

Cato Institute Policy Analysis No. 181: Equal Protection for Economic Liberty: Is the Court Ready?

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Executive Summary

When President Bush nominated Clarence Thomas to the U.S. Supreme Court, pundits were certain that Thomas's confirmation hearings would focus on his positions on abortion and affirmative action. Although those issues did come up at the hearings, the Democratic senators saved their most probing and hostile questions for the issue of constitutional protection of economic liberty. They grilled Thomas about his professed affinity for the writings of Stephen Macedo of Harvard University and Richard Epstein of the University of Chicago Law School, two exponents of greater judicial protection for economic liberty.[1] And they also asked Thomas narrower, more specific questions, such as: Did he think that minimum-wage laws violated the Constitution? Should judicial protection of property rights be expanded at the expense of Congress' regulatory power? What is the scope of Congress' power to regulate commerce?

That constitutional protection for economic liberty should have been a major focus of a Supreme Court confirmation hearing in 1991 is an extraordinary development in the history of American constitutional law. During the New Deal era, a liberal Supreme Court reversed dozens of precedents that had restricted the power of government to regulate economic activity. From that time until the late 1970s, there was almost unanimous agreement among legal scholars on both the left and the right that the Supreme Court's pre-New Deal protection of economic liberty--stretching back for a century and a half--was a mistake that should never be repeated.

Beginning in the late 1970s, however, a few dedicated legal scholars began to revive the idea that the Constitution limits government power in the economic sphere and that the judiciary should enforce those limits.[2] At first the mainstream legal community ignored the works of those scholars. But as the Reagan Revolution transformed the ideological character of the federal judiciary, the intellectual climate changed as well. Suddenly, scholars who had been dismissed as eccentrics by mainstream legal academia had the attention of the federal bench.[3] Meanwhile, scholarship and discussion relating to economic liberties exploded.

Yet, despite all of that activity, there has been relatively little movement in the courts toward greater protection of economic liberty.[4] The biggest obstacle has been the Supreme Court's refusal to reconsider the decisions of the last six decades that have eviscerated constitutional protection of economic liberty. Even under the current conservative Court, the best one can say is that things have not deteriorated further. Yet, with the Court's opinions often focusing on the original intent and plain meaning of the Constitution, there is still hope that economic liberty may once again take its place among the constitutional rights strongly protected by the Constitution.

The Roots of Constitutional Economic Liberty

Even conservatives who oppose strict judicial review of economic regulation--largely because they believe the Constitution gives great scope to legislative rule--recognize that the Founders of the American constitutional system believed deeply in economic liberty. According to Gary L. McDowell, a leading conservative critic of the emerging school of economic liberty jurisprudence:

The Founding Fathers took very seriously the idea that private property was the essence of personal liberty. From John Locke's Second Treatise to the Federalist Papers to the Constitution's explicit provisions to protect the "obligation of contracts" and to insure that no private property could be taken for public use without just compensation, the grammar of private-property rights significantly shaped our legal language.[5]

Modern liberals, such as Laurence Tribe of the Harvard Law School, also acknowledge the Founders' solicitude for economic liberty. Tribe notes that "many of the Framers believed that preservation of economic rights was the central purpose of civil government." [6]

Judicial decisions in early America repeatedly reflected this concern with economic liberty and property rights. Because natural rights theory enjoyed wide support, judges often saw no need to refer to specific constitutional provisions to justify their protection of economic liberty. Instead, they based their decisions on the fundamental principles expressed by the Constitution as a whole.[7] In a 1795 case, for example, the Supreme Court declared that the "primary object of the social compact" is "preservation of property." [8] Three years later, Justice Samuel Chase argued that even laws "not expressly restrained by the Constitution" should be struck down if they violate natural rights.[9] A law that "takes property from A and gives it to B" is just such a law, he concluded.[10]

In 1810 Chief Justice John Marshall, often considered the greatest jurist in the history of the Supreme Court, wrote an opinion that noted that property rights may be protected by the judiciary based on "particular provisions of the Constitution." [11] But he noted too that legislative power in the economic sphere may also be inherently limited by the nature and principles of a free society and government.[12] Five years later, the Supreme Court struck down Virginia's confiscation of Episcopal Church property as violating the "principles of natural justice," the fundamental law of every free government, and the "spirit as well as the letter" of the Constitution.[13]

The philosophy of the Court in those early years could be summed up by a statement made in an 1829 case: the "fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred." [14] Unfortunately, a consensus that the "fundamental maxims of free government" include protection for economic liberty no longer exists in the United States or in the American legal community. But the Framers did not trust the protection of our liberties to the whims of changing intellectual fashion. As a prophylactic against the possibility of future tyrannical government, they wrote explicit protections for property and economic liberty into several provisions of the Constitution. In an era dominated by legal positivism, it is to those provisions that we must now turn.

Constitutional Provisions Protecting Economic Liberty

The most vilified example of judicial protection of economic liberty is the 1905 Supreme Court case of *Lochner v. New York*, [15] which struck down a New York statute limiting the hours that bakers might contract to work. The *Lochner* majority held that the Fourteenth Amendment's command that no person shall be deprived of liberty without due process of law strongly protected economic liberty from government regulations. Always extremely unpopular among progressives and modern liberals, *Lochnerian* jurisprudence was rejected by the Supreme Court in the midst of the New Deal.[16] More recently, however, a Supreme Court dominated by liberals used the same clause of the Fourteenth Amendment to discover purported rights in the Constitution that have no historical basis.[17] During the Warren Court era, liberal legal scholars hoped that the Supreme Court would even find a right to a minimum income in the Fourteenth Amendment.[18] Had it not been for the Nixon administration's appointment of several new, more conservative justices, the Supreme Court might very well have entrenched the American welfare state in the morass of modern constitutional law.

Not surprisingly, the constitutional sojourns of the Warren and Burger courts have left many conservatives reluctant to revive Lochnerian jurisprudence for fear that the open-ended Fourteenth Amendment might fall into the wrong hands. Although *Lochner* is certainly a defensible decision,[19] I argue here that even assuming that the Fourteenth Amendment does not directly protect economic liberty,[20] the Supreme Court has still neglected its obligation to protect economic liberties under other provisions of the Constitution.[21]

The Enumerated Powers

Although it is not always recognized as such, federalism is a great protector of economic liberty. Until the New Deal era, the powers of the federal government to spend and to regulate the economy were severely limited, with most such power being vested in the states. Because state authority was limited geographically, if people were dissatisfied with their states' regulations, they could always vote with their feet and move to a neighboring state. Indeed, the federalist structure protected whole groups: blacks, for example, migrated by the thousands from the Jim Crow South to the North, where state power was used far less often to stifle black workers and entrepreneurs.[22]

The New Dealers, however, were unhappy with the ability of Americans to escape progressive legislation. As Edward S. Corwin observed in 1932, manufacturers had evaded labor regulations imposed by northern and midwestern states by moving to the South.[23] With the election of Franklin Delano Roosevelt that year, progressives began a major push to nationalize economic regulation, fully recognizing, as Corwin had put it, that such regulation "means coercion for intransigent minorities." [24] When the Supreme Court began to block that effort by finding much of the New Deal program unconstitutional, Roosevelt attempted to neutralize the Court with his infamous court-packing scheme. That gambit failed, but the Court ultimately succumbed to political pressure and new Roosevelt appointments during the New Deal's second phase. The result was a revolution in the American constitutional system, which was transformed from a system in which strict limits were placed on the powers of the national government to one in which the national government's powers were almost limitless, particularly in the commercial sphere.

Under the Constitution as written--even as expansively interpreted in such early cases as *McCulloch v. Maryland*,[25] which upheld the establishment of the National Bank--Congress' powers are enumerated and hence strictly limited.[26] All other legal authority rests with state or local government.[27] The supporting historical evidence on this point is quite clear. During the Federal Constitutional Convention, for example, Governor Edmund Randolph submitted a resolution that would have given Congress authority over all matters that could not be satisfactorily handled by the states. Of course, that proposed resolution was rejected.[28]

The Federalist Papers also lend support to the idea that Congress is limited to its enumerated powers. In *The Federalist* no. 32, for example, Alexander Hamilton wrote that "the state governments would clearly retain all the rights of sovereignty which they before had, and which were not . . . exclusively delegated to the United States." [29] And in *The Federalist* no. 39, James Madison added that the federal government's "jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects." [30] Also, in *The Federalist* no. 45, Madison insisted that "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." [31]

Despite the assurances of Hamilton, Madison, and others, some skeptics were still concerned that the powers of the national government would be interpreted expansively. To assuage those fears, the Founders promulgated the Bill of Rights, which concluded with the Tenth Amendment: "The powers not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [32]

Alas, despite the best efforts of the Founders, the federal government has grown into a modern Leviathan. As the rest of this section shows, this result was neither inevitable nor constitutionally justifiable. Rather, it came about because the Supreme Court abdicated its responsibility to adhere to constitutional principles in the wake of the Great Depression and the New Deal.

The General Welfare Clause. Article 1, section 8, of the Constitution grants Congress the power to tax "to pay the debts and provide for the common Defense and general Welfare of the United States." Michael Conant, among others, has argued that this clause is reinforced by "the purposive statement in the Preamble: 'To promote the general

Welfare.'" According to Conant, the preamble was meant to ensure that the national government created by the Constitution would have the powers to pursue "all the objects for which governments commonly were formed. . . . Consequently, it is clear that the original meaning of the language was that the Congress was granted a general power to tax and spend for all activities which would promote the general welfare." [33]

Even under the expansive reading that Conant has given the general welfare clause, nothing in the clause would permit the huge growth of government that Americans have witnessed since the 1930s. In particular, the Constitution was established to promote the general welfare, not the welfare of certain parties at the expense of others. [34] The most plausible reading of the general welfare clause, then, is as a further limit on Congress' powers; specifically, the clause means that even if Congress stays within its enumerated powers, it can only tax and spend if doing so benefits the public as a whole. Thus, redistribution of wealth to politically powerful special interest groups in the guise of protecting the general welfare is not only inefficient but also unconstitutional for being beyond the power of Congress. [35]

In fact, for more than a century the general welfare clause was understood in just this way--as a substantive limit on Congress' power to benefit special interests at public expense. Until this century, special interests were most closely identified with parochial, local interests. Presidents Tyler, Polk, Pierce, Grant, Arthur, and Cleveland all vetoed appropriations for "internal improvements" because they were for local rather than national purposes and thus violated the general welfare clause. [36]

The Supreme Court did not issue an important decision regarding the proper interpretation of the general welfare clause until it decided *United States v. Butler* [37] in 1936. That case involved the Agricultural Adjustment Act, which authorized the secretary of agriculture to levy a tax on agricultural processors and to use the revenue to purchase crop reduction agreements from farmers. The act was a centerpiece of the New Deal, and the Court was under tremendous pressure to uphold it.

The Court withstood the pressure and struck down the act, but it did so in an ultimately futile way. Rejecting the idea that the general welfare clause limited the exercise of Congress' enumerated powers, the Court instead adopted the position that the clause granted Congress the power to tax and spend for the general welfare but did not give Congress power to regulate. [38] Congress could not get around what were then strict limits on its power to regulate commerce directly by using its spending power for regulatory ends, which is what it was trying to do with the Agricultural Adjustment Act. This prohibition soon became substantially moot, however, as the Court found over the next few years that Congress had virtually limitless authority under the commerce clause to regulate directly.

The *Butler* decision did not reach the issue of whether the Court would engage in a substantive review of the general welfare content of federal legislation. [39] That opportunity arose the following year, however, when the Court declared:

The line must still be drawn between one welfare and another, between particular and general The discretion, however, is not confided to the courts. The discretion belongs to Congress. . . . Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times. [40]

The Court, in short, refused even to try to devise a test for reviewing the general welfare content of legislation. Instead, it announced that it was abandoning its constitutional role in an important area of the law.

The Commerce Clause. The federal government currently finds most of its broad powers to regulate the national economy in the commerce clause, which states that Congress shall have power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." [41] As the plain language of this clause makes clear, Congress has the power to regulate commerce only, and only if that commerce is interstate or international. Yet, since the New Deal, the Supreme Court has held that the commerce clause gives Congress the authority to regulate any economic activity that has a substantial effect on interstate commerce, including intrastate economic activity, and including economic activity that almost certainly was not intended to come within the definition of commerce, such as

contracting for labor.[42] The Court also has held that Congress may regulate economic activity that is intrastate and, by itself, might not have a substantial effect on interstate commerce, such as a wheat farmer's production for personal consumption,[43] as long as the general class of activities (in this case, farming) is within the reach of federal power.[44] Most recently, the Court has silently done away with the requirement that a regulated activity have a substantial effect on interstate commerce in favor of a test that the regulated activity have some nexus with interstate commerce.[45]

Prior to the New Deal, the most important Court decision interpreting the commerce clause was the 1824 case of *Gibbons v. Ogden*.^[46] As propounded by the last several generations of liberal legal scholars, the history of the commerce clause has gone something like this: Chief Justice John Marshall established an extremely broad interpretation of the clause in *Gibbons*, which was then ignored by the laissez-faire Supreme Court of the late 19th century, only to be reestablished by the heroic New Deal Court of the late 1930s and early 1940s.

That version of commerce clause history has of late been roundly and persuasively criticized by several scholars of varying political perspectives.^[47] More to the point, if Marshall gave such an expansive view to the commerce clause, he was wrong; the laissez-faire Court was correct; and the New Deal Court was wrong to return to Marshall's precedent.

The expansive view of the commerce clause propounded by the New Deal Court would make American constitutional history incomprehensible. As Richard Epstein has noted, the Constitution would never have been ratified if the commerce clause had been as broadly understood in the late 18th century as it came to be during the New Deal era.^[48] If the clause had granted Congress the power to regulate labor,^[49] agriculture,^[50] and manufacture,^[51] whether interstate or not, in minute detail, as claimed by the New Deal Court, a majority vote of Congress and a signature by the President could have outlawed slavery. Surely the southern states would never have ratified the Constitution had the commerce clause been understood as having such broad implications.^[52]

More generally, the New Deal Court's broad interpretation of the commerce clause renders the Constitution's enumeration of Congress' powers superfluous. If the commerce clause was meant to give Congress the power to minutely regulate any aspect of human life that remotely effects the economy, what was the purpose of enumerating any other powers? And what was the purpose of adding the Tenth Amendment to the Constitution if not to remind us that Congress' powers are not limitless?

Was the New Deal a Legitimizing "Constitutional Moment"? To his credit, Bruce Ackerman of the Yale Law School recognizes that the revolutionary expansion of the federal government during the New Deal rests on extremely shaky constitutional ground.^[53] Unlike many of his liberal colleagues, Ackerman acknowledges that the expansion of federal powers during the New Deal, and the eventual judicial acquiescence thereto, represented a constitutional revolution, not a restoration of Marshallian jurisprudence. Perhaps out of fear that the newly conservative Supreme Court may revisit the New Deal decisions, Ackerman has devoted himself to developing a theory that would legitimate the growth of national government since the 1930s. Ackerman asserts that the New Deal revolution was legitimate because it represented a "constitutional moment," similar to the Founding and to Reconstruction, in which it was permissible to "amend" the Constitution outside of the processes described in Article 5.^[54]

The first major problem with Ackerman's thesis is that it relies upon the tidal shift in public and legal opinion that occurred during the New Deal, which led to the demand for an activist national state, as a substitute for the constitutional process. But, as Justice George Sutherland pointed out in dissent in 1937, if such a shift in public opinion does occur, "the remedy . . . is to amend the Constitution. . . . Much of the benefit expected from written constitutions would be lost if their provisions were to be bent to circumstances or modified by public opinion. . . ."^[55]

Indeed, given President Roosevelt's overwhelming popularity and the dominance of the Democratic party in Congress and the statehouses, it should have been relatively easy to amend the Constitution in favor of a powerful national government. Although many such amendments were submitted to Congress in 1936 and 1937,^[56] Roosevelt tried to pack the Supreme Court with six additional members instead of pursuing the amendment process. When that gambit failed, he appointed his political allies to the bench as vacancies opened. One can only speculate why the New Dealers sought to ignore or to reinterpret the Constitution rather than to amend it, but whatever their reasons, they failed to

legitimately establish the modern activist federal government.

But a second major problem with Ackerman's theory of constitutional change goes beyond process to substance: The thesis neglects the moral foundations of the American constitutional system. The system rests on the idea that the purpose of government is to secure the natural rights of the citizenry. Ackerman's other examples of constitutional moments--the Founding and Reconstruction--produced legal changes that protected rights, as the concept of rights was understood by classical liberals sympathetic to natural rights theory. The Declaration of Independence, the Constitution itself, the Bill of Rights (especially the Ninth Amendment), the Civil War amendments, and the American political tradition before the Progressive Era were all based on the proposition that governments are instituted to secure the natural rights of the citizenry. The New Deal programs, by contrast, gave the national government tremendous authority to violate natural rights in the name of social progress and of the efficient management of the economy. Surely, such a radical change in the conception of American government could be legally established only through explicit amendment--and even then would raise substantive problems. Ackerman's theory, then, does not save the New Deal from being assessed as "blatantly unconstitutional." [57]

The Future of Limited National Government. To date there has been no serious movement by the Supreme Court toward limiting Congress to its enumerated powers. Since the early 1940s, Supreme Court justices have found statutes to be beyond Congress' regulatory power under the commerce clause only on very rare occasions, and usually in dissent. [58]

In a 1981 concurrence, however, Justice William Rehnquist criticized the Court for turning the idea that Congress may exercise only those powers delegated to it by the states into a "fiction." [59] Rehnquist reminded his colleagues that "there are constitutional limits on the power of Congress to regulate [private economic activity] pursuant to the Commerce Clause" and that the Court has a duty to review congressional legislation to ensure that it adheres to those limits. [60] Doubtless, even Rehnquist would not champion a return to pre-New Deal commerce clause jurisprudence. But given the changes in the ideological composition of the Court since 1981, Rehnquist might one day find himself leading a Court whose opinions take the requirements of the commerce clause seriously, with potentially salutary results. [61]

The memory of the limitations placed on Congress' power to regulate the economy has also been kept alive on the current Supreme Court by the insistence of Justice Rehnquist and Justice Sandra Day O'Connor that the enumeration of powers in Article 1, section 8, of the Constitution and the Tenth Amendment limit the power of Congress to regulate state action when state governments are engaging in traditional state functions. [62] This past term, in a relatively narrow opinion written by Justice O'Connor in *New York v. United States*, [63] the Court held that the federal government may not command a state government to regulate economic activity.

As yet, however, there is no cause to celebrate. Despite the fact that *Butler* has never been overruled and has been cited favorably in *New York* and in other recent opinions, [64] the New York Court held that Congress can "bribe" states to regulate even when it could not directly order the states to do so, as long as such "encouragement" is not actually coercive. [65]

Moreover, the New York Court held that Congress has more power than state governments to regulate private economic activity, despite the plain wording of the Tenth Amendment, which reminds us that the enumeration of powers limits Congress' power to regulate "the people" as much as it limits the power of Congress to regulate the states. To be faithful to both text and original intent, therefore, the Court should support the same limitations on national regulatory power when individuals or private businesses are the regulated parties as it does when a state is being regulated. To date, however, there is no sign that such consistency will be forthcoming. [66]

Yet, while the conservative Supreme Court, like its liberal predecessors, continues to acquiesce in the centralization of power in the federal government, there is virtual unanimity among modern conservative and libertarian scholars that the broadening of federal power during the New Deal era resulted from mistaken Supreme Court decisions. [67] When it comes to what can be done about it, however, there is less unanimity. One school of thought, represented by former Judge Robert Bork and Judge Ralph Winter of the U.S. Court of Appeals for the Second Circuit, argues that it is too late to rely on the judiciary to reverse the centralizing trend of modern government. Winter claims that the unraveling

of the modern Leviathan must be done through the political process, because it would be too disruptive to society and to the economy for judges to strike down federal programs wholesale. And, because judges must act on principle, they cannot pick and choose which laws to declare unconstitutional.[68]

Although it may be true, for practical reasons, that the judiciary cannot quickly return the federal government to its pre-New Deal constitutional functions, that does not mean that constitutional limitations on federal power over the economy must be abandoned completely. Richard Epstein argues that, at least on the margins, the Supreme Court can still restrain national economic regulation. He thinks "that it is possible to make incremental changes by principled adjudication." [69] Surely even Bork and Winter would advocate the overruling of *Wickard v. Filburn*, in which the Supreme Court absurdly held that Congress' power to regulate "interstate commerce" includes the power to regulate growing food on one's own land for family consumption.

Yet, even if the Supreme Court remains reluctant to reexamine its post-New Deal unwillingness to restrain Congress' taxing, spending, and regulatory powers, the judiciary is not the only branch of the federal government that has the constitutional authority to restrain illicit congressional actions; the president also takes an oath to defend the Constitution. Consider, for example, the president's power to spend money appropriated by Congress. Although the courts and Congress have limited the president's ability to impound appropriated funds,[70] he has the power to refuse to spend money appropriated in violation of the general welfare clause or any other constitutional provision.

Indeed, because of the oath of office, one can argue that the president has not just a power but a duty to order the executive branch to undertake an independent review of all spending and regulatory measures to ensure that they comply with constitutional norms and to refuse to implement those measures that do not.[71] The complexities of the power of presidential review are too detailed to examine here,[72] but one can be fairly certain that if Congress' powers are to be constitutionally restrained in any meaningful way, the impetus will have to come from the executive branch as much as from the judicial branch of government.

The Contracts Clause

There can be no doubt that the courts have shirked their constitutional duty to enforce the contracts clause, which declares:

"No State shall . . . make any . . . Law impairing the Obligation of Contracts."

The concerns that led to the promulgation of the clause were central to the Founders' realization that the Articles of Confederation were untenable. State governments, besieged by politically well-organized debtors, were under severe pressure to pass legislation relieving those debtors of their obligations. The contracts clause was promulgated to ensure that such legislation could not be enacted, and more generally also gave broad protection to contracts from state interference.[73]

In 1934, however, the Court, responding to the exigencies of the Great Depression, ignored the history and text of the contracts clause in *Home Building and Loan Association v. Blaisdell*. [74] The Court held that state abrogation of contracts is permissible if "the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." Even Lino Graglia of the University of Texas Law School, a staunch apostle of judicial restraint, objects to that decision. According to Graglia:

Examples of enacted law clearly in violation of the Constitution are extremely difficult to find. Perhaps the clearest example in 200 years is Minnesota's 1933 Mortgage Moratorium Act, debtor-relief legislation clearly prohibited by the contracts clause. By a five-to-four vote, however, the Supreme Court held the law constitutional, thereby missing one of its few, if not its only, legitimate opportunities to exercise judicial review to invalidate a law.[75]

Even so, Chief Justice Charles Evans Hughes's opinion was not as radical as the Court's ruling would suggest. Hughes emphasized the "emergency" character of the legislation in question, which was passed to deal with the deflationary macroeconomic results of the depression. Although even that consideration does not save the decision from the harsh judgment that it "is probably one of the most explicitly unprincipled Constitutional decisions ever rendered by the

Court,"[76] it does mean that the Blaisdell precedent could have been distinguished in other contexts if the Court did not wish to follow it.

Over the next few decades, however, no such distinctions were made. Instead, with little dissent,[77] the Court destroyed the contracts clause by adding a "reasonableness" exception to its strictures; thus, the clause was read to say "No State shall . . . make any . . . [unreasonable] Law impairing the Obligation of Contracts." This reasonableness standard was so forgiving that in 1978 the Court found it necessary to warn that the contracts clause is "not a dead letter." [78] But even in that case, the Court used a very broad and forgiving standard of reasonableness.[79]

The current standard for contracts clause violations places a great deal of importance on whether the contracting parties are already operating in a heavily regulated field and thus can anticipate the possibility that the new regulation will alter the obligation imposed by the contract.[80] In other words, the Court has decided, ironically, that the more the government impairs the obligations of contracts, the less likely that its regulations violate the contracts clause.

The requirements of the contracts clause are so explicit that there is no way to square its virtual abandonment by the Supreme Court with principled judicial decisionmaking, particularly in light of how strictly the Court has construed such other constitutional provisions as the First Amendment. As Judge Richard Posner points out:

Imagine what freedom of speech would have come to mean if the Court had interpreted the First Amendment--which is no more absolute in its language or clearcut in its history than the contract clause--as loosely as it now interprets the contract clause. . . . Constitutional provisions that protect rights which are "preferred," though preferred for reasons that cannot be referred to the text or history of the Constitution, are read broadly; provisions that protect rights which are not preferred are read narrowly.[81]

Although many aspects of constitutionally protected economic liberty are controversial in conservative legal circles, the need for a revival of the contracts clause is not among them. Edwin Meese,[82] Robert Bork,[83] Richard Posner, Frank Easterbrook,[84] Michael McConnell,[85] Lino Graglia, the Justice Department, and, most importantly, Justice Antonin Scalia[86] are among those who have called for a stricter application of the clause. That is not surprising, as both the plain meaning and the original intent of the clause lead clearly toward a far stricter contracts clause jurisprudence than exists today.

The Fifth Amendment's Takings Clause

The Fifth Amendment's takings clause prohibits government from taking private property for public use without paying just compensation to the owner. Realizing that government would have to take private property for public use from time to time, the Founders wanted to ensure that the costs of such takings would not fall on isolated individuals but on the public as a whole, which presumably would benefit from them. Moreover, if the public had to pay for what it took, presumably that would tend to limit takings and hence limit the growth of government as well.

What Is a Taking? On its face the takings clause is obscure as to exactly what constitutes a taking of private property. To determine that, one must first define the term "property." The legal definition of property is not, and never has been, restricted to mere ownership. To the Framers of the Bill of Rights, the right to property was understood to include the right to possess, use, and dispose of property.[87] In the takings clause, therefore, the word "property" includes that bundle of rights.[88] Thus, it makes no difference for purposes of the takings clause whether the government actually takes title to an owner's land or simply restricts use of the land through regulation. Both cases involve use of the condemnation power by the government. When title is taken, the right to the fee is condemned; when use is restricted, the right to use the property is condemned.

Not all regulations, however, should be subject to the just compensation requirement. Government regulations of property are not takings under the Fifth Amendment if they merely prohibit uses of the property that are not encompassed by traditional common-law property rights. Thus, common-law property rights do not include the right to use property in such a way as to violate the rights of others, such as by creating nuisances.[89] If the government regulates property to prevent the owner from creating a nuisance, no property right has been taken and just compensation is not required.[90]

The Decline of the Takings Clause. Like other constitutional provisions dealt with in this study, the takings clause was done in by ideology. In the case of this clause, however, the perpetrators were not New Dealers but their predecessors, the Progressives. Faced with a growing regulatory state, in which government would leave property in the hands of the owner but would regulate its use, sometimes to the point of making it almost worthless, the Court turned from a principled analysis of takings to what was called a balancing test. Thus, in 1921, Justice Oliver Wendell Holmes, a leading legal progressive and critic of rights-based jurisprudence, found that wartime rent controls were constitutional because they were "in the public interest."^[91] But a year later he cautioned that if regulations went "too far," they would constitute a taking.^[92] Unfortunately, Holmes never made clear what he meant by "too far"; nor has that mistaken criterion been made clear by any court since. As a result, takings jurisprudence in this century has been referred to by all sides as ad hoc and rudderless.^[93] Its general thrust, however, became increasingly clear early on: Short of outright condemnation, property owners would find it very difficult to get relief.

The Revival of the Takings Clause. By the end of the Carter years, the demise of property rights had become so thorough that the Court started having second thoughts. Unfortunately, however, instead of fundamentally reassessing its takings clause jurisprudence, the Court began to carve out examples of per se takings that were exempt from the balancing test the Court had generally applied to regulatory takings. In 1980, for example, in *Agins v. Tiburon*,^[94] the Court held that a property regulation that deprives an owner of all economically viable use of his property is subject to just compensation. Then, in 1982, in *Lorretto v. Teleprompter*,^[95] the Court revived a line of precedents from before 1960 in holding that any actual permanent physical invasion of property by government, no matter how small, is a per se taking subject to just compensation. Although those decisions did expand the rights of property owners, the distinctions they relied on had no basis in a properly conceived takings clause.

The same may be said about the Court's celebrated 1987 decision in *Nollan v. California Coastal Comm'n*.^[96] In *Nollan* the Court announced a stricter balancing test for analyzing regulatory takings than it had used in the past. Under *Nollan*, to be excepted from the just compensation requirement of the takings clause, a regulation must "'substantially advance' the 'legitimate state interest' sought to be achieved."^[97] In contrast to earlier cases in which the Court had formulated relatively strict balancing tests, the *Nollan* Court actually found for the property owner.

Notwithstanding this "heightened scrutiny," however, the *Nollan* opinion also rests on a false premise; as noted, the takings clause does not call for any sort of balancing test but for compensation whenever government takes property rights. Nevertheless, *Nollan* was seen by many as a harbinger of things to come; the outcome seemed to reflect an ideological shift on the Court to a more skeptical, less deferential approach to government regulation of property, which could lead to sounder opinions in the future.

The Future of the Takings Clause. The first major test for the Court's takings jurisprudence after *Nollan* came in 1992, in *Lucas v. South Carolina Coastal Comm'n*.^[98] *Lucas* involved a lawsuit by a South Carolina landowner whose beachfront property had been rendered all but worthless by a state regulation prohibiting development of the property, notwithstanding that adjacent property had already been developed. Because such alleged purposes of the regulation as the prevention of beach erosion and the promotion of tourism were either implausible or fell well outside the traditional nuisance exception to the compensation requirement, many advocates of property rights hoped that the Court would use *Lucas* to fundamentally reassess its takings clause jurisprudence in favor of a more principled approach.^[99]

Instead, the Court issued an extremely narrow opinion that in essence merely reaffirmed the holding of *Agins*--that a regulation that results in a total diminution in the value of property entitles an owner to compensation. The Court then properly qualified this "categorical rule"--defeating in the process an effort to include all environmental regulations under the nuisance exception to the just compensation requirement--by holding that when an owner has been denied all economically viable use of his property, only uses of property that are traditionally prohibited by common law or statute are exempt from the requirements of the takings clause.

The problem with the Court's opinion, of course, is that it maintains the irrational distinction between "total" regulatory takings (where the total value of the property has been destroyed), which require compensation unless the regulation prohibits traditionally prescriptible activity, and "partial" regulatory takings (where only part of the value of the property has been destroyed), which require compensation only if the regulation fails to "'substantially advance' the

'legitimate state interest' sought to be achieved." Beyond its reliance on precedent, the Court did not provide a justification for this groundless distinction. Nor did it even give clear guidance for drawing the distinction.

Nevertheless, at least Lucas did not disturb the Court's jurisprudence on partial regulatory takings. Before Lucas the Court seemed ready to adopt as law for partial regulatory takings the following dictum from a 1960 case, *Armstrong v. United States*:^[100] "The Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." In 1988, in *Pennell v. City of San Jose*,^[101] that language was cited by Justice Scalia, joined in dissent by Justice O'Connor (the majority held that the issue was not ripe), who argued that it establishes "the guiding principle" of the takings clause.^[102] According to Scalia, the takings clause requires that the care of the poor and other public purposes must be accomplished not through takings from individuals but through funds "raised from the public at large through taxes."^[103]

The possibility that Scalia's *Pennell* dissent may be adopted by the Court in the future makes the reasoning of Lucas particularly significant, and heartening. As Scalia realized at the time, his *Pennell* principle could be eroded by specious arguments made by defenders of regulation. He noted, for example, that one could make the argument that housing shortages are "caused" by landlords. A city defending a takings suit could claim that it passed a rent-control ordinance to force those who are responsible for causing a harm to bear the burden of ameliorating that harm. Rent control, by this reasoning, would not be a taking.

The logic of Lucas, however, suggests that from now on, once the Court establishes a principle that the government action at issue falls into the general category of a taking, the government will be excused from paying compensation only if it is preventing a harm recognized as such by traditional legal principles. Rent control, landmark preservation laws, and other common forms of property regulation clearly violate the principle established by the *Pennell* dissent that public purposes must be accomplished not through property regulation but through funds "raised from the public at large through taxes." Traditional legal principles, moreover, do not recognize raising rents or renovating an old building as a cognizable harm. In the aftermath of Lucas, therefore, if Scalia's *Pennell* principle is adopted by the Court, precedents holding that everything from rent control to landmark preservation^[104] to the more onerous forms of exclusionary zoning^[105] are not takings will be at risk. And, more generally, the test urged at the beginning of this section will have been adopted in substance if not in form. Given that Scalia wrote Lucas as well as the *Pennell* dissent, one can only hope that this is what he has in mind.

Frank Michelman of the Harvard Law School recognizes the radical implications of the *Pennell* dissenters' approach and challenges it in this way:

However minimal the core postulate may seem, it has, if taken seriously, . . . the immense consequence of ruling out the welfare state--which operates, after all, by seizing assets from the lawfully obtained possessions of some people just in order to translate those assets into benefits for others.^[106]

In fact, Richard Epstein argued in *Takings: Private Property and the Power of Eminent Domain* that the takings principle does apply to welfare-state redistributions.^[107]

Although Epstein's theory is provocative and challenging, there is very little likelihood that the Court will adopt it. Nevertheless, there are all sorts of theories the Court could adopt that would allow the *Pennell* dissent to become law without adopting Epstein's. The Court could argue, for example, that the implications of the dissent are limited because the Sixteenth Amendment allows for the redistribution of income through taxation.^[108] Unless property and its uses are to be counted as "income," that is, the proper route to the redistributive state is through the Sixteenth Amendment, not through ignoring the property protections of the Fifth Amendment.

Whether or not one agrees with Epstein's theory that the takings clause makes the New Deal unconstitutional, the Court's adoption of the *Pennell* dissent would clearly be a great improvement over current takings clause doctrine. Epstein himself, realizing that the Court is almost certainly not going to invalidate the welfare state through the takings clause, observes that in a world of second-best solutions, the *Pennell* dissenters' prohibition of "off-budget" redistribution is a pretty good compromise.^[109] But whether the Court will be bold enough to adopt that rule in the face of years of contrary precedent remains to be seen.

The Future of Economic Liberty

According to one of the most influential of Justice Oliver Wendell Holmes's many opinions--and one written in dissent--the Constitution was "not intended to embody a particular economic theory, whether of paternalism and the organic relation of the individual to the state, or of laissez-faire." [110] As Richard Epstein observes, "That may be true of other constitutions, but it's not true of ours, which was organized upon very explicit principles of political theory." [111]

As a personal matter, Holmes, like many of today's legal conservatives, was skeptical of economic regulation but did not believe that the courts should overturn it. [112] It is important to note, however, that Holmes may have been politically conservative but he was a radical in legal philosophy, leading the movement against judicial formalism and neutral principles in favor of legal positivism and legal realism. Neither of those ideologies has the slightest thing in common with the original intent of the Framers or with classical political conservatism. Indeed, in contrast to Holmes, who spoke of the "right of the people to embody their opinions in the law," [113] it has been noted that "prominent conservative figures such as Russell Kirk, Felix Morley, and Gottfried Dietze have pointed out that the Constitution is an undemocratic document, intended to protect individual rights [including economic liberty] from 'pure' popular government and majoritarian despotism." [114] Nevertheless, in the name of conservatism and original intent, Robert Bork, Gary McDowell, Lino Graglia, and others echo Holmesian dogma. [115]

Bork, at least, has left himself open to the possibility that economic liberty should receive greater protection. He has said: "I am not hostile to economic liberties, constitutionally enforced, provided you can show me that is what the framers intended." [116] Richard Epstein thought that a Justice Bork would have been more sympathetic to economic liberty than his public statements on the issue would allow. [117] Yet Bork's recent best-selling book shows little sympathy for judicial protection of economic liberty. In that book, he seems stuck in the conservative past, still fighting the last war against the once-dominant liberal judicial activists, when what is needed now is a manifesto for the conservatives and classical liberals who today sit on the federal bench.

Fortunately, a new generation of conservatives and libertarians is intent on restoring our legacy of judicial protection for economic liberty. The Wall Street Journal's editorial page, [118] and its L. Gordon Crovitz [119] in particular, have been leading voices in support of what are termed "economic civil rights." Among think tanks, the Heritage Foundation [120] and the Cato Institute [121] have sponsored lectures and programs supporting the restoration of judicial protection of economic liberty. And the Federalist Society has held a number of conferences focusing on economic liberty. [122] Several public interest law groups, from the Pacific Legal Foundation, in operation for nearly 20 years, to the new Institute for Justice, litigate on behalf of economic liberties. The Justice Department's Office of Legal Policy has come out strongly in favor of greater judicial protection of economic liberty. [123] And scholarship on economic liberties issues, spearheaded by, among others, Richard Epstein, Bernard Siegan, and Roger Pilon, has grown from a trickle to a flood. [124] Even in the high reaches of the federal appellate courts, judges such as Richard Posner, Alex Kozinski, and Pasco Bowman have expressed support for enhanced judicial protection for economic liberty in their published opinions. And, on the Supreme Court, Justice Thomas is known for his sympathy for economic liberty. Indeed, as a mark of the arrival of this "whole new school of thought," Sen. Joseph R. Biden, as he opened the Thomas confirmation hearings, observed that "up until five years ago [this school] only spoke to one another but . . . now is being listened to." [125]

If the Court does move toward reviving judicial protection for economic liberty, it will be subjected to attacks from the left for turning "Mr. Richard Epstein's Takings" into American constitutional law. [126]

Even some modern conservatives will criticize the Court for its alleged judicial activism on behalf of economic liberty. But as this study shows, economic liberty is embedded in the philosophy, history, and explicit text of the Constitution. Judges do not need to be judicial activists or followers of libertarian legal theory to protect economic liberties. All they need is a proper respect for the Constitution itself. One can only hope that present and future members of the Supreme Court will develop that respect and that economic liberty will once again take its place among the constitutionally guaranteed liberties of every American.

Notes

[1] See especially Stephen Macedo, *The New Right v. The Constitution* (Washington: Cato Institute, 1986); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1985).

[2] See, for example, Bernard Siegan, *Planning Without Prices: The Taking Clause As It Relates to Land Use Regulation without Compensation* (Lexington, Mass.: Lexington Books, 1977); Dwight Murphy, "Myths and American Constitutional History: Some Liberal Truisms," *The Intercollegiate Review* 14, No. 1 (Fall 1978): 13; Bernard Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980); Roger Pilon, "On the Foundations of Justice," *The Intercollegiate Review* (Fall/Winter 1981): 314; Michael Conant, "AntiMonopoly Tradition under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-examined," *Emory Law Journal* 31 (1982): 786; Mark S. Pulliam, "Two Faces of Judicial Review," *Policy Review* (Spring 1982): 163 (reviewing Siegan, *Economic Liberties and the Constitution*); Doug Bandow, "Judging the Judges," *Policy Review* (Fall 1982): 157; Roger Pilon, "Property Rights, Takings, and a Free Society," *Harvard Journal of Law & Public Policy* 6 (1983): 16595; Norman Karlin, "Substantive Due Process: A Doctrine for Regulatory Control," *Southwestern University Law Review* 13 (1983): 479; Christopher Wonnell, "Economic Due Process and the Preservation of Competition," *Hastings Constitutional Law Quarterly* 11 (1983): 91145; Richard A. Epstein, "Toward a Revitalization of the Contract Clause," *University of Chicago Law Review* 51 (1984): 703-51; *Cato Journal* (Winter 1985) (collected papers from the Cato Institute's conference, "Economic Liberties and the Judiciary," held on October 26, 1984); Bernard Siegan, "Rehabilitating Lochner," *San Diego Law Review*, 22 (1985): 453; Epstein, *Takings: Private Property and the Power of Eminent Domain*; Paul Gottfried, "Book Review," *National Review* May 23, 1986, p. 40 (reviewing *Takings: Private Property and the Power of Eminent Domain*); Macedo, *The New Right v. The Constitution*; Randy Barnett, "Foreword: Judicial Conservatism v. A Principled Judicial Activism," *Harvard Journal of Law & Public Policy* 10 (1987): 273; Richard A. Epstein, "The Proper Scope of the Commerce Power," *Virginia Law Review* 73 (1987): 1387-1455; Ellen Frankel Paul, *Property Rights and Eminent Domain* (New Brunswick, N.J.: Transaction Books, 1987); *George Mason University Law Review* (Winter 1988) (collected papers from the Federalist Society's conference, "Constitutional Protections of Economic Activity: How They Promote Individual Freedom," held on October 16-17, 1987).

By challenging the New Deal jurisprudence head on, on normative and historical grounds, this body of work differed significantly from the empirical challenges that had begun a generation earlier at the University of Chicago. This new work sought to show not simply that the New Deal did not work but that it was wrongmorally and legally.

[3] See Marcia Coyle, "Property Revival; Economic Rights Gurus Look to High Court," *National Law Journal*, January 27, 1992, p. 1.

[4] For two exceptions, see *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987).

[5] Gary McDowell, "Why Liberals May Long for Bork," *New York Times*, September 28, 1990, p. A27.

[6] Laurence Tribe, *American Constitutional Law* (Cambridge, Mass: Harvard University Press, 2d ed. 1988), p. 1373, n. 1 (Tribe's emphasis). For examples of the Founders' concern for economic liberty, see *The Federalist* no. 10 (Clinton Rossiter, ed.)(J. Madison) and Max Farrand, ed., *Records of the Federal Convention* (1911), vol. 1, p. 533 (statement of Gouverneur Morris).

[7] See Suzanna Sherry, "The Founders' Unwritten Constitution," *University of Chicago Law Review* 54 (1987): 112777.

[8] *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795).

[9] *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 386 (1798).

[10] *Ibid.*, at 388.

[11] *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 139 (1810).

[12] *Ibid.*, at 135.

[13] *Terrett v. Taylor*, 13 U.S. (9 Cranch.) 43, 52 (1815). These opinions were at least arguably consistent with the plain meaning and intended implications 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." See Randy Barnett, *The Rights Retained by the People* (Fairfax, Va.: George Mason University Press, 1990); Roger Pilon, "The Forgotten Ninth and Tenth Amendments," *Cato Policy Report* 13, no. 5 (September/October 1991): 1.

[14] *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829).

[15] 198 U.S. 45 (1905).

[16] See *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

[17] See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[18] See, for example, Frank I. Michelman, "On Protecting the Poor through the Fourteenth Amendment," *Harvard Law Review* 83 (1969): 759.

[19] For the most persuasive work on this subject, see Siegan, *Economic Liberties and the Constitution*; Siegan, "Rehabilitating *Lochner*." For some of my thoughts on *Lochner* -- specifically, a discussion of the positive effects of *Lochnerian* jurisprudence on the economic status of women, immigrants, and blacks -- see "The Supreme Court and Civil Rights, 1886-1908," *Yale Law Journal* 100 (1990): 725-45.

[20] I also do not delve into the question of whether the Fourteenth Amendment actually incorporates the protections provided by the Bill of Rights, thus applying those protections against the states. The Supreme Court has so held, and seems to have no inclination to change its mind. Of all the constitutional provisions discussed here, only the takings clause would be thus incorporated, and that clause was applied to the states well before the modern theory of incorporation took hold. *Chicago, Burlington & Quincy Railway Co. v. City of Chicago*, 166 U.S. 226, 236 (1897).

[21] Compare with Gary Lawson, "In Praise of *Woodenness*," *George Mason University Law Review* 11 (1988): 212-6.

[22] See Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), p. 52.

[23] Edward Corwin, "Social Planning under the Constitution," *American Political Science Review* 25 (1932): 15, 22.

[24] *Ibid.*, p. 15.

[25] 17 U.S. (4 Wheat.) 316 (1819). In that opinion, written by Chief Justice Marshall, the Court based its relatively expansive interpretation of Congress' powers on the "elastic" necessary and proper clause: Congress shall have the 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." Marshall reasoned that Congress's creation of the National Bank, a precursor to the modern Federal Reserve, was constitutional because it was an "appropriate" means toward carrying out Congress's enumerated powers. President Andrew Jackson later dissolved the bank, arguing, despite Marshall's opinion, that its establishment was unconstitutional.

[26] Article I, Section 8 of the Constitution limits Congress, in brief, to the following powers: the power to tax, to borrow money on credit, to regulate interstate and international commerce, to establish uniform rules of naturalization and bankruptcy, to coin money, to punish counterfeiting, to establish post offices, to grant exclusive patents and copyrights, to establish lower federal courts, and to maintain and use military forces.

[27] The powers of state and local governments are themselves limited, of course, by the federal Constitution and by

the respective state constitutions.

[28] Max Farrand, ed., *Records of the Federal Conventions of 1787*, (rev. ed., 1937), p. 21 (Randolph's sixth resolution).

[29] *The Federalist* no. 32, p. 198 (A. Hamilton) (emphasis in original).

[30] *The Federalist* no. 39, p. 245 (J. Madison).

[31] *The Federalist* no. 45, pp. 292-93 (J. Madison).

[32] In fact, in a variety of cases spanning decades, the Supreme Court held that the Tenth Amendment was meant to be a substantive limit on the power of the federal government. See, for example, *Hammer v. Dagenhart* 247 U.S. 251 (1918), overruled: *United States v. Darby* 312 U.S. 100 (1941); *Collector v. Day*, 11 Wall. (78 U.S.) 113, 124 (1870), overruled: *Edwards v. California*, 314 U.S. 160 (1941).

[33] Michael Conant, *The Constitution and Capitalism* (St. Paul: West Publishing Co., 1974), p. 180.

[34] See *The Federalist* no. 10 (J. Madison on factions).

[35] Compare with note 108 below.

[36] Thomas James Norton, *The Constitution of the United States: Its Sources and Applications* (Cleveland and New York: World Publishing Co., 1941), p. 46.

[37] 297 U.S. 1, 65 (1936).

[38] *Ibid.*, at 7174.

[39] *Ibid.*, at 68.

[40] *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937).

[41] U.S. Constitution, Article I, section 8, clause 3.

[42] *United States v. Darby*, 312 U.S. 100 (1941).

[43] *Wickard v. Filburn*, 317 U.S. 111 (1942).

[44] See, for example, *Perez v. United States*, 402 U.S. 146 (1971).

[45] See *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 276 (1981).

[46] 22 U.S. (9 Wheat.) 1 (1824).

[47] For example, G. Edward White, *The Marshall Court and Cultural Change*, 2 vols. (New York: Macmillan Publishing Co., 1989); Epstein, "The Proper Scope of the Commerce Power"; Stephen Macedo, "Economic Liberty and the Future of Constitutional Self-Government," in Ellen Frankel Paul and Howard Dickman, eds. *Liberty, Property, and the Future of Constitutional Government* (Buffalo: SUNY Press, 1990), p. 96; Earl M. Maltz, "Trust Betrayal," *Harvard Law Review* 97 (1984): 1017-18.

[48] Richard A. Epstein, "The Mistakes of 1937," *George Mason University Law Review* 11 (1988): 11.

[49] *United States v. Darby*, 312 U.S. 100 (1941).

[50] *Wickard v. Filburn*, 317 U.S. 111 (1942).

[51] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

[52] Advocates of an expansive commerce power also argue that because the scope of interstate commerce has expanded so greatly since the 18th century, the commerce power must expand as well. The slavery example refutes that claim. Cotton and tobacco, the main crops of southern plantations, were traded widely in both interstate and international commerce, even in the 18th century. But no one believed that the interstate shipment of, say, tobacco, gave Congress the power to pass legislation regulating labor conditions in the tobacco fields.

[53] See Bruce Ackerman, *We the People: Volume I, Foundations* (Cambridge: Harvard University Press, 1991). For a different approach to the same end, see Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge: Harvard University Press, 1990).

[54] See Ackerman, *We the People*.

[55] *West Coast Hotel*, 300 U.S. at 402-4 (Sutherland, J., dissenting). Or, as Cass Sunstein of the University of Chicago Law School puts it: "At least in America, a Constitution is a written text. For this reason the New Deal cannot, by definition, be a constitutional amendment. Unwritten amendments simply are not amendments." *New Republic*, January 20, 1991, p. 34.

[56] Michael Aprahamian, "Constitutional Crisis Revisited: The New Deal Proposals to Amend the Constitution and Judicial Codification" (unpublished manuscript, 1991) (on file with author).

[57] Pulliam, "Two Faces of Judicial Review," p. 168 (reviewing Siegan, *Economic Liberties and the Constitution*).

[58] For example, *Perez v. United States*, 402 U.S. 146, 15758 (1971) (Stewart, J., dissenting) (arguing that title II of the Consumer Credit Protection Act goes beyond Congress' power under the commerce clause).

[59] *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 307 (1981) (Rehnquist, J., concurring).

[60] *Ibid.*, at 309, 311-13 (Rehnquist's emphasis).

[61] Rehnquist's concurrence has recently been relied upon by a federal appellate court in an opinion limiting the regulatory authority of the EPA. *Hoffman Homes, Inc. v. Administrator*, No. 903810, 961 F.2d 1310 (7th Cir. April 20, 1992). Whether this opinion is a harbinger remains to be seen.

[62] For example, *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled; *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *Garcia*, 469 U.S. at 580 (O'Connor, J., dissenting); see also Edwin R. Meese, "Address before the American Bar Association, July 9, 1985: *Garcia v. San Antonio Metropolitan Transit Authority*," p. 3 ("The court displayed ... a disregard for the Framers' intention that state and local governments be a buffer against the centralizing tendencies of the national Leviathan.").

[63] *New York v. United States*, 60 U.S.L.W. 4603 (1992). The Court declined to revisit *Garcia*, but all indications are that the majority is unhappy with that decision.

[64] For example, *South Dakota v. Dole*, 483 U.S. 203, 209 (1987).

[65] Justice O'Connor thus abandoned her position in dissent in *Dole* that if Congress is prohibited from directly ordering a state to pursue a certain policy, it may not "encourage" the state to do so through its spending power. *Ibid.*, at 213 (O'Connor, J., dissenting).

[66] The majority in *Garcia* adopted the correct test, at least formally: if a regulation would be valid against a private party, it is valid against a state. Unfortunately, the majority also adhered to the substantive position that almost any economic regulation of a private party is valid under the commerce clause. Justice O'Connor has rejected the abovenoted test as "inconsistent with the spirit of our Constitution." *Garcia*, 469 U.S. at 588.

[67] This intellectual coalition includes Judge Bork. Bork, *The Tempting of America*, p. 56.

[68] *Manhattan Report on Economic Policy* 5, no. 2 (1985): 1112 (remarks of Ralph Winter).

[69] *Ibid.*, p. 12 (remarks of Richard Epstein).

[70] E.g., *Impoundment Control Act*, 2 U.S.C. section 681688. *State Highway Commission of Mo. v. Volpe*, 479 F.2d 1099 (8th Cir. 1973). President Bush has used the Impoundment Control Act to his advantage of late, exercising the power of presidential recession pursuant to 2 U.S.C. section 683 to propose the elimination of porkbarrel spending and relying on congressional Republicans to force the Democrats to vote on rejecting his recessions. See Eric Pianin, "Presidential Recessions May Become the Pivotal Issue in Budget Debate,"

Washington Post, April 24, 1992, p. A6.

[71] In fact, this is not a novel idea. Toward the end of his second term, President Reagan signed Executive Order no. 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights" (March 1988), requiring the executive branch to ensure that its regulatory policies do not violate the Fifth Amendment's takings clause, which prohibits government from taking private property for public use without just compensation. More recently, when signing certain bills, President Bush has asserted the right of

"constitutional excision" in announcing his refusal to enforce legislative provisions he deems to be unconstitutional. See Burt Solomon, "Bush's Personal Power May Wane but Not the Power of His Office," *National Journal* 23 (1991): 1192.

[72] Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit has written a brief but excellent introduction to this topic. See Frank H. Easterbrook, "Presidential Review," *Case Western Reserve Law Review* 40 (1989-90): 905-29.

[73] Whether the clause was meant to prohibit both *ex ante* and *ex post* interference with contracts is open to debate. Richard Epstein, for one, thinks it should be applied to both. Epstein, "Toward a Revitalization of the Contract Clause," *University of Chicago Law Review* 51 (1984): 703. Because the Supreme Court held generations ago that the clause applies only to *ex post* interference with contracts, it is not likely to reassess that decision in the absence of clear and convincing evidence that it was mistaken.

[74] 290 U.S. 398 (1934).

[75] Lino Graglia, "Judicial Activism of the Right: A Mistaken and Futile Hope," in Paul and Dickman, p. 67.

[76] Office of Legal Policy, "Report to the Attorney General: Economic Liberties Protected by the Constitution" (March 16, 1988), p. 74.

[77] For a rare example, see Justice Hugo Black's dissenting opinion in *City of El Paso v. Simmons*, 379 U.S. 497 (1965).

[78] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978).

[79] *Ibid.*, at 24251.

[80] See, for example, *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983).

[81] *Chicago Bd. of Realtors v. City of Chicago*, 819 F.2d 732, 744 (1987) (Posner, J., concurring).

[82] Edwin R. Meese, "The Law of the Constitution" (speech delivered at Tulane University, October 21, 1986), p. 2.

[83] Robert Bork, "The Constitution, Original Intent, and Economic Rights," *San Diego Law Review* 23 (1985): 829.

- [84] Judge Easterbrook joined Judge Posner's opinion in *Chicago Board of Realtors v. City of Chicago*, 819 F.2d 732 (1987).
- [85] Michael W. McConnell, "The Counter-Revolution in Legal Thought," *Policy Review* (Summer 1987): 18.
- [86] Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1989): 856.
- [87] William B. Stoebuck, "A General Theory of Eminent Domain," *Washington Law Review* 47 (1972): 586.
- [88] One does not have to fully subscribe to the theory of original intent to agree with this analysis. Unlike opened terms in the Constitution such as "liberty" or "cruel and unusual punishment," "property" is a legal term of art that had a fixed meaning when the takings clause was promulgated.
- [89] This principle found expression in the common-law maxim, "sic utere tuo ut alienum non laedas""use your own proper ty in such manner as not to injure that of another."
- [90] See, for example, *Reinman v. Little Rock*, 237 U.S. 171 (1915) (downtown livery stable is a nuisance not subject to just compensation requirement).
- [91] *Block v. Hirsch*, 256 U.S. 135 (1921).
- [92] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-16 (1922).
- [93] See Richard A. Epstein, "Takings: Descent and Resurrection," in P. Kurland, G. Casper, and D. Hutchinson, eds., 1987 *The Supreme Court Review* (Chicago: University of Chicago Press, 1988), pp. 1-45; Carol M. Rose, "Mahon Reconstructed: Why the Takings Issue Is Still a Muddle," *Southern California Law Review* 57 (1984): 561.
- [94] 447 U.S. 255 (1980).
- [95] 458 U.S. 419 (1982). This case involved a regulation requiring an owner to install 1.5 cubic feet of cable-television equipment on his apartment building. The Court held that this demand constituted a "physical invasion" and hence was subject to the just compensation requirement.
- [96] 483 U.S. 825 (1987).
- [97] *Ibid.*, at 834, n. 3.
- [98] No. 91-453, 60 U.S.L.W. 4842 (1992).
- [99] See, for example, Roger Pilon, "Property and Constitutional Principles," *Wall Street Journal*, February 28, 1992.
- [100] 364 U.S. 40, 49 (1960).
- [101] 485 U.S. 1 (1988).
- [102] *Ibid.*, at 22 (Scalia, J., concurring in part and dissenting in part).
- [103] *Ibid.*, at 2122.
- [104] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978).
- [105] *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).
- [106] Frank Michelman, "Tutelary Jurisprudence and Constitutional Property," in Paul and Dickman, p. 145.
- [107] Epstein, *Takings: Private Property and the Power of Eminent Domain*, pp. 306-29.

[108] Compare with Stephen Macedo, "Economic Liberty and the Future of Constitutional SelfGovernment," in Paul and Dick man, *Liberty, Property, and the Future of Constitutional Development*, p. 115 (arguing that the Sixteenth Amendment allows for progressive taxation and the redistribution of income). For a contrary view, see Epstein, *Takings: Private Property and the Power of Eminent Domain*, pp. 306-29.

[109] Epstein, "Takings: Of Maginot Lines and Constitutional Compromises," in Paul and Dickman, p. 195.

[110] *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[111] *Manhattan Report on Economic Policy* 5, no. 2 (1985): 4.

[112] See Paul L. Murphy, *The Constitution in Crisis Times: 1918-1969* (New York: Harper & Row, 1972), p. 15 (describing Holmes' skepticism about federal regulation of the economy).

[113] *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[114] Pulliam, "Two Faces of Judicial Review," p. 166.

[115] See Jeremy Rabkin, "Judicial Activism on the Right," *Policy Review* (Summer 1986): 78. ("It is conservatives who are more likely to embrace Holmesian skepticism".)

[116] "Robert Bork on Judicial Restraint," *Manhattan Report on Economic Policy* 5, no. 2 (1985): 16.

[117] Richard A. Epstein, "Robert Bork and Business: A Man of Two Clashing Principles," *New York Times*, August 23, 1987, section 3, p. 3, col. 1.

[118] For example, "Equality for Economic Rights," *Wall Street Journal*, February 29, 1988; "Surf's Up for Property Rights," *Wall Street Journal*, July 3, 1987.

[119] For example, "Justices to Decide if Even Land Developers Have Civil Rights," *Wall Street Journal*, December 11, 1991; "Justices Should Defend a Revolutionary Idea the Contract," *Wall Street Journal*, December 4, 1991; "Justices Have No Reason to Fear Private Property," *Wall Street Journal*, November 27, 1991; "The New Civil Rights Era Begins with a Veto," *Wall Street Journal* October 3, 1990; "Constitution Protects Life, Liberty, Property," *Wall Street Journal*, October 8, 1986.

[120] For example, Hadley Arkes, "A Jurisprudence of Natural Rights: How an Earlier Generation of Judges Did It," *The Heritage Lectures*, no. 364, December 1991; William Campbell, "Constitutional Economics: Ancients vs. Moderns," *The Heritage Lectures*, no. 171, July 1988 ("Activity should take place at both the legislative and judicial levels to promote economic freedom."); Donald P. Hodel, "The Constitution and Economic Liberties," *The Heritage Lectures*, no. 129, June 1987; William E. Simon, "Why the Constitution Fosters Free Enterprise and Economic Efficiency," *The Heritage Lectures*, no. 129, June 1987.

[121] See, for example, papers collected in Dorn and Manne, *Economic Liberties and the Constitution*; Macedo, *The New Right v. The Constitution*; Barnett, *The Rights Retained by the People*.

[122] For example, *George Mason University Law Review* (Winter 1988) (collected papers from the Federalist Society's conference, "Constitutional Protections of Economic Activity: How They Promote Individual Freedom," held on October 16-17, 1987).

[123] Office of Legal Policy, "Report to the Attorney General: Economic Liberties Protected by the Constitution" (March 16, 1988).

[124] Epstein, in fact, is widely credited with having a direct impact on Scalia's takings decisions, described above. See, for example, Henry Manne, "Introduction," *George Mason University Law Review* 11 (1988): 3.

[125] "Excerpts from Senate's Hearings on the Thomas Nomination," New York Times, September 11, 1991, p. A22.

[126] The allusion is to Justice Holmes's dissent in *Lochner*, in which he accused the Supreme Court of attempting to turn a libertarian work of social philosophy, "Mr. Herbert Spencer's *Social Statics*," into American constitutional law. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).