the commerce power, can regulate virtually anything, what was the point of having enumerated its powers?

Unleashing the Means of Government

But if the ends for which Congress may act have expanded to the point that enumeration is now an empty promise, so too have the means available to Congress been unleashed, making the Necessary and Proper Clause an empty promise as well. The issue here is straightforward: whether Congress, even if limited to its enumerated powers, can choose whatever means it wishes when exercising those powers or pursuing those ends. If so, then the constitutional enumeration of powers would prove an illusory restraint on government, for almost any means might then be held to be “appropriate” or otherwise “rationally related” to the various powers Congress has been given.

As noted earlier, the Founders addressed that question when they authorized Congress “to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”⁷¹ While many have understood that authorization as expanding Congress’s power,⁷² the clause does not say that Congress may make “all laws for carrying into execution” but all laws “which shall be necessary and proper,” thus limiting the means available to Congress to those that are necessary and proper.

Although there was little debate over the Necessary and Proper Clause during the constitutional convention, both Hamilton and Madison were especially con-

cerned during the ratification debates to assure those who feared the clause to be a fertile font of power that they had no cause to worry. With or without the clause, they both argued, Congress would have whatever implied powers were "necessary" for carrying out its expressly enumerated powers.⁷³ That argument is plainly correct, for it would have made no sense to have authorized ends but not the means that were at least necessary to effect those ends. By including the clause, however, the requirements of necessity and propriety are made explicit. Moreover, given the doctrine of enumerated powers—and this is one such power—Congress has no authority to pursue means that are not necessary and proper for carrying into execution any of its enumerated powers. Were Congress to employ unnecessary or improper means, it would be acting beyond its authority.

Unfortunately, that is not how Chief Justice Marshall read the clause in *McCulloch v. Maryland*,⁷⁴ the Court's first extended discussion of the issue. Ever concerned to secure national power, especially against the states, Marshall reveals his hand when he proffers that "those who contend that [the government] may not select any appropriate means . . . take upon themselves the burden of establishing that exception."⁷⁵ Having thus departed, with his "appropriate," from the plain language of the Constitution, Marshall next questions whether, "in the common affairs of the world," "necessary" is always used to import "an absolute physical necessity," noting that the term frequently imports no more than that one thing is "convenient" or "useful" to another. Thus, he concludes that: "[t]o employ the means necessary to an end, is generally understood as employing *any* means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable."⁷⁶

Whatever Marshall may have meant by "absolute physical necessity," it is true that "in the common affairs of the world" people often do use language as carelessly as Marshall is here urging. But in this same opinion Marshall had just reminded us that "we must never forget that it is a constitution we are expounding."⁷⁷ If there is any place to use language carefully, a constitution is surely such a place. Presumably, the founders used "necessary" because they meant "necessary," not "appropriate," as Marshall goes on to do.⁷⁸

At bottom, however, Marshall has made here one of the more elementary mistakes of logic. He has confused a necessary condition—a condition "without which" something else would not happen—with a sufficient condition—a condition "calculated to produce" an end. There is all the

difference in the world between restricting Congress to necessary means and permitting it to use whatever means are sufficient. The Constitution requires the former. Marshall allowed the latter. The result ever after has been the evisceration of the Necessary and Proper Clause and any restraint it might otherwise have imposed upon the means available to the federal government.

Reducing the Realm of Individual Rights

In this same opinion, however, Marshall sketched the only method of constitutional reasoning that can withstand serious scrutiny: that a constitution cannot "partake of the prolixity of a legal code," that "only its great outlines should be marked," and that, accordingly, "the minor ingredients which compose those objects [must] be deduced from the nature of the objects themselves."⁷⁹ With regard to federal powers, as we have seen, Marshall and those who followed him on the Court have made those deductions—and much more. As a result, the federal government today has both derived and underived powers, powers that can and powers that cannot be "deduced" from the Constitution's "great outlines."

With regard to individual rights, however, those same "deductions," from the Bill of Rights and elsewhere, have never really been made. To be sure, during the early years of the Republic we find judges deriving rights from both written and higher law, consistent with the Ninth Amendment's admonition.⁸⁰ (After all, if the Framers intended unenumerated rights to be protected before the Bill of Rights was added to the Constitution, we should hardly imagine they meant them to go unprotected after that adoption.) That judicial "activism" lasted for only a short while, however, after which judges confined themselves to the "four corners" of the Constitution—at least with respect to finding rights.⁸¹ With the ensuing "restraint" regarding rights, yet "activism" regarding powers, the early Constitution, as informed by the rights-based theory of the Declaration, today stands on its head. Whereas the early Constitution set forth strictly enumerated powers restrained by both enumerated and unenumerated rights, constitutional law today sanctions vast federal powers restrained by a limited list of enumerated rights, often narrowly construed.

The explanation for this inversion must begin with the triumph of the Federalists and with the need they felt early on to secure some measure of national power. But it should continue, as noted above, by pointing to changes in the climate of ideas over the course of the nineteenth century and to the implications of those changes for constitutional thought and practice. Recall that the gradual de-

mise of natural rights theory and the rise of utilitarianism, with its focus not on individual rights but on group welfare, complemented and encouraged our growing pragmatism as we moved west, industrialized, and urbanized. Recall too that what expansion there was of federal power over this period came later in the period, for the most part; was little challenged in the courts, because done through the general welfare power; and so afforded little opportunity for the development of a systematic and robust body of rights—even as constitutional rationales for federal power had been or were being developed.

Thus, we entered the Progressive Era—with its concern to use government to solve social problems—with a constitutional doctrine far better equipped to rationalize than to restrain federal power. In fact, given the accelerating demise of the enumerated powers doctrine, a demise that would reach fruition during the New Deal, restraint on

There is all the difference in the world between restricting Congress to necessary means and permitting it to use whatever means are sufficient.

the growth of government could come neither from that doctrine nor from the political process, where limited government was increasingly out of favor, but only from a concern for the rights of those individuals who found themselves in the way of social progress. An effort to restrain government along those lines was made during the first third of this century, but it was uneven, and never deeply grounded. By the time Progressive Era doctrine had infused New Deal politics, there was hardly any restraining force left.

To sketch this account a bit more fully, however, we should begin with the period surrounding the Civil War—the second period in our history when natural rights were at the forefront of public attention. That concern culminated in the passage of the Civil War Amendments, which abolished slavery,⁸² universalized at least male suffrage,⁸³ and prohibited states from abridging our privileges or immunities, depriving us of life, liberty, or property without due process of law, or denying us the equal protection of the laws.⁸⁴ With those amendments, most of the promise of the Declaration of Independence was at last secured in the Constitution, however insecure it turned out

to be in fact.

There followed, of course, the Reconstruction Era and the rise of the Jim Crow South. For our purposes, however, it was the loss in 1872 of the Fourteenth Amendment's Privileges and Immunities Clause that is noteworthy, marking a significant retreat of the Court as the "bulwark of our liberties," as Madison had put it.⁸⁵ Brought by a number of New Orleans butchers who had been deprived of their livelihoods by a Louisiana statute that had chartered a private slaughterhouse corporation as a private monopoly, the Slaughter-House Cases⁸⁶ dealt with a paradigmatic example of the kind of legislation that results when economic interests are able to get to a legislature to gain an advantage over competitors. The debate surrounding the adoption of the Fourteenth Amendment had made it clear that the right to pursue one's livelihood unfettered by such interference as the Louisiana statute interposed was at the core of those privileges and immunities that William Blackstone had located among our "natural liberties."⁸⁷ Nevertheless, by a vote of five to four, a sharply divided Court found for the state, effectively removing the clause from the Constitution.⁸⁸

What has followed has been an episodic effort by subsequent Courts to do substantive justice with the less substantive Due Process and Equal Protection Clauses. The results, whether drawing upon those or upon other provisions of the Constitution, have been mixed and incomplete, invariably reflecting nothing so much as an unwillingness to return to the first principles that inspired us as a nation. Thus, we find the 1898 Court upholding federal legislation intruding on the freedom of contract,⁸⁹ while seven years later the Court overturned state legislation having the same effect.⁹⁰ In 1921, the Court upheld an intrusion on property rights in the form of rent controls,⁹¹ while a year later it overturned an intrusion on the same rights that went "too far"⁹²—from which has followed some seventy years of takings jurisprudence that the 1992 Court called "essentially ad hoc."⁹³

If any sense can be made today of the Court's rights jurisprudence, it stems from the crisis that arose during the period of the New Deal. Faced with a recalcitrant Court that stood athwart his efforts to introduce far-reaching economic legislation, President Roosevelt threatened to pack that branch with six additional members.⁹⁴ The scheme failed on the surface when Congress balked, but the Court got the message and started stepping aside.⁹⁵ In the end a chastened Court crafted a theory of the Constitution that has almost nothing to do with the document or its history. Barely sketched in the now-famous Footnote Four of *United States v. Carolene Products*,⁹⁶ the notorious

“filled milk” case,⁹⁷ the 1938 Court distinguished two kinds of rights—fundamental and nonfundamental—and two levels of judicial review—strict and minimal. Legislation implicating “fundamental rights”—voting or speech rights, for example—would come in for strict judicial scrutiny. By contrast, legislation implicating “nonfundamental rights”—“ordinary commercial transactions,”⁹⁸ for example—would receive minimal judicial scrutiny. Again, nowhere in the Constitution is there the remotest support for this bifurcated rights jurisprudence. On the contrary, Madison put well the Constitution’s unitary vision of rights when he 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.”⁹⁹ The purpose of the *Carolene Products* formula was not fidelity, however, it was political—to pave the way for the New Deal, and for the economic regulation, including industrial policy, that has followed.

THE ESSENTIAL ILLEGITIMACY OF INDUSTRIAL POLICY

When we consider industrial policy today, therefore, candor requires that we recognize its essential illegitimacy. As a form of federal planning, involving economic redistribution and regulation undertaken not to secure rights but to achieve social goals, industrial policy proceeds without constitutional authority and in violation of the rights of those who want only to be left alone to plan their own lives. Rights of property and contract are immediately implicated by industrial policy, of course. But under another name, those rights amount simply to the right to be free.

Yet even under modern constitutional principles, however unconnected to the Constitution itself, industrial policy has about it an air of illegitimacy. Those principles require, in essence, that economic regulations implicate no “fundamental rights” and that the means government selects be “rationally related” to its asserted ends.¹⁰⁰ On both counts, industrial policy fails.

Although property rights and economic liberties are no longer counted as “fundamental,”¹⁰¹ the rights to vote and to have an equal voice in the political process are.¹⁰² As the New Deal Court deferred to the political branches in the matter of economic regulation, in fact, one implication was that there would thereafter be much greater political control of economic activity—in which each of us, through the political process, would have an equal say. Economically benighted and constitutionally infirm as that result may be, it is “the law.”

But industrial policy does not satisfy that democratic ideal. Whatever its variations, it operates through

quasi-governmental boards, commissions, and committees—“private-public partnerships” that fairly reek of special-interest influence.¹⁰³ So far is this from participatory democracy—with “the people” controlling “their” economy—as to be its very opposite. Indeed, not only do private individuals no longer control their private assets, but those assets are no longer effectively controlled even by public officials. Control has been handed over instead to a consortium of carefully selected forces—as in the case of SEMATECH—forces that invariably reflect politically influential classes or interests. Those forces determine in turn where “investments” will be made—which firms will or will not get contracts, which workers will or will not be eligible for retraining, which technologies will or will not be subsidized. Having transferred those decisions from private to public to quasi-public hands, to then pretend that having done so does not implicate “fundamental rights,” requiring the strictest judicial scrutiny, simply strains credulity.

But industrial policy fares no better in satisfying the second leg of the modern test. If a means a legislature selects is to be “rationally related” to the legislature’s asserted end, at a minimum it must be “calculated to produce the end,” as Marshall had put it.¹⁰⁴ Again, that is a minimal standard, hardly difficult to meet. Yet industrial policy does not meet it.

As we saw earlier, among Mr. Clinton’s ends are “a stronger economy, more competitive businesses, and technological leadership.”¹⁰⁵ To achieve those ends he would direct money, time, and talent from where they would otherwise go to where he wants them to go. He would compel those transfers, in other words, through the taxing, spending, and regulatory powers of government.

Yet as economic analysis tells us, wealth is maximized—another way of stating Mr. Clinton’s “stronger economy”—when resources are allowed to move freely to their highest valued uses. (That is the only definition of wealth maximization that has ever been able to withstand scrutiny—every other definition begs fundamental questions.¹⁰⁶) Mr. Clinton, however, would not allow that process to take place. Instead, he would move resources from the places individuals and firms would employ them to places he prefers. And in doing so he would have us believe that the ensuing disutility to the affected individuals and firms is less than the utility to society as a whole.

Unfortunately, no one has ever been able to make that utilitarian calculation plausibly. On the contrary, the best calculation we have, the one that results when we let individuals and firms make their own decisions, reflects a distribution different than Mr. Clinton’s—which is why he

has to resort to force. Stated less theoretically, but to the point, the president thinks he knows best, but he has no way of demonstrating it.

What history will demonstrate, however, as we saw earlier, is that efforts to force "a stronger economy" through the redistributive and regulatory powers of government inevitably produce unforeseen and unintended consequences as individuals and firms continue to try to maximize their wealth even as government tries to force them to maximize its view of social wealth. From rent controls to wage and price controls, from health care policy to industrial policy, the pattern invariably is the same: the means are not "calculated to produce" the end and so are not "rationally related" to it. To the contrary, those coercive means invariably frustrate the ends they purport to serve.

The foregoing economic assessment is not difficult to make, from economic theory or from economic history. With rare exceptions, however, courts today will not make it, preferring instead to defer to the judgment of the legislature, however uninformed that judgment may be—or, indeed, informed by interests that have nothing whatever to do with any rational basis test. In this last connection, in fact, one commentator has remarked of *Carolene Products*:

The statute upheld in the case was an utterly unprincipled example of special interest legislation. The purported "public interest" justifications so credulously reported by Justice Stone were patently bogus. If the preference embodied by this statute was not "naked," it was clothed only in gossamer rationalizations.¹⁰⁷

When "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data,"¹⁰⁸ as the current Court has just said, we should hardly be surprised when legislatures behave as the founding generation understood they might. That is why the founders gave us a constitution—and courts to enforce it.

ON THE TRUE FOUNDATIONS OF INDUSTRIAL POLICY

The irony of our periodic pursuits of industrial policy, especially over the course of this century, is that we already have an industrial policy written into the core of our Constitution. Understood as it was meant to be understood, the American Constitution is calculated to maximize individual liberty—precisely the condition that theory and

history teach will maximize the well-being of a society. And what is industrial policy about, after all, if not our well-being?

The story of the twentieth century, however, is the story of trying to achieve well-being not by allowing it to arise from conditions of freedom but by consciously aiming at it. That is fine for individuals and firms, even commendable. But when governments try to promote the well-being of society through the only means available to them—coercion—they interfere with the efforts of individuals to achieve their own well-being and thus divert or discourage those efforts, even as they themselves confront the intractable coordination problems earlier discussed. In the end, well-being is not something governments can achieve by aiming at it. It is what results when individuals are left free to aim at it themselves, in their own individual lives.¹⁰⁹

That is a hard lesson for governments to learn—driven as they so often are to be constantly doing something. And it seems to be a hard lesson for many citizens to learn as well, since they often do the driving. Indeed, one could say that the problem goes to the human condition itself, to our quite natural tendency to want to do something when we see a problem. But the difference between doing

Nowhere in the Constitution is there the remotest support for this bifurcated rights jurisprudence.

something in our individual, private capacities and doing something in our collective, public capacities is profound.

Over the twentieth century, we have lost sight of that distinction, such that it is possible today for a Robert Reich to commend his version of an industrial policy by pleading that it is not "possible not to have an industrial policy"¹¹⁰ since "[n]o sharp distinction can validly be drawn between private and public sectors within this or any other advanced industrialized country. . . ."¹¹¹ However accurate Reich's premise may have become, as a prescription for the future it will prove lethal over time, as the twentieth century has shown. When they distinguished the private from the public the founding generation got it right. It is up to us to restore that distinction, for on it turns nothing less than our liberty and our prosperity. 🍷🌿

NOTES

¹ PRESIDENT WILLIAM J. CLINTON & VICE PRESIDENT ALBERT GORE, JR., TECHNOLOGY FOR AMERICA'S ECONOMIC GROWTH, A NEW

ON THE FOLLY AND ILLEGITIMACY OF INDUSTRIAL POLICY

DIRECTION TO BUILD ECONOMIC STRENGTH (1993) [hereinafter TECHNOLOGY].

² *President Outlines Comprehensive New Technology Initiative*, Press Release (The White House, Office of the Press Secretary), Feb. 22, 1993, at 1 [hereinafter Press Release].

³ TECHNOLOGY, *supra* note 1, at 1.

⁴ THE FEDERALIST, esp. Nos. 41, 45 (James Madison), and 84 (Alexander Hamilton).

⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

⁶ 18 CONG. REC. 1875 (1887).

⁷ Rexford G. Tugwell, *Rewriting the Constitution: A Center Report*, CENTER MAG., Mar. 1968, at 20.

⁸ 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (Oxford Univ. Press 1976) (1776).

⁹ Writing in the bicentennial year of our independence, L. E. Birdzell, Jr. noted some 40 to 50 significant federal statutes that "may reasonably be viewed as imposing requirements on corporate management in favor of employee, consumer, investor or environmental interests, ranging all the way to comprehensive regulation of entry, prices and services in much of the transportation, communication, energy, and banking industries." L. E. Birdzell, Jr., *Constitutionalizing the Corporation: The Case for the Federal Chartering of Giant Corporations*, 32 BUS. L. 317 n.1 (1976) (book review). That number today, of course, is much larger, for contrary to popular belief, the Carter and Reagan years saw only limited and selective deregulation, while the Bush years saw substantial increases in both regulation and spending. On regulation, see *Small Change: The Regulatory Record of the Bush Administration*, REGULATION, Winter 1992, at 10-11; on spending, see Stephen Moore, *Crisis? What Crisis? George Bush's Never-Ending Domestic Budget Build-Up*, CATO POLICY ANALYSIS No. 173 (June 19, 1992).

¹⁰ Press Release, *supra* note 2, at 1-2.

¹¹ See John H. Fund, *A French Lesson for Clinton*, WALL ST. J., May 28, 1993, at A10.

¹² FRIEDRICH A. HAYEK, THE FATAL CONCEIT 27 (1988).

¹³ Die Wirtschaftsrechnung im sozialistischen Gemeinwesen, 47 *Archiv für Sozialwissenschaften und Sozialpolitik* 1 (Apr. 1920), translated and reprinted as *Economic Calculation in the Socialist Commonwealth*, in COLLECTIVIST ECONOMIC PLANNING (Friedrich A. Hayek ed., 1935).

¹⁴ FRIEDRICH A. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER, ch. VII-IX (1948).

¹⁵ 121 CONG. REC. 15, 583 (1975).

¹⁶ Henry G. Manne, *Preface*, LAW AND ECONOMICS CENTER, U. MIAMI L. SCHOOL, CATALOG OF RESEARCH ISSUES FOR UNDERSTANDING NATIONAL ECONOMIC PLANNING at iv (1976).

¹⁷ *Id.* at ii.

¹⁸ See generally DON LAVOIE, NATIONAL ECONOMIC PLANNING: WHAT IS LEFT? (1985).

¹⁹ Robert Heilbroner, *Was the Right Right All Along?* HARPER'S MAG., Jan. 1991, at 18-19.

²⁰ For a more detailed discussion, see Brink Lindsey, *Chipping Away at Industrial Policy*, REG., Fall 1992, at 9-13 [hereinafter *Industrial Policy*]; Brink Lindsey, *DRAM SCAM: How the United States Built an Industrial Policy on Sand*, REASON, Feb. 1992, at 40-48.

²¹ *Industrial Policy*, *supra* note 20, at 12.

²² *Industrial Policy*, *supra* note 20, at 13.

²³ Cited in GEORGE F. GILDER, MICROCOSM 333 (1989).

²⁴ TECHNOLOGY, *supra* note 1, at 9.

²⁵ See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 6 (1974).

²⁶ See Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 508-17 (1993).

²⁷ William A. Niskanen, A "Supply-Side" Industrial Policy, 4 CATO J., Fall 1984, at 381.

²⁸ See RICHARD M. WEAVER, IDEAS HAVE CONSEQUENCES (1948).

²⁹ JOHN LOCKE, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT § 123 (Peter Laslett ed., 1960). See also EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955).

³⁰ U.S. CONST. pmbl. & art. VII.

³¹ See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION, ch. v (1967).

³² JEREMY BENTHAM, *Anarchical Fallacies*, in 2 WORKS OF JEREMY BENTHAM 489, 501 (Richard Doyne ed., 1843). I have discussed the issues that follow more fully in Pilon, *supra* note 26, at 517-21.

³³ See Robert S. Summers, *Pragmatic Instrumentalism: America's Leading Theory of Law*, 5 CORNELL L. F. 15 (1978).

³⁴ I have discussed these issues more fully in Pilon, *supra* note 26, at 517-521.

³⁵ *Eclipse of Liberalism*, 71 NATION 105 (1900).

³⁶ Niskanen, *supra* note 27. For Hamilton's Report, see Arthur Harrison Cole ed., *INDUSTRIAL AND COMMERCIAL CORRESPONDENCE OF ALEXANDER HAMILTON* 247 (1968). The passage from Madison is from correspondence to Henry Lee, Jan. 1, 1792, in 6 THE WRITINGS OF JAMES MADISON, at 81n. (Gaillard Hunt ed., 1906).

³⁷ *Kansas v. Colorado*, 206 U.S. 46, 89-90 (1907).

³⁸ The point is made clear by the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." I have discussed the jurisprudential implications of the final two amendments in the Bill of Rights in Roger Pilon, *The Forgotten Ninth and Tenth Amendments*, CATO POLICY REPORT, Sept./Oct. 1991, at 1.

³⁹ U.S. CONST. art. I, § 8: "The Congress shall have the Power . . . To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers"

⁴⁰ As the Ninth Amendment makes clear: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." See Randy E. Barnett ed., *THE RIGHTS RETAINED BY THE PEOPLE* (vol. I, 1989; vol. II, 1993).

⁴¹ U.S. CONST. art I, § 8: "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 . . ." To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"

⁴² See *supra* note 5.

⁴³ 6 ANNALS OF CONG. 1727 (1796).

⁴⁴ *Id.* at 1724.

⁴⁵ Act of Feb. 12, 1794, 6 Stat. 13.

⁴⁶ 4 ANNALS OF CONG. 170 (1794).

⁴⁷ See, e.g., 1 DAVID M. O'BRIEN, *CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY* (1991).

⁴⁸ CHARLES WARREN, *CONGRESS AS SANTA CLAUS* 22, 50-91 (1932). On President Arthur, see JUSTUS D. DOENECKE, *THE PRESIDENCIES OF JAMES A. GARFIELD & CHESTER A. ARTHUR* 81 (1981): "Arthur was not opposed to internal improvements in general . . . but . . . [the] grants . . . did not advance the common defense, interstate commerce, or the general welfare and hence went 'beyond the powers given by the Constitution to Congress and the President.'"

⁴⁹ See *supra* note 41.

⁵⁰ James Madison, *Report on Resolutions*, in 6 WRITINGS OF JAMES MADISON, *supra* note 36, at 357. See also Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), in 10 WRITINGS OF THOMAS JEFFERSON at 90, 91 (Paul Leicester Ford ed., 1899):

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

⁵¹ See Hamilton's Report, in Cole, *supra* note 36, at 293:

It is, therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for a doubt, that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, as far as regards an application of money. The only qualification of the generality of the phrase in question, which seems to be admissible, is this: That the object, to which an appropriation of money is to be made, be general, and not local; its operation extending, in fact, or by possibility throughout the Union, and not being confined to a particular spot.

⁵² As South Carolina's William Drayton put it in 1828: "[I]f Congress can determine what constitutes the General Welfare and can appropriate money for its advancement, where is the limitation to carrying into execution whatever can be effected by money?" 4 CONG. DEB. 1632-34 (1828).

⁵³ See Act donating Public Lands to the several States and Territories which may provide Colleges for the Benefit of Agriculture and the Mechanic Arts, ch. 130, 12 Stat. 503 (1862) (codified as amended at 7 U.S.C. § 301 (1988)).

⁵⁴ See Act to amend an Act donating Public Lands to the several States and Territories which may Provide Colleges for the Benefit of Agriculture and the Mechanic Arts, ch. 102, 22 Stat. 484 (1883) (codified as amended at 7 U.S.C. § 304 (1988)).

⁵⁵ For an excellent, critical account of the growth of general welfare spending, see WARREN, *supra* note 48.

⁵⁶ I have discussed the demise of the General Welfare and Commerce Clauses more fully in Pilon, *supra* note 26, at 521-38.

⁵⁷ Frothingham v. Mellon, 262 U.S. 447, 485-486 (1923).

⁵⁸ United States v. Butler, 297 U.S. 1, 65-66 (1936).

⁵⁹ Helvering v. Davis, 301 U.S. 619, 640 (1937).

⁶⁰ For Hamilton's thoughts on the power of judicial review, see THE FEDERALIST Nos. 78-83.

⁶¹ See ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ORIGINS AND DEVELOPMENT 109 (4th ed. 1970); FREDERICK DUMONT SMITH, THE CONSTITUTION: ITS STORY AND BATTLES 184-89 (1926).

⁶² Although a relatively minor aspect of the commerce power today, that negative or dormant power continues. See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1125 (1986).

⁶³ Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

⁶⁴ Wabash, St. L. & Pac. Ry. v. Illinois, 118 U.S. 557, 577 (1886).

⁶⁵ Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

⁶⁶ Houston, E. and W. Tex. Ry. v. United States, 234 U.S. 342, 355 (1914).

⁶⁷ Transportation Act of 1920, ch. 91, § 422, 41 Stat. 456, 488 (1920); Railroad Commission of Wisconsin v. Chicago, B. & Q. R.R., 257 U.S. 563, 589 (1922).

⁶⁸ See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1418 (1987).

⁶⁹ Indeed, with the modest deregulatory efforts of the Carter and

Reagan Administrations, regulation at the state level—especially in the health, safety, and environmental areas—has grown substantially. Yet the possibility of federal preemption under the Commerce Clause—a proper use of the commerce power—was frustrated during the Reagan years by that administration's preoccupation not with libertarian but with "states' rights" federalism. See CLINT BOLICK, GRASSROOTS TYRANNY, ch. 1-4 (1993); W. John Moore, *Stopping the States*, 22(3) NAT'L J., July 21, 1990, at 1758-62.

⁷⁰ Perhaps the high-water mark on this view came in 1942 in Wickard v. Filburn, 317 U.S. 111, 128, when the Supreme Court held that a federal wheat marketing quota could be applied against a farmer who grew wheat in excess of the amount set by the quota even though the wheat was grown, reaped, baked, and consumed on his own property—because that excess wheat would otherwise have been purchased on the market, the Court reasoned, and so his actions "affected" interstate commerce.

⁷¹ *Supra* note 39.

⁷² See, e.g., WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 380-81 (1953).

⁷³ See THE FEDERALIST No. 33 (Alexander Hamilton) and No. 44 (James Madison).

⁷⁴ *Supra* note 5.

⁷⁵ *Id.* at 410.

⁷⁶ *Id.* at 413-14 (emphasis added).

⁷⁷ *Id.* at 407 (emphasis added).

⁷⁸ "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

⁷⁹ *Id.* at 407.

⁸⁰ *Supra* note 40. On the early judiciary's resort to higher law, see Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

⁸¹ *Id.* at 1167.

⁸² U.S. CONST. amend. XIII.

⁸³ U.S. CONST. amend. XV.

⁸⁴ U.S. CONST. amend. XIV.

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

⁸⁶ 83 U.S. (16 Wall.) 36 (1872).

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

⁸⁸ *Supra* note 86, at 82.

⁸⁹ United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).

⁹⁰ Lochner v. New York, 198 U.S. 45 (1905).

⁹¹ Block v. Hirsh, 256 U.S. 135 (1921).

⁹² Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

⁹³ Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).

⁹⁴ *See* ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 487-500 (6th ed. 1983); MERLO J. PUSEY, THE SUPREME COURT CRISIS (1937).

⁹⁵ West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

⁹⁶ 304 U.S. 144 (1938).

⁹⁷ For a devastating critique of the politics behind the case, see Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397.

⁹⁸ *Supra* note 96, at 152.

⁹⁹ James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, at 175, reprinted in Hunt, *supra* note 36, at 101.

¹⁰⁰ *See, e.g.*, Sullivan v. Stroop, 496 U.S. 478, 485 (1990).

¹⁰¹ *See generally* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

¹⁰² *See, e.g.*, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

¹⁰³ *See* Edwin Vieira, Jr., *The Constitutional Chaos of Industrial Policy*, 4 CATO J., Fall 1984, at 578-85.

¹⁰⁴ *Supra* note 76.

¹⁰⁵ *Supra* note 10.

¹⁰⁶ *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 10 (2d ed. 1977).

¹⁰⁷ Miller, *supra* note 97, at 398-99. Miller continues:

The consequence of the decision was to expropriate the property of a lawful and beneficial industry; to deprive working and poor people of a healthful, nutritious, and low-cost food; and to impair the health of the nation's children by encouraging the use as baby food of a sweetened condensed milk product that was 42 percent sugar.

Id.

¹⁰⁸ FCC v. Beach Communications, Inc., No. 92-603, slip. op. at 7 (June 1, 1993).

¹⁰⁹ *See generally* CHARLES A. MURRAY, IN PURSUIT OF HAPPINESS AND GOOD GOVERNMENT (1988).

¹¹⁰ Robert B. Reich, *An Industrial Policy of the Right*, PUB. INTEREST 73, Fall 1983, at 7.

¹¹¹ ROBERT B. REICH, THE NEXT AMERICAN FRONTIER 233 (1983).