RIGHTS AND THE UNITED STATES CONSTITUTION: THE DECLENSION FROM NATURAL LAW TO LEGAL POSITIVISM

*Edwin Vieira, Jr.**

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Other participants in this Symposium have dealt with the issues of defining rights, describing their source, and delimiting their content. This article addresses the question: "What role do rights play in the United States Constitution?" For this purpose, it is unnecessary to prove, or even to presume, that those people who adopted

* A.B., Harvard College; A.M., Ph.D., Harvard University; J.D., Harvard Law School. Member of the Maryland and District of Columbia Bars. The author acknowledges with gratitude the support of the Earhart Foundation, Ann Arbor, Michigan, in the research underlying portions of this work.

the Constitution[1] correctly assessed the relationship between rights and positive law, or even that they stated the best case for their position. Their science of politics may have been incomplete—perhaps, naive. From the perspective of contemporary thought, it may not justify their conclusions. That, however, is an issue separate from whether, in historical fact, the Constitution rests upon the principles of "natural law" or "legal positivism."[2]

I. THE UNITED STATES CONSTITUTION AND NATURAL LAW: THE ORIGINAL UNDERSTANDING

History shows that the Constitution embodies the principles of natural law.

A. *Natural Law in the Political Philosophy of the Founders*

That the Founders based their political philosophy on natural law is not seriously disputable.[3] None the less, reconsideration of their basic perceptions of man, society, and government is not amiss.

1. *Natural Rights as a Check on Power.*—The Founders' sociopolitical presuppositions embody a realistic, if not pessimistic, appreciation of human weakness and fallibility. In their estimation, history chronicled the "depravity of human nature,"[4] and how passion causes men to disregard the general welfare. The Founders identified three passions particularly threatening to the society they desired: avarice, ambition, and the love of power. The tendency to succumb to avarice, though, nearly all men share; and ambition,

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[1] Described herein as "the Founders." Although not of one mind on many matters relating to the Constitution—as witnessed by the often acrimonious debate between the Federalists and Anti-federalists—they all more or less agreed on the basic principles discussed here.

[2] According to "natural law," rights exist as aspects of reality in and of themselves, deriving directly from the ultimate structure of the natural world, and belonging to individual men as part of their intrinsic characters. Governments may enunciate, codify, and enforce rights in law. This, however, amounts only to recognition of their existence, not to their creation. Conversely, according to "legal positivism," rights exist only in such laws as governments enact. Only through embodiment in law, following the peculiar procedures of a legal system, can rights have a substantive content. For a general discussion, comparison, and contrast of natural law and legal positivism, *see* A. D'ENTREVES, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY (2d rev. ed. 1970). Also useful is C. FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE (2d ed. 1963).

[3] *E.g.*, G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).

[4] Remarks of Patrick Henry, in the Virginia Convention, *reported in* 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 327 (2d ed. 1836).

although a potential pitfall, is also a well-spring of social progress if properly channelled. Conversely, the love of power arises in a minority of men,[5] but infrequently serves the general welfare (if at all), and therefore posed the greatest danger.

Nature, the Founders opined, had implanted "a fondness for power" in men.[6] And just as "the Nature of Power [is] to be even encroaching . . . nor does it ever part willingly with any Advantage," so too does human nature "never part from power. Look for an example of a voluntary relinquishment of power, from one end of the globe to another; you will find none."[7] Moreover, "[c]onstant experience" proved that "every man invested with power is apt to abuse it, and to carry his authority as far as it will go."[8] Therefore, the Founders concluded that "no Man ought to be trusted with what no Man is equal to."[9]

Yet they believed that political power is at once necessary for, as well as antagonistic to, individual liberty.[10] The conflict between power and liberty emerges in a dichotomy between the governors and the governed. Power inheres in government and those who control it; whereas, liberty inheres in people generally. Liberty is not the concern of those invested with power, who neither speak for nor serve it, but is the peculiar possession of society. The governors seek to acquire and exploit power, society to preserve and enjoy liberty under the protection of, but not the direction of, power. Power and liberty, then, exist in an uneasy balance in which the one always threatens to extinguish the other.

The Founders' problem was how to arrange institutions based

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[5] *Cf.* N. MACHIAVELLI, THE PRINCE c, ix (T. Bergin trans.).

[6] 1 THE WORKS OF ALEXANDER HAMILTON 114 (H. Lodge ed. 1885).

[7] Trenchard & Gordon, Cato's Letters No. 115, in THE ENGLISH LIBERTARIAN HERITAGE 257 (D. Jacobson ed. 1965); remarks of Patrick Henry, in the Virginia Convention, *reported in* 3 J. ELLIOT, *supra* note 4, at 174.

[8] Montesquieu, THE SPIRIT OF THE LAWS bk. XI, c. 4 (T. Nugent trans. 1949). *Cf.* THE FEDERALIST No. 51 (J. Madison).

[9] Cato's Letters No. 33, in THE ENGLISH LIBERTARIAN HERITAGE, *supra* note 7, at 87.

[10] ". . . Power is naturally active, vigilant, and distrustful; which Qualities in it push it upon all Means and Expedients to fortify itself, and upon destroying all Opposition, and even all Seeds of Opposition, and make it restless as long as any Thing stands in its Way. It would do what it pleases, and have no Check. Now, because Liberty chastises and shortens Power, therefore Power would extinguish Liberty; and consequently Liberty has too much Cause to be exceeding jealous, and always upon her Defence. . . . And whereas Power can, and for the most part does, subsist where Liberty is not, Liberty cannot subsist without Power; so that she has, as it were, the Enemy always at her Gates.

Id. at 85-86.

upon power yet consistent with liberty. "It may be a reflection on human nature," wrote *The Federalist,*

> that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external or internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[11]

These precautions took into account four principles: First, that "when the dangers that might arise from the *abuse* are greater than the benefits that may arise from the use, the power ought to be withheld."[12] Second, that the control of governmental authority should not depend upon the self-restraint of the governors themselves, or upon "the probable virtue of our representatives,"[13] but instead "ought to have such checks and limitations as to prevent bad men from abusing it. It ought to be granted on a supposition that men will be bad; for it may be eventually so."[14] Third, that democracy offered as many opportunities for the corrupting influences of power as did any other system of government.[15] And fourth, that, whatever system of government prevailed, natural law and

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[11] THE FEDERALIST No. 51 (J. Madison).

[12] Remarks of George Mason, in the Virginia Convention, *reported in* 3 J. ELLIOT, *supra* note 4, at 432.

[13] Remarks of Patrick Henry, in the Virginia Convention, *reported in* 3 *id.* at 327.

[14] Remarks of William Grayson, in the Virginia Convention, *reported in* 3 *id.* at 563.

[15] "It is of great importance in a republic," noted THE FEDERALIST No. 51 (J. Madison), not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

For, as history taught,

> turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority, have produced factions and commotions, which, in republics, have, more frequently than any other cause, produced despotism.

Remarks of James Madison, in the Virginia Convention, *reported in* 3 J. ELLIOT, *supra* note 4, at 87.

natural rights circumscribed its power.[16]

Natural law underlay the Founders' socio-political conceptions in four ways: First, it provided moral standards to govern private conduct among virtuous men in a free and prosperous commonwealth.[17] Second, natural law provided ethical criteria to which positive law should conform. The Founders realized that no double-standard insulated political activity from moral criticism. Third, natural law established limits beyond which governments acted at the peril of resistance or revolution. In natural law, the Founders saw a moral justification for arguably extra-legal acts of people against governments that oppressed them. And fourth, natural law was the source of natural (or individual) rights, antecedent and superior to government. For the Founders, natural rights were the legal embodiment of moral principles, the means to subordinate to morality the positive law governments enacted.

"[A]ll men," ran a typical summation of the Founders' theories of law and politics, "are by nature free and independent, and have certain rights, of which, when they enter into society, they cannot by any compact deprive or divest their posterity."[18] By "natural rights" the Founders meant rights that belong to individuals simply because of their humanity, and that ethics and law should recognize for that reason alone. These rights were *natural* because they derived from the plan "of Nature and of Nature's God."[19] They were *essential* because they were necessary to the existence of free men. They were *absolute* because they inhered in individuals without regard to the commands or prohibitions of governments. And they were *unalienable* because they constituted an element of each man's individuality itself. Natural rights differed from "civil" or "political rights" because they were antecedent to the peculiar laws of any particular society or government. Natural rights came with individuals into society, and were the primary rationale for government

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[16] The founders recognized a natural limitation on the magistrate's authority: He ought not to take what no Man ought to give; nor exact what no Man ought to perform. . . .

So that the Nature of Government does not alter the natural right of Men to Liberty, which in all political Societies is alike their due. . . .

Cato's Letters No. 60, in THE ENGLISH LIBERTARIAN HERITAGE, *supra* note 7, at 118.

[17] C. LE BOUTILLIER, AMERICAN DEMOCRACY AND NATURAL LAW c. iii (1950).

[18] Remarks of Patrick Henry, in the Virginia Convention, *reported in* 3 J. ELLIOT, *supra* note 4, at 137.

[19] DECLARATION OF INDEPENDENCE (1776).

and against one that acted contrary to their precepts.[20]

The Founders knew that individuals are not equal in talents, prestige, income, wealth, or social position; neither did they conceive of any "natural right" to equality in respect of these things, enforceable by government. The equality they recognized was, as Locke defined it,

> the *Equality,* which all Men are in, in respect of Jurisdiction or Dominion one over another . . . being that *equal Right* that every man hath, to *his Natural Freedom,* without being subjected to the Will or Authority of any other Man.[21]

To the Founders, equality in this sense was the fundamental principle of politics.

"Property" and "liberty" were also central principles of their political theory. That men have a natural right to the fruits of their labors as private property, free from the predation of other men in private station or acting under color of governmental authority, was a common-place among eighteenth-century Americans. In his influential *Second Treatise,* Locke had often used the term "property" to include whatever of value a man has, including his "liberty."[22] Perhaps more correctly, the Founders saw property as part of liberty.[23]

The Founders' conceptions of liberty, property, and equality correlated perfectly. Equality in liberty, the freedom of each individual

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[20] "We hold these truths to be self-evident," wrote Jefferson,

> that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Id.

[21] J. LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT § 54 (P. Laslett ed. 1960).

[22] *E.g., id.* § 123 ("their Lives, Liberties and Estates, which I call by the general name, Property").

[23] Necessity alone makes Men the Servants, Followers, and Creatures of one Another. And therefore all Men are animated by the Passion of acquiring and defending Property, because Property is the best Support of that Independency, so passionately desired by all Men. . . . And as Happiness is the Effect of Independency, and Independency the Effect of Property; so certain Property is the Effect of Liberty alone, and can only be secured by the Laws of Liberty. . . .

Cato's Letters No. 68, in THE ENGLISH LIBERTARIAN HERITAGE, *supra* note 7, at 177-78.

from the arbitrary wills of other men, government could attain. Indeed, liberty could exist only in so far as all members of society possessed it equally. Property, though, was the product of liberty exercised by individuals dissimilar in talents, intelligence, or circumstances. And therefore, equality in property was impossible, unless government denied equality in liberty, in disregard of the very reason for its existence. The Founders, in short, foresaw a society in which men earn different incomes, enjoy different amounts of wealth, and occupy different social positions, yet remain equal in the one thing that properly concerns government, their "Natural Freedom."

2. *Government as the Guarantor of Natural Rights.*—The Founders presumed that protection of natural rights is the only justification for government. Relying on Locke's principle that the "great and *chief end* . . . of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*,"[24] the Founders conjoined "government, and liberty, its object" in their discourse.[25] To them, government had no purpose except to protect the liberty, security, and property of those individuals who institute it. Indeed, the "allegiance of freedom to government will ever be a consequence of protection . . . in their sacred rights and privileges".[26] Their goal was what Locke called

> *Freedom of Men Under Government*, . . . to have a standing Rule to live by, common to every one of that Society . . . ; A Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, unknown, Arbitrary Will of another Man.[27]

The Founders did not assume, however, that a government fit for free men would spontaneously arise from "the people's will," without a carefully wrought structure based upon the principles of natural law.[28] The people, too, had to accept "that the minority have

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[24] J. LOCKE, *supra* note 21, § 124.

[25] Remarks of Edmund Pendleton, in the Virginia Convention, *reported in* 3 J. ELLIOT, *supra* note 4, at 294.

[26] The Letters of "Philadelphiensis" No. X, in the Independent Gazetteer (Philadelphia), 21 Feb. 1788, p. 2, col. 1.

[27] J. LOCKE, *supra* note 21, § 22.

[28] To say . . . that our security is to depend upon the spirit of the prople, who will be watchful of their liberties, and not suffer them to be infringed, is absurd. It would equally prove that we might adopt any form of government. . . . Government operates upon the spirit of the people, as well as the spirit of the people operates upon it, and

indisputable and inalienable rights; that the majority are not everything, and the minority nothing; that the people may not do what they please."[29]

Limitations upon the popular will the Founders embodied in the principle that government was justifiable only in so far as its powers reflect what reasoning men would freely choose, and compact among themselves, to give it.[30] Consent was the legitimating principle of government, and the "social compact" the mechanism of popular consent. Consent explained why men should submit to governmental compulsion, how positive laws could legitimately control them, and wherefore they remained free while accepting a concentration of political power that restricted their actions, took their goods, and conscripted their lives for the general welfare: Men obey government in exchange for protection of their natural rights.

The Founders often spoke of how the "social contract" removed men from the "state of nature" and created political institutions. To them, the state of nature was simply a community without gov-

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> if they are not conformable to each other, the one or the other will prevail. In a less time than twenty-five years, the government will receive its tone. What the spirit of the country may be at the end of that period, it is impossible to foretell. Our duty is to frame a government friendly to liberty and the rights of mankind, which will tend to cherish and cultivate a love of liberty among our citizens.

Remarks of Melancton Smith, in the New York Convention, *reported in* 2 J. ELLIOT, *supra* note 4, at 249-50.

[29] Joseph Story, *quoted in* "Political Causes of the American Revolution," ESSAYS ON CHURCH AND STATE BY LORD ACTON 302-03 (D. Woodruff ed. 1953).

[30] The idea that American political institutions rest upon consent and compact appears again and again in the literature of the period. "[F]rom the first settlement of the country," wrote one pamphleteer, "the necessity of civil associations, founded upon equality, consent, and proportionate justice have ever been universally acknowledged." *See, e.g.*, To the Free Citizens of the Commonwealth of Massachusetts (Letters of "John De Witt" No. 1), in The American Herald (Boston), 22 Oct. 1787. And again: "in the constitution of government . . . Consent . . . is the spring. The form is the mode in which the people choose to direct their affairs, and the magistrates are but trustees to put the mode in force. . . . [T]his people . . . have a right of living under a government of their own choosing." To the Free Citizens of the Commonwealth of Massachusetts (Letters of "John De Witt" No. 3), in The American Herald (Boston), 5 Nov. 1787. "No people on earth are, at this day, so free as the people of America," declared one of the Founders. "All other nations are, more or less, in a state of slavery. They owe their constitutions partly to chance, and partly to the sword; but that of America is the offspring of their choice. . . ." Remarks of James Lincoln, in the South Carolina Legislature, *reported in* 4 J. ELLIOT, *supra* note 4, at 313. "It is an idea favorable to the interest of mankind at large," wrote another, "that government is founded in compact. Several instances may be produced of it, but none is more remarkable than our own." The Letters of "Agrippa" No. XVIII, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 115 (P.L. Ford ed. 1892).

ernment.[31] Whether it ever existed was unimportant. It provided political theorists with a paradigm emphasizing man's nature; identifying the rights that emanate from that nature, and not from society or government; establishing the priority of these natural rights to positive law; demonstrating the necessity of government to secure natural liberty; and explaining how free men could construct political institutions favorable to their continued freedom.

Both society and government derive naturally from man's needs. With government, however, men can choose who should govern, for what purposes, and by what methods. To the Founders, the social contract was the agreement among free and equal individuals, already existing in a society, to institute such government as they found satisfactory.[32] Logic does not limit the substance of a social compact among consenting individuals. The Founders, however, believed that no individual needed to, or would rationally, surrender to government any portion of his natural liberty other than the privileges to judge and execute sentence in his own case.[33] Where governments had arisen from supposed compacts between the people and their rulers, theorists had concluded that the people must have ceded all their liberties in exchange for governmental protection. But where (as in America) the people entered into a social compact among themselves, and themselves constituted the government, no such conclusion followed, thought the Founders. According to their political science, no individual had to yield to government any liberty compatible with the rational functioning of society where the sole end of government was to protect individuals' liberties.[34] To them, natural liberty and government were mutual com-

[31] *See* J. LOCKE, *supra* note 21, § 19: "*Want of a common Judge with Authority, puts all Men in a State of Nature.*"

[32] For such a compact, their own history provided numerous precedents. *E.g.*, the pledge of King Canute to govern by the laws of England, Charter of Canute, in SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST 75-76 (W. Stubbs, 8th ed., 1895); the promise of William the Conqueror to continue Anglo-Saxon customs, Section 7, The Laws of William the Conqueror, in SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES 7-8 (E. Henderson ed. 1896); the coronation charter of Henry I., The Coronation Charter of Henry I. (5 August 1100), in 2 ENGLISH HISTORICAL DOCUMENTS 1042-1189, at 400-02 (D. Douglas & G. Greenway eds. 1953); the several versions of Magna Carta, Magna Carta (1215), in SELECT HISTORICAL DOCUMENTS, *supra*, at 135-48; the execution of Charles I., C.W. WEDGWOOD, THE TRIAL OF CHARLES I. (1964); and the malfeasances of James II., Letter from the Massachusetts House of Representatives to Agent Dennys de Berdt, 12 Jan. 1768, in 1 THE WRITINGS OF SAMUEL ADAMS 140 (H. Cushing ed. 1904).

[33] *See* J. LOCKE, *supra* note 21, §§ 123-31.

[34] The privileges to judge in one's own case and to execute the law of nature are not compatible with the rational functioning of society, except where exercised in self-defense.

plements: the protection of liberty the reason for government, and government the guarantor of liberty. To say that one was somehow inconsistent with the other, the Founders considered self-contradictory.

The social compact as the Founders understood it, however, did imply that governmental powers are limited. Then as now, the general rule of English common law was that the authority of any body formed by contract among its members extends only to the objects of their contract. Moreover, inherent in common-law contract is definiteness: the parties know what they agree to do. Individuals who unite for a specified object cannot contemplate all the unspecified purposes for which a group might coalesce; and therefore their contract cannot extend to any of those unspecified purposes. The social compact of the Framers empowered government only to protect each citizen's natural rights, according to certain defined procedures for the enactment and enforcement of positive laws, and—by its very contractual nature—disabled government from any other actions.

Perhaps nothing was more obvious to the Founders than that for people to agree to an unlimited government over their liberty and property was ridiculous.[35] A wise people, the Founders urged, should suspect governments and governors.[36] To be sure, the American people as a whole were "sovereign". But this description did not imply unlimited powers in their government. Whatever the abuses perpetrated in its name, sovereignty was a legal conception that, in the context of natural law, implied limitation in its very statement. And

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[35] The end of design of government is, or ought to be, the safety, peace, and welfare of the governed. Unwise, therefore, and absurd in the highest degree, would be the conduct of that people, who, in forming a government, should give to their rulers power to destroy them and their property, and thereby defeat the very purpose of the institutions; or, in other words, should give unlimited power to their rulers, and not retain in their own hands the means of their own preservation.

Remarks of Thomas Tredwell, in the New York Convention, *reported in* 2 J. ELLIOT, *supra* note 4, at 397.

[36] As History had illustrated so often, "rulers in all governments will erect an interest separate from the ruled, which will have a tendency to enslave them. There is, therefore, no other way of . . . warding off the evil as long as possible, than by establishing principles of distrust . . . and cultivating the sentiment . . . ." G. Clinton, The Letters of "Cato" No. 8 (3 Jan. 1788). Indeed, even "the most strenuous assertors of liberty, in all ages, after having successfully triumphed over tyranny, have themselves become tyrants, when intrusted by the people with unlimited and uncontrollable powers." A Manifesto of a Number of Gentlemen from Albany County, in The New York Journal and Weekly Register (New York City), 26 Apr. 1788.

the Founders knew that popular sovereignty itself derives from the natural-law postulate that individuals may choose their own governing institutions because they may defend themselves against aggression.[37] Governmental power, then, is inherently limited because natural law recognizes only *defensive* powers in individual men, from whose voluntary consent governments arise.[38] Certainly government can gain no more power than individuals have originally.[39] And the exercise of even such power as government has must always satisfy the test of reasonableness.[40]

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[37] "The Right of the Magistrate arises only from the Right of private Men to defend themselves, to repel Injuries, and to punish those who commit them." Cato's Letters No. 59, in THE ENGLISH LIBERTARIAN HERITAGE, *supra* note 7, at 108.

[38] As Locke explained,

> that all men may be restrained from invading others Rights, and from doing hurt to one another, and the Law of Nature be observed, . . . the *Execution* of the Law of Nature is in that State, put into every Mans hands, whereby every one has a right to punish the transgressors of that Law to such a Degree, as may hinder its Violation. . . .
>
> And thus in the State of Nature, *one Man comes by a Power over another*; but yet no Absolute or Arbitrary Power, . . . but only to retribute to him . . . what is proportionate to his Transgression, which is so much as may serve for *Reparation* and *Restraint*. For these are the two only reasons, why one Man may lawfully do harm to another, which is that we call *punishment*. In transgressing the Law of Nature, the Offender declares himself to live by another Rule, than that of *reason* and common Equity. . . .

J. LOCKE, *supra* note 21, §§ 7-8.

[39] A Man, . . . having in the State of Nature no Arbitrary Power over the Life, Liberty, or Possession of another, but only so much as the Law of Nature gave him for the preservation of himself, and the rest of Mankind; this is all he doth, or can give up to the Commonwealth, and by it to the *Legislative Power*, so that the Legislative can have no more than this. Their power in the utmost Bounds of it, is *limited to the publick good* of the Society. It is a Power, that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the Subjects.

. . . .

[T]he *end measure of this Power*, when in every Man's hands in the state of Nature, being the preservation of all of his Society . . ., it can have no other *end or measure*, when in the hands of the Magistrate, but to preserve the Members of that Society in their Lives, Liberties, and Possessions; and so cannot be an Absolute, Arbitrary Power over their Lives and Fortunes, which are as much possible to be preserved; but a *Power to make Laws*, and annex such *Penalties* to them, as may tend to the preservation of the whole, by cutting off those Parts, and those only, which are so corrupt, that they threaten the sound and healthy, without which no severity is lawful.

Id. §§ 135, 171.

[40] The *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.

Id. § 6.

In short, the Founders saw government as a repository of powers, permanently limited by the principles of natural law, that the magistrates may exercise solely to protect each individual's enjoyment of his liberties within a community of citizens equal before the law.

3. *The Constitution as a Limit on Government.*—To define the proper sphere of governmental authority according to the principles of natural law is easier than to confine it to that sphere. To achieve this end, the Founders employed a written constitution.

Here, they parted with British tradition. The (unwritten) British constitution embodied only those principles the nation's institutions and their development implied.[41] Under this conception, however, a governmental act contrary to custom was not an exercise of power without right, only an act of bad government.[42]

In their struggle with Parliament, the Founders learned to rely on principles of justice rather than legal institutions. They saw the paradox in expecting a "constitution" that embodied the acts of a legislature to limit the power of that legislature; and they realized that its solution required separating principles of law from acts of government, and conceiving of those principles as bounds beyond which government could not act. Experience taught them the difference between a constitution and a government: A constitution is an act, not of government, but of the people constituting a government; and its violation is not simply an error of judgment, but an affront to popular right.[43] A constitution antecedes the government it defines; it establishes the authority the people have committed to

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[41] As Lord Bolingbroke had said,

> [b]y constitution we mean . . . that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed. . . . We call this a good government, when . . . the whole administration of public affairs is wisely pursued, and with a strict conformity to the principles and objects of the constitution.

A Dissertation upon Parties, in 2 THE WORKS OF LORD BOLINGBROKE 88 (1841).

[42] Although Britons may have believed that their "laws . . . derived from certain fixed principles of reasons," they also knew that this derivation in no way limited the powers of Parliament. Few and far between were decisions of British courts invalidating legislative acts because of their contrariety to reason.

[43] In a Lockean system, where rights exist independently of government, if governmental action is unconstitutional, it affronts individual rights even though it may be the product of the magistrate's good-faith mistake. Conversely, in a non-Lockean system, where government defines all rights, governmental action may be inexpedient, unwise, or even harmful; but it cannot be wrongful.

their governors; and its very existence voids any acts of government outside its grants of power.

To achieve their goal, the Founders provided the Constitution with three types of provisions limiting governmental authority: First, the Constitution contains statements of the purposes of government. Second, it prescribes the framework of government and circumscribes the authority of its various branches and levels. And third, it guarantees to individuals certain named and other unenumerated liberties.

The Preamble, for instance, describes the purposes of the people of the United States in ordaining their Constitution in terms of the very ends for which Locke argued that men form political societies: to enact laws for the reparation and restraint of criminals; to defend themselves against domestic and foreign enemies; to advance the common good by legislation that preserves the members of society in their lives and possessions; and to guarantee the natural freedom of all men who follow the rule of reason and common equity.[44]

To "establish Justice," "promote the general Welfare," and "secure the Blessings of Liberty" are three essential purposes of the Constitution. The Founders knew, however, that government could not be left free to declare whatever it did as in service of these ends. Under the Founders' plan, there could never be a "living Constitution," the fundamental principles of which change coloration, chameleon-like, with the political caprices of the times.[45] Instead, they limited the actions of government by explicit reference to precepts of natural law. "Justice," "the general Welfare," and "the Blessings of Liberty" enunciate a law higher than what governments enact, negate arbitrary sovereignty, and affirm that all men have certain unalienable rights to secure which they institute governments in the first place.

The body of the Constitution, in describing the framework of

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[44] *I.e.*, "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . . ." U.S. CONST. preamble. On the importance of the preamble for resolving doubts as to or ambiguities in the limitations on governmental power, *see* 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 365-67, 374-79 (1953); 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462, at 351-52 (5th ed. 1891).

[45] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S 398, 448-53 (1934) (Sutherland, J., dissenting).

government, circumscribes the authority of each of its levels and branches. For example, the Constitution empowers Congress "To coin Money, [and] regulate the value thereof," and disables the States from "coin[ing] Money; emit[ting] Bills of Credit; [and] mak[ing] any Thing but gold and silver Coin a Tender in Payment of Debts."[46] The Founders had had long and dolorous experience with paper-money and legal-tender laws, recognized that these devices frustrate honesty among men, and therefore resolved to eliminate them as instruments of governmental policy.[47] The monetary provisions accomplish this goal by complementary grants and withdrawals of power.

First, the Founders disabled the States from enacting laws making paper-money legal tender. Second, they empowered Congress to coin money. Together, these provisions guarantee a monetary system based on specie. Since the States cannot make anything but gold and silver coin a tender in payment of debts, even if Congress unconstitutionally attempted to "coin Money" not redeemable in specie, State courts could not force its "coinage" upon unwilling recipients. Thus, under the operation of Gresham's Law, creation of legal-tender paper-money at the national level would generate a political crisis in the United States leading to demands for repeal of, and removal of the federal politicians who enacted, *fiat*-money legal-tender laws.[48]

Finally, the various Amendments to the Constitution refer to individual rights reserved against governmental encroachment. Some rights are explicitly named, such as "the freedom of speech, or of

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[46] U.S. CONST. art. I. § 8, cl. 5; § 10, cl. 1.

[47] *E.g.*, 1 J. STORY, *supra* note 44, §§ 1358-62, 1364, 1366-67, 1371.

[48] The mills of the gods grind slowly, but the beginnings of this political crisis, which almost surely will end with the disestablishment of the so-called "Federal Reserve System," the demonitization of "federal-reserve" notes, and the return to a national currency fully backed by gold and silver, are already evident in the wide-spread public outcry against "inflation" and the growing realization among common people that a "dollar" of constantly decreasing purchasing-power is inconsistent with the fundamental principle that men are entitled to the full product of their labors, and to a monetary system that accurately reflects and adequately preserves that product. Interestingly enough, the Supreme Court has not yet ruled on the constitutionality of *fiat* legal-tender paper-money issued under the auspices of Congress. *Compare* Norman v. Baltimore & O.R.R., 294 U.S. 240 (1935); Perry v. United States, 294 U.S. 330 (1935); *and* Nortz v. United States, 194 U.S. 317 (1935), *with* Julliard v. Greenman, 110 U.S. 421 (1884); Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870); *and* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869).

the press"; "the right . . . to keep and bear Arms"; "[t]he right . . . to be secure . . . against unreasonable searches and seizures"; "the right to a speedy and public trial, by an impartial jury"; and so on.[49] Others are unenumerated.[50] All of these references, though, presume that individual rights owe nothing to governments, written constitutions, or the will of the people for their recognition—indeed, that a government, a constitution, or even a society that refuses or neglects to recognize them is therefore defective and unjust, and that such a deficiency and injustice permits those aggrieved to seek redress by appeal to principles that transcend positive laws, and by recourse to actions extra-legal in character.[51]

The Second Amendment, guaranteeing "the right of the people to keep and bear Arms," is a prime example of this presumption. Under the Constitution governmental authority flows from principles upon the enforcement of which society depends for its existence and proper functioning. Now, what distinguishes society from a mere agglomeration of men is that its members cooperate among themselves for their general benefit, rather than dividing into mutually hostile groups of aggressors and victims. Therefore, since government is meant to serve the needs of men in society, it must at a minimum protect individuals against criminal attacks. To suggest that the magistrates could, consistently with natural law, themselves aggress under color of positive law, tolerate criminal behavior by any class of citizens, or prohibit individuals from defending themselves against the depredations of others, is self-contradictory. By definition, criminal acts destroy the social order; and no social institution can logically be competent to perform, countenance, or render effective such acts. Indeed, a government that aids or abets aggression against its own citizens thereby forfeits its legitimacy, and ceases to be a government. The Second Amendment therefore embodies perhaps the most important principle of political science under natural law: that individuals owe no allegiance to, and may rightfully resist and destroy, any government that does not protect them against their enemies.

The Second Amendment is an instrumental restatement of the natural privilege of self-defense. Social cooperation, of course, im-

[49] U.S. CONST. amends. I, II, IV, VI.

[50] U.S. CONST. amends. IX, X.

[51] *See, e.g.*, J. LOCKE, *supra* note 21, §§ 168, 199-210.

poses a duty on all individuals to refrain from violence as much as possible. In political society, however, this duty presupposes that government will protect everyone from aggression. The duty of non-violence, therefore, is contingent, not absolute; it applies only if government provides adequate protection. Otherwise, individuals have an absolute privilege to defend themselves—as, for instance, where the suddenness of aggression precludes governmental intervention; or, where the magistrates themselves are the aggressors.[52] In each of these cases, the privilege of self-defense would be meaningless unless individuals possessed the arms necessary to repel criminals or tyrants, and therefore, unless government were powerless to disarm them.[53] Where police-protection is inadequate, to disarm honest citizens is to aid and abet criminals. Moreover, where governmental officials are themselves the aggressors, arguments for disarming the citizenry are particularly ludicrous and obnoxious. No Lockean government may command its citizens to surrender peaceably to tyranny. Indeed, as the American War of Independence teaches, attempting to disarm the people in order to perpetrate tyranny is itself an act of war against them, justifying armed resistance of every kind.

The Constitution, of course, contemplates the protection of individual rights short of armed resistance. Perhaps the most characteristically American device for securing individual rights is "judicial review," the concept that, in enforcing all positive laws arguably trenching on personal liberty, courts must be shown that the letter and spirit of the Constitution permits the government's action.[54]

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[52] *See id.* § 207.

[53] This exposes the basic fallacy of the so-called "gun-control" argument for limiting the availability of purely defensive arms (such as the undefinable"Saturday Night Special") that supposedly "have no legitimate sporting use." It also emphasizes the weakness in the position of many sportsmen who oppose "gun-control" because it threatens recreational activities with handguns or long-guns. The "right . . . to keep and bear arms" is not fundamentally concerned with target-shooting or hunting wildlife (although a correct construction of the Second Amendment would protect these activities, too). Rather, it guarantees each individual access to whatever arms are reasonably necessary for effective defense in light of the perceived threat.

[54] The peculiar visibility of the Supreme Court has tended to make *judicial* review of the constitutionality of statutes or executive actions appear exclusive. But on the same theory that commends *judicial* review, there are equal grounds for *legislative* review of judicial and executive decisions, and *executive* review of legislative and judicial decisions. *Compare* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179-80 (1803), *with* U.S. CONST. art. II, § 1, cl. 8 (presidential oath); art. VI, cl. 3 (oaths of Senators and Representatives). Indeed, the explicit power of the President to "take Care that the Laws be faithfully executed," appears to sanction executive review (above and beyond the veto power) even more strongly than any

During the late eighteenth century, apologists had argued that the British Parliament enjoyed a supreme, absolute, and unlimited authority to control the acts of individuals. From this perspective, judicial review based on "common right and reason," or on natural-law principles, was an impertinence.[55] Conversely, from the perspective of the Founders—who saw the supreme law neither in the acts of legislatures, nor in the texts of constitutions, nor even in the demands of majorities, but instead in tenets of natural justice that limit governmental activity, that constitutional provisions embody, and that majorities are bound to respect—judicial review appeared in another, more favorable, light.[56]

From its earliest beginnings, as well, judicial review judged the actions of governments and secured the liberties of individuals according to principles superior to positive laws. And thereafter, Supreme Court opinions over a century repeatedly recognized that legislatures are not absolute, even though their "authority should not be expressly restrained by the constitution, or fundamental law of the state"; that "certain vital principles . . . will determine and overrule . . . abuses of legislative power"; that "the nature of society and of government . . . prescribe[s] some limits to the legislative power"; that the dissolution and re-establishment of governments do not involve "the dissolution of civil rights, or an abolition of the common law"; that the "fundamental maxims of a free government . . . require . . . the rights of personal liberty and private property should be held sacred"; that there are "rights in every free government beyond the control of the State," and "limitations on . . . power which grow out of the essential nature of all free governments"—and that these limitations, in large measure, find their source in "common right," the unalienable rights of freemen to which the Declaration of Independence refers.[57]

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provision of the Constitution sanctions judicial review. U.S. CONST. art. II, § 3; art. I, § 7, cls. 2 and 3.

[55] *E.g.*, 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 46, 91 (Am. ed. 1771).

[56] *See* THE FEDERALIST No. 78.

[57] Lochner v. New York, 198 U.S. 45, 53 (1905); Allgeyer v. Louisiana, 165 U.S. 578, 589-90 (1897); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 762 (1884) (Bradley, J., concurring); Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662-64 (1874); License Tax Cases, 72 U.S. (5 Wall.) 462, 469 (1866); Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 656-58 (1829); Terret v. Taylor, 13 U.S. (9 Cranch) 43, 49-51 (1815); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135-38 (1810); Calder v. Bull, 3 U.S. (3 Dall.) 386, 387-88 (1798). *See also* Ham v. McClaws, 1 Bay 93, 96 (S.C. 1789).

B. *Natural Law in the Reconstruction Amendments*

The prevalence for natural-law thinking with respect to the Constitution was not unique to the Founders, or to Justices of the Supreme Court. Throughout the first half of the nineteenth century, a moral, political, and (ultimately) constitutional debate grew in intensity among Americans over negro chattel-slavery. In the area of constitutional law, a struggle ensued between natural law and totalitarian positivism. The Civil War and the Reconstruction Amendments ratified in its wake settled the conflict in favor of natural law.

1. *The Debate Between Natural Law and Totalitarian Positivism on the Slavery Question.*—The opponents of slavery did not turn to natural-law arguments to support their position only when the issue became politically critical. Even before the American War of Independence, exponents of natural rights referred to slavery in their defense of free Americans' right to govern themselves.[58] Jefferson used natural-rights arguments in his indictments of George III with regard to the slavery-question, in both the Virginia Convention of 1774 and the Declaration of Independence. And literature of the revolutionary period reflected the same sentiment.[59]

By the 1840's, opponents of slavery realized that the issue concerned not simply slavery for the black man, but also liberty for the white.[60] Confronted by militants praising slavery as a "positive good," and by mobs and lynch-law, the supporters of law and order saw that "some organized, systematic effort was absolutely necessary to save their own liberties from the ruthless hands of unprincipled men".[61] Slavery and liberty, they concluded, were incompatible. Later, Seward would speak of an "irrepressible conflict," and Lincoln of a "house divided." But already the opponents of slavery were predicting that, "[i]f slavery live at the South, liberty must die at the North. . . . There is no middle ground."[62] They saw "the elements of conflict and repulsion in fearful operation in this land of liberty. Slavery and freedom cannot long co-exist—one must de-

[58] *E.g.*, J. OTIS, THE RIGHTS OF BRITISH COLONIES (1764); A. LEE, ESSAY IN VINDICATION OF THE CONTINENTAL COLONIES OF AMERICA (1764).

[59] Conway, *Antislavery Sentiment in American Literature*, 14 J. NEGRO HIST. 371, 380-84 (1929).

[60] The point was elaborated fully in the later works of W. GOODELL, SLAVERY AND ANTISLAVERY (1852), and THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE (1853).

[61] Edward Beecher, *quoted in* 1 H. WILSON, THE HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 362 (1872).

[62] J. Birney, in The Cincinnati Philanthropist, 30 Dec. 1836.

stroy the other."[63]

The evolution of the controversy revealed that libertarians and their pro-slavery opponents subscribed to two social and political theories so radically at odds that the protagonists differed even on the meanings of such central terms as "liberty" and "equality." Moreover, their disagreement extended as well to the construction and application of the Declaration of Independence and the Constitution. To one group, the Declaration was an instrument of government, with practical force. To the other, it was merely an abstract political statement, with no pragmatic application. To one group, the Constitution embodied natural rights, and therefore discountenanced, if it did not outlaw, slavery. To the other, the Constitution established and protected slavery, thereby denying natural rights. This conflict forced libertarians to re-evaluate what they meant by "liberty," "equality," and "natural rights," and what role these concepts play in the Declaration and the Constitution.

The Slave Power had its own ideas. After the death of Jefferson, a new political philosophy arose at the South that discarded natural-law precepts for the positivistic thesis that rights are nothing more than what "society" acknowledges.[64] In addition, with Jacksonian democracy, the "common man" increasingly assumed political power in the Southern States—bringing with that assumption the majority's traditional intolerance for minority opinion. These two forces, positivism and democracy, coalesced on the slavery-question: The democrats supported the vast complex of "property" rights established in the slave-system; and apologists for the slave-holders encouraged the masses' racial bigotry and their suppression of anti-slavery sentiment throughout Southern society. Both intended to keep the South a "white-man's country."[65]

Unable to reconcile the "peculiar institution" with natural rights, pro-slavery intellectuals abandoned natural law entirely. After about 1830, Southern literature championed the notions that men have no unalienable rights, and that slavery is the natural state of mankind and freedom an artificial and unworkable form of social organization. Similarly, Southern spokesmen denied the concept of equality stated in the Declaration of Independence, or reinterpreted it to assert that slavery alone guarantees "true" equal-

[63] Rev. A. Granger, A Sermon Preached in Meriden, Connecticut 5 (1853).

[64] *See* W. DODD, THE COTTON KINGDOM: A CHRONICLE OF THE OLD SOUTH c. iii (1919).

[65] Phillips, *The Central Theme of Southern History*, 34 AM. HIST. REV. 30 (1928).

ity. One argued that men are born unequal, that society violates their unalienable rights every day for its own safety and welfare, and that it has no duty to recognize such rights in any case. Therefore, to enslave negroes for society's benefit is no violation of a right to equality that negroes never possessed.[66] Others employed "science" to prove blacks racially inferior to whites. Then, they reasoned, since "equality" means an equality among equals, and since negroes constitute an inferior race, to invoke the Declaration of Independence to mandate racial equality does an injustice to whites and blacks alike.[67] According to these authorities, "the perfect equality of the superior race, and the legal subordination of the inferior race, are the foundation on which we have erected our republican system."[68] And its apologists did not stop here, but argued further that slavery applies to all men, black or white.[69]

Perhaps the most complete jurisprudential defense of slavery appears in the antebellum writings of George Fitzhugh. Fitzhugh realized that, to "vindicat[e] the institution of Slavery in the abstract," he "should be compelled to make a general assault on the prevalent political and moral philosophy."[70] That moral philosophy, he explained, "is deduced from the existing relations of men to each other in free society, and attempts to explain, to justify, to generalize and regulate those relations." Therefore, he predicted,

> [n]o successful defence of slavery can be made, till we succeed in refuting or invalidating the principles on which free society rests for support or defence. The world, however, is sick of its philosophy; and the Socialists have left it not a leg to stand on. In fact, it is . . . a mere expansion and application of . . . the phrase, "Laissez Faire," or "Let Alone."[71]

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[66] W. SIEBERT, VERMONT'S ANTISLAVERY AND UNDERGROUND RAILROAD RECORD 20 (1837).

[67] W. JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 193-94 (1935).

[68] Robert Toombs, *quoted in id.* at 194.

[69] "[T]he South now maintains," said one pro-slavery newspaper, "that slavery is right, natural, and necessary, and does not depend upon difference of complexion. The laws of the slave states justify the holding of white men in bondage . . . . Difference of race, of lineage, of language, of habits and customs, all tend to render the institution more durable . . . ." *Quoted in* The National Anti-Slavery Standard, 11 Oct. 1856, p. 1, col. 3. And another Southern newspaper reported that "the defense of slavery is not to be confined to mere Negro slavery . . . . While it is far more obvious that negroes should be slaves than whites, . . . yet the principle of slavery is itself right . . . ." *Quoted in* The Radical Abolitionist, Oct. 1857.

[70] G. FITZHUGH, CANNIBALS ALL! OR, SLAVES WITHOUT MASTERS 5 (C. Vann Woodward ed. 1960).

[71] *Id.* at 52.

Fitzhugh impugned the natural-law concept that the legitimacy of government depends upon the consent of the governed. "All governments," he opined, "originated in force, and have been continued by force. The very term, government, implies that it is carried on against the consent of the governed. . . . Masters dare not take the vote of slaves as to their government."[72] Moreover, he said, "[a]ll government proceeds *ab extra*," by force of social necessity. "Neither individuals nor societies can govern themselves . . . . The South is governed by the necessity of keeping its negroes in order . . . ."[73]

This being true, thought Fitzhugh, permanent constitutions are inexpedient, and recourse to "fundamental principles" of government even worse:

> Men and societies . . . cannot forsee or provide for the future, nor lay down rules for other peoples' conduct. All platforms, resolutions, bills of rights, and constitutions, are true in the particular, false in the general. Hence all legislation should be repealable, and those instruments are but laws. Fundamental principles, or the higher law, are secrets of nature . . . . The vain attempt of "frequent recurrence to them" is but the act of the child . . . . Recurrence to fundamental principles and appeals to the higher law are but the tocsin of revolution that may upset everything but which will establish nothing, because no two men are agreed as to what the higher law . . . is.[74]

Besides, the principle of individual human freedom is false in fact. "There is no such thing as *natural human* liberty, because it is unnatural for man to live . . . without the pale and government of society."[75] "Government," he wrote, "presupposes that liberty is surrendered as the price of security. . . . There can be no liberty where there is government . . . ." In society, "there is no liberty for the masses. Liberty has been exchanged by nature for security."[76]

This exchange, however, Fitzhugh felt theory and practice justified. For,

> "[i]t is the duty of society to protect the weak"; but protection cannot be efficient without the power of control; therefore, "It

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[72] *Id.* at 243.
[73] *Id.* at 133.
[74] *Id.* at 134.
[75] *Id.* at 71.
[76] *Id.* at 72, 78.

> is the duty of society to enslave the weak." And it is a duty which no organized and civilized society ever failed to perform. . . .
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> . . . [T]here can be no efficient protection without enslavement of some sort. In England, it has often been remarked, that all the legislation for the poor is borrowed from the system of domestic slavery.
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> . . . .
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> Those who give should have the power to control . . . the conduct and expenditure of the objects of their charity. Not till then can they be sure that their gifts will be promotive of good. But such power of control would be slavery.[77]

Therefore, he concluded, " 'Slavery is the natural and normal condition of society.' The situation of the North is abnormal and anomalous."[78]

To Fitzhugh, the problem society faced was in recognizing individual rights at all. "The right of Private Judgment," he wrote,

> led to the doctrine of Human Individuality, . . . [and] the doctrines of Laissez Faire, free competition, human equality, freedom of religion, of speech and of the press, and universal liberty. The right of Private Judgment . . . leads . . . to the supreme sovereignty of the individual, and the abnegation of all government. . . . [I]t is . . . the excessive applications of that philosophy, to which we object. Man . . . is born a part and member of society, born and lives a slave of society. . . . What are his obligations to society . . . depend upon . . . the necessities and well-being of the society to which he belongs.[79]

The philosophy of individualism, he opined, forgets that "[t]he social body is of itself a thinking, acting, sentient being"—a being that is "infallible," and the "infallibility of [which] is suggested . . . in the maxim—*Salus populi, est suprema lex.*"

> Liberty of the press, liberty of speech, . . . and the unlimited right of private judgment have borne no good fruits, and many bad ones. . . . Society has the right, and is in duty bound, to take care of itself; and when public opinion becomes powerless,

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[77] *Id.* at 187-88.
[78] *Id.* at 40.
[79] *Id.* at 53-54.

> law should intervene and punish all acts, words, or opinions which have become criminal by becoming dangerous or injurious.[80]

Fitzhugh did not, however, recommend slavery for all men; for "some are formed for higher, others for lower stations—the few to command, the many to obey."

> [N]ineteen out of every twenty individuals have "a natural and inalienable right" to be taken care of and protected, to have guardians, trustees, . . . or masters; in other words, they have a natural and inalienable right to be slaves. The one in twenty are as clearly born or educated or some way fitted for command and liberty. Not to make them rulers or masters is as great a violation of natural rights as not to make slaves of the mass.

"Imitation, grammar, and slavery," he concluded, "suit the masses. Liberty and Laissez Faire, the men of genius, and the men born to command. . . . To secure true progress, we must unfetter genius, and chain down mediocrity. Liberty for the few—Slavery, in every form, for the mass!"[81]

Here, then, was the authentic voice of elitist, positivistic totalitarianism, garbed as always in the cloak of "social necessity," but at base advocating nothing more than the unlimited power of a few self-appointed dictators over the mass of their fellow-men.

2. *The Thirteenth Amendment as a Restatement of the Fundamental Principles of Natural Law.*—The Framers of the Reconstruction Amendments[82]—of which the Thirteenth Amendment is most important—were conversant with the "positive-good" theory of slavery. Indeed, Chief Justice Taney's notorious opinion in *Scott v. Sandford* had encapsulated the essential rationale for slavery in the statement that slaves are "regarded as . . . of an inferior order, and altogether unfit to associate with the [master-class], either in social or political relations; and so far inferior, that they ha[ve] no rights which the [master-class is] bound to respect . . . ."[83] Not surprisingly, therefore, equality of liberty was a major topic of congressional debate prior to ratification of the Thirteenth Amend-

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[80] *Id.* at 131, 132.
[81] *Id.* at 63, 69.
[82] U.S. CONST. amends. XIII, XIV, XV.
[83] 60 U.S. (19 How.) 393, 407 (1856).

ment. "[E]quality of rights," "equal before the law," "personal freedom without distinction," and like phrases recur repetitively in the legislative history.[84] That "all men [are] free and equal," said one representative, is "the corner-stone of [the United States], and . . . above all constitutions and all laws."[85] Another argued that "[t]he effect of [the Thirteenth A]mendment will be . . . a practical application of the self-evident truth, 'that all men are created equal.' "[86]

Congress also recognized that legal equality did not apply to blacks alone. As one representative noted, slavery "had its origin in force. It claims no natural sanction for its existence, nor is it confined to any race."[87] Another interpreted the phrase "all men are created equal" to mean that every individual is entitled to legal rights and protection "without regard to race, color, or any other accidental circumstances by which he may be surrounded."[88] And still another emphasized that the Thirteenth Amendment would eradicate the institution that "[t]ake[s] away . . . fundamental rights from any large class of human beings."[89] Moreover, opponents repeatedly denounced the Amendment because it would confer legal equality on all men,[90] and deny Chief Justice Taney's theory that "[e]very State has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory."[91]

Equality before the law was also a dominant theme in debates on federal civil-rights statutes enacted pursuant to the Thirteenth Amendment and intended to serve as "a power enforcing the language of the Constitution, guarantying all the rights which the amendment gives."[92] As one senator explained, "any [State law] which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude . . . ."[93] Con-

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[84] Cong. Globe, 38th Cong., 1st Sess. 2614 (1864); *id.*, 38th Cong., 2d Sess. 155, 143 (1865).

[85] *Id.*, 38th Cong., 2d Sess.. 199 (1865).

[86] *Id.* at 142.

[87] *Id.* at 216.

[88] *Id.* at 260.

[89] *Id.* at 193.

[90] *E.g., id.* at 179, 216.

[91] Strader v. Graham, 51 U.S. (10 How.) 82, 93 (1850). *E.g.*, Cong. Globe, 38th Cong., 1st Sess. 2616 (1864).

[92] Cong. Globe, 39th Cong., 1st Sess. 1805 (1866).

[93] *Id.* at 474.

gresssional intervention was necessary to "destroy all these discriminations in civil rights"—since otherwise the Amendment would "amoun[t] to nothing."[94] "[W]e demand," concurred another senator, "that by irreversible guarantees no portion of the population of the country shall be degraded," but all receive "protection by equal laws."[95] "[T]he citizen must be endowed with all the rights which other men possess," agreed one representative;[96] while another urged Congress to "make all the citizens of the country equal before the law," "to break down all walls of caste," and "to offer equal opportunities to all men."[97] A third described congressional legislation as necessary "to secure the fundamental rights of citizenship; those rights which constitute the essence of freedom, and . . . make all men equal before the law."[98] And one of the most characteristic arguments presented in the debates explained that the Thirteenth Amendment both promises legal equality and guarantees certain immutable civil rights and immunities that government must recognize and protect.[99]

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[94] *Id.* at 322.

[95] *Id.* at 340, 343.

[96] *Id.* at 513.

[97] *Id.* at 589.

[98] *Id.* at 1832-33.

[99] *Id.* The Amendment, said Representative William Lawrence, imposes upon every legislature

> the limitation that there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished by State . . . laws.
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> . . . .
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> There is in this country no such thing as "legislative omnipotence." [State constitutions do not confer authority] to destroy all that is valuable in citizenship. Legislative powers exist in our system to protect, not to destroy, the inalienable rights of men . . . . This has been the common understanding in our whole history, and upon which governments have been created.
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> . . . .
>
> It has never been deemed necessary to enact in any constitution or law that citizens should have the right to life or liberty or the right to acquire property. These rights are recognized by the Constitution as existing anterior to and independently of all laws and all constitutions.
>
> . . . [T]here are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him. But not only are these rights inherent and indestructible, but the means whereby they may be possessed and enjoyed are equally so.
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> . . . .
>
> Now, there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by prohibitory laws, or by failure to protect any one of them.
>
> If the people of a State should become hostile to a large class of . . . citizens and

Congress understood that the very legitimacy of government turns upon fulfillment of its duty to protect all men's freedom equally. "[T]here are characteristics of Governments," said another representative, "that belong to them as such, without which they would cease to be governments"—first among these being recognition that "[t]he rights and duties of allegiance and protection are corresponding rights and duties."[100] A colleague concurred: "The highest obligation which the Government owes to the citizen in return for the allegiance exacted of him is to secure him in the protection of his rights."[101] Thus Congress concluded that, if government owes all citizens protection for their natural liberty; and if slavery can arise or be suffered only by positive law—then slavery can never coexist with government, rightly understood. For in creating, regulating, or even tolerating the slave-system, any political body must "cease to be governmen[t]."[102] To Congress, the simultaneous existence of government and slavery within the same jurisdiction was self-contradictory and absurd.

The Thirteenth Amendment, then, was no departure from American libertarian tradition. Yet it holds a special place in this tradition because its framers designed it to incorporate into the Constitution the basic postulate that "all men are created equal" and "endowed . . . with certain unalienable Rights." One senator, for example, described himself and his colleagues as committed "champions" of the Declaration of Independence, who "mean that just and equal laws shall pervade every rood of this nation."[103] Congress was "determined," said a representative among the majority, "to build into a law the doctrines of the Declaration of Independence."[104]

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should enact laws to prohibit them and no other citizens from making contracts, from suing, . . . from holding . . . property, . . . that would be prohibitory legislation. If the State should . . . enact laws for [one class of citizens] and provide no law under which [another class of] citizens could enjoy any one of these rights, and should deny them all protection by civil process, . . . that would be a denial of justice.

[100] *Id.* at 1263.

[101] *Id.* at 1295.

[102] *Id.* at 1263.

[103] *Id.* at 344.

[104] *Id.* at 1839. The Thirteenth Amendment, these men intended, was to serve as a testament to the principle that no government rightfully

can legalize the enslavement of man. . . . [A]nd that which a Government cannot rightfully do it cannot rightfully or legally authorize or even permit its subjects to do. . . . A majority in a republic cannot rightfully enslave the minority, nor can the

In short, the Thirteenth Amendment reaffirmed those principles that form "the corner-stone of [American government]" and guaranteed anew those "rights . . . recognized by the Constitution as existing anterior to and independently of all laws and all constitutions."[105] Its framers knew that the Constitution

> is not the beginning of a community, nor the origin of private rights; . . . it is not the cause, but [the] consequence of personal and political freedom; it grants no rights to the people, but is the creature of their power . . . . Designed for their protection in the enjoyment of rights and powers which they possessed before the [C]onstitution was made . . . . [I]t is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thoughts. . . . It presupposes an organized society; law; order; property; personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachments of tyranny.[106]

They knew as well from then-recent experience that, unless the constitutional presuppositions of "an organized society, law, order, property, [and] personal freedom" are adequately protected in the fundamental charter of government, those without "a love of political liberty" or "enough of cultivated intelligence to know how to guard it against the encroachments of tyranny" may betray freedom. Informed by such reasoning, they codified in one guarantee the basic constitutional presuppositions that inspire American government.

From the Declaration of Independence, the framers of the Thirteenth Amendment drew the principle that "all men are created equal" and "endowed . . . with certain unalienable Rights." Congress, indeed, had no higher goal for the Amendment than "to build into law the doctrines of the Declaration."[107] From the Preamble to the Constitution, they drew the principle of equal protection of the laws embodied in the phrase "to . . . establish Justice." For they knew that "[i]f the State should enact laws for [one class of

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accumulated decrees of courts or the musty precedents of Government make oppression just.

Id., 38th Cong., 2d Sess. 138 (1865).

[105] *Id.* at 199; *id.*, 39th Cong., 1st Sess. 1833 (1866).

[106] Hamilton v. County Court, 15 Mo. 13, 14 (1851).

[107] Cong. Globe, 39th Cong., 1st Sess. 1839 (1866).

citizens] and provide no law under which [another class of] citizens could enjoy any one of these rights, and should deny them all protection by civil process, . . . that would be a denial of justice."[108] Similarly, they sought "to . . . promote the general Welfare" by "offer[ing] equal opportunities to all men;" and "to . . . secure the Blessings of Liberty to ourselves and our Posterity" by guaranteeing "to all people in the United States," "irrespective of class," those "fundamental rights of citizenship . . . which constitute the essence of freedom"—those "inherent and inalienable rights, pertaining to every citizen, which cannot be abolished" by any rightful law.[109] From the express prohibitions in the body of the Constitution, they drew the principle of limited government that subordinates democracy to freedom under the rule of law. For they knew that neither the demands of majorities nor "the accumulated decrees of courts or the musty precedents of Government [can] make oppression just."[110] From the Amendments to the Constitution, they drew the specific rights that constitute the "civil rights, fundamental rights belonging to every man as a free man" and are the "necessary incidents" of the "right to live" in any nation that fancies itself "a land of liberty and law."[111] And from the plan and structure of the Constitution as a whole, they drew the principle that the American political system establishes government to secure the context for a free society—and therefore presupposes both popular and individual sovereignty, both democratic decision and personal self-determination. In short, they knew that "the surest and safest way" to guarantee a republican government "is to provide proper guards and checks for the protection of individual and social rights."[112] For a republican government supports a free and independent society, rather than submerging private relations in totalitarian controls.

The Thirteenth Amendment, therefore, is the ultimate statement that ours is a limited government—under which majorities decide issues within an ambit defined by rules of law not subject to majority-votes. Beyond the reach of sovereigns popular or unpopular, it creates a preserve of individual autonomy, independence, and equal protection of the laws where each man balances his own inter-

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[108] *Id.* at 1833.

[109] *Id.* at 589.

[110] *Id.*, 38th Cong., 2d Sess. 138 (1865).

[111] *Id.*, 39th Cong., 1st Sess. 476, 1833 (1866).

[112] *Id.*, 38th Cong., 2d Sess. 143 (1865).

ests, weighs his own values, and makes his own choices—where, indeed, each man governs himself.

In the two great constitutional crises in American history, then, the same jurisprudential theme has sounded: the theme of natural law, equality of right, government by consent of the governed, and limitations on political power in favor of individual liberty. The original understanding of the United States Constitution, in its birth in revolution and its re-birth in civil war, is consistent and compelling. The protection of individual rights is the purpose of government, the basis of its legitimacy, and the true test of the ambit of its authority.

II. The United States Constitution and Positivism: The New Legality

If those who framed and interpreted the Constitution during its first century saw that document as a repository of and protection for individual freedoms drawn from natural law, its more-recent expositors have applied it according to the quite different tenets of legal positivism. As a result, a new category of "social" and "economic rights" has displaced traditional individual liberties as the law's primary concern. Furthermore, under theories of judicial review denominated the "rational-basis" and "balancing tests," the courts have denied meaningful protection to both the unenumerated and the enumerated liberties embodied in the Constitution.

A. *The Precedence of "Social" and "Economic Rights" Over Individual Freedom*

Since the turn of this century, legislatures and courts have increasingly created new "social" and "economic rights": particular *material* benefits to which every person is presumably entitled, and for the provision of which government is responsible. The peculiar character of these rights arises from their origin as an attempted reconciliation of traditional "inherent individual rights," on the one hand, and "Marxist principles," on the other.[113]

"Inherent individual rights," drawn from natural law, and "Marxist principles" are mutually inconsistent, however. If there are Marxian rights to material benefits that the spontaneous action

[113] This is the explanation given in the Report of the UNESCO Committee on the Theoretical Bases of Human Rights, *in* Human Rights, Comments and Interpretation (UNESCO, 1949).

of society, through the market, does not satisfy, then government must in some measure suppress, re-direct, or supersede that action. Social and economic rights have full meaning only as the economic system tends towards complete centralization, and as individuals act according to principles of distributive justice enforced by a superior authority, rather than according to the principles of market-freedom. Because the spontaneous operation of the market does not, and presumably will not, provide certain benefits to some people, government cannot permit participants in the market to act for themselves, but instead must more or less "plan" their activities so as to guarantee a particular distribution of goods. The fulfillment of social and economic rights is therefore incompatible with continued protection of traditional individual freedoms. Government cannot direct individuals to perform according to its "plans" without at the same time denying those individuals the right to plan their own lives according to, for example, the natural-law principles of freedom of contract, or the right to property.

Moreover, once an attempt is made to reconcile Marxian principles with traditional individual rights, the transition from a free to a command system becomes autocatalytic. The more individuals and groups perceive their social and economic positions to depend upon governmental intervention, the more they will welcome, if not insist upon, such intervention in aid of this or that notion of distributive justice. In addition, under a system of majority-rule, government will respond to the claims of special-interest constituencies to the extent they organize for political action—thereby encouraging the mobilization of pressure-groups. And the more government tries to affect the substantive outcome of the market-process in favor of one or another group, the closer it will approach a totalitarian system.

Strangely, no coherent legal theory explains the ferment on behalf of social and economic rights. If government may assumedly enforce such claims, then which groups should receive what benefits, and which other groups should provide them, involve "rights" and "duties" in a formal sense. But the assumption begs the underlying question of whether there *are* rights to particular social positions and economic rewards that justify governmental favoritism (in contravention of equality before the law) and coercion (in contravention of fundamental individual liberties).

To explain the development of social and economic rights as a perversion of traditional rights-theory is possible, though. Locke

maintained that political institutions are justifiable only in so far as they protect individuals' liberty and property. The classical economists contributed the further concept of the "invisible hand," regulating private interactions so as to generate a spontaneous social order. The "invisible hand" explained how a community structures itself through the peaceful pursuit of private interests, and further encouraged limiting governmental activity to those areas in which the market-mechanism was inoperative. The Founders of the United States, however, did not adequately provide for the likelihood that special-interest groups within and outside government would redefine the purpose of political institutions; or that these groups would excoriate the unhampered market-economy, and demand that government assume management of the "invisible hand." The Founders understood that a system of individual rights reinterpreted to include rights *to* particular social and economic results (as opposed to rights *against* governmental interference with liberty) promotes the rapid development of a political order of unlimited pervasiveness. But they were unable to devise sufficient institutional checks to prevent this from happening.[114] Certainly the Founders did not foresee what Benda described as *la trahison des clercs*[115] and what best explains the key role intellectuals have played in the evolution of "Marxist principles" in this country over the last hundred years.[116]

The emergence of social and economic rights and the gradual insinuation of legal positivism into constitutional law have gone hand-in-hand, because legal positivism is simply the jurisprudential rationalization for the claim that legislative power is omnipotent. The characteristic demand of positivists that "law" and "rights" are what the political process decrees (and, indeed, are otherwise meaningless) unfetters government from the natural-law stricture that there are *"Bounds* which the trust that is put in them by the Society, and the Law of . . . Nature, have set to the Legislative Power of every Commonwealth."[117] And the positivistic conception

[114] Perhaps because the only effective institutional check in a democracy is the political self-restraint of the common man—about which the Founders harbored few illusions and therefore in which they placed little long-term reliance.

[115] J. BENDA, LA TRAHISON DES CLERCS 131-32, 141-42, 143 (1928).

[116] Vieira, "The Syndicalism of the Intellectuals: A Commentary On The Role and Purpose of the American *Intelligentsia* In Promoting Socialism in the United States" (unpublished manuscript, 1978).

[117] J. LOCKE, *supra* note 21, § 142.

of sovereignty as unlimited power removes all checks from, and even all possibility of appeal from the decisions of, "the people"—or, more precisely, those politicians and *fonctionnaires* who claim to speak for "the people." Under legal positivism, "freedom" reduces to the collective freedom of the political community: the power to legislate. And "law" becomes a process of identifying conflicts of "interests" among various groups, ascertaining the will of the majority (or its spokesmen) as to which interests should be recognized at the expense of others, and enforcing that judgment by various coercive techniques.

Legal positivism and American constitutionalism are irreconcilable. For example, positivism finds the basis for law in the will of a sovereign, in principle absolute, that promulgates rules to its subjects. Positivism does not identify the warrant for the absolute and unchallengeable supremacy of the law-givers over everyone else. American constitutionalism, *per contra,* rejects absolute sovereignty, placing fundamental principles of government, ascertainable by reason, above the will of any man or group.

Similarly, legal positivism defines law as a rule of conduct prescribed by the supreme power of a state, commanding action or forbearance by its subjects. In positivistic theory, "law" and "rights" are merely the adventitious combination of will and physical force sufficient to compel obedience. To be sure, the efficacy of law may often depend upon force. But positivism ultimately identifies law *as* force, and denies any necessary relationship between law and rights not themselves the creatures of force. Yet, if mere will and force suffice to establish law, then wherever they continue united to the successful accomplishment of some object, they constitute law.[118] So, in a society divided into militant factions struggling for political supremacy through direct action or subversion of government, with none of the factions capable of enforcing its demands for any significant period of time, law could not exist.[119] American constitutionalism, conversely, presumes that law and rights are permanent aspects of the natural order of things; that,

[118] *See, e.g.,* the neat *reductio ad absurdum* of the classical formulation of positivistic sovereignty in L. SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 11-14 (1860).

[119] For instance, where militant unions are so physically or politically powerful that the state cannot suppress their violent conduct, but not powerful enough to supersede the state and establish a syndicalistic or labor-socialistic regime, legal positivism would have to conclude that "law" and "rights" are in abeyance. On that theory, Britain and its population are perhaps on the verge of lawlessness and rightlessness.

whereas force may be necessary to secure them, they differ essentially from force alone; and that they exist even where physical power is insufficient to enforce them.

Again, legal positivism claims that government fulfills its function by creating rights it then confers on individuals. Although perhaps consistent if governments received their authority through divine inspiration, where popular sovereignty is the basis for the political order the claim merely generates a paradox: According to positivism, the sovereign-people select certain agents as their government; these agents then create law and confer rights on various segments of the people. Where the sovereign-people derive the right to create rights; or why, if they have the right to create the intermediary, government, they do not have the right to create rights directly; legal positivism does not explain. Apparently, positivists believe the sovereign-people originally maintain all power in an undivided whole. Government receives this power by delegation, and then identifies which individuals and groups will enjoy what portion of the sovereign's authority to act according to their own wills. Following this line of reasoning, each person has a "private capacity," in which he is the subject of government, and a "public capacity," in which he is part of the sovereign-people who appoint and control government. In his private capacity, each individual receives rights; and in his public capacity, grants them. Thus, each individual has an equal joint-interest in all rights in his public capacity, but either no interest or a complete personal interest in particular rights in his private capacity. Therefore, unless positivistic government performs the nugatory operation of "creating" for all citizens *all* the rights the sovereign-people can bestow on anyone, government must either: (i) leave all individuals with fewer rights than they had without its intervention; or (ii) leave some people with fewer, some with more, rights, thereby creating a class-structure of super- and subordination among individuals who started as equals. So, from the perspective of any rational individual who could not guarantee his ultimate legal position, the institution of positivistic government would be either valueless or dangerous. American constitutionalism posits a different result. The purpose of political institutions being to secure natural rights that antedate their formation, no non-aggressive individual loses by the creation and operation of government.

These inconsistencies between legal positivism and American constitutionalism, however, have not prevented the courts from in-

corporating into constitutional law positivistic doctrines at war with individual liberty. Two of these doctrines, the "rational-basis" and the "balancing tests," exemplify the courts' commitment to the central premisses of positivism that: (i) legislatures have unlimited power to "experiment" in "social" and "economic" matters, notwithstanding their experiments' inconsistency with individuals' unenumerated constitutional liberties; and (ii) the courts must recognize "conflicts of interest" between government and individuals that justify abridgment of the latters' enumerated freedoms.

B. *Destruction of Unenumerated Liberties Through the "Rational-Basis Test"*

The exertion of any governmental power to some degree infringes "liberty" in the lexicographical sense. The legally relevant question is whether it infringes "liberty" in the constitutional sense. To answer this question, the Supreme Court has employed three tests, two consistent with natural-law principles and the third not. First, in a few cases, the Court invoked the doctrine that a purported exercise of governmental power is unconstitutional, regardless of any purpose it may serve, if it infringes individual liberty or equality before the law (the *per se* test). For example, in *Truax v. Raich*, the Court held that arguably promoting the public welfare does not justify a State in denying some individuals "the right to work for a living in the common occupations of the community," because "reasonable classification implies action consistent with the legitimate interests of the state."[120] Similarly, in *Coppage v. Kansas*, the Court ruled that arguably promoting the "bargaining power" of some wage-earners does not justify a State in denying freedom of contract to others.[121] These cases taught that no "social" or

[120] 239 U.S. 33, 41-42 (1915).

[121] [W]herever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. . . . And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But [the Constitution], in declaring that [government] shall not "deprive any person of life, liberty, or property without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as coexistent human rights. . . .

And since [government] may not strike them down directly, . . . it may not do so indirectly, as by declaring in effect that the public good requires the removal of those

"economic facts" entitled a legislature to interfere with the exercise of constitutionally protected liberties.

Second, in a few cases, the Court invoked the doctrine that a purported exercise of governmental power arguably infringing a protected liberty is unconstitutional unless the state proves with clear and convincing evidence that the end it seeks to achieve is legitimate, and the means it intends to use has a demonstrably rational relation to that end, according to an accepted economic theory (the rationality test).[122] For instance, in *Nebbia v. New York*, Justice McReynolds characteristically criticized the Court for failing to inquire into the reasonableness of an "economic regulation."[123] In other instances, the Court judicially noticed the absence of a reasonable means-ends nexus in support of some statute challenged as infringing constitutionally protected liberty or property.[124] These

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inequalities that are but the normal and inevitable result of their exercise . . ., without in effect nullifying the constitutional guaranty.

236 U.S. 1, 17-18 (1915).

[122] This approach complemented the *per se* test applied in *Truax* and *Coppage*: If a governmental goal was not legitimate, the state's exertion of power was void, no matter how plausible the economic theory advanced in its support. On the other hand, if the end was legitimate, the state still had to show that it was reasonable. The overall result of these two tests perfectly fitted the Lockean theory that individuals, through the social compact, had (i) retained certain liberties for themselves, and (ii) alienated others to government, provided that it acted reasonably for the common good of society.

[123] Here, we find direct interference with guaranteed rights defended on the ground that the purpose was to promote the public welfare by increasing milk prices at the farm. Unless we can affirm that the end proposed is proper and the means adopted have reasonable relation to it this action is unjustifiable.

The court below has not definitely affirmed this necessary relation; it has not attempted to indicate how higher charges at stores to impoverished customers when the output is excessive and sale prices by producers are unrestrained, can possibly increase receipts at the farm. . . . Demand at low prices being wholly insufficient, the proposed plan is to raise and fix higher minimum prices at stores and thereby aid the producer whose output and prices remain unrestrained!

291 U.S. 502, 556-57 (1934) (McReynolds, J., dissenting).

[124] *E.g.*, Ribnik v. McBride, 277 U.S. 350, 356-57 (1928); Tyson & Bro. v. Banton, 273 U.S. 418, 439-42 (1927); Burn Baking Co. v. Bryan, 264 U.S. 504, 517 (1924). Contrast the typically positivistic utterance of Justice Stone, dissenting, in *Ribnik*:

[R]egulation is within a state's power whenever any combination of circumstances seriously curtails the regulative forces of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole. . . . The economic disadvantage of a class and the attempt to ameliorate its condition may alone be sufficient . . . to justify the regulation of contracts with its members.

277 U.S. at 360. Also characteristic is the comment of Justice Holmes, dissenting, in *Tyson*: "[A] state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution. . . . The truth seems to me to be that . . . the legislature

cases taught that, even where liberty is only arguably threatened, government must demonstrate the rationality of its regulations.

Third, in the vast majority of cases decided during this century that dealt with social or economic rights, the Court invoked the doctrine that a purported exercise of governmental power admittedly infringing a protected liberty or taking property without compensation is constitutional unless the challenger can prove there is no conceivable set of facts that might support the exercise of power (the rational-basis test).[125]

These decisions repeat the theme that courts must allow legislatures "[c]onsiderable latitude . . . for differences of view," "[o]therwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economic opinions, which by no means are held *semper ubique et ab omnibus*."[126] Such comments also reflect a peculiar forgetfulness that a major reason for the American War of

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may forbid or restrict any business when it has a sufficient force of public opinion behind it." 273 U.S. at 446.

[125] "There was a time," said Justice Black for the Court in *Ferguson v. Skrupa*,

> when the Due Process Clause was used . . . to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy . . . .
>
> . . . .
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> The doctrine . . . has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . Legislative bodies have broad scope to experiment with economic problems. . . .

372 U.S. 726, 729-30 (1963). Similarly, in *Williamson v. Lee Optical Co.*, Justice Douglas opined that

> the law need not be in every respect logically consistent with its aim to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> The day is gone when this Court uses the Due Process Clause . . . to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . "For protection against abuses by legislatures the people must resort to the polls, not to the courts."

348 U.S. 483, 488 (1955). *Ferguson* and *Williamson* represent the distillate of years of such statements by the Supreme Court or its members. Interestingly enough, both Justices Black and Douglas gained reputations as libertarians as far as certain individual rights, such as freedom of speech, were concerned. They never seemed to understand, though, that freedom of speech means little in a country where the government controls all social and economic relations. *But see* International Ass'n of Machinists v. Street, 367 U.S. 740, 784-91 (1967) (Black, J., dissenting), and *compare with* Railway Employes' Dep't v. Hanson, 351 U.S. 225, 233-35 (1956) (Douglas, J.).

[126] Otis v. Parker, 187 U.S. 606, 608-09 (1903) (Holmes, J.).

Independence was precisely that the British Parliament did not recognize certain "fundamental rules of right," including limitations on legislative power in favor of individual freedom. None the less, the Supreme Court has faithfully followed the notion that, where "social" and "economic regulation" is involved,

> judges should be slow to read into the [Constitution] a "nolumus mutare" as against the law-making power.
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> . . . .
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> . . . [T]he police power . . . may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.[127]

In the Court's present view, that "prevailing morality or strong and preponderant opinion" may be vicious or wrong, does not affect the existence of legislative power to enforce that morality or opinion against dissenters. The Constitution, admonished Justice Holmes, does not "prevent the making of social experiments that an important part of the community desires . . . even though the experiments may seem futile or even noxious. . . ."[128] "Whether the enactment is wise or unwise," Justice Hughes opined, "whether it is based on sound economic theory, . . . are matters for the judgment of the legislature."[129] "In present conditions," Justice Holmes suggested,

> a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. . . . If that belief, whether right or wrong, may be held by a reasonable man, . . . it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins. Whether in the long run it is wise for the workingmen to enact legislation of this sort is not my concern, . . . there is nothing in the Constitution of the United States to prevent it . . . .[130]

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[127] Noble State Bank v. Haskell, 219 U.S. 104, 110-11 (1911) (Holmes, J.).

[128] Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

[129] Chicago, B. & Q.R.R. v. McGuire, 219 U.S. 549, 569 (1911).

[130] Coppage v. Kansas, 236 U.S. 1, 26-27 (1915) (Holmes, J., dissenting). The same view appears in Adair v. United States, 108 U.S. 161, 191-92 (1908) (Holmes, J., dissenting).

Several of Holmes' assumptions in *Coppage* are revealing: First, that "liberty of contract begins" in an "equality of [material-] position between the [contracting] parties." According to this reasoning, "liberty" in law depends upon "equality" in income, wealth, or social

When the "solution" of what some people consider a social or economic injustice "turns upon considerations of economics about which there may be reasonable differences of opinion," advised Justice Stone, "[c]hoice between these views takes us from the judicial to the legislative field."[131]

But perhaps the classical statement of the doctrine is Justice Holmes' dissent in *Lochner v. New York*,[132] a dissent as long and widely praised as the majority opinion in that case has been vilified. In *Lochner,* the Court held unconstitutional a statute limiting hours of labor for bakers, on the ground that such limitation arbitrarily denied liberty of contract.[133] "This case," retorted Holmes,

> is decided upon an economic theory which a large part of the country does not entertain. . . . [M]y agreement or disagreement has nothing to do with the right of a majority to embody

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position—precisely reversing the relationship understood by the Founders, and articulated by the Court's majority in *Coppage*, that "liberty" in law would lead naturally to inequality in material-position. Second, that "working-men [may] enact legislation." Here is the basic presumption of syndicalism and fascist-syndicalism taken as a premiss of constitutional law—with no thought whatever to the consequences of its adoption with regard to the *general* welfare or the *common* good, the touchstones of legitimate legislation in a Lockean system. Third, that "there is nothing in the Constitution . . . to prevent it." Holmes, of course, was a foe of "liberty of contract." He failed to understand that "liberty" and "contract" are, in many respects, two ways of saying the same thing. But even more fundamentally, he never saw that the essence of the antithesis of liberty—that is, slavery—was its denial of the right of common workers to make employment contracts without the intermediation of "masters," be those "masters" plantation-owners, legislators, or unions of their fellow-wage-earners. *See* Vieira, *Of Syndicalism, Slavery and the Thirteenth Amendment: the Unconstitutionality of "Exclusive Representation" in Public-Sector Employment,* 12 WAKE FOREST L. REV. 515 (1976).

[131] Tyson & Bro. v. Banton, 273 U.S. 418, 454 (1927) (Stone, J., dissenting). Admittedly, stated the Court in *Muller v. Oregon*,

> [c]onstitutional questions . . . are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration.

208 U.S. 412, 420-21 (1908). In *Muller,* Louis Brandeis initiated the tactic of submitting "social" and "economic data" (the so-called "Brandeis brief") to provide the court with a basis in popular opinion for finding a particular legislative judgment "reasonable."

[132] 198 U.S. 45 (1905).

[133] The statute, said the Court, "involves neither the safety, the morals nor the welfare of the public, and . . . the interest of the public is not in the slightest degree affected. . . . The law . . . does not affect any other portion of the public than those who are engaged in that occupation." *Id.* at 57.

> their opinions in law. . . . State [c]onstitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical as this and which equally with this, interfere with the liberty to contract. . . . The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by [many laws]. The [Constitution] does not enact Mr. Herbert Spencer's Social Statics. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But 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*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel or even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.
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> . . . [T]he word liberty is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[134]

What those "fundamental principles" are, and how one determines whether they "have been understood by the traditions of our people and our law," Justice Holmes did not explain.

No one has ever satisfactorily explained why the rational-basis test is incumbent on the courts. To be sure, Justice Black talked of "return[ing] to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies."[135] But whence arose this "original constitutional proposition," he did not say. Certainly it is not a product of the Constitution itself.[136] Indeed, the first decision of the Supreme

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[134] *Id.* at 75-76 (Holmes, J., dissenting).

[135] Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

[136] As a matter of pleading, a party claiming a right under the Constitution must establish a *prima facie* case to avoid dismissal. Allegations sufficient to make out such a case need not rise to the level of definitive proof, however. And, in any event, the sufficiency of such allegations is itself a question of law that a trial court—and certainly the challenged statute

Court invalidating an act of Congress makes no allusion to any presumption that legislation is constitutional if a reasonable doubt could possibly exist as to its invalidity. Rather, *Marbury v. Madison* conveys the characteristic view of Chief Justice Marshall that the unconstitutionality of a statute is an objective quality discoverable by reference to fixed principles, not to evanescent popular notions of what the "facts" are.[137] Moreover, in *Gibbons v. Ogden,* Marshall explicitly rejected any operative presumption of the constitutionality of statutes absent proof beyond a reasonable doubt.[138] And other leading decisions declaring laws unconstitutional are equally devoid of references to a rational-basis test, until after the Civil War.[139]

Apparently, the presumption arises from nothing more than "a decent respect due to the . . . legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt."[140] Such a self-imposed respect, however, is inconsistent with the courts' assump-

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itself—cannot conclude against the aggrieved party on the basis of any vague presumption. *See, e.g.,* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938); Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 204, 209-13 (1934); Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 595-96 (1896).

On the other hand, even under the rational-basis test, the party relying on the statute should have to make a *prima facie* defense of the law's real and substantial relation in reason to a legitimate governmental goal. *Compare* Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330, 347-48 n.5 (1935), *and* Nebbia v. New York, 291 U.S. 502, 525 (1934), *with* Mayflower Farms, Inc. v. Ten. Eyck, 297 U.S. 266, 274 (1936). *See also* Rinaldi v. Yeager, 384 U.S. 305, 308-10 (1966).

[137] 5 U.S. (1 Cranch) 137 (1803). Marshall's view had supporters in this century, also. *E.g.,* United States v. Butler, 297 U.S. 1, 62 (1936).

[138] "The state of New York," he began,

> maintains the constitutionality of these laws; and their legislature, their council of revision, and their judges, have repeatedly concurred in this opinion. . . . No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government.

22 U.S. (9 Wheat.) 1, 186-87 (1824).

[139] Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869), is the first opinion in which the Court's majority discusses the doctrine. Within a few years, though, the Court was applying the rational-basis test even to acts of state legislatures challenged under the explicit prohibitions of Article I, § 10. Antoni v. Greenhow, 107 U.S. 769, 774-75 (1882); Houston & T.C.R.R. v. Texas, 177 U.S. 66, 89-90 (1900).

[140] Ogden v. Saunders, 25 U.S. (12 Wheat.) 212, 269 (1827) (Washington, J.).

tion of the authority to declare laws unconstitutional in the first place. Judicial review rests on the propositions that the Constitution is the supreme law of the land; that it is the essence of judicial duty to determine what the law is in all cases and controversies presented for decision; and that, to perform this duty, judges must refuse to enforce those legislative and executive acts they find in conflict with the Constitution. If, however, judges do not decide for themselves whether a conflict exists, but attempt instead to determine the opinions of other reasoning men, they have not declared the law, but only what someone else might find it to be. If this be enough to perform their offices, it should also suffice for courts to eschew constitutional analysis altogether, and simply defer to the executive and legislative branches in all things. Indeed, a rigorous application of the reasonable-doubt doctrine would lead to the invalidity of no law ever being established, because *some* legislator, executive, administrator, or law-professor could always be found to assert this or that reason in its defense.

The rational-basis test, though, is hardly susceptible of rigorous application. Rather, it is a web of fallacies and self-contradictions. Holmes' dissent in *Lochner* is a prime example. Besides forgetting the Biblical injunction that "[t]hou shalt not follow the multitude to do evil, neither shalt thou yield in judgment to the opinion of the most part, to stray from the Truth[,]"[141] Holmes neglected as well the very document he was supposed to be interpreting: the United States Constitution. "[A] Constitution is not intended," he explained in *Lochner*, "to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views . . . ."[142] Note the several elements of confusion here: First, Holmes' reference to what "*a* Constitution" in the abstract "is intended" to do *according to Holmes*, without concern for what the *United States* Constitution specifically imports *according to its explicit language and history*. Second, Holmes' implicit definition of "paternalism and the organic relation of the citizen to the state" as an *economic*, rather than a *political*, theory. Apparently Holmes never considered that, if special-interest groups inside and outside government could invoke the rational-basis test to support mislabelled "economic" theories, they could radically transform Ameri-

[141] *Exodus* 23:2.

[142] 198 U.S. at 75-76 (Holmes, J., dissenting).

can politics, without meaningful judicial scrutiny.[143] Third, Holmes' assumption that the Constitution, far from embodying a consensus on fundamental principles, merely establishes a procedure whereby conflicting interest-groups struggle to enact their arbitrary opinions into law. Apparently Holmes was not conversant with the view of the Founders that unalienable individual rights

> should be made the basis of every constitution; and if a people be so situated, or have such different opinions that they cannot agree in ascertaining and fixing them, it is a very strong argument against their attempting to form one entire society to live under one system of laws only.[144]

Apparently he was equally unconversant with the Founders' desire to forefend the socially destructive machinations of factions,[145] or with the experiences they had had with majorities, heedless of the general welfare, enacting their aberrant economic opinions into law.[146]

Again, in *Lochner* Holmes quipped that

> a Constitution is not intended to embody a particular economic theory . . . the word liberty . . . is perverted when it is held to prevent the natural outcome of a dominant opinion, unless . . . a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles . . . .[147]

But Holmes' supposed "rational and fair man" (lacking any social, economic, or political philosophy) and his "constitution" (equally devoid of any such preconceptions) are fantasies. And revealingly, Holmes, Brandeis, Stone, Hughes, Frankfurter, and others of the

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[143] For an example of this process going on today in the area of public employment, see Vieira, *"To Break and Control the Violence of Faction:" the Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (Foundation for Advancement of the Public Trust 1980).

The court has not been unmindful of the problem. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). But, never having understood the intimate interrelation between "economic" and "political" rights, it has taken only inconsistent action at best.

[144] R. Lee, Letters from the Federal Farmer No. 2, 9 Oct. 1787.

[145] *E.g.*, THE FEDERALIST No. 10 (J. Madison).

[146] *See, e.g.*, A. MCLAUGHLIN, THE CONFEDERATION AND THE CONSTITUTION ch. ix-x (1905), for a discussion of how, prior to the Constitutional Convention in 1787, state legislatures controlled by farmer-debtors had enacted numerous anti-creditor measures; and how the prevalence of such class-based legislation influenced the movement for constitutional reform.

[147] 198 U.S. at 75-76 (Holmes, J., dissenting).

anti-*Lochner* school never applied their theory of constitutional "neutrality" with regard to social and economic theories to *dis*allow the use of the "Brandeis brief" as an argument against the existence of constitutional limitations on legislative action.[148] Their "neutrality" was one-sided.[149]

Moreover, their claim that the Constitution is neutral with regard to "social" and "economic theories" cannot withstand analysis. Now, whether there are natural rights, or whether their defense by Locke or other libertarians in the seventeenth and eighteenth centuries is cogent, is debatable. But that the Constitution, rightly or wrongly, guarantees such rights is beyond dispute. That being so, there must also be "social" and "economic rights" in so far as traditional natural rights guarantee freedom in those areas of human endeavor that the Holmesian school would label "social" and "economic."[150] To say, with Holmes, that there are *no* social or economic rights guaranteed against governmental abridgment is to say either: (i) that there are no natural individual rights that gov-

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[148] Contrast Ives v. South Buffalo Ry., 201 N.Y. 271, 287, 294-95, 295 (1911):

> The . . . report of the Commission . . . is based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of which are designed to show that our own system of dealing with industrial accidents is economically, morally and legally unsound. Under our form of government, however, courts must regard all economic, philosophical and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be moulded into statutes without infringing upon the letter or spirit of our written constitutions.
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> . . . .
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> In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval, but courts are not permitted to forget that law is the only chart by which the ship of state is to be guided.

[149] The exposure of Frankfurter as an activist for syndicalism, for example, has already begun. *See* Petro, *Injunctions and Labor Disputes: 1880-1932* (pt. 1), 14 WAKE FOREST L. REV. 341 (1978).

[150] One of the difficulties of the Holmes-Brandeis-Stone-Hughes-Frankfurter argument is its imprecise definitions of "social" and "economic rights," "theories," and "regulations." Throughout, the argument suggests that "economic" matters implicate only such market-phenomena as prices (including wage-rates), commercial contracts, and so on. But Holmes and his fellow-Justices certainly were aware that economic activities of this kind are not ends in themselves, but merely preconditions for or means to other ends. They are not somehow separate from other kinds of human action, but integral to it all, as Professors Gewirth and Pilon have shown earlier in this Symposium. And therefore, Holmes and his confreres must have understood that there is no category of merely economic activity that political institutions can control without affecting individual liberty in other areas. From this perspective, the Holmesian argument collapses to a panegyric for totalitarianism—against which, of course, there are no natural-law defenses by hypothesis.

ernment is bound to respect[151]—a position the history of the Constitution refutes; or (ii) that natural rights have no relation to social or economic interactions among men—a position self-evidently ridiculous. It may be that scrupulous enforcement of the natural rights the Founders recognized in the Constitution leads to a society not unlike that the champions of *laissez faire* envisioned. If so, it is a product of *political*, not economic, arrangements.

Other aspects of the rational-basis test are as defective as those upon which Holmes relied in *Lochner*. To Holmes and Brandeis, one of the great virtues of the rational-basis approach to social and economic regulations was that it permitted legislative "experimentation." Holmes adamantly opposed invoking the Constitution "to prevent the making of social experiments that an important part of the community desires . . . even though the experiments may seem futile or even noxious."[152] And Brandeis warned that "[t]o stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. . . . [W]e must let our minds be bold."[153] Comments such as these suggest disquieting things about the psychological and political proclivities of the Justices.[154] Moreover, they expose a certain insensitivity to history. The very purpose of the Constitution, after all, was to free the American people from being "perpetually tormented with new experiments" in government.[155] And the Supreme Court has recognized that "[t]he principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments."[156] "The Constitution was intended . . . to prevent experimentation with the fundamental rights of the individual."[157]

And wisely so. "Experimentation," in the natural-scientific sense, is impossible in the field of social and economic action. The natural

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[151] *Compare* Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856), *with* G. FITZHUGH, CANNIBALS ALL! OR, SLAVES WITHOUT MASTERS (1856), quoted at note 70 and accompanying text *supra*.

[152] Truax v. Corrigan, 257 U.S 312, 344 (1921) (Holmes, J., dissenting).

[153] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[154] *See* Vieira, *supra* note 130, at 593 & n.315.

[155] The Letters of "Agrippa" No. XVII, *supra* note 30.

[156] New State Ice Co. v. Liebmann, 285 U.S. 262, 280 (1932).

[157] Truax v. Corrigan, 257 U.S. 312, 338 (1921). *Accord,* Pointer v. Texas, 380 U.S. 400, 413 (1965) (Goldbert, J., concurring).

sciences can experiment because they are able to "control" the subject-matter of their inquiries, to observe in the laboratory the consequences of changing a single, isolated element in the system under investigation. Every meaningful experimental observation refers to these isolated elements. "Facts" in the natural sciences are the causal relations discovered through controlled experiments. But in the field of social and economic activity, things are different.

Human experience is complex and historical in nature, the result of joint efforts by many individuals acting over time, together with the effects of natural circumstances beyond their knowledge and control. No one can manipulate the conditions of social interaction, isolate one causal factor from another, or observe the consequences of changing one factor *ceteris paribus*. For this reason, the interpretation of social and economic events depends, not upon experimentation, but upon theories independent of so-called "data." No one can explain complex, historical phenomena except by reference to abstract principles, logically antecedent to the facts that require analysis. Mere compilation of data cannot answer any question in the social and economic field, because (i) what constitutes relevant data is itself an issue soluble only by reference to pre-existent theories; and (ii) the selfsame data often appear to support contradictory explanations. Indeed, those who reject deductive reasoning in favor of what they believe is empiricism usually succeed only in enmeshing themselves in superstitions and myths that seem to fit the facts, but (in reality) are the products of logical fallacies.[158]

The enthusiasm of Holmes and Brandeis for governmental "experimentation" in the social and economic field, then, was misplaced. Carried to its extreme, their thesis denies individuals any right to refute by discursive reasoning whatever scheme the political authorities put forward, no matter how "futile or . . . noxious,"[159] unsound in economic theory,[160] or logically inconsistent.[161] Political "reformers" need only suggest what appears desirable to them, and everyone else is bound to submit himself to the reorganization of society according to the reformers' plan. Because the experiments can never prove the reformers correct, however, the process is scientifically nugatory; and dissenters lose their liberty and property in

[158] Various popular explanations for economic depressions are typical of the genre. *See, e.g.*, M. ROTHBARD, AMERICA'S GREAT DEPRESSION chs. 1-3 (1963).

[159] Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

[160] Chicago, B. & Q.R.R. v. McGuire, 219 U.S. 549, 569 (1911).

[161] Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955).

exchange for nothing. In addition, futile, noxious, economically unsound, and logically inconsistent experimentation may irreversibly destroy our social, economic, *and political* systems. So, in sum, the Holmes-Brandeis thesis simply concedes to legislatures—controlled as experience teaches they often are by factions oblivious to the common good—sweeping powers to rearrange all social institutions by blindly and ignorantly interfering, now here, now there, in individuals' lives.

The point of the experimentation-doctrine is not difficult to grasp. If courts carefully analyzed legislative programs to determine whether a clear and convincing case exists in economic science for the rationality of those programs, and for their consistency with the public interest, few would pass muster.[162] Therefore, if the judiciary is to cooperate in advancing social and economic rights, it has to drain legal analysis of economic science as much as possible, and to employ a positivistic theory of legislative power and judicial (non-) review that permits government to act on the basis of popular myths, superstitions, and beliefs. "Experimentation," as a name, does not signify the provisional nature of this or that particular act of governmental intervention. Rather, it connotes the limitless nature of governmental intentions in general: the willingness to tinker with anything and everything in social and economic life in order to "make things better" according to the value-judgments of politicians, *fonctionnaires,* and their special-interest constituencies.[163]

The Holmes-Brandeis school also extolled the rational-basis approach to social and economic regulation because it supposedly takes cognizance of the "facts" underlying legislation.[164] Unfortunately, neither Brandeis nor Holmes apparently understood how facts relate to constitutional law.

Facts are elements of agreement that constitute the foundation for further argument. Therefore, prior to identifying facts, one must

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[162] For a classical case, compare the majority and dissenting opinions in New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), in the light of R. POSNER, ECONOMIC ANALYSIS OF LAW 267-70 (1972).

[163] *Cf., e.g.,* Summers, *Pragmatic Instrumentalism, America's Leading Theory of Law,* 5 CORNELL L. FORUM 15 (1978).

[164] "The determination of [constitutional] questions," wrote Brandeis in *Burns Baking Co. v. Bryan,* "involves an enquiry into facts. Unless we know the facts on which the legislators may have acted, we cannot decide whether they were (or whether their measures are) unreasonable, arbitrary, or capricious. Knowledge is essential to understanding; and understanding should precede judging." 264 U.S 504, 519-20 (1924) (Brandeis & Holmes, JJ., dissenting).

understand the dispute to which they are relevant. This casts in sharp relief one of the most serious problems with the analytical approach of the Holmes-Brandeis school: Was *Lochner*, for instance, a case that dealt with *social*, or *political*, facts—with whether some amount of daily labor above the legal maximum is arguably detrimental to the bakers' health, or whether denying bakers the freedom to work beyond the legal maximum is inconsistent with a constitutional concept of individual autonomy? If, as Holmes suggested, *Lochner* dealt only with such biological facts as the relationship between work and health,[165] and if legislatures may protect individuals against their own improvidence,[166] then perhaps the Court incorrectly questioned the legislative judgment that a maximum-hours law is a health-measure.[167] But if, contrary to Holmes, *Lochner* involved the political judgment that the Constitution denies legislatures the authority to interfere in certain ways with individuals' lives, no matter what the biological facts are, then Holmes' much-publicized dissent was irrelevant.

Under the rational-basis test, a social or economic regulation is constitutional if any state of facts that supports the regulation is conceivable. A fact, however, is not what one disputant might conceive—for some people are capable of conceiving anything—but instead what an honest individual, in possession of the knowledge extant at a particular time in history, cannot reasonably deny.

In almost all the rational-basis-test cases, however, the social facts *were* in issue, *not* undisputed, *not* incapable of rational denial. They were, therefore, not facts at all. But if they were not facts, what weight did they add, in the judicial scales, to the mere existence of the challenged regulation? What consequence of constitutional law can rationally flow from the existence of mere conjecture on the part of various individuals in regard to the effect of some legislative enactment? Indeed, if a legislature has power to act on the basis of unprovable conjecture, why need courts consider that

[165] Interestingly enough, in *Lochner* as in most of the other rational-basis-test cases, even the biological "facts" were not facts at all, but rather disputes between the parties. The Holmes-Brandeis school side-stepped this inconvenience by adopting the doctrine that legislatures may act on the basis of *beliefs* (mis-labelled "facts"), so long as those beliefs are not "unreasonable."

[166] Suggested by Holmes' reference in *Lochner* to the theory of "paternalism and the organic relation of the citizen to the state." 198 U.S. at 75 (Holmes, J., dissenting).

[167] The doctrine of "constitutional fact," however, suggests otherwise. *See* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 50-52 (1936); Crowell v. Benson, 285 U.S. 22, 54-60 (1932).

conjecture at all? Evidently, the facts to which the rational-basis test refers are really *artifacts*—rhetorical props and make-weights to rationalize the invocation of arbitrary power.

In sum, the rational-basis test is a compilation of positivistic fallacies that sets constitutional adjudication on its head. Instead of the judiciary demanding that government establish the rationality of those acts arguably infringing individual liberty, it requires the individual to prove the non- or irrationality of those acts: a hopeless task where the criterion of rationality is what a "reasonable man" *might* believe. Thus, in the area of social and economic regulation—which in principle embraces every activity of man in society—there is nothing government cannot do for politically influential groups, and to their political opponents. In short, the rational-basis test excises from the Constitution the Preamble's concern for the general welfare, eviscerates the Thirteenth and Fourteenth Amendments' implicit guarantees of freedom of contract, and extinguishes all private property. As long as it continues as a guiding doctrine of judicial review, unenumerated individual liberties are, for all practical purposes, non-existent in this country.

C. *Destruction of Enumerated Liberties Through the "Balancing Test"*

That the rational-basis test has destroyed the general constitutional guarantees of individual liberty and private property many self-styled "liberals" will concede. In defense, though, they argue that: (i) these guarantees, developed prior to the evolution of modern industrial society, are of little relevance today; (ii) to recognize them would preclude government from creating new social and economic rights necessary to the welfare of "workers," the "poor," "minorities," and other groups particularly needful of special political privileges; and (iii) in any event, the Supreme Court continues to protect "fundamental" enumerated rights, such as freedom of speech or immunity from invidious discrimination, that are more important than freedom of contract and kindred liberties. The problem with this line of reasoning is that, even if its first two branches were true, the third is not. For, under the "balancing test," the Court has largely eradicated even the enumerated rights that everyone takes for granted as the *sine qua non* of American constitutionalism.

The balancing test arose supposedly because the exercise of First Amendment freedoms of speech and association often involves con-

duct otherwise subject to governmental control.[168] Instead of developing principled definitions carefully distinguishing constitutionally protected from nonprotected conduct, however, the Supreme Court chose instead to fashion *ad hoc* "workable accommodations" between the exercise of governmental power and individuals' constitutional immunities. Thus, the Court today sustains "incidental" impingements upon fundamental personal liberty if the challenged statute furthers a legitimate and "compelling" state aim;[169] if the governmental action in question has a demonstrably substantial rational relationship to that aim;[170] and if the regulation constitutes the least-restrictive means essential to attain the government's interest.[171]

Particularly ominous in the balancing test is its recognition that, where the government employs the means least-restrictive of individual freedom to accomplish its end, it may abridge a fundamental liberty if the interest it seeks to achieve is "compelling"—in short, may do precisely what the Constitution explicitly forbids if its spokesmen adduce a reason that satisfies a majority of the Supreme Court. The balancing test, then, sets up as a fundamental premise of constitutional law the radically positivistic notion that the ephemeral decisions of society's legislative and judicial agents are superior to society's own long-term judgment as expressed in the nation's organic law.

But then, with the steady infiltration of positivism into constitutional jurisprudence, courts have increasingly turned away from

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[168] *E.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[169] *E.g.*, Shelton v. Tucker, 364 U.S. 479, 486-87 & n. 7, 490 (1960) (public exposure of private associations an impermissible purpose); Bates v. City of Little Rock, 361 U.S. 516, 523, 526-27 & n.11 (1960) (impermissible to apply disclosure provisions of statute for purposes of harassment of legitimate private association); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 464-65 (1958) (disclosure of membership lists of private association not warranted where association offers to comply with corporate registration law); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 403 (1963); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546 (1963); Craig v. Harney, 331 U.S. 367, 376 (1947).

[170] *E.g.*, Organization for a Better Austin v. Keefe, 402 U.S 415, 419 (1971); Carroll v. Princess Anne County, 393 U.S 175, 181 (1968); Freedman v. Maryland, 389 U.S. 51, 57 (1965); Sherbert v. Verner, 374 U.S. 398, 406 (1963); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546, 551 (1963); NAACP v. Button, 371 U.S. 415, 439-44 (1963); Bates v. City of Little Rock, 361 U.S. 516, 525-27 (1960).

[171] *E.g.*, Gregory v. City of Chicago, 394 U.S. 111, 118 (1969) (Black, J., concurring); Shapiro v. Thompson, 394 U.S. 618, 631 (1969); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969); NAACP v. Button, 371 U.S. 415, 433, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960). Compare and contrast United States v. Robel, 369 U.S. 258, 267-68 (1967).

earlier theories of adjudication based on historical analysis and deductive legal reasoning and adopted "interest-balancing" instead. They have never explained, however, how this technique is consistent with constitutionalism. To be sure, individuals and groups have different, often conflicting interests; and law necessarily recognizes some interests rather than others. Yet this does not support interest-balancing as the basis for judicial review. To say that various interests compete for legal recognition is not to concede that all of these interests are legitimate, or (even if legitimate) are properly enforceable by law against dissenters. Moreover, some interests may be, as the framers of the Constitution evidently believed, *absolute*, in the sense that they are beyond "balancing" or other forms of compromise.

More specifically, modern interest-balancing purports to weigh governmental interests against supposedly conflicting individual interests. Inherent in this process, though, are certain question-begging assumptions about the thing called "government," and what its interests properly may be. Correctly to identify the interests of government requires definition of its nature. Government cannot properly have an interest, and especially a "compelling" interest, in X unless X is something that is in the nature of government to pursue under the United States Constitution. For example, government cannot have any interest in disarming law-abiding citizens, because its primary purpose is to protect those citizens from criminal aggression, whereas disarming them denies them self-protection in situations where the police cannot repel aggression. In short, balancing the purported interests of government against individuals' interests in constitutionally guaranteed liberties is premature—until the character, and limitations on the actions, of government have received constitutional definition.

Now, the process of constitutional definition leads immediately to a paradox. Where government is concerned, a "compelling" interest is one that "drive[s] or urge[s] with force, or irresistibly; . . . constrain[s]; oblige[s]; necessitate[s] . . . by . . . moral force."[172] And the prime purpose of the Constitution is to oblige governmental officials, by the moral force of its provisions, to respect individual liberty. Yet the balancing test assumes that these officials can point to "compelling" reasons for doing exactly the opposite: or, that government may be driven to do what the funda-

[172] WEBSTER'S NEW INTERNATIONAL DICTIONARY 544 (2d ed. unabrdg. 1934).

mental law constrains it not to do. The Supreme Court's balancing-test decisions, then, articulate the self-evident absurdity that our political institutions may rightfully pursue goals contradictory of the purpose of and sole justification for political institutions in the first instance.

Beside this, the balancing test is also legally and logically absurd. First, it asserts that an individual must acquiesce, in his private capacity, in the violation of his fundamental rights in order to exercise, in his public capacity, the power to achieve a "compelling" governmental interest. The test thus assumes that government must violate the law in some cases in order to function in others. It does not explain, though, how the sacrifice of any individual's liberty has any rational connexion with the protection or advancement of other people's freedom. Second, it assumes that courts must weigh the relative value of governmental interests and individual rights whenever the magistrates decide the two conflict. Yet, as a matter of constitutional logic, no such conflict can exist. If government exercises only its delegated powers, it cannot infringe individuals' rights; and if it purports to exercise powers not delegated, it necessarily exceeds its own authority, rendering its acts void. Governmental action can be rightful, in short, only if it consists with individual liberty. Therefore, balancing of governmental power versus individual liberty can never be appropriate in the American constitutional system, by hypothesis.[173]

One need not be overly cynical to conclude that the real motivation for the balancing test finds its source, not in the Constitution, but rather in the desire of modern judges to promote the creation and expansion of social and economic rights they know cannot coexist with traditional conceptions of individual liberty. Judges, of course, are immune neither to the prejudices of our time nor to the apparent law of human action that every body of men invested with office are tenacious of power, and ever seek to extend it. What the Founders perhaps did not fully anticipate is that every extension of the powers of legislators and executives *vis-a-vis* individual citizens also extends the powers of courts, and the dignity and importance

[173] This, indeed, should be self-evident, since in each case the true balancing process cannot logically weigh the magistrates' interest in some statute or regulation against the individual's interest in exercising his guaranteed liberty, but instead should weigh the magistrates' interest, as agents for society, against society's interest in personal freedom. And, as Justice Black correctly noted, "the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." Konigsberg v. State Bar, 266 U.S. 36, 61 (1961) (Black, J., dissenting).

of judges. The more social and economic rights proliferate, the more judges will be importuned to exercise, or take upon themselves *sua sponte,* the power to intervene in conflicts between special-interest groups squabbling for political or economic privileges at society's expense. The balancing test is simply one of the devices they have invented to frustrate constitutional limitations on governmental action, including their own. It is a means by which judges can themselves exercise, or permit others to exercise, powers the Constitution withholds from political institutions, while at the same time appearing to perform their traditional judicial duties on behalf of individual liberty.[174]

Originally, the test applied only to incidental infringements supported by a "compelling" interest achieved through the means least-restrictive of personal liberty. Piercing the veil of rhetoric, however, Justice Black warned of the "unlimited breadth and danger of the 'balancing test' as it is currently being applied."[175] Today, his foresight has been vindicated. For already we find courts prepared to balance abridgments of individual liberty against governmental interests that, far from being "compelling," are arguably illegitimate on their face.[176] And it is only a matter of time until the more "progressive" judges begin to argue that the balancing should be left entirely to the political process. Indeed, in *Dennis v. United States*, Justice Frankfurter provided them with a ready-made ra-

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[174] [A]s a practical matter, . . . those who support the balancing test are the very same people who almost invariably find freedom to be outweighed in the balance. A test . . . the authority of which is almost never invoked except as justification for the suppression of freedom, would seem to be more of an excuse for a result already determined, than a meaningful tool to determine the result in the first place.

McAlister, *Labor, Liberalism and Majoritarian Democracy,* 31 FORDHAM L. REV. 661, 686 (1963) (footnote omitted).

[175] For him the question the court asked in every balancing case

is not whether there has been an abridgment of [an individual's] right, not whether the abridgment of that right was intentional on the part of the Government, and not whether there is any other way in which the Government could accomplish a lawful aim without an invasion of the constitutionally guaranteed rights of the people. It is, rather, simply whether the Government has an interest in abridging the right involved and, if so, whether that interest is of sufficient importance, in the opinion of a majority of th[e] Court, to justify the Government's action in doing so. This doctrine, to say the very least, is capable of being used to justify almost any action Government may wish to take to suppress [constitutional] freedom.

Scales v. United States, 367 U.S. 203, 262 (1961) (Black, J., dissenting).

[176] Contrast Abood v. Board of Educ., 431 U.S. 209 (1977), *with* Petro, *Sovereignty and Compulsory Public-Sector Bargaining,* 10 WAKE FOREST L. REV. 25 (1974), and Vieira, *Are Public-Sector Unions Special Interest Political Parties?,* 27 DEPAUL L. REV. 293 (1978).

tionale.[177] Under this approach, of course, the Constitution as a check on political power would be no more, and radical majoritarianism would emerge triumphant—its only limitation being the impotent rational-basis test under which courts defer to legislative "findings" whenever "it might be thought that the particular legislative measure [is] a rational way to correct [some purported evil]."[178]

In any event, continued employment of the balancing test is incompatible with the survival of our constitutional system: Long ago, wiser justices brusquely rejected the suggestion that, when "the infraction of the Constitution is slight," "the courts may be trusted to see that the reduction [of guaranteed freedom] shall not be duly extended." A constitutional question, they explained, cannot be decided "by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar but more serious infractions which might be conceived." Any reduction in constitutional protections for individual freedom "is not to interpret that instrument but to disregard it."[179]

III. The Asylum of Avarice and Ambition

A commonplace of political history is that democratic institutions have foundered, time and again, soon after special-interest groups learned to manipulate government so as to enrich themselves from the public treasury at their fellow-citizens' expense. In the Constitution, the Founders sought to provide against this contingency through a system of checks and balances anchored in what they hoped would be a permanent popular respect for the principles of natural law. Yet they recognized that the new seat of the national government, "the ten mile square," "would be the asylum of the base, idle, avaricious and ambitious."[180] Their knowledge of history

[177] 341 U.S. 494, 517, 542, 525, 539-40 (1951) (Frankfurter, J., concurring). He argued that, in the "careful weighing of conflicting interests," "[f]ull responsibility for the choice [of which interest is to prevail] cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." Rather, "[p]rimary responsibility for adjusting the interests which compete . . . of necessity belongs to the [legislature]." "How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced . . ., but to be respected unless outside the pale of fair judgment."

[178] Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955).

[179] Patton v. United States, 281 U.S. 276, 292 (1930).

[180] G. Clinton, *The Letters of "Cato,"* in Essays on the Constitution, *supra* note 30, at 265.

and human nature led them to fear what might arise from

> this happy place, where men are to live, without labor, upon the fruit of the labors of others; this political hive, where all the drones in the society are to be collected to feed on the honey of the land. How dangerous this city may be, and what its operation on the general liberties of this country, time alone must discover . . . .[181]

Time has proven that their concerns were amply justified.

The denizens of the "ten mile square" perhaps always knew that special-interest groups are ever-ready to parasitize the community through state-action of one kind or another, when not thwarted by constitutional limitations. But in the last century they also discovered that a majority of ordinary people seem willing to trade their own and their fellow-citizens' liberties for the false security of governmental privileges, subsidies, and other political hand-outs—even though accompanied (as such gratuities from an absolute sovereign are always accompanied) by heavy regulatory "strings."[182] Aided by the courts, and particularly by the intellectual and academic communities, they turned this knowledge to good account, gradually elaborating a system of positive law, centrally directed from the "political hive" of Washington, D.C., that in principle claims the power to control every aspect of human existence in the United States whenever the political process deems such control expedient.

To speak, then, of the United States Constitution *and* rights is misleading unless the statement emphasizes the disjointness between the two. For the Constitution, founded in natural law as an embodiment of and protection for individual rights, has been transformed into an instrument for the subordination of rights to an effectively unlimited government ruled—or, perhaps, *driven* is more descriptive—by the very passions the Founders most feared: avarice, ambition, and the love of power. Where these passions will carry this society, no one can foretell accurately—except that, if History teaches any lesson, it will not be to the fulfillment of those objects of government the Preamble to the Constitution catalogues.

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[181] Remarks of Thomas Tredwell, in the New York Convention, reported in 2 J. ELLIOT, *supra* note 4, at 402.

[182] *Compare* G. GARRETT, THE PEOPLE'S POTTAGE (1953), *with* Wickard v. Filburn, 317 U.S. 111, 131 (1942) ("It is hardly lack of due process for the Government to regulate that which it subsidizes.").