Constitutional Theory & History in a Nutshell

Sunday, 9:00 a.m. – 10:00 a.m.

Dr. Roger Pilon
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This session will distinguish the Constitution from modern "constitutional law."
The Constitution derives its legitimacy from the natural rights tradition as originated in antiquity and as development through the common law and the Enlightenment. Progressives rejected that vision, giving us modern constitutional law, the minutia of which every law student must master, however removed it may be from the Constitution itself.

Selected Reading:

Roger Pilon, *On the Origins of the Modern Libertarian Legal Movement*, 16 CHAP. L. REV. 255 (2013).

Roger Pilon, *The United States Constitution: From Limited Government to Leviathan*, 45 Economic Education Bulletin 1 (2005).

On the Origins of the Modern Libertarian Legal Movement

Roger Pilon[*]

The growing influence of the modern libertarian legal movement in America and beyond was no better illustrated recently than during the two-year run-up to the Supreme Court's "Obamacare" decision, which came down on the Court's final day last June.[1] Marginalized for years by many conservatives[2]—to say nothing of the long dominant liberal establishment that dismissed their arguments out of hand[3]—libertarians offered a principled vision[4] that resonated not only with judges who over that period decided several challenges to the Act's massive expansion of government,[5] but with a large part of the American public as well—and, in the end, with a majority on the High Court itself.[6] And why not: The vision was grounded in the nation's First Principles.

The movement did not come out of nowhere, however. Its roots are deep and often subtle, the product of decades of thought and work by philosophers, economists, lawyers, and others, all toward securing the legal foundations for liberty. An entire volume would be needed to adequately

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1 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

2 For the most recent example, see J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE (2012).

3 Among countless examples, see Akhil Reed Amar, Op-Ed., *Constitutional Showdown*, L.A. TIMES, Feb. 6, 2011, at A17.

4 *See* ROBERT A. LEVY, THE CASE AGAINST PRESIDENT OBAMA'S HEALTH CARE REFORM: A PRIMER FOR NONLAWYERS (2011); Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010); Ilya Shapiro, *A Long, Strange Trip: My First Year Challenging the Constitutionality of Obamacare*, 6 FLA. INT'L U. L. REV. 29 (2010).

5 *See, e.g.*, Florida *ex rel*. Att'y. Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), *aff'd in part, rev'd in part*, 132 S. Ct. 2566 (2012); Florida *ex rel*. Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *aff'd in part, rev'd in part*, 648 F.3d 1235 (2011), *aff'd in part, rev'd in part*, 132 S. Ct. 2566 (2012); Virginia *ex rel*. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (2011).

6 *See* James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011–2012 CATO SUP. CT. REV. 67 (2012); David B. Rivkin Jr. et al., NFIB v. Sebelius *and the Triumph of Fig-Leaf Federalism*, 2011–2012 CATO SUP. CT. REV. 31 (2012).

treat the origins and course of the movement.[7] In the limited compass I'm afforded here I will be able simply to scratch the surface, touching on some of the main themes, actors, and events—largely from my own perspective and experience as one who was there toward the beginning, seeing and living events that younger members of the movement today have only read or heard about, if that. My aim is to give those members at least a glimpse of that history, the better to appreciate the value of the work that lies before them.

I. BACKGROUND: THE RISE AND FALL OF CLASSICAL LIBERALISM

The place to begin, however, is with the context from which the movement arose. And for that we need to reach far back: to the natural law of antiquity, grounded in reason; to the Roman law, with its development of property and contract; to the English common law, especially, its judges drawing on reason and custom to craft the theory of rights, captured in the positive law of an evolving Magna Carta; to John Locke, who would conceptualize those rights as natural rights and order them systematically within a larger theory of moral and political legitimacy; and to America's Founders and Framers, including the Framers of the Civil War Amendments, who would institutionalize the principles that emerged from that long tradition.[8] Covering first private then public law, those principles and the regime the Framers secured over time spoke simply of individual liberty under limited constitutional government—the vision that inspired the modern libertarian movement, especially in its legal manifestations.

As with all human institutions, the regime that followed from those principles was far from perfect. But it enabled unprecedented liberty and prosperity for countless millions already living in America as well as those drawn here by the principles. With the rise of Progressivism, however, the vision faced a frontal assault, grounded in the idea that government planners could better order human affairs than could individuals pursuing their own ends as if guided by Adam Smith's invisible hand.[9] So attractive was that collectivist idea, especially among Western elites, that by the middle of the twentieth century there were few advocates of the older view to be found, at least among the elites who would come to run the affairs of nations. And that is where our story begins, first with the slow reemergence of the classical view, then with the more specifically legal cast of it.

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7 On the broader conservative legal movement, see STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008); BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT (Lee Edwards ed., 2004).

8 For a learned overview of this history, see Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law,* (pts. 1 & 2), 42 HARV. L. REV. 149, 365 (1928-1929). For the Civil War Amendments, see Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361 (1993).

9 *See* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006).

II. FROM OUT OF THE ASHES: ANSWERING THE NEW DEAL

No event precisely marks the rebirth of modern libertarianism[10]—remnants of the classical view endured, to be sure—and its specifically legal aspect would emerge only in time from a mélange of writings by economists, philosophers, political theorists, lawyers, literary figures, journalists, and others, all part of a broadly "conservative" response to the modern liberalism that dominated the mid-century world of ideas. But a useful marker is of course the 1944 publication of F.A. Hayek's *The Road to Serfdom*, a withering critique of central planning. An Austrian economist but in truth a polymath, Hayek would go on to publish broadly philosophical works—*The Constitution of Liberty* in 1960 and the three-volume *Law, Legislation, and Liberty* in the 1970s, among much else—but over that stretch a great deal more would unfold to bring into being the modern American conservative movement in which libertarianism could be found growing, if not always comfortably.

Here, let me simply list but a few of those developments as they underpinned and eventually led to the modern libertarian *legal* movement that began to emerge in the mid-1970s. The Austrian and Chicago economists such as Hayek and Milton Friedman were seminal libertarian influences, of course, as were the philosophical novels of Ayn Rand for many, and the variety of writers who found a sympathetic home after William F. Buckley Jr. established his *National Review* in 1955.[11] But as important as those and other such individuals were—too many to recount here—the institutions that emerged during those early years were perhaps even more important, starting with the Mount Pelerin Society that Hayek founded in 1947; the Foundation for Economic Education (FEE), founded a year earlier by Leonard Read, which in the mid-1950s would begin publishing *The Freeman* as we know it today; the Intercollegiate Society of Individualists, founded by Frank Chodorov in 1953, which would later become the rather more conservative Intercollegiate Studies Institute, but not before helping to launch the *New Individualist Review*[12] at the University of Chicago in 1961; the Philadelphia Society, established in

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10 For the theory and history of libertarianism, see respectively, DAVID BOAZ, LIBERTARIANISM: A PRIMER (1997), and THE LIBERTARIAN READER: CLASSIC AND CONTEMPORARY READINGS FROM LAO-TZU TO MILTON FRIEDMAN (David Boaz ed., 1997). For the recent history, see BRIAN DOHERTY, RADICALS FOR CAPITALISM: A FREEWHEELING HISTORY OF THE MODERN AMERICAN LIBERTARIAN MOVEMENT (2007).

11 For a useful anthology of some twenty-four authors from this early period, see AMERICAN CONSERVATIVE THOUGHT IN THE TWENTIETH CENTURY (William F. Buckley Jr. ed., Transaction Publishers 2011), *originally published sub nom.* DID YOU EVER SEE A DREAM WALKING? AMERICAN CONSERVATIVE THOUGHT IN THE TWENTIETH CENTURY (William F. Buckley Jr. ed., 1970). For my introduction to the 2011 edition, which places the volume in a contemporary context, see Roger Pilon, *Introduction to the Transaction Edition* (2011), *available at* http://www.cato.org/pubs/books/Pilon-Buckley-Book-Intro.pdf.

12 In 1981, in 991 pages, the Liberty Fund Press republished the entire run of the *New Individualist Review*, from April 1961 to Winter 1968. *See* NEW INDIVIDUALIST REVIEW: VOLS. 1–5, (Liberty Press ed., 1981).

1964, whose annual meetings drew together a variety of conservative and libertarian intellectuals for debate and discussion; and, most important for our purposes, the Institute for Humane Studies, founded by F.A. "Baldy" Harper in 1961, which in time would become a significant force in bringing the modern libertarian legal movement into being. Also to be noted of course is the establishment of several conservative and libertarian think tanks, most prominently the Heritage Foundation in 1973 and the Cato Institute in 1977.

The importance of those and similar institutions cannot be overstated: They served to stimulate the debate that would eventually change the climate of ideas, bringing the classical liberal vision back to the fore. In those early years, however, to oversimplify considerably in the interest of economy, the domestic policy debate on the Right tended to involve cultural conservatives and economic libertarians more than the focused legal and constitutional debates we think of today. Conservatives and libertarians, sometimes at loggerheads, more often together, were working out responses to the liberalism that had dominated public discourse since the Progressive Era, overwhelmingly since the New Deal. But insofar as law was at issue, the early debate eventually took two main tracks. First, economic consequentialists sought to show that the liberals' programs, far from achieving their purported ends of helping the poor and the like, accomplished just the opposite results. From that effort emerged the law and economics movement, emanating from the University of Chicago under such early proponents as Aaron Director, Ronald Coase, Henry Manne, Richard Posner, and many others. But second, quite apart from that effort there arose another critique of the liberal legal order, a conservative attack on the "rights revolution" of the Warren Court and the "judicial activism" that many conservatives thought they saw being practiced by that Court and, later, by the Burger Court as well.[13]

That brings us closer to our main subject. But before reaching it we should note that, in an important sense, both the libertarian law and economics consequentialists and the conservative critics urging judicial deference to the political branches were operating *within* the political confines instituted by the New Deal's "constitutional revolution"—a Congress, freed from the doctrine of enumerated powers, exercising effectively unlimited power; an executive branch increasingly infused with "legislative" powers delegated to it by Congress; and courts unwilling to engage in checking the vast redistributive and regulatory schemes that were flowing from the political branches and the states (except, later on, when those schemes implicated certain "fundamental" rights).[14] For their part in

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13 This latter strain was captured much later and most prominently by Robert H. Bork in his book, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990). For a critique, see Roger Pilon, *Constitutional Visions*, REASON, Dec. 1990, at 39, and Roger Pilon, Op-Ed., *Rethinking Judicial Restraint*, WALL ST. J., Feb. 1, 1991, at A10.

14 I discussed this revolution more fully in ROGER PILON, THE UNITED STATES CONSTITUTION:

that post-New Deal constitutional milieu, the law and economics people sought to show legislators not that their efforts were without constitutional authority but, as noted just above, that they were counterproductive or perhaps inefficient; but insofar as those consequentialists brought their arguments to the courts, as they increasingly did, they were often seen as urging judges to make *policy* calls concerning economic efficiency, which judges have no authority to do. By contrast, conservatives were criticizing the Court not for invoking economic values like efficiency but for invoking social values, especially "evolving" liberal social values, thus to make *policy* judgments that should be left to the legislative branch, they said.[15] Yet in neither case did either camp come to grips with the challenge posed by the New Deal constitutional revolution itself. Both camps railed, mostly, against the Leviathan that the revolution had enabled; but neither seemed willing to tackle it at its core.

III. THE MODERN LIBERTARIAN LEGAL MOVEMENT EMERGES

Enter, therefore, the modern libertarian legal movement, animated by liberty and hence by the need to revive the constitutional principles that had secured it, which the New Deal Court had ignored as it opened the constitutional floodgates, allowing the modern welfare state to pour through. Not that the new movement did not draw from the two legal strains just outlined: law and economics consequentialism has a role to play in adjudication, of course, especially in line-drawing contexts involving nuisance, risk, and the like; and the conservatives were often right in critiquing the Court's activism, even if they often misidentified or overstated the problem. But they were surely wrong in calling for far-reaching judicial deference to the political branches.[16]

In fact, it was precisely that conservative call for judicial restraint and, even more, the underlying criticism of the Court's "rights-revolution" that sparked my own interest in pursuing the issues more deeply. After all, I thought, wasn't the nation founded in the name of rights—*natural* rights, which conservatives dismissed as no business for the courts? And wasn't it the duty of the courts, in the name of such rights, to protect individuals against majoritarian tyranny? Still, I paused, because the conservative critique and those questions were arising in the context of a galloping

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FROM LIMITED GOVERNMENT TO LEVIATHAN (2005), *available at* http://www.cato.org/pubs/articles/CT05.pdf.

15 I discussed this strain more fully in Roger Pilon, *Lawless Judging: Refocusing the Issue for Conservatives*, 2 GEO. J.L. & PUB. POL'Y. 5 (2001), *available at* http://www.cato.org/pubs/articles/pilon_gtwnfs_lawlessjudging.pdf.

16 *See, e.g.*, Lino A. Graglia, *Judicial Activism of the Right: A Mistaken and Futile Hope*, *in* LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 65, 66–67 (Ellen Frankel Paul & Howard Dickman eds., 1990) ("The Constitution places very few restrictions on the exercise of the federal government's enumerated powers . . . . As a result, examples of enacted law clearly in violation of the Constitution are extremely difficult to find."). For a much earlier version of this view, see L. Brent Bozell, *The Unwritten Constitution*, *in* AMERICAN CONSERVATIVE THOUGHT IN THE TWENTIETH CENTURY, *supra* note 11, at 52–75.

welfare state at home—Lyndon Johnson's Great Society—and an intellectual climate that called for greater protection for "social and economic rights"—welfare rights—both at home and abroad,[17] which hardly seemed consistent with the Framers' plan for *limited* government.

And so I, and others too who at the time were studying philosophy, dove more deeply into the theory of the matter, especially the theory of rights. And as luck would have it, long dormant normative theory was just then starting to reemerge in Anglo-American analytical philosophy. Two books in particular, both by Harvard philosophers, animated our thinking: John Rawls' *A Theory of Justice*, which arrived in 1971 and was generally understood as an apology for the modern welfare state, and Robert Nozick's *Anarchy, State, and Utopia*, which appeared in 1974 as a critique of Rawls and, more fully, as a sophisticated defense of libertarianism and limited government. But Nozick had erected his argument on the assumption that people had rights, which meant that there was a good deal of more fundamental work to be done—a project that I and others were only too willing to take on. In my case, it culminated finally in 1979 in a doctoral dissertation at Chicago entitled *A Theory of Rights: Toward Limited Government*, which drew on everything from Aristotle's *Metaphysics* to Isaiah Berlin's "Two Concepts of Liberty" to my mentor Alan Gewirth's *Reason and Morality*. Others, too, from the mid-1970s and beyond were at work establishing the philosophical foundations for liberty and limited government—through the Liberty Fund in Indianapolis, at the Reason Foundation in Los Angeles, the Pacific Institute for Public Policy Research and the Cato Institute (at that time) in San Francisco, the Social Philosophy and Policy Center in Bowling Green, Ohio, and elsewhere.

But the lawyers also were at work at their end of the project, and none more productive or insightful than the man who arrived across the Midway a year after I got to Chicago, Richard Epstein. No stranger to philosophy—his undergraduate major at Columbia, my own alma mater—Epstein was at the time developing his theory of strict liability in torts, which dovetailed nicely with the Lockean understanding of rights, even as it contrasted with his colleague Richard Posner's negligence approach to torts. We struck up a collaborative relationship that has continued to this day,[18] beginning with my 1976 review[19] of his first four tort essays,[20] placing them in a Hayekian and Nozickian context. The Institute for Humane Studies (IHS) had commissioned the piece for their *Law & Liberty*, which reached some

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17 *See* Maurice Cranston, *Human Rights, Real and Supposed*, *in* POLITICAL THEORY AND THE RIGHTS OF MAN 47 (D. D. Raphael ed., 1967); Inga Markovits, *Socialist vs. Bourgeois Rights—An East-West German Comparison*, 45 U. CHI. L. REV. 612 (1978).

18 *See, e.g.*, EPSTEIN, *supra* note 9.

19 Roger Pilon, *Liberty and the Law of Tort*, 2 L. & LIBERTY 1 (1976).

20 Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975).

8,000 lawyers, judges, and scholars, I was told. And right there is a crucial piece of the story.

Located at the time in Menlo Park, California, next door to Stanford, and led by Leonard Liggio, a historian, and Davis Keeler, a lawyer who headed up their Law & Liberty project, IHS and its people had an exceptionally keen appreciation of the need to establish not simply the economic arguments for liberty, including economic liberty, but the moral and legal arguments as well. Thus, even before I'd finished my dissertation they put me and many others on the speaking circuit, spreading the ideas that were the beginnings of what in time would constitute "the movement." One such effort stands out: it was a 1979 conference in San Diego on the theory of rights, underwritten by the Liberty Fund, which I organized through IHS at a time when I was teaching at the Emory University Law School. The conference, examining the theory of rights systematically, drew together some of the leading scholars on the subject. Its proceedings and more were published that year in a special edition of the *Georgia Law Review*,[21] copies of which were then used for years thereafter by IHS in its teaching and training programs for budding and newly minted libertarian academics, including law professors, who needed all the help they could get to penetrate the too often hostile academic walls. Those kinds of multiplier effects were crucial for building a movement.

But others, too, were engaged in the same kinds of efforts. Thus a young Harvard Law student, Randy Barnett, himself a philosophy undergraduate major at Northwestern, was exploring the criminal law side of things with a conference he organized on the subject and an important essay on restitution that followed in 1977 in *Ethics*, published by the University of Chicago.[22] And on the constitutional side, the late Bernard Siegan, another Chicago product who taught for years at the University of San Diego School of Law and attended that 1979 IHS rights conference, was at work at that time on his much needed *Economic Liberties and the Constitution*, published in 1980, also by Chicago. The mid- to late-'70s was a fertile period for developing the foundations for what would become the modern libertarian legal movement.

But it would take sustained effort to become a true movement, to say nothing of a successful one. Fortunately, that effort was forthcoming, although the events that went into it are so varied and numerous that I can mention only a few—and again, only those with which I am most familiar. They begin, in the 1980s, with the election of Ronald Reagan and the subsequent appointment to the bench of numerous judges and justices, many of whom came from the legal academy or were otherwise conversant with the developing intellectual currents as they pertained to the law. But

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21 Symposium, *Perspectives on Rights*, 13 GA. L. REV. 1117 (1979).

22 Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977). *But see* Roger Pilon, *Criminal Remedies: Restitution, Punishment, or Both?*, 88 ETHICS 348 (1978).

the differences between conservatives and libertarians were lying just below the surface, so for those of us in the libertarian camp, especially on the question of the proper role of the courts, it was a matter of charting a slow but methodical course aimed at changing the climate of ideas to one that would be more sympathetic to the idea that judges should be more engaged in defending constitutional liberties than most conservatives at the time, fearing judicial activism, were inclined to support. To accomplish that, quite simply, we got involved—with our fellow conservatives, and with the Left as well, where doing so would advance our ideas.

Thus, just after the 1980 elections I worked with George Pearson, at that time with Koch Industries, to help plan the agenda for the annual meeting of the Philadelphia Society, which took place in early April 1981 near the start of the Reagan administration that I would be joining only weeks later. The subject of the meeting was the philosophy of law. By design, my own address at the meeting, subsequently published by the then quite conservative Intercollegiate Studies Institute,[23] gently called into question the conservatives' approach to the courts. Those efforts to work with people of different views continued, but so did efforts to refine our work among ourselves while at the same time promoting it to others. A good example was Cato's 1984 conference on "Economic Liberties and the Judiciary," the outline for which I had sketched on a paper napkin a year earlier over lunch with Ed Crane, Cato's president, and Jim Dorn, editor of the *Cato Journal*. At that conference we reached across the aisle in at least one instance, with the spirited opening debate between then-Judge Antonin Scalia and Richard Epstein, whose response to Scalia's defense of judicial restraint was somewhat short of gentle.

Here too there were multiplier effects. The Scalia-Epstein debate was soon published as a pamphlet by the conservative American Enterprise Institute, while the entire conference proceedings were published in the *Cato Journal* a year later[24]—and republished two years after that by the George Mason University Press with a foreword, "The Judiciary and the Constitution," by Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit.[25] Meanwhile, the *Cato Journal* edition garnered invitations to Bernie Siegan and me to speak on the subject of economic liberties and the judiciary at the ABA convention's 1987 showcase program celebrating the Bicentennial of the Constitution. And to top it all off, my ABA speech, published subsequently in *The Freeman*,[26] received the Bicentennial Commission's Benjamin Franklin Award, presented to me in 1989 by recently retired Chief Justice Warren Burger—all this from that paper napkin! Multiplier effects indeed!

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23 Roger Pilon, *On the Foundations of Justice*, 17 INTERCOLLEGIATE REV. 3 (1981).
24 Symposium, *Economic Liberties and the Judiciary*, 4 CATO J. 661 (1985).
25 ECONOMIC LIBERTIES AND THE JUDICIARY (James A. Dorn & Henry G. Manne eds., 1987).
26 Roger Pilon, *On the Foundations of Economic Liberty*, 38 THE FREEMAN 338 (1988).

There were many other such events during the 1980s, of course, but doubtless none was more important than the 1982 creation of the Federalist Society, which has grown exponentially since then. For three decades, first through law school student chapters, then through lawyers chapters and practice groups, and over time through several other means, not least its annual student and lawyer conventions, the society has encouraged and facilitated a robust exchange of ideas through which libertarians have been able to present their views to an increasingly receptive audience. Considerably more conservative than libertarian at its inception, the society and its officers were nonetheless admirably open to a variety of ideas, the central one being that truth will eventually prevail. Thus it has hosted countless events featuring libertarian themes—such as its own symposium on "Constitutional Protections of Economic Liberty," held at the George Mason University School of Law in 1987.[27] And numerous books setting out various aspects of the libertarian legal vision, books by Richard Epstein, Randy Barnett, Gary Lawson, Chip Mellor, Clint Bolick, Robert A. Levy, David Bernstein, Walter Olson, and others, have enjoyed a warm reception at Federalist Society events, as a result of which the society is considerably more libertarian today, especially in its younger ranks, than it was in its early years.

Again, therefore, it is the institutions that have been so crucial for advancing the ideas of the individuals who have worked in and through them. For that reason, when I left the Reagan administration toward its conclusion in 1988 it was to establish Cato's Center for Constitutional Studies, the purpose of which was to help change the climate of ideas to one more conducive to liberty under limited constitutional government. For nearly twenty-five years now, through books, monographs, op-eds, conferences, forums, lectures, amicus briefs, media appearances, and, especially, the annual *Cato Supreme Court Review*, we have worked to bring that change about—mostly with others, such as with our friends at the Institute for Justice,[28] which came on the scene a few years after we arrived. And we have seen that change come about—slowly and haltingly, to be sure, but clearly too, as in the Court's last Term. When judges finding Obamacare "a bridge too far" cite James Madison, assuring skeptics, in *Federalist 45*, that the powers of the new government would be "few and defined," that is a change worth noting, and worth celebrating as well.

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27 Symposium, *Constitutional Protections of Economic Activity*, 11 GEO. MASON L. REV. 1 (1988).

28 The Institute for Justice now has a Center for Judicial Engagement, under the direction of senior attorney Clark Neily, dedicated to encouraging courts to enforce constitutional limits on government. *Center for Judicial Engagement*, INSTITUTE FOR JUSTICE, http://www.ij.org/cje (last visited Nov. 7, 2012).

CONCLUSION

Twenty-five years and more ago, most conservatives had made their peace with the New Deal Court's rejection of the very centerpiece of the Constitution, the doctrine of enumerated powers, from which the document derives such legitimacy as it can have as positive law. "A lost cause," they said. Their concern instead, from fears about judicial activism, was that courts might recognize rights not enumerated in the document. Yet the plain text of the Constitution, together with its structure, should make it clear to any textualist that countless rights, only a few of which could have been *enumerated* in the document, are nevertheless recognized by and hence "in" the Constitution because, as it plainly says, they are "retained by the people"—and you cannot "retain" what you do not first have to be retained. Thus the fundamental importance of understanding the theory of rights that has stood behind the Constitution from before the time the Bill of Rights made explicit what was always implicit in the doctrine of enumerated powers—that where there is no power there is a right, belonging either to the states (as powers) or to the people.

At a second ABA convention showcase program, this one in 1991 celebrating the Bicentennial of the Bill of Rights, Randy Barnett and I addressed both of those issues—both the powers and the rights issues—in speeches we gave on "The Forgotten Ninth and Tenth Amendments."[29] In the years since, the limits imposed by both enumerated powers and enumerated and unenumerated rights have been rediscovered—not entirely, to be sure, far from it—but in ways we could only have imaged decades ago. There is much more to be done, but the foundations for doing it are now in place.

Yet those foundations are hardly new. They have been refined substantially, for sure, and that is no small matter. But they rest on principles that have been understood over the ages, even if too often forgotten or ignored over the past century. Progressives thought they could improve the lot of mankind by ordering vast areas of life through law. America's Founders knew better. They understood that liberty, under the rule of law, was the path to both prosperity and dignity. That is the path the modern libertarian legal movement is taking.

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ADDENDUM

After I had sent my symposium essay in to the *Chapman Law Review*, Professor Todd Zywicki was kind enough to send me his essay for this symposium[30] with the idea that I might wish to respond since it took a

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29 Roger Pilon, *The Forgotten Ninth and Tenth Amendments*, 13 CATO POL'Y REP. 1 (1991).

30 Todd J. Zywicki, *Libertarianism, Law and Economics, and the Common Law*, 16 CHAP. L.

somewhat different position than my own. I do wish to, briefly. Before continuing here, however, the reader should first read Professor Zywicki's essay below.

As will be seen, Zywicki's main aim is to distinguish libertarian legal theory from the common law and modern law and economics, despite their vast commonalities, and in the process to explain how he himself moved gradually from the former to the latter as the sounder approach to legal questions. Granting that the common law and law and economics are not exactly alike, he focuses on those few occasions where he believes they deviate from libertarian theory, which

> has traditionally been deontological and normatively-oriented, typically grounded in natural rights theory and reasoning to normative statements about the content of the law. Law and economics, by contrast, purports to be foremost a positive theory of the common law, while also providing a normative justification for the common law as well (namely, social wealth maximization as a normative value).[31]

And he takes as his libertarian foil a 1982 *Cato Journal* essay by Murray Rothbard,[32] the libertarian economist who was a prolific writer on all manner of subjects right up to his death in 1995.

Rothbard's fecundity aside, I would note first that while he may be a particularly useful foil for his having argued directly against the law and economics approach, there are many in the normative libertarian law tradition, as I noted above,[33] who take a broader view than Rothbard did, finding a place for both the common law and the law and economics approaches *within* the underlying libertarian theory.[34] In fact, not only do the rights-based libertarian and efficiency-based law and economics approaches most often reach the same conclusions, but properly related they complement each other, as we will see shortly.

But second, in explicating Rothbard's—and "the libertarian"—approach to "allocating" rights and liability in a nuisance context—his main focus—Zywicki charges Rothbard with "retreating" and eventually with "drift[ing] quite far from his initial premise that any physical invasion of land is an abatable nuisance and anything else is not actionable."[35] Yet a careful reading of Rothbard's essay, including passages Zywicki himself quotes, will show that Rothbard, as he goes along, is simply "refining" his

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REV. 309 (2013).

31 *Id*. at 309.

32 Murray Rothbard, *Law, Property Rights, and Air Pollution*, 2(1) CATO JOURNAL 55–99 (1982).

33 *See supra* text accompanying note 16.

34 Three years before Rothbard's essay appeared, in fact, I myself argued for conclusions not unlike those Zywicki urges, though within a rights-based libertarian normative context, not an efficiency context. *See* Roger Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171, 1193–96 (1979); Roger Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245, 1332–39 (1979). *See generally* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS (2008).

35 Zywicki, *supra* note 30, at 314.

"concept of invasion to mean not just boundary crossing, but boundary crossings that in some way interfere with the owner's use or enjoyment of this property. What counts," Rothbard concludes, "is whether the senses of the property owner are interfered with."[36] Thus, in defining property rights and setting liability rules, Rothbard would allow the "invasion" of radio waves or airplane flights at 35,000 feet, but not such standard nuisances as noise, odors, vibrations, and the like, at least if they are above a level that interferes with the owner's quiet enjoyment of his rights.[37]

Seizing on Rothbard's refinement of his position, Zywicki next brings us closer to his own thesis, that the Coase Theorem[38] is the better approach to nuisance disputes:

> Thus, despite his best efforts to avoid Coase, Rothbard has in fact implicitly come to concede the core premise that underlies the Coase Theorem—that what matters are incompatible and competing uses of scarce resources, and as a result, costs are reciprocal. It is only because *both* parties want to use the same scarce resource that incompatible uses arise.[39]
>
> . . . .
>
> Despite his best efforts to articulate simple bright-line rules, Rothbard's clear rules inevitably collapse under the weight of a multitude of *ad hoc* exceptions. But the myriad of exceptions illustrates the central problem—it is precisely the problem of incompatible uses that gives rise to the need to define property rights in the first place . . . . If the problem is incompatible uses among *people* then there is no obvious reason (as Rothbard implicitly admits) that it must be intrinsically tied to particular parcels of land or that the concept of physical invasion takes on some particular normative primacy.[40]

Having reduced the matter to incompatible uses, the solution Zywicki (and Coase) offer to this dilemma then follows naturally. Where there are low transaction costs, how a court allocates the rights does not matter, because either way the parties can bargain to an allocation of rights that maximizes total wealth. But where transaction costs are high, the initial allocation of rights might well matter, because the parties, for any number of reasons, may be unable to negotiate an efficient solution. In the stock example, a plaintiff suffering small losses from the actions of a defendant will seek to enjoin those actions, the effect of which, if the injunction is issued, will impose huge losses on the defendant. In such cases, Zywicki argues, "the law should try to *replicate* the bargain that the parties *likely*

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36 *Id*.

37 Regrettably, Rothbard sees no place for defining those levels through public, statutory law, even in large number contexts like automobile pollution. At the same time, after citing Rothbard to the effect that supersensitive plaintiffs do not get relief ("Those who have a special desire for quiet, Rothbard observes, must build their own soundproof room."), Zywicki then implies that Rothbard does *not* take that position ("Nor would nuisance arise [on the Rothbard view] if, for example, Mr. Burns [in Zywicki's example] only had a normal, and not a highly sensitive, sense of smell.") *Id.* at 315.

38 Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

39 Zywicki, *supra* note 30, at 314.

40 *Id.* at 315.

would have struck had they been able to sit down and bargain out the terms, but are unable to do so because of the high transaction costs."[41]

Well what is wrong with that approach? Not a lot, really, assuming we can approximate individual and social costs—no small assumption. But we are not home free yet. First, Zywicki writes that "what matters" is that we have incompatible and competing uses of scarce resources. But clearly, more than that matters. In particular, *causality* matters. And the efficiency approach effectively ignores that issue as it considers alternative ways to "allocate" rights and liability. Thus, in the first of Zywicki's examples it is the polluting vaccine factory, not its downstream victim, that is causing the harm, but for which that victimized owner would not be seeking an injunction, the effect of which, if issued, would *then* harm the factory. Ignore the temporal aspects of that causal sequence and, indeed, it becomes then a matter simply of incompatible and competing uses of scarce resources, the solution to which could very well turn on "maximizing social wealth" as one among several possible values. But if a court initially, in the name of efficiency, allocated the right to the factory by refusing to grant the injunction, that result would be achieved at the expense of the no-harm principle, properly qualified, that most people think fundamental to justice. The factory would not be internalizing the full costs of its actions but would be imposing some of those costs on unwilling strangers. Thus, again, "what matters" here is more than incompatible and competing uses.[42]

Second, although Rothbard does not accept the idea that a court might have to impose an efficient solution on the parties where transaction costs are high—as in the decisions Zywicki cites, *Ploof v. Putnam*[43] and *Alaska Packers v. Domenico*[44]—his refinements of his initial "physical invasion" premise do not amount to "a multitude of *ad hoc* exceptions," as Zywicki asserts. In fact, it is causation, a factual matter, and not incompatibility that enables the libertarian to distinguish legitimate from illegitimate uses of property, whereas incompatibility alone leaves one with only an evaluative criterion for making such distinctions. Quiet uses by adjacent owners are compatible because they are causally inefficacious. Active uses are causally efficacious and hence are compatible with quiet uses or with other active uses only if active users internalize the costs they impose on others, including through compensation agreements, for which a bedrock causal analysis is essential.[45]

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41 *Id*. at 317 (emphasis in original).

42 I discuss some of these issues more fully in Roger Pilon, *Property Rights and a Free Society* in RESOLVING THE HOUSING CRISIS: GOVERNMENT POLICY, DECONTROL, AND THE PUBLIC INTEREST, 369–401 (M. Bruce Johnson ed. 1982); reprinted as *Property Rights, Takings, and a Free Society*, 6 HARV. J.L. & PUB. POL'Y 165 (1983).

43 81 Vt. 471 (1908).

44 117 F. 99 (9th Cir. 1902).

45 I discuss these issues more fully in *Property Rights*, *supra* note 42.

But finally, if Rothbard's approach does not amount to a multitude of *ad hoc* exceptions, Zywicki's "law of necessity"—the very law that common law courts have fashioned in decisions like *Ploof* and *Alaska Packers*—*does* operate, by Zywicki's own admission, "as an exception to the general rule of property and tort that your property is yours to keep"—and rightly so, as the facts in those decisions should make clear. The old common law judges who fashioned such exceptions over the years may not have invoked the language of "bilateral monopolies" or "negative-sum rent-seeking transactions," but their intuitions were on the mark.

Libertarian legal theory, at its best, does not hold that rights are absolute, for the world is too complex and varied to allow for such a conclusion. But it does rest on reason, from which rights themselves are derived, and it takes reason as far as it will go, after which evaluative considerations like those that are inherent in the Coase Theorem, as applied in necessity and other such contexts, come into play. It is crucial to appreciate, however, just what the order is. It is not that "social wealth maximization" is a free-standing base line, as many in the law and economics movement would have it. Rather, that criterion comes into play in the context of a prior, normatively grounded property rights foundation, where pre-existing rights are held "by nature," to be *recognized*, not "assigned," by legislatures and courts. And it comes in toward the end, as an exception to the normal rules. Deciding precisely *when* to invoke exceptions like the law of necessity is another matter, of course, as is the underlying theory of natural rights, but those are matters for another day.

THE UNITED STATES CONSTITUTION: From Limited Government to Leviathan

By
Roger Pilon

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FOREWORD

TODAY the Federal government is very large and very powerful. Its annual budget exceeds the national income of the United Kingdom. The number of Federal employees is about the same as the entire population of Kansas. A host of government legislation, programs, and regulations affects Americans' lives. There are separate Federal departments to oversee agriculture, commerce, defense, education, energy, health and human services, homeland security, housing, justice, labor, transportation, and more. From the moment you get up in the morning until the close of the day, and from the day you are born until the day you die, the Federal government intrudes upon virtually every aspect of your life.

If the public opinion polls are accurate, many Americans support this arrangement. Public debate over proposals to shrink government typically focus on relatively minor changes—cutting a few billion dollars out of the multi-trillion dollar budget, rolling back a few regulations, etc. Yet even such modest proposals often garner more public opposition than support. The largest Federal programs, Social Security and Medicare, have broad popular support (the debate is over how to modify them, not eliminate them), as apparently do many other programs and activities.

Americans want their government to spend tax dollars wisely, to be more efficient, and to reduce waste, fraud, and abuse. But the issue is usually how the government could do something better, not whether it should be doing the thing at all. Moreover, it remains far from clear whether there is more than a small constituency in favor of drastically downsizing the role of the central government or reining in its powers. Even the conservative revolution of the past 25 years has succeeded mainly in slowing or marginally reversing the expansionary trend of government, rather than significantly shrinking it. Indeed, under the current "conservative" leadership, government spending has soared and the war on terrorism has been used to justify a further expansion of government powers at the expense of individual liberty.

The Founding Fathers had a very different philosophy about the proper role of government. They envisioned a far more limited role than exists now. Moreover, they enshrined this view in the document that embodies

the principles upon which the United States operates. The U.S. Constitution grants few specific powers to the central government.

The Constitution has not changed all that much since it was written in 1787, yet the Federal government has vastly expanded since that time, especially during the 20th century. How did this happen? How *could* it have happened, given the limits set forth by the Framers?

On October 14, 2005, at the Annual Meeting of the Voting Members of the American Institute for Economic Research, distinguished constitutional scholar Roger Pilon addressed this question in a talk entitled "The United States Constitution: From Limited Government to Leviathan." As he put it, he attempted to explain "how it happened that under a Constitution meant to limit government we got a government of effectively unlimited power." He also discussed the implications of this "constitutional revolution."

Eleven days later, Dr. Pilon addressed a similar theme in testimony he was invited to deliver before the U.S. Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Federal Financial Management, Government Information, and International Security. We reprint here a slightly revised version of that testimony.

ABOUT THE AUTHOR

ROGER Pilon is the founder and director of the Cato Institute's Center for Constitutional Studies in Washington, D.C. He is also Vice- President for Legal Affairs at Cato and holds the B. Kenneth Simon Chair in Constitutional Studies there. He held several senior posts in the Reagan Administration, has taught philosophy and law, and was a national fellow at Stanford's Hoover Institution. Dr. Pilon has published and lectured widely on constitutional issues and is a frequent commentator for national media outlets. In 1989 the National Press Foundation and the Commission on the Bicentennial of the U.S. Constitution presented him with the Benjamin Franklin Award for excellence in writing on the U.S. Constitution.

THE UNITED STATES CONSTITUTION: FROM LIMITED GOVERNMENT TO LEVIATHAN

THANK you, Mr. Chairman, for inviting me to testify today at this hearing on "Guns and Butter: Setting Priorities in Federal Spending in the Context of Natural Disasters, Deficits, and War"—the purpose of the hearing being, as your letter of invitation states, "to focus on the limits and role of our federal government as outlined in the Constitution."

I can well understand the subcommittee's concern to focus on that issue. In essay 45 of the *Federalist Papers*, James Madison, the principal author of the Constitution, spoke to a skeptical nation, worried that the document the Constitutional Convention had just drafted gave the central government too much power. Be assured, he said, the powers of the new government were, and I quote, "few and defined." How things have changed. Yet in its 218 years, the Constitution itself has changed very little. The questions before us, then, are (1) under that Constitution, how did we go from limited to essentially unlimited government, (2) what are the implications, and (3) what should be done about it?

A closely related question is whether Madison understood and correctly reported on the document he'd just drafted, or whether modern interpretations of the Constitution, which have allowed our modern Leviathan to arise, are correct. Let me say here that Madison was right; the modern interpretations are wrong. As a corollary, most of what the federal government is doing today is unconstitutional because done without constitutional authority. That contention will doubtless surprise many, but there you have it. I mean to speak plainly in this testimony and call things by their proper name.

But before I defend that contention by addressing those questions, let me note that the nominal subject of these hearings—"setting priorities in federal spending"—concerns mainly a matter of policy, not law. Unless some law otherwise addresses it, that is, how Congress prioritizes its spending is its and the people's business—a political matter. By contrast, the subtext of these hearings, which I gather is the subcommittee's principal concern, is "the limits and role of our federal government as outlined in the

Constitution," and that is mainly a legal question. I distinguish those questions, let me be clear, for a very important reason. It is because we live under a Constitution that establishes the rules for legitimacy. Thus, in the case at hand, Congress may have pressing policy reasons for prioritizing spending in a given way, but such reasons are irrelevant to the question of whether that spending is constitutional.

Constitutional Legitimacy

Because that distinction and the underlying issue of legitimacy are so central to these hearings, they warrant further elaboration at the outset. In brief, our Constitution serves four main functions: to authorize, institute, empower, and limit the federal government. Ratification accomplished those ends, lending political and legal legitimacy to institutions and powers that purported by and large to be morally legitimate because grounded in reason. Taken together, the Preamble, the first sentence of Article I, the inherent structure of the document, and especially the Tenth Amendment indicate that ours is a government of delegated, enumerated, and thus limited powers. The Constitution's theory of legitimacy is thus simple and straightforward: To be legitimate, a power must first have been delegated by the people, as evidenced by its enumeration in the Constitution. That is the doctrine of enumerated powers, the centerpiece of the Constitution. For the Framers, it was the main restraint against overweening government. In fact, the Bill of Rights, which we think of today as the main restraint, was an afterthought, added two years later for extra precaution.

Once that fundamental principle is grasped, a second follows: Federal powers can be expanded only by constitutional amendment, not by transient electoral or congressional majorities. Over the years, however, few such amendments have been added. In the main, therefore, Article I, section 8 enumerates the 18 basic powers of Congress—the power to tax, the power to borrow, the power to regulate commerce with foreign nations and among the states, and so forth, concluding with the power to enact such laws as may be necessary and proper for executing the government's other enumerated powers. It is a short list, the idea being, as the Tenth Amendment makes explicit and the *Federalist Papers* explain, that most power is to remain with the states—or with the people, never having been delegated to either level of government.[1]

In fact, given the paucity and character of the federal government's enumerated powers, it is plain that the Framers meant for most of life to be lived in the private sector—beyond the reach of politics, yet under the rule of law—with governments at all levels doing only what they have been authorized to do. Far from authorizing the ubiquitous government planning and programs we have today, the Constitution allows only limited government, dedicated primarily to securing the conditions of liberty that enable people to plan and live their own lives. I turn, then, to the first of the questions set forth above: How did we move from a Constitution that limited government to one that is read today to authorize effectively unlimited government?

From Limited to Unlimited Government

The great constitutional change took place in 1937 and 1938, during the New Deal, all without benefit of constitutional amendment; but the seeds for that change had been sown well before that, during the Progressive Era.[2] Before examining that transition, however, I want to lay a proper foundation by sketching briefly how earlier generations had largely resisted the inevitable pressures to expand government. It is an inspiring story, told best, I have found, in a thin volume written in 1932 by Professor Charles Warren of the Harvard Law School. Aptly titled, *Congress as Santa Claus: or National Donations and the General Welfare Clause of the Constitution*, this little book documents our slow slide from liberty and limited government to the welfare state—and that was 1932! In truth, however, Warren's despair over that slide notwithstanding, the book is a wonderful account of just how long we lived under the original design, for the most part, before things started to fall apart during the Progressive Era. And so I will share with the subcommittee just a few snippets and themes from the book, along with material from other sources, to convey something of a sense of how things have changed—not only in the law but, more important, in the culture, in our attitude toward the law.

When Thomas Jefferson wrote that it was the natural tendency for government to grow and liberty to yield, he doubtless had in mind his rival, Alexander Hamilton, for hardly had the new government begun to operate when Hamilton proposed a national industrial policy in his 1791 *Report on Manufactures*.[3] To Hamilton's argument 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,"[4] 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."[5] Congress shelved Hamilton's *Report*. He lost that battle, but over time he won the war.

The early years saw numerous attempts to expand government's powers, but the resistance mostly held. In 1794, for example, a bill was introduced in the House to appropriate $15,000 for the relief of French refugees who had fled to Baltimore and Philadelphia from an insurrection in San Domingo,[6] whereupon Madison rose on the floor to say that he could not "undertake to lay [his] finger on that article of the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents."[7] Two years later a similar bill, for relief of Savannah fire victims, was defeated decisively, a majority in Congress finding that the General Welfare Clause afforded no authority for so particular an appropriation.[8] As Virginia's William B. Giles observed, "[The House] should not attend to what … generosity and humanity required, but what the Constitution and their duty required."[9]

Those early attempts to expand Congress's power, and the resistance to them, centered on the so-called General Welfare Clause of the Constitution, found in the first of Congress's 18 enumerated powers.[10] Hamilton argued that the clause authorized Congress to tax and spend for the general welfare. Not so, said Madison, Jefferson, and many others. South Carolina's William Drayton put it best in 1828:

> If Congress can determine what constitutes the General Welfare and can appropriate money for its advancement, where is the limitation to carrying into execution whatever can be effected by money? How few objects are there which money cannot accomplish! … Can it be conceived that the great and wise men who devised our Constitution … should have failed so egregiously … as to grant a power which rendered restriction upon power practically unavailing?[11]

Stated differently—with reference to constitutional structure—what was

the point of enumerating Congress's powers if any time it wanted to do something it was not authorized to do, because there was no power granted to do it, Congress could simply say it was spending for the "general welfare" and thus make an end-run around the limits imposed by the doctrine of enumerated powers? Enumeration would have been pointless.

That argument largely held through the course of the 19th century. To be sure, inroads on limited government were made on other constitutional grounds, as Warren recounts. Congress made gifts of land held in trust under the Public Lands Clause, for example, with dubious consideration given in return; then gifts of revenues from the sale of such lands; and finally, gifts of tax revenues generally.[12] But there were also numerous examples of resistance to such redistributive schemes. Thus, in 1887, 100 years after the Constitution was written, President Grover Cleveland vetoed a bill appropriating $10,000 for distribution of seeds to Texas farmers suffering from a drought.[13] In his veto message he put it plainly: "I can find no warrant for such an appropriation in the Constitution."[14] Congress sustained the veto. And as late as 1907 we find the Supreme Court expressly upholding the doctrine of enumerated powers in *Kansas v. Colorado*:

> The 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. … The natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment.[15]

Thus, although the doctrine of enumerated powers faced political pressure from the start, and increasing pressure as time went on, the pattern we see through our first 150 years under the Constitution can be summed up as follows. In the early years, measures to expand government's powers beyond those enumerated in the Constitution rarely got out of Congress because they were stopped by objections in that branch—*constitutional* objections. Members of Congress actually debated whether they had the power to do whatever it was that was being proposed; they didn't simply assume they had the power and then leave it to the courts to check them. *Congress took the Constitution and the limits it imposed on congressional action seriously*.[16] Then when constitutionally dubious bills did get out of

Congress, presidents vetoed them—not simply on policy but on *constitutional* grounds. And finally, when that brake failed, the Court stepped in. In short, the system of checks and balances worked because the Constitution was taken seriously by sufficient numbers of those who had sworn to uphold it.

The Progressive Era called all of that into question. Marked by a fundamental change in the climate of ideas, it paved the way for the New Deal. In fact, as early as 1900 we could find *The Nation*, before it became an instrument of the modern left, lamenting the demise of classical liberalism. In an editorial entitled "The Eclipse of Liberalism," the magazine's editors surveyed the European scene, then wrote that in America, too, "recent events show how much ground has been lost. The Declaration of Independence no longer arouses enthusiasm; it is an embarrassing instrument which requires to be explained away. The Constitution is said to be 'outgrown.'"[17]

The Progressives to whom those editors were pointing, sequestered often in elite universities of the East, were animated by ideas from abroad: British utilitarianism, which had supplanted the natural rights theory on which the Constitution rested; German theories about good government, as reflected in Chancellor Otto von Bismarck's social security experiment; plus our own homegrown theories about democracy and pragmatism.[18] Combined with the emerging social sciences, those forces constituted a heady brew that nourished grand ideas about the role government could play in improving the human condition. No longer viewing government as a necessary evil, as the Founders had, Progressives saw the state as an engine of good, an instrument through which to solve all manner of social and economic problems. In a word, it was to be better living through bigger government.[19]

But a serious obstacle confronted the political activists of the Progressive Era—that troublesome Constitution and the willingness of judges to enforce it. Dedicated to liberty and limited government, and hostile to government planning garbed even in "the public good," the Constitution stood as a bulwark against overweening government, much as the Framers intended it would. Not always,[20] to be sure, but for the most part.

With the onset of the New Deal, however, Progressives shifted the focus of their activism from the state to the federal level. But they fared little

better there as the Court found several of President Franklin Roosevelt's schemes unconstitutional, holding that Congress had no authority to enact them.[21] Not surprisingly, that prompted intense debate within the administration over how to deal with "the nine old men." It ended early in 1937, following the landslide election of 1936, when Roosevelt unveiled his infamous Court-packing scheme—his plan to pack the Court with six new members. The reaction in the country was immediate. Not even the overwhelmingly Democratic Congress—nearly four to one in the House—would go along with the scheme. Nevertheless, the Court got the message. There followed the famous "switch in time that saved nine" and the Court began rewriting the Constitution—again, without benefit of constitutional amendment.

It did so in two main steps. In 1937 the Court eviscerated the doctrine of enumerated powers. Then in 1938 it bifurcated the Bill of Rights and invented a bifurcated theory of judicial review. For the purpose of these hearings, it is one half of the 1937 step that is most important, the rewriting of the General Welfare Clause; but the rest merits a brief discussion as well, to give a more complete picture of this constitutional revolution.

In 1936, in *United States v. Butler*,[22] the Court had found the Agricultural Adjustment Act[23] unconstitutional. But in the course of doing so it opined on the great debate between Madison and Hamilton over the meaning of the so-called General Welfare Clause, coming down on Hamilton's side—yet only in dicta and hence not as law. A year later, however, following the Court-packing threat, the Court elevated that dicta as it upheld the Social Security Act[24] in *Helvering v. Davis*.[25] The words were ringing: "Congress may spend money in aid of the 'general welfare,'"[26] said the 1937 Court. Moreover, "the concept of the general welfare [is not] static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation."[27] Thus were the floodgates opened. The modern welfare state was unleashed.

But if Congress could now engage in unbounded redistribution, so too could it regulate at will following the Court's decision that same year in *NLRB v. Jones & Laughlin Steel Corp*.[28] The issue there was the scope of Congress's power to regulate interstate commerce, a power Congress had been granted to address the impediments to interstate commerce that had

arisen under the Articles of Confederation as states were imposing tariffs and other measures to protect local merchants and manufacturers from out-of-state competition. Thus, the power was meant mainly to enable Congress to ensure the free flow of goods and services among the states—to make that commerce "regular," as against state and other efforts to impede it.[29] It was not a power to regulate anything for any reason. Yet that, in effect, is what it became as the 1937 *Jones & Laughlin* Court held that Congress had the power to regulate anything that "affected" interstate commerce, which is virtually everything.

The doctrine of enumerated powers now effectively eviscerated—the floodgates open for the modern redistributive and regulatory state to pour through—only the Bill of Rights stood athwart that unbounded power. So in 1938, in famous footnote 4 of *United States v. Carolene Products*,[30] the Court addressed that impediment to Leviathan by distinguishing "fundamental" and "nonfundamental" rights, in effect, and inventing a bifurcated theory of judicial review to complement that distinction. If a law implicated "fundamental" rights like speech or voting, the Court would apply "strict scrutiny" and would doubtless find it unconstitutional. By contrast, if a law implicated "nonfundamental" rights like property, contract, or the rights we exercise in ordinary commercial relations, the Court would uphold the law as long as there was some "rational basis" for it.[31] That judicial deference to the political branches regarding economic rights, coupled with strict scrutiny for political rights, amounted to the democratization and to the politicization of the Constitution, to opening the door to political control of economic affairs, public and private alike, beyond anything the Framers could have imagined.[32]

The rest is history, as we say, with redistributive and regulatory schemes, federal, state, and local, pouring forth. Others on this panel can testify as to the numbers that illustrate that explosion in government programs. My concern, rather, is to outline how it happened that under a Constitution meant to limit government we got a government of effectively unlimited power.

Toward that end, and beyond the history of the matter, let me add that most of the spending that is the focus of these hearings has arisen under the so-called General Welfare Clause, which the Court has also referred to as

the Spending Clause. In truth, however, there are no such clauses in the Constitution,[33] which is why I have invoked the term "so-called." A careful reading of the first of Congress's 18 enumerated powers, which is the nominal source of those so-called clauses, coupled with reflection on the structure of the document, will reveal merely a power to tax at the head of Article I, section 8, much as the second of Congress's enumerated powers is the power to borrow. If Congress exercises either or both of those powers—or its Article IV power to "dispose" of public lands, for that matter—and it wants then to appropriate and spend the proceeds on any of the ends that are authorized to it, it must do so under the Necessary and Proper Clause. For taxing, borrowing, disposing, appropriating, and spending are distinct powers. The first three are expressly authorized to Congress. Appropriating and spending, by contrast, are necessary and proper *means* toward executing the powers authorized to the government—means provided for under the Necessary and Proper Clause. As such, they are not *independent* but only *instrumental* powers, exercised in service of ends *that in turn limit their use to those ends*. Put simply, Congress cannot appropriate and spend for any end it wishes, but only for those ends it is authorized to pursue—and they are, as Madison said, "few and defined."

We come, then, to the nub of the matter. Search the Constitution as you will, you will find no authority for Congress to appropriate and spend federal funds on education, agriculture, disaster relief, retirement programs, housing, health care, day care, the arts, public broadcasting—the list is endless. That is what I meant at the outset when I said that most of what the federal government is doing today is unconstitutional because done without constitutional authority. Reducing that point to its essence, the Constitution says, in effect, that everything that is not authorized—to the government, by the people, through the Constitution—is forbidden. Progressives turned that on its head: Everything that is not forbidden is authorized.

But don't take my word for it. Take the word of those who engineered the constitutional revolution. Here is President Roosevelt, writing to the chairman of the House Ways and Means Committee in 1935: "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation."[34] And here is Rexford Tugwell, one of the principal architects of the New Deal, reflecting on his handiwork some thirty years later: "To the extent that these new social virtues

[i.e., New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them."[35] They knew exactly what they were doing—turning the Constitution on its head. That is the legacy we live with today.

Implications of the Constitutional Revolution

That legacy has many implications. Let me distinguish five. First, and perhaps most important, is the loss of legitimacy—moral, political, and legal. Today, we tend to think mainly of political legitimacy, failing to see how the several grounds of legitimacy go together. We imagine that the people, by their periodic votes, tell the government what they want; and to the extent that it responds to that expression of political will, consistent with certain state immunities and individual rights that might check it, the government and its actions are legitimate. Whatever moral legitimacy flows from that view is a function of the moral right of self-government, we believe, but that right is largely open-ended regarding the arrangements it might produce. It could produce limited government. But it could as easily produce unlimited government.[36] And without a keen sense of the role and place of moral legitimacy, we are indifferent as to which it is.

That view characterizes legitimacy in a parliamentary system, more or less; it is not how legitimacy operates in our constitutional republic. Rather, as shown by the Declaration of Independence, the main principles of which shaped the Constitution, we find our roots in Lockean state-of-nature theory and its underlying theory of natural rights.[37] Legitimacy is first defined by the moral order, by the rights and obligations we have with respect to each other. Only then do we turn to political and legal legitimacy, through the social contract—the Constitution—that facilitates and reflects it. As outlined earlier, the federal government gets its powers by delegation from the people through ratification—reflecting mainly the (natural) powers the people have to give it—not through subsequent elections, which are designed primarily to fill elective offices. To be sure, many of the powers thus delegated leave room for discretion by those elected. That is why elections matter: different candidates may have different views on the exercise of that discretion—the discretion to declare war, to take a clear example. But through elections the people can no more give government a power it does not have than they can take from individuals a right they do

have. In a constitutional republic like ours, it is the Constitution that sets the powers, not the people through periodic elections.

But when powers or rights are expanded or contracted not through ratification but through elections and the subsequent actions of elected officials, and the courts fail to check that, the Constitution is undermined and the powers thus created are illegitimate. That happened when the New Deal Court bowed to the political pressure brought on by Roosevelt's Court-packing threat. And that paved the way for powers that have never been *constitutionally* authorized by the people—for illegitimate powers, that is—and for the accompanying loss of rights.

Some would argue that we could correct that problem of illegitimacy simply by putting our present arrangements to a vote through the supermajoritarian amendment and ratification procedures provided for in Article V. Were that vote successful, that would indeed produce political and legal legitimacy. But because the Constitution as it stands today reflects fairly closely, in my judgment, the moral order that can be justified—in other words, the Framers and those who subsequently amended the document got it right, for the most part—I would object to amending the Constitution simply to lend political and legal legitimacy to the modern welfare state. Better, I believe, to be able to point not simply to that state's moral illegitimacy but to its political and legal illegitimacy as well.

The second untoward implication of our departure from the Constitution is the chaos that follows for law more generally.[38] The judicial methodology the Constitution contemplates for most constitutional questions is really quite simple. Assuming a court has jurisdiction in a case challenging a given federal statute, the first question is whether Congress had authority to enact the statute. If not, that ends the matter. If yes, the next question is whether and how the act may implicate rights, enumerated or unenumerated.

Those questions are not always easy to answer and often involve close calls. But the difficulties are multiplied exponentially when the floodgates are opened and federal, state, and local legislation pours through, producing often inconsistent and incoherent "law" from every direction. Add to that, as noted above, the tendentious and politicized judicial methodology that flowed from *Carolene Products*—today we have three and sometimes four "levels" of judicial review,[39] each with its own standards, and multi-

factored "balancing" tests—and it soon becomes clear that we are far removed from a Constitution that was written to be understood at least by the educated layman. Life is complicated enough on its own terms. When government intrudes in virtually every corner of life, the complications can easily become overwhelming and unbearable. The Constitution was meant to bring order. If under it "anything goes," order goes too, and chaos follows.

Closely related to those two implications is a third: disrespect for the Constitution entails disrespect for the rule of law itself. If Congress can redistribute and regulate virtually at will, unrestrained by the limits the Constitution imposes, the rule of law is at risk. By definition, unauthorized powers intrude on rights retained by the people; but a cavalier attitude toward powers can lead more directly to the same attitude toward rights: if powers can be expanded with impunity, so too can rights be contracted.[40] In fact, a "living constitution," interpreted to maximize political discretion, can be worse than no constitution at all, because it preserves the patina of constitutional legitimacy while unleashing the political forces that a constitution is meant to restrain. And how long can "anything goes" for officials go unnoticed by the citizenry? A general decline in respect for law must follow.

Fourth, when constitutional integrity declines we lose the discipline a constitution is designed to impose on government. A constitution makes it harder for government to act, which is one of the main reasons for having one. This implication speaks to one of the basic functions of a constitution, which is not only to empower but to *limit* the government that is created through it. In the original position, when we created and ratified the Constitution, we agreed to limit the government's power as an act of self-discipline. We could have set no limits on the government's power, of course; but that would have left us to a future determined by the political winds, and experience had taught us the perils of that course. Thus, we struck what we thought was a careful balance, giving the government enough power to do what we thought it should do, but reserving to ourselves the liberty appropriate to a free people. With that balance struck, the Constitution would serve to discipline us and future generations who might be tempted, given the circumstances, to grant the government more power than, in our considered judgment, we thought prudent.

Future generations could adjust that balance, of course, by amending the Constitution, provided sufficient numbers among them wanted to do so. In fact, that is just what happened following the Civil War. Troubled as the Framers were about the institution of slavery, which they recognized only obliquely in the Constitution to ensure union, they left its regulation to the states. After the Civil War, however, a new generation not only abolished slavery but, through the Fourteenth Amendment, fundamentally changed the balance between the federal government and the states. With the ratification of that amendment we finally had federal remedies against state violations of our rights.[41] Thus, although the amendment is properly read as having expanded *federal* power, it was done to discipline *state* power. A new balance was struck, to be sure, but because it was done through the constitutional process it did not amount to abandoning the discipline a constitution imposes, which is what happens when we stray from the document's principles. In fact, the contrast between the different ways in which the Civil War and the New Deal generations changed the rules is stark and instructive. The Civil War generation did it the right way—through the ratification process. The New Deal generation, faced with a choice between amending the Constitution and changing it by judicial legerdemain, chose the latter.

But the larger picture regarding discipline should not be lost. For just as the Constitution disciplines the government, so too it disciplines the people in their daily lives. Professor Warren captures that point nicely with a quote from South Carolina's Warren R. Davis, speaking in the House on April 4, 1832:

> This system of transferring property by legislation—of giving pensions and gratuities to individuals, companies, corporations, and the States—… will degrade the States by inducing them to look for bounties, to the Federal Government; will degrade and demoralize the people, by making them dependent on the Government; will emasculate the free spirit of the country …. As soon as the people of ancient Rome were taught to look to the public granaries for support, the decay of public virtue was instantaneous.[42]

Vast numbers of Americans today look to Washington for a rich array of "entitlements" that speak of nothing so much as the illusion of something

for nothing. And politicians nurture that illusion, propelling us all in the downward spiral that Thomas Hobbes aptly called a war of all against all. Stated otherwise, as contributors to public largesse become fewer and recipients more numerous, the downward spiral becomes a death spiral. And we are headed in that direction as discipline continues to erode.

Finally, and closely related, let me little more than mention the economic implications of effectively unlimited government as I expect that others on the panel will address those more fully. By this point in human history, and especially after the collapse of the socialist experiments of the 20th century, we have a fairly clear understanding of the connection between liberty and prosperity—a connection that Adam Smith articulated so well in 1776[43] and economists like Mises, Hayek, and Friedman, among many others, have refined and extended in our own time. What that understanding points to, once again, is the prescience of the Framers in drafting a constitution dedicated to securing our liberty and hence our extraordinary prosperity. But neither liberty nor prosperity is guaranteed by a mere parchment, especially by one that is ignored. The American economy has proven resilient enough to withstand the blows imposed by the galloping government of the 20th century—although we will never know how much more prosperous we might have been had that government been better reined. In future, however, to the extent we ignore the lessons of economics we invite the consequences that have befallen so many other nations that have chosen economic planning over economic liberty. And the basic lesson of economics is that liberty, property, and contract are the fundamental preconditions of prosperity.

What Is to Be Done?

We did not create our overextended, unconstitutional government overnight. We cannot restore constitutional government overnight—too many people have come to rely on the irresponsible promises that have been made. But we can begin the process of restoration. For that, the most important thing to do now is to start restoring a constitutional ethos in the nation. And that should be the business of all branches, not simply the Court, which can hardly do the job by itself, even if it were the right body to do so. What we have here, in short, is not simply or even mainly a legal problem. Rather, it is a political and, more deeply still, a moral problem.

Because I have discussed what needs to be done in some detail in chapter 3 of the *Cato Handbook on Policy*,[44] copies of which are available in every congressional office, I will simply outline those proposals here.

Limits on government today, when we've had them, have come largely from political and budgetary rather than from constitutional considerations. It has not been because of any perceived lack of constitutional authority that government in recent years has failed to undertake a program but because of practical limits on the power of government to tax and borrow—and even those limits have failed in times of economic prosperity. To restore truly limited government, therefore, we have to do more than define the issues as political or budgetary. We have to go to the heart of the matter and raise the underlying constitutional questions. In a word, we have to ask the most fundamental question of all: Does the government have the authority, the constitutional authority, to do what it is doing?

That means, of course, that we are going to have to come to grips with the present state of public debate on the subject. It surely counts for something that a substantial number of Americans—to say nothing of the organs of public opinion—have little apprehension of or appreciation for the Constitution's limits on activist government. Thus, when thinking about how and how fast to reduce government, we have to recognize that the Court, after nearly 70 years of arguing otherwise, is hardly in a position, by itself, to relimit government in the far-reaching way a properly applied Constitution requires. But neither does Congress at this point have sufficient moral authority, even if it wanted to, to end tomorrow the vast array of programs it has enacted over the years with insufficient constitutional authority.

For either Congress or the Court to be able to do fully what should be done, therefore, a proper foundation must first be laid. In essence, the climate of opinion must be such that a sufficiently large portion of the American public stands behind the changes that are undertaken. When enough people come forward to ask—indeed, to demand—that government limit itself to the powers it is given in the Constitution, thereby freeing individuals, families, and communities to solve their own problems, we will know we are on the right track.

Fortunately, a change in the climate of opinion on such basic questions

has been under way for some time now. The debate today is very different than it was in the 1960s and 1970s. But there is a good deal more to be done before Congress and the courts are able to move in the right direction in any far-reaching way.

To continue the process, Congress should take the lead by engaging in constitutional debate in Congress, much as happened in the 19th century, thereby encouraging constitutional debate in the nation. That was urged by the House Constitutional Caucus during the 104th Congress. Under the leadership of House freshmen like J. D. Hayworth and John Shadegg of Arizona, Sam Brownback of Kansas, and Bob Barr of Georgia, together with a few more senior congressmen like Richard Pombo of California, an informal Constitutional Caucus was established in the ''radical'' 104th Congress. Unfortunately, the caucus has been moribund since then. It needs to be revived—along with the spirit of the 104th Congress—and its work needs to be expanded.

By itself, of course, neither the caucus nor the entire Congress can solve the problem before us. To be sure, in a reversal of all human experience, Congress in a day could agree to limit itself to its enumerated powers and then roll back the countless programs it has enacted by exceeding that authority. But it would take authoritative opinions from the Supreme Court, reversing a substantial body of largely post-New Deal decisions, to embed those restraints in ''constitutional law''—even if they have been embedded in the Constitution from the outset, the Court's modern readings of the document notwithstanding.

The ultimate goal of the caucus and Congress, then, should be to encourage the Court to reach such decisions. But history teaches, as noted above, that the Court does not operate entirely in a vacuum—that to some degree public opinion is the precursor and seedbed of its decisions. Thus, the more immediate goal of the caucus should be to influence the debate in the nation by influencing the debate in Congress. To do that, it is not necessary or even desirable, in the present climate, that every member of Congress be a member of the caucus—however worthy that end might ultimately be—but it is necessary that those who join the caucus be committed to its basic ends. And it is necessary that members establish a clear agenda for reaching those ends.

To reduce the problem to its essence, every day members of Congress are besieged by requests to enact countless measures to solve endless problems. Indeed, one imagines that no problem is too personal or too trivial not to warrant *federal* attention, no less. Yet most of the ''problems'' Congress spends most of its time addressing—from health care to day care to retirement security to economic competition—are simply the personal and economic problems of life that individuals, families, and firms, not governments, should be addressing—quite apart from the absence of constitutional authority to address them.

Properly understood and used, then, the Constitution can be a valuable ally in the efforts of the caucus and Congress to reduce the size and scope of government. For in the minds and hearts of most Americans, it remains a revered document, however little it may be understood by a substantial number of them.

If the Constitution is to be thus used, however, the principal misunderstanding that surrounds it must be recognized and addressed. In particular, the modern idea that the Constitution, without further amendment, is an infinitely elastic document that allows government to grow to meet public demands of whatever kind must be challenged. More Americans than presently do must come to appreciate that the Framers, who were keenly aware of the expansive tendencies of government, wrote the Constitution precisely to check that kind of thinking and that possibility. To be sure, they meant for government to be our servant, not our master, but they meant it to serve us in a very limited way—by securing our rights, as the Declaration of Independence says, and by doing those few other things that government does best, as spelled out in the Constitution.

In all else, as discussed above, we were meant to be free—to plan and live our own lives, to solve our own problems, which is what freedom is all about. Some may characterize that vision as tantamount to saying, ''You're on your own,'' but that kind of response simply misses the point. In America individuals, families, and organizations have never been ''on their own'' in the most important sense. They have always been members of communities, of civil society, where they could live their lives and solve their problems by following a few simple rules about individual initiative and responsibility, respect for property and promise, and charity toward the

few who need help from others. Massive government planning and programs have upset that natural order of things—less so in America than elsewhere, but very deeply all the same.

Those are the issues that need to be discussed, both in human and in constitutional terms. We need, as a people, to rethink our relationship to government. We need to ask not what government can do for us but what we can do for ourselves and, where necessary, for others—not through government but apart from government, as private citizens and organizations. That is what the Constitution was written to enable. It empowers government in a very limited way. It empowers people—by leaving them free—in every other way.

To proclaim and eventually secure that vision of a free people, the Constitutional Caucus should reconstitute itself and rededicate itself to that end in the 109th Congress and at the beginning of every Congress hereafter. Standing apart from Congress, the caucus should nonetheless be both of and above Congress—as the constitutional conscience of Congress. Every member of Congress, before taking office, swears to support the Constitution—hardly a constraining oath, given the modern Court's open-ended reading of the document. Members of the caucus should dedicate themselves to the deeper meaning of that oath. They should support the Constitution the Framers gave us, as amended by subsequent generations, not as ''amended'' by the Court's expansive interpretations.

Acting together, the members of the caucus could have a major impact on the course of public debate in this nation—not least, by virtue of their numbers. What is more, there is political safety in those numbers. As Benjamin Franklin might have said, no single member of Congress is likely to be able to undertake the task of restoring constitutional government on his own, for in the present climate he would surely be hanged, politically, for doing so. But if the caucus hangs together, the task will be made more bearable and enjoyable—and a propitious outcome made more likely.

On the agenda of the caucus, then, should be those specific undertakings that will best stir debate and thereby move the climate of opinion. Drawn together by shared understandings, and unrestrained by the need for seri-

ous compromise, the members of the caucus are free to chart a principled course and employ principled means, which they should do.

They might begin, for example, by surveying opportunities for constitutional debate in Congress, then making plans to seize those opportunities. Clearly, when new bills are introduced, or old ones are up for reauthorization, an opportunity is presented to debate constitutional questions. But even before that, when plans are discussed in party sessions, members should raise constitutional issues. Again, the caucus might study the costs and benefits of eliminating clearly unconstitutional programs, the better to determine which can be eliminated most easily and quickly.

Above all, the caucus should look for strategic opportunities to employ constitutional arguments. Too often, members of Congress fail to appreciate that if they take a principled stand against a seemingly popular program—and state their case well—they can seize the moral high ground and prevail ultimately over those who are seen in the end to be more politically craven.

All of that will stir constitutional debate—which is just the point. For too long in Congress that debate has been dead, replaced by the often dreary budget debate. This nation was not established by men with green eyeshades. It was established by men who understood the basic character of government and the basic right to be free. That debate needs to be revived. It needs to be heard not simply in the courts—where it is twisted through modern ''constitutional law''—but in Congress as well.

Before concluding, Mr. Chairman, let me leave the subcommittee with three basic recommendations, which I have discussed more fully in the *Cato Handbook* I referenced above:

- Enact nothing without first consulting the Constitution for proper authority and then debating that question on the floors of the House and the Senate.
- Move toward restoring constitutional government by carefully returning power wrongly taken over the years from the states and the people.
- Reject the nomination of judicial candidates who do not appreciate

that the Constitution is a document of delegated, enumerated, and thus limited powers.

Conclusion

America is a democracy in the most fundamental sense of that idea: authority, or legitimate power, rests ultimately with the people. But the people have no more right to tyrannize each other through democratic government than government itself has to tyrannize the people. When they constituted us as a nation by ratifying the Constitution and the amendments that have followed, our forefathers gave up only certain of their powers, enumerating them in a written constitution. We have allowed those powers to expand beyond all moral and legal bounds—at the price of our liberty and our well-being. The time has come to return those powers to their proper bounds, to reclaim our liberty, and to enjoy the fruits that follow.

ENDNOTES

[1] The Tenth Amendment states: "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."

[2] For a discussion of the Progressives' approach to the Constitution, see Richard A. Epstein, "The Monopolistic Vices of Progressive Constitutionalism," 2004-2005 *Cato Sup. Ct. Rev*. 11 (2005); Richard A. Epstein, *How Progressives Rewrote the Constitution* (2006) (forthcoming).

[3] See Arthur Harrison Cole ed., *Industrial and Commercial Correspondence of Alexander Hamilton* 247 (1968).

[4] Id.

[5] Letter to Henry Lee, in 6 *The Writings of James Madison*, at 81n. (Gaillard Hunt ed., 1906) (original emphasis).

[6] Act of Feb. 12, 1794, 6 Stat. 13.

[7] 4 Annals of Cong. 170 (1794).

[8] 6 Annals of Cong. 1727 (1796).

[9] Id. at 1724.

[10] "The Congress shall have Power To lay and collect Taxes, Imposts and Excises, to pay the Debts and provide for the common Defense and General Welfare of the United States; . . . ."

[11] 4 Reg. Deb. 1632-34 (1828). Madison made a similar point on several occasions. See, e.g., James Madison, "Report on Resolutions," in 6 *The Writings of James Madison* 357 (Gaillard Hunt ed., 1900): "Money cannot be applied to the *general welfare*, otherwise than by an application of it to some *particular* measure conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made." (emphasis in original). And Jefferson also addressed the issue. See, e.g., "Letter from Thomas Jefferson to Albert Gallatin"

(June 16, 1817) in *Writings of Thomas Jefferson* 91 (Paul Leicester Ford ed., 1899): "[O]ur tenet ever was, and, indeed, it is almost the only landmark which now divides the federalists from the republicans, that Congress had not unlimited powers to provide for the general welfare, but were restrained to those specifically enumerated; and that, as it was never meant they should . . . raise money for purposes which the enumeration did not place under their action; consequently, that the specification of powers is a limitation of the purpose for which they may raise money."

[12] Charles Warren, *Congress as Santa Claus* 32 (1932).

[13] H.R. 10203, 49th Cong., 2d Sess. (1887).

[14] 18 Cong. Rec. 1875 (1887).

[15] *Kansas v. Colorado* 206 U.S. 46, 89 (1907).

[16] Contrast that with Congress's enactment of the Gun-Free Schools Act of 1990 (18 U.S.C. § 922 (q)(1)(A) (1988 ed., Supp. V), which the Court found unconstitutional in 1995, holding for the first time in nearly 60 years that Congress had exceeded its authority under the Commerce Clause. *United States v. Lopez*, 514 U.S. 549 (1995). In enacting the statute, Congress had not even bothered to cite its constitutional authority for doing so.

[17] *The Nation*, Aug. 9, 1900, p. 105.

[18] See Robert S. Summers, "Pragmatic Instrumentalism: America's Leading Theory of Law," 5 *Cornell L. F.* 15 (1978).

[19] Progressives did not limit their attention to economic regulation. In 1927, for example, we find Justice Oliver Wendell Holmes, the "Yankee from Olympus," writing for the Court to uphold a Virginia statute that authorized the sterilization of people thought to be of insufficient intelligence. Buck v. Bell, 274 U.S. 200 (1927). There followed in this country some 70,000 sterilizations. For an insightful discussion of the case and surrounding issues, see William E. Leuchtenburg, "Mr. Justice Holmes and Three Generations of Imbeciles," ch. 1 in *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (1995).

[20] *Buck v. Bell*, *supra* note 20, is a good example, as is *Euclid v. Ambler Realty*, 272 U.S. 365 (1926), which upheld a zoning ordinance involving a

regulatory taking of property without compensation.

[21] Thus, on "Black Monday," May 27, 1935, in three 9-0 decisions, the Court invalidated the National Industrial Recovery Act and the Frazier-Lemke Act on mortgage moratoria and, in *Humphrey's Executor v. United States*, circumscribed the president's power to remove members of independent regulatory commissions. For a discussion of this era, see Leuchtenberg, *The Supreme Court Reborn*, *supra* note 20.

[22] 262 U.S. 1, 65-66 (1936).

[23] 7 U.S.C.A. 601 (1933).

[24] 49 Stat. 620 (1935).

[25] 301 U.S. 619, 640 (1937).

[26] Id.

[27] Id. at 641.

[28] 301 U.S. 619 (1937); see also Wickard v. Filburn, 317 U.S. 111 (1942).

[29] See Randy E. Barnett, "The Original Meaning of the Commerce Clause", 68 *U. Chi. L. Rev.* 101 (2000); brief of Amicus Curiae by Cato Institute, *Jones v. United States*, 529 U.S. 848 (2000) (visited Oct. 21, 2005) www.cato.org/pubs/legalbriefs/jvsusa.pdf.; Cf., Richard A. Epstein, "The Proper Scope of the Commerce Power," 73 *Va. L. Rev.* 1387 (1987).

[30] 304 U.S. 104 (1938). For a devastating critique of the politics behind the *Carolene Products* case, see Geoffrey P. Miller, "The True Story of Carolene Products," 1987 *Sup. Ct. Rev.* 397.

[31] I have discussed that methodology in Roger Pilon, "Foreword: Substance and Method at the Court," 2002-2003 *Cato Sup. Ct. Rev.* vii. (2003).

[32] See Bernard H. Siegan, *Economic Liberties and the Constitution* (1980).

[33] See Gary Lawson, "Making a Federal Case Out of It: *Sabri v. United States* and the Constitution of Leviathan" 2003-2004 *Cato Sup. Ct. Rev.* 119 (2004).

[34] Letter from Franklin D. Roosevelt to Rep. Samuel B. Hill (July 6,

1935), in 4 *The Public Papers and Addresses of Franklin D. Roosevelt* 91-92 (Samuel I. Rosenman ed., 1938).

[35] Rexford G. Tugwell, "A Center Report: Rewriting the Constitution," *Center Magazine*, March 1968, at 20. This is a fairly clear admission that the New Deal was skating not simply on thin ice but on no ice at all. For comments from the other side, see, e.g., Gary Lawson, "The Rise and Rise of the Administrative State," 107 *Harv. L. Rev.* 1231 (1994): "The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution;" Richard A. Epstein, *Commerce Clause*, *supra* note 30, at 1388: "I think that the expansive construction of the [commerce] clause accepted by the New Deal Supreme Court is wrong, and clearly so."

[36] That was pretty much the view of Justice Holmes in his famous dissent in *Lochner v. New York*, 198, U.S. 45 (1905). Declaring that the case was "decided upon an economic theory which a large part of the country does not entertain," and adding that his "agreement or disagreement [with the theory] has nothing to do with the right of a majority to embody their opinions in the law," Holmes proceeded to read out of the Constitution all economic substance: "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire." Id. at 75. But we find a similar view in many modern conservatives as well. Thus, Robert H. Bork speaks of the "two opposing principles" of what he calls the "Madisonian dilemma." Our first principle, Bork says, "is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule." Robert H. Bork, *The Tempting of America* 139 (1990). That gets Madison exactly backward. Madison's vision was that in *wide* areas of life individuals are entitled to be free simply because they are born free. Nonetheless, in *some* areas majorities are entitled to rule because we have authorized them to rule, giving them powers "few and defined."

[37] John Locke, "The Second Treatise of Government," in *Two Treatises of Government* (1960) (1690).

[38] I have discussed this issue more fully in Roger Pilon, "Foreword: Can Law this Uncertain Be Called Law?" 2003-2004 *Cato Sup. Ct. Rev.* vii (2004).

[39] For my critique of an opinion by Justice Anthony Kennedy distinguishing four "levels" of review, *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994), see Roger Pilon, "A Modest Proposal on 'Must-Carry,' the 1992 Cable Act, and Regulation Generally: Go Back to Basics," 17 *Hastings Comm/Ent.* L.J. 41 (1994).

[40] That is arguably what happened in *McConnell v. FEC*, 124 S. Ct. 619 (2003), upholding the McCain-Feingold Campaign Finance Act, 116 Stat. 81 (2002), which President George W. Bush signed while saying it was unconstitutional. See Eric S. Jaffee, "*McConnell v. FEC*: Rationing Speech to Prevent 'Undue Influence,'" 2003-2004 *Cato Sup. Ct. Rev.* 245 (2004).

[41] See Robert J. Reinstein, "Completing the Constitution: The Declaration of Independence, Bill of Rights, and Fourteenth Amendment," 47 *Temp. L. Rev.* 361 (1993). In 1833 the Court had ruled that the Bill of Rights applied only against the government created by the document (the U.S. Constitution) to which it was appended. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243 (1833).

[42] Warren, *Santa Claus*, *supra* note 13, front page, citing only to 22d Cong., 1st Sess.

[43] Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (1776).

[44] Roger Pilon, "Congress, the Courts, and the Constitution," ch. 3, in *Cato Handbook on Policy* (2005).

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