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INTRODUCTION

No constitutional test is more important than the compelling-government-interest test. It is the foundation of all analysis of constitutional rights. But can a government interest really defeat a constitutional right?

The courts repeatedly say that claims of constitutional rights must give way to government interests. The courts even sometimes say that a compelling government interest justifies the infringement of a right—as when the Supreme Court asks "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right."[1] In support of such doctrine, it often is said that rights are "not absolute."

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All quotations in this Article, other than those from the Constitution, are rendered in conventional modern English—that is, they are reproduced with modern spelling and capitalization, and without italicization, and abbreviations are spelled out. The only exceptions are where the original English is retained for emphasis.

1. Sherbert v. Verner, 374 U.S. 398, 406 (1963). Lest one think this was inadvertent overstatement, the Court concluded that it was "highly doubtful" whether the sort of evidence presented in that case "would be sufficient to warrant a substantial infringement of religious liberties." *Id.* at 407.

This sort of analysis of rights and government interests raises a profoundly important question about the structural relationship between rights and power. Which type of claim is superior? And which is subordinate? Put another way, is government power subject to rights, or are rights subject to government power? The Supreme Court itself has begun to ask such questions—as when the Court, in *Citizens United v. Federal Election Commission*, recognized the possibility that political speech may stand beyond any government interests—the possibility that "political speech simply cannot be banned or restricted as a categorical matter."[2] But the Court left the question unanswered and thereby has continued to leave even enumerated rights subject to power.

One might expect that rights would have the upper hand. Much traditional Anglo-American political theory suggested that rights prevailed over power, and American constitutions enumerated rights to overcome the power granted to

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2. Citizens United v. FEC, 130 S. Ct. 876, 898, 919, 924, 925 (2010). Along these lines, Eugene Volokh observes that "[t]here are restrictions the Court would strike down . . . even though they are narrowly tailored to serve a compelling state interest." Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2417 (1996). He further argues that:

> an approach that operates through categorical rules—such as a per se ban on content-based speech restrictions imposed by the government as sovereign—coupled with categorical exceptions, such as the exceptions for fighting words, obscenity and copyright . . . would better direct the Court's analysis, and would avoid the erroneous results that strict scrutiny seems to command.

Id. at 2418.

Indeed, in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 536, 543, 544, 547-49 (2001)—a spending case rather than case of sovereign commands—the Court focused on whether the restriction violated the First Amendment without bothering to consider whether the restriction was justified by compelling government interests.

Of course, in suggesting that political speech may be unconditionally protected by the First Amendment, the Court may have been speaking too colloquially. More accurately, the Amendment bars Congress from making laws abridging the freedom of speech, and this is a hint that the analysis should focus on the law rather than simply on the speech. For example, the First Amendment appears to bar laws that constrain speech on account of its being political, but it surely does not thereby bar laws against, for example, treason or defamation, under which political speech may be evidence of violations.

government. Contemporary judicial doctrine, however, reaches a different conclusion. It subjects enumerated rights to compelling government interests and thereby inverts the theoretical and constitutional relationship of such rights and government power.

Elements of this argument are familiar. Ronald Dworkin's description of rights as "trumps" nicely captures how rights ideally operate to defeat other claims—most significantly, claims of power.[3] Without relying on Dworkin's understanding of the matter (which has been disputed), and without claiming that all rights are trumps, this Article argues that enumerated constitutional rights should be understood to trump power and that the contrary position overturns their relationship to power.[4]

This view stands in contrast to current jurisprudence. As put by Richard Pildes, rights are widely understood to be merely the means of "channeling the *kinds of reasons* government can invoke when it acts in certain arenas."[5]

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3. Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153, 153 (Jeremy Waldron ed., Oxford Univ. Press 1995) (1984).

4. What Dworkin meant in saying that rights are trumps has been disputed. *Compare* Richard H. Pildes, *Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998), *with* Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301, 305 (2000). *But see* Richard H. Pildes, *Dworkin's Two Conceptions of Rights*, 29 J. LEGAL STUD. 309, 311-12 (2000).

5. Pildes, *Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, *supra* note 4, at 729.

According to Pildes, government can qualify rights "when the state acts on the basis of justifications consistent with the character of the relevant common good in question." *Id.* at 761. It is unclear, however, exactly how claims of compelling government interests can ever really be consistent with the claims of rights that they defeat. Pildes' point about justifications "consistent with the character of the relevant common good in question," appears to echo the test in *United States v. O'Brien* under which a regulation of expressive conduct can be constitutional only if it furthers an important government interest that is "unrelated to the suppression of free expression." United States v. O'Brien, 391 U.S. 367, 377 (1968). This qualification is not part of the more typical doctrines applying government interests, and it therefore would appear that Pildes is really offering an idealized version of contemporary jurisprudence rather than an entirely descriptive account.

Although Jeremy Waldron disagrees with Pildes' understanding of Dworkin, he observes that Pildes generally makes a good case that "[r]ights are ways to

Thus, when government acts on acceptable reasons, it can "infringe even the most fundamental rights."[6]

When rights, however, are understood structurally, it becomes apparent that enumerated rights are stronger than claims of government power. Of course, many questions of rights run into deeper waters, and the argument here does not follow them far in that direction.[7] But at least when rights are considered in the structural arrangement of enumerated rights and powers in the U.S. Constitution, the rights are distinctively strong claims, and it thus becomes apparent that the current judicial analysis of rights inverts their relationship to power.

Rights often get left out of structural understandings of constitutional law. Indeed, questions of rights are often viewed as different from questions of structure. Yet if enumerated rights are the means of elevating private spheres of authority above the authority of government, then they are as much a part of the structural arrangement of power as any other part of constitutional law, and the inversion thus has structural significance for the limitations on government.[8]

The inversion is sobering, for although it may be tempting to dismiss it as a merely theoretical problem, it cuts into the everyday freedom of Americans. When rights trump powers, they sharply limit government, notwithstanding its powers. When powers can trump rights, however, the rights

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channel the kinds of reasons and justifications government can act on in different domains." Waldron, *supra* note 4, at 305.

6. Pildes, *Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, *supra* note 4, at 729; *see also* Pildes, *Dworkin's Two Conceptions of Rights*, *supra* note 4, at 311-12 (government can "infringe individual interests on the basis of certain reasons but permit infringement on other grounds").

7. The jurisprudential literature is of limited relevance for this Article—in part because of the jurisprudential tendency to generalize about rights as a whole. In contrast, for purposes of understanding traditional constitutional structure, enumerated and unenumerated constitutional rights are very different, and both are different from non-constitutional rights.

8. For a recent recognition of the structural role of rights, see Barry Cushman, Carolene Products *and Constitutional Structure*, 2012 SUP. CT. REV. 321, 322-24, 334 (2013) (regarding due process limits on the power over interstate commerce).

become vulnerable to claims of superior power, and this has consequences both in court and out of court—as will become apparent from cases on national security, religious liberty, jury rights, and freedom of speech.[9]

Caveats & Objections. —Of course, the argument here comes with caveats and objections. Rather than defeat the argument, however, these qualifications reveal its limits.

The caveats will become obvious but are worth stating expressly. For one thing, the argument here concerns only enumerated constitutional rights and their relationship to government power. In other words, its logic does not apply to unenumerated constitutional rights (as will be explored in Part I.C.).

Second, although it is possible that at least some non-constitutional rights and powers are absolute in relation to other non-constitutional rights and powers, such ideas are not pursued here.[10] The non-constitutional questions are interesting, but the complexities would distract from this Article's relatively simple constitutional point.

Third, even as to the constitutional question, this Article rests on a pair of empirical inquiries. It examines the changed relationship of constitutional rights and powers, and the consequences of inverting this structure. These empirical questions are the foundation of the argument, and this Article therefore has no need to dig into deeper jurisprudential questions about rights.

In this connection, it is worth emphasizing that this Article looks back to history to measure the subsequent loss in rights, not to assert the authority of the past. The Article therefore makes no claim about the optimal method for

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9. The argument here is loosely aligned with Vincent Blasi's suggestion that speech rights should be formulated from a "pathological perspective"—meaning that they should be formulated for "the worst of times." Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-51 (1985). For the alignment and some differences, see *infra* Part VI, especially section D.

10. For a discussion of such issues, see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (questioning "rights essentialism" as to private rights).

interpreting the Bill of Rights, nor even about the optimal extent of any particular right. Instead, the goal is, more generally, to observe changes in the protection for rights, for by this means one can see the danger of doctrines that invert rights and power.[11] Such are the caveats.

Some predictable objections further illuminate the limited character of the argument here; rather than identify real obstacles, these objections refine the argument's focus. For example, it inevitably will be objected that rights cannot be understood without reference to government interests or powers. Certainly, when lawmakers establish rights, they need to take government interests or powers into account, but this does not mean that they need to define rights in terms of such interests or powers.

Similarly, it may be objected that, metaphysically, rights are not absolutes. But this Article's argument has little to do with the ultimate nature or character of rights; instead, it merely examines the structural relationship of enumerated rights to powers in American constitutions, particularly the U.S. Constitution. On this foundation, it will become apparent that if such rights are to have adequate bite—if they are to protect liberty when it is under profound stress from a majority or other dominant opinion—then they must be structurally absolute in the sense that they are not qualified by government interests or expressions of power.[12]

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11. For example, the Second Amendment right to bear arms can be interpreted in many ways, and can be understood either broadly or narrowly, but rather than address such questions, this Article merely suggests that, like other enumerated rights, it should be understood in a way that does not subject it to government power.

12. Of course, there are yet other possible objections. For example, it may be thought that the inversion affects only the periphery of rights, not their core. It will be seen, however, that the inversion actually cuts into central claims of rights. *See infra* Parts II and VI

Another objection may be that the argument here is merely terminological. Yet the framing of rights has consequences. Although there always is a danger that government will violate rights, some ways of framing of rights have the effect of legitimizing violations.

A further concern may be that this Article elevates form over function. Forms of law, however, including the forms of rights, can have functional advantages, thus uniting form and function. This point will be pursued later, *see infra* Part III, but already here it can be noted that, just as there is much value to rule

Summary. —In many other societies (from imperial Rome to modern Europe) power has traditionally been superior to rights. Even in the United States, where at least some rights are enumerated, power has at times prevailed over them, for the claims of government are often in tension with liberty and cannot always be stayed.[13] But it has been left for twentieth and twenty-first century judges to elevate power over rights, even enumerated rights, as an American constitutional ideal. The result is that whereas enumerated rights once were superior to government power, they now are subordinate to the very power they were designed to confine.

This Article begins (I) by observing the structural relation between rights and power in the U.S. Constitution—showing how, in contrast to Continental ideas of absolute power, the U.S. Constitution traditionally enumerated constitutional rights as absolute exceptions to government power. The Article then (II) shows how judicial doctrine has inverted rights and powers—the primary example being the compelling-government-interest test. The Article rounds out its argument by examining (III) the place of interests and other functional analysis in understanding rights and (IV) the structurally absolute character of enumerated

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utilitarianism, so there is much value to what might be called rights utilitarianism.

Yet another possible question is whether the choice between absolutely protecting rights, and allowing power to trump them, is merely another instance of the choice between rules and standards. The rules-standards debate, however, addresses a much broader problem. For example, it mostly concerns non-constitutional rights and often merely a conflict over rights between private parties, and thus, where the rights are treated as mere standards, the balancing often elevates merely the interest of one private party over another. In contrast, the problem here exclusively concerns constitutional rights, and the balancing or trumping is done not for a range of parties, private and public, but for the government. The problem here is therefore both narrower and more serious than the average rules-standards problem. Accordingly, when the inversion problem is swept under the rules-standards rug, a profound constitutional danger is masked under the familiar and reassuring terminology of a more mundane question.

13. Traditionally, when executive officers thought it necessary for them briefly to exceed the law for the sake of the nation, they were expected to throw themselves on the mercy of the people, or their legislature, which could indemnify the officers or leave them to their fate in the courts, as it saw fit. In this way, they could depart from law as necessary, without legitimizing unlawful power. For a contemporary approach to the question, see generally Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

constitutional rights and how, as a result of the inversion, their character has changed. Finally (V & VI), the Article examines the inversion's alleged benefits and its sobering practical costs.

Topping off this argument, the Appendix shows that when Americans introduced the inversion, they drew upon Continental absolutist ideas. It thus is not a coincidence that constitutional rights have been subjected to power.

I. STRUCTURAL RELATION OF RIGHTS AND POWER

Enumerated rights limit power. Giving effect to this structural relationship, American constitutions not only allocate powers and rights but also arrange these spheres of authority in relation to each other so that enumerated rights carve out exceptions from government power. Put another way, government power is subject to constitutionally enumerated rights.

A. *Two Traditions of Rights*

Roughly speaking, two predominant legal traditions have evolved in the past millennium—an absolutist Continental tradition and a constitutionalist Anglo-American tradition.[14] Although they could be viewed as merely historical, their contrasting paths remain important,

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14. Of course, this generalization is subject to a host of obvious qualifications. Nonetheless, it is difficult to think of a legal tradition that has been as dominant in the last thousand years as either the common law or the civil law.

More narrowly, one might question whether the civilian tradition should be characterized as absolutist. Certainly, there were repeated efforts by many civilian scholars to limit the worst elements of the absolutism, as evident from at least the time of Accursius onward. *See infra* note 23. Even when thus moderated, however, civilian scholarship typically leant toward accepting one degree or another of absolute power.

In the wake of World War II, much scholarship on Continental law has emphasized the civilian theories that limited absolutism. It is understandable that scholars working in Continental law have sought to find in its traditions at least some foundation for limits on state power. It would be a mistake, however, to ignore the profound differences between the common law and civil law approaches to power.

for they suggest just how much is at stake in the relation of rights to power.

The Tradition of Absolute Power. —Beginning in the Middle Ages, European scholars developed ideas about absolute power. Although multiple types of power could be associated with absolutism, absolutism generally attributed to rulers (whether monarchs or, eventually, the State) a power that, at least in some instances, rose above the law and the rights claimed under it.[15] This structural understanding that government power could trump rights, even constitutional rights, is the sort of absolute power that matters here.

Although advocates of absolute power included some common lawyers, it arose mainly in the learned law—the academic study of the civil and canon law and their foundations in Roman models.[16] In this tradition, some scholars elevated the sovereign power of the monarch or the State so high as to place it above law and legal rights, and although there is no need here to explore all features of this absolute power, some elements of it require attention because they remain so suggestive about the contemporary elevation of power over rights.

One sort of power associated with absolutism was the power to bind subjects, not merely through and under the law adopted by the community or its representatives, but also beyond the law and above it. In civilian systems, it seemed an inherent characteristic of sovereignty that a ruler could impose his will through mere commands or orders and thus outside the regular mechanisms of lawmaking. This was not to say he should rule in such a manner, but simply that he could. And at least when he exercised power extralegally—through commands rather than legislative acts—he seemed

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15. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 25-26 (2014).

16. *See* Francis Oakley, *Jacobean Political Theology: The Absolute and Ordinary Powers of the King*, 29 J. HIST. IDEAS, 323, 331-32 (1968). For some theological beginnings, see WILLIAM J. COURTENAY, CAPACITY AND VOLITION: A HISTORY OF THE DISTINCTION OF ABSOLUTE AND ORDAINED POWER 87 (1990) (regarding philosophic development of ideas about God's potential to ordain law differently than he did).

free to act regardless of any law to the contrary. His extralegal power thus was also largely supralegal. This understanding of sovereign power has emboldened rulers from the Middle Ages to the present—from kings to bureaucratic states—to claim a power that defeats rights, even legally protected rights.[17]

Elevating this point of view to political theory, Jean Bodin defined the sovereign as one who enjoyed a power outside and above the law—a power that therefore could not be challenged on grounds of rights. It was "an absolute power, not subject to any law" and thus a power to "dispose of the goods and lives, and of all the state at his pleasure."[18] More recently and crudely, the Nazi apologist Carl Schmitt celebrated sovereignty as the power to institute emergency power, proclaiming: "Sovereign is he who decides on the exception."[19] This sort of power was an exception to law and the rights claimed under it.

A second aspect of absolutism was to view government as the ultimate source of authority in society and thus as the final judge of what was best for the people. In the Middle Ages and later, some civilian-influenced commentators attributed such authority to rulers, but from the sixteenth century onward, they increasingly attributed it, instead, to the State.[20] From this perspective, regardless of whether the

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17. For example, Thomas Cromwell encouraged Henry VIII to believe that "his will and pleasure" should be "regarded for a law" because this was what it "was to be a very king." Letter from Stephen Gardiner to Protector Somerset (Oct. 14, 1547), *in* THE LETTERS OF STEPHEN GARDINER 379, 399 (James Arthur Miller ed., 1933) (recounting conversation with Cromwell and the king).

18. JEAN BODIN, THE SIX BOOKES OF A COMMONWEALE 73, 84, 88, 92, (Kenneth Douglas McRae ed., Richard Knolles trans., facsimile reprint 1962) (1606). Such a ruler could deign to act through his ordinary laws, but he could not thereby limit himself if he was to remain sovereign or absolute. Of course, as Kenneth Pennington emphasizes, even this was not a freedom from "the laws of God and nature," for "all princes and people of the world are unto them subject," even if only "before the tribunal seat of almighty God." *Id.* at 92, 104; KENNETH PENNINGTON, THE PRINCE AND THE LAW 276-283 (1993).

19. CARL SCHMITT, POLITICAL THEOLOGY 5-7 (George Schwab trans., Univ. Chi. Press 2005) (1922).

20. *See, e.g.*, BODIN, *supra* note 18, at 168 (arguing that the right of hearing "the [l]ast [a]ppeal" was a mark of sovereignty).

State acted through law or outside it, the State had a power to act in interests of the society, even if at the cost of law and legal rights.

This supreme State authority was sometimes explained in terms of a third element of absolutism, the doctrine of state necessity. Necessity, it was said, had no law—*necessitas non habet legem*. From this perspective, necessity defeated rights, regardless of whether the State acted through law or through mere executive commands.[21] In contemporary terms, when government had necessitous or compelling interests, its interests rose above claims of rights.

Of course, many civilian commentators worried about the extent of power such ideas could justify, and some attempted to moderate the worst dangers—for example, by developing doctrine on *causa*. A standard example of the unjust exercise of power was a ruler's decision to take property from one of his subjects and give it to another. Rather than celebrate this extraordinary power, commentators tended to regret it. They did not deny that a ruler could do such a thing, but they sought to discourage it, and they therefore argued that a ruler could not transfer property in this way without *causa*—that is, without a cause or reason.[22] Although the words have changed, this amounted to a requirement that the ruler had to have a compelling interest.

In such ways, the absolutist tradition hints at the genealogy and danger of ideas about overriding state interests. Exactly how this tradition and its doctrines about compelling state interests entered American law must be relegated to the Appendix, but already here the absolutist heritage is enough to make one worry.

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21. ALBERICI DE ROSATE, DICTIONARIUM IURIS: TAM CIVILIS, QUAM CONONICI (Facsimile reprint 2009) (1581); *see also* WALTER ULLMANN, THE MEDIEVAL IDEA OF LAW AS REPRESENTED BY LUCAS DE PENNA 95 (Barnes & Noble, Inc. 1969) (1946).

22. *See* ULLMANN, *supra* note 21, at 100-03. For another discussion of this just cause requirement, and how little it really constrained rulers, see R. W. CARLYLE & A. J. CARLYLE, 6 A HISTORY OF MEDÆVAL POLITICAL THEORY IN THE WEST 453 (Barnes & Noble, Inc. 1962) (1936) (paraphrasing Gentili on the power of the prince to take his subjects' property).

The Constitutional Tradition. —In contrast to the absolutism tradition was the constitutional tradition that flourished in common law countries. Aspects of this approach developed on the Continent, but it was pursued most consistently in the United States.

What elevated law, and thus constitutional rights, above sovereign power was the underlying power of the people to make law. The thirteenth century English judge Bracton already hinted that the law established the ruler and that a law made by the people might bind the ruler.[23] By the fifteenth century, some Englishmen were disputing whether the "ordinances of men, by which some of them are raised into kings" really "deserve to be called constitutions"—this being a variant of the old Roman name for an enacted law.[24] And at least by the seventeenth century, it was commonplace to

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23. Bracton recited the familiar notion that the king was to "temper his power by law, which is the bridle of power, that he may live according to the laws," and then suggestively added: "for the law of mankind has decreed that his own laws bind the lawgiver." 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 305 (George E. Woodbine ed., Samuel E. Thorne trans., 1968) (1922) [hereinafter BRACTON]. Brian Tierney suggests that Accursius took such a view and, indeed, that he was the source of Bracton's ideas. Brian Tierney, *"The Prince is not Bound by the Laws." Accursius and the Origins of the Modern State*, 5 COMP. STUD. SOC'Y & HIST. 378, 400 (1963). Although Accursius sought to confine the danger from absolutist Roman texts, he did not go nearly as far as Bracton. As Tierney himself notes, Accursius merely argued that the prince, by his own will, subjects himself to the law. *Id.* at 390. Even when Accursius engaged in "a sort of rhapsody on the rule of law," *id.* at 394, he still was merely arguing that the prince should choose to submit to the laws—laws that Accursius identified as "promulgated by the divine will." *Id.* at 393. In contrast, it should be recalled, Bracton speaks of the law as the "bridle of power," and says that "the law of mankind has decreed that his own laws bind the lawgiver." BRACTON, *supra*, at 305. Bracton understood the possibility that human law could limit other human law, and he thereby went much further than the learned lawyers on the Continent who had to remain within their absolutist Roman framework, and who therefore could, at best, attempt to moderate it.

The failure of the learned lawyers to break out of the absolutist mold is recognized by Kenneth Pennington. As he puts it, the jurists, in "a slightly paradoxical argument," argued that "the prince should conform to the provisions of the law, although he himself was not bound by it." PENNINGTON, *supra* note 18, at 59.

24. John Fortescue, *De Natura Legis Naturæ*, *in* 1 THE WORKS OF SIR JOHN FORTESCUE 73, 200 (Thomas Fortescue ed., facsimile reprint 1978) (1869) (constitutiones merenter dici).

speak about how the people adopted the "constitution" of their government.[25]

The conceptual point was that constitutional law, including constitutional rights, trumped any government power. If all sovereign or government power came from the people—in particular, if it came from the people's enactment or constitution establishing the government—then sovereign power was subject to that law and any rights it secured. As put by the sixteenth century Scottish theorist George Buchanan, the "voice of the people" had the effect of "circumscrib[ing]" the society and thereby also the ruler within "the hedge of laws."[26]

Seeking to avoid any such constraint, Buchanan's most famous student, James VI of Scotland—soon to be James I of England—argued that his power came not from the people, but from God, and that, therefore, James himself had created the Scottish constitution.[27]

Those who distrusted kings, however, had the advantage of arguing from the power of the community or people. In the 1640s, for example, the Parliamentary pamphleteer Henry Parker asserted: "[p]rinces were created by the people, for the

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25. PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 84-90 (2008).

26. GEORGE BUCHANAN, DE JURE REGNI APUD SCOTOS 71, 113 (Philalethes trans., n.p. 1680). Buchanan was not alone. According to *Vindiciæ Contra Tyrannos*, "the king receives the laws from the people," and "if the laws be superior to the king," and if "the king be tied in the same respect of obedience to the laws, as the servant is to his master[,] who will be so senseless, that will not rather obey the law, then the king?" Thus, "the king is not lord over the laws." JUNIUS BRUTUS, VINDICIÆ CONTRA TYRANNOS 63, 66 [sic] (sigs. K2[r], K[3v]) (London 1648). Francois Hotman noted that "the kings of France have not been granted unmeasured and unlimited power by their countrymen and cannot be considered absolute," for "they are bound by definite laws and compacts"—the laws being "leges regias," which came from the people. Francois Hotman, *Francogallia*, *in* CONSTITUTIONALISM AND RESISTANCE IN THE SIXTEENTH CENTURY: THREE TREATISES BY HOTMAN, BEZA, & MORNAY, app. at 90, 92 (Julian H. Franklin ed. & trans., 1969). This was from Chapter XXV, which Hotman added in the third, 1586 edition to emphasize that the French king "does not have unlimited dominion in his kingdom but is circumscribed by settled and specific law." *Id.* at 90.

27. King James VI and I, *The Trew Law of Free Monarchies*, *reprinted in* THE POLITICAL WORKS OF JAMES I 53, 61-62 (Charles Howard McIlwain ed., 1918) (1598).

peoples sake, and so limited by express laws as that they might not violate the peoples liberty."[28] Of course, the same argument could be made against Parliament when it claimed absolute power, and the royalist judge David Jenkins therefore hammered away at the legislature in the 1640s, declaring that "the safety and security of the English people, their lives, their liberties, and peculiar proprieties, are as it were entrusted to the guardianship, and deposited in the keeping and defense of laws and constitutions of their own framing."[29] If power came from the people, and if the people empowered their rulers through their constitution, then there could not be any lawful power that was not subject to the constitution and constitutional rights.

The English settled that power was subject to rights in the Revolution of 1688. King James II sought in various ways to assert absolute power over legal rights, and partly for this reason, the English chased him out the country and established William III and Mary as king and queen. In so doing, the English used their Declaration of Rights to make clear that royal power was subject to rights. The Declaration recited James' violations of law as the ground for his departure from the throne, and it then vindicated the violated rights by declaring them and making William's commitment to "preserve" them the basis for crowning William and Mary.[30] This couple sat as sovereigns, but their power was subject to the rights of the people.

Constitutional Limits on Legislative Power. —Although the Crown in the seventeenth century was subjected to the constitution and constitutional rights, Parliament increasingly claimed a sovereign power above law. Predictably, it used this power in a high-handed way, and

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28. HENRY PARKER, JUS POPULI 2 (London, 1644).

29. DAVID JENKINS, THE KING'S PREROGATIVE AND THE SUBJECT'S PRIVILEDGES ASSERTED 49 (London, 1684). Jenkins understood that the English had layers of constitutional documents and traditions, and therefore tended to speak of multiple "constitutions." HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 25, at 88 n.44.

30. An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (Declaration of Rights), 1689, 1 W. & M., sess. 2, c.2 (Eng.).

after Americans suffered under Parliament, they subordinated even legislative power to their constitutions and constitutional rights.

In the 1640s, when Parliament began to defeat royal absolutism, its supporters claimed that it now enjoyed absolute power—even an absolute power over rights. William Prynne, for example, urged that Parliament could imprison men without regard to Magna Carta or habeas corpus, explaining that it had "an absolute sovereignty over the laws themselves"—"yea, over Magna Carta."[31] Although in the next century, Blackstone avoided such dramatic statements, he concluded that Parliament enjoyed a constitutional power above law—the legislature being "the place where . . . absolute despotic power . . . is entrusted by the constitution of these kingdoms."[32] To be sure, this was a power exercised through statutes, but it was absolute in being unlimited by law, and it thus was a power over all rights.

Parliament thereby came to exercise power over the rights that Americans expected to hold as Englishmen. Consequently, when Americans, in their Declaration of Independence, recited George III's acts of oppression, they included some that were really Parliamentary violations of their rights. The Americans complained, for example, of his "quartering large bodies of armed troops among us," of his "imposing taxes on us without our consent," and of his "depriving us, in many cases, of the benefits of trial by jury."[33] These were among the "[o]ppressions" that Parliament had authorized on the foundation of its absolute power.[34]

In reaction to their experience with Parliament, Americans generally aimed to establish constitutions that limited all parts of their government, including their

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31. WILLIAM PRYNNE, THE SOVERAIGNE POWER OF PARLIAMENTS AND KINGDOMES: DIVIDED INTO FOURE PARTS, First Part, 46, 93, 103, Fourth Part, 15 (London, 1643).

32. 1 WILLIAM BLACKSTONE, COMMENTARIES *156.

33. THE DECLARATION OF INDEPENDENCE paras. 16, 19, 20 (U.S. 1776).

34. *Id.* at para. 30; *see* Quartering Act, 1765, 5 Geo. 3, c. 33 (Eng.); *see also* Amendment to Quartering Act, 1774, 14 Geo. 3, c. 54 (Eng.); Stamp Act, 1765, 5 Geo. 3, c. 12 (Eng.).

legislatures, and they thereby ensured that all government power would be subject to constitutional rights. Writing in 1786 about the people of North Carolina during the Revolution, James Iredell explained that they "were not ignorant of the theory, of the necessity of the legislature being absolute in all cases, because it was the great ground of the British pretensions," and on their "own severe experience" with this theory, the people of the state "decisively gave our sentiments against it."[35] They had adopted their constitution as "the fundamental basis of our government" so as "to impose restrictions on the legislature that might still leave it free to all useful purposes, but at the same time guard against the abuses of unlimited power."[36] Accordingly, there was "no doubt, but that the power of the assembly is limited and defined by the Constitution"—and this meant primarily its enumeration of rights.[37] As the

35. James Iredell, *To the Public* (Aug. 1786), *reprinted in* 3 THE PAPERS OF JAMES IREDELL 227, 227-28 (Donna Kelly & Lang Baradell eds., 2003) (emphasis omitted).

36. *Id.* at 227.

37. *Id.* at 228. For example, when the North Carolina Superior Court, in 1787 in *Bayard v. Singleton*, held a North Carolina statute unconstitutional, it explained that "by the [state's] constitution every citizen had undoubtedly a right to a decision of his property by a trial by a jury." 1 N.C. 42, 45 (1787); *see also Newbern, June 7*, VA. INDEP. CHRON., July 4, 1787. It added that if "the legislature could take away this right," it could do anything else prohibited by the Constitution: "[I]t might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all." *Bayard*, 1 N.C. at 45; *see also Newbern, June 7*, *supra*. For details, see HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 25, at 449-61.

A decade earlier, the same court held that a judicial act violated a constitutionally guaranteed right. After a 1777 North Carolina Statute authorized county courts to detain and sell manumitted blacks, the Perquimans County Court held and sold a substantial number of men, women, and children who had been freed prior to the enactment of the statute. On certiorari, the Superior Court therefore held the County Court's proceedings "[n]ull and [v]oid" on the ground that:

> the said County Court, in . . . their proceedings, have exceeded their jurisdiction, violated the rights of the subjects, and acted in direct opposition to the Bill of Rights of this state considered justly as part of the Constitution thereof, by giving a law not intended to affect this case a retrospective operation thereby to deprive free men of this state of their liberty contrary to the law of the land.

North Carolina lawyer Archibald Maclaine observed about his state's legislature, "[t]he assembly is the sovereign of this country[,] having all the powers of the people delegated to them under certain restrictions."[38] Rights trumped power.

B. *Enumerated Rights in American Constitutions*

Both in the state constitutions and the federal Constitution, Americans carved out rights as exceptions from powers. They gave power—legislative, executive, and judicial—to their governments and then guaranteed rights that restricted or withdrew portions of this power.[39] Power thus was subject to enumerated rights rather than the other way round.

The U.S. Constitution revealed the relation of rights and powers already in its allocation of powers to the three branches of government. In section 8, Article I granted enumerated powers to Congress, and immediately afterward, in section 9, it carved out various rights, such as that against a bill of attainder or an ex post facto law. These were exceptions to the powers, and ordinarily that was the end of the matter.

The Constitution, of course, could also specify a subsequent government interest or power, which defeated a right—as when the Constitution stated: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[40] The Constitution thus identified where a

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State v. Clerk of Perquimans County (N.C. Superior. Ct., 1778), as quoted in HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 25, at 389.

38. Archibald Maclaine, Memorandum (c.1786), as quoted in HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 25, at 470-71.

39. Of course, some states, Connecticut and Rhode Island, did not follow this pattern because they did not adopt express constitutions. HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 25, at 436.

40. U.S. CONST. art. I, § 9. Another example was the provision that "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." *Id.* It is disturbing to think of this provision as a right, and certainly it threatened other rights, but it

government interest justified an exception from an enumerated right. But otherwise the enumerated rights were exceptions from power.

When Anti-Federalists demanded a bill of rights, they relied on the general assumption that a right was a secure exception, which always defeated power. They feared that the Constitution's enumeration of powers would not adequately limit the new government, and they therefore demanded an enumeration of rights, for only by this means, they thought, could power be constrained. As one of them explained, "wherever the powers of a government extend to the lives, the persons, and properties of the subject, all their rights ought to be clearly and expressly defined—otherwise, they have but a poor security for their liberties."[41]

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nicely illustrates how a wide range of limitations on the federal government could function as rights.

41. *A Democratic Federalist*, PA. HERALD, Oct. 17, 1787, *reprinted in* 13(1) THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 386, 388 (John P. Kaminski & Gaspare J. Saladino eds., 1981).

Anti-Federalist complaints of this sort were numerous. For example, the Federal Farmer argued: "[t]here are certain . . . rights, which in forming the social compact, ought to be explicitly ascertained and fixed—a free and enlightened people . . . will not resign all their rights to those who govern, and they will fix limits to their legislators and rulers." *Federal Farmer Letters to the Republican* (Letter II) (Oct. 9, 1787), *in Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; and to Several Essential and Necessary Alterations in It* (1787), *reprinted in* 14(2) THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 43, at 25, 27. Elbridge Gerry complained that "the system is without the security of a bill of rights." Letter from Elbridge Gerry to the Massachusetts General Court (Oct. 18, 1787), *in* 13(1) THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra*, at 548. Another Anti-Federalist wrote:

> There is no provision by a bill of rights to guard against the dangerous encroachments of power in too many instances to be named. . . . The rights of individuals ought to be the primary object of all government, and cannot be too securely guarded by the most explicit declarations in their favor.

MERCY WARREN, A COLUMBIAN PATRIOT: OBSERVATIONS ON THE CONSTITUTION (1788), *reprinted in* 16(4) THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra*, 272, 281-82.

Later, Jefferson observed: "What I disapproved from the first moment . . . was the want of a bill of rights to guard liberty against the legislative as well as executive branches of the government." Letter from Thomas Jefferson to Francis Hopkinson

Although Federalists at least initially disagreed about the necessity of a bill of rights, they similarly understood rights to be exceptions to powers. Alexander Hamilton, in his defense of the U.S. Constitution, explained that "[b]y a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like."[42] Similarly, when James Madison overcame his objections to a bill of rights, he introduced the initial draft of the Bill of Rights on the floor of the House of Representatives with the observation that "a bill of rights" would "enumerat[e] particular exceptions to the grant of power."[43]

C. *Unenumerated Rights*

Although the main point here is that enumerated rights were exceptions to powers, it should be recognized that the other rights retained by the people were not. Some contemporary commentators assume that the unenumerated rights protected by the Ninth Amendment had the same relationship to federal power as enumerated rights. The unenumerated rights, however, were understood to be the rights or liberty left over, after the grant of federal powers and the subtraction of enumerated rights.[44] Such rights thus were defined, in the first instance, by federal powers.

(Mar. 13, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON 649, 650 (Julian P. Boyd ed., 1958). He worried about "the important rights, not placed in security by the frame of the constitution itself." Letter from Thomas Jefferson to David Humphries (Mar. 18, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 676, 678.

42. THE FEDERALIST NO. 78, at 524 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

43. Speech of James Madison (June 8, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 77, 83 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS].

44. *See* Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 7-8 (1980); Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1, 3 (1994); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 271 (1988); Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1219-23 (1990); William Van Alstyne, *Slouching Toward Bethlehem with the Ninth*

This traditional vision of unenumerated rights may come as a surprise, for many scholars reify unenumerated rights and expect them to serve as additions to the enumerated rights. Historically, however, unenumerated rights were merely aspects of the undifferentiated freedom that was left to the people after their grant of power to federal government. This perspective is well documented, and it is important here because it illustrates the distinctive trumping character of the enumerated rights.[45]

When Anti-Federalists protested that the Constitution could not safely be ratified without a bill of rights, Federalists responded that a bill of rights was unnecessary. The Constitution's enumeration of powers would leave all unenumerated matters beyond the reach of the federal government, and in this sense the enumeration of federal powers defined a broad extent of undifferentiated liberty or unenumerated rights. On this basis, Federalists felt confident that the Constitution as proposed would protect freedom. Thus, even without a bill of rights, it was safe to ratify the document.

Indeed, some Federalists added that it would be dangerous to add a bill of rights. Although an enumeration of rights would secure what was listed, it might be taken to imply that whatever was not enumerated as a right was not constitutionally protected. In other words, an enumeration of rights would be understood to "disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government."[46] Thus, the enumeration of rights would undermine the effect of the enumeration of powers in protecting the people's unenumerated liberty or rights. Madison was among those who made this argument, and therefore, when he eventually was persuaded (primarily for political reasons) to propose the Bill of Rights, he had to

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Amendment, 91 YALE L.J. 207, 207, 209 (1981) (reviewing CHARLES BLACK, DECISION ACCORDING TO LAW (1981)).

45. For the documentation, see sources cited *supra* note 44.

46. Speech of James Madison (June 8, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 43, at 83.

admit that this was "one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system."[47]

To avoid the danger that he and his fellow Federalists had emphasized, he included in his proposed bill of rights what would become the Ninth Amendment. He designed the amendment to avoid any misconstruction of the Bill of Rights—to clarify that the enumerated rights were merely exceptions from the enumerated powers, not suggestions about further powers, which would reach any unenumerated rights. On this foundation, the amendment as finally adopted guaranteed that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[48]

It was in support of this position that Madison emphasized that "a bill of rights" would "enumerat[e] particular exceptions to the grant of power."[49] Being merely exceptions to federal power, the enumerated rights did not

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47. *Id.*

48. U.S. CONST. amend. IX.

49. Speech of James Madison, *in* CREATING THE BILL OF RIGHTS, *supra* note 43, at 83. This conception of enumerated rights was familiar because of the controversy as to whether a Bill of Rights would be taken to imply unenumerated powers—as to whether a list of rights would seem to suggest the government had power over all matters not specifically mentioned as rights. *Id.* To preserve the character of the Bill of Rights and other enumerated rights as a series of exceptions from the powers granted, the Virginia ratifying convention proposed:

> That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.

Amendments Proposed by the Virginia Convention (June 27, 1788), *in* CREATING THE BILL OF RIGHTS, *supra* note 43, at 17, 21. Echoing this, Madison proposed what developed into the Ninth Amendment:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

James Madison's Resolution (June 8, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 43, at 11, 13.

imply that unenumerated matters were within federal power. Thus, when correctly understood, and especially as clarified by the Ninth Amendment, the enumeration of rights did not imply any additional federal power over any unenumerated rights.

But this did not mean that the two types of rights had the same structural relationship to federal power. Enumerated rights carved out exceptions to federal power, and federal power thus was subordinate to these rights. The unenumerated rights, however, were both broader and weaker. They amounted to all the liberty from the federal government that remained after the Constitution granted powers and subtracted rights, and therefore, far from being exceptions from power, they were merely the remnants that were left to the people beyond the power placed in the federal government.

Enumerated rights thus were very different from unenumerated rights. Whereas unenumerated rights were defined by the limited federal powers, enumerated rights trumped federal power.[50]

In sum, enumerated rights have a profound structural relationship to government power. There is a long constitutionalist tradition of viewing rights as trumps. More particularly, in American constitutions, enumerated rights are trumps. They carve out exceptions from government power, and in this sense power is subject to rights.

II. INVERSION

Notwithstanding American constitutions, judicial doctrine nowadays subordinates rights to government power. Although constitutions still enumerate rights as exceptions from power, and although judicial doctrine still recognizes this up to a point, the doctrine then reintroduces questions of government interests or power—thus allowing power to carve out exceptions from the enumerated rights. The doctrine

50. Of course, unenumerated aspects of freedom are often protected by cases that take broad interpretations of the enumerated rights, but the point here is simply to understand how the Constitution structured rights and powers, not to inquire whether unenumerated rights should be secured through broad conceptions of the enumerated rights.

thereby allows power to defeat any aspect of a right, not just at its periphery, but even at its core. The result is to invert the constitutional relationship of rights and powers, making rights subordinate to the very powers they are meant to limit.

A. *Compelling Government Interests*

The primary mechanism by which enumerated rights are subject to power is the doctrine on compelling government interests. This doctrine is all about subordinating rights to power.

In terms of legal realism, rights and powers are competing "interests"—individuals having liberty interests and government having government interests. It will be seen in Part IV that constitutional powers and rights are not merely interests; instead, they are spheres of authority, the powers belonging to government, and the rights to those it governs. Moreover, even if enumerated rights are interests, they are not merely individual interests, for with few exceptions, most such rights also belong to corporations and other artificial persons. Nonetheless, the notion that rights are individual interests and that powers are government interests has become pervasive in judicial opinions, not least those that allow government interests to trump individuals' rights.

Of course, it may be doubted whether a government's claim about its interest is always a claim about its power. At least in arguments about compelling government interests, however, the claim about the government's interest is really a claim about its power—a power that defeats a competing right. As put by the Supreme Court, the question is whether there is a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate."[51] Thus, when a judge evaluates a government interest, he is deciding whether the interest of the government in its power trumps the interest of individuals in their rights.

Initially, this may seem surprising because the compelling-government-interest test is presented as if it were

51. Sherbert v. Verner, 374 U.S. 398, 403 (1963) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

especially protective of rights. The Supreme Court emphasizes that "only" a compelling government interest can defeat a right, and it frames the inquiry by saying that it is exercising "strict scrutiny."[52] The judges thereby seem to be reassuring themselves, and fellow Americans, that they are doing all they can to protect constitutional rights.

But the compelling-government-interest test is protective of rights only as compared to a looser balancing test, not compared to the tradition that rights trump power. And strict scrutiny is not really a heightened duty of judgment or inquiry, but rather is merely a presumption in favor of an enumerated right, until the right is defeated by a government interest. Again, this is strict compared to mere balancing, but not compared to the traditional trumping effect of rights.

The compelling-government-interest test is thus less protective than it purports to be. It is presented in legitimizing ways, but in reality the test requires judges to reject claims of right on account of claims of power.

In this way, the compelling-government-interest test inverts the relation between rights and powers. Whereas rights once rose above power, now power rises above rights.[53]

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52. *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 895 (1990) (O'Connor, J., concurring); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); *cf.* United States v. O'Brien, 391 U.S. 367, 377 (1968).

53. Although the danger from this inversion of rights and powers usually goes unrecognized, the Supreme Court glancingly noticed it in at least one case, *United States v. O'Brien*. This was a prosecution of a man who had burned his draft card, and it remains the leading case on expressive conduct—on conduct in which "'speech' and 'nonspeech' elements are combined." *O'Brien*, 391 U.S. at 376-77 (1968). As might be expected, the Court decided the case on the doctrine that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376. The Court ordinarily might have stopped with this, but because the right at stake in *O'Brien* seemed so significant, the Court added that a regulation of expressive conduct can be constitutional only if it furthers a government interest that is "important or substantial" and is "unrelated to the suppression of free expression." *Id.* at 377. This insistence on an important government interest unrelated to suppression was a departure from the usual doctrine on compelling government interests, and it cannot easily be reconciled with the Constitution's apparently equal treatment of different rights. It at least, however, reveals some

B. *Balancing*

The inversion of rights and power can also be observed in the doctrine on "balancing"—the doctrine that allows government interests to prevail where they simply outweigh claims of liberty. Under this sort of test, the government interest need not be particularly compelling; instead, it need only outweigh the individual interests.

This balancing has flourished where the government substitutes administrative process for the due process of law in a court. Although the Supreme Court in *Mathews v. Eldridge* states the doctrine in terms of three factors, the gist of the doctrine is that the right must give way where a government interest seems to have greater weight.[54]

The test first took hold in cases involving administrative denials of benefits, and this is revealing, for these were cases in which judges traditionally would have been skeptical of the due process claim. There thus is reason to suspect that courts valued the test for allowing government interests to prevail where the courts were exploring the outer edges of due process—that is, where a strong version of the right would have seemed strained.

What began at the periphery, however, soon infected the core. Although the balancing test started as an attempt to delimit due process at its expanding periphery, it soon eviscerated the very marrow of the right. To be concrete, what began as a means of justifying the expansion of due process to government benefits is now used to deny due process for government constraints. The balancing test thus

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slight recognition by the Court that there are risks in allowing a compelling government interest to defeat rights.

54. In *Eldridge*, the Court recited these factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

leaves open the possibility that government interests can brush aside basic due process rights—as will be seen in detail in Part VI.

In the meantime, it is enough to recognize that, in balancing rights against government interests, this doctrine inverts rights and power. Rights are now subject to power.

C. *Equal Protection*

A less central illustration of the inversion can be observed in equal protection doctrine. It will be seen that there are underlying justifications for much of what the judges do in these cases. Nonetheless, equal protection doctrine, as phrased by the judges, prominently contributes to the inversion of rights and powers.

Under current judicial doctrine, judges evaluate equal protection claims by considering whether they can be defeated by a government interest. For example, where a case involves a racial or other "suspect" classification, the judges say they apply "strict scrutiny" and that the unequal law can be upheld only where it is justified by a compelling government interest. At the other end of the spectrum, if the case does not involve a suspect classification, the judges apply only their minimal degree of scrutiny, which can be satisfied wherever the law has a "rational basis" in a "legitimate state purpose."[55]

Of course, judges in these equal protection cases are doing something that arises out of the Equal Protection Clause. Rather than bar state discrimination on the basis of a specified characteristic, the Fourteenth Amendment generally prohibits states from denying the equal protection of the laws. The judges therefore need to sort out which classifications matter and to what degree. For these purposes, the judges assume that some classifications are presumptively constitutional and others are presumptively unconstitutional—this reliance on presumptions being why the middle ground of "intermediate scrutiny" has always seemed so uncomfortable.

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55. As put in *Geduldig v. Aiello*, 417 U.S. 484, 490 (1974) (quoting Aiello v. Hansen, 359 F. Supp. 792, 801 (N.D. Cal. 1973)), that there must be a "rational and substantial relationship to a legitimate state purpose."

But it is a pity that the judges do not candidly admit that they are relying on presumptions. The use of presumptions in constitutional analysis is open to question. Nonetheless, a candid recognition that this is what the judges are doing would at least have the virtue of allowing them to reason more openly about when a classification is presumptively equal or unequal and when a statute's use of a classification cannot be presumed to fit the judges' standard assumptions. Instead, the judges put their analysis in terms of different degrees of "scrutiny"—as if judges apply different degrees of judgment in different cases. And they speak in terms of rational bases and compelling government interests, thereby legitimizing the notion that an enumerated right is subject to government interests or power.

In short, the judges have good reason to resolve their equal protection cases in terms of presumptions about classifications. But when they say they engage in different degrees of "scrutiny," and then say that the results are determined by rational bases or compelling government interests, they lend support to the idea that power can thwart an enumerated right.

D. *Public Rights*

A further example of how power nowadays defeats enumerated rights can be found in the public rights doctrine. Under this doctrine, the government's pursuit of its "public rights" in administrative adjudications defeats the Seventh Amendment right to a jury. This is not the typical inversion of rights and power, but it is interesting, for it reveals that even when courts allow power to trump enumerated rights, they sometimes find it advantageous to speak of the power as if it were a matter of governmental or public "rights."

In 1856, in *Murray's Lessee v. Hoboken Land & Improvement Co.*, the Supreme Court used the term "public rights" to refer simply to the government's lawful executive power.[56] In many instances, the executive could not act on its

56. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 275, 284 (1856). The term "public rights" as used in *Murray's Lessee* has been interpreted to mean, among other things, the private rights of persons challenging the executive's exercise of power. *See* Henry P. Monaghan, Marbury

own. For example, it could not promulgate a judicial edict that constrained a member of the public; instead, it had to persuade a court to try and punish the individual. Nonetheless, in other ways, within parameters defined by the Constitution and Congress, the executive often could act on its own, without turning to the courts—for example, when distributing benefits and other "privileges."

Murray's Lessee concerned one of these areas in which the executive acted on its own—in this instance, to take advantage of the self-help remedy known as "distress."[57] An executive officer had issued a warrant authorizing a lesser officer to distrain private property.[58] When this was challenged in court—on the ground that the executive had exercised judicial power and thereby had deprived the property owner of his due process of law, not to mention his Seventh Amendment right to a jury—the Court upheld the

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and the Administrative State, 83 COLUM. L. REV. 1, 15 (1983). Upon close reading, however, the relevant passage in *Murray's Lessee* does not sustain this interpretation:

> [T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of Congress, were conclusive.

Murray's Lessee, 59 U.S. at 284.

There is an interesting question as to whether "public rights" were understood to belong to the executive or the government as a whole. Undoubtedly, Congress enjoys the power to authorize and limit a wide range of lawful executive actions, and in this sense, Congress can shape or define the extent of public rights. But the executive traditionally exercised the resulting power or "rights." Although nowadays some independent agencies also exercise what are considered public rights, most of them are only partly independent, and in any case they can be viewed as acting in place of the executive.

57. *Murray's Lessee*, 59 U.S. at 274.

58. *Id.* at 274-75.

distress warrant and subsequent distress as a matter of "public right."[59]

Murray's Lessee has often been taken to justify administrative adjudication—to suggest that there is a general power or public right in the executive to issue judicial edicts constraining members of the public without providing a civil jury. But the Court in this case was merely upholding the lawful power of the executive to use one of its traditional self-help remedies. Distress was an ancient mode of self-help execution that (at common law and eventually by statute) was available to landlords when collecting unpaid rent, and to the government when collecting unpaid taxes.[60] In other words, distress was not exclusively a governmental power. Moreover, the distress warrant that was contested in *Murray's Lessee* was merely an executive instruction to a lesser executive officer, authorizing and requiring him to exercise the self-help remedy that the government had long enjoyed, and because this was not "judicial power," but merely a lawful executive action, the Court concluded that the executive was doing nothing more than exercising its "public rights."[61] From this point of view, the government exercised its public rights wherever the executive could lawfully act on its own without turning to the courts—such as where it distributed benefits or where, as here, it pursued a traditional self-help remedy.

In the twentieth century, however, the Supreme Court took a much broader view of "public rights." Traditionally, the executive had to go to the courts for adjudicatory edicts that constrained members of the public, and thus (outside equity and admiralty) it could not usually exercise power domestically against Americans without persuading an independent judge and jury. Nonetheless, the executive increasingly has used its own, merely administrative tribunals to issue binding edicts that constrain members of the public—thus avoiding independent judges and juries.

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59. *Id.* at 275-76, 285.

60. HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 15, at 216-17.

61. *Murray's Lessee*, 59 U.S. at 284. For other skepticism about the standard interpretation of *Murray's Lessee*, based on other considerations, see Barbara Aronstein Black, *Who Judges? Who Cares? History Now and Then*, 36 OHIO N.U. L. REV. 749, 771-89 (2010).

This binding administrative adjudication runs outside the Constitution's path for judicial power, and it thereby evades the Constitution's procedural guarantees, including the Seventh Amendment's right to jury. Such an evasion of jury rights traditionally would have been unconstitutional. Accordingly, when the Supreme Court upheld this administrative exercise of judicial power, it had to explain how government power—indeed, an adjudicatory power that ran outside the regular constitutional paths for such power—could defeat the constitutional right to a jury.

The Court could have pretended that the Seventh Amendment's guarantee of juries "in Suits at common law" assured Americans of civil juries only in the courts—thus leaving them without such juries in administrative tribunals. The Court understood, however, that this would have perverted the amendment's meaning. (Indeed, this would have allowed the government to evade the jury requirement wherever the government evades the courts, thus allowing one violation of the Constitution to justify another.) It therefore is no surprise that the Supreme Court recognized the conflict between administrative proceedings and the Seventh Amendment right to a jury, and that it needed to find a way to justify the conflict.

The Court could have resolved the matter in terms of mere power—saying that there was a compelling government interest that outweighed the right. This, however, would have invited a case-by-case analysis. Rather than go down so tortuous a path, the Court settled the question with a sweeping generalization.

It seized upon its phrase in *Murray's Lessee* to cast the government's assertion of administrative power in terms of a right, thereby attributing a right's trumping effect to government power. As put by the Court in *Atlas Roofing v. Occupational Safety and Health Review Commission*, where the government sues in its "sovereign capacity" to enforce "public rights created by statutes . . . the Seventh Amendment does not prohibit Congress from assigning the fact-finding function and initial adjudication to an administrative forum with which the jury would be

incompatible."[62] In other words, when the government exercises sovereign power against its people—at least when it does so under statutory authority—its "public rights" trump the right to a jury that the people secured for themselves in their constitution.

Obviously, the statutory basis of a claim does not excuse the government from complying with the Seventh Amendment. What led to the adoption of the Amendment were demands for jury rights generally in civil actions, and the Amendment therefore guarantees juries in suits at common law—that is, in all civil cases outside of equity and admiralty—not merely in common law actions.[63] It therefore

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62. Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 450 (1977).

63. The many demands for a guarantee of jury trial in civil cases can be illustrated by the inquiry in the North Carolina ratifying convention, by Timothy Bloodworth, whether "there be any security that we shall have juries in civil causes. . . . [T]here is no provision made for having civil causes tried by jury." Speech of Bloodworth (July 28, 1778), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 153-54 (Jonathan Elliot ed., 2d ed. 1836). Shortly after the adoption of the Bill of Rights, St. George Tucker taught his students at William and Mary about how the Seventh and Eighth Amendments secured "this mode of trial, as well in civil as in criminal cases." St. George Tucker, Law Lectures at William and Mary, Notebook 4, 145-46 (c. 1790s) (unpublished Tucker-Coleman Papers) (located at the Earl Gregg Swem Library at the College of William and Mary).

The Supreme Court once recognized the history. Justice Joseph Story explained for the Court in 1830:

> The phrase "common law," found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence . . . . By common law, [the Framers of the Amendment] meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.

Parsons v. Bedford, 28 U.S. 433, 446-47 (1830) (emphasis omitted).

Long afterward, when the Supreme Court in *Curtis v. Loether* quoted this passage, it drew the conclusion that "Mr. Justice Story established the basic principle." In fact, what the Court attributed to Story was the very point of adopting the Seventh Amendment in 1789. Curtis v. Loether, 415 U.S. 189, 192-

is strange and unconvincing to assume that the statutory foundation of a claim is significant—as if a constitutional right that excludes criminal, equitable, and admiralty proceedings should be read to exclude the government's distinctively statutory claims.[64]

Ultimately, therefore, the Court's conclusion in *Atlas* comes to rest on the idea that sovereign public rights defeat constitutional rights. On the Continent, in the absolutist heritage of the civil law, prerogative or administrative decisions on behalf of the government's public power were often said to be sovereign and thus superior to the rights of private persons. But the whole point of the U.S. Constitution, including the Seventh Amendment, is to establish and limit the sovereign, not least by means of constitutional rights. It therefore is entirely alien to the United States and its constitution to conclude that the constitutional right to a jury melts away before the sovereign's "public rights."

A range of judicial doctrines thus inverts rights and power. Some doctrines speak of government "interests;" another doctrine speaks in terms of "public rights;" but one way or another the doctrines subject enumerated rights to power, thereby inverting their relationship.

E. *A Generic Government Power*

Before leaving the doctrines that invert rights and power, this Part must consider how the Supreme Court's expansive approaches to federal power have magnified the inversion. The Court not only has taken a broad view of particular federal powers but also has tended to generalize about a generic government power, and all of this has profound consequences.

Broad Interpretation of Particular Federal Powers. —It is widely familiar that the Court takes a broad interpretation of federal powers, particularly the powers of Congress. The

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93 (1974) (upholding right to jury upon demand by either party in fair housing claim for damages under Section 812 of the Civil Rights Act of 1968).

64. Indeed, the Supreme Court in *Curtis v. Loether* backed away from this statutory reasoning, but not so clearly as to put an end to its significance, let alone the authority of *Atlas*. *Curtis*, 415 U.S. at 194 (1974).

expansive implications for federal power are so familiar that they scarcely require to be mentioned, but what requires attention here are the narrowing implications for enumerated rights.

Although the broad interpretation enlarges federal powers, it thereby simultaneously reduces enumerated rights. Under the traditional structural relationship between rights and powers, an expansion of powers did not cut back on the enumerated rights. Of course, the expanded powers diminished the unenumerated rights—the undifferentiated liberty that was left over after the enumeration of powers—but because enumerated rights trumped powers, they were unaffected by the expansion of power. Thus, when Congress and the courts in the nineteenth century took ever broader views of what Congress could do under the Commerce Clause, there was a systematic loss in the unenumerated liberty, but not in the enumerated rights.

This is changed, however, by the doctrine that compelling government interests defeat enumerated rights. Now the broadened federal powers establish not only the extent of federal power but also the extent of the government interests that overcome claims of enumerated rights. The broadening of federal powers thus simultaneously expands these powers and cuts back on enumerated rights.

Generic Government Power. —Of even greater import for the inversion of rights and power is the tendency of the Supreme Court, when applying the relevant doctrines, to assume a generic government power. Whereas the government's enumerated powers are subject to the enumerated rights, the rights then are in turn subject to generic government power.

Rather than grant Congress a general legislative power, the Constitution grants Congress a series of enumerated powers. Thus, even if courts were justified in subjecting enumerated rights to compelling government interests, they would be justified only to the extent they limited any such reasoning to the interests of the government in its enumerated powers. When applying its doctrines that invert rights and power, however, the Supreme Court does not pay much attention to different federal powers, but instead tends

to generalize about government power, as if rights were subject to a generic government power.

One explanation is that the Court has interpreted some grants of congressional power—notably the Commerce Clause and the Necessary and Proper Clause—so broadly that (as a practical matter) Congress now has a nearly general legislative power.[65] Another explanation is that the Court most commonly inverts rights and power in reaching decisions about state laws. A state's legislature typically enjoys a generic legislative power under its state constitution, and thus whenever state laws come into conflict with the U.S. Bill of Rights as "incorporated" against the states, the Court tends to think about rights in terms of the generic government interest that it associates with state legislatures. By this means, the Court has become accustomed to assuming that rights are subject to a general government interest, and thus even when applying the balancing and compelling-government-interest tests to federal violations of rights, it continues to assume a generic government interest.[66]

Of course, there are layers of explanations, and another, more sobering layer will be considered later (in the Appendix), but for now it is enough to observe the result: Even when a right is claimed against the federal government, the judges subject the right not merely to the government's interests in its enumerated powers, but more broadly to a generic government interest or power. In other words, regardless of whether state or federal power is introduced to defeat claims of rights, the rights remain plural, but the government interest that can defeat them usually gets expanded to a single generic governmental interest.

The breadth of this government interest that can defeat rights is worrisome, for on account of its generality it is not clear how it is limited. At the federal level, the result is not merely an inversion that subjects the enumerated rights to the enumerated powers, but a more profound inversion that

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65. U.S. CONST. art. I, § 8.

66. The primary exception is *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *see supra* note 53.

subordinates the enumerated rights to a generic federal power not contemplated by the Constitution.

The relevant doctrines—those on compelling-government-interests, balancing, equal protection, and public rights—thus have an even more emphatic effect than would otherwise be expected. They invert not merely rights and powers, but rights and a single generic power.

III. PLACE OF INTERESTS IN UNDERSTANDING RIGHTS

Notwithstanding what the judges say they are doing, it may be supposed that they actually are taking government interests into account merely to understand rights and, in particular, their definition. Certainly, interests have a place in attempts to understand rights. But when the judges candidly allow government interests or power to cut off claims of rights, it is difficult to avoid the conclusion that, in both form and reality, they are subordinating rights to power, thereby inverting their relationship.

A. *Inverting Rather Than Defining*

Government interests do more than merely help judges understand rights and their definition. As already suggested, they often defeat rights.

The structure of the Court's compelling-government-interest test already reveals that the Court is really allowing power to trump rights, for the test introduces government power at a late stage of constitutional analysis, after the individual's "interest" or right has been acknowledged. When a judge decides the constitutionality of a government act under the test, he must begin by asking whether the government acted within one of its enumerated powers. The judge must then inquire whether the relevant power is limited by a constitutional right—or as put by the judges, whether the individual has a constitutionally protected interest. Under the Court's test, however, the judge then must add a third step: He must inquire whether there is a

government interest that defeats the individual interest.[67] He thereby reopens the question of power to defeat the claim of a right.

This is not only the form but also the reality of how the compelling-government-interest test is typically used. Far from assisting in the definition of a right, the test has the effect of liberating judges to take very broad or vague conceptions of rights. It assures them that, however broad or uncertain their definition of a right, they can rely on compelling government interests to prevent any untoward consequences. It thus is no coincidence that this test has flourished when, during the last half-century, judges have taken expansive conceptions of some rights. Rather than a means of defining constitutional rights, government interests serve as a means of containing rights when their expansive definitions go too far.

The inversion becomes explicit in free exercise cases. The judges who have interpreted the free exercise of religion expansively, as a constitutional right of exemption, have tended to state that the right itself—not merely a claim to the right—is defeated by government interests. It already has been observed how the Supreme Court in *Sherbert v. Verner* said that a compelling government interest "justifies the substantial infringement of appellant's First Amendment

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67. The Constitution itself does not use interest analysis to define either powers or rights, but to the extent it comes close to such analysis, it does so in connection with powers rather than rights—in the Necessary and Proper Clause. This clause authorizes Congress to make all laws "necessary and proper" for carrying out other powers, and it thus could be viewed as defining congressional power by reference to federal interests. James Madison understood this clause in terms of "the means of attaining the object of the general power," and John Marshall later observed that it provided the "means" of effectuating "the legitimate objects of the Government." THE FEDERALIST NO. 44, at 304 (James Madison) (Cooke ed., 1961); *see also* McCulloch v. Maryland, 17 U.S. 316, 422-23 (1819). From this point of view, the enumerated powers of Congress are really the government's legitimate objects, ends, or interests.

Even in the Necessary and Proper Clause, however, when government powers are a measure, they are part of a means-ends analysis rather than a balancing analysis, and they are a measure of power rather than of rights. The Necessary and Proper Clause therefore offers little legitimacy for weighing government interests against rights.

right."[68] Other free exercise cases confirm the Court's candid subordination of the right to government interests. For example, in *Bob Jones University v. United States*, the Court summarized that "[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."[69]

Of course, as the judges explained in one of the religious exemption cases, *Wisconsin v. Yoder*, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[70] In the words of Justice O'Connor, when concurring in *Employment Division v. Smith*, "[o]nly an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms."[71] It is not reassuring, however, that only an important government interest can require an infringement or sacrifice of First Amendment freedoms, for the general message is that interests do not merely help to understand the rights, but rather serve as a means of denying them.

As an illustration of how rights are not merely defined, but defeated by government interests, the free exercise doctrine is particularly interesting, because the Supreme Court has changed its views about the extent of the right. Until the mid-twentieth century, the Court understood the right as a freedom under general laws regardless of one's religious beliefs. Beginning at least in *Sherbert* in 1963, however, the Court held that the right included at least some freedom from general laws on account of one's religious beliefs, and to delimit this expanded freedom, it held that in

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68. Sherbert v. Verner, 374 U.S. 398, 406 (1963) (recognizing free exercise right of exemption from general law on unemployment benefits).

69. Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983) (quoting United States v. Lee, 455 U.S. 252, 257-58 (1982)) (upholding IRS interpretation of §501(c)(3) denying tax exempt status to racially discriminatory university).

70. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (recognizing free exercise right of exemption for Amish from general laws on education).

71. Emp't Div. v. Smith, 494 U.S. 872, 895 (1990) (O'Connor, J., concurring) (quoting Bowen v. Roy, 476 U.S. 693, 728 (1986)) (rejecting free exercise right of exemption).

some instances a compelling government interest "justifies the substantial infringement of appellant's First Amendment right."[72] Since then, in *Smith* in 1990, it has largely repudiated the *Sherbert* freedom from general laws. Although there have been statutory and judicial attempts to restore that broader freedom, the Court has not, thus far, constitutionally restored the more expansive freedom.[73]

Strikingly, however, although the Court has retreated to the more modest conception of free exercise, it has continued (as will be seen in Part VI.B) to assume that compelling government interests can defeat the right to free exercise. Thus, the candid inversion of rights and power, which entered the case law to render the expanded right plausible, still persists even after the right has returned to its more modest size. The inversion is no longer required by a broad definition of free exercise, but it remains because it has become part the Court's generic approach to rights.

In sum, rather than a means of understanding the definition of rights, the compelling-government-interest test and other modes of inversion are means of defeating rights. Sometimes, the Court simply says that the claim of a right will not prevail because of a compelling government interest; sometimes it goes so far as to say that the right must be "infringed" or "sacrificed" because of such an interest. One way or another, government interest or power defeats rights.

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72. *Sherbert*, 374 U.S. at 406. Earlier, in *Braunfeld v. Brown*, Justice Brennan dissented on the free exercise question by asking: "[w]hat, then, is the compelling state interest which impels the Commonwealth of Pennsylvania to impede appellants' freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants' freedom?" 366 U.S. 599, 610, 613-14 (1961) (upholding Sunday law against free exercise challenge by Orthodox Jews).

73. *Smith*, 406 U.S. at 884-85. The public attempts include the legislation—notably the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2012), and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5 (2012). The judicial attempts are more subtle but probably can be discerned in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533-34, 542 (1993); for details see Part VI.B below.

B. *The Limited Role of Interests*

What then is the role of government interests in understanding rights? Such interests are important, but this is not to say they should trump rights.

Theory. —Legal theory has long recognized that interests and other aspects of utility or expedience can, and probably should, enter into the decision as to whether a claim should be established as a legal right. But at least in Anglo-American legal theory, there has been a tradition of recognizing that, once a right is established, it cuts off further consideration of such interests.

Of course, when one right collides with another right—as when one property right collides with another property right—the question becomes more complicated. Along similar lines, when the government claims what it calls a "public right" in opposition to a privately-held constitutional right, it disturbs the clarity that the constitutional right is trumps—a danger seen in *Atlas Roofing*.[74] But there is a long tradition in Anglo-American constitutional law and legal theory of assuming that, although utilitarian analysis should be part of the decision to establish a right, the right then cuts off further consideration of utilitarian concerns.

This point was notably expounded in 1791 by the political theorist James Mackintosh. After Edmund Burke condemned the French Revolution, Mackintosh argued in his *Vindiciæ Gallicæ* that some rights (such as the freedom from slavery) were universal.[75] Although his 1791 argument espoused universal rather than civil rights, what matters here is his observation about the structure of rights—that notwithstanding underlying considerations of expedience, a right (after it has been recognized) is impervious to such considerations.[76]

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74. Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 450 (1977).

75. JAMES MACKINTOSH, VINDICÆ GALLICÆ 213-14 (Woodstock Books 1989) (1791).

76. *See id*.

Mackintosh began with rules of morality. "All morality is, no doubt, founded on a broad and general expediency," and in this sense, "[j]ustice is expediency."[77] Yet "it is expediency, speaking by general maxims," and the expedience of the maxim or rule overrides the expedience that could, in some instances, cut against it—this being what nowadays is often called "rule utilitarianism":

> Every general principle of justice is demonstrably expedient, and it is this utility alone that confers on it a moral obligation. But it would be fatal to the existence of morality, if the utility of every particular act were to be the subject of deliberation in the mind of every moral agent. A general moral maxim is to be obeyed, even if the inutility is evident, because the precedent of deviating more than balances any utility that may exist in the particular deviation.[78]

In other words, there is a weighty interest in having moral rules.

This approach also applied to rights: The assertion of "a right to life, liberty, &c. . . . [based] on general interest . . . prohibits any attack on these possessions," for an attack based on interest, expedience, or utility in any particular instance does not outweigh the deeper utility of preserving the right.[79] Mackintosh therefore held that in a "primary and radical sense, all rights, natural as well as civil, arise from expediency. But the moment the moral edifice is reared, its basis is hid from the eye forever."[80] Speaking of universal rights, Mackintosh concluded that "[t]he moment these maxims, which are founded on an utility that is paramount and perpetual, are embodied and consecrated, they cease to

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77. *Id.* at 215-16.

78. *Id.* at 216. Mackintosh was a lawyer, and his point here echoes an old common law adage that "[a] mischief shall be rather suffered than an inconvenience"—meaning that "it is better to suffer a mischief to a particular person that may be wronged, than to suffer a general inconvenience," such as departing from a rule. 6 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 431 (Boston, Cummings, Hilliard, & Co. 1824); Gwanralt v. Burwall et al Censors de le Coll de Physitians & Cose their Servant (K.B. 1700), in British Library, Holt's Opinions, Add. Ms. 35980, fol. 125v.

79. MACKINTOSH, *supra* note 75, at 216-17.

80. *Id.* at 217.

yield to partial and subordinate expediency."[81] As applied to universal rights, Mackintosh's argument opens up more questions than it resolves, but at least it suggests how rights can be founded on considerations of utility while simultaneously cutting off such considerations. Once a right is established—in this Article, once it is enumerated—it defeats contrary utilitarian concerns.

There is a time for weighing government interests, and a time for putting them aside. Enumerated rights define the time when government interests must be put aside.

Lawmaking v. Judging: The Dangers of Government Interests as a Judicial Measure of Rights. —The traditional Anglo-American theory of rights gives the consideration of interests an institutional location, mainly in the lawmaking body. There is not only a time but also a place for weighing government interests.

Lawmaking, including the lawmaking done by the people in adopting a constitution, involves a careful weighing of government interests. When the people have acted as lawmaker in guaranteeing constitutional rights, they traditionally have been expected to consider government interests, so as to avoid guaranteeing rights that might interfere with essential government power. From this perspective, when James Madison introduced the Bill of Rights, he and his fellow Federalists carefully limited the rights to avoid undermining the broader interests of the federal government, and as a result, the Bill of Rights largely sidestepped this danger.[82]

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81. *Id.*

82. Madison had opposed a bill of rights and only reluctantly was brought around to support it—initially to satisfy constituents and then to reconcile Anti-Federalists to the new constitution. Kenneth R. Bowling, *"A Tub to the Whale:" The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223, 231-32 (1988); Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 302-03, 341 (1991). Having thereby become the primary mover for the Bill of Rights, he needed to satisfy himself and his fellow Federalists that the enumerated rights would not undermine the Constitution's powers and other structures. For example, when introducing the Bill of Rights on the floor of the House of Representatives, he argued the amendments could guard against abuse of federal powers "while no

Of course, the judges sometimes make constitutional law in their decisions, and in such instances they, too, as lawmakers, need to consider government interests. The judges, however, apply one or another of the doctrines that invert rights and power not merely when they clearly make law, but whenever a claim of constitutional rights comes before them. It therefore is difficult to believe that the inverting doctrines merely reflect the judges' alleged lawmaking role. In most cases, the judges appear to be almost exclusively applying the law; in almost all cases, moreover, the judges are unwilling to say that they are making law. Therefore, in almost all cases in which the judges apply the inverting doctrines, it is not evident that the judges have a lawmaker's need to consider government interests.

Indeed, the traditional ideal among common lawyers has been for judges to take only very limited cognizance of government interests. Judges have long examined utilitarian concerns, including government interests. They ordinarily, however, were to rely on utility not as the measure of a power or right, but rather merely as the means of illuminating dark corners—as a means of illuminating unsettled questions, whether about common law or legislative intent.[83]

Even then, utility itself was expected to be only a secondary consideration. It was not ultimately the boundary of a power or right, but rather was a means of determining whether or not to adopt a doctrinal boundary. This judicial

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advantage, arising from the exercise of that power, shall be damaged or endangered by it." Speech of James Madison (June 8, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 43, at 79. He added:

> We have in this way something to gain, and, if we proceed with caution, nothing to lose; and in this case it is necessary to proceed with caution; for while we feel all these inducements to go into a revisal of the constitution, we must feel for the constitution itself, and make that revisal a moderate one. I should be unwilling to see a door opened for a re-consideration of the whole structure of the government, for a re-consideration of the principles and the substance of the powers given.

Id.

Similarly, see *id.*, at 79-80.

83. *See* HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 25, at 336-44.

consideration of utility was what one would expect where judges came close to making law. Not surprisingly, it was to be a one-time event, and after judges had done it, they were to follow their doctrinal measure, not the utility.[84] Along similar lines, government interests should not be the measure of a right; instead, they should be me rely a means of testing the plausibility of a proposed understanding of a right.

Moreover, rather than show, in a positive way, what judges should adopt as a doctrinal measure, utility was ideally only a negative indicator—a gauge of implausibility. Indeed, far from a refined indicator of this sort, it was an indicator of radical implausibility. For example, inutility could show what constituted an absurd interpretation of a statute's intent or an unreasonable understanding of a common law rule.[85]

Any more ambitious consideration of government interests is apt to be dangerous. Especially when government interests are elevated as a measure of enumerated rights, there is a risk that they will defeat rights—that the rights will be subordinate to power, thus inverting their relationship.

Hence, the submerged role of government interests. When lawmakers guarantee rights, they need to avoid guaranteeing rights so broadly as to interfere in essential government powers, and when judges discern rights, they need to consider government interests to double check the plausibility of their understandings of the rights. But enumerated rights cannot be measured in ways that more

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84. This assumption was reflected, for example, in the expectation that judges should suffer a mischief in a particular case rather than the inconvenience of departing from a rule. *See supra* note 78. Once a rule was established, the judges tended to say, as in *Slade's Case*, "we cannot change the law now, for that would be inconvenient." Slade's Case, 4 Co. Rep. 92b, 93b-94b, 76 Eng. Rep. 1074, 1076-77 (K.B. 1602). *See generally* HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 25, at 127.

85. Of course, utility could indirectly have a more positive role because natural law theory included a stylized account of utility, and some Anglo-American commentators (usually those attracted to the academic learning of the Roman civil law) said that judges should look to natural law or justice to fill gaps where common law or a statute was indeterminate. This, however, offered only a very indirect role for utility.

ambitiously consider government interests—in ways that elevate government interests as a judicial measure of rights—without undermining the very function of the rights in limiting power.

C. *Functionalism and the Forms of Law*

The compelling-government-interest test and other inversions of rights and power can all be understood as functionalist alternatives to more formal approaches to understanding rights. It therefore is important to recognize that the risk is just as great when rights are said to be subject to functionalist reasoning about the needs of society or when rights are otherwise measured by public or majority perceptions of social or governmental needs.

Lawyers, especially legal academics, often pursue functionalist reasoning in ways that override constitutional text, doctrine, and other forms of law. This approach typically is justified as necessary for recognizing social realities and overcoming the rigidity of the forms of law.[86]

At least, however, where rights are protected by the forms of law—for example, where rights are protected by being enumerated—this functionalist reasoning comes with risks. Rights become insecure when they are open to functionalist reconsideration on the basis of government interests, let alone majority, populist, or judicial perceptions of such interests, and this is what sometimes happened when the Supreme Court allowed government interests to trump enumerated rights. The functionalism became an avenue for inverting rights and power—indeed, for subjecting rights to a majoritarian, populist, or judicial veto, exercised by judges in their perceptions of the functional need for the trumping power.

Thus, at least as to rights, the functionalist reasoning does not merely overcome the forms of law; it also defeats

86. For the development of functionalist analysis among American political scientists, see DANIEL T. RODGERS, CONTESTED TRUTHS 162-63 (1987). Rodgers notes that "[t]hey preferred to talk in terms of the 'functions' of the State, rather than the harder lawyers' language of limits or spheres." *Id.* at 163. As it happens, the functionalist mode of speaking was borrowed from German scholarship, and it soon was adopted by American lawyers. For details, see HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 15, at 468-71.

rights, subordinating them to power. Of course, functionalist reasoning about government interests has its place in the judicial analysis of rights. But if judges are to avoid subjecting rights to power, they cannot enact, define, measure, interpret, or otherwise deal with enumerated rights in ways that subject rights to government interests, functions, or other considerations of power.

IV. STRUCTURALLY ABSOLUTE

The subordination of rights to power tends to be defended on the ground that rights are not absolute. This justification, however, tends to conflate the metaphysical question with the structural question. The question of whether rights are metaphysically absolute is not at stake here; nor should it be. Instead, the question is whether rights are structurally absolute.

A. *Structurally Absolute*

There is much to be said for the conclusion that rights are not absolute. Little is known or even knowable with certainty, and if this is true even in the physical world, it surely is all the more true in the moral and legal sphere. Even merely as a heuristic, metaphysical doubts about absolutes are a useful caution against dogmatism. But an anti-absolutist vision can itself become dogmatic—for example, when it is applied too sweepingly in practical matters such as law. All sorts of things are absolute in small ways, and in this spirit it can be recognized that, even if rights are not metaphysically absolute, they can be legally absolute in the structural sense that they trump other claims—in this instance, claims of government interests or power.

The law is full of mechanisms by which some claims systematically defeat others. Conditional gifts are subject to conditions, and conditions thus systematically trump property interests in gifts. Leases and other contracts structure the order of contractual claims, thereby allowing some property or contract rights to prevail over others. Under the Supremacy Clause, state power is subject to federal law, and acts of Congress thus systematically trump state

statutes.[87] It thus is evident that much in law is absolute in the sense of systematically defeating certain other claims, and this is most profoundly true of enumerated constitutional rights in relation to government.

These rights were characteristically absolute because they were designed as limits on government. It is commonly said that rights belong to individuals—thus justifying the notion that rights are "individuals' interests"—and certainly some rights are based on individualistic ideas. The Constitution, however, generally does not enumerate rights specifically for individuals, and this makes sense, for the Constitution guarantees rights not simply to protect individuals, but more generally to limit government.

Although the First Amendment includes rights of religion and speech that may be thought peculiarly individualistic, the amendment is framed not in individualistic terms but as a limit on power. Indeed, it begins, not "Individuals shall have the right . . .," but rather "Congress shall make no law . . . ."[88] The Second through Eighth Amendments, moreover, protect rights almost entirely in the passive voice—thereby limiting all parts of government and leaving open the opportunity for anyone within the jurisdiction of American law (even if not a citizen or even an individual) to claim the protected rights.[89] As a

87. U.S. CONST. art. VI, § 1, cl. 2.

88. U.S. CONST. amend I.

89. On the passive voice of most enumerated rights, the scholarship of Nicholas Rosenkranz is valuable. But rather than accept the implication that, for example, the procedural amendments thereby limit all parts of government, his work suggests that each of the passive guarantees mainly limits a single part of government other than Congress—for example that the Due Process Clause "is essentially a restriction on what the *executive* branch may do in the *absence of a law*." Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1042 (2011). Although this is important in recognizing the passive voice, it takes too narrow a view of the significance. For example, a court surely can violate due process by condemning a defendant without trial, and Congress can violate it by authorizing such proceedings.

As for the location of the Bill of Rights, the first ten amendments originally were distributed within the first three articles of the body of the Constitution but then were collected together and placed at the end as the Bill of Rights. The decision of Congress in 1789 to locate the amendments at the end of the Constitution rather than to interweave them into the document has been described as merely

practical matter some rights (such as habeas) are relevant only for individuals, and as legal matter rights can be claimed in court only by persons of one sort or another. Otherwise, however, there usually is no additional requirement in the first eight amendments that claimants be persons, let alone individuals.[90]

It thus appears that the enumerated rights are not merely "individual interests," which can be trumped by government interests. On the contrary, they are small spheres of authority from which the government is barred. It has vast powers through which it can assert its interests, but it has no lawful interest or power in these little realms of freedom.

Of course, where it seems necessary, the Constitution allows government interests to intrude on rights, but it must do this expressly. For example, it expressly allows the government to suspend habeas and to quarter soldiers in houses, but only in extreme circumstances, as authorized by statute.[91] Absent such caveats, when the Constitution

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"arbitrary." Mehrdad Payandeh, *Constitutional Aesthetics: Appending Amendments to the United States Constitution*, 25 BYU J. PUB. L. 87, 90 (2011). But the central implication of this shift was to clarify that the rights stated in the passive voice would limit all parts of government. If added to Article I, a procedural right stated in the passive voice would have limited only Congress, and if added to Article III, it would have limited only the courts, but when added in a bill of rights at the end of the Constitution, it limited all parts of the government.

90. The point that corporations are not excluded from claiming constitutional rights is partly recognized in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). The point, however, is broader, as suggested in the text. Moreover, it is supported by much detailed historical evidence. For example, the claims for religious liberty leading up to the adoption of the First Amendment were typically made not by individuals but by churches, church associations, presbyteries, and incorporated religious bodies, and other religious societies of varying sorts.

91. U.S. CONST. art. I, § 9; U.S. CONST. amend. III. Although since the time of Lincoln it has been disputed whether only Congress can suspend habeas, the earlier history left little doubt on this, for habeas was protected by an act of Parliament, and it therefore needed an act of Parliament to suspend it—a conclusion that became all the more clear when the king's suspension power came to be recognized as unlawful. *See* Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1908-09, 1917-21 (2009). For examples of how early American states relied on legislation to suspend the writ, see Amanda L. Tyler, *Suspension as an Emergency Power*, 118 Yale L.J. 600, 622-27 (2009); Amanda L.

guarantees rights, it bars the government from exercising any authority within these protected spheres of authority.

Structurally, therefore, enumerated rights are supplementary limits on government. The Constitution places layers of legal limits on the federal government. It sketches out federal power with the broad brushstrokes of enumerated powers, which confine the government to a specialized set of powers. It then uses enumerated rights to pencil in more detailed limits. The rights thus are additional limits on government, and to the extent the Constitution establishes such rights, they absolutely limit government.

The expansive interpretation of federal powers has made the absolute character of enumerated rights all the more important. As already noted (in Part II.E), broad interpretations of the Commerce Clause and the Necessary and Proper Clause have given the federal government a nearly general power, and the government therefore is no longer much limited by the enumeration of its powers. Consequently, the enumerated rights, although once only secondary limits on federal power, have become the primary limits.

These rights are now the front-line barriers to federal power.[92] It therefore is essential that they be understood as superior to power—that they be understood as structurally absolute.

B. *Middle Ground*

One might suppose that when the Supreme Court inquires about government interests, it is attempting to split the difference between rights and powers—that it is not establishing either over the other. In theory, so balanced an approach may be possible. The Supreme Court, however,

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Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 958 (2012). For more information on the power to suspend laws in England and America, see HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 15, at 65-82.

92. Of course, like all governments, the United States is subject to a host of structural, political, and other practical constraints, and in this sense, like other governments, the extent of its power cannot be judged simply by the legal limits imposed by the Constitution. For purposes, however, of understanding the lawful extent of its power, its legal powers and the legal limits on them are what matter.

frames most of its relevant doctrines in terms of the trumping force of power. And in any case the Constitution sets a baseline: against the background of the Constitution, which elevates rights over powers, the Court's doctrines clearly have the effect of elevating power over rights.

For example, in the balancing test used to determine whether administrative determinations satisfy the due process of law, the Court gives no greater priority to either power or rights, and this therefore may seem a genuine middle ground. But against the background of the Constitution's protection of rights as exceptions from power, the effect of the balancing test is to undermine the protection for rights by opening up the possibility that power can defeat them. Another example is the compelling-government-interests test. Rather than establish a middle ground between rights and powers, it acknowledges merely an initial presumption in favor of rights and then allows the presumption to be overcome by the argument for power. Moreover, in contrast to the Constitution's treatment of rights, the test makes government interests decisive whenever they are sufficiently strong.

Of course, the Court allows power to trump rights only where the need for the power seems pressing, but this does not mean that the Court has not made power trumps. The whole point of the doctrines on balancing, compelling interests, and public rights is to allow claims of power to prevail over claims of rights. Rather than use rights as a measure of power, the Court relies on power as a measure of rights.

C. *Little Realms of Liberty*

The structurally absolute character of enumerated rights is plausible only because American constitutional rights merely carve out small realms of liberty. The modest character of such rights is often forgotten, but it needs to be recalled if their absolute character is to be recognized as realistic.

Spheres of Authority. —A starting point for understanding the modesty of American constitutional rights is that they generally do not guarantee substantive

rationality or justice. Instead, on the whole, they merely carve out spheres of authority or freedom.

Where a legal system attempts to sort out the substantive justice between two parties, let alone between a people and their government, it can be difficult to discern unconditional or absolute legal rights. Even in the least complicated circumstances, substantive justice is complex, and substantive justice thus tends to preclude carving out any simple sphere of authority.

Anglo-American law, however, has often traditionally allocated absolute spheres of authority. Whereas the civil law frequently elaborated complex substantive rules of justice, thus making it difficult to acknowledge unconditional rights, the common law more typically demarcated relatively clear-cut rights. Put another way, the common law was often more procedural than substantive. For example, the common law laid down the flat rule that when a donor makes a conditional gift and the donee breaches the condition, the donor has a right to recover the property.[93] The common law does not thereby avoid the pursuit of justice, but rather recognizes that, in a complex society, in which individuals value freedom, justice often is best achieved by leaving persons free to pursue their different visions of justice through their spheres of liberty.[94]

This point about the common law stands in contrast to contemporary legal theory. In such theory, rights tend to be understood as avenues for reasons or reasoning, and it therefore is unsurprising that the theory does not often linger on the possibility that rights can be absolute.[95] The common

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93. In contrast, in the civil law, such a gift must be made with the participation of a third party, a notary.

94. *See* Philip Hamburger, *Judicial Office*, 6 J.L. PHIL. & CULTURE 53, 69-70 (2011).

95. Pildes, *Dworkin's Two Conceptions of Rights*, *supra* note 4 at 311-12 ("[R]ights are not justified as all-purpose shields," but "channel the kinds of reasons upon which the state can constitutionally act . . . ."); Pildes, *Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, *supra* note 4, at 729 ("Rights are not general trumps against appeals to the common good or anything else; instead, they are better understood as channeling the *kinds of reasons* government can invoke when it acts in certain arenas."); Waldron, *supra* note 4, at 305 (not dissenting from Pildes's view that "[r]ights are

law, however, has often treated rights as little realms of freedom in which the rights holders can act as they please.[96]

Seeking this sort of protection for constitutional rights, not merely a protection for what was reasonable, Patrick Henry rejected a system in which "[p]ower and privilege . . . depended on implication and logical discussion."[97] "Reason" was one of the things that "powerfully urge us to secure the dearest rights of human nature," but reason by itself was no protection.[98] From this perspective, Henry protested that a right such as religious liberty "ought not to depend on constructive logical reasoning."[99] He illustrated the point by reading the Virginia Declaration of Rights and then asking, "[w]ill they exchange these rights for logical reasons?"[100]

Henry's view of enumerated rights as the legal protection for little spheres of freedom, not as paths for reasoning, was typical of eighteenth century Americans. Most of them understood their ideas of legal rights to be founded on reason. Most of them, however, also thought that reason revealed the necessity of securing protection for freedom through expressly enumerated constitutional rights.

Once this is recognized, one can begin to understand how enumerated rights can be absolute. Madison, for example, understood enumerated rights to "limit and qualify the powers of government, by excepting out of the grant of power those cases in which the government ought not to act, or to act only in a particular mode."[101] When understood in this

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ways to channel the kinds of reasons and justifications government can act on in different domains").

96. Indeed, the common law treats most rights and even many things that are not quite rights as spheres of authority. *See* HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 25, at 47, 619; Hamburger, *Judicial Office*, *supra* note 94, at 59-60, 67-68.

97. Speech of Patrick Henry, Va. Ratifying Convention (June 12, 1788), *in* 10(3) THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 41, at 1211-13.

98. *Id.* at 1211.

99. *Id.* at 1213.

100. *Id.*

101. Although Madison was speaking of state bills of rights, he was relying on them to explain the proposed U.S. Bill of Rights. Speech of James Madison (June 8, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 43, at 81.

way, enumerated rights do not necessarily demarcate what is right, let alone what is right in each circumstance. Instead, they carve out little spheres of liberty from the mass of government powers, and because they thus establish rights rather than what is substantively right, they have the potential to be guaranteed absolutely.

Overstated Powers and Understated Rights. —Another modest feature of American constitutional rights, which also makes it possible for them to be absolute, is that they are understated. Indeed, American constitutions characteristically combine overstated powers with understated rights.

Constitutional power must be broadly stated, even overstated, because it is not possible ahead of time to anticipate the exact range of power the government will need to defend the society and preserve its interests. A constitution that stated powers too narrowly would run the risk of putting the government in the position of having to violate the law, and therefore, precisely to preserve the law, a constitution must lean toward overstatement in granting powers.

Similarly, to avoid the risk that rights will stand in the way of an essential exercise of power, and that government will therefore be tempted to violate rights, a constitution must tend toward understating rights. As James Madison explained in 1788 to Thomas Jefferson, if the Bill of Rights was drafted too broadly, the government in dire exigencies would be unable to avoid violating what was guaranteed:

> Supposing a bill of rights to be proper[,] the articles which ought to compose it, admit of much discussion. I am inclined to think that *absolute* restrictions in cases that are doubtful, or where emergencies may overrule them, ought to be avoided. The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public; and after repeated violations in extraordinary cases, they will lose even their ordinary efficacy.[102]

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102. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 11 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland et al. eds., 1977).

To be sure, there also is a risk in understating rights, as Madison understood.[103] But the structural risk in relation to powers is in overstating rights, for this invites the government to conclude that its essential interests require it to override rights, thus subjecting them to power and weakening the ideal of constitutional governance.[104] To avoid these risks of overstatement, Madison ensured that the enumerated rights carve out only little realms of liberty, and this is why they can be structurally absolute.

The federal government and the states enjoy vast powers, which they can exercise with vigor. From this great mass of power, the enumerated rights remove only a few small spheres of liberty. It surely, therefore, is not too much to maintain these rights as structurally absolute in relation to power.

D. *The Changed Character of Rights*

The inversion of the Constitution's enumerated rights alters their character. Whereas such rights once secured spheres of liberty regardless of government power, they now merely begin conversations about the government's interests or power.

Of course, as noted in Part III, government interests are central for determining what should be protected as a right. Recognizing this, the early Americans who framed and ratified the Constitution and its Bill of Rights repeatedly worried about whether the enumerated rights would collide

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103. Madison feared this especially as to "the rights of conscience." *Id.* at 298.

104. This point about overstated powers and understated rights was frequently discussed by the framers in terms of establishing a "permanent" constitution. Most of them hoped for a constitution that would be relatively permanent, in the sense that it would not have to change with the development of society. In other words, they wanted a constitution that, already at the time of its ratification, would be adapted to future circumstances; but rather than mean that it should be open-ended and therefore adjustable by later judges, they meant that it should be drafted in a way that would not restrict the government in ways that would require later generations to bend, break, or even much amend it. Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239 (1989); Philip Hamburger, *The Permanent Constitution*, *in* SESQUICENTENNIAL ESSAYS OF THE FACULTY OF COLUMBIA LAW SCHOOL, 123, 123-26 (2008).

with the needs of government.[105] Once rights were enumerated, however, they were to bar federal power. As already seen, some rights (such as those on habeas and the quartering of soldiers) expressly allowed federal power to prevail in specified circumstances. Otherwise, however, it was characteristic of enumerated rights that they stood as bulwarks against power. This was the very point of having such rights.

It therefore is a profound change that nowadays a claim of an enumerated right does not simply defeat a claim of power, but instead lays the foundation for a discussion of about the degree of the government's interest. Rights thus no longer conclude constitutional analysis, but rather merely frame an ensuing conversion about interests and power.

V. PRACTICAL BENEFITS

Before turning to the inversion's costs, this Article must consider its most significant possible benefit—that it often may be necessary, or at least useful, for expanding the definition of rights.[106] The suggestion that the inversion is valuable for expansive definitions of rights has some foundation. But the necessity of the inversion is not as great as may be assumed, and it comes at the cost of undermining the trumping character of enumerated rights.

A. *Expanded Rights and the Necessity of Restricted Access*

As a theoretical matter, there generally is an inverse relationship between the breadth of a right and the breadth of access to it—this being the more-is-less problem. To be precise, as the definition of a right is expanded, there

105. Such concerns were particularly evident in debates about whether the Constitution or, later, the Bill of Rights, could guarantee the right to a jury in civil cases. *See* Debates in the N.C. Ratifying Convention, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 63, at 153-55; Hamburger, *The Constitution's Accommodation of Social Change*, *supra* note 104, at 295-97.

106. New rights often are established by expanding the definition of existing rights, and therefore, although one might ask about the benefits of the inversion for establishing new rights, there seems little need to add such an inquiry.

eventually are apt to be pressures to restrict access, and as access to a right is expanded, there eventually are apt to be pressures to restrict the definition.[107] It therefore may be assumed that, in order to expand the definitions of rights, judges must restrict access, and that they must do so by inverting rights and powers—that is, by using the compelling-government-interest test.

Certainly, there are many instances in which judges have justified their expansive definitions of rights by explaining that they can cut back on access with government interests. For example, the judges in the last half of the twentieth century frequently interpreted the Free Exercise Clause to guarantee a right of religious exemption—that is, they interpreted it to secure not merely a freedom under equal laws, regardless of one's religion, but also a freedom from equal laws precisely on account of one's religion. This vision of free exercise was so individualistic and expansive that the judges almost inevitably had to restrict access to it, and they predictably did so with the compelling-government-interest test.[108] As put by the Supreme Court in *Sherbert v. Verner*, the judges had to inquire "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right."[109] A government interest thus could "warrant a substantial infringement of religious liberties."[110]

The reality of how judges expand rights thus may seem to confirm that judges must restrict access and that they must do so with the notion of compelling government interests. This use of government interests, to restrict access to rights, has become the standard approach for dealing with overly expansive definitions of constitutional rights, and by now this inversion is so familiar, that it often may seem inevitable.

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107. *See* Philip Hamburger, *More is Less*, 90 VA. L. REV. 835 (2004).

108. *Id.* at 858.

109. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

110. *Id.* at 407.

B. *Not So Necessary*

Notwithstanding the logic of more is less—that expanded definitions of rights are apt, eventually, to require restrictions on access—it does not follow that restrictions on access in terms of government interests are always or even regularly necessary for expanded rights. On the contrary, such restrictions often are unnecessary for such purposes, and it therefore cannot be assumed that there is a need for the inversion of rights and power.

Expanded Powers More than Expanded Rights. —One reason that the inversion is not always necessary for expansive definitions of rights is that the conflict between rights and government interests does not arise merely from expansive judicial definitions of rights. In many instances, at least at the federal level, the conflict more centrally arises from expansive judicial views of government power.

There has been an extraordinary expansion of federal power; indeed, the definitions of federal powers have expanded far more than the definitions of rights. Whatever one thinks of this, it means that one cannot simply focus on the expansion of the definitions of the rights. On the contrary, it suggests that conflicts between rights and government interests arise more from expanded powers than from expanded rights.

Carefully Defined Rights. —A second reason that the inversion is not regularly necessary for expansive definitions of rights is that when judges expand rights, they could be more careful in defining the reach of the expanded rights. If judges took care to define rights expansively, but in a manner that did not conflict with compelling government interests, they would have little need to resort to such interests to cut back on access.

Currently, the inversion of rights and power leaves judges free to take the most expansive possible understanding of a right. Rather than feel obliged to define rights in ways that would avoid conflicts with compelling government interests, judges rely on such interests to demarcate the limits of rights, and they therefore often treat

rights as open-ended interests. Justice O'Connor, for example, in *Employment Division v. Smith*, declared:

> the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community.[111]

She could take so expansive and amorphous a view of the right because she knew she could rely on the compelling-government-interest test to define its practical application.

Judges, however, could avoid this inversion of rights and power by taking the time to define the expanded right in a way that does not collide with compelling government interests. For example, rather than assert a generic freedom from equal laws on account of one's religion—a definition that clearly is overstated—the judges could specify a religious freedom from particular types of laws.

Of course, it sometimes would be difficult for judges to define rights in moderate terms that are both broad and consistent with essential government interests. But the problem is that the judges do not even try to do this. By way of excuse, one might conclude the judges are responding to their general conception of rights as individual interests, which ultimately are boundless and which thus almost inevitably conflict with government interests. One also, however, must wonder about the intellectual laziness of the judges, who do not even make an effort to define rights in ways that would render them compatible with compelling government interests.

One way or another, the judges need to put more effort into defining rights, and until they do so, the evidence cannot be read as indicating that the inversion is necessary for any current version of expansively defined rights. Although the inversion can enable expanded definitions, what is more apparent is that it enables the judges to be lazy. Perhaps some rights are not susceptible to definition, but it is difficult to reach this conclusion while the judges take an expansive

111. Emp't Div. v. Smith, 494 U.S. 872, 897 (1990) (O'Connor, J., concurring).

vision of government powers and often do try to define rights in a manner consistent with government interests.

Case Law. —The suggestion that the inversion is necessary for expansive definitions of rights becomes especially problematic when one examines the case law. Revealingly, the Supreme Court does not apply its inverting doctrines only where it takes an expansive view of rights.

For example, as has been seen of the free exercise of religion (in Part III.A), the Court applies its compelling-government-interest test even where it takes a decidedly non-expansive view of the right—something that will become further apparent (in Part VI.B) from *Lukumi*. Similarly, as evident from *Atlas* (in Part II.D), the Court applies the public rights doctrine to defeat the right to a civil jury, even though the Court has reduced juries from twelve to six persons.[112] Thus, in some notable instances, the Court uses its inverting doctrines to cut back on rights at the same time that it imposes confined definitions of the rights.

Clearly, the justification for the inversion that it allows the expansion of rights is not regularly reflected in the case law. On the contrary, the inverting doctrines often allow the Supreme Court to double down on rights, such that even where it takes a confined view of their definition—indeed, even where it reduces their definition—it also can reduce access.

Calculation of Gains and Losses. —Of course, none of this is to deny the point made earlier that expansive definitions of rights can *sometimes* require an inversion of rights and power. But if this is true only in some instances, there is no need for judges who seek expansive rights to apply the inverting doctrines in all instances. The question, therefore, is not whether the inversion generally is beneficial in allowing expansive definitions of enumerated rights but rather whether it is beneficial in allowing expansive

112. For the point about six persons, see Colgrove v. Battin, 413 U.S. 149, 160 (1973) (holding that the Seventh Amendment does not require a jury of more than six persons).

definitions of some rights, even though it puts all enumerated rights at risk.

Perhaps the benefit is worth the cost. But this cannot be simply assumed without considering the evidence. Moreover, where the expansion of rights comes at the cost of depriving enumerated rights of their trumping character and thus of their very character as enumerated rights, it becomes all the more necessary to consider not only the alleged benefit but also the practical costs.

VI. PRACTICAL COSTS

The inversion of rights and powers has substantial practical costs. The doctrines that invert rights and power allow power to trump rights, and thereby legitimize, even practically invite, serious infringements of constitutional rights—not just infringements at the periphery of such rights but at their very core.

Of course, proof of causation always is difficult, and it therefore is unrealistic to expect proof that the inversion, in a strong sense, causes any particular deprivation of rights. And how substantial the loss of freedom will be over the long haul depends on evidence that is not yet available. Nonetheless, some salient examples show that the losses already are substantial.

Along the way, it will become apparent that the danger from the inverting doctrines are pervasive—that far from being confined to emergencies, they are evident even in apparently normal times. The work of Vincent Blasi suggests that, on account of the danger to speech in "pathological" eras, speech doctrines should be framed for "the worst of times," and this Article concurs with the implications for how rights should be formulated.[113] At the same time, the evidence here will call into question the assumption that the danger primarily concerns speech rights and that it arises mainly in pathological or other special circumstances. The last point requires particular attention. Although the danger is bad in emergencies, it can be just as bad in regular times, and this is profoundly important, for it suggests the risk of assuming

113. Blasi, *supra* note 9, at 450-51.

that the danger comes merely from other people and other times.

That the danger comes even in ordinary times—not only from the pressure of emergencies but also from the mundane demands of the *demos*—should not be a surprise. Even in the best of circumstances, rights are vulnerable to majority sentiment. Nowadays, however, the inversion alters the very nature of rights, making them subject to popular power. It justifies the triumph of majority power over minority rights, and it thus invites judges to uphold the very power that rights were designed to limit.

A. *Emergencies: National Security*

The inversion of rights and powers is most clearly dangerous in emergencies. A sharp emergency can make a government interest seem especially pressing. In such circumstances, therefore, the compelling-government-interest test opens up a path for harsh infringements of rights—infringements that are apt to be regretted only after the sense of emergency passes.

Theory of Emergency Power. —The theory that government can violate rights and otherwise depart from law in an emergency echoes the old absolutist idea of necessity. And as with the old doctrine of necessity, so in the new doctrine of compelling government interests, the exigency of emergency circumstances sharpens the implications for rights.

It has been seen that in the absolutist theory of power, necessitous or compelling government interests rose above claims of law and legal rights. As also noted, however, American constitutions, including the U.S. Constitution, carefully precluded such claims of state necessity, including claims of an emergency power above the law.[114]

Even in emergencies, the Constitution barred emergency power above the law. For example, when the Constitution guaranteed habeas corpus, it allowed the federal government to detain individuals without habeas corpus in emergencies,

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114. *See supra* note 67.

but only in cases of rebellion or invasion, only with an act of Congress suspending the writ, and only under the authority of the Constitution itself.[115] Rather than a power above the law, this emergency power to detain was one permitted and limited by law.[116] Similarly, when the Constitution protected Americans against having soldiers quartered in their houses without their consent, it provided that the government could quarter soldiers only in time of war and only in a manner prescribed by law.[117] Again, although the Constitution recognized the need for emergency power, it provided for this power to be exercised through and under law, and it thereby carefully avoided any recognition of an emergency power above the law or any of the rights protected by law.[118]

Nowadays, however, judicial doctrine opens up a path for an undefined emergency government power to defeat enumerated rights. To be sure, the doctrine is not framed in terms of a "state of emergency," "absolute power," or other lurid phrases. Nonetheless, it allows government interests—most clearly, "compelling state interests"—to defeat even the enumerated rights, and this echoes the old doctrine on state necessity, the doctrine that allowed necessities of state to rise above the law.

Like Continental theories of state necessity, the theory of compelling government interests is especially forceful in

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115. *See* U.S. CONST. art. 1, § 9.

116. It has been argued by Trevor Morrison that, even under a suspension of habeas, detentions were unlawful and eventually subject to other legal remedies. Trevor W. Morrison, Hamdi*'s Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411, 432 (2006); Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1543, 1545-47 (2007). The pre-constitutional evidence for this argument, however, does not actually support the conclusion. HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 15, at 557 n.15. More generally, there is overwhelming evidence, from England and America, that a statute authorizing detention and suspending habeas rendered detentions lawful and without remedy. Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 386 (2006); Tyler, *Suspension as an Emergency Power*, *supra* note 91, at 613, 636; *see also* David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 86-87, 89 (2006).

117. U.S. CONST. amend. III.

118. HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 15, at 423-26.

emergencies, for the more exigent the circumstances, the more necessitous or compelling the government interest. Thus, by means of the compelling-government-interest test, the government acquires an emergency power to deny rights notwithstanding the Constitution.

Korematsu *and* Hamdi. —The results can be observed in two notorious cases. Far from being exceptions, they are exactly what one would expect in emergencies from the inversion of rights and powers.

Korematsu v. United States arose from the exclusion (and detention) of Japanese Americans during World War II.[119] This treatment of these Americans seemed a state necessity, and the executive carried out the discriminatory constraint without a congressional suspension of habeas corpus.[120] When the exclusion came before the Supreme Court in 1944 in *Korematsu v. United States*, the Court upheld it on the ground that the military emergency was a "[p]ressing public necessity"—this being (as already observed) an early way of speaking about a compelling government interest.[121]

Nowadays, many commentators look back on the holding in *Korematsu* as an aberration. But if rights are subject to compelling government interests, and especially if they are subject to the government's wartime interests, it should hardly be a surprise that courts will end up bowing to the claims of the government.[122]

Of course, it may be said that *Korematsu* was an exceptional case because it occurred in the aftermath of a military emergency, but that is precisely the point. The Constitution rejected the absolutist doctrine that necessity rises above the law and thereby defeats rights. The Supreme

119. Korematsu v. United States, 323 U.S. 214, 216-17 (1944).

120. *Id.*

121. *Id.* at 216.

122. In a sense, one should not attribute the result in *Korematsu* to the compelling-government-interest test because this test was not yet established as doctrine at the time of the decision. The idea of a necessitous or compelling government interest, however, was already familiar, and it clearly underlaid the decision.

Court, however, in *Korematsu* elevated "[p]ublic necessity" above a constitutional right, with the nearly inevitable result that, in an emergency, the government's interest seemed necessitous or compelling. The doctrine created by the judges thus comes astonishingly close to a recognition of an emergency power above the law, but the judges apparently do not understand that they are walking along the edge of this precipice.

That *Korematsu* is not an aberration is confirmed by *Hamdi v. Rumsfeld*.[123] Hamdi was an American citizen who was captured while fighting against the United States in Afghanistan.[124] Ordinarily, he would have had a right to the full due process of law in a criminal case, including a jury trial in an Article III court and all of the other rights of a criminal defendant. But in the crisis atmosphere following 9-11, he was held for three years by the military, and when his writ of habeas came before the Supreme Court, it "weigh[ed] the opposing governmental interests against the curtailment of liberty."[125] The Court concluded that the government had to give Hamdi "a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker" but not more than this.[126] As put by the Court, "the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[127] In short, where justified by "the exigencies of the circumstances" during an "ongoing military conflict," the government can hold an American citizen without a regular criminal trial or other due process of law.[128]

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123. Hamdi v. Rumsfeld, 542 U.S. 507, 546-47 (2004).

124. *Id.* at 510.

125. *Id.* at 531.

126. *Id.* at 509.

127. *Id.* at 533.

128. *Id.* During the Civil War, the United States held many Confederate soldiers as prisoners of war without giving them trials in Article III courts, but that was a conflict that was simultaneously a rebellion and a civil war, and the United States therefore had reason sometimes to prosecute Confederates for treason and sometimes to hold them simply as prisoners of war. For details, see Andrew Kent,

The case turned on Hamdi's demand for due process of law, and the Court therefore did not even give him the benefit of the compelling-government-interest test. Instead, it just applied a "balancing" standard.[129] Either way, however, the result was predictable. Although persons subject to American law ordinarily have a constitutional right to a speedy and regular trial, with regular criminal due process and a jury trial in court, the "exigencies" of war outweighed this right.

The inversion of rights and power is almost a guarantee that, in wartime or other emergencies, rights will give way to power. Of course, the judges do not put this in terms of the state necessity, the sovereign's absolute power, or other ideas of power above the law, but the similarities are obvious enough. In most emergencies, the government's interests or power are apt to seem especially "compelling," thus defeating constitutional rights precisely when an attachment to such rights is most needed.

B. *Ordinary Circumstances in Court: Free Exercise and Jury Rights*

Not only in emergencies but also in ordinary circumstances, the inversion is dangerous. The consequences can be observed in decisions on free exercise and on administrative denials of civil jury rights.

Free Exercise: Lukumi. —In a leading free exercise case, *Church of Lukumi Babalu Aye v. City of Hialeah*, the Supreme Court condemned a series of town ordinances that penalized animal sacrifice.[130] The ordinances focused on "ritual" and "sacrifice" and thus, on their face, might seem to have singled out religion for constraint.[131] The Court, however, did not agree on this. Instead, it concluded that the ordinances, although neutral on their face, were designed to

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The Constitution and the Laws of War During the Civil War, 85 NOTRE DAME L. REV. 1839 (2010).

129. *Hamdi*, 542 U.S. at 532.

130. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546-47 (1993).

131. *Id.* at 533-34.

prohibit the practice of Santeria, which requires the slaughter of chickens.[132]

One way or another, when the Court concluded that the ordinances penalized a religion—on their face or in reality—it might have stopped and simply held the ordinances unconstitutional. Instead, the Court followed its standard approach to rights, stating that the First Amendment right of the Santeria church depended on whether the ordinances were justified by a compelling government interest and were narrowly tailored to promote it.[133] Already in the district court, the decision seemed to be a matter of determining the "balance" between the "'the governmental and religious interests.'"[134] Although the Supreme Court rejected the district court's view that the government interests were compelling, the Court adopted the compelling-government-interest test to determine the constitutionality of laws that it already had found to impose discriminatory constraints on religion.[135] The Court thus opened up the possibility that a law singling out a particular religion for constraint or penalty could be justified by a compelling government interest.

This is astonishing and deeply worrisome. Although the Court rightly condemned the ordinances in *Lukumi*, it suggested that discriminatory religious constraints would be upheld where the government had a sufficiently strong reason to single out a particular religion.[136] The compelling-government-interest test thus opens up dangers already in ordinary times, and it thereby lays the basis for even worse in emergencies.

Administrative Denials of Jury Rights. —Perhaps, the clearest illustration concerns the public rights doctrine. Even in entirely ordinary, non-emergency circumstances, this

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132. *Id.* at 533-34, 542.

133. *Id.* at 546.

134. *Id.* at 529 (quoting Church of Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467, 1484 (S.D. Fla. 1989)).

135. *See id.* at 546-47.

136. For a more detailed analysis of *Lukumi*, see Hamburger, *More is Less*, *supra* note 107, at 879-81.

doctrine defeats the right to a jury where the government acts through administrative adjudication.

Defendants traditionally had a right to a jury in judicial decisions, other than those in equity or admiralty, and this meant that, with these two exceptions, government could not issue edicts imposing constraints on persons without offering a jury. Executive decisions about government benefits were binding in the sense that they settled who would get benefits. Judicial decisions, however, were binding in the deeper sense that they were edicts that imposed legally binding constraints, and in these cases defendants had a right to a jury.[137]

Although this right was widely understood to be a foundation of liberty, it has suffered profoundly with the development of administrative power. In particular, when an executive or other agency engages in binding adjudication, it issues edicts that impose binding constraints but without a jury. Many such administrative proceedings are criminal in nature and therefore deny the jury guaranteed by the Constitution in "the Trial of all Crimes" and "all criminal prosecutions."[138] Although the Supreme Court has not recognized the criminal nature of such proceedings, it should be kept in mind that, if administrative proceedings are not criminal in nature, they are civil. And this presents a constitutional problem, for the Seventh Amendment guarantees trial by jury "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars."[139]

As already noted in Part II, this right to a jury was not simply a guarantee of juries in common law (non-statutory) actions. Indeed, it arose from demands for juries in civil actions. Fearing attempts to evade jury trials, Anti-Federalists insisted on an express guarantee of juries in civil cases. The Seventh Amendment therefore guaranteed a jury not merely in common law actions, but more broadly in

137. For these distinctions, see HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 15, at 2-4, 191. Of course, for civil cases under forty shillings, there traditionally was no right to a jury because these cases fell below the floor for royal jurisdiction. HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 25, at 410.

138. U.S. CONST., art. III, § 2; U.S. CONST. amend. VI.

139. U.S. CONST. amend. VII.

"[s]uits at common law"—that is, in all civil cases outside of equity and admiralty.

This was especially significant because the Constitution vested federal judicial power in the courts and assumed only criminal and civil jurisdiction. Initially, the Constitution guaranteed only criminal juries, but the Seventh Amendment added a guarantee of civil juries. This amendment thereby completed the establishment of juries as an enforcement filter between the government and the people.[140]

Put another way, the Seventh Amendment's right to a jury was not simply a technicality about the courts; instead, it completed a fundamental mechanism that required the government, whenever it acted against members of the public, to act through the judgment of the community, as represented by the jury.[141] Just as the king in England could

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140. Alexander Hamilton wrote: "[i]t is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience," and "[t]his penalty, whatever it may be, can only be inflicted in two ways; by the agency of the courts and ministers of justice, or by military force; by the coercion of the magistracy, or by the coercion of arms." THE FEDERALIST NO. 15, at 95 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). From the other side of the debate, "Brutus" observed that "[t]he real effect of this system of government, will . . . be brought home to the feelings of the people, through the medium of the judicial power." Brutus XI, NEW YORK JOURNAL (Jan. 31, 1788), *reprinted in* 15(3) THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 41, at 512.

141. The breadth of the Seventh Amendment's guarantee has tended to go unrecognized, because of a misunderstanding about its twenty dollar floor. The amendment guarantees trial by jury in suits at common law, "where the value in controversy shall exceed twenty dollars," and on this basis, it is widely assumed that the amendment truncated the common law right. In fact, the amendment was drafted on the assumption that civil disputes for amounts below twenty dollars could be considered below the jurisdiction of the common law and thus not within the common law rights enjoyed in civil cases.

In English law, the floor for the civil jurisdiction of the common law courts, and thus for the right to a jury in civil cases, had been forty shillings. In the American colonies and early American states, legislatures attempted to lift this floor so as to leave room for justices of the peace to hear small claims without juries. HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 25, at 410. Such attempts, however, were widely condemned as unconstitutional, and after the New Hampshire legislature raised the amount to ten pounds, the state's Inferior

not impose a fine or give damages on his own, so the federal executive had no such power. Unable to act judicially on its own to issue an edict imposing any binding constraint, the king or executive had to go to a court and get the verdict of a jury. The right to a jury—including the right to a jury in a civil case—thereby precluded any executive adjudication imposing a binding constraint.[142]

Indeed, the Supreme Court in *Atlas Roofing* recognized this basic conflict between administrative adjudication and the Seventh Amendment's right to a jury.[143] But rather than uphold the right, it preserved administrative power by concluding that, at least where the government was enforcing statutory claims, it was exercising sovereign public rights.[144] According to the Court, these sovereign public rights defeated the merely private constitutional right to a jury.[145]

As if this were not bad enough, the Court in subsequent cases has extended this sort of argument to uphold the administrative denial of jury rights in decisions between

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Courts in 1786 held the enactment void for violating the state's constitution. *See id.* at 422-35 (describing New Hampshire's Ten Pound Cases).

In at least one other state, however, North Carolina, the jurisdiction of justices of the peace over debts was successfully raised to twenty pounds. 1786 N.C. Sess. Laws, ch. 14, § 7, *reprinted in* 24 THE STATE RECORDS OF NORTH CAROLINA 806 (Walter Clark ed., 1905). Although some legislators protested, there appears to have been no constitutional challenge in the courts. For the protest, see HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 25, at 424 n.70.

Against this background, it is a mistake to assume that the Seventh Amendment's twenty dollar requirement simply denied the common law right to a jury when cases did not go above that amount. Instead, the requirement was understood to represent the floor for common law jurisdiction and thus the floor for the common law right to a jury in civil cases.

142. Of course, the executive was thereby limited only in imposing binding constraints, not in distributing benefits (unless they had vested and thereby became legal rights), and only in imposing such constraints on subjects—on persons subject to the law of the United States—not in making demands of non-subjects. *See* HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 15, at 228.

143. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 449-50 (1977).

144. *Id.* at 450.

145. *See id.*

private parties, in which the government's public right is nothing more than the executive's claim of power to adjudicate in place of the courts. The Court in *Granfinanciera v. Nordberg*, for example, "rejected the view that a matter of public rights must at a minimum arise between the government and others."[146] On the contrary, public rights now include not only the government's sovereign claims against private parties but also its sovereign claim to adjudicate between private parties—at least where the government by statute has created a private right that is "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[147] Whatever this means, it generally allows the sovereign claims of public rights to defeat Seventh Amendment jury rights—at least where the executive usurps the judicial power. There would be no point in violating the Constitution's placement of the judicial power in the courts if the executive could not also repudiate the right to a jury, and the Court explains this by saying that the government's "sovereign capacity" and "public rights" trump private claims to a constitutional right.[148]

Thus, even in ordinary circumstances, the inversion has consequences. These are hinted at in a leading free exercise case, and are widely felt in the administrative denial of jury rights.

C. *Ordinary Circumstances Out of Court: Free Speech*

What is dangerous in ordinary times in court can be especially bad out of court—as can be illustrated by the freedom of speech. The inversion of rights and powers has justified the imposition of a sweeping federal system of licensing academic speech and publication, and part of the justification has been the theory that the government has a

146. Granfinanciera v. Nordberg, 492 U.S. 33, 54 (1989) (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982)) (internal quotation marks omitted).

147. *Id.* at 69 (emphasis omitted) (quoting Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 593-94 (1985)) (internal quotation marks omitted).

148. *Atlas Roofing Co.*, 430 U.S. at 450.

compelling government interest in protecting human-subjects.

Of course, lawyers tend to measure the effect of law by looking at cases. Law, however, obviously affects the world in ways that never reach the courts, and far from being merely an additional way of understanding the consequences, this becomes a central conceptual point when the law has the effect of discouraging Americans from asserting and defending their constitutional rights.

Out of Court. —Americans fortunately enjoy most of their liberty outside of court—that is, without having to go to court—but they can enjoy this blessing only to the extent that their rights are clear enough not to require judicial vindication. The function of the enumerated rights, therefore, cannot be understood merely in terms of what they allow courts to do in defending liberty. No less significantly, such rights preserve liberty by clarifying for the people what they may confidently assert as their liberty.

Madison already recognized that a bill of rights would be valuable for establishing rights not merely in court, but more substantially in the minds of the people. He understood that a bill of rights would be a foundation for judicial decisions securing liberty.[149] He recognized, however, that in a republic, where the "political" and "physical" powers of the community were vested "in the same hands, that is in a majority of the people," the "tyrannical will of the sovereign" could not be "controlled by the dread of an appeal to any other force within the community."[150] He therefore made the profound observation that the primary function of a bill of rights, would be to establish maxims that would be internalized by the people: "The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free government, and as they become incorporated

149. Speech of James Madison, *in* CREATING THE BILL OF RIGHTS, *supra* note 43, at 83 ("If [rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights . . . .").

150. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 11 THE PAPERS OF JAMES MADISON, *supra* note 102, at 295, 298.

with the national sentiment, counteract the impulses of interest and passion."[151]

This role of enumerated rights in preserving liberty out of court had implications for the framing of such rights, and it still has implications for judicial interpretation. To become maxims that became incorporated with the national sentiment, they had to be stated relatively generally. Moreover, if they were to be foundations for liberty out of court, they could not depend on the vagaries of getting a court to weigh competing interests. Above all, if rights were to become national sentiments and were to be enjoyed out of court, they had to be clear to the people, and this meant that they had to clearly trump government power.

By inverting rights and power—by subjecting rights to compelling government interests—the courts render all claims of rights uncertain. Of course, all questions of law are uncertain at their edges, but by inverting rights and power, the courts systematically render enumerated rights uncertain even at their core. The courts thereby give the government confidence that it can interfere with rights, while they also deprive the people of their confidence that they have any clear, strong claim against their government. Instead, they inculcate the enervating ideas that the people's rights are uncertain until they go to court and, indeed, that all rights are subject to power and thus must be evaluated with a sort of deference to power. The effect is to deprive the people of the very idea that they have constitutional rights in the traditional sense—rights that trump power.

In such ways, the courts undermine the confidence and ability of individuals to assert their rights both out of court and in court. Out of court, individuals cannot assert a right with confidence that it will not be defeated by power. Nor can they rely on the government to respect their rights, for what once were "fundamental maxims . . . incorporated with the national sentiment" are now merely occasions for the government to assert its trumping interests.[152] Moreover, individuals cannot easily seek remedies in court. Because they lack the confidence that they can prevail, they often

151. *Id.* at 298-99.

152. *Id.*

hesitate to spend the money and energy necessary to pursue litigation; and because potential allies are apt to share their lack of confidence, they have difficulty getting their support. Thus, the lack of confidence out of court bleeds over into a lack of confidence in going to court.

IRB Licensing. —The results can be observed in the restoration of the licensing of speech and the press. Such licensing was last imposed systematically in the seventeenth century—notably by the Inquisition and the Star Chamber. Although the extent of the First Amendment's speech and press rights is open to dispute, there is nothing these rights more clearly forbade than the licensing of words. Nonetheless, this seventeenth century danger is back, once again threatening the very core of the freedom of speech and the press, and much of the responsibility lies with the Supreme Court.

The licensing works through universities and other research institutions. The Star Chamber already used the universities to license the publications of their personnel, and similarly the federal government uses universities to license human-subjects research and its publication by their personnel.[153] Nor is this a coincidence, for in a free society, government cannot successfully license speech and publication unless it obtains the cooperation of intermediate institutions.

The universities are required to carry out the licensing by establishing Institutional Review Boards.[154] Under federal regulations, these "IRBs" license "research involving human subjects."[155] Although this sounds like conduct, the regulations directly require IRBs to license speech in research and in the publication of research.[156] Not

153. Philip Hamburger, *IRB Licensing*, *in* WHO'S AFRAID OF ACADEMIC FREEDOM 153, 153 (Akeel Bilgrami & Jonathan R. Cole eds., 2015).

154. *Id.*

155. 45 C.F.R. § 46.101(a) (2014).

156. The federal regulations already make this clear when they define "human subjects" in terms of persons about whom one acquires "[d]ata" in certain ways or specified "information." 45 C.F.R. § 46.102(f) (2014). The regulations further reveal the focus on speech and publication when they apply the licensing only to

surprisingly, therefore, IRBs mostly restrict not what researchers can do, but what they can say in conducting their research and what they can publish about it.[157]

The federal government gets the universities to impose this licensing in part by making the establishment of IRBs a condition of federal research grants, and it therefore may be thought that the primary force behind this licensing consists merely of lawful conditions. The government, however, uses its grants for some research to secure licensing of all human-subjects research, regardless of its funding, and because this is so disproportionate and non-germane, it goes beyond what is permissible under the Supreme Court's doctrine on unconstitutional conditions. The imposition of the licensing through conditions has therefore never been a sufficient justification for the IRB licensing of speech and the press. Indeed, already at the inception of the IRB regulations, the government and its advisors recognized the conflict with the First Amendment, and they therefore emphasized that the licensing could be justified by government interests.

Sadly, it was the Supreme Court that gave the government such confidence that its interests trumped the First Amendment freedom from licensing. The Court had repeatedly stated that all rights, including the freedom of speech, were subject to compelling government interests. It therefore should be no surprise that when the federal government in the 1970s and 1980s imposed licensing of human-subjects research, it felt it could do so by licensing speech and the press and that it justified itself on grounds of

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attempts to develop "generalizable knowledge"—that is, attempts to develop theories, which (in the scientific vision) are what need to be published. 45 C.F.R. § 46.102(d) (2014). The licensing regulations thus focus on speech more than legally cognizable harms.

157. As in the earlier tradition of necessity or reason of state, so in cases of compelling government interest, the courts defer to the government's judgment about the necessity, reason, or interest, without considering whether it is supported by empirical evidence. This is particularly tragic in the case of IRBs, for there is no scientifically serious empirical evidence that inquiry, publication, or anything else done in academic research is more dangerous than when it is done in other spheres of life. In contrast, the IRB licensing clearly suppresses knowledge in ways that cost thousands, perhaps even tens of thousands of lives, every year. Hamburger, *IRB Licensing*, *supra* note 153, at 180-82.

compelling government interests. For example, a consultant to the government defended the licensing by reciting that "the First Amendment is not an absolute bar to prior restraint."[158] Similarly, a key government commission reported that the government could regulate research methods "in order to protect interests in health, order and safety."[159] On such reasoning, the government was emboldened to do what it otherwise would never have attempted.[160]

Even worse, those who opposed the licensing came to accept the mantra that free speech was subject to compelling government interests, and they therefore largely accepted that they lacked a clear right against the licensing. This can be observed in the protests by a distinguished political theorist, Ithiel de Sola Pool. He declared in 1980 that IRB licensing would be "a more fundamental attack" than McCarthyism, because it would "institutionalize a system of censorship over what is at the very heart of free speech, namely, inquiry into political, economic, and social matters—which has always been precisely the thing that people could do at will, without asking anyone."[161]

The regulators, however, confronted Pool with the Supreme Court's doctrine that the freedom of speech is not absolute. Pool therefore felt obliged to retreat to the "balancing" approach and unfortunately conceded: "we all

158. ROBERT LEVINE, ETHICS AND REGULATION OF CLINICAL RESEARCH 359 (Yale Univ. Press, 2d ed. 1988) (1986) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 725 (Foundation Press 1978)).

159. NAT'L COMM'N PROT. HUMAN SUBJECTS BIOMEDICAL & BEHAVIORAL RESEARCH, DHEW, (OS) 78-0008, REPORT AND RECOMMENDATIONS: INSTITUTIONAL REVIEW BOARDS 79 (1978).

160. Incidentally, federal licensing of speech and the press has come back not merely in the regulation of human-subjects research but also in other regulations, such as the licensing of medical information under the HIPAA Privacy Rule, FDA licensing of labeling, FCC licensing of radio and television on the basis of what is said, and IRS determinations about the tax status of churches, schools, and charities on the basis of their political speech.

161. Ithiel de Sola Pool, Remarks at the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research Meeting 243 (July 12, 1980) (on file at Georgetown University, Box 37, Special Collections, National Reference Center for Bioethics Literature).

understand that freedom of speech is not absolute."[162] The advocates of the licensing then triumphantly told him that the Court's doctrine "require[d] an argument as to why the impermissible impact on speech . . . is not justified by legitimate state interests."[163] The compelling-government-interest doctrine thus seemed to justify the licensing, and for decades after Pool's defeat, no academic (let alone any academic institution) challenged its constitutionality—either out of court or in court.[164]

The enervating effect of judicial doctrine has been particularly severe for academics because they lack political strength. When asserting rights in broad political movements, Americans often enjoy the confidence that comes with political popularity. Those such as Pool and other academics, who must assert their rights merely as individuals or as weak minorities, are not so fortunate. They can muster the strength and resources to resist invasions of their rights only if they have confidence in their claims, and judicial doctrine has systematically deprived them of this.[165]

The result has been a disaster. By emboldening the government and debilitating the people—in particular, by depriving Americans of the confidence in liberty, that is one of the primary benefits of having a bill of rights—the inversion has left academics subject to the most widespread and systematic abridgment of the freedom of speech and the press in the nation's history.[166]

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162. Letter from Ithiel de Sola Pool to Morris Abrams & Alexander Capron (July 29, 1980) (on file at Georgetown University, President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Box 3, Special Collections, National Reference Center for Bioethics Literature).

163. Letter from Alexander M. Capron to Ithiel de Sola Pool (Aug. 13, 1980) (on file at Georgetown University, President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Box 3, Special Collections, National Reference Center for Bioethics Literature). For more on the debilitating effects of the doctrine, see Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 SUP. CT. REV. 271, 351-54 (2005).

164. *See id.*

165. *Id.*

166. McCarthyism was more political but much less widespread, systematic, and enduring. The abridgment of the political speech of churches, schools, and charities under I.R.C. § 501(c)(3) is also more political, and it is widespread and

Minority Rights Subject to Majority Opinion. —One of the reasons the compelling-government-interest test has had such devastating effects is that what seems compelling tends to reflect prevailing sentiment. Sometimes this actually is majority sentiment, and sometimes it is merely what is expected to become majority sentiment, but either way, the compelling-government-interest test has rendered minority opinions vulnerable to majoritarian visions of power.

IRB licensing again is a revealing example. For nearly half a century, unsubstantiated popular or at least populist fears about the risks to human subjects have sustained the suppression of speech under the human-subjects research regulations.

Although fears for human subjects seem to justify the impingement on speech, such concerns are largely unjustified. To be sure, there are occasional tragedies in new drug and device trials done under the Food and Drug Administrative regulations, but these harms are irrelevant for understanding the risks from the non-FDA research done under the more general human-subjects research regulations. Once one puts aside the FDA studies, it becomes clear that, on the whole, even in medical research, there is no scientifically serious empirical evidence that human-subjects research in general is harmful.[167] Instead, what appears to be distinctively risky is a specific type of research—that done by government medical personnel on human subjects, especially on wards of government. Beyond this, however, the fears about human-subjects research are unsubstantiated.[168]

In fact, the fears for human subjects appear to reflect popular anxieties about science, modernity, and academics.

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enduring, but it is not as vigorously enforced and it has not been as lethal in its effects. For the thousands, even tens of thousands of deaths, caused by the suppression of medical research and its publication under the human-subjects research regulations, see Hamburger, *IRB Licensing*, *supra* note 153, at 181-82.

167. To be precise, there is no scientifically serious empirical evidence that anything is more dangerous when done in academic research than when outside research is done.

168. Indeed, the article typically cited to show the danger (published by Henry Beecher in 1966) leaves this impression only because it suppresses relevant data. *See* Philip Hamburger, *Getting Permission*, 101 NW. U. L. REV. 405, 455-56 (2007).

That is, they reflect majoritarian anxieties about a distinctively modern activity engaged in by an unpopular minority—indeed, an intellectual elite.[169] The disproportionate anxieties are evident from the tendency of commentators to compare American researchers with ghoulish Nazis scientists. Commentators (including government commentators) regularly justify IRB licensing by recounting the crimes perpetrated in Auschwitz by Josef Mengele and his associates.[170] The ludicrous and offensive character of such comparisons hints at the distorted and "pathological" character of the fears that have upheld constitutional licensing for nearly half a century. IRB licensing thus illustrates how much the compelling-

169. As put by one observer, some of the "intense inquiry" about harm to human subjects was "conducted by individuals whose concern for subjects seems a surrogate for worries about unrelated problems of modern society." E. L. Pattullo, *Institutional Review Boards and Social Research*, *in* NIH READINGS ON THE PROTECTION OF HUMAN SUBJECTS IN BEHAVIORAL AND SOCIAL SCIENCE RESEARCH 10, 14 (Joan E. Sieber ed., 1984).

170. Almost all accounts of the need for IRBs begin with the experiments in Nazi concentration camps, and this is true not only of popular studies but also of supposedly sober academic accounts. Nuremberg, for example, is the opening example in the Belmont Report. Already in its fourth sentence—the Belmont Report states: "[d]uring the Nuremberg War Crime Trials, the Nuremberg Code was drafted as a set of standards for judging physicians and scientists who had conducted biomedical experiments on concentration camp prisoners." Belmont Report: Ethical Principles and Guidelines for Research Involving Human Subjects, 44 Fed. Reg. 23,192, 23,192 (Apr. 18, 1979). Later, when discussing the historical foundation for understanding research on human subjects, the report works from the example of "the exploitation of unwilling prisoners as research subjects in Nazi concentration camps." *Id.* at 23,194.

Commentators even compare Stanley Milgram—one of the most profound and serious of twentieth century psychological researchers—with Mengele. This lumping together of Milgram with Mengele and his colleagues can be observed, for example, in the government education film, EVOLVING CONCERN: PROTECTION FOR HUMAN SUBJECTS (National Library of Medicine 1986). As Richard O'Brien observes, this "opens with a collage of four pictures showing (1) Nazi medical researchers at Nuremberg, (2) the Tuskegee Study, (3) the Wichita Jury Study, and (4) Stanley Milgram's (1974) obedience research." Richard M. O'Brien, *The Institutional Review Board Problem: Where It Came From and What to Do About It*, 15 J. SOCIAL DISTRESS & HOMELESS 23, 33 (2006). O'Brien comments: "While there is some disagreement on the ethics of Milgram's experiment, would anyone group his work with that of the physicians at Tuskegee or the Nazis tried at Nuremberg?" *Id.*

government-interest test gives effect to irrational majoritarian fears even in "normal" times.

D. *Normal People in Normal Times*

According to the work of Vincent Blasi, speech doctrine needs to be framed in anticipation of what he calls "pathological times."[171] This is an important insight, and the evidence that has been examined here goes even further. It shows that not only speech rights, but all rights are at risk, and that the danger arises not merely during emergencies and other special times, but at all times. Put concretely, the inverting doctrines (ranging from the compelling-government-interest test to the public rights doctrine) endanger all sorts of rights at all times, including normal times.

The reason that the inverting doctrines are dangerous at all times is that they create supposedly lawful pathways for majority opinion to cut short the enjoyment of rights by minorities. Of course, majority power can sometimes defeat rights without the legitimacy of law, but when sanctified by constitutional doctrine, majority power can triumph over rights with self-righteous ease.

Pathological or Normal? —It is important to recognize that the inverting doctrines are dangerous even in normal times. The application of the public rights doctrine to curtail the right to a jury, and the application of the compelling-government-interest test to speech, reveal that the danger is as great in ordinary times as in emergencies. And this should be no surprise, for the primary danger in a republic is the power of majorities, regardless of an emergency.

The pervasiveness of the threat, even in normal times, needs to be recognized, for only in this way will Americans and their judges confront the threat from the inverting doctrines. In contrast, when they can assume that the danger comes mainly from pathologies or pathological times, they are apt to think that the danger lies in other persons and

171. *See* Blasi, *supra* note 9, at 483, 485.

other periods, thus allowing complacency about current assaults on constitutional rights.

The notion of "pathology" locates the constitutional danger in a social sickness, and it thereby allows a current majority and its judges, who consider themselves and their views normal, to sidestep the possibility that they and their constitutional doctrine are profoundly dangerous. As has been seen, however, the danger cannot be dismissed as the product of other, sick persons and times. On the contrary, the danger is the product of majority sentiment, both in emergency and ordinary circumstances, and it therefore is essential for Americans to be aware that they themselves, even in their apparent normalcy, can be the source of the danger. The problem lies not in a psychologically and politically distant other, but in ourselves—even our normal selves.

Indeed, what is normal is in some ways particularly dangerous. In a period of a placid consensus about a danger, there is apt to be especially widespread opinion about the strength of the government's interests and about the need for its interests to trump any conflicting rights. In such circumstances, the compelling-government-interest test can justify broad and enduring infringements of rights—as evident from the decades-long system of licensing speech and publication in human-subjects research. Rather than the product of an especially pathological period, this is the result of apparently normal times, when there is complacent agreement about the government's interest.

It thus is a mistake to assume that the danger from the compelling-government-interest test is especially great in "pathological" times. At best, one could conclude that all times are "pathological" in their own way. It therefore is important to put aside psychological labels and to recognize the unfortunate normalcy of the anxieties that lead to suppression. In all times, there are great dangers in suggesting that government interests can trump constitutional rights.

CONCLUSION

The Supreme Court has inverted rights and powers. Whereas the Constitution enumerated rights as exceptions to power, judicial doctrine has introduced power as an exception to rights. In the language of contemporary philosophy, although the Constitution enumerated its rights as trumps, judicial doctrine has made power trumps. It is a sobering change, and it opens up disturbing questions about both the structure and character of constitutional liberty.

To be sure, it is a predictable mantra that rights are not absolute, and in many ways, for many types of rights, this may be true. The constitutional question, however, is structural rather than metaphysical. Power is now understood to trump enumerated constitutional rights, and this revives dangers that such rights were meant to put to rest.

Among the results is a change in the character of constitutional rights. Whereas enumerated rights once preserved spheres of freedom that largely cut off trumping claims about social and governmental needs, nowadays judicial doctrines on government interests deprive rights of this effect. Rights thus no longer conclude constitutional analysis but merely begin a conversion about the extent of power. Rather than little realms of liberty, rights are now often viewed as "ways to channel the kinds of reasons and justifications" government can use to deny liberty.[172]

The inversion thereby profoundly compromises the capacity of rights to limit government. Most basically, by subordinating enumerated rights to power, it reverses the structural relationship of rights and power. And because government interests are apt to seem especially compelling during emergencies, the inversion gives the government what is nearly an emergency power above constitutional rights. The problem, however, is not limited to emergencies, for even in ordinary times the inversion elevates power over rights. Indeed, it tends to elevate majoritarian or at least popular perceptions of the need for power over minority rights. In such ways, it systematically undermines the

172. Pildes, *Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, *supra* note 4, at 761; Waldron, *supra* note 4, at 305.

protection for rights, even at their core. The inversion thereby emboldens the government to think it may lawfully violate rights; it allows the government to defeat rights in the courts; it even undermines the confidence of the people that they have rights that they can successfully defend, thus additionally having profound consequences out of court.

Absolutism. —None of this should be a surprise, for Americans drew upon absolutist ideas when they introduced the inversion. In the absolutist tradition that developed on the Continent, constitutional law came not from the people, but from the State, and power thus could trump rights, even constitutional rights. Many late nineteenth century and early twentieth century Americans echoed the gist of this *Staatstheorie*, and they thereby transformed the American understanding of rights.

The details are left to the Appendix, but three salient examples can be summarized. First, many Americans assimilated a version of the old absolutist doctrine of state necessity—the doctrine that government necessity rises above the law and legal rights. From this point of view, the Supreme Court in *Korematsu* bluntly acknowledged that "[p]ressing public necessity" defeated constitutional rights, and although the Court thereafter avoided speaking in terms of "necessity," it persisted in allowing compelling state interests to defeat claims of rights.[173]

Second, the Supreme Court adopted the civilian term "public rights," including its absolutist implications. Rather than accept that government power is subject to constitutional rights, the Court came to assume that government has sovereign "public rights" that defeat merely private constitutional rights, and this became the justification for denying jury rights in administrative adjudication.[174]

Third, and most broadly, many Americans absorbed the absolutist assumption that the State is the source of rights

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173. Korematsu v. United States, 323 U.S. 214, 216 (1944).

174. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 450 (1977).

and thus can realign them in accord with its understanding of societal needs. Many turn-of-the-century Americans repeatedly espoused this view, and they thereby reinforced the conclusion that government has the power to adjust even constitutional rights.[175]

In such ways, although enumerated constitutional rights once were structurally absolute, now government power is structurally absolute. The lesson seems to be that at least constitutional law, and the rights protected and enumerated by it, must be absolute so that power does not become absolute.

Lazy Judging. —The problem can be understood as one of intellectual laziness. Where claims of enumerated rights seem to conflict with government claims, judges analyze the rights in terms of conflicting interests, and they thereby leave the definitions of rights so open-ended that the judges almost inevitably feel the need to confine the rights by looking to government interests. Government interests thus become a lazy substitute for careful definitions of rights.

Regardless of whether judges define enumerated rights narrowly, expansively, or somewhere in the middle, they should at least try to define them in a way that is not so open-ended as to invite the use of government interests to trump the rights. This means defining rights doctrinally, not in terms of power or government interests or functions. It also means choosing doctrinal definitions carefully, so that they have a good chance of standing the test of time, across varying circumstances, without having to be trumped by power. None of this precludes judges from expanding rights or establishing new ones, but it does require judges to do so thoughtfully. Whatever judges do with rights, they should not define them in ways that invite inversion and thereby undermine the character and effectiveness of enumerated rights as limits on power.

The Role of the Supreme Court. —If at any time in the twentieth century the justices of the U.S. Supreme Court had

175. This perspective overlapped with, and was closely allied with, the legal realist view of rights, but that is a story for another time.

declared that they were restructuring rights and power so as to invert their relationship, there would have been protests. So candid and bold a subversion of liberty surely would have provoked widespread and probably successful opposition. Like other judicial modifications of law, however, the restructuring of rights was never formally declared, at least not in such terms, and it therefore became a part of judicial doctrine without a public decision, without public debate, and most fundamentally without even being recognized for what it was.

Fortunately, the Supreme Court recently acknowledged the possibility that there be some core of the freedom of speech that stands beyond any government interests.[176] The Court, however, refrained from endorsing this conclusion, because so broad a holding was unnecessary for its decision.

Although such restraint would be commendable if the Court were discussing a question at the outer edges of the law, it is another matter when the Court refuses to state a basic constitutional principle about the relationship of rights to power. It is especially problematic where the Court bears much responsibility. The Court long ago went far beyond what was necessary for deciding its cases when it sweepingly generalized that no right is absolute and that all rights are subject to compelling government interests or other balancing. These doctrines inverted the relationship between rights and power and ever since have practically invited the government to abuse its power. Therefore, quite apart from the ordinary obligation of judges to state foundational principles of law accurately, the justices of the Supreme Court have a special obligation to do so here. Having stood rights on their head, they need to set matters right.

Although it is late in the day, it should never be too late to restore constitutional liberty. The restructuring of rights and power has already seriously abridged key constitutional rights, including freedom of speech, jury rights, and the freedom from detention without trial, and these losses provide a grave warning about the losses yet to come if the inversion is not recognized and repudiated.

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176. Citizens United v. FEC, 130 S. Ct. 876, 898 (2010). For further discussion, see *supra* note 2.

APPENDIX

THE ABSOLUTIST ORIGINS OF THE INVERSION OF RIGHTS AND POWER

The inversion of rights and power has a history in absolutist ideas. The elevation of government power over rights is apt to be defended as a pragmatic American response to the pressures of modern industrial life, or as a realist rejection of metaphysical conceptions of rights. What always, however, is omitted from such accounts is that the Americans who introduced the inversion into American law drew, directly or indirectly, upon Continental and especially German *Staatstheorie*—a theory of government and law that carried forward old absolutist assumptions about the State's authority over the people and individuals. Absolute power thus became a key foundation for the inversion and its rejection of structurally absolute rights.

Of course, this history may seem long past, and in any case absolutist ideas were not the only foundation for the inversion. Nonetheless, such ideas remain important in suggesting the nature of the inversion and its danger. The inversion gave effect in America to earlier Continental ideas of absolute power—in particular Continental ideas about how State power can trump even enumerated constitutional rights—and once this is understood, it is difficult to avoid being self-conscious about the danger.

A. Staatstheorie *in America*

During the late nineteenth and early twentieth centuries, American scholars, lawyers, and politicians drank deeply from German theory. Of particular interest here, they imbibed much of the German political and legal theory of the State, in which the State had a generic power over society, including personal rights.[177]

These ideas of power had developed in the Middle Ages largely among scholars of the civil law, but by the eighteenth and nineteenth centuries, they no longer were confined to

177. *Staatstheorie* is understood broadly here to include its manifestation not only in political theory but also in legal and administrative scholarship.

civilian scholarship. German academics were particularly systematic in developing such ideas in legal and political theory, and on this foundation many Americans, mostly progressives, built their own vision of power over rights.

Pre-constitutional ideas of absolute power thus circled back to Anglo-American law through Germany. Although, in the seventeenth and eighteenth centuries, Anglo-American constitutional law had defeated absolutist ideas about a sovereign or State power over rights, absolutist ideas survived on the Continent, especially in Germany, and from there, beginning in the late nineteenth century, they returned to common law lands.[178]

Staatstheorie. —German academics were the most prolific and distinguished expositors of the civilian tradition of the State. The common law, since at least the time of Bracton, had generally embraced the ideal that the law established rulers and limited what they could do.[179] The civil law, however, had assumed that rulers established law and that they therefore could adjust the rights enjoyed under it—indeed, that they sometimes could deny such rights.[180] During the Middle Ages, civilian scholars had attributed this sort of absolute power to kings or princes, but around the time of the Reformation, civilian-trained scholars increasingly located this power in the State.

Of course, when the personal power of kings became the depersonalized power of the State, much changed. For example, the prerogative will of the ruler exercised outside

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178. DENNIS J. MAHONEY, POLITICS AND PROGRESS: THE EMERGENCE OF AMERICAN POLITICAL SCIENCE 30 (2004); Sylvia D. Fries, Staatstheorie *and the New American Science of Politics*, 34 J. HIST. IDEAS 391, 403-04 (1973).

179. The English judge Bracton emphasized that what a king forbade to others, "he ought not to do himself." BRACTON, *supra* note 23, at 305. The king was thus to "temper his power by law, which is the bridle of power, that he may live according to the laws"—to which Bracton suggestively added: "for the law of mankind has decreed that his own laws bind the lawgiver." *Id.*

180. The civilian analysis harkened back to the view, recorded by Justinian, that "[w]hat pleases the prince has the force of law." The maxim was from Ulpian's version of the *Lex Regia*, recited in DIG. 1.4.1.pr (Ulpian, Institutes 1); J. INST. 1.2.6 ("quod principi placuit, legis habet vigorem.").

the legislature became the administrative rulemaking exercised outside the legislature. All the same, there was much continuity. The Continental scholars who upheld the State as the ultimate authority in society, and especially the German scholars who propounded this in their *Staatstheorie*, became the primary conduits for perpetuation of absolutist ideas.[181]

In the German vision, the State was not merely the government, but something more enduring and ominous. According to Anglo-American constitutional theory, the people created the fundamental law, the constitution, and thereby established government subject to legal limits, including constitutional rights. In the German theory, however, at least as it developed by the nineteenth century, the State persisted over time, and notwithstanding changes in the constitution or form of government, the State's basic interests remained unchanged.[182] Most prominently, it always enjoyed the power necessary to preserve itself and the order, or *Ordnung*, of the society.[183]

From this perspective, the State enjoyed power independently of what the people might say, and although the people might purport to enact a law establishing their government, the real constitution was what the State did or at least what it authorized. For example, because law was understood to embody the State's coercive power, the State itself was the source of all law, whether the constitution or other law. Indeed, although the State could act through law, it also could act against the people through other forms of command—this extralegal command being what was called "administrative power."[184]

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181. *See* HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 15, at 441-78.

182. *See* G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 311-12 (Allen W. Wood ed., H.B. Nisbet trans., 1991).

183. 4 Allgemeines Landrecht für die Preussischen Staaten, 1004, tit. XVII § 10 (Berlin 1794). This section of the Prussian code famously provided: "[t]o make the necessary provisions for preserving public peace, security, and order (*Ordnung*), and for averting dangers threatening the public or individuals, is the function of the police." *Id.* as translated by ERNST FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 140 n.2 (1928).

184. HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 15, at 1-5.

Of course, the State (echoing earlier monarchs) justified itself on the ground that it sought the well-being of the people. And it attempted to substantiate this claim by employing the educated and supposedly disinterested to exercise its administrative power. But the key point was that all of its authority came from above, not from below.

Americans. —In the half-century from the Civil War until World War I, vast numbers of academic and other Americans turned, at least to some degree, toward the absolutist vision of the State. Many were pained by what they considered the provincial character of America and its ideas, and they therefore were easily awed by the "scientific" study of law and politics in German universities. Increasing numbers of educated Americans, moreover, felt uneasy about the democratization of American politics, in which diverse and uneducated masses repeatedly elected corrupt officials. Many of the educated also felt disgust for the crass, commercial character of American life and were disappointed that popularly elected legislatures had failed to confine the pursuit of commercial self-interest.

They often made explicit that their concerns about democracy were anxieties about the *demos* itself. Woodrow Wilson complained that the reformer needed to influence "the mind, not of Americans of the older stocks only, but also of Irishmen, of Germans, of Negroes."[185] Taking a slightly different tack, Professor John Burgess of Columbia generalized about the "spurious" sort of democratic government in which "the ignorant rule the enlightened" and "the vulgar rule the refined."[186]

In these circumstances, large swaths of educated Americans, especially progressives, lost faith in "democratic" government and began to explore alternatives. Rather than place their trust in the people, many shifted their hopes to a government led by the educated, considering this to be the

185. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 209 (1887).

186. Professor John W. Burgess, Address Made on the Invitation and at the Request of the Newport Improvement Association (Sept. 5, 1913), *in* Bulletin No. 2, Sept. 1913, at 23.

means of establishing uncorrupt public interests above the discordant interests of America's fractured society.

In other words, rather than leaving the people to govern themselves, many educated Americans, above all progressives, hoped for a mode of government that would be guided by persons of education, taste, and refinement—namely, by persons like themselves. Wilson, for example, urged that "[t]he most despotic of governments under the control of wise statesmen is preferable to the freest ruled by demagogues," and he therefore sought to combat "the error of trying to do too much by vote," lest public opinion become "meddlesome."[187] Documenting such attitudes, William Nelson caustically observes: "Many reformers believed that they themselves constituted precisely the sort of aristocracy needed in government."[188]

It therefore is not a surprise that many Americans, beginning in the late nineteenth century, turned from familiar ideas of power by the people to foreign ideas of power over the people. Of course, they still said it was power of and for the people—just not so much *by* them. Americans by the thousands went to Germany to study the *Staatstheorie* and its elaboration in constitutional and administrative scholarship, and after German-inspired scholars came to dominate parts of the American professoriate, young Americans did not have to travel further than domestic colleges to imbibe the theory and its reconfiguration of American constitutional law and rights.[189]

One result was a tendency among American political theorists, politicians, and eventually also lawyers, to think

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187. WOODROW WILSON, CABINET GOVERNMENT IN THE UNITED STATES 20 (1947); Wilson, *The Study of Administration*, *supra* note 185, at 214-15.

188. WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900, at 90 (1982).

189. MAHONEY, *supra* note 178, at 3, 8-9, 11, 22 (regarding German training of American political scientists); C. EDWARD MERRIAM, A HISTORY OF AMERICAN POLITICAL THEORIES 338-39 (1903) (regarding German ideas in America); Fries, *supra* note 178, at 391, 392, 394, 396 (regarding the German training of Americans and German ideas in America); Ronald J. Pestritto, *The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, 24 SOC. PHIL. & POL'Y 16, 40 (2007).

not merely about *the government of the United States*, with its limited powers under the U.S. Constitution, but rather about *the State* as a type of institution that persisted through history and across the globe with relatively uniform interests and thus almost limitless power. As Wilson explained in his book *The State*, "the functions of government are still . . . much the same both in number and magnitude that they always were," and, recognizing the implications, he concluded that government's "sphere is limited only by its own wisdom, alike where republican and where absolutist principles prevail."[190]

This assimilation of absolutist ideas about the State had consequences for the relationship of rights to power. After being taught such ideas in American law schools, the judges eventually forgot that enumerated constitutional rights were exceptions from the enumerated federal powers and, instead, concluded that such rights were merely interests, which were subject to generic state or government interests.

B. *State Necessity*

One of the absolutist civilian ideas that was transmitted to America through German *Staatstheorie* was the doctrine of state necessity. The common law's constitutionalist tradition had long rejected any claim that government necessity could rise above the law and the rights it secured against government. In the absolutist tradition, however, necessities of state—sometimes described as sovereign necessities—were said to rise above the law and legal rights. This Continental vision had broad appeal among American progressives, who soon used it to assert government power over enumerated rights.

It was an old adage of the learned law (the academic study of civil and canon law) that necessity had no law, and from this perspective, the state's "necessities"—its

190. WOODROW WILSON, THE STATE: ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS 50 (special ed. 1918) (1911). As noted by Daniel Rodgers, Wilson taught that rights rested on "the broad ground of convenience," and that they were to be adjusted in accord with "the state of opinion and the stage of social convention." RODGERS, *supra* note 86, at 159 (emphasis omitted).

compelling interests—rose above the law, even above legally protected rights.[191] As might be expected of academic ideas of power, such claims about necessity elevated reasoning about the State and its needs above any legally defined sphere of authority, whether the powers of government or the rights of those subject to it.[192] Indeed, the academic lawyers often asserted their arguments about government necessity in terms of "reason of state," and this thereby became a widely recognized name for government lawlessness.

Already in England, when seventeenth century English kings made claims of necessity, or of reason of state, Parliament systematically repudiated their arguments. Many worried, in the words of one Parliamentarian, Edmund Waller, that "[n]ecessity" had the effect of "dissolving all law."[193] In response, it was commonly insisted that the law was impervious to assertions of necessity. As put by John Selden, "No matter of state can alter the law."[194] Although Parliament rejected the king's power of necessity only to claim it for itself, Americans eventually rejected Parliament's power above the law.[195] Indeed, the U.S. Constitution systematically established all power under law, and all

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191. For a fourteenth century civilian statement of the maxim, see ALBERICI DE ROSATE, *supra* note 21 ("[n]ecessitas non h[ab]et lege[m]."). For the role of the maxim in seventeenth century ideas about reason of state, see David S. Berkowitz, *Reason of State in England and the Petition of Right, 1603-1629*, *in* STAATSRÄSON: STUDIEN ZUR GESCHICHTE EINES POLITISCHEN BEGRIFFS 165 (Roman Schnur ed., 1975).

192. *See supra* part IV.C.

193. Speech of Edmund Waller, *in* 3 HISTORICAL COLLECTIONS 1339 (John Rushworth ed., 1721).

194. John Selden, Speech Before the House of Commons (Mar. 27, 1628), *in* 2 COMMONS DEBATES 1628, 164, 164 (Robert C. Johnson & Maija Jansson Cole eds., 1977). Thomas Hedley earlier complained about the king's power to impose duties or taxes, noting "[t]his question [is] determinable only by the common law of England, for law of State he knows not." Thomas Hedley, Speech Before the House of Commons (June 23-28, 1610), *in* PARLIAMENTARY DEBATES IN 1610, 72, 72 (Samuel Rawson Gardiner ed., 1862).

195. *See supra* Part I.A.

enumerated rights free from government power, thus burying state necessity under law.[196]

It may be thought that the Necessary and Proper Clause allowed government necessity to prevail over rights, but nothing could be further from the truth. In fact, the Necessary and Proper Clause was designed to tame claims of necessity by reducing them to claims through and under the law. In his lectures at Princeton, John Witherspoon had worried about how a claim of state necessity could be brought within the law and had suggested a solution: "If the law described circumstantially what might be done, it would be no longer a right of necessity, but a legal right."[197] When the framers, including some of Witherspoon's students, later wrestled with the problem in the summer of 1787, they similarly brought necessity within the law. They allowed the federal government to respond to necessities, but only through laws that were enacted by Congress and that met the Constitution's measure of what was necessary—a measure that required any such statute to be both necessary and proper for carrying out one of the powers that the Constitution vested in the government.[198] Evidently, the Necessary and Proper Clause brought necessity under law.[199]

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196. Even where the guarantee of habeas authorized suspension and the guarantee against quartering soldiers left an exception, the government had to act under statute, and the remaining freedom was guaranteed free from any trumping power. *See supra* Part IV.A.

Of course, as observed, *supra* note 13, executive officials could still depart from law on grounds of necessity, but it was assumed that in doing so, they should confess the unlawfulness of their conduct and should be subject to the legal consequences unless spared by an act of indemnification. This tradition of a noble departure from law was very different from the claim that necessity legally justified otherwise unlawful acts.

197. *Lectures on Moral Philosophy*, *in* 3 THE WORKS OF THE REV. JOHN WITHERSPOON 370 (1800).

198. To be precise, the clause authorized Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

199. HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 15, at 423-26; HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 25, at 335 n.12.

Moreover, after authorizing Congress to respond to necessities, the Constitution limited congressional powers with enumerated rights—initially in the Constitution itself, and then in the Bill of Rights. Madison himself, when introducing the Bill of Rights, noted how it would limit the dangers apprehended from the Necessary and Proper Clause by restraining the power exercised under it.[200] Far from rising above rights, the power granted by the Necessary and Proper Clause was entirely subject to the enumerated rights.

Nonetheless, the old claim of state necessity has crawled back out of the grave—this time in the form of the compelling-state-interest test. Although most progressives did not themselves read German *Staatstheorie*, many assimilated the spirit of arguing from social, public, or governmental necessity.[201]

For example, when upholding administrative power notwithstanding its violation of the Constitution (including its procedural rights), American courts repeatedly relied on the notion of necessity. As early as 1918, Professor John Cheadle observed that "there seems to be a growing tendency in the decisions to give prominence to the supposed 'necessity' of the case, even while admitting—unnecessarily, perhaps—that this delegation appears contrary to the letter if not to the spirit of the Constitution."[202] Even where the cases did not admit they were responding to necessity, legal realists were ready to conclude that this was the underlying reality—"that acceptance by the courts of the practice of delegating rule-making power is merely a recognition of governmental necessities."[203] It thus became commonplace to observe that, notwithstanding the constitutional objections, administrative powers were sustained by the courts "because

200. Speech of James Madison, *in* CREATING THE BILL OF RIGHTS, *supra* note 43, at 82-83.

201. The political theorists, however, usually made the effort to study in Germany or at least to learn German—Woodrow Wilson being a prominent example.

202. John B. Cheadle, *The Delegation of Legislative Functions*, 27 YALE L.J. 892, 892-93 (1918).

203. JOHN B. ANDREWS, ADMINISTRATIVE LABOR LEGISLATION 170 (1936).

of the recognition of the necessity which prompts them."[204] Even the Supreme Court justified administrative law on the basis of alleged necessity—for example, when it opined that Congress's power in relation to the other branches "must be fixed according to common sense and the inherent necessities of the governmental co-ordination."[205]

The argument from government necessity justified not only new sorts of government power but also the exertion of power over rights. Indeed, when the Supreme Court, in *Korematsu v. United States*, first introduced what became the compelling-government-interest test, it spoke in terms of necessity. It explained that racially discriminatory constraints were "immediately suspect" and thus subject to "the most rigid scrutiny" but immediately added that "[p]ressing public necessity may sometimes justify the existence of such restrictions."[206] The Court thereby resuscitated the old absolutist doctrine of public or state necessity, and although the Court soon rephrased it in terms of a "compelling" government interest, the implications for rights were the same. Like state necessity, a compelling state interest is the generic interest of the State. Like its

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204. Thomas I. Parkinson, *Functions of Administration in Labor Legislation*, 20 AM. LAB. LEGIS. REV. 143, 149 (1930).

205. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928). The Court similarly observed: "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940).

At least once, in *Schechter Poultry Corp. v. United States*, the Supreme Court cautioned against the repeated claims of necessity. Speaking about statutes that subdelegated rulemaking power, the Court said that "the constant recognition of the necessity and validity" of such enactments "cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935). The Court acknowledged that "[e]xtraordinary conditions may call for extraordinary remedies," but "[e]xtraordinary conditions do not create or enlarge constitutional power." *Id.* at 528. Thus, the "powers of the national government are limited by the constitutional grants," and "[t]hose who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary." *Id.* at 528-29.

206. Korematsu v. United States, 323 U.S. 214, 216 (1944). *But see* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 355-56, 381 (2006) (arguing that the compelling-state-interest test first developed not in equal protection decisions but in First Amendment cases).

predecessor, it reveals nothing about the nature of the state interest, except that it is enough to defeat the contrary legal claims. Like its forbear, it allows State power to prevail over rights.

Of course, the justices in the 1940s and later did not intend to revive the old doctrine of state necessity. Indeed, it is doubtful how much at that late date they even understood what they were doing. But they had imbibed much of what progressive Americans had taught, and in this spirit they held that "public necessity" or "compelling state interests" trumped claims of rights.

C. *Public Rights*

Another illustration of how absolutist Continental ideas became part of the American elevation of power over rights can be observed in the notion of public rights. When the Supreme Court initially used the phrase "public rights" in 1856 in *Murray's Lessee v. Hoboken Land & Improvement Co.*, it was referring merely to the executive's traditional power under law and thus not to any administrative attempt to exercise the judicial power, which the Constitution generally places in the courts.[207] The phrase, however, has subsequently become a springboard for claims that administrative power, including administrative adjudication, defeats the Seventh Amendment's right to a jury, and not surprisingly the phrase was drawn from the absolutist traditions of the civil law.

When first encountered, the notion of the executive's "public rights" is disconcerting, for it is conventional to speak of personal rights and governmental powers. To be sure, there is no necessary difference between rights and powers, and it is not uncommon to speak of the government's rights in relation to other governments. Nonetheless, in relation to

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207. By the judicial power, this Article does not mean adjudication about the distribution of government benefits, except where a legal right in them has vested. Instead, it means adjudication of the sort that concludes with an edict imposing a legally binding constraint. For details, see HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 15, at 191-226; *see also supra* note 142.

domestic persons, one ordinarily says that the government exercises powers rather than rights.

How, then, did the Supreme Court come to speak of the executive's domestic "public rights"? Roman law had distinguished between *ius publicum* and *ius privatum*, and this could be translated as a distinction between public and private law. The former concerned the interests of the state, and the latter, merely private interests. Yet even when thus understood simply as a distinction between two types of law, the public-private distinction carried risks, for it suggested that public and private matters were not subject to the same law of the land, and it thereby could lend legitimacy to claims by the government and its officers that they were not subject to the law that applied to others. In opposition to this dual vision of law, the common law placed the monarch under the law of the land, the same law that governed his subjects. Similarly, Anglo-American constitutions limited government on the theory that they were part of the law of the land. Rather than another sort of law, constitutions were simply the highest part of the same law.[208]

Although it was not easy at common law to accept a civilian distinction between public and private law, there was another possibility, for *ius publicum* and *ius privatum* could be understood as two types of rights: the public rights of government and the private rights that ordinarily were enjoyed by private persons. The word *ius* was notoriously capable of meaning either law or right, and it therefore is unsurprising that *ius publicum* came to be understood by civilian-influenced commentators (such as William Blackstone) to be the government's public rights.[209] Similarly, some American lawyers found it an appealing label for the government's (or at least the executive's) lawful power.

One problem was the sheer breadth of the power that could be subsumed under the rubric of "public rights." Recognizing this difficulty, one American commentator

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208. *See, e.g.*, U.S. CONST. art. VI, § 2.

209. *See* LEXICON IURIDICUM: HOC EST, IURIS CIVILIS ET CANONICI IN SCHOLA ATQUE FORO USITATARUM VOCUM PENUS 520 (n.p., 1607) ("Ius pluribus modis dicitur, hoc est, multa significat."); *see also* BLACKSTONE, *supra* note 32, at *118.

attempted to flip the phrase around by speaking, instead, about "the public rights of the people."[210] Typically, however, the implications cut the other way. Like the Continental notion that lingered in the background, the phrase "public rights" (although plural) could suggest the generic power of government in public matters, not merely enumerated powers, let alone merely executive power.

An even greater problem with the phrase "public rights" was the suggestion that the government did not merely have powers derived from the people, but rather, *qua* government had rights against the people. Ideas about *ius publicum* and derivative notions of the government's public rights seemed to suggest that the government had a range of inherent power, which could not be limited by the law or rights established by the people.

Far from being merely historical, these dangers have come back to life. As in the past, the notion of *ius publicum*, or "public rights," lends itself to the idea that the executive enjoys general governmental rights that trump the legal claims of the public. The U.S. Constitution structures rights as exceptions to the powers of government; but when the executive's power is understood as a right, it becomes plausible to invert this structural relationship—to conclude that the government's public rights override merely private claims to constitutional rights.

Such is the conclusion of the Supreme Court in *Atlas Roofing*. Faced with a Seventh Amendment objection to administrative fact-finding, the Court in that case says that the executive in its administrative proceedings is asserting the government's "public rights." It then concludes that where public rights are based on a statute, they carve out an exception from the constitutional right to a jury. Public rights override constitutional rights.

D. *State Power Over Individual Rights*

At the broadest theoretical level, the American elevation of power over rights drew on the absolutist German idea that all rights, even constitutional rights, were derived from the

210. WILLIAM BARTON, THE CONSTITUTIONALIST: ADDRESSED TO MEN OF ALL PARTIES IN THE UNITED STATES 38 (1804).

State. From this perspective, the State could adjust rights in its ordinary exercise of its power.

Americans traditionally had assumed that government derived from an act of the people and ultimately even from the consent of individuals, and on this foundation, they understood their constitutional rights to trump government power. They increasingly learned from the Germans, however, that the State was the source of all law and rights and that it thus had priority over rights. Many Americans thereby came to assume that government power trumped individual rights and that it could reshape them to satisfy government interests.[211]

German State Power. —The absolutist assumptions that the Germans inherited from civilians elevated the State above all other interests in society and established State power as the measure of individual freedom. Even a scholar as liberal as Georg Jellinek went so far as to say: "The individual personality is not the basis but the result of the legal community."[212] From this perspective, even when German scholars allowed that the State could establish administratively enforceable rights against itself, they emphasized that the State was the source of such rights and that it therefore could reduce or abrogate them.[213]

One element of this delegitimization of rights was the notion that rights were merely selfish claims of individual interest. Sometimes echoing Hegel, although not always in agreement with him, many German academics distinguished

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211. Writing about American political scientists, Daniel Rodgers observes: "To a man, the new professional political scientists shuttled talk of rights—both natural and conventional—off into their back pages, compressed it drastically, or simply dropped it out as irrelevant to the central concern of their science." RODGERS, *supra* note 86, at 159. Although Rodgers believes that "[t]he political scientists' State was the logical consequence of their antirights talk," there is reason to think that the logic worked both ways. *Id.* at 161.

212. GEORG JELLINEK, SYSTEM DER SUBJEKTIVEN ÖFFENTLICHEN RECHTE 29 (1905), as quoted by Jud Mathews, Administrative Law in Comparative Perspective: Translating the German Doctrine of Subjective Public Rights 30 (May 2, 2005) (unpublished paper) (on file with author).

213. *Id.* at 36.

between the at least potentially unified interests of the State and the fragmented interests of individuals in society.[214] They thereby often denigrated claims of rights against the government as subjective claims of individual self-interest in opposition to the objective and moral interests of the State.[215] The State's power over rights thus seemed essential for securing protection against the selfish and discordant character of society—indeed, for securing the sort of liberty that could safely be enjoyed in society.

In this vision, the power of the State rested on the people's unity of interest. It is not unreasonable to assume that a people have at least some shared interest. At the same time, however, if their shared interest, and thus the power of the State, is taken to be so complete, unified, and objective that all other interests are merely selfish and subjective, there can be little room for constitutional rights. In such a framework, any constitutional rights become matters of individual self-interest that must be trumped whenever there is a greater State interest.

American Progressives. —Many progressives, echoing the German model, abandoned the constitutional vision of rights as limits on government and instead suggested that rights were merely selfish individual claims, which the State was justified in restricting. As put by Frank Goodnow, an "insistence on individual rights" could "become a menace when social rather than individual efficiency is the necessary prerequisite of progress."[216]

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214. *See, e.g.*, Erich Hahn, *Rudolf Gneist and the Prussian* Rechtsstaat: *1862-78*, 49 J. MOD. HIST. D1361, D1362, D1371 (1977); Robert D. Miewald, *The Origins of Wilson's Thought: The German Tradition and the Organic State*, *in* POLITICS AND ADMINISTRATION: WOODROW WILSON AND AMERICAN PUBLIC ADMINISTRATION 17, 19–20 (Jack Rabin & James S. Bowman eds., 1984); Mark R. Rutgers, *Can the Study of Public Administration Do Without a Concept of the State? Reflections on the Work of Lorenz Von Stein*, 26 ADMIN. & SOC'Y 395, 398-400, 402 (1994); Giles Pope, Abstract, *The Political Ideas of Lorenz Stein and Their Influence on Rudolf Gneist and Gustav Schmoller*, 4 GER. HIST. 60, 60 (1987).

215. *See, e.g.*, JELLINEK, *supra* note 212, at 28, as quoted by Mathews, *supra* note 212, at 30.

216. FRANK JOHNSON GOODNOW, THE AMERICAN CONCEPTION OF LIBERTY AND GOVERNMENT 21 (1916).

The Germanic vision stood in contrast to traditional American visions of society in many ways, but most broadly by imposing a vision of unified State power on a diverse society. Hegel understood that America had not yet developed in a manner that fit his vision. But when Americans adopted his ideas and those of other Germans, they came to understand America in terms that left little legitimacy for the nation's diversity. The Germanic vision, in which State power was unified, moral, and objective, and in which individual rights were merely diverse, subjective, and selfish, did not recognize the ways in which diverse individuals, associations, and groups could have their own legitimacy in society—a legitimacy that did not depend on State power and was not entirely subject to it. And without this legitimacy, it is no wonder that claims of constitutional rights seemed merely contingent upon State power.

Although progressives typically held back from extremes and insisted that they valued individual liberty, many adopted at least the German view of the State's power over rights. They argued that the State rather than the people was the source of liberty and that individuals therefore were subject to the State's judgment about how far individual rights had to give way to state interests. At Columbia, for example, John Burgess concluded that the State "formed for itself a constitution" and that it itself was "the source of individual liberty."[217] Indeed, he defined sovereignty as

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217. JOHN W. BURGESS, 1 POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 49, 175 (1890). Similarly, he wrote that "[l]iberty is . . . truly a creation of the state . . . ." *Id.* at 88, quoted by RODGERS, *supra* note 86, at 159. A professor at New York University urged that the individual:

> may do things, ought to do things that will be for the benefit of the community, but he has not the right to demand anything of the community. Moreover, the criterion of what is for the benefit for the community at large must be settled by the community itself, not by any individual.

JEREMIAH W. JENKS, PRINCIPLES OF POLITICS FROM THE VIEWPOINT OF THE AMERICAN CITIZEN 41 (Colum. Univ. Press, 1916) (1909); RODGERS, *supra* note 86, at 159-60.

Burgess and some others thought that the liberty protected by the State would expand with civilization, but the point is that liberty was the gift of the State. *See* RODGERS, *supra* note 86, at 164.

"original, absolute, unlimited, universal power over the individual subject and over all associations of subjects."[218] Such views were commonplace. Professor James Garner of Illinois declared that sovereignty "can be bound only by its own will, that is, it can only be self-limited," and according to Westel Willoughby of Johns Hopkins, the state is "not a creature of law."[219]

Following this Germanic vision of the state, leading scholars taught that individual rights restrained government only as the State determined expedient. Wilson thought that the "inviolability of person[s]," as protected by a bill of rights, did "not prevent the use of force by administrative agents for the accomplishment of . . . the legitimate objects of government."[220] Instead, a bill of rights "simply prevents malicious, unreasonable, arbitrary, unregulated direction of force against individuals."[221] Frank Goodnow argued that an individual's rights were "conferred upon him . . . by the society to which he belongs" and that what they were, could therefore be "determined by the legislative authority in view of the needs of that society. Social expediency, rather than natural right, is thus to determine the sphere of individual freedom of action."[222] In his anxiety about the anti-communal character of "individual rights," he expressed satisfaction that "the sphere of governmental action is continually widening and the actual content of individual rights is being increasingly narrowed."[223]

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218. BURGESS, *supra* note 217, at 52.

219. JAMES WILFORD GARNER, INTRODUCTION TO POLITICAL SCIENCE 251 (1910); WESTEL WOODBURY WILLOUGHBY, AN EXAMINATION OF THE NATURE OF THE STATE 224 (1896).

220. Wilson's Lectures on Administration at the John Hopkins (Jan. 26, 1981), *in* 7 THE PAPERS OF WOODROW WILSON 112, 154 (Arthur S. Link ed., 1969).

221. *Id*. (emphasis omitted).

222. GOODNOW, *supra* note 216, at 11.

223. *Id*. at 11, 21. Indeed, he regretted that "the private individual rights of American citizens have come to be formulated and defined, not by representative legislative bodies, as is now the rule in Europe, but by courts . . . ." *Id.* at 13. Herbert Croly observed, "Individual freedom is important, but more important still is the freedom of a whole people to dispose of its own destiny." HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 178 (1914).

The implication was that judges had to accept intrusions on rights, at least where the intrusions seemed necessary. For example, after progressive legislatures authorized administrative power, Goodnow urged that judges should recognize the "wide discretion" of legislative bodies in constitutional interpretation, as this was essential for "[a]ttempts so to change the structure of our political system and so to modify the content of private rights as to bring them into conformity with modern conditions."[224] Such attitudes obviously remain influential. As put by a contemporary commentator, Peter Strauss, "social changes brought about by industrial and post-industrial economies" could not have been anticipated by the Constitution, and "American judges have responded to this challenge, on the whole, by interpreting the Constitution in ways that confirm the structural changes that have been made, and by reinterpreting citizens' rights in light of the changed arrangements."[225]

German ideas about State power over rights (including ideas about the merely individual character of rights and about how the State was the source of rights) thus paved the way for the subordination of rights to power. Americans tended to value individual liberty, and they therefore typically held back from the most extreme of German ideas,

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Westel Willoughby generalized in 1910 about "Administrative Necessity as a Source of Federal Power," and under this heading he explained that "the principle of administrative efficiency has been employed to permit the field of individual rights to be entered." WESTEL WOODBURY WILLOUGHBY, 1 THE CONSTITUTIONAL LAW OF THE UNITED STATES 62 (1910). In other words, the Supreme Court:

> has frankly argued that where, for the efficient performance of the administrative duties laid upon the General Government, it is necessary that an administrative order should take the place of a judicial process, the private rights of person and property are not to be allowed to stand in the way.

Id.

224. FRANK J. GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 5 (New York, Burt Franklin 1970) (1911); *see* KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 112-17 (2004).

225. PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 12-13 (2d ed. 2002).

but many embraced a Germanic view of the State's power over rights.

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When judges and commentators conclude that enumerated constitutional rights must give way to power, they no longer recall the origins of what they are saying. It should not be assumed, however, that their ideas—whether about necessitous or compelling government interests, about public rights, or about the power of the State over rights—arose out of thin air. Such ideas came from the absolutist tradition that developed in the civil law and eventually flourished in German *Staatstheorie*.

By recognizing this, one can begin to understand what is at stake. The danger is not merely to one right or another, but to all enumerated constitutional rights. And as a result, the danger is not merely to rights, but to the constitutional enterprise of subjecting government to law.