



6-1-1999

# Separation of Powers & Economic Liberties

Bernard H. Siegan

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

## Recommended Citation

Bernard H. Siegan, *Separation of Powers & Economic Liberties*, 70 Notre Dame L. Rev. 415 (1993).

Available at: <http://scholarship.law.nd.edu/ndlr/vol70/iss3/1>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

---

---

# Propter Honoris Respectum

---

---

## Separation of Powers & Economic Liberties

*Bernard H. Siegan\**

### TABLE OF CONTENTS

Summary . . . . .	416
Introduction . . . . .	416
I. Considerations and Concerns Leading to the Adoption of a Separation of Powers System . . . . .	419
A. <i>Coke, Locke and Blackstone and Natural Rights</i> . . . . .	421
B. <i>Madison's Strong Support for Separation of Powers</i> . . . . .	427
C. <i>The Framers Sought to Limit Legislatures</i> . . . . .	431
II. The Judiciary's Duty to Protect Liberty . . . . .	436
A. <i>The Legitimacy of Judicial Review</i> . . . . .	443
III. Early Judicial Decisions on the Judicial Responsibility to Protect Liberties . . . . .	449
IV. Contemporary Judicial Decisions Expanding Freedom . . . . .	459
V. The Supreme Court's Contemporary Record on Economic Liberties . . . . .	465
A. <i>FCC v. Beach Communications</i> . . . . .	465
B. <i>Minnesota v. Clover Leaf Creamery Co.</i> . . . . .	467
C. <i>United States v. Carolene Products Co.</i> . . . . .	469
VI. Applying the Separation Doctrine To Economic Liberties . . . . .	471
VII. Conclusion . . . . .	481

---

\* Distinguished Professor of Law, University of San Diego School of Law.

## SUMMARY

The major objective of the separation of powers is to preserve liberty and prevent oppression. The means for achieving this objective are twofold: First, each branch is limited in its power on the basis of function and second, each branch is required to check and balance the others in the cause of liberty. On the whole, the U.S. Supreme Court probably has accomplished these purposes with two major exceptions. First, the Court has strayed from its role as interpreter by imposing affirmative mandates on the legislative and executive branches. Second, in contemporary years, the Court has failed to protect economic liberty, a matter of vital concern both to the individual and society. This article discusses the latter problem from the perspective of a separatist constitution and explains the necessity and desirability of a change in the judicial policy.

## INTRODUCTION

During the initial forty years of this century, the Supreme Court construed the Due Process and Equal Protection Clauses of the Constitution as securing economic liberties—those liberties relating to the production and distribution of goods and services.<sup>1</sup> In the late 1930s, the Court reversed these decisions, largely eliminating the protections they provided for the exercise of these liberties.<sup>2</sup> The meaning of two clauses are not dispositive of the issue, however. Even assuming the validity of these reversals, the result is inconsistent with a major rationale for the Constitution's separation of powers principle—that the separation system is intended to limit the power of government to oppress the people.

Since their early years, American courts, including the Supreme Court, have struck down measures they deemed oppressive, notwithstanding a lack of textual basis for such action. The separation of government powers not only made this practice possible but also required it as means of implementing checks and balances to preserve freedom. In contemporary times, producers and distributors of goods and services have not benefitted from this jurisprudence. This article examines the separation of powers as it

---

1 1. See generally BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1981).

2 *Id.* at 184-203.

applies to restrictive economic laws that are not invalid under any other constitutional provision. My conclusion is that if these measures are arbitrary or capricious they are no less vulnerable to judicial review under the separation principle than any other oppressive legislation.

This position is consistent with the Framers' concerns; they greatly feared legislative bodies and sought to limit their powers. Thus, in his discussion of the separation of powers doctrine, James Madison observed "that the people ought to indulge all their jealousy and exhaust all their precautions" against the enterprising ambition of the legislature. "The legislative department," warned Madison, "is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."<sup>3</sup> Many other Framers were of similar opinion.<sup>4</sup>

This concern has not dissipated. Nevertheless, for all practical purposes, the Supreme Court does not exercise review over economic regulation. In few areas in contemporary years have the holdings been more consistent. Overturning existing precedents, the Court in 1938 held that economic regulation

is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.<sup>5</sup>

Fifty-five years later in *FCC v. Beach Communications, Inc.*, the Court reiterated that economic legislation will be upheld against an equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."<sup>6</sup> Challengers have the burden "to negative every conceivable basis which might support it."<sup>7</sup>

"This standard of review is a paradigm of judicial restraint," wrote Justice Clarence Thomas for a unanimous court in *Beach Communications*.<sup>8</sup> Justice Thomas went on to quote *Vance v. Bradley*:

The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be recti-

---

3 THE FEDERALIST No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

4 See *infra* notes 60-64 and accompanying text.

5 *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

6 113 S. Ct. 2096, 2101 (1993).

7 *Id.* at 2102 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

8 *Id.* at 2101.

fied by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.<sup>9</sup>

In a nation that harbors considerable cynicism, if not great distrust, for political processes, such views are not very persuasive. The fact that a tyrant's powers are limited in time does not remove the harm caused in the interim. Judicial restraint is not a virtue when it permits either of the elected branches to exercise unlimited power over the people's liberties; judicial review is intended as a remedy for the problem of political failure. Interestingly, the Court rarely expresses confidence in the political process when adjudicating cases involving speech, press, religion, or privacy restraints; but seems not reluctant to voice confidence when economic restrictions are challenged.

Separation of powers requires the judiciary to engage in serious inquiry about whether the legislature or executive has infringed or denied liberty. As Justice Brandeis has explained: "The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was . . . to save the people from autocracy."<sup>10</sup> Under the separation of powers system, no branch may oppress the people, and each branch has some authority over other branches to prevent this from occurring. Government was intended to function within these restraints. Indeed, Chief Justice John Marshall asserted his Court "never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required."<sup>11</sup> I submit that the Court's contemporary policy on economic regulation is contrary to its duty to monitor the legislature.

The federal judiciary presently enforces enumerated liberties and certain unenumerated ones. I assume for purposes of this paper that no specific provision of the Constitution or any unenumerated liberty secures economic activity. The question then, is whether the separation of powers doctrine by itself impos-

---

9 *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

10 *Meyers v. United States*, 272 U.S. 52, 293 (Brandeis, J., dissenting). In practice Brandeis did not always subscribe to this perspective. See, for example, his dissents in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), in both of which he sought to uphold stringent state controls.

11 JAMES B. THAYER ET AL., *JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES AND FELIX FRANKFURTER ON JOHN MARSHALL* 85 (1967).

es a duty on the Supreme court to protect economic liberties. My discussion is divided into six parts: First, the considerations and concerns leading to the adoption of a separation of powers system; second, the judiciary's duty to protect liberty; third, early judicial decisions on the judicial responsibility to protect liberties; fourth, contemporary judicial decisions expanding the judicial protection of freedom; fifth, the Supreme Court's contemporary record on economic liberties; and sixth, reasons for applying the separation doctrine to economic liberties.

My position in this paper is different than the one I presented in my book, *Economic Liberties and the Constitution*.<sup>12</sup> In the book, I concluded that the privileges and immunities, due process and equal protection clauses each secured economic liberties. In part my argument was based on the Constitution's protection of economic activity as a natural right and parts of that argument appear in this paper. I did not consider the responsibility of the judiciary pursuant to the separation doctrine to preserve liberty. This presentation is concerned with the separation of powers limitations on economic legislation and regulation.

#### I. CONSIDERATIONS AND CONCERNS LEADING TO THE ADOPTION OF A SEPARATION OF POWERS SYSTEM

A major objective both of England's unwritten constitution and America's written one is to preserve liberty by denying government the power to enact oppressive legislation. English speaking people trace their liberties to the Magna Carta executed under threat of force by King John in 1215. The Magna Carta did not deprive the king and his agents of all powers but only of *arbitrary* power over life, liberty and property.<sup>13</sup> This understanding was secured over the years by many acts of Parliament and by the judiciary in the common law. With the advent of legislative supremacy, the people believed that English custom and tradition would protect their liberties. As Supreme Court Justice Bradley once dramatically explained: "England has no written constitution, it is true; but it has an unwritten one, resting in the acknowledged, and frequently declared, privileges of Parliament and the people, to violate which in any material respect would produce a revolution

---

12 SIEGAN, *supra* note 1.

13 Bernard H. Siegan, *Majorities May Limit the People's Liberties Only When Authorized to Do So by the Constitution*, 27 SAN DIEGO L. REV. 309, 334-335 (1990).

in an hour."<sup>14</sup>

The English solution was not acceptable in the New World. When they became independent, individual states rejected the English unitary system in favor of a separation system, making the creation and enforcement of laws a shared responsibility for the legislative, executive, and judicial branches. By the time the Constitutional Convention of 1787 was convened, the principle of separating government powers had long been established in North America.

Framers of the state and national constitutions objected to unitary government primarily in the belief that it was not consistent with human liberty. They harbored serious apprehensions and misgivings about government and insisted on dispersing and confining it.

Recent historical analysis of the Revolutionary period is very persuasive that the Colonists greatly feared and distrusted government. In *Ideological Origins of the American Revolution*, historian Bernard Bailyn discusses the philosophy of those who inspired the Revolution.<sup>15</sup> He is convinced that fear of a comprehensive conspiracy against liberty lay at the heart of American Revolutionary thought. For protection against this conspiracy, many looked for guidance to the advocates of a new liberty that espoused natural rights and sought elimination of institutions and practices that harbored despotism. The key concepts were natural rights, the contractual basis of government, the uniqueness of English liberty, and the preservation of constitutions founded on dispersed authority. Government was thought to be by its nature hostile to human liberty and happiness and especially susceptible to corruption and

---

14 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 115 (1872) (Bradley, J., dissenting). "But from 1689 onwards no King, not even George III in his youth, ever attempted to govern without Parliament, or contrary to the votes of the House of Commons." GEORGE MACAULAY TREVELYAN, *A SHORTENED HISTORY OF ENGLAND* 335 (1942).

In England, a simple majority of Parliament is capable, with the assent of the Crown, of carrying out any constitutional change, however revolutionary; and the House of Commons, in practice, has absorbed to itself all the main power in the Constitution. . . . The Royal veto has become wholly obsolete. The Royal power under all normal circumstances is exercised at the dictation of a ministry which owes its being to the majority of the House of Commons . . . . The House of Lords has, it is true, greater power, and can still, by a suspensive veto, delay great changes until they are directly sanctioned by the constituencies at an election."

WILLIAM E.H. LECKY, *DEMOCRACY AND LIBERTY* 56 (Liberty Classics 1981) (1896).

15 BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

despotism. Therefore, it should be confined to serve those needs of the people that could not otherwise be satisfied.

The means for restricting governmental powers was through a constitution, which would define authority and create a separation and mixture of functions that would prevent any one group from gaining ascendancy. Creating this balance of forces was essential to preserve the capacity to exercise natural rights—those God-given, inalienable, and indefeasible rights founded on immutable maxims of reason and justice and inherent in all people by virtue of their humanity. Those rights were expressed—not created—in the English common law, in the statutory enactments of parliament, and in the charters and privileges promulgated by the Crown. However, because not even these sources could exhaust the great treasure of human rights, they delineated the minimum, not the maximum, boundary of liberty. Government had to be so constituted that it could not infringe these rights, for the legitimacy of positive law rests on the degree to which it preserves human rights.

While the passions may have subsided and the explanations become more pragmatic, these libertarian ideas were prominent and influential during the time when the U.S. Constitution was drafted and ratified. It is evident from the ratification debates that the protection of the individual from government was then the predominant political concern. Opponents of the proposed Constitution displayed great apprehension and antagonism toward centralized government, while its supporters responded that the federal government would have no more power than necessary to secure the people from foreign and domestic perils.<sup>16</sup>

#### A. *Coke, Locke and Blackstone and Natural Rights*

From the sixteenth through the eighteenth century, the natural law concept commanded a great deal of scholarly attention, and by the time of the Constitutional Convention of 1787, a considerable number of philosophers, ecclesiastical scholars, social commentators, and jurists had written on the subject. All agreed that people by reason of their humanity possessed natural rights which could not be abridged by positive law. American constitutional and bill of rights models were constructed at a time when

---

16 See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* at 9-13 (1969); Gary J. Schmitt & Robert H. Webking, *Revolutionaries, Antifederalists, and Federalists: Comments on Gordon Wood's Understanding of the American Founding*, 9 POL. SCI. REVIEWER 195 (1979).



the natural law school of judicial thought was highly influential.

The thinking of three very influential commentators provides insight and perspective about how natural law and natural rights were viewed by the political and judicial leaders of those times. These commentators are Edward Coke (1552-1634),<sup>17</sup> John Locke (1632-1704), and William Blackstone (1723-1780).<sup>18</sup> The Revolutionary generations accepted much of Locke's political philosophy and were committed to many legal doctrines espoused by Coke and Blackstone.

Locke wrote that people sought the sanctuary of political society because of the uncertain conditions existing in the state of nature, in which everyone who lacked the physical power to defend himself might be victimized by the unscrupulous and the evil. In forming society, the people entered into a social compact, defining the authority and purposes of government and relinquishing many of their individual powers to the state, which then became responsible for protecting life, personal liberties, and possessions, all of which were included in the term "property." "The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the state of nature there are many things wanting."<sup>19</sup>

The legislature, as the supreme body of the organized state, must necessarily be limited in power, at least to the extent that lawmakers could not impose conditions worse than those existing in the state of nature. The legislature may not deprive the individ-

---

17 Coke's "influence, as the embodiment of the common law, was so strong that it is useless to contend that he 'was either misled by his sources or consciously misinterpreted them' for Coke's mistakes, it is said, *are* the common law." W.J. Brockelbank, *The Role of Due Process in American Constitutional Law*, 39 CORNELL L.Q. 561, 562 (1954). Throughout the Eighteenth Century, Coke was one of the most frequently cited legal and political thinkers. Robert E. Riggs, *Substantive Due Process in 1791*, 4 WIS. L. REV. 941, 959, 992 (1990).

18 Blackstone's *Commentaries* was "the first important and the most influential systematic statement of the principles of the common law. For generations of English lawyers, it has been both the foremost coherent statement of the subject of their study, and the citadel of their legal tradition. To lawyers on this side of the Atlantic, it has been even more important. In the first century of American independence, the *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law . . . . And many an early American lawyer might have said, with Chancellor Kent, that 'he owed his reputation to the fact that when studying law . . . he had but one book, Blackstone's *Commentaries*, but that one book he mastered.'" DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 3 (1941) (quoting C. WARREN, *HISTORY OF THE AMERICAN BAR* 187 (1911)).

19 JOHN LOCKE, *OF CIVIL GOVERNMENT*, SECOND ESSAY, § 124.

ual of fundamental rights—first, because the social compact does not provide government with this power, and second, because government's purpose is to play a fiduciary role in safeguarding and enhancing these rights.

[The legislative power] . . . is not nor can possibly be absolutely arbitrary over the lives and fortunes of the people. For it being but the joint power of every member of society given up to that person, or assembly, which is legislator, it can be no more than those persons had in a state of nature before they entered into society, and gave it up to the community. For nobody can transfer to another more power than he has in himself; and nobody has an absolute arbitrary power over himself, or over any other to destroy his own life, or to take away the life or property of another.<sup>20</sup>

Limitations on governmental power are central to Locke's thesis.

It cannot be supposed that they [individuals] should intend, had they a power so to do, to give to any one, or more, an absolute arbitrary power over their persons and estates, and put a force into the magistrate's hand to execute his unlimited will arbitrarily upon them: This [would be] to put themselves into a worse condition than the state of nature, wherein they had a liberty to defend their right against the injuries of others, and were upon equal terms of force to maintain it, whether invaded by a single man or many in combination.<sup>21</sup>

When the government violated its limitations, the people could rightfully disobey it or even revolt against it:

Where-ever law ends, tyranny begins, if the Law be transgressed to another's harm. And whosoever in Authority exceeds the Power given him by the Law, and makes use of the Force he has under his Command, to compass that upon the Subject, which the Law allows not, ceases in that to be a Magistrate, and acting without Authority, may be opposed, as any other Man, who by force invades the Right of another . . .<sup>22</sup>

[W]henever the legislators endeavor to take away, and destroy the property of the people, or to reduce them to Slavery under Arbitrary Power, they put themselves into a state of war with the People, who are thereupon absolved from any farther Obe-

20 *Id.* § 135.

21 *Id.* § 137.

22 *Id.* § 202.

dience . . . . By this breach of trust they forfeit the power, the people had put into their hands, for quite contrary ends, and it devolves to the people, who have a Right to resume their original liberty . . . .<sup>23</sup>

Coke offered a much less drastic remedy for the tyranny of the legislature. He professed that the courts are empowered to monitor and annul the legislature's actions. Judicial review can be traced to his famous dictum in *Dr. Bonham's Case*, decided by the court of common pleas in 1610. Coke ruled that the London College of Physicians was not entitled, under an Act of Parliament, to punish Bonham for practicing medicine without its license. Coke declared:

And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such an Act to be void.<sup>24</sup>

This dictum was used in America to support judicial oversight and to justify resistance to the British Parliament and by jurists after the Revolution as a basis for judicial review.

*Bonham's Case* was not an isolated event. In his *Institutes*, Coke presented other instances of judicial power. Three cases illustrated that adoption of a law or regulation by a governmental authority did not necessarily make it the law of the land. The first concerned a custom in a town that enabled the lord to occupy the freehold of his tenant upon an arrearage in rent, and the second concerned a charter granted by the king that allowed a corporation to confiscate cloth dyed with "logwood." No judicial process was required in either prior to executing the claimed power. Each claim of power was adjudged "against the law of the land."<sup>25</sup> The third case involved an ordinance by a company of merchant tailors "having power by their charter to make ordinances" that restricted the sellers from whom members could buy their clothes. This ordinance was held to violate the law "because it was against the liber-

---

<sup>23</sup> *Id.* § 222.

<sup>24</sup> 77 Eng. Rep. 646 (K.B. 1610).

<sup>25</sup> 2 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 46 (1817). Plunknett cites numerous instances when courts from the middle of the fourteenth century to Coke's day ignored statutes of Parliament or disregarded their plain meaning. Theodore F.T. Plunknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 36 (1926).

ty of the subject, for every subject [has] freedom to put his clothes to be dressed by whom he will."<sup>26</sup>

Coke also wrote that the prohibition in the Magna Carta against being disseised required that "[n]o man ought to be put from his livelihood without answer,"<sup>27</sup> meaning without proper judicial process. Forfeiture of any protected interest could come about only when its possessor is "brought in to answer[] . . . by due process of the common law."<sup>28</sup> Coke explains "process of the law" as including "by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original[] of the common law."<sup>29</sup> Hence, the abridgement by the king or other governmental authorities of life, liberty, or property without the person being "brought in to answer" violated the required process of law. Coke's legal opinions and writings provided a foundation for the creation of a system of limited government under which the courts would be able to preserve the people's liberties.<sup>30</sup>

Blackstone's *Commentaries* are not at variance with natural law doctrine when viewed within the context of the American system. He believed in the omnipotence of the British Parliament,<sup>31</sup> how-

26 1 COKE, *supra* note 25, at 47.

27 *Id.*

28 *Id.* at 50.

29 *Id.*

30

Prior to the 17th century, therefore, the English judicial tradition had often tended to assign a subordinate role to the legislative function of King and Parliament, holding that the law was not created but ascertained or declared. Common law was fundamental law, and, although it could be complemented by the legislator, it could not be violated by him; hence law was largely withdrawn from arbitrary interventions of King and Parliament. This was the tradition Coke inherited and used as a weapon in his struggle against the exercise of arbitrary power by King James I.

MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 36-37 (1971).

31 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*156.

I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and

ever, his position on this issue has limited application to the American constitutional system, under which legislative powers are confined. His chapter, "Of the Absolute Rights of Individuals," holds that the legislature is not unlimited in its powers over the absolute rights of life, liberty, and property.<sup>32</sup>

Blackstone believed that the principal end of society is to protect the enjoyment of these absolute rights, which were subject only to "[r]estraints in themselves so gentle and moderate, as will appear upon farther inquiry, that no man of sense or probity would wish to see them slackened."<sup>33</sup> If violated, the people were entitled to vindicate these rights by first, seeking judicial relief; second, petitioning the king and parliament; and last, using armed force.<sup>34</sup>

Blackstone condemned laws as destructive of freedom that were wanton and causeless restraints, "whether practiced by a monarch, a nobility, or a popular assembly."<sup>35</sup> "[T]hat system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint."<sup>36</sup>

Accordingly, Locke, Coke and Blackstone agreed that legislators have no rightful authority to oppress the people, that is, to burden the people with cruel or unjust impositions or restraints.

Absent from Blackstone's description of the just state was a mechanism to limit legislative power.<sup>37</sup> He extolled England as the "only nation in the world, where political or civil liberty is the direct end of it's [sic] constitution."<sup>38</sup> But Blackstone's observations were not very persuasive to people who had suffered under the British system and distrusted government. The Americans demanded a separation system to restrain government. As a prominent American asserted, "[P]ower ought to have such checks and limitations as to prevent bad men from abusing it. It ought to be granted on a supposition that men will be bad; for it may be

---

therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it.

1 *id.* at \*91.

32 1 *id.* at \*119-25.

33 1 *id.* at \*140.

34 *Id.*

35 1 *id.* at \*122.

36 *Id.*

37 However, Blackstone viewed the courts as a protector of liberty. 1 *id.* at \*140.

38 1 *id.* at \*140-41 (quoting Montesquieu).

eventually so."<sup>39</sup>

The Declaration of Independence incorporates the ideas of Locke, Coke and Blackstone. Governments are instituted, according to the Declaration, to secure life, liberty and the pursuit of happiness. Laws that prohibit the attainment of each are illegitimate. Such laws are moral nullities. It follows that judicial intervention is required to make them legal nullities.

In the ratification debates on the proposed Constitution, the amount of power accorded the branches was a matter of controversy. The Anti-Federalists attacked the proposed Constitution as containing provisions that vested Congress and the President with excessive powers. But the objective of limited government was not an issue. As Professor Storing explains, if the Federalists and Anti-Federalists were divided among themselves, they were, at a deeper level, united with one another about confining government powers.

Their disagreements were not based on different premises about the nature of man or the ends of political life. They were not the deep cleavages of contending regimes. They were the much less sharp and clear-cut difference within the family, as it were, of men agreed that the purpose of government is the regulation and thereby the protection of individual rights and that the best instrument for this purpose is some form of limited, republican government.<sup>40</sup>

### *B. Madison's Strong Support for Separation of Powers*

The leading theoretician among the Framers on the subject of separation of powers was James Madison. In replying to the Anti-Federalists' concerns about excessive government powers in the proposed Constitution, Madison devoted five Federalist Papers to discussing and explaining the Constitution's separatist powers.<sup>41</sup> The separation of powers consisted of two parts: first, the division of functions; and second, the checks and balances held by each branch with respect to the others. Responding to attacks on the proposed Constitution, Madison asserted: "Were the federal Constitution, therefore, really chargeable with this accumulation of pow-

---

39 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 563 (Jonathan Elliot ed., 2d ed. 1901) [hereinafter ELLIOT'S DEBATES] (quoting William Grayson).

40 HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 3 (1981).

41 THE FEDERALIST Nos. 47-51.

er, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire universal reprobation of the system."<sup>42</sup> An opponent of majority rule, Madison extolled the separation principle: "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty . . . ."<sup>43</sup>

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.<sup>44</sup>

Protection of the separation principle would not only be accomplished by the legal text but also by "so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."<sup>45</sup>

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. . . . In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.<sup>46</sup>

Under separation, government power would be used to control government power. As previously noted, Madison was particularly concerned about legislative excesses.<sup>47</sup> "In republican government the legislative authority necessarily predominates."<sup>48</sup> And the experience in this regard had been very poor. The legislature "was

---

42 THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

43 *Id.*

44 *Id.*

45 THE FEDERALIST No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

46 *Id.* at 321-22.

47 See *supra* note 3 and accompanying text.

48 THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

the real source of danger to the American Constitution [necessitating] giving every defensive authority to the other departments that was consistent with republican principles."<sup>49</sup> Madison rejected majority rule as a matter of principle. "In fact, it is only re-establishing, under another name and more specious form, force as a matter of right."<sup>50</sup> In a letter to Jefferson, he asserted that the invasion of private rights is chiefly to be apprehended "from acts in which the Government is the mere instrument of the major number of the constituents."<sup>51</sup>

According to the legislature unlimited power, Madison wrote, violated a fundamental principle of a free society:

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine?<sup>52</sup>

In his Farewell Address, President George Washington lauded the separation of powers and urged the country to reject consolidation of powers since it would create "a real despotism."

But let there be no change [by] usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.<sup>53</sup>

There are numerous provisions in the U.S. Constitution that are intended to be used by the branches to confine the exercise of government power. The objective is to secure what the Preamble refers to as "the blessings of liberty." This, after all, is the basis

49 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 74 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS].

50 THE FORGING OF AMERICAN FEDERALISM: SELECTED WRITINGS OF JAMES MADISON 45 (Saul K. Padover ed., 1965) [hereinafter FORGING OF AMERICAN FEDERALISM].

51 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 616 (1971).

52 THE FEDERALIST No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

53 SOL BLOOM, THE STORY OF THE CONSTITUTION 141 (1937).



for the rejection of unitary government, as Chief Justice Warren Burger explained in a contemporary decision:

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked . . . . With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully *crafted* restraints spelled out in the Constitution.<sup>54</sup>

Measures that are oppressive are outside of the government's authority since, to borrow from Locke, "by their breach of Trust they forfeit the power, the people had put in their hands, for quite contrary ends."<sup>55</sup> In addition, limiting government power is pragmatically rewarding for it enables and encourages the people, as the primary source of creativity, innovation and productivity, to advance the society.<sup>56</sup>

Madison supported separation in part because of his serious doubts about the wisdom of government. Madison was not disturbed that separation would impede governmental finality and cause deadlock (now referred to as "gridlock") among the branches. As the following quotations concerning the commercial area illustrate, he was a great proponent of individual liberty both for philosophical and pragmatic reasons:

Government is instituted to protect property of every sort; as well as that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own* . . . .<sup>57</sup>

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute

54 *INS v. Chadha*, 462 U.S. 919, 959 (1983).

55 LOCKE, *supra* note 19.

56 See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1937). Originally published in 1776, this work considerably influenced thinking of this character during the American revolutionary and constitutional periods.

57 FORGING OF AMERICAN FEDERALISM, *supra* note 50, at 267-268 (*National Gazette*, March 29, 1792).

their property in the general sense of the word; but are the means of acquiring property strictly so called . . . .<sup>58</sup>

I own myself the friend to a very free system of commerce, and hold it as a truth, that commercial shackles are generally unjust, oppressive, and unpolitic; it is also a truth, that if industry and labor are left to take their own course, they will generally be directed to those objects which are the most productive, and this is a more certain and direct manner than the wisdom of the most enlightened Legislature could point out.<sup>59</sup>

### C. *The Framers Sought to Limit Legislatures*

A person holding such beliefs is not likely to favor unlimited power for the legislature. My reading of the discussions at the Constitutional Convention of 1787 does not suggest Madison's views on property and economic well-being differed substantially from many other delegates.

Madison was far from alone in fearing majoritarian power. James Wilson, an influential Framers, observed that after the destruction of royal supremacy in England, "a more pure and unmixed tyranny sprang up in the parliament than had been exercised by the monarch."<sup>60</sup> Other Framers were apprehensive about lawmakers. Hamilton condemned the state legislatures for failing to safeguard commercial rights.<sup>61</sup> Gouverneur Morris found in every state legislative department "excesses [against] personal liberty private property [and] personal safety,"<sup>62</sup> and Edmund Randolph presented the Virginia Plan to the Convention to overcome the "turbulence and follies of democracy."<sup>63</sup>

Hamilton described the dangers an unlimited legislature posed for a society:

Are not popular assemblies frequently subject to the impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities? Is it not well known that their determinations are often governed by a few individuals in whom they place confidence and are, of course, liable to be tainted

58 *Id.* at 268.

59 *Id.* at 269 (First Congress, April 9, 1789).

60 1 THE FOUNDERS' CONSTITUTION 323 (Philip B. Kurland & Ralph Lerner eds., 1987).

61 THE FEDERALIST No. 7, at 65 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

62 1 FARRAND'S RECORDS, *supra* note 49, at 512.

63 1 *id.* at 51.

by the passions and views of those individuals?<sup>64</sup>

Only the judiciary was in a position to secure the Constitution.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By 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. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.<sup>65</sup>

Hamilton declared that the judiciary would never endanger the liberty of the people "so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree that 'there is no liberty if the power of judging be not separated from the legislative and executive powers.'"<sup>66</sup>

Accordingly, under the U.S. Constitution, the legislature is the agent for authority and the judiciary the agent for liberty. The legislature equates the public interest with the creation of laws, the judiciary with the preservation of liberty. Errors occur: There is no power that is not liable to abuse. In the words of Justice Joseph Story:

It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse . . . . From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse.<sup>67</sup>

Assuming the objective is liberty, errors and abuses by the legislature are less tolerable than those by the judiciary. Failings on the part of the legislature usually enlarge authority, while those by the judiciary mostly remove authority.<sup>68</sup> An early American empha-

64 THE FEDERALIST No. 6, at 56-57 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

65 THE FEDERALIST No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

66 *Id.* (quoting I MONTESQUIEU, SPIRIT OF LAWS 181 (1748)).

67 *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344-45 (1816).

68 However, a major shortcoming of the Supreme Court in recent years has been its failure to apply the separation principle to its own exercise of power. As I have previ-

sized the difference in the responsibility.

Different abilities are necessary for the making, judging, and executing of laws. They require the exercise of different powers, faculties, and knowledge. No one man ever had a sufficient extent of abilities, or versatility of genius, to attend to the duties of all, at one time, or in a quick succession. Such a union must frequently occasion a confusion of principles, and remediless violation of rights.<sup>69</sup>

Limiting the legislature could hardly have been a difficult proposition for the Framers who in keeping with the general consensus of the time were strongly supportive of property rights. At the Constitutional Convention, Gouverneur Morris explained property ownership in Lockean terms:

Life and liberty were generally said to be of more value, than property. An accurate view of the matter would nevertheless prove that property was the main object of Society. The savage state was more favorable to liberty than the Civilized; and sufficiently so to life. It was preferred by all men who had not acquired a taste for property; it was only renounced for the sake of property which could only be secured by the restraints of regular government.<sup>70</sup>

As previously reported, James Madison was of similar mind. During the Convention, he said that in civilized communities the preserva-

---

ously observed:

The Supreme Court says the nicest things about the division of powers principle, and sternly lectures the other branches to observe it. When we measure this inspiring rhetoric against the Court's own performance, the record is not very inspiring. In many of the most important controversies of the times—when the observance of law is most acute—the Court has usurped powers reserved to the federal or state legislatures.

Bernard H. Siegan, *Separation of Powers and other Divisions of Authority under the Constitution*, 23 SUFFOLK U. L. REV. 1, 14 (1989).

As a result of such judicial errors, many conservatives have become quite hostile to judicial power in the constitutional area. In advocating a lesser role for the judiciary, however, they are seeking to curtail the separation of powers, which is at the core of the American constitutional system. The problem lies in the judiciary dispensing positive mandates and has less to do with its veto powers. According legislators total authority would hardly serve the cause of liberty.

69 Nathaniel Chipman, *Sketches of the Principles of Government* (1793), reprinted in 1 THE FOUNDERS' CONSTITUTION, *supra* note 60, at 332-33. Hamilton observed that if society is prone to distrust the judiciary, it should also strip the judges of their power over statutory interpretation. THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

70 1 FARRAND'S RECORDS, *supra* note 49, at 533-34.

tion of property, as well as personal rights, was an essential object of the law.<sup>71</sup> Later, he wrote that the protection of the "faculties of men, from which the rights of property originate," is the first object of government.<sup>72</sup> Madison voiced apprehensions about what would occur in the absence of such protections:

An increase of population will of necessity increase the proportion of those who will labour under all the hardships of life, secretly sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this Country, but symptoms of a leveling spirit . . . have sufficiently appeared in certain quarters to give notice of the future danger.<sup>73</sup>

At the Convention, other delegates emphasized property rights. Rufus King of Massachusetts and John Rutledge of South Carolina agreed with Morris and Madison that the protection of property was the primary or principal object of society.<sup>74</sup> Pierce Butler of South Carolina contended that "property was the only just measure of representation. This was the great object of Govern[men]t: the great cause of war, the great means of carrying it on."<sup>75</sup> William R. Davie of North Carolina, Abraham Baldwin of Georgia, and Charles Pinckney of South Carolina thought the Senate should represent property or wealth. George Mason of Virginia stated that an important objective in constituting a Senate was to secure the right of property.<sup>76</sup> John Dickinson of Delaware considered freeholders as the best guarantors of society.<sup>77</sup> Hamilton said that inequality in property ownership should not cause the society to abridge liberty.<sup>78</sup> "The differences in wealth are already great among us, nothing like equality of property exists. Inequality will exist as long as liberty exists, and it unavoidably results from that very liberty itself."<sup>79</sup>

71 1 *id.* at 450.

72 THE FEDERALIST No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

73 1 FARRAND'S RECORDS, *supra* note 49, at 422-23 (1937).

74 1 *id.* at 533-34.

75 1 *id.* at 541-42.

76 1 *id.* at 469-70, 528, 542.

77 2 *id.* at 202.

78 3 *id.* at 110.

79 ROBERT A. HENDRICKSON, THE RISE AND FALL OF ALEXANDER HAMILTON 214 (1985).

As the architects of a free society, the Framers understood that it could not exist unless government is prohibited from confiscating private property. If government can seize something owned by a private citizen, it can exert enormous power over people. As Hamilton stated, "a power over a man's subsistence amounts to a power over his will."<sup>80</sup> Likewise, individual investment and saving would be insecure. Ownership and investment, upon which the economy depends, would be in jeopardy if the legislature was not deprived of confiscatory powers.<sup>81</sup>

Hence, the viability of the national government the Framers contemplated required that the legislature's powers over property be substantially limited. This view obviously was not confined to the property right. According to Charles Grove Haines, in his authoritative work on judicial review, a commonly held belief in 1787 was that the greatest peril to liberty comes from the expanding powers of legislative bodies:

[T]here was more concern as to the restrictions under which governments should operate than as to the functions to be performed. Governments were to be prohibited from interfering with freedom of person, security of property, freedom of speech and of religion. The guaranty of liberty was, therefore, to give the rulers as little power as possible and then to surround them with numerous restrictions—to balance power against power.<sup>82</sup>

Nevertheless, the original constitution contained no bill of rights to protect the people from oppression by government. The Framers believed such provisions unnecessary and undesirable, as will

---

80 THE FEDERALIST No. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

81 "The principle established by the Magna Carta and thus basic to the common law and later to the Constitution was the identification of liberty and property. Ownership of property was evidence of liberty. In solemn ceremony, it was there decreed that neither the King nor government could take property except *per legem terrae* . . . . To the framers, identifying property with freedom meant that if you could own property, you were free." Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U. L. REV. 627, 637-38 (1988) (footnotes omitted). There are two explanations for the absence of specific protection for property in the original Constitution. First, the right of property is a natural right which government had no power to deny or disparage. See Douglas Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367 (1991). Second, the *ex post facto* clauses in Article I, Sections 9 and 10 of the Constitution protect a property owner from diminution or deprivation of his property interests. SIEGAN, *supra* note 1, at 67-82.

82 CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 209-10 (1959).

be explained in the next section. In Alexander Hamilton's opinion, "the Constitution is itself, in every rational sense, and to every useful purpose, *A Bill of Rights*."<sup>83</sup>

## II. THE JUDICIARY'S DUTY TO PROTECT LIBERTY

The Federalists maintained that the national government had no power to deprive people of their liberties. Their approach to protecting individual liberty and local powers was to limit the powers of the national government. Madison explained in *The Federalist* No. 45:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.<sup>84</sup>

Madison considered that the operations of the national government would be "most extensive and important in times of war and danger; those of the State Governments in times of peace and security."<sup>85</sup> As a result of this division of powers, the state governments generally would be more important than the federal government.

The Anti-federalists were not convinced; they viewed with alarm the national supremacy power in Article VI and the Necessary and Proper Clause at the end of Article I, Section 8. Both Hamilton and Madison emphatically rejected their claims. These provisions, Hamilton wrote, were "the source of much virulent invective and petulant declamation against the proposed Constitution."<sup>86</sup> He and Madison explained that the provisions did not increase the government's powers but were merely declaratory of what would have resulted by unavoidable implication, as the appropriate and technical means of executing the enumerated pow-

---

83 THE FEDERALIST No. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

84 THE FEDERALIST No. 45, at 292-23 (James Madison) (Clinton Rossiter ed., 1961).

85 *Id.* at 293.

86 THE FEDERALIST No. 33, at 201 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

ers.<sup>87</sup>

Because the powers of the national government were so limited, they argued, the people had little to fear that their liberties would be denied. The Constitution's terms and provisions support this view. "To preserve innumerable many rights from the power of the federal government—to avoid limiting freedom to such rights as could be listed—the framers left most rights to be defined by the enumeration of federal powers."<sup>88</sup> It was therefore essential that the Bill of Rights to be appended to the Constitution contain a provision securing unenumerated rights. The Ninth Amendment serves this purpose.

In practice, the major restraint on government authority is the judiciary. The question arises as to how much power the Supreme Court actually possesses in the protection of liberty. Was it confined to the text of the Constitution or could the Court go beyond the text for this purpose? The separation of powers concept provided the judiciary with two justifications for following the latter course. First, determining the powers of the various branches is a matter of interpretation, a judicial function. Second, the judiciary has a duty to check the other branches to preserve liberty.

In *The Federalist* No. 78, Hamilton spelled out an answer to the above inquiry. Not only was the judiciary the guardian of the stated liberties, which were very few at the time, but also of others not stated. Hamilton asserted the judiciary had an obligation to preserve liberty that was not identified in the Constitution:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. . . .

But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential

---

87 See THE FEDERALIST No. 33 (Alexander Hamilton), No. 44 (James Madison); see also Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

88 Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 7 (1994).



safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.<sup>89</sup>

Thus, under Hamilton's analysis, the Supreme Court is empowered to "mitigat[e] the severity and confin[e] the operation" of "unjust and partial laws" as well as to protect against "dangerous innovations in the government, and serious oppressions of the minor party in the community."<sup>90</sup> Finality over unjust and oppressive measures rests with the judiciary and not the legislature. By this measure, the Court could invalidate those legislative measures condemned by Blackstone ("wanton and causeless" restraints) and Coke (laws "against common right and reason").<sup>91</sup> Hamilton believed that

[i]n the form of this government, and in the mode of legislation, you find all the checks which the greatest politicians and the best writers have ever conceived. . . . This organization is so complex, so skillfully contrived, that it is next to impossible that an impolitic or wicked measure should pass the scrutiny with success.<sup>92</sup>

Hamilton believed in natural rights and his strong endorsement of the proposed Constitution suggests that it was satisfactory in this respect. He wrote in 1774: "The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole *volume* of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power."<sup>93</sup>

Subsequently in 1796, Hamilton in his capacity as a private attorney wrote an opinion that natural law was a decisive consideration in determining whether good faith purchasers of land were protected under the Constitution from the Georgia legislature's attempt to revoke their titles:

89 THE FEDERALIST No. 78, at 469-70 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

90 *Id.*

91 See *supra* notes 17-18, 31 and accompanying text.

92 2 ELLIOT'S DEBATES, *supra* note 39, at 348.

93 Alexander Hamilton, *The Farmer Refuted, &c.*, in 1 THE PAPERS OF ALEXANDER HAMILTON 81, 122 (Harold C. Syrett ed., 1961).

Without pretending to judge of the original merits or demerits of the purchasers, it may be safely said to be a contravention of the first principles of natural justice and social policy, without any judicial decision of facts, by a positive act of the legislature, to revoke a grant of property regularly made for valuable consideration, under legislative authority, to the prejudice even of third persons on every supposition innocent of the alleged fraud or corruption . . . .<sup>94</sup>

In his writings in *The Federalist*, Madison does not discuss specifically the judiciary as the protector of individual rights. He explained in his discussion of the Necessary and Proper Clause that the executive and judiciary departments would restrain legislative usurpations:

If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution [Necessary and Proper Clause] and exercise powers not warranted by its true meaning, I answer the same as if they should misconstrue or enlarge any other power vested in them; . . . the same, in short, as if the State legislatures should violate their respective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers.<sup>95</sup>

Madison did not define usurpation. It surely meant violation of constitutional terms and provisions. It also included violation of natural rights. Since the major protection for liberty in the original constitution was the limitation of powers, government's curtailment of a natural right usually was a usurpation of power. In *The Federalist* No. 44, Madison displayed his belief in natural rights doctrine:

Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are

---

94 BENJAMIN F. WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION* 22 (1938) (opinion of Hamilton). The opinion related to the matter subsequently litigated in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

95 *THE FEDERALIST* No. 44, at 285-86 (James Madison) (Clinton Rossiter ed., 1961).

prohibited by the spirit and scope of these fundamental charters.<sup>96</sup>

As would be expected from the earlier discussion, the natural law perspective existed at the Constitutional Convention. When the prohibitions on bills of attainder and ex post facto laws were introduced, Oliver Ellsworth, a Connecticut delegate who later became Chief Justice of the U.S. Supreme Court, argued that these protections were superfluous, contending that "there were no lawyer, no civilian who would not say that ex post facto laws were void of themselves."<sup>97</sup> James Wilson, who also later served on the Supreme Court, likewise opposed inserting the prohibitions, explaining that "[i]t will bring reflections on the Constitution—and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so."<sup>98</sup> As a member of the first Congress, Framers Roger Sherman drafted a proposed bill of rights which was recently discovered. It contained the following "natural rights" provision: "The people have certain natural rights which are retained by them when they enter into Society."<sup>99</sup> He then went on to name them (religion, property, expression, assembly, and so on), and concluded: "Of these rights therefore they shall not be deprived by the Government of the United States."<sup>100</sup>

In presenting amendments to the Constitution in the First Congress (of which he was a member)—that would be adopted subsequently as the Bill of Rights—Madison explained the role of the judiciary in guaranteeing them:

If [these amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.<sup>101</sup>

---

96 *Id.* at 282. The clauses were inserted according to Madison, because "[o]ur own experience has taught us . . . that additional fences against these dangers ought not to be omitted." *Id.*

97 2 FARRAND'S RECORDS, *supra* note 49, at 376.

98 *Id.*

99 DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 520 (1989).

100 *Id.*

101 1 CONG. DEB. 456 (1834) (Speech of James Madison). This passage follows the ones quoted in the text accompanying the next two footnotes in which Madison refers to protecting unspecified rights, supporting the conclusion that he looked to the judiciary to

Congressman Madison sought extensive protections for liberty, beyond those rights enumerated. He expressed concern that a bill of rights might not protect all of the people's liberties:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would 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, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.<sup>102</sup>

This clause of the fourth resolution became, in time, the Ninth Amendment, and read initially in Madison's draft as follows:

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.<sup>103</sup>

The final form of the Ninth Amendment is essentially a shorter version of this provision: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."<sup>104</sup>

Madison's assertions that the judiciary would prevent legislative usurpation and guard constitutional rights together with his view that the Constitution secures both enumerated and unenumerated liberties reveal that his position on the judicial power was essentially the same as Hamilton's. Neither position was tied to specific constitutional language but gave the Court considerable discretion to eliminate oppressive laws and regulations.

Perhaps more than any other provision, the Ninth Amendment discloses the intended constitutional relationship between governor and governee. The original Constitution did not grant the federal government authority to abridge the people's liberties,

---

protect rights, whether or not enumerated.

102 *Id.*

103 *Id.* at 435.

104 U.S. CONST. amend. IX.

whether identified or not, except when so provided therein. The rights specifically protected in the original Constitution must have been those of greatest concern to the Framers. They expected that the judiciary would secure these few specified rights as well as the greater number they did not specify. The Framers of the Bill of Rights followed the same approach. Under the pressures generated in the ratification proceedings and subsequently, they specified the rights they considered of greatest concern. Similarly, they anticipated the judiciary would safeguard these, as well as those not named. The Ninth Amendment was the means they used for the latter purpose. Without this Amendment, unenumerated rights might not be protected, and freedom would have been less secure than under the original Constitution, which safeguarded both specified and unspecified liberties.

The powers of the judiciary are vast but not unlimited. “[I]n questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution . . . .”<sup>105</sup> No chain is placed on the judiciary’s veto power over the actions of the legislature and executive, but strong chains otherwise exist on this branch as follows:

1. Congress has the power to determine the number of Justices of the Supreme Court.

2. Congress controls the compensation of the Justices which cannot be diminished while in office.

3. The President, with the concurrence of the Senate, appoints all Justices of the Supreme Court and other federal judges.

4. Congress has the power to establish all courts in the federal system other than the Supreme Court.

5. Article III, Section 2, confines the judicial power to actual cases and controversies, as enumerated, arising between adverse litigants, duly instituted in courts of proper jurisdiction.

6. Article III, Section 2, sets forth and limits the original jurisdiction of the Supreme Court.

7. Article III, Section 2, authorizes the Supreme Court to have appellate jurisdiction in all other cases “with such exceptions, and under such regulations as the Congress shall make.” In the only case to date interpreting this clause, the U.S. Supreme Court upheld Congress’s removal in 1867 of its appellate jurisdiction in cases of habeas corpus.<sup>106</sup>

---

105 ETHELBERG D. WARFIELD, *THE KENTUCKY RESOLUTIONS OF 1798*, at 158 (2d ed. 1894) (quoting Thomas Jefferson).

106 *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1868). Scholars have expressed doubt

8. Congress can impeach judges for "treason, bribery, or other high crimes and misdemeanors." Otherwise they are entitled to serve for life.

9. Separation of powers restricts the judiciary solely to negative powers over legislation and regulation; it has no authority to impose affirmative mandates.<sup>107</sup>

### A. *The Legitimacy of Judicial Review*

The argument has been made that judicial review is not legitimate because it is nowhere authorized in the Constitution. My response is that judicial review is inherent in a separatist government and does not require enumeration. Indeed, as previously set forth, it was the fear of legislative excesses and finality that largely led to the separation of powers. Friedrich Hayek wrote that "it must indeed seem curious that the need for courts which could declare laws unconstitutional should ever have been questioned."<sup>108</sup> As Chief Justice Marshall asserted, to allow Congress to be the judge of the constitutionality of its own acts "would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."<sup>109</sup>

Whatever remained of it, the argument that judicial review is not constitutionally authorized was demolished with the ratification of the Fourteenth Amendment. The first sentence of Section 1 of this Amendment was adopted specifically to overcome the U.S. Supreme Court's decision in *Dred Scott*.<sup>110</sup> This decision ruled that persons of African descent were not eligible to obtain state or

---

about *McCardle's* vitality as a precedent today. See Beckel, *What's Wrong With Nixon's Busing Bills?*, THE NEW REPUBLIC, Apr. 22, 1972, at 19, 21.

107 "[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989). "Although the liberty protected by the Due Process Clauses affords protection against unwarranted government interference . . . , it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom." *Harris v. McRae*, 448 U.S. 297, 317-18 (1980); see *Maier v. Roe*, 432 U.S. 464 (1977); SIEGAN, *supra* note 1, at 304-17. *Contra Plyler v. Doe*, 475 U.S. 202 (1982); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

108 FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 187 (1978).

109 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

110 *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

federal citizenship. While some members of the Thirty-Ninth Congress, which framed the Amendment, sought to curtail judicial review, no such action was taken notwithstanding the strong feelings in the nation that the Supreme Court had seriously erred in *Dred Scott*.

Members of Congress who participated in the debates on the Fourteenth Amendment generally assumed that the Amendment would be subject to judicial review of the same character that already existed. Thus, Senator Jacob Howard who introduced the measure in the U.S. Senate stated that a prior judicial interpretation of the meaning of privileges and immunities gives "some intimation of what probably will be the opinion of the judiciary."<sup>111</sup>

The second sentence of Section 1 contains the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause, all of which greatly increased the Constitution's guarantee of liberties, effectively according the Supreme Court much greater power than it previously possessed to monitor and invalidate state legislation. The fact that the Thirty-Ninth Congress considered the review power and did nothing to limit it, but actually enlarged it by adopting the proposed Fourteenth Amendment, is persuasive evidence that the power was constructively approved by the Congress sitting as a constitution-making body. Likewise, the ratification conventions might have rejected the Amendment for this reason but none did. The Framers of and the State conventions that ratified the original constitution may not have comprehended the potential power of the Supreme Court, but the Framers and ratifiers of the Fourteenth Amendment clearly did.

Strictly construed, separation of powers relates only to the three branches of the federal government and has no application to the states. Assuming that the separation of powers principle mandates judicial review over federal legislation, what requires use of such power with respect to state legislation? In *Fletcher v. Peck* (1810), *Terrett v. Taylor* (1915), and *Wilkinson v. Taylor* (1829), all to be discussed in part III, the early Supreme Court either by rule or dicta asserted supremacy of the U.S. Supreme Court over oppressive state legislation. Doubts about the propriety of such judicial practices were resolved with the ratification of the Fourteenth Amendment in 1868. Section 1 was intended to provide citizens with the same protections against the states that they possessed

---

111 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

against the federal government. Much legal literature is devoted to the interpretation of these clauses, and this article will make only brief reference to their meaning.

My conclusion about the objectives of Section 1 is based on the debates on the Amendment by the Thirty-Ninth Congress. The most important participants in these debates were Congressman John Bingham of Ohio, the principle author of the second sentence of Section 1; Senator Jacob Howard, who introduced the proposed Amendment in the U.S. Senate; and Representative Thadeus Stevens, who presented it to the House of Representatives.

Bingham explained Section 1 as follows:

There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.

Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy.<sup>112</sup>

The Ohio representative defined the term "privileges and immunities" appearing in Article IV, Section 2, which states "the Citizens of each state shall be entitled to all Privileges and Immunities in the several states," in a speech he had previously delivered: "[C]itizens of the United States . . . are entitled to all of the privileges and immunities . . . amongst which are the rights of life and liberty and property, and their due protection in the enjoyment thereof by law . . ."<sup>113</sup>

In his speeches, Bingham used the term "inborn rights" to

---

112 *Id.* at 2542.

113 CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859).



mean natural rights, and included all other guaranteed rights within the term "privileges and immunities."<sup>114</sup> Senator Howard,

---

114 Bingham (whom Justice Hugo Black referred to as the James Madison of the first section of the Fourteenth Amendment, *Adamson v. California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting)) articulated his views on the issues with which the three major guarantees of Section 1 are concerned in speeches he presented before Congress in 1857 and 1859. CONG. GLOBE, 34th Cong., 3d Sess. app. 135 (1857); CONG. GLOBE, 35th Cong., 2d Sess. 981 (1859). His later addresses to the Thirty-ninth Congress reveal similarity in position. Bingham customarily viewed privileges and immunities and due process in natural rights terminology, each as insulating human freedom from government oppression. In his 1857 speech, he defended the power of Congress to control slavery in the Territories, while in 1859 he attacked Oregon's attempt at statehood because it barred freed negroes and mulattoes from settling there or holding real property and making contracts within Oregon.

Unlike the contemporary interpretation, Bingham construed the Privileges and Immunities Clause in Article IV, Section 2, as guaranteeing fundamental rights; these were, he contended, natural or inherent liberties of citizens of the United States that were intended to be secure from violation by the states. As a strong believer in natural rights, he maintained a distinction between them and political rights, relating the former to safeguarding of life, liberty, and property. Natural rights were insulated from the majority, whereas political rights were its product. The following are excerpts from his two speeches relating to privileges and immunities:

I deny that any State may exclude a law abiding citizen of the United States from coming within its Territory, or abiding therein, or acquiring and enjoying property therein, or from the enjoyment therein of the "privileges and immunities" of a citizen of the United States . . . . [Pursuant to Article IV, Section 2, the] citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to "all privileges and immunities of citizens in the several States." Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to "all privileges and immunities" of citizens of the United States in the several States. There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is "the privileges and immunities of citizens of the United States in the several States" that it guaranties [sic] . . . . All free persons, then, born and domiciled in any State of the Union, are citizens of the United States; and, although not equal in respect of political rights, are equal in respect of natural rights. Allow me, sir, to disarm prejudice and silence the demagogue cry of "negro suffrage," and "negro political equality," by saying, that no sane man very seriously proposed political equality to all, for the reason that it is impossible. Political rights are conventional, not natural; limited, not universal; and are, in fact, exercised only by the majority of the qualified electors of any State, and by the minority only nominally.

CONG. GLOBE, 35th Cong., 2d sess. 984-85 (1859).

His due process orientation was of the same character. According to Bingham, the Due Process Clause of the Fifth Amendment secures natural rights of all persons, requires equal treatment by the law, and comprehends the highest priority for ownership. Note his statement that no one shall be deprived of property "against his consent," a stronger affirmation of property rights than contemplated in the Fifth Amendment, which contains no such qualification, and another indication of his strong libertarian inclinations.

after quoting Justice Bushrod Washington's broad definition of the privileges and immunities provision in Article IV,<sup>115</sup> interpreted the Privileges and Immunities Clause of the Fourteenth Amendment as follows:

To these privileges and immunities [as set forth by Justice Washington], whatever they may be—for they are not and can-

[N]atural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guaranteed [sic] by the broad and comprehensive word "person," as contradistinguished from the limited term citizen—as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race, that "no person shall be deprived of life, liberty, or property but by due process of law, nor shall private property be taken without just compensation.

*Id.* at 983.

Who . . . will be bold enough to deny that all persons are equally entitled to the enjoyment of the rights of life and liberty and property; and that no one should be deprived of life or liberty, but as punishment for a crime; nor of his property, against his consent and without due compensation?

*Id.* at 985.

It must be apparent that the absolute equality of all, and the equal protection of each, are principles of our Constitution, which ought to be observed and enforced in the organization and admission of new States. The Constitution provides, as we have seen, that *no person* shall be deprived of life, liberty, or property, without due process of law. It makes no distinction either on account of complexion or birth—it secures these rights to all persons within its exclusive jurisdiction. This is equality. It protects not only life and liberty, but also property, the product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life.

CONG. GLOBE, 34th Cong., 3d Sess. app. 140 (1857).

Delivered in oratorical style, the following passage from a speech in 1866 urging adoption of his early version of Section 1 reveals Bingham's commitment to a natural rights perspective holding due process to embody the highest reaches of justice:

Representatives, to you I appeal, that hereafter, by your act and the approval of the loyal people of this country, every man in every State of the Union, in accordance with the written words of your Constitution, may, by the national law, be secured in the equal protection of his personal rights. Your Constitution provides that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law—law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice; that justice which requires that every man shall have his right; that justice which is the highest duty of nations as it is the imperishable attribute of the God of nations.

CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866).

115 See *infra* notes 149-51 and accompanying text.

not be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed [sic] and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution . . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.<sup>116</sup>

Representative Stevens asserted that Section 1 applied protections identified in the Declaration of Independence and contained in the Constitution to the states.

The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the “equal” protection of the laws.

I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States . . . .<sup>117</sup>

Inasmuch as there was no serious disagreement in the debates of the Thirty-ninth Congress among the Amendment’s proponents

---

116 CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866).

117 *Id.* at 2459.

about the meanings given by Bingham, Howard, and Stevens to Section 1, the foregoing excerpts can be regarded as reasonably accurate interpretations. The debates also disclose that Blackstone and Kent were the most authoritative legal commentators for the Thirty-ninth Congress, further evidencing a strong perspective in that Congress to secure strongly and broadly the protection of liberty. The conclusion is warranted that the purpose of Section 1 was to accord citizens of the United States the same protections from the state governments that they enjoyed from the central government.<sup>118</sup>

### III. EARLY JUDICIAL DECISIONS ON THE JUDICIAL RESPONSIBILITY TO PROTECT LIBERTIES

Let us now consider judicial practices subsequent to the ratification of the original Constitution. If the judiciary were confined to protecting enumerated liberties, its members would have enjoyed considerable leisure. Only a small number of liberties are protected in the original Constitution. The federal government was limited in power to suspend the writ of habeas corpus, to levy taxes, to pass bills of attainder or ex post facto laws; jury trials were required in all criminal matters, usually to be held within the state where committed; treason was defined and its punishment confined, and no religious test was required as a qualification for any office under the United States government. No other personal guarantees were provided.

However, as previously discussed, the absence of personal protections was not regarded as a decisive factor in determining the authority of the proposed government. According to James Madison, the Constitution would never have been ratified if the people believed that all unstated liberties were totally under the control of the federal government.<sup>119</sup>

According to the Federalists, the proposed national government was one of limited and enumerated powers; it possessed only those powers specifically vested in it. Theophilus Parsons of Massachusetts, a leading Federalist, who was later to become Chief Justice of Massachusetts, asserted that the Antifederalist fears of a powerful national government were groundless since “[n]o pow-

---

118 See BERNARD H. SIEGAN, *THE SUPREME COURT'S CONSTITUTION* 41-93 (1987).

119 3 FARRAND'S REPORTS, *supra* note 49, at 435 (Letter No. CCCXXXI from James Madison to Judge Roane (Sept. 2, 1819)).

er . . . was given to Congress to infringe on any one of the natural rights of the people by this Constitution; and, should they attempt it without constitutional authority, the act would be a nullity and could not be enforced."<sup>120</sup> Madison agreed: "[E]very power not granted thereby remains with the people, and at their will."<sup>121</sup>

The Federalists contended that the national government was so limited in power that a bill of rights was unnecessary. Moreover, they contended that an enumeration of specific rights might be harmful because it would imply the existence of power where there was none, and because it might not list all rights that were protected, to the detriment of those omitted. In *The Federalist* No. 84, Alexander Hamilton argued against any need for including a bill of rights in the constitution. He asserted that the proposed document was intended to regulate not personal and private concerns, but rather, the nation's general political interests. Under the Constitution, "the people surrender nothing; and as they retain everything they have no need of particular reservations."<sup>122</sup> Therefore, a bill of rights was superfluous. Such a declaration might even be dangerous, Hamilton thought, because it would contain various exceptions of powers that were not conferred, and to this extent would furnish a "colorable pretext" for claiming more than was granted—possibly by those disposed to usurpation. "For why declare that things shall not be done which there is no power to do?"<sup>123</sup> Indeed, for Hamilton, the Constitution is a bill of rights:<sup>124</sup> Congress has no authority to oppress the people, and the judiciary is obligated to annul measures that do this.

By not including a bill of rights, the Framers entrusted the judiciary with the giant responsibility of preserving liberty. In *The Federalist* No. 78, Hamilton described the functions of three branches with particular focus on the powers of and restraints on the judiciary:

The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on

---

120 WOOD, *supra* note 16, at 538.

121 3 ELLIOT'S DEBATES, *supra* note 39, at 620.

122 THE FEDERALIST No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

123 *Id.* at 513.

124 *Id.* at 515.

the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>125</sup>

The ratification arguments over the protection of press freedom provide an illustration of the function the judiciary would perform in securing liberties. Hamilton wrote in *The Federalist* No. 84 that there was no need to be concerned about securing press freedom, inasmuch as the Constitution does not grant the government any power to restrain it.<sup>126</sup> Does this mean, then, that as far as the national government is concerned, freedom of the press is absolute, and not subject to any restraint? James Wilson explained during the ratification debates that freedom of the press was subject to the powers of government under the common law, which were then considerable.<sup>127</sup> In other words, the national government had no power to diminish freedom of the press as the term was defined under the common law.

From this example, it is apparent that the judiciary would have a large role in defining and protecting freedom, not an unusual role for judges at the time of the framing of the Constitution. In that period, common law tradition espoused the progressive enlargement of the people's liberties. In applying the common law, judges changed it continually pursuant to new understandings and conditions. From the earliest years of the English state, judges and parliament created and steadily expanded common law protections. As an example, at one time, only the meager rudiments of criminal procedure were required; by Blackstone's day, however, "absolute rights" to life, liberty, and property were acknowledged.

When the Constitution was framed, the judiciary was highly regarded as a guardian of individual rights. Hamilton praised the American judiciary: "The benefits of the integrity and moderation of the judiciary have already been felt in more States than one;

---

125 THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

126 THE FEDERALIST No. 84, at 513-14 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

127 PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 308-09 (John Bach McMaster & Frederick D. Stone eds., 1988).

and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested.<sup>128</sup> For many Americans, the unwritten English constitution, which consisted principally of common law rights, provided a great measure of human freedom. As historian Gordon S. Wood has put it, "what made their Revolution seem so unusual [was that] they revolted not against the English constitution but on behalf of it."<sup>129</sup>

Judicial review arrived at the federal level with Chief Justice John Marshall's unanimous opinion in *Marbury v. Madison*.<sup>130</sup> Marshall declared that the Court had the power to invalidate a congressional statute that violated the terms of the Constitution. Marshall applied customary rules of statutory construction to the Constitution, just as if he were reviewing a legislative act. As such, once he resolved the issue of judicial review, there was nothing extraordinary about his method of interpreting the constitutional provision in question.

However, another approach to constitutional construction already existed. Some state courts reviewed the validity of legislation on the basis of natural and common law principles.<sup>131</sup> In 1798, Justice Samuel Chase presented this theory of constitutional government in *Calder v. Bull*.<sup>132</sup> The theory was consistent with a view of government that was then not uncommon—that a legislature was devoid of authority to deprive people of their natural rights.

I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without controul; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will de-

---

128 THE FEDERALIST No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

129 WOOD, *supra* note 16, at 10.

130 5 U.S. (1 Cranch) 137 (1803).

131 See 2 WILLIAM CROSSKEY, POLITICS AND THE CONSTITUTION 938-75 (1953); HAINES, *supra* note 82, at 89-112; SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 13-44 (1990).

132 3 U.S. (3 Dall.) 386 (1798).

cide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. . . . There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an appar[e]nt and flagrant abuse of legislative power; . . . An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A law that punished a citizen for an innocent action . . . ; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.<sup>133</sup>

Chase tied down the constitutional protections to the purposes for which legislatures are created,<sup>134</sup> seemingly a smaller limitation on the legislature than natural rights would be although some might well say the two are essentially the same. In the same case, Justice Iredell wrote an opinion rejecting Chase's position that a legislative act against natural justice is void. According to Iredell, only an act of the legislature that exceeds its "marked and settled boundaries" is void. This debate between Chase and Iredell has continued among other Justices and commentators.<sup>135</sup> The United States today is one of the most free countries in the world largely because it has protected individual rights far beyond the limitations that Iredell sought to place on it. To this extent, the Framers' objective of confining government power has been achieved.

In *Van Horne's Lessee v. Dorrance* (1795),<sup>136</sup> Justice William Paterson, who had been a delegate to the Constitutional Convention, displayed a perspective similar to that of Chase.

[T]he right of acquiring and possessing property, and having it

---

133 *Id.* at 387-88 (1798).

134 See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 428-29 (1978).

135 See *Griswold v. Connecticut*, 381 U.S. 479, 480, 507 (1965) (majority opinion of Douglas, J., and dissenting opinion of Black, J.).

136 2 U.S. (2 Dall.) 304 (1795).



protected, is one of the natural, inherent, and unalienable rights of man . . . . The preservation of property then is the primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law . . . . The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary both to the letter and spirit of the [Pennsylvania] Constitution. In short, it is what every one would think unreasonable and unjust in his own case.<sup>137</sup>

While referring to the Pennsylvania Constitution, Patterson's emphasis was on natural law principles. According to this opinion, constitutional protections can be determined by considering the language of a constitution or the tenets of natural law. In this case, Patterson seems to have applied the text as a secondary means to secure a liberty.

Thus with the decision in *Marbury v. Madison*, two theories of interpretation existed when legislation was challenged as being unconstitutional. First, the judiciary was supposed to annul laws or regulations contrary to the meaning of constitutional provisions, and second, the judiciary could strike down oppressive legislation (that is, violations of natural rights or of the social compact embodied in the Constitution) without reference to constitutional text. *Marbury* is an example of the first power. Marshall ruled that Congress could not supplement the original jurisdiction accorded the Supreme Court by the Constitution, and therefore, the statutory provision authorizing the Court to entertain mandamus suits as an original matter was invalid. *Calder and Van Horne's Lessee* are examples of the second power.

The Marshall court applied both theories in *Fletcher v. Peck*<sup>138</sup> to overturn a Georgia law canceling purchasers' title to millions of acres of land in what is now most of Alabama and Mississippi. This land had been bought in good faith from grantors who had acquired it through legislative corruption. Marshall combined the alternate grounds for decisionmaking by holding that the law in question was oppressive as well as a violation of the Contracts

---

137 *Id.* at 310 (1795).

138 10 U.S. (6 Cranch) 87 (1810).

## Clause.

It is, then, the unanimous opinion of the Court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void . . . .<sup>139</sup>

. . . .

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.

To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of a legislative power, is well worthy of serious reflection . . . .<sup>140</sup>

In ruling on the contracts issue, Marshall interpreted the Contracts Clause by examining its language and meaning, concluding that it prohibited the passage of the challenged statute.

Justice Johnson (a Jeffersonian and therefore presumably not disposed to accept Marshall's Federalist outlook) concurred despite his inability to find a provision in the Constitution denying a state power to revoke its own land grants. "But I do it, on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity."<sup>141</sup>

In *Terrett v. Taylor*,<sup>142</sup> Justice Joseph Story invoked the spirit and letter of the Constitution, principles of natural justice, and the fundamental laws of all free governments to strike down a Virginia statute that would have deprived the Episcopal Church of its property. Infringing on the church's rights would be "utterly inconsistent with a great and fundamental principle of a republican government."<sup>143</sup>

Chief Justice Marshall, who had joined in Story's opinion,

139 *Id.* at 139.

140 *Id.* at 135-36.

141 *Id.* at 143 (Johnson, J., concurring).

142 13 U.S. (9 Cranch) 43 (1815).

143 *Id.* at 50-51.

spelled out his views on natural law many years later. Dissenting in *Ogden v. Saunders*,<sup>144</sup> which involved the validity of state bankruptcy laws, Marshall asserted that the Contracts Clause limits a state from restricting freedom of contract. Marshall strongly asserted his belief that the right of contract is natural.

[I]ndividuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it. The right of coercion is necessarily surrendered to government, and this surrender imposes on government the correlative duty of furnishing a remedy . . . .

This reasoning is, undoubtedly, much strengthened by the authority of those writers on natural and national law, whose opinions have been viewed with profound respect by the wisest men of the present and of past ages.<sup>145</sup>

Moreover, according to Marshall, the Framers of the Constitution were intimately acquainted with writings on natural law that declare that contracts possess an original, intrinsic obligation not given by government. Because of this knowledge, Marshall opined that “[w]e must suppose, that the framers of our constitution took the same view of the subject, and the language they have used confirms this opinion.”<sup>146</sup> Thus natural law was also a guide, if not necessarily the paramount consideration, in constitutional interpretation.

Subsequently, in *Wilkinson v. Leland*,<sup>147</sup> the Supreme Court, per Justice Story, asserted that the legislature was an inherently limited body.

That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be

---

144 25 U.S. (12 Wheat.) 213 (1827).

145 *Id.* at 346-47 (Marshall, C.J., dissenting).

146 *Id.* at 354 (Marshall, C.J., dissenting).

147 27 U.S. (2 Pet.) 627 (1829).

warranted in assuming, that the power to violate and disregard them; a power so repugnant to the common principles of justice and civil liberty lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being . . . .<sup>148</sup>

Justice Bushrod Washington, while on circuit in 1823, attempted to import the natural rights doctrine into the Constitution by way of the Privileges and Immunities Clause of Article IV. In *Corfield v. Coryell*,<sup>149</sup> the first federal interpretation of the clause, Washington held that the clause protects those privileges "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments."<sup>150</sup> He declared the Federal Constitution guarantees nonresidents' fundamental rights against encroachment by a state.<sup>151</sup>

Notwithstanding his natural rights position, many view Marshall as a strong supporter of national authority because of his decision in *McCulloch v. Maryland*.<sup>152</sup> *McCulloch* permitted Congress great discretion in adopting legislation that "is really calculated to effect any of the objects intrusted to the government."<sup>153</sup> In this decision, Marshall accorded more power to Congress than the Framers intended it to have. Nevertheless, he held Congress must justify its enactments under a standard of reasonableness:

Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.<sup>154</sup>

The Chief Justice subsequently explained that Congress could not "under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government."<sup>155</sup> Thus, Congress' enactments were valid only if they were legitimate, appropriate, and related to their purpose. Similar criteria might

148 *Id.* at 657.

149 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

150 *Id.* at 551.

151 *Id.*

152 17 U.S. (4 Wheat.) 316 (1819).

153 *Id.* at 423.

154 *Id.* at 421 (footnote omitted).

155 *Id.* at 423.

have been considered by Coke in determining "common right and reason" and by Blackstone in evaluating "wanton or causeless" restraints. Marshall rejected as illegitimate legislation for its own sake, not otherwise sufficiently justified. In applying this standard, however, Marshall gave much more deference to the legislature than either Coke or Blackstone would have preferred.<sup>156</sup>

James Kent, the celebrated constitutional commentator and New York Chancellor, followed Marshall and Story in upholding natural law principles. In an opinion written in 1811 as Chancellor of New York, he stated that judges were not to be confined by the rights enumerated in constitutions:

Our constitutions do not admit the power assumed by the Roman prince; and the principle we are considering [no retroactive laws] is now to be regarded as sacred. It is not pretended that we have any express constitutional provision on the subject; nor have we any for numerous other rights dear alike to freedom and to justice.<sup>157</sup>

In his *Commentaries on American Law* (1826), Kent wrote that a statute "affecting and changing vested rights is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void." By "unconstitutional," Kent did not mean contrary to the provisions of the document, but rather, contrary to what he considered to be general limitations implicit in all free governments—limitations based on natural rights and the social compact.<sup>158</sup>

In these observations, Kent was expressing views prominent among jurists. According to the well-regarded constitutional scholar Edward Corwin, during the initial period of federal constitutional history, which closed about 1830, leading judges and lawyers accepted the ideas of natural rights and the social compact as bases for constitutional decisions.<sup>159</sup> Professor J.A.C. Grant reported that between 1816 and 1860, high or federal courts in New York, New Jersey, New Hampshire, Georgia, Maryland, Arkansas, and Iowa held or expressed the belief that natural justice required

---

156 A storm of protest erupted throughout the country against Marshall's opinion. The critics contended that by giving the Congress great deference, Marshall had undermined states rights.

157 *Dash v. Van Kleeck*, 7 Johns. 477, 505 (N.Y. 1811).

158 See PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 116 (1983).

159 See Edward Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914).

that compensation be paid when private property is taken for public use.<sup>160</sup>

#### IV. CONTEMPORARY JUDICIAL DECISIONS EXPANDING FREEDOM

An examination of contemporary U.S. Supreme Court decisions protecting liberties reveals that like its predecessors, the twentieth century court has engaged in two kinds of inquiry. First, whether the law in question violates the language or meaning of a specific term or provision of the Constitution, and second, whether the law is oppressive.<sup>161</sup> Chief Justice Marshall applied the first inquiry to determine constitutionality in *Marbury* and Justice Chase relied on the second in *Calder*. "It is emphatically the province and duty of the judicial department to say what the law is," asserted Marshall, which in *Marbury* meant interpreting constitutional text and meaning.<sup>162</sup> By contrast, Justice Chase did not feel bound by the language of the Constitution. He believed that the purposes for which men enter into society will determine the limits of the legislative power, even if not expressed. The theory that the legislature has the power to oppress the people, if not expressly restrained, is both contrary to reason and "a political heresy, altogether inadmissible in our free republican governments."<sup>163</sup>

These early views of the judicial responsibility have prevailed throughout the Supreme Court's existence. By its rulings, dicta, and practice, the U.S. Supreme Court has acknowledged that its obligation to preserve liberty requires it strike down laws that are oppressive regardless of whether the Constitution's text requires such action. Accordingly, the Court presently guarantees liberties which are not enumerated and greatly expands the meaning of enumerated liberties far beyond original understanding.

Consider the history of free expression in the United States. Although noted for his support of free expression, Justice Oliver Wendell Holmes held in 1907 that the constitutional guarantees of speech and press were quite limited.

[T]he main purpose of such constitutional protections is "to

---

160 J.A.C. Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56, 71-81 (1931).

161 See *supra* note 107 and accompanying text with respect to positive constitutional mandates.

162 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

163 *Calder v. Bull* 3 U.S. (3 Dall.) 386, 388-89 (1798).

prevent all such *previous restraints* upon publications as has been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the criminal law apart from statute in most cases if not in all.<sup>164</sup>

Holmes cited Blackstone in support of his ruling. Blackstone modestly construed freedom of the press.

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous restraints* upon publications, and in freedom from censure from criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public. To forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.<sup>165</sup>

Holmes interpreted the First Amendment on the basis of the common law definition of free press at the time the amendment was ratified. He followed an accepted form of inquiry for determining the meaning of a law. Subsequently, he turned sharply from this approach and interpreted the First Amendment by reasoning based on the importance of the marketplace of ideas both to the individual and to society. This interpretation resulted in the celebrated "clear and present danger" test. There is little connection between the First Amendment's textual meaning and the clear and present danger test.

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.<sup>166</sup>

Once the Court adopted the clear and present danger test, it rarely looked back to original meaning, but continued instead to broaden the Constitution's protection of expression. In 1964, the Court threw out the common law of libel and slander as it existed

164 *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (citations omitted).

165 4 WILLIAM BLACKSTONE, COMMENTARIES \*151-52 (emphasis added).

166 *Schenck v. United States*, 249 U.S. 47, 52 (1919); see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) for discussion of the relation between the Framers' views and those of Justice Brandeis on free expression.

during and for a long time after constitutional ratification. It substituted instead a modified interpretation of defamation intended to encourage public debate that is "uninhibited, robust, and wide-open" even if it meant at times the publication without penalty of untruths and sharp attacks on government and public officials.<sup>167</sup> Although the language of the First Amendment applies only to Congress, the Court effectively substitutes the word "government" in its place and applies the protection as against all the branches of state and federal government.<sup>168</sup>

Expression is protected unless it falls within the parameters of the *Chaplinsky* test.

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them, is clearly outweighed by the social interest in order and morality.<sup>169</sup>

Under the *Brandenburg* test, the successor to the clear and present danger test, the advocacy of force and violence is not necessarily wrongful under the First Amendment.

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and

---

167 *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

168 *See New York Times Co. v. United States*, 403 U.S. 713 (1971). This is the Pentagon Papers Case in which the executive department sought to obtain an injunction from the judicial department. Congress had not enacted any legislation relating to the matter.

169 *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); *see R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992).



is likely to incite or produce such action.<sup>170</sup>

The controversial flag burning case illustrates the interpretation of these rules. The Supreme Court found that the malicious burning of the American flag to express condemnation of and displeasure with American society was not "imminent lawless action" and therefore constituted protected expression.<sup>171</sup>

There is little relationship between original understanding and contemporary interpretation of the expression guarantees of the First Amendment. But, of course, according to Justice Chase and others, constitutional language was not decisive in the protection society should accord critical liberties. The U.S. Supreme Court continues to subscribe to this position and, as the foregoing examples of expression illustrate, secures liberties nowhere mentioned or originally secured in the Constitution.

Without basis in original meaning and notwithstanding the furor raised in many quarters, the Court secured a pregnant woman's right to an abortion as part of the right of privacy, on the general theory that government's prohibition of this operation is oppressive. The Court found that a pregnant woman might experience severe mental detriment if she was not permitted to abort her fetus.<sup>172</sup> In providing protection for the liberty of mobility, which the Court has referred to as the right to travel, the Court asserted: "We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision."<sup>173</sup> The Court protected the right because it "occupies a position fundamental to the concept of our Federal Union."<sup>174</sup> A person denied this liberty suffers oppression.

Gender classification is similar to this situation. When the Fourteenth Amendment was ratified in 1868, women enjoyed far less civil rights than men. Neither the equal protection clause of that amendment nor any other clause was intended to apply to gender. Beginning in 1972 with its decision in *Reed v. Reed*, the Supreme Court has provided women substantial protection against

---

170 *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). This rule protects speech advocating forcible overthrow of government, a position some scholars consider as without basis in original understanding. See Bork, *supra* note 166, at 31.

171 *Texas v. Johnson*, 491 U.S. 397 (1989).

172 *Roe v. Wade*, 410 U.S. 113 (1973). *But see* *Planned Parenthood of Southeastern Pennsylvania v. Casey* 112 S. Ct. 2791 (1992) (substantially increasing the power of a state to limit abortion).

173 *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969).

174 *Id.*

preferential treatment for men.<sup>175</sup> "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."<sup>176</sup> This standard is without basis in the original meaning of the Fourteenth Amendment yet controls current interpretations.

The Supreme Court also has protected numerous other liberties such as the right of association, the right to be presumed innocent, the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, and the right to attend criminal trials—all of which are not mentioned in the Constitution. The Court has created a very high standard of review, referred to as strict scrutiny, applicable to certain rights and suspect classifications, that is very difficult for legislatures to satisfy. It has struck down laws that limit property ownership, which is mentioned, on the basis that the laws were unjust or oppressive.<sup>177</sup>

Clearly, the practice of the Supreme Court has been to provide protection for liberty frequently without regard to constitutional language and original meaning. The practice is consistent with the objective of judicial review under the separation of powers; that is, to void measures of the legislature or executive that are oppressive to the people. Were the judiciary to be confined to textual meaning, the libertarian objectives of the separation of powers would only be partially achieved.

The quintessential case on modern rights jurisprudence is *Griswold v. Connecticut*<sup>178</sup> in which the Supreme Court found a right of privacy in the Constitution. This case concerned the violation by Griswold and others of a Connecticut statute prohibiting any person from assisting another in the use of any drug, medicinal article, or instrument for the purpose of preventing conception. Justice William Douglas sought to write an opinion confined to constitutional text and meaning. He condemned prior jurispru-

---

175 404 U.S. 71 (1971).

176 *Craig v. Boren*, 429 U.S. 190, 197 (1976).

177 See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). Conceding that early constitutional theorists did not believe the takings clause embraced regulation of property, Justice Scalia, for the majority, relied on an "historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Id.* at 2900. The concept of inverse condemnation enforced under the Takings Clause of the Fifth Amendment is difficult to reconcile with the original understanding of that clause. See *United States v. Causby*, 328 U.S. 256 (1946); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993).

178 381 U.S. 479 (1965).

dence in the economic area that he insisted violated constitutional restraints on the judiciary and operated to make the Court a super legislature, determining the wisdom, need, and propriety of economic and social laws. Interestingly, history discloses that in this opinion, Douglas opened the door to a jurisprudence protecting sexual activity with far less basis in original understanding than the one he attacked.

The problem presented was that the Connecticut law involved the intimate relation of husband and wife, to which there was no constitutional liberty directly applicable. Douglas observed that a number of rights were judicially protected even though they were not mentioned in the Constitution. In each of these instances, the Court secured the rights as implicitly protected under an enumerated liberty. These decisions suggest, Douglas concluded, that specific guarantees in the Bill of Rights have penumbras "formed by emanations from those guarantees that give them life and substance."<sup>179</sup> Thus, while each provide particular protections, the First, Third, Fourth, and Fifth Amendments also create zones of privacy that would include sexual privacy.

The right of association [is] contained in the penumbra of the First Amendment . . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment . . . .<sup>180</sup>

Douglas proceeded to cite to the Ninth Amendment as providing the Court with discretion to protect unenumerated rights. In his opinion, Douglas protected a liberty that the Framers had not included in their list, but which "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees[.]"<sup>181</sup> and was consistent with their constitutional aspirations.

We deal with the right of privacy older than the Bill of Rights—older than our political parties, older than our school

---

179 *Id.* at 484.

180 *Id.*

181 *Id.* at 485.

system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>182</sup>

It was a ruling that could have been penned by Justice Chase. Other concurring Justices applied the Ninth Amendment and the due process provisions to reach the same result. Justice Black dissented, accusing Douglas and other of his colleagues of undermining constitutional law by invoking natural law concepts exterior to the Constitution. "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."<sup>183</sup> He cited and quoted Justice Iredell's opinion in *Calder* in support of his position.<sup>184</sup> History reveals that the only major constitutional area in which the *Iredell-Black* position has prevailed is economics.

## V. THE SUPREME COURT'S CONTEMPORARY RECORD ON ECONOMIC RIGHTS

Three U.S. Supreme Court decisions covering the period from 1938 to 1993 present the Court's current position on the protection of economic liberties: *United States v. Carolene Products Co.*,<sup>185</sup> *Minnesota v. Clover Leaf Creamery Co.*,<sup>186</sup> and *FCC v. Beach Communications, Inc.*<sup>187</sup>

### A. *FCC v. Beach Communications, Inc.*

The complainants in *Beach Communications* were operators of SMATV Cable Services. An SMATV system typically receives a signal from a satellite through a small satellite dish located on a rooftop, and then transmits the signal by wire to units within a building or complex of buildings.

In providing for the regulation of cable television facilities, Congress drew a distinction between facilities that do not use

---

182 *Id.* at 486.

183 *Id.* at 509 (Black, J., dissenting).

184 *Id.* at 525 (Black, J., dissenting).

185 304 U.S. 144 (1933).

186 449 U.S. 456 (1981).

187 113 S. Ct. 2096 (1993).

public rights-of-way and serve separately owned or managed buildings and those that do not use public rights-of-way and serve one or more buildings under common ownership or management. Cable facilities in the latter category are exempt from regulation. *Beach Communications* presented the question whether there was sufficient reason to justify this distinction for purposes of the Due Process Clause of the Fifth Amendment. The complainants, who serviced separately owned or managed buildings, asserted that they, like those who were exempt, were entitled to engage freely in this legitimate business activity. Since the statutory classification involved economic liberties and neither implicated a suspect class nor infringed upon fundamental constitutional rights, the courts considering the matter applied the minimal scrutiny test under which the classification would be upheld if any reasonably conceivable facts could support it.

Merely stating this rule suggests the answer; it is difficult to imagine a classification that would not succeed under such a broad, subjective test. Nevertheless, two members of a three judge panel of the D.C. Circuit Court of Appeals concluded: "We see no 'rational basis' for the distinction . . . ." <sup>188</sup> The concurring judge was not similarly troubled. He contended that his colleagues showed "too little reluctance to overturn complex economic legislation under the minimal rational-basis test." <sup>189</sup>

Under the rational-basis test, the reasons need not be persuasive, just conceivable. Writing for a unanimous Supreme Court, Justice Thomas was not impressed with the Circuit Court majority's limited imagination, and the Court reversed. "Whether the posited reason for the challenged distinction actually motivated Congress is 'constitutionally irrelevant.'" <sup>190</sup> Thus, Thomas thought that the exception was based on the small size of single owner or managed complexes. When counsel asserted that an exception on the basis of size, which prior regulations contained, was not included in the legislation being challenged, Justice Thomas replied that it did not make any difference what the legislators actually contemplated, the critical question was whether the legislators might conceivably have so intended. <sup>191</sup>

Thomas's second conceivable basis for the statutory distinction

---

188 *Beach Communications, Inc. v. FCC*, 959 F.2d 975, 977 (D.C. Cir. 1992).

189 *Id.* at 988.

190 113 S. Ct. at 2103 (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

191 *Id.* at 2103.

related to the "monopoly power" the provider of cable TV for separately owned and managed buildings would obtain by the initial installation of a dish which would allow additional buildings to be connected for the small cost of the cable, an arrangement not applicable for single owned or managed developments. Whether the difference is sufficient to warrant regulation is a matter that merits considerable inquiry, which would not be required under the minimal scrutiny test. Frequently, regulation leads to price increases. Regardless, for constitutional purposes, the distinction may be based entirely on rational speculation. "Congress had to draw the line somewhere . . ." and, therefore, wrote Thomas, "the precise coordinates of the resulting legislative judgment [are] virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally."<sup>192</sup>

#### B. Minnesota v. Clover Leaf Creamery Co.

This case involved a 1977 Minnesota law prohibiting the retail sale of milk in plastic, nonreturnable, nonrefillable containers. The sale of milk in paperboard cartons was not affected. The legislature's articulated purposes were to promote resource conservation, ease solid waste disposal problems, and conserve energy. Plastic bottle manufacturers and retailers sued to have the law declared unconstitutional on the basis that it denied them the liberty to produce and distribute plastic milk bottles, a legitimate item of commerce.<sup>193</sup>

Applying its version of the minimal scrutiny test, the trial court initially considered whether the law serves important government objectives. Legislatures impose economic regulation for one or both of the following reasons: first, to cause the economic system to function better—that is, to remedy or remove the excesses or limitations of the private market; second, to secure an economic advantage for a person, corporation, or group by the elimination or obstruction of competing businesses, occupations, products, or services.

A law passed to achieve the second reason serves private interests and not important governmental objectives. In addition to denying liberty to some person or group, such a law also reduces

---

192 *Id.* at 2102.

193 *Clover Leaf Creamery Co. v. Minnesota*, No. 423258 (Dist. Ct., County of Ramsey Apr. 5, 1978).

production and competition, and thereby increases costs, which disadvantages the vast majority while benefiting only a few. It takes from A and gives to B for the benefit of B. In the Minnesota plastic bottle case, the state trial court found that contrary to the stated purposes the "actual basis for the act" was to promote the interests of certain parts of the local dairy industry and the pulpwood industry, and to harm the interests of other segments of the dairy industry and the plastics industry. It held the law unconstitutional.

However, suppose the court finds that the law seeks to increase competition and productivity, to eliminate waste, or to improve the environment. These are important governmental objectives. The next issue is whether the law will substantially achieve these objectives—the means-ends test. The Minnesota Supreme Court assumed that the articulated purposes motivated the legislature, but held that the law would not achieve these purposes.<sup>194</sup> Therefore, the restraint on liberty was without purpose and unconstitutional.

The U.S. Supreme Court reversed. It found that the Minnesota Supreme Court wrongfully "did not reverse on the basis of . . . [the District Court's] patent violation of principles governing rationality analysis under the Equal Protection Clause."<sup>195</sup> The trial court had not been sufficiently deferential to the legislature. The Supreme Court held that the determining factor under the minimal review test is whether the legislative means is rationally related to the achievement of the statutory purposes. The parties had agreed at the final level of litigation that the legislature had truthfully articulated its purposes.

The state identified four reasons why the distinction between the plastic and nonplastic nonreturnables was rationally related to the articulated statutory purposes. The Supreme Court stated that if any one of the four substantiates the state's claim, the Act must be sustained.

The Minnesota Supreme Court upheld the invalidation of the law, rejecting on an empirical basis the stated reasons. The legislature's conclusions were "speculative and illusory," not sensible, or totally wrong. Nevertheless, the Supreme Court reversed each ruling on the ground that it is not the function of the court to substitute its evaluation of legislative facts for that of the legisla-

---

194 *Minnesota v. Clover Leaf Creamery Co.*, 289 N.W.2d 79 (1979).

195 *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

ture.

Justice Brennan, writing for the Court, stated:

Respondents apparently have not challenged the *theoretical* connection between a ban on plastic nonreturnables and the purposes articulated by the legislature; instead, they have argued that there is no *empirical* connection between the two. They produced impressive supporting evidence at trial to prove that the probable consequences of the ban on plastic nonreturnable milk containers will be to deplete natural resources, exacerbate solid waste disposal problems, and waste energy, because consumers unable to purchase milk in plastic containers will turn to paperboard milk cartons, allegedly a more environmentally harmful product.

But states are not required to convince the courts of the correctness of their legislative judgments. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."<sup>196</sup>

### C. United States v. Carolene Products Co.

The United States Filled Milk Act prohibited the shipment in interstate commerce of any product, consisting of skimmed milk and a fat or oil other than milk fat, which resembled milk or cream. The defendant manufactured and distributed "Milnut," a compound of condensed skimmed milk and coconut oil and was indicted under the Act on the ground that this product "is an adulterated article of food, injurious to the public health."<sup>197</sup> The statute was directed at compounds which although safe for consumption, might be substituted for milk, denying the consumer the nutrients contained in milk. Congress rejected efforts to limit the legislation solely to requiring that the containers fully disclose their contents.

In an analysis of the Filled Milk Act, Professor Geoffrey Miller considers it "an utterly unprincipled example of special interest legislation."<sup>198</sup> He writes that proponents of the legislation were various farmer associations: breed groups, county, state, and na-

---

196 *Id.* at 463-64 (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

197 Congressional committees concluded the product facilitates fraud on the public because it would be confused with evaporated milk.

198 Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 398.



tional political organizations; dairy newspapers; agricultural colleges and universities; granges; and dairy promotional organizations. Broadly speaking, these members of the "dairy industry" were threatened by the low price for the filled milk products compared with pure dairy products. The purpose of the statute was to drive small producers out of the market, which in the main it accomplished, disadvantaging also working and poor people deprived of a healthful, nutritious and low cost food.<sup>199</sup>

The U.S. Supreme Court upheld the act on the basis of a newly created standard of minimal scrutiny applicable in economic matters under which a legislature will almost inevitably prevail, as previously described.<sup>200</sup> The decision reversed the much higher standards of review for economic regulation that had been in effect since 1897.<sup>201</sup> Ironically, the occasion for the application of this new standard was one where judicial review under a separation system was most appropriate: The Congress, responding to politically powerful forces, had deprived people of their liberty to manufacture and distribute a legitimate article of commerce. The decision also introduced into constitutional law jurisprudence the celebrated footnote four which provided a new and highly controversial theory of constitutional interpretation.<sup>202</sup>

According to footnote four, the extent to which legislation should be subject to judicial scrutiny depends on the legislative relief available to the complainants. Those who are denied meaningful access to the political process and have little realistic chance of influencing lawmakers should be accorded preferential treatment by the judiciary. If a group has a reasonable opportunity to avail itself of the electoral and legislative processes to accomplish change in its behalf, it does not require judicial aid.

According to the footnote, racial, religious, and some ethnic groups are discrete and insular minorities requiring judicial intervention on their behalf. Producers and sellers do not come within this category. However, in a representative government premised on majority rule, many people engaged in economic activities do not have the resources to protect their interests either at the ballot box or in the legislative halls. They too can be victims of per-

---

199 *Id.* at 399.

200 *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); *see also supra* text accompanying note 5.

201 *See Nebbia v. New York*, 291 U.S. 502 (1934); *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

202 *See* JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980).

verse, arbitrary, and capricious measures. However, under the separation system, the judiciary's role is to protect liberty, regardless of whether the victim is rich or poor, influential or powerless.

The filled-milk case concerned a denial of liberty with little resulting benefits to society. The defendant was the producer of a new product, cheaper than, and a substitute for, milk and therefore a serious competitive threat to the farm and dairy interests. In time, however, these interests lost their persuasiveness with the federal judiciary. In 1972, a federal district court invalidated a filled-milk statute as arbitrary and capricious, and in the absence of any contrary ruling by a higher court, Milnut type products may now be marketed freely.<sup>203</sup>

## VI. APPLYING THE SEPARATION DOCTRINE TO ECONOMIC LIBERTIES

English and American political history and experience made it inevitable that the U.S. Constitution would substantially limit the power of political majorities. English and American law was greatly influenced by the ideas of Locke, Coke, and Blackstone, all of whom believed that government is limited in its sovereignty over the individual. The ideas of natural rights and limited government prevailed in intellectual circles, and among those who signed the Declaration of Independence and framed the U.S. Constitution. The framers of constitutions in America—both state and federal—sought to achieve a system in which the people are supreme except that they must always defer to individuals' exercise of their liberties. The Federal Framers created a limited government which was dependent on constitutional authority to exercise its will.

The early Americans faced with this dilemma of liberty and authority sought to create a government that would be powerful enough to protect them but not powerful enough to oppress them. They rejected the parliamentary system since it vested almost all governmental powers in an elected body, the House of Commons. They believed that when unlimited power is lodged either in a king or a legislature, regardless of how well-intentioned either may be, there is considerable risk that it will be exercised tyrannically.

The Constitution's framers consequently imposed strong limitations on government, to a degree that had rarely existed in any

---

203 *Milnot Co. v. Richardson*, 350 F. Supp. 221 (S.D. Ill. 1972). The product in question is now produced and distributed in the United States.

nation. The government was to be divided and confined and the people's liberties were to be guaranteed. Separation of powers meant that the legislature would share its rule making powers with the other branches. From the prospective of a free government, this is the paramount issue.

The U.S. Supreme Court has in large measure implemented this constitutional scheme. In rulings, dicta, and practice, the Court has protected a wide variety of liberties from legislative invasion. It has, on the whole, sought to protect the Constitution's express terms and provisions from violation. In addition, it has often interpreted its constitutional obligation as mandating the guarantee of liberties not identified in the document. This has occurred in two situations: First, it has protected liberties nowhere mentioned in the Constitution. Second, it has protected activities related to enumerated liberties that cannot be construed as included in the original understanding (*e.g.*, clear and present danger test, malicious flag burning, commercial speech, strong protections for people accused of criminal activity). In the absence of the protection accorded unstated liberties, the power of the legislature over human activities would be unlimited in many areas.

Why then are economic liberties treated differently? A large portion of the American society is engaged in economic activity. Under current law, producers and distributors of goods and services have little legal security against majority rule; government has near absolute power to bar entry into a business, to limit the output of the business and to establish arbitrary or capricious rules under which its owners or managers must operate the business. The constitutional promise of freedom does not exist for people aggrieved by these rules; for them the state or federal government consists of two branches—a most deplorable outcome.

Separation of powers accords an aggrieved person the right to seek judicial redress against arbitrary and capricious legislative impairments of liberty. This opportunity is available to those who exercise speech, press, religion, assembly, property, travel, and privacy. Why not for entrepreneurs or would-be-entrepreneurs seeking to exercise the liberties of the commercial marketplace? That no specified liberty protects this right—which is assumed in this article—is not relevant since the same holds true for many other liberties that are protected. The critical issue for a nation dedicated to “secure the blessings of liberty”<sup>204</sup> is whether the

government has acted excessively.

It is argued that economic liberty is not worthy of constitutional protection. Understandably, not all human activities merit constitutional support. However, to maintain this position with respect to economic liberties requires evidence that great priorities among the most common liberties should exist. This is a difficult position to sustain. When government arbitrarily prohibits or impedes economic activity, it deprives great numbers of people of their right to act freely in their own interest. Such policy inhibits self-realization, personal satisfaction and personal development, which are surely prize goals of human life. One must wonder why so common and ordinary a liberty is removed from the boundaries of a document that is dedicated to liberty. In the three decisions discussed in the prior section, persons were deprived of their liberties without accompanying benefits to society.

Establishing the priority of liberties is a political judgment involving the distribution of benefits on a subjective basis. This is a matter of political policy and not judicial administration. The judiciary possesses no political power. It has little authority to extend its protections as it deems desirable or necessary. Nor does it have the power to favor certain groups over others, as occurs when it protects those who produce and distribute ideas but not those who produce and distribute goods and services. Those who framed and those who ratified the Constitution never intended to grant positive powers to this branch of government. The judicial branch, declared Hamilton, would have no influence over either the sword or the purse, and no direction either of the strength or of the wealth of the society.<sup>205</sup> The courts of justice were to be no more than the bulwarks of a limited Constitution against legislative encroachments.<sup>206</sup> It is inconceivable that the judiciary was given the power to excise from the Constitution, in whole or in part, the fundamental principle of separation of powers.

Since there is no question that economic liberty is of great importance to many people, the only basis for not preserving it would be that it is detrimental to the welfare of the society. This is a difficult position to take in the 1990s in view of the worldwide rejection of Communism in large part because it forbade the exercise of economic liberty. The great lesson of our times is that the

---

205 THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

206 *Id.* at 469.

forces of production, conservation, and creativity rest principally in the freedom of the marketplace and not in the power of government.

Because much welfare and regulatory legislation has proved economically harmful, judicial review of such legislation serves the pragmatic interests of society. During the substantive due process years (prior to the *Carolene Products* case), opposition to judicial review came largely from the left side of the political spectrum. These critics demanded social reforms and income redistributions, which could be effected only by Congress and the state legislatures. They viewed the judiciary as a serious impediment to such ends. What the reformers apparently did not comprehend was that while judicial review would terminate some liberal measures, it would also dispose of legislation favorable to wealthy and special-interest groups. Although legislatures pass statutes intended to help the disadvantaged, they also impose regulations that serve the wealthy and special-interest groups at the expense of the poor.

Modern understanding of the regulatory processes reveal that many of the most controversial opinions of the Supreme Court during the substantive due process period (when economic liberties were secured) were well founded in economic theory. A substantial number of economists would now accept the majority opinions in *Lochner*,<sup>207</sup> *Adkins*,<sup>208</sup> and *New State Ice*,<sup>209</sup> as well as the dissenting opinion in *Nebbia*,<sup>210</sup> as expressing economically reasonable positions, especially beneficial to the more disadvantaged members of society.

The more freedom in the marketplace, the more likely it will better provide for the people. Contemporary economic studies show that in the United States, government regulation of economic markets very often operates negatively. In my book, *Economic Liberties and the Constitution*, I summarized fifty-three studies of government regulation, by more than sixty individual and institutional researchers, which have appeared in the most prestigious scholarly literature. These studies show that although every regulation accomplishes some purpose, the great majority fail a cost-benefit analysis. Indicative of their conclusions, the vast bulk of these scholars favor either total or substantial deregulation of the

---

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

208 *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

209 *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

210 *Nebbia v. New York*, 291 U.S. 502 (1934).

area under study.<sup>211</sup>

As revealed in these studies, much regulation has resulted in the reduction of economic efficiency, misallocation of resources, and redistribution of income from the consumer to the regulated group. Considered as a whole, regulations seriously limit this nation's productivity and output. A common finding in these studies is that the regulation of concern raises prices, first, by reducing competition, and second, by imposing a variety of unnecessary requirements on producers and sellers that increase cost. People of average and lesser income, those least able to afford higher prices, are the most adversely affected.

As the subsequent pages will disclose, there are many explanations for the failures of regulations. Thus, a proposed regulation may be based on the best intention and information but this does not mean that in its final form it will serve the public interest. For regulatory proposals to become law, the legislative and administrative authorities must adopt necessary statutes and rules to implement them. However, the record of the political process in this respect has not been very good. The perfect plan is often quite imperfect by the time it emerges from the pressures and compromises of the legislative process on the local or higher government level, and it might be ravaged still more as administered. It is possible that the courts may lay some or much of the plan to rest.

Consider the comments on regulation by Professor Ronald Coase, 1991 Nobel Laureate in economics, who was for a long time the editor of the *Journal of Law & Economics*. Over the years, the journal published numerous studies on economic regulation, and Coase concluded:

The main lesson to be drawn from these studies is clear; they all tend to suggest that the regulation is either ineffective or that, when it has a noticeable impact, on balance the effect is bad, so that consumers obtain a worse product or a higher-priced product or both as a result of the regulation. Indeed, this result is found so uniformly as to create a puzzle; one would expect to find in all these studies at least some government programs that do more good than harm.<sup>212</sup>

Professor Coase believes that, in theory at least, there is no reason why government regulation cannot improve on market

---

211 SIEGAN, *supra* note 1, at 283-303.

212 Ronald Coase, *Economists and Public Policy, in LARGE CORPORATIONS IN A CHANGING SOCIETY* 184 (J. Fred Weston ed., 1974).

processes. He states, however, "My puzzle is to explain why these occasions seem to be so rare, if not non-existent."<sup>213</sup>

The experience of government regulation in the United States reveals the great difficulty of maintaining economic freedoms in democratic societies. As the Minnesota plastic bottle case reveals, economic regulation emanates chiefly from two different sources. The first source is those people who demand the passage of laws to remedy what they see as problems in the economic system. They are motivated by ideological or more general public interest reasons. Members of this group do not directly benefit from the laws they propose or favor. The second source of economic regulation is those individuals and corporations who seek regulation in their own self-interest. Most of the people in this group are in business, trades, or professions. They want regulations imposed to obtain more income for themselves.

This second group is engaged in rent seeking, a term used by economists to identify actions by individuals and interest groups intended to change public policy with respect to taxes, spending, and regulation in a manner that will redistribute more income to them. In addition to obstructing the market, rent seeking requires the employment of lawyers and lobbyists in activities that do not advance productive activity.<sup>214</sup>

The second group accounts for a great deal of regulation—perhaps most of it. In a democratic society, legislators are highly receptive to the demands of their constituents. As a result, a relatively small number of persons seeking to obtain monetary gains have considerable political opportunity to do so. U.S. Circuit Court Judge Richard Posner has suggested that the lawmaking process creates a market for legislation in which politicians "sell" legislative protection to those who could help their electoral prospects with money or votes or both.<sup>215</sup>

Professor Michael Granfield has likened the legislature to a general store whose inventory includes monopolies, preferences, and concessions. The politicians sell these goods, as any astute store owner would, to the group offering the highest price. The arrangement does not necessarily include bribery or any other illegal activity. It may simply involve a legal contribution or a

---

213 *Id.*

214 JAMES D. GWARTNEY & RICHARD L. STROUP, *ECONOMICS PUBLIC AND PRIVATE CHOICE* 94, 743, 753-55 (1989).

215 RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 405 (1977).

promise of votes.<sup>216</sup>

The process that leads to legislation benefitting comparatively few people is not difficult to understand. Those who would be helped monetarily by laws have the incentive to wage a strong lobbying effort, whereas those who would bear the cost without sharing the benefits frequently do not have sufficient personal stake to fight for their position. The concentration of benefits provides a special interest group with an incentive for creating a narrow political lobby, whose small size makes organizing relatively easy.

On the other side, a larger number of citizens are involved; they are often widely dispersed and frequently have little or no knowledge of the proposed laws or the probable effects. Further, the costs of the legislation are spread so that few persons suffer very much, which limits incentive to organize. As a consequence, the costs of spending measures, subsidies, and special economic preferences are passed along to an often unknowing and uncomplaining public.

Yet, considered as a whole, many studies disclose that regulation in the United States is very costly. A recent study estimates that federal regulation may cost American taxpayers an additional \$400-500 billion annually over the costs the government disclosed in the national budget. This amounts to an average of \$4000-5000 per household.<sup>217</sup>

These figures do not separate what might be termed "necessary" and "unnecessary" regulations. Even assuming a considerable amount of these costs is for "necessary" regulations, experience in this area reveals that a huge portion is being spent as a result of government controls that do not protect or benefit people's lives and property. It should also be noted that perhaps the most expensive of "unnecessary" controls are those which operate to inhibit the human skills that advance society.

Given the incentives of the political process, the well-being of property owners and entrepreneurs can be precarious. Reform

---

216 Michael Granfield, *Changing Industries and Economic Performance*, in COASE, *supra* note 212, at 164.

217 THOMAS D. HOPKINS, COST OF REGULATION (Rochester Institute of Technology Working Paper 1991); see ROBERT E. LITAN & WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION (1983); MURRAY L. WEIDENBAUM, THE COSTS OF GOVERNMENT REGULATION OF BUSINESS, A STUDY FOR THE JOINT ECONOMIC COMMITTEE, CONGRESS OF THE UNITED STATES (Apr. 10, 1978); Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. REG. 233 (1991).



groups who reject or distrust market mechanisms and various interest groups who seek monetary gain have considerable opportunity to achieve their shared goals.

The protection of owners and entrepreneurs from the power and might of these special economic interests can only be achieved through the judicial process. These persons are in a very realistic sense discrete and insular minorities with little power in the political process. The separation of powers principle is intended to protect the liberties of all people, surely including producers and distributors of goods and services.

The Supreme Court's jurisprudence in the early part of this century that protected economic liberties under either the Due Process or Equal Protection Clause is often referred to as discredited by jurists and legal commentators. *Lochner v. New York*<sup>218</sup> is cited as a prime example of judicial abuse in cases of that character. Considering the many contemporary decisions that uphold unenumerated liberties, the Court's decision in that case can hardly be considered as illegitimate. The statute in issue was one passed by New York's legislature limiting to sixty the number of hours a baker could "be required or permitted" to work each week, with a maximum of ten hours a day. The Supreme Court struck down the law as violative of the freedom of contract secured by the Fourteenth Amendment's Due Process Clause. Many critics concluded that the *Lochner* decision operated harshly to prevent workers from obtaining shorter working hours, ignoring its total impact. They apparently did not recognize that reducing working hours often proportionally lessens the amount of pay that the worker receives.

Bakers who sought more income could work elsewhere and continue to have a long work day, possibly under equally difficult conditions. Bakers who worked less time as a result of the law would receive a reduction in their earnings. They would then find it more difficult to obtain food, medication, housing, clothing, and other necessities for themselves and their families. Potentially, shorter hours could result in greater health problems than those related to long work hours.

The legislative solution of reduced working hours is not necessarily a desirable outcome, as the *Lochner* critics insist. Understandably, for justices concerned about maintaining freedom of contract, the state did not show sufficient justification for the law.

Which is to be preferred, longer hours and higher wages or shorter hours and lower wages? A reasonable basis for deciding this question is to favor the result consistent with liberty of the marketplace.

Market conditions in time reduced the work day in bakeries. The average length of the working day for bakery employees declined nationally from about ten hours in 1909, to nine hours in 1914, to eight hours in 1919, but increased slightly in 1921.<sup>219</sup> A survey of working hours for union workers in various industries shows that on the average, union bakers worked 64.5 hours per week in 1890, 59.3 in 1905, 52.5 in 1915, and 47.8 in 1926.<sup>220</sup>

The 1936 decision *Nebbia v. New York* began the slide in judicial protection of economic liberties. New York criminalized the sale of milk below nine cents a quart in retail stores. *Nebbia*, a small store owner in Rochester, sold two bottles of milk and a loaf of bread for eighteen cents and was subsequently convicted of a misdemeanor for violating the milk control law. Maximum prices were not then prescribed, nor was production in any way limited. In *Nebbia*, the U.S. Supreme Court, in a five to four decision, upheld the conviction against a challenge that it violated the seller's rights under the Fourteenth Amendment's Due Process and Equal Protection Clauses.<sup>221</sup>

In his dissent, Justice McReynolds sought to identify a grocer's liberty of contract with the public interest:

Not only does the statute interfere arbitrarily with the rights of the little grocer to conduct his business according to standards long accepted—complete destruction may follow; but it takes away the liberty of twelve million consumers to buy a necessity of life in an open market. It imposes direct and arbitrary burdens upon those already seriously impoverished with the alleged immediate design of affording special benefits to others. To him with less than nine cents it says—You cannot procure a quart of milk from the grocer although he is anxious to accept what you can pay and the demands of your household are urgent! A superabundance; but no child can purchase from a willing storekeeper below the figure appointed by three men at headquarters! And this is true although the storekeeper himself may have bought from a willing producer

---

219 HAZEL KYRK & JOSEPH S. DAVIS, *THE AMERICAN BAKING INDUSTRY 1849-1923 AS SHOWN IN THE CENSUS REPORTS* 61 (1925).

220 PAUL H. DOUGLAS, *REAL WAGES IN THE UNITED STATES 1890-1926*, at 112 (1966).

221 *Nebbia v. New York*, 291 U.S. 502 (1934).

at half that rate and must sell quickly or lose his stock through deterioration. The fanciful scheme is to protect the farmer against undue exactions by prescribing the price at which milk disposed of by him at will may be resold!<sup>222</sup>

In all probability, such sentiments reflected the views of James Madison and many of his colleagues at the Constitutional Convention of 1787. Their adoption of limited government and rejection of majoritarian government reveals their strong belief that liberty rather than authority best serves the interests of society.

Nobel Laureate Friedrich Hayek has written very persuasively about the benefits and rewards of human freedom. For Hayek, liberty is the foremost concern of constitutionalism. He regards liberty as beneficial to the individual and the community and as essential to the advancement and progress of society. The benefits an individual derives from freedom are largely the result of the uses of freedom by others, most of which the individual could never avail himself of. Therefore, the freedom that a person can himself exercise is not necessarily most important.

What is important is not what freedom I personally would like to exercise but what freedom some person may need in order to do things beneficial to society. This freedom we can assure to the unknown person only by giving it to all. . . .

. . . If we proceeded on the assumption that only the exercises of freedom that the majority will practice are important, we would be certain to create a stagnant society with all the characteristic of unfreedom.<sup>223</sup>

Maximizing liberty will lead to the greatest societal gains and advances:

Most scientists realize that we cannot plan the advance of knowledge, that in the voyage into the unknown—which is what research is—we are in great measure dependent on the vagaries of individual genius and of circumstance, and that scientific advance, like a new idea that will spring up in a single mind, will be the result of a combination of conceptions, habits, and circumstances brought to one person by society, the result as much of lucky accidents as of systematic effort.<sup>224</sup>

History strongly supports Hayek's thesis. Because of fewer regulations, the number and variety of products and services are

222 *Id.* at 557-58 (McReynolds, J., dissenting).

223 HAYEK, *supra* note 108, at 32.

224 *Id.* at 33.

much more plentiful in capitalist than in communist nations. All the current and former communist states are economically less developed because of restrictions on liberty. Under communism, all firms are government owned, and the operation of each is directed by national planners and other officials. A firm's managers are supposed to do little more than follow orders. Neither they nor the government regulators have much incentive to innovate or improve the firm's products or operations.

As a result, communist companies continue to make virtually the same products every year, while capitalist producers are continually improving the quality (and quantity) of their output. Participants in the capitalist marketplace, as Professor Kirzner reminds us, are engaged in an incessant race to get or keep ahead of one another—and to be ahead always means “to be offering the most attractive opportunities to other market participants.”<sup>225</sup> It follows, therefore, that any regulations that inhibit individual initiative and creativity impede advancement, whether in the marketplace of ideas or of goods and services.

## VII. CONCLUSION

The Framers of the U.S. Constitution created a limited government which relied on freedom as the principle means for societal advancement and progress. In the separation and confinement of government powers and the guarantees of liberties, the Framers embodied the libertarian ideas of Locke, Coke, and Blackstone and the principles espoused in the Declaration of Independence. These ideas and principles compel the judiciary to preserve and protect economic rights. In failing to protect these constitutional liberties of investors and entrepreneurs, the judiciary has not fulfilled its constitutional duty.<sup>226</sup>

---

225 ISRAEL M. KIRZNER, *COMPETITION AND ENTREPRENEURSHIP* 20 (1973).

226 An appropriate level of review for economic regulation would be similar to the heightened scrutiny currently applied in property regulation cases. *See Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *see also* BERNARD H. SIEGAN, *DRAFTING A CONSTITUTION FOR A NATION OR REPUBLIC EMERGING INTO FREEDOM* 37-43 (2d ed. 1994); SIEGAN, *supra* note 1, at 318-331.

## Bernard H. Siegan

Bernard H. Siegan obtained his J.D. degree from the University of Chicago Law School in 1949, where he was associate editor of the law review. A research fellow in law and economics at that school in 1967-68, he is now and has been since 1975 distinguished professor of law at the University of San Diego School of Law. He has been a practicing attorney, newspaper columnist and private real estate investor. He teaches and specializes in constitutional law. He was a member of the National Commission on the Bicentennial of the Constitution (established by the U.S. Congress) and a member of President Reagan's Commission on Housing. He has been a Consultant to three federal agencies: the Department of Justice, the Department of Housing and Urban Development, and the Federal Trade Commission.

Professor Siegan was director of the United States Justice Department's project on the "Bibliography of Original Meaning of the United States Constitution." He was a member of the U.S. Advisory Team on Bulgarian Growth and Transition and authored its recommendation for a proposed Bulgarian constitution. He has also provided constitutional advice to government or private groups in Argentina, Armenia, Bolivia, Brasil, Canada, Czechoslovakia, Peru, Poland, Tajikistan and Ukraine.

## Books Authored by Professor Siegan

- DRAFTING A CONSTITUTION FOR A NATION OR REPUBLIC EMERGING INTO FREEDOM (1992) (2d ed. 1994) (translated into and published in Spanish, Portuguese, Ukrainian and Polish).
- THE SUPREME COURT'S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY (1987).
- ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).
- OTHER PEOPLE'S PROPERTY (1976).
- LAND USE WITHOUT ZONING (1972); republished in soft cover (1993).

## Books Edited by Professor Siegan

- GOVERNMENT, REGULATION, AND THE ECONOMY (1980).
- REGULATION, ECONOMICS, AND THE LAW (1979).
- THE INTERACTION OF ECONOMICS AND THE LAW (1977).
- PLANNING WITHOUT PRICES: THE TAKING CLAUSE AS IT RELATES TO LAND USE REGULATION WITHOUT COMPENSATION (1977).

## Monographs Authored by Professor Siegan

- SUPREME COURT DECISION REAFFIRMS NEED TO PROVIDE COMMERCIAL SPEECH FULL CONSTITUTIONAL PROTECTION, (Washington Legal Foundation, Legal Opinion Letter, Oct 1, 1993).
- CONSTITUTIONALLY PROTECTING ECONOMIC AND PROPERTY RIGHTS, (Instituto Liberal Rio de Janeiro Brasil 1993) (In Portuguese).

DRAFTING A CONSTITUTION FOR A FREE NATION, (Instituto Liberal, Rio de Janeiro, Brasil 1992) (In Portuguese).

THE RISE AND FALL OF ECONOMIC DUE PROCESS - WHEN THE SUPREME COURT CHAMPIONED AND THEN CURTAILED ECONOMIC FREEDOM (International Institute for Economic Research, 1983).

Costs and Consequences of Public Land Use Regulation, Moorman Lecture Series at Culver-Stockton College (1975).

ZONING AND NON-ZONING: TRENDS AND PROBLEMS, (University of Chicago Law School and *Journal of Law and Economics* 1971).

### Chapters or Articles in Books

*Foreword* to MARK L. POLLOT, GRAND THEFT AND PETIT LARCENY xi (1993).

*Proposal for a New Constitution, Report of Bulgarian Economic Growth and Transition Project*, NATIONAL CHAMBER FOUNDATION (Oct. 1990).

*One People As To Commercial Objects*, in LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 101 (Ellen Frankel Paul & Howard Dickman eds., 1989).

*The Constitution and the Contracts Clause*, in THE NEW FEDERALIST PAPERS 369 (J. Jackson Barlow et al. eds., 1988).

*Economic Liberties and the Constitution: Protection at the State Level*, in ECONOMIC LIBERTIES AND THE JUDICIARY 137 (James A. Dorn & Henry G. Manne eds., 1987).

*Economic Liberties and the Constitution*, in THE ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (Leonard W. Levy ed., 1986).

*The Supreme Court: The Final Arbiter*, in BEYOND THE STATUS QUO 273 (David Boaz & Edward H. Crane eds., 1985).

- The Economic Constitution in Historical Perspective, in*  
CONSTITUTIONAL ECONOMICS 39 (Richard B. McKenzie  
ed., 1984).
- The Law and the Land, in* PRIVATE RIGHTS AND PUBLIC LANDS  
9 (Phillip N. Truluck ed., 1983).
- The Constitution and the Protection of Capitalism, in* HOW  
CAPITALISTIC IS THE CONSTITUTION? 106 (Robert A.  
Goldwin & William A. Schambra eds., 1982).
- Property, Economic Liberties and the Constitution, in* RESOLVING  
THE HOUSING CRISIS 359 (M. Bruce Johnson ed., 1982).
- Industrial Regulation: The Market versus Government, in*  
GOVERNMENT, REGULATION, AND THE ECONOMY 1  
(Bernard H. Siegan ed., 1980).
- Land Use Regulation at State and Federal Levels, in*  
REGULATION, ECONOMICS, AND THE LAW 81 (Bernard H.  
Siegan ed., 1979).
- Introduction: The Anomaly of Regulation under*  
*the Taking Clause, in* PLANNING WITHOUT PRICES 1  
(Bernard H. Siegan ed., 1977).
- Regulating the Use of Land, in* THE INTERACTION OF ECONOMICS AND  
THE LAW 159 (Bernard H. Siegan ed., 1977).
- No Zoning is the Best Zoning, in* NO LAND IS AN ISLAND 157  
(Institute for Contemporary Studies ed., 1975).

### Articles in Journals

- Hayek and the United States Constitution, 23 S.U. L. REV.*  
469 (1994).
- Constitutional Protection of Property and Economic Rights,*  
29 SAN DIEGO L. REV. 161 (1992).



- Comment on Anthony Downs' "The Advisory Commission on Regulatory Barriers to Affordable Housing: Its Behavior and Accomplishments,"* 2 HOUSING POL'Y DEBATE 1169 (1992).
- Book Review, 38 WAYNE L. REV. 513 (1991) (reviewing PAUL KENS, JUDICIAL POWER AND REFORM POLITICS, THE ANATOMY OF *Lochner v. New York* (1990)).
- Conserving and Developing the Land*, 27 SAN DIEGO L. REV. 279 (1990).
- Land Use Regulations Should Preserve Only Vital and Pressing Governmental Interests*, 10 CATO J. 127 (1990).
- Majorities May Limit the People's Liberties Only When Authorized To Do So By The Constitution*, 27 SAN DIEGO L. REV. 309 (1990).
- Economic Liberties and the Constitution*, BUS. ECON. (Jan. 1989).
- Separation of Powers and Other Divisions of Authority under the Constitution*, 23 SUFFOLK U. L. REV. 1 (1989).
- Commentary on Monahan Paper (Judicial Review) (Symposium Excerpt: The Economic Implications of the Changes in the Canadian Constitution and Charter of Rights)* 21 UNIV. BRIT. COLUM. L. REV. 165 (1987).
- Economic Liberties and the Constitution: Protection at the State Level*, CATO J. (Winter 1985).
- Rehabilitating Lochner*, 22 SAN DIEGO L. REV. 453 (1985).
- Keynote Address, Oregon Land Use Conference*, 14 ENVTL. L. 645 (1984).
- The Oregon Example: A Prospect for the Nation*, 14 ENVTL. L. 843 (1984).
- Commentary on Redistribution of Income through Regulation in Housing*, 32 EMORY L.J. 721 (1983).

- Panel Discussion: Redistribution and Regulation of Housing*, 32 EMORY L.J. 767 (1983).
- Economic Liberties, the Constitution, and the Courts*, TOWN HALL (OF L.A.) REP. (Mar. 1982).
- The President's Commission on Housing: Zoning Recommendations*, URB. LAND 24 (Nov. 1982).
- Report of the President's Commission on Housing*, 11 LAND USE L. & ZONING DIG. 7 (1982).
- Comment*, (on Penn Central Transportation Co. v. New York), 30 LAND USE L. & ZONING DIG. No. 9, at 8 (1978).
- A Free Society*, FREEMAN (Feb. 1976).
- Controlling Other People's Property through Covenants, Zoning, State and Federal Regulation*, 5 ENVTL. L. 385 (1975).
- Land Use Regulation-A Tool of Politics, Not of Planning*, FREEMAN (Mar. 1974).
- Zoning Restrictions-Boom or Bane*, THE GUARANTOR (Spring 1973).
- No Zoning Appears to be the Best Zoning*, FARM & LAND REALTOR (October 1971).
- The Houston Solution: The Case for Removing Public Land Use Controls*, LAND USE CONTROLS Q. (Summer 1970).
- Non-Zoning in Houston*, 13 J.L. & ECON. 71 (1970).

### Congressional Publications

- There Should Not Be Greater Regulation of Land Use at the State and Federal Levels*, CONG. REC. (May 26, 1977).
- Benefits of Non-Zoning*, CONG. REC. (June 1, 1975).
- Rights of Property Owners*, CONG. REC. (Mar. 25, 1975).

*No Growth is Another Way of Saying 'Urban Sprawl'*, CONG. REC. (May 15, 1973).

*Statement in Opposition to Land Use Regulation, Hearings Before the Interior and Insular Affairs Committee, U.S. Senate* (June 22, 1971).