

LINGUISTIC RELATIVISM AND THE DECLINE OF THE RULE OF LAW

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INTRODUCTION

Nobody today on any side of the political spectrum opposes the rule of law. And for good reason. At a minimum, the rule of law carries with it the idea that legal rules should be certain, so that individuals will not be left at sea as to their legal obligations. The fixity of the law, by constraining the behavior of political actors, also improves the odds that the liberty and property of any individual will not be subject to continuous political pressures and intrigue. The standard set of requirements for the rule of law has been summarized by Lon Fuller. In his 1964 classic, *The Morality of Law*, he lists a variety of additional constraints, including that rules be simple enough to give clear notice of what they require, be internally consistent, have only prospective application, possess relative constancy over time, and be administered by neutral officials.¹ For these purposes, it is not necessary to resolve the many fine points that arise over the proper interpretation of this doctrine. It is quite sufficient to note that each and every one of these constraints presupposes that the language we use to express our legal rules—and hence our commands to ordinary citizens and public officials alike—is intelligible enough to meet the requirements of fair notice and neutral interpretation, even if public officials frequently violate (and are known to violate) these norms. Unless that requisite level of intellectual clarity is satisfied, then the rule of law emerges stillborn from the mouths of philosophers and legal theorists. Linguistic coher-

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1. LON L. FULLER, *THE MORALITY OF LAW* 39 (1964). For my work that seeks to show the connection between traditional systems of private property and the rule of law, see RICHARD A. EPSTEIN, *DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW* 73–76 (2011).

ence is a minimum condition for the rule of law. Yet, as will become clear, this minimalist conception of the law does not lack any substantive component. Rightly understood, the rule of law carries more meat on its bones than an appeal to legal certainty. It has to make normative commitments to particular principles—principles, I shall argue, reflected in both Roman and common law, whose fundamental similarities are far more important than their refined differences.²

Both the narrow and broad conceptions of the rule of law presuppose that the tools of ordinary language are powerful enough to allow judges and scholars to formulate legal rules that make implementing the rule of law possible. Unfortunately, many scholars despair that the tools of textual analysis are not strong enough to meet the persistent challenges of the linguistic skeptic. Today, many people, both on the bench and in the academy, share this all too fashionable view of ordinary language. This undermines the rule of law, fanning the general populist unease that now infects much of our public discourse. At a theoretical level, it is common for linguistic skeptics to scoff at language as the fundamental unit of law. For example, Mark Tushnet, in his caustic review of my book *Design for Liberty: Private Property, Public Administration, and the Rule of Law*, celebrates the proposition that terms like “property” and “nuisance” “have no determinate content, which means that the judges must actually be relying on something else to resolve the dispute,”³ without ever letting us know what that “something else” is. This type of relativism easily extends to other terms, most notably “liberty” and “coercion,” which have similarly been attacked as otiose, most famously by Robert L. Hale. In his highly influential essay, *Coercion and Distribution in a Supposedly Non-Coercive State*,⁴ he finds that any refusal to deal

2. For this point in connection with the problem of the good-faith purchaser, see Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43 (1987).

3. Mark Tushnet, *Epstein's Best of All Possible Worlds: The Rule of Law*, 80 U. CHI. L. REV. 487, 505 (2013). For my reply, see Richard A. Epstein, *Tushnet's Lawless World*, 80 U. CHI. L. REV. DIALOGUE 1, 5 (2013).

4. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923), to which I respond in RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM 110–14 (2003) (criticizing Professor Hale's expansion of the term “coercion”).

should be regarded as coercive both in competitive and monopoly markets.

The danger of that position on the meaning of coercion and harm is starkly illustrated by the aggressive modern application of the idea that there is nothing wrong with limiting ordinary businessmen and women, under the antidiscrimination laws, to the choice between serving same-sex couples and losing their businesses. One notable example is the recent case of *Craig v. Masterpiece Cakeshop*,⁵ decided by the Colorado Court of Appeals, in which the defendant cake artist, Jack Phillips, refused to prepare a wedding cake for a gay couple. One of the Commissioners, Diann Rice, said: "I would also like to reiterate what we said in . . . the last meeting [concerning Jack Phillips]. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust . . . I mean, we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use . . . their religion to hurt others."⁶

No one who understands the meaning of the terms "coercion" or "harm" could make this statement. Nonetheless, in good Orwellian fashion, this remark was made when the Commission denied Phillips's request to suspend a commission order that required Phillips and his staff to undergo a reeducation program to make them aware of the dangers of discrimination in dealing with same-sex couples.⁷ The ability to attribute

5. No. 14CA1351, 2015 WL 4760453, at *1 (Colo. App. 2015); see also Michael Paulson, *Can't Have Your Cake, Gays Are Told, and a Rights Battle Rises*, N.Y. TIMES (Dec. 15, 2014), http://www.nytimes.com/2014/12/16/us/cant-have-your-cake-gays-are-told-and-a-rights-battle-rises.html?_r=2 [https://perma.cc/BVP5-PJ8A]. For an earlier episode in the same vein, see, for example, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 58–59 (N.M. 2013), cert. denied, 134 S. Ct. 1787 (2014), which I criticize in Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241 (2014).

6. Alliance Defending Freedom, *Revealed: Colo. commissioner compared cake artist to Nazi* (Jan. 12, 2015), <http://www.adfmedia.org/News/PRDetail/9479> [https://perma.cc/J8CK-DSCD].

7. Alliance Defending Freedom, *Colo. cake artist appeals gov't 're-education' order* (July 17, 2014), <http://www.alliancedefendingfreedom.org/News/PRDetail/9211> [https://perma.cc/Q45F-LVZR]. ("The commission's order requires cake artist Jack Phillips and his staff at Masterpiece Cakeshop to create cakes for same-sex celebrations, forces him to re-educate his staff that Colorado's Anti-Discrimination

coercive behavior to the victims of coercion is one dire consequence of this massive breakdown in the English language.

The dangerous point here is that the excesses of the Colorado Commission follow in linear fashion from the inability to grasp the distinction between the mass slaughter of people in gas chambers, on the one hand, and refusing to serve them in a competitive market, on the other. The phrase “using religion to hurt others” consciously elides that difference and never once asks the question of what harm the state does to individuals whom it forces by fines, injunctions, or imprisonment to surrender their religious beliefs in order to remain in business. Note the relative sacrifices. In a competitive market, dozens of other cake shops can, and will, serve this couple. But the proprietor who is forced to either go out of business or suffer reeducation has no such luxury in responding to government commands. The common law entitlements were set as they were because of the differential impact of the two sets of inconveniences, and that principle on refusals to deal is both timeless and universal, for a world with multiple alternatives is always less coercive than a world with only one. The lesson to be learnt is that whenever there is no sense of entitlements, it is easy to say that those who refuse to deal with others—say on grounds of religious conscience—are in fact engaging in coercion similar in kind, if less coercive, to the Nazi extermination of the Jews—which was of course preceded by their banishment from the common occupations of everyday life.

A second misguided way to justify the state coercion is to argue that there really is no coercion at all, for so long as people have been left with a choice, they cannot be said to have suffered from any form of legal duress.⁸ Making wedding cakes or going out of business are the supposed choices left to Jack Phillips. But as Justice Holmes said long ago: “It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest

Act means that artists must endorse all views, compels him to implement new policies to comply with the commission’s order, and requires him to file quarterly ‘compliance’ reports for two years. The reports must include the number of patrons declined a wedding cake or any other product and state the reason for doing so to ensure he has fully eliminated his religious beliefs from his business.”).

8. *See, e.g.,* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting).

does not exclude duress. It is the characteristic of duress properly so called.”⁹ Again, no account of duress is intelligible without a robust account of the antecedent property rights. There is no duress if your choice is between *my* watch and *your* money. There is duress par excellence when your choice is confined to surrendering either *your* watch or *your* money. The analytics are what make the argument go. The self-conscious decision to put key terms in quotation marks is sure evidence that the sound understandings of ordinary language have been rejected or ignored, opening the path to near-totalitarian excesses. Reeducation is a dangerous word worthy of Pol Pot’s Cambodia and Mao Tse-tung’s China.

It is linguistic shifts toward skepticism similar to, if less calamitous than, the reasoning against religious cakemakers in Colorado that in large measure have fueled the expansion of government power from the classical liberal tradition to a modern progressive one. This change has proceeded in two directions at the same time. First, the constitutional *limitations* on the legislative power of the federal government have eroded with an expansive reading of the Commerce Clause and a *diminution* in the protections afforded to private property and economic liberty. Second, the opposite result has occurred with the unjustified *expansion* of judicial power that *expands* the constitutional limitations on the state’s ability to regulate abortion and impose punishments on various criminal offenses. The case for judicial control is stronger on the scope of federal power and the protection of property entitlements than it is in setting the definitions and punishments of various criminal offenses. In the first two cases it is possible to set clear boundaries on government conduct, which is far harder in the last two cases given that setting punishment involves an uneasy amalgam of concerns with deterrence, retribution, rehabilitation, and incapacitation.

These major political interventions were driven by a view of language that marks a sharp departure from the Framers’ confidence that the English language was clear enough to organize the fundamental institutions of government. They knew what it meant to divide government powers into the legislative, executive, and judicial branches, as is done in Articles I, II, and III of the original Constitution. They did not unduly trouble them-

9. *Union Pac. R.R. Co. v. Pub. Serv. Comm’n of Mo.*, 248 U.S. 67, 70 (1918).

selves with the inevitable disputes that arise at the margins of these categories, much less use borderline cases (of which there are always many) to undo the basic contours of their system, which features first separation of powers and then the checks and balances among the various branches. All too often, however, the writers in the progressive tradition (who first ushered in and then defended the Court's New Deal jurisprudence) take the general position that these key constitutional words are deeply plastic and filled with inherent ambiguity, making it difficult to maintain the initial categorical structure. That doubt paves the way for the rise of the Fourth Branch of Government—the independent administrative agencies like the Federal Trade Commission and the National Labor Relations Board—whose “duties,” Justice Sutherland said, “are neither political nor executive, but predominantly quasi-judicial and quasi-legislative,” without giving any idea as to how these novel terms map onto the constitutional structure.¹⁰ Once this degree of linguistic freedom is given, it becomes difficult, if not impossible, to distill clear meanings from established texts whose meaning had once filtered through a set of shared historical experiences.

In Part I, I speculate as to why this modern view of the pliability of language has risen in popularity. In Part II, I offer a criticism of this modernist view and show the defects that follow from this wholesale disregard of the possibility of recovering a clear meaning from the original text of the Constitution. In Part III, I provide some examples of how this relativist view has shaped recent Supreme Court constitutional jurisprudence. Part IV concludes by offering a general account as to how the disparate examples discussed in this article link to a common theme. The decline of intellectual rigor in the use of language leads not only to violations of the rule of law, but also to social welfare losses that arise when judges are allowed to upset fixed and definite rules of property rights on the one hand, and impose their own judgments about the open-textured judgments necessarily involved in setting criminal penalties on the other. It is a fitting irony that the current pattern of judicial decisions flips over areas of legislative and judicial dominance from what they should be in a well-ordered society.

10. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935).

I. THE EVOLUTION OF THE MODERNIST VIEW

As a matter of intellectual history, why did this profound change in the view of language occur, and how does it relate to the changes in law? Historically, the legal move toward progressive thought coincided with the publication of some highly influential philosophical and legal texts in the 1930s. I will discuss two influential staples of this literature.

On the philosophical front, perhaps the most startling manifesto of the 1930s was A.J. Ayer's *Language, Truth and Logic*,¹¹ which burst onto the philosophical scene as a universal manifesto intent on exposing the traditional false thinking on ethics and theology. Ayer branded these entire areas of thought as devoid of meaning because they could not be verified empirically by use of the senses. My point here is not to criticize his views, well critiqued in J.L. Austin's *Sense and Sensibilia*,¹² but to mention that his analysis has no ideological direction whatsoever. Indeed, Ayer's philosophical skepticism necessarily undermines any consistent normative view, be it classical liberal or progressive, neither of which he discusses. But Ayer's writing does lay the groundwork for undermining one pillar of the rule of law: the notion that language has consistent and coherent usage.

The second landmark book is Jerome Frank's *Law and the Modern Mind*,¹³ written in 1930 as a breathless exposé of the infantile fetish of individuals who for psychological reasons cling to the evident fiction that law contains timeless certainties that judges are duty-bound to find but never make. I doubt anyone has ever endorsed the bald thesis that Frank purported to demolish. But again, his form of skepticism alone offers no descriptive theory on human behavior or normative theory on the proper shape of legal rules. It cannot therefore furnish the ammunition that justifies the need for government to redress the imbalance of power within the workplace—a burning issue that drove the major labor law reform of the 1930s. But Frank's view did undermine the linguistic integrity on which the rule of law rests, and thus made it easier for others to use linguistic

11. ALFRED J. AYER, *LANGUAGE, TRUTH AND LOGIC* (1936).

12. J.L. AUSTIN, *SENSE AND SENSIBILIA* (G.J. Warnock ed., 1960).

13. JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

arguments to attack the classical liberal synthesis of property, tort, and contract.

It is, therefore, no coincidence that substantive critique of the classical liberal position on freedom of contract crested during this period. Claims of internal incoherence are most easily lodged against existing systems even though, theoretically, they apply to rivals as well. The most influential critique of this sort was offered by Robert L. Hale in his famous book review, *Coercion and Distribution in a Supposedly Non-Coercive State*,¹⁴ which was intended to show that the laissez-faire ideal of freedom of contract was unintelligible because it was parasitic on an incoherent notion of coercion. But Hale admitted that the usual definitions of coercion and duress, tied with the threat of use of force, remained valid. Indeed, he did nothing to refute the observation of Holmes that duress, properly understood, necessarily involves the threat of force.¹⁵ But in his view, coercion was not confined to those cases, but also permeated every contract, so much so that “a careful scrutiny will . . . demonstrate that the systems advocated by the professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom, and with restrictions, moreover, out of conformity with any formula of ‘equal opportunity’ or of ‘preserving the equal rights of others.’”¹⁶ His key move is that the refusal to deal with another person is a form of coercion, on the ground that it leaves the disappointed suitor bereft of a potential gain. The point therefore means that coercion necessarily pervades all forms of competitive markets, so the only thing the government can do is decide who is allowed to coerce whom. What Hale misunderstands is the common law tradition that long recognized that the refusal to deal was not permissible when the defendant held a regulated or natural monopoly, at which point there was a duty of service on fair and reasonable terms. By conflating threats of force with refusals to

14. Hale, *supra* note 4. Hale’s views were defended in BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998), which I reviewed in Richard A. Epstein, *The Assault that Failed: The Progressive Critique of Laissez Faire*, 97 MICH. L. REV. 1697 (1999). I have also critiqued Hale in EPSTEIN, *SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM* 110–14 (2003).

15. See *Union Pac. R.R. Co. v. Pub. Serv. Comm’n of Mo.*, 248 U.S. 67, 70 (1918), discussed at note 9, *supra*.

16. Hale, *supra* note 4, at 470.

deal in a competitive market, he establishes a false equivalence between a robust competitive market and a lawless society, based on force in which output levels will remain forever low.

Hale's effort to tie his peculiar version of coercion to its observed output thus renders this conceptual critique wholly wrong-headed. Nonetheless, ideas like his had consequences, most notably on the labor law. It is important, therefore, to note that his theory is adapted by *The Labor Injunction*,¹⁷ published in 1930 by Felix Frankfurter, then Professor of Law at Harvard, and Nathan Greene, of the New York bar. Their book passionately attacks the injunction as the worst possible employer abuse in labor disputes, by dismissing, as one reviewer noted, "the so-called rights of property and liberty."¹⁸ Although devoid of grand philosophical pretensions, *The Labor Injunction* helped speed the passage in 1932 of the Norris–LaGuardia Act,¹⁹ which curtailed the ability of employers to obtain injunctions in federal court in their disputes with unions. Once again, linguistic skepticism eases the path toward major political reform.

II. SHORTCOMINGS OF THE MODERNIST VIEW

So why then the legal relativism—that is, some notion that there are no independent grounds for preferring one outcome to another—which surfaces in different ways in different contexts? The simplest explanation is the best. Let a judge assume that there are fixed meanings to controversial terms, and the scope of judicial discretion in interpreting statutes or constitutional texts is necessarily limited. For progressive law professors like Felix Frankfurter, those linguistic straitjackets would reduce the opportunity to transform constitutional doctrine in ways that displaced the classical liberal conception with the progressive and New Deal views he so emphatically championed. This palpable change in the judicial approach fueled much of Frankfurter's jurisprudence of the period.

To give but one example, in *Wilkerson v. McCarthy*,²⁰ the question before the Court was how much discretion a jury should receive in making a finding of negligence under the

17. FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1930).

18. Maurice Finkelstein, Book Review, 30 COLUM. L. REV. 425 (1930).

19. 29 U.S.C. § 101 *et seq.* (2012).

20. 336 U.S. 53 (1949).

Federal Employer Liability Act, under which neither contributory negligence nor assumption of risk constitutes a defense.²¹ That statutory move put enormous pressure on the negligence concept itself, because even the tiniest contribution of the defendant's negligence to the overall situation could lead to an imposition of total liability. Frankfurter issued a special concurrence of a jury finding of negligence when the plaintiff deliberately ignored visible warnings and barriers while taking a dangerous shortcut at work that resulted in serious injury. Frankfurter justified his position by noting:

The difficulties in these cases derive largely from the outmoded concept of "negligence" as a working principle for the adjustments of injuries inevitable under the technological circumstances of modern industry. This cruel and wasteful mode of dealing with industrial injuries has long been displaced in industry generally by the insurance principle that underlies workmen's compensation laws.²²

Note the use of the quotation marks around the term "negligence," which is intended to introduce a note of incoherence into a well-established concept that continues in use to this very day. Note also that Frankfurter overstates the scope of the "insurance principle" in workmen's compensation laws, which limit recovery to the losses that arise in the course of employment, which like any critical concept has generated extensive litigation as well. Once again, the linguistic skepticism paves the way for a clear—but insufficiently defended—policy preference. Frankfurter was a strong opponent of freedom of contract, and thus missed the historical fact that the strength of the workmen's compensation laws lies in large measure in the simple fact that they first came on the scene as part of voluntary agreements between management and workers in high-risk industries, most notably the railroads and mining.²³

It is therefore no great leap to conclude that this pervasive sense of linguistic ambiguity is accompanied by a celebration of the transformative purpose of law and of the justices who interpret it. For insight on that point, it is best to put the philoso-

21. *Id.* at 61, 68.

22. *Id.* at 65.

23. For a more systematic explanation of the economic logic of workers' compensation systems, see Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982).

phers to one side and instead look at how judges and lawyers view their own roles. On this point we can do no better than to start with Justice William J. Brennan, who stated the point with his customary clarity when he wrote:

Current Justices read the Constitution in the only way that we can: as twentieth-century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time.²⁴

A similar sentiment has been expressed by my University of Chicago colleague David Strauss, who invokes the common law method to explain how it is possible to avoid the vise-like control that an originalist approach would impose on the Constitution, without falling prey to the dangerous view that all constitutional principles are subject to nullification by the vagaries of the judges:

The good news is that we have mostly escaped [this risk], albeit unselfconsciously. Our constitutional system, without our fully realizing it, has tapped into an ancient source of law, one that antedates the Constitution itself by several centuries. That ancient kind of law is the common law. The common law is a system built not on an authoritative, foundational, quasi-sacred text like the Constitution. Rather, the common law is built out of precedents and traditions that accumulate over time. Those precedents allow room for adaptation and change, but only within certain limits and only in ways that are rooted in the past. Our constitutional system has become a common law system, one in which precedent and past practices are, in their own way, as important as the written Constitution itself. A common law Constitution is a "living" Constitution, but it is also one that can protect fundamental principles against transient public opinion,

24. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

and it is not one that judges (or anyone else) can simply manipulate to fit their own ideas.²⁵

The popular positions of Brennan and Strauss are, I believe, misguided in several ways. First, they do not distinguish clearly between the *meaning* of a term, which may be constant over time, and the *desirability* of a legal policy, which may vary from time to time. To give but one example, the definition of a contract at will—whereby an employer may fire, or a worker may quit, for good reason, bad reason, or no reason at all—is a constant in labor law. But the desirability of that position, which was a cardinal proposition of the nineteenth century, was the subject of sustained attack in the twentieth century by writers who thought that this contract gave too much power to employers.²⁶ It is possible either to defend or to attack the contract at will, but there is no definitional twist that gives this particular phrase a meaning today different from that which it had in the nineteenth century. It is therefore one thing to argue that the relative dominance of large industrial firms renders the contract at will obsolete, but quite another to argue that today the contract at will means a contract in which termination takes place only for cause. Indeed, the phrase “for cause” only means that the worker has done something that merits discharge, and the meaning of that term does not change even if there are new reasons for discharge—for example, abuse of Internet privileges—that could not have applied a century ago. In both settings, the idea of a discharge for cause is that the worker has done something in breach of his or her contractual duties. The fact that these duties have changed may modify what actions count as reasons to fire, but they do not alter the meaning of the term.

In his remarks, Justice Brennan introduces needless ambiguity when he asks: “what do the words mean in our time?”²⁷ If the question is one of semantic meaning, the answer is that the words have the same meaning that they have always had. But often the term “meaning” is used in a looser sense, of what *de-*

25. David A. Strauss, *The Living Constitution*, THE RECORD ONLINE (Fall 2010), <http://www.law.uchicago.edu/alumni/magazine/fall10/strauss/> [https://perma.cc/93YA-CTXD].

26. See, e.g., Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984).

27. Brennan, *supra* note 24 and accompanying text.

sirability the original understanding should have in a world of changed circumstances. But once that line of inquiry is opened up and constitutional terms do not have a static meaning, the sky is the limit on what can be done with a text that is not able to speak in its own defense. Now judges have to decide exactly how often and why they change their meaning and coloration. Theoretically, the difficulty goes deeper because it becomes questionable as to how the text could be understood at any given time in history by different readers who necessarily bring to it different background expectations; the diversity of their backgrounds and interests makes it difficult to claim that they all live in the same interpretive community. It is of course possible with time to reject propositions that were regarded as true on some earlier occasion, which is what has happened with the major shift in political beliefs since the New Deal, if not before. But these are not differences over semantic meaning. They are conscious differences over *policy*, which should be thrashed out on the merits, and not by some skeptical linguistic ploy that can be selectively invoked in some cases and studiously ignored in others.

The passage quoted from David Strauss attempts to fill this interpretive gap by noting that constitutional interpretation evolves in the same sense as the common law. The difficulty with this argument is that it oversimplifies how the common law evolves, chiefly by ignoring its deep substantive commitments. At root, the common law has been remarkably constant in its basic propositions over centuries. As one who has studied in detail the principles of Roman and early English law, it is clear that they address, across time and culture, the major problems of social organization in terms that are as familiar to us as they were at the time that they were first uttered.²⁸ For example, the difficult interaction among such key notions of tort law as intention, negligence, and wrongfulness give rise to the identical interpretive understandings *and* confusions today as they did nearly 2,000 years ago. The point is made clear by the identical transition in both systems from a system of strict liability with defenses to one in which either negligence or in-

28. See, e.g., Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1980). To observe some of the parallels, see THOMAS LUND, *THE CREATION OF THE COMMON LAW: THE MEDIEVAL YEAR BOOKS DECIPHERED* (2015), to which I contributed the Foreword.

tention is made part of the *prima facie* case.²⁹ The reason is that the historical common law had as its implicit premise the control of force and fraud, and later on monopoly. The particular rules became coherent because they were all adopted in light of this implicit major premise. Within the framework, hard cases necessarily arise and these issues must be attacked today just as they were centuries ago, but only by using the techniques that are as suitable in the one age as in the other.³⁰

One illustration of how this incremental process works comes in the area of deceit. "It is admitted," said Judge Grose, "that the action is new in point of precedent: but it is insisted that the law recognises principles on which it may be supported."³¹ Grose made that statement in connection with a decision that held that an action in deceit for fraudulent misrepresentation could be brought even if the defendant did not directly profit from the plaintiff's loss. The issue had not been squarely addressed before, but it is a general proposition about deceit that is as true today as it was when it was first uttered in 1789.³² Put otherwise: of course there are always novel circumstances

29. On this point, compare the text of the *Lex Aquilia* with Gaius's *Institutes*. The first chapter of the *Lex Aquilia* reads:

[I]f anyone wrongfully kills another's slave of either sex, or his fourfooted beast, let him be condemned to pay to the owner whatever was its greatest value in the past year.

Lege aquilia capite primo cavetur: "ut qui servum servamve alienum alienamve quadrupedem vel pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto."

DIGEST 9, 2, 2, in *LEX AQUILIA* (James B. Thayer trans. & ed., 1929). Gaius writes:

He is held to have killed wrongfully to whose dole or fault death is attributable, there being no law that imputes blame for loss occasioned without wrong-doing; therefore a man goes unpunished who, by some accident, and without fault or dole, does some damage to another's property.

[I]niuria autem occidere intellegitur cuius dolo aut culpa id acciderit, nec ulla alia lege damnum quod sine iniuria datur reprehenditur; itaque inpunitus est qui sine culpa et dolo malo casu quodam damnum committit.

GAIUS, *INSTITUTES* III, § 211, in *THE INSTITUTES OF GAIUS AND RULES OF ULPIAN* (James Muirhead trans. & ed., 1880).

30. See, e.g., *Coggs v. Bernard*, 92 Eng. Rep. 107 (K.B. 1703) (incorporating the Roman law of bailments—the delivery of goods with the intention to redeliver—into English law).

31. *Pasley v. Freeman*, 100 Eng. Rep. 450 (K.B. 1789).

32. *Id.*

that must be addressed, but it hardly follows that modern judges must create novel principles to address them.

Judge Grose's opinion in *Pasley* should remind us that the basic structure of the traditional common law starts with a small set of prima facie cases that sound in tort, contract, and restitution. The first deals with harms to strangers, the second with promises, and the third with benefits conferred on other persons, not by way of gift, for which compensation is required. From the very beginning it was recognized that these basic provisions had to be fleshed out by a set of defenses and further qualifications,³³ which was done by the explication of the term "iniuria" in the *Lex Aquila*. These defenses include, in tort, contributory negligence and assumption of risk; in contracts, mistake and frustration; and in restitution, necessity and mistake. Yet *none* of these standard elaborations of the basic case in any way depends on changes in larger social contexts. The same set of modifications that was introduced in the *Lex Aquilia* of Roman times to deal with restitution when the thing given over was destroyed or incorporated into a large structure is as timely today as it was when first advanced. Even modern fields like product liability law are not dependent upon the modern modes of production, but rather on the clear sense that modest changes to a general theory of misrepresentation are needed to cover those cases in which a latent defect in the defendant's product causes harm in normal and proper use—the very theory that was in fact announced at the dawn of the modern age in *Escola v. Coca Cola Bottling Co. of Fresno*.³⁴

There is also a second dimension. None of this soothing talk about incremental changes can deny that discontinuous changes take place in legal theory and practice, which they surely do. But

33. The theme is one that I have stressed on this subject for over forty years. See, e.g., Richard A. Epstein, *Assumption of Risk in a System of Strict Liability: Conceptual Tangles and Social Consequences*, in DEFENCES IN TORT 265 (Andrew Dyson, James Goudkamp & Frederick Wilmot-Smith eds., 2015); Richard A. Epstein, *The Not So Minimum Content of Natural Law*, 25 OXFORD J. LEGAL STUD. 219 (2005); Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973).

34. 150 P.2d 436, 444 (Cal. 1944) ("The manufacturer's liability should, of course, be defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market.").

these changes are not a result of changed social circumstances, but rather are the result of a conscious change in worldview, such as that which fueled the rise of progressivism in the first third of the twentieth century. No longer is private property at the center of the legal order; no longer are most legal obligations phrased in terms of controlling force and fraud or keeping promises. An extreme form of the attack on private-law institutions comes from *The Communist Manifesto*,³⁵ which states that “the theory of the Communists may be summed up in the single sentence: Abolition of private property.” We do not implement changes of that magnitude through courts. Nonetheless, the case law often contains some dramatic and discontinuous changes in the private law. For example, key contract³⁶ and tort³⁷ decisions of the 1960s and 1970s represented a conscious repudiation of the principle of freedom of contract as applied to wide ranges of social activities, coupled with a deep conviction that the control of force and fraud (as with latent defects) did not set the outer limit of legal protections. The common law thus also produces mini-revolutions that do not, as the Strauss excerpt contends, follow in some comfortable gradualist mode, but rather in one that is radically discontinuous and explicitly transformative. Thus, in product liability law, the New York Court of Appeals rejected the latent defect requirement with its own manifesto: “The time has come to depart from the patent danger rule enunciated in *Campo v. Scofield*.”³⁸ What a blunder! The potential scope of that one doctrinal change was not examined, but it led

35. KARL MARX & FREDERICK ENGELS, MANIFESTO OF THE COMMUNIST PARTY 22 (1848).

36. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

37. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (1963) (rejecting the principle of freedom of contract and thus paving the way for far more expansive readings of product liability law); see also *Larsen v. Gen. Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) (introducing a crashworthiness cause of action); *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978) (broad definition of product defect); *Micallef v. Miehle Co.*, 348 N.E.2d 571 (N.Y. 1976) (removing the open and obvious defense in duty to warn cases).

38. *Micallef*, 348 N.E.2d at 573, 576 (overruling *Campo v. Scofield*, 95 N.E.2d 802 (N.Y. 1950) (“If a manufacturer does everything necessary to make the machine function properly for the purpose for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law’s demands.”)). The latent defect rule is far superior because it ties in with misrepresentation, which the generalized cost benefit rule never does.

to at least a 100-fold increase in machine tool cases, which in turn precipitated an immediate insurance industry crisis that took shape by the fall of 1976, when I was hired as a consultant by the American Insurance Association, none of whose members had any idea as to the source in the huge upsurge in claims that took place at that time. As I argue later, discontinuous changes of this sort, albeit with far greater ramifications, apply to key constitutional principles.

III. HOW THE SUPREME COURT'S LINGUISTIC SKEPTICISM TRANSFORMS LEGAL RULES—FOR THE WORSE

In many modern disputes, the provisions of the Constitution have held their meaning over time. That is certainly the case with the many provisions that set out the various qualifications for office and describe the various procedures for passing laws, voting on treaties, and the confirmation of presidential nominees. But that practice is far from uniform, so here I shall focus on a few important cases that ushered in the conscious repudiation of this classical liberal system of limited government in two ways at once. On the one hand, key areas of the criminal law relating to both abortion and cruel and unusual punishments now are subject to judicial oversight, without any clear textual warrant for government intervention. On the other hand, on economic matters, the realist impulses have ushered in the modern progressive social welfare state, which relies on an expansive administrative apparatus staffed by supposedly expert and impartial administrators to implement major programs that respond to the political preferences of the popular majority.³⁹ To the progressive mind, the private rights of property and contract embodied what they regarded as somewhat obsolete institutions that needed to be modified, regulated, and improved by massive federal and state legislation, without critical judicial oversight.

Two dubious techniques of constitutional interpretation have been invoked to achieve this epochal transformation, both of which command assent from both conservative and liberal justices today. The first relies on partial quotations from earlier opinions, which turn their meanings upside down. Here is one example of how an unannounced truncation of a classic text on

39. For the evolution, see RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* ch. 3 (2014).

privilege or immunities converts the provision for a negative right (allowing citizens of other states equal access to the home state) into a positive right (welfare payments for new citizens coming into the state). In *Saenz v. Roe*,⁴⁰ the Court had to decide whether California, consistent with the Privileges and Immunities Clause of the Fourteenth Amendment,⁴¹ could limit “the amount payable to a family that has resided in the State for less than 12 months to the amount payable by the State of the family’s prior residence.”⁴² That provision was a clear compromise, whereby California did not want citizens of other states to migrate into California for its larger benefits. But after a time, it was prepared to switch gears by conferring eligibility. This is but one example of the kinds of tricky compromises that are always required in a domain of positive rights.

Justice Stevens cared little for this accommodation. In dealing with this point, he excerpts a key passage from Justice Bushrod Washington’s well-known opinion in *Corfield v. Coryell*,⁴³ which he quotes as follows: “‘fundamental’ rights protected by the Privileges and Immunities Clause include ‘the right of a citizen of one state to pass through, or to reside in any other state.’”⁴⁴ The purpose of this quotation is to make it appear that the rights of those who enter one state with the intention of going elsewhere should be treated the same as those who wish to reside. Indeed, there has never been a serious textual argument that the right to “travel” between states does not exist because the word “travel” “is not found in the text of the Constitution.”⁴⁵ If the Clause does not apply to travel, then it becomes a nullity. Yet when the Clause receives a sensible interpretation, it appears as if the right to receive various welfare benefits is neatly caught by the words “to reside” in this sentence. As written, there are no dots at the end of the sentence to indicate what is removed. The full sentence, which is quoted in Justice Thomas’s dissent, reads quite differently: “The right of a citizen of one state to pass

40. 526 U.S. 489 (1999).

41. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV, § 1.

42. *Saenz*, 526 U.S. at 492.

43. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

44. *Saenz*, 526 U.S. at 501 n.14.

45. *Id.* at 498.

through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise.”⁴⁶

The first three items on the list are far removed from welfare benefits. In principle, Justice Stevens could have explicitly argued the words “or otherwise” were sufficiently broad to cover the welfare benefits claimed here. But the lack of explicit quotation makes it clear that those two words cannot be used to take a provision that was designed to secure parity in the traditional negative rights—those to make contracts and do business—to cover the right to receive welfare benefits of any sort for which the new resident had not paid any contribution at all. The result, therefore, was to transform a provision that was intended to create an extended free trade zone—a move of immense structural importance—into one that allowed new citizens to share in welfare benefits to which they did not contribute. It is a perfect example of how the unannounced truncation of an earlier text involves an unprincipled transformation of legal regimes. It is one part of the systematic tendency to convert the classical liberal constitution of 1787 and 1868 into a progressive constitution of the New Deal.

The second and more critical technique insists that legal terms have no clear meanings, so that formalist conceptions of language must yield to practical considerations of modern life that call for either a stronger conception of the central government, or a weaker division of property rights, or both. Both of these interpretive strategies are inconsistent with any conception of the rule of law, with its notions of consistency across times and issues, because they promote unneeded levels of government discretion that do not improve governance, but which are likely to be abused at every point.

These strategies were congenial to the legal realist movement that extolled the creative role of judges in setting aside formalist doctrines and fuzzy precedents that purported to be rigorous and scientific, but were in fact idle abstractions that masked hidden policy preferences, many of which could not survive in the light of critical reason.⁴⁷ To use the famous phrase of Roscoe Pound, “mechanical jurisprudence,” which

46. *Id.* at 525 (Thomas, J., dissenting).

47. For one account of the movement, see N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism*, 1989 DUKE L.J. 1302.

purports to be scientific, is only “a rigid scheme of deductions from *a priori* conceptions.”⁴⁸ Those remarks were a consequence of Pound’s progressive politics and his commitment to legal pragmatism. Both these strands of legal thought are in my view unsound: they give government officials vast and uncontrollable discretion to shift wealth and opportunities among and across individuals and groups, thereby slighting productive labor and encouraging factional politics.⁴⁹ From that vantage point, it takes but a short step to conclude that established meanings can be shifted without real cost because they ignore the underlying realities of “time, place and person” that necessarily should be taken into account to shape the evolution of law, lest it become subservient to the dead hand of the past.⁵⁰

The Constitution has not proved immune to these interpretive manipulations or the desire to break through a formal text that has outlived its usefulness. Yet regrettably, neither the effort to truncate the key writings nor the effort to trumpet the plasticity of language is consistent with the text, structure, or history of the Constitution. It will not do to make bald assertions that both these interpretive attacks on the Constitution are unsound. Instead, it is necessary to give, in addition to the earlier illustrations, further concrete examples, and often to supplement them by quoting chapter and verse so that the reader can decide whether the evidence supports the charge of linguistic obfuscation against the Court, and whether the changes that these stratagems wrought count as some sort of social improvement.

A. *The Abortion Cases*

Over forty years after *Roe v. Wade*⁵¹ imposed constitutional limits on the state’s power to regulate abortion,⁵² its threadbare reasoning is there for all to see. Historically, abortion was held criminal in every state of the union, often for periods of more

48. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 608 (1908).

49. For the critique, see RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

50. Karl Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 699 (1936).

51. 410 U.S. 113 (1973).

52. *Id.* at 162–67.

than a century.⁵³ “By the end of the 1950’s, a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.”⁵⁴ In addition, the Model Penal Code had introduced its own abortion statute, which fourteen states had adopted, without any discussion about the pedigree of its constitutionality.⁵⁵ Yet *Roe* wrought massive change by a single decision, one that offered no clear legal theory as to why its dramatic course of action was proper.

The most common attack on *Roe* is that the Court lacked the institutional competence to make a decision that instead required close legislative attention.⁵⁶ I did not, and still do not, think that this institutional argument carries much weight, here or anywhere else.⁵⁷ High stakes issues do not require special interpretive techniques. They only require that great attention be attached to the use of conventional ones. Accordingly, the serious objection to *Roe* comes from its defective textual and conceptual arguments, which do not support any claim for constitutional invalidation. After all, the decision could not assign a particular clause on which its tectonic ruling might rest, given that there is no evidence anywhere that the Constitution was intended to work any redefinition of substantive crimes. The fact that the challengers invoked “the First, Fourth, Fifth, Ninth, and Fourteenth Amendments”⁵⁸ does not mean that all of those amendments applied. It is far better evidence that, in the absence of any textual warrant, the rote recitation of five different constitutional amendments means that none of them applies. The major precedents that the Court cited for its behavior dealt with rights of privacy, chiefly in connection with the Fourth Amendment protection against searches and seizures (where the right of privacy was invoked, for example, to extend protection to conversations in phone booths that were overheard by an electronic eavesdropping device attached to

53. See *id.* at 138–41 (summarizing American abortion laws).

54. *Id.* at 139.

55. *Id.* at 140 & n.37.

56. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 923–26 (1973).

57. See Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 175.

58. *Roe*, 410 U.S. at 120.

the booth, and where the Court held that an individual had a legitimate expectation of privacy).⁵⁹

Having fought this war of dubious analogies, Justice Blackmun then held that his newly minted right of privacy trumped the government interest in protecting the health of the mother or the life of the child, at least during the first trimester of pregnancy.⁶⁰ In good sociological fashion, Justice Blackmun traced the long evolution of abortion law, without once explaining how that history bore on the constitutional issues in question.⁶¹

But the conceptual weakness goes deeper, for at one point he confessed that he had no clear theory of whether life should begin at conception or at birth or at any point in between.⁶² He then concluded: “When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”⁶³ If he had concluded, incorrectly, that neither the health of the mother nor the wellbeing of an unborn child were entitled to protection, his decision might make sense. But *Roe* is decided against a constitutional tradition that regards both interests as entitled to protection under the police power of the state, recognized even in classical liberal opinions—that is, the power to regulate private behavior on matters of health, safety, morals, and general welfare.⁶⁴

It was against this background that *Roe* came as something of a shock, because the traditional views of the police power

59. See *id.* at 152 (citing *Katz v. United States*, 389 U.S. 347, 350 (1967)). In my view, the relationship between privacy and the Fourth Amendment is much misunderstood. For a fuller account, see generally Richard A. Epstein, *Entick v. Carrington and Boyd v. United States: Keeping the Fourth and Fifth Amendments On Track*, 82 U. CHI. L. REV. 27 (2015).

60. *Roe*, 410 U.S. at 164.

61. *Id.* at 129–47.

62. See *id.* at 159 (stating the Court “need not resolve the difficult question of when life begins”).

63. *Id.*

64. For one canonical reference, see *Lochner v. New York*, 198 U.S. 45, 53 (1905):

There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public.

could certainly cover both the health of the mother and the life of the unborn fetus. But in his stunning reversal of constitutional doctrine, Blackmun at no point mentioned the police power, but instead referred repeatedly to the nondescriptive phrase “compelling state interest,” which does not link government power to the typical functions of the police in dealing with health and safety. Instead, he concluded that it allowed for some government intervention after the first trimester, but not before.⁶⁵ But it is all *ipse dixit* against uniform historical understandings on the scope of the criminal law. It may well be that forty years later, the decision is so much a part and parcel of American life that it is dangerous, even unwise, to overturn it.⁶⁶ But none of those subsequent issues explains how the Court in the first instance could invent a constitutional right devoid of any discernible constitutional foundation.

The point is made clearer by noting that the health and safety components of the police power have to be read narrowly. The twin objectives of health and safety invoke a narrow conception of the Millian harm principle—“the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”⁶⁷ That purpose is necessarily fulfilled if the fertilized egg is regarded as a person within the meaning of the harm principle. But it should not be thought that the police power concern with health and safety disappears even if, as Justice Blackmun hints, the fetus is *not* a person within the contemplation of the Fourteenth Amendment. The central question becomes whether the protection of the fetus is an interest that falls within the health or safety heads of the state’s police power. Animals are not persons either, and yet they are surely afforded some police power protection, typically under a wide range of anti-cruelty laws.⁶⁸

Moreover, it follows from this analysis that *Roe* is wrong conceptually, even if the highly contentious decision in *Loch-*

65. *Roe*, 410 U.S. at 164.

66. See EPSTEIN, *supra* note 39, at 375.

67. JOHN STUART MILL, *ON LIBERTY* 22 (2d ed. 1859).

68. For an exhaustive compilation of such laws, see *Animal Protection Laws of the United States of America and Canada*, ANIMAL LEGAL DEFENSE FUND (Dec. 17, 2015), <http://aldf.org/resources/advocating-for-animals/animal-protection-laws-of-the-united-states-of-america-and-canada/> [<https://perma.cc/FXP5-S55J>].

ner—which struck down a ten-hour maximum hours law for bakers—was correct. The *Lochner* Court was right to reject the contention that the maximum hour law was intended as a public health statute.⁶⁹ The reason why the Court struck down New York’s maximum hours law was that it was convinced, rightly in my view, that the statute was a disguised effort to invoke health rationalizations to justify a paternalistic and anticompetitive law intended to stifle competition in the baking industry.⁷⁰ But Holmes contested that narrow view in his famous *Lochner* dissent, where he stated, without a word of support for the ten-hour workday: “A reasonable man might think it a proper measure on the score of health.”⁷¹ The term “police power” became less important, and when it was used, the connection with health was more tenuous than real.

Thereafter, one watershed case of the scope of government power was *Nebbia v. New York*,⁷² which upheld a state statute that authorized the setting of minimum prices for milk. Note that the New York state legislature invoked a supposed health justification, which bore little relation to the issue,⁷³ because the difference between milk prices and laws dealing with quarantine⁷⁴ and cleanliness⁷⁵ are too obvious to require any discussion. But by this time the game was really over, and the specific phrase “police power” fell out of use under the rational-basis test, which became the overarching test under the constitutional law in dealing with economic liberties and private property.⁷⁶

69. For proof, see DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 23 (2011) (“[T]he bakers’ union conceived of and promoted the hours legislation not simply to address health concerns, but also to drive small bakeshops that employed recent immigrants out of the industry. The union also encouraged selective enforcement of the law against nonunion bakeries.”).

70. See *Lochner*, 198 U.S. at 64.

71. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

72. 291 U.S. 502 (1934).

73. *Id.* at 518 n.2.

74. *Id.* at 522–23.

75. *Id.* at 522.

76. For a discussion of the process in land-use cases, see ROBERT C. ELLICKSON, VICKI L. BEEN, RODERICK M. HILLS & CHRISTOPHER SERKIN, *LAND USE CONTROLS* 115 (4th ed. 2013) (speaking of the “demise of the orthodox quartet [of police power justifications]” and stating that “[s]uppressing competition’ is not a member of the orthodox quartet”).

To be sure, the Millian principle has serious difficulties when it is used to deal with competitive harms that were (at least until the rise of the Progressive Era) excluded from the class of permissible police power justification.⁷⁷ The consequence of the social transformation is the huge increase in the number of legal abortions, which counts as a major social transformation in anyone's mind. One can call *Roe* an illustration of the common law method of constitutional adjudication. But no one could call it an incremental change.

B. Cruel and Unusual Punishments

A second example of judicial adventurism is the Supreme Court's modern jurisprudence dealing with the prohibition against "cruel and unusual punishments" that is found in the Eighth Amendment to the Constitution.⁷⁸ The Clause is lifted word for word from the English Bill of Rights of 1689, where a stated reason for the Bill was that "illegal and cruel punishments [had been] inflicted."⁷⁹

The clear meaning of this provision was to stop the use of certain types of punishments. The exact punishments that were caught by the prohibition were not listed, and surely the list was capable of expansion to take into account technological advances. Thus, if torture by rack and screw was prohibited, so too by electrical prod. But the death penalty as such was not on anyone's list in England, where it was routinely applied even after the adoption of the 1689 Bill of Rights. And in the United States, it was not prohibited but regulated under the Bill of Rights, which contains three other provisions that are intelligible only if the death penalty is permitted. These include the requirement that punishment for a capital crime be on a presentment or indictment of a Grand Jury, and that no person be "twice put in jeopardy of life or limb" or "deprived of life, liberty, or property, without due process of law."⁸⁰

77. For discussion, see Richard A. Epstein, *The Harm Principle—And How It Grew*, 45 U. TORONTO L.J. 369, 377–81, 409 (1995).

78. U.S. CONST. amend. VIII.

79. An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, I W. & M. (Eng.), available at http://avalon.law.yale.edu/17th_century/england.asp [<https://perma.cc/R2EH-HHFH>].

80. U.S. CONST. amend. V.

Nonetheless, it is an achievement of modern jurisprudence to turn this provision upside down. The first maneuver is typically to drop the letter “s” from the Amendment so it becomes a general prohibition against cruel and unusual punishment. Once that is done, it follows that the Eighth Amendment is no longer solely a barrier against certain types of punishments. Instead it becomes a vehicle through which the Supreme Court can apply a principle, to use the phrase of Justice Elena Kagan—who in *Miller v. Alabama*⁸¹ accurately summarized a long, but suspect, interpretive tradition—that the clause “guarantees individuals the right not to be subjected to excessive sanctions.”⁸² The reformulation eliminates both the “cruel” and “unusual” requirements and makes this clause into a mirror image of that portion of the Eighth Amendment that says, more sensibly, that “[e]xcessive bail shall not be required,”⁸³ which invites an inquiry into matters of degree that are foreclosed for the “cruel and unusual punishments” clause. From this point, it is just a short jump to a living constitution that examines this prohibition “less through a historical prism than according to ‘the evolving standards of decency that mark the progress of a maturing society.’”⁸⁴

In her *Miller* opinion, Justice Kagan acted as the keeper of the faith, but her resort to the living constitution cannot bear the weight that is put upon it. On its face the notion is surely neutral, and nothing precludes a living transformation that once again posits the importance of the death penalty as an effective tool for criminal deterrence, and hence narrows the scope of the prohibition. But the pressure is all in the other direction, by cutting back, often dramatically, on the use of the death penalty. Her position in *Miller* also overlooked the awkward fact that popular sentiment often does not move in the direction she prefers. Indeed, the trends on the death penalty are too complicated to fit into any simple unidirectional calculus. One recent Gallup study summarized the situation this way: “Sixty percent of Americans say they favor the death penalty for convicted murderers, the lowest level of support Gallup has measured since November 1972, when 57% were in favor. Death penalty

81. 132 S. Ct. 2455 (2012).

82. *Id.* at 2463 (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)).

83. U.S. CONST. amend. VIII.

84. *Miller*, 132 S. Ct. at 2463 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

support peaked at 80% in 1994, but it has gradually declined since then.”⁸⁵ Note that in all modern times most Americans have supported the death penalty for murder. Indeed, these numbers probably understate the support for the death penalty in at least some cases, for it is quite possible that some of those who oppose the death penalty for murder generally may support it for some select killings that are especially gruesome and cruel. It is hard to resist the conclusion that in the hands of the Supreme Court, evolving standards of decency are always elitist, and often against dominant sentiments of the people, which in this area of dominant public control at least should carry a lot of weight. It is thus hard to fathom what intellectual metric drives such political *ipse dixits* as *Graham v. Florida*,⁸⁶ which concluded that a mandatory life sentence without parole is inappropriate for juveniles who commit non-homicide offenses, or that this holding should be extended in *Miller* to cover a prohibition against the use of life without parole in juvenile homicide offenses as well. It is imperative to give some explanation as to how the various weights are to be assigned in this open-ended modernist calculus. None of these problems arise if the Eighth Amendment is directed to certain types of punishment, a perfectly intelligible function, wholly without regard to the question of proportionality.

The deficiencies of this modernist approach are most evident in *Kennedy v. Louisiana*,⁸⁷ in which the Court through Justice Kennedy concluded that the death penalty was inappropriate in child rape cases, in large part because most states had removed that penalty. But the sociological point cuts the opposite way. If the political process works in the eighteen states that have abolished the death penalty, why assume that it does not work in the thirty-two states, including such opposites as Texas and California, that retain the death penalty?⁸⁸ And of all things, why assume that the social consensus on child rape should hold when Congress had, in 2006, amended the Uni-

85. Jeffrey M. Jones, *U.S. Death Penalty Support Lowest in More Than 40 Years*, GALLUP (Oct. 29, 2013), <http://www.gallup.com/poll/165626/death-penalty-support-lowest-years.aspx> [https://perma.cc/K5QT-R6LJ].

86. 560 U.S. 48, 82 (2010).

87. 554 U.S. 407, 421–23, 426 (2008).

88. For the complete list, see *States With and Without the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [https://perma.cc/7LCW-YRJS] (last visited Mar. 6, 2016).

form Code of Military Justice to provide for death in those cases?⁸⁹ It is ironic that the Court should intervene so heavily in an area for which, outside the constitutional framework, it is hard to develop any strong theory of the optimal levels of punishment. In all cases, the choice of remedy is always more difficult than defining the basic nature of the offense. But strong theories do work on certain key constitutional issues that pertain to both federalism and economic matters, a theme that is developed in the next two sections devoted first to examining the Commerce Clause and then to the constitutional protection of private property rights.

C. Commerce Power

The evolution of the Commerce Clause involves a complex pattern of continuous and discontinuous changes. Thus a familiar sense of gradualism allows one to explain why the Commerce Clause reaches interstate railroads or telegraph communications, which can easily be justified under a living constitution,⁹⁰ precisely because the phrase “Commerce . . . among the several States”⁹¹ is not tied to any particular instrumentality of interstate commerce, be it canoes or speedboats. But the view that covers both canoes and speedboats should make it equally clear that the Clause does not touch those journeys that are intrastate or those communications that are purely local. Yet as far back as 1870, the Supreme Court bobbed and weaved when it concluded that an *intrastate* journey conducted by one company should be treated as an *interstate* journey because some of its passengers or freight were intended go on into interstate commerce through some other independent in-

89. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552(b)(1), 119 Stat. 3135, 3263 (codified at 10 U.S.C. §§ 920(a)-(b) (2006)) (statutory note authorizing “death or such other punishment as a court-martial may direct” in child rape cases, “[u]ntil the President otherwise provides”).

90. *See, e.g., Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 9 (1877) (“The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth.”).

91. U.S. CONST. art. I, § 8, cl. 3.

strumentality.⁹² The correct mode of interpretive incrementalism recognizes that the line between national and local has to be preserved as new modalities of transportation are introduced. It is no part of the common law method to blur an established distinction, easily capable of application to these new modalities, and then declare that the new interpretation renders all traditional decisions obsolete.

The more radical expansions of the Commerce Clause did not, however, depend on the patient use of analogies that covered an incremental expansion of its growth to take into account new technologies. Rather, in the truly transformative cases on the federal commerce power, it is possible to cite to chapter and verse to show the conscious judicial efforts to expand the scope of federal power. That change is driven by two beliefs that fundamentally underestimate the risks of government intervention: a deep distrust of competitive federalism, and a strong belief that competitive markets are conducive to major social injustices. But in this instance it is instructive to do the micro-examination to show how the new progressive political vision (very much at work in both the abortion and punishment cases) operates.⁹³

The Commerce Clause provides that “Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁹⁴ In dealing with its interpretation, Madison in *Federalist* No. 45 wrote:

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; with which last the power of taxation will, for the most part, be connected. 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;

92. See *The Daniel Ball*, 77 U.S. 557, 565–66 (1870).

93. See Richard A. Epstein, *A Most Improbable 1787 Constitution: A (Mostly) Originalist Critique of the Constitutionality of the ACA*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS* 28, 44–47 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013).

94. U.S. CONST. art. I, § 8, cl. 3.

and the internal order, improvement, and prosperity of the State.⁹⁵

That position was echoed in a decision by Chief Justice Marshall in *Gibbons v. Ogden*,⁹⁶ in which the Chief Justice held that Congress had the power to regulate an interstate journey of a steam ship between New Jersey and New York. In it he stated:

Comprehensive as the word “among” is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description.⁹⁷

The formal distinction between state and federal power had to be scrupulously observed in the antebellum period, lest Congress exercise its power over commerce to abolish slavery throughout the United States, which would have made it impossible to put the United States together in the first place. It was also the case that during this period very little was made of the domestic role of the Commerce Clause at the Constitutional Convention, where the real pressure was on the foreign Commerce Clause, which closely related to the issue of the protective tariffs—an issue that divided the North from the South in the antebellum period.⁹⁸ Even after the Civil War, the principle of enumerated powers remained strong, so it was conveniently said that the federal government had the power to regulate those matters that were “directly” in interstate commerce, but not those that had an “indirect” effect on its operations.⁹⁹ Lest there be any confusion about the meaning of these terms, the key decisions noted that direct regulation of commerce

95. THE FEDERALIST No. 45, at 227 (James Madison) (Terence Ball ed., 2003).

96. 22 U.S. (9 Wheat.) 1 (1824).

97. *Id.* at 194–95.

98. See, e.g., Calvin H. Johnson, *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 WM. & MARY BILL RTS. J. 1, 1 (2004) (“In the original debates over adoption of the Constitution, ‘regulation of commerce’ was used, almost exclusively, as a cover of words for specific mercantilist proposals related to deep-water shipping and foreign trade.”). Laissez faire only came later. *Id.*

99. See *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895).

covered the shipment of goods and the transportation of persons across state boundary lines. The indirect effects included internal activities in the state, such as manufacture, that could influence the number of people or the volume of goods that could be shipped via interstate commerce.¹⁰⁰

In defending this distinction, nineteenth-century cases did not fret over the deep ambiguity of ordinary language, nor did the Court trouble itself with its institutional limitations. The Court emphatically took the exact opposite tack. Thus, in 1888 it said in *Kidd v. Pearson*:¹⁰¹ “No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture[] and commerce.”¹⁰² The Court explicitly noted that the balance of power would be upset if Congress could regulate routinely all things that in “a great variety of ways affect commerce and persons engaged in it.”¹⁰³ The *Kidd* Court understood that the system of enumerated federal powers would collapse if any decision about activities internal to any individual state could attract federal power because of its impact on the number and kind of goods shipped in interstate commerce. The basic rule was then qualified in cases of direct burdens on interstate commerce, narrowly construed to deal with the inevitable conflicts in the interstate arena between the federal power to regulate commerce and local police power over matters of health and safety. Early on, in *United States v. Coombs*,¹⁰⁴ this principle allowed the Supreme Court to uphold federal jurisdiction against a party who stole goods from a beached interstate vessel, even though those behaviors were clearly criminal under state law. Nearly a century later, in a case closer to the margin of the federal power, was *United Mine Workers of America v. Coronado Coal Co.*,¹⁰⁵ which held that the federal commerce power could reach those activities by miners inside the state that consciously blocked the movement of coal in interstate commerce where those acts were undertaken with the ex-

100. See, e.g., *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 238–40 (1899); *Knight*, 156 U.S. at 16.

101. 128 U.S. 1 (1888).

102. *Id.* at 20.

103. *Id.* at 23.

104. 37 U.S. 72 (1838).

105. 259 U.S. 344 (1922).

PLICIT purpose of protecting the sales of coal mined by union workers at other locations.

In contrast, the five-to-four Court in *Hammer v. Dagenhart*¹⁰⁶ held that the interstate commerce power did *not* extend to those cases in which the United States sought to prevent the shipment of goods in interstate commerce that were made in factories that employed children below the age of fourteen.¹⁰⁷ This argument was premised on the need to ship goods in commerce being so great that every local firm would yield to the federal directive on local manufacturing issues to reach those markets, so federal power would necessarily oust the police power of the state. The Court reinforced that decision several years later in the *Child Labor Tax Case*,¹⁰⁸ in which it held that the federal government could not circumvent the limitations of the Commerce Clause by using taxes to achieve that same end—a structural parity between taxation and regulation that was wholly lost in Chief Justice Roberts’s decision in *National Federation of Independent Business v. Sebelius*,¹⁰⁹ which upheld the Affordable Care Act¹¹⁰ under the taxing power after concluding that it failed to pass muster under the Commerce Clause. Against this set of precedents, it is easy to understand how *Wickard v. Filburn*¹¹¹ upended the earlier synthesis by relying on the theory that *Kidd* and similar cases had explicitly rejected—namely, that Congress should have the power to regulate all things indirectly affecting commerce, by controlling the quantity or price of goods shipped in interstate commerce.

By the pre-*Wickard* standard, the Gun-Free School Zones Act of 1990, which forbids “any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone,”¹¹² clear-

106. 247 U.S. 251 (1918).

107. *See id.* at 276–77 (determining that the regulation of child labor in manufacture was not within the federal commerce power, but rather was part of the states’ police power); *Champion v. Ames*, 188 U.S. 321 (1903) (adopting an expansive interpretation of the commerce power in relation to the sale of lottery tickets, which were legal in the states where they were made and sold, and not used while in transit).

108. 259 U.S. 20 (1922).

109. 567 U.S. 1 (2012).

110. Pub. L. No. 111–148, 124 Stat. 119–1025.

111. 317 U.S. 111 (1942).

112. The Act was later amended to apply to only those firearms that had “moved in” or that “otherwise affect[ed] interstate or foreign commerce.” *See* 18 U.S.C. § 922(q)(2)(A) (2012).

ly lies outside the scope of the federal commerce power, as the Supreme Court held by a five-to-four vote in *United States v. Lopez*.¹¹³ Notably, the justices who struck down the statute went to great pains to reaffirm *Wickard*¹¹⁴ and to eviscerate *Gibbons*, lest a broader rationale invalidate much New Deal progressive legislation. In his concurring opinion, Justice Kennedy first re-wrote *Gibbons*:

Chief Justice Marshall announced that the national authority reaches “that commerce which concerns more States than one” and that the commerce power “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”¹¹⁵

Check this artful reformulation against Marshall’s original passage in *Gibbons*, quoted in full above.¹¹⁶ Note in particular the substitution of the word “reaches” for the original term “restricted,” which carries the exact opposite meaning. It is therefore no mistake that Marshall’s notion of “the completely interior commerce of the state” disappears entirely from view in this reformulation. Kennedy also ignores the phrase that appears just down the page, which notes that “though limited to specified objects, [the Commerce Clause] is plenary as to those objects . . .”¹¹⁷ The Clause thus gave Congress pride of place but *only* within its specified domain. The removal of these key elements in Justice Kennedy’s reformulation of the original text makes it wholly unintelligible how Chief Justice Marshall could conclude that local inspection laws are beyond the limit the Commerce Clause power, even if Congress could put in place a comprehensive system of output regulation under the Agricultural Adjustment Act.¹¹⁸

How does such blatant linguistic manipulation pass intellectual muster? Only because it is driven by today’s expansive progressive vision of the proper role of the national govern-

113. 514 U.S. 549 (1995).

114. For example, the Court attempted to distinguish *Wickard* on grounds that *Wickard* applied to a broader scheme to regulate a commercial good (there, control of the volume of wheat production), whereas the Gun-Free School Zones Act was a “criminal statute that by its terms ha[d] nothing to do with ‘commerce’ or any sort of economic enterprise.” See *Lopez*, 514 U.S. at 560–61.

115. *Id.* at 568 (Kennedy, J., concurring).

116. See *supra* text accompanying note 97.

117. *Gibbons*, 22 U.S. at 197.

118. Pub. L. No. 73–10, 48 Stat. 31.

ment, which shares all of its distaste for clear boundaries on the jurisdictional issues that need them. Thus, in dismissing *Kidd*, Justice Kennedy rejects mechanically “defining by semantic or formalistic categories those activities that were commerce and those that were not.”¹¹⁹ Horrors! But is that not exactly what fidelity to constitutional text commands the Justices to do? Thus, if the issue is not semantic, then meaning no longer matters, and so we may bypass the actual language of the Constitution and thereby usher in a massive expansion of the federal power over internal activities within any given state.

Nor does Justice Kennedy give any explanation for why his expansion of congressional power counts as a good thing, let alone explain how far his reasoning should go. Moves like this explain why today’s limitations on federal power typically cover only a minuscule fraction of the total legislative landscape. Sadly, at no point does Kennedy appear to understand why formal distinctions are so critical to the many jurisdictional issues that arise in the law. It would hardly do to dismiss the hard-edged physical boundaries between two states as formalistic, when it is imperative to determine which state exercises power over which parcel of land. One might as well try to get rid of boundaries in determining ownership of neighboring plots of land, generating the same kind of confusion.¹²⁰

Of course, in a system of federalism, physical boundaries will not work because federalism imposes *dual* sovereignty over the same territory. Nonetheless, it is critical for the success of a federal system to devise a clear rule that allows both public and private actors to sort out which functions belong to which sovereign. Occasional overlap is inevitable, as when local gunfire blocks the movement of an interstate train. But in this context, balancing tests between the federal and state interest always occur at the edges of every legal system. It is commonplace, for example, to develop a system of reciprocal negative easements under which the owner of each plot of land cannot dig out his own land in ways that undermine the support for the land (but not any improvements thereon) of his

119. *Lopez*, 514 U.S. at 569 (Kennedy, J., concurring).

120. See generally Gary Libecap & Dean Lueck, *The Demarcation of Land and the Role of Coordinating Property Institutions*, 119 J. POL. ECON. 426 (2011).

neighbors.¹²¹ These deviations from the hard-edged line typically lead to social improvement that is not otherwise obtained, and are much more common in land cases in which units of ownership are far smaller than a state's entire territory. But in principle the reciprocal benefits should be allowed in federalism contexts when that mutual gain can be shown. Nonetheless, the possibility of some such improvement does not negate the necessity to carefully cabin these exceptions lest they destroy the whole structure.¹²² The notion of enumerated powers made these cases the exception, not the rule, which is why the modern synthesis that allows for the near universal concurrent application of both federal and state law creates a far more complicated structure, with great pressures on the doctrine of federal preemption when dual controls are routinely imposed. Indeed, the current formulation, which starts with a presumption against preemption and then announces multiple exceptions,¹²³ all uncertain in scope, has ushered in a nonstop jurisprudential struggle.¹²⁴

But what arguments could be made to justify this modern departure from the original plan? The usual answer appeals uncritically to the complexity of modern life. Thus, in answering this question in connection with the constitutionality of the Affordable Care Act,¹²⁵ colloquially known as "Obamacare,"

121. For discussion, see generally Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

122. On the relationship between clear boundary rules and the reasonableness adjustments, see EPSTEIN, *supra* note 1, at 31–43.

123. The basic post-New Deal standard is found in *Rice v. Santa Fe Railway*, 331 U.S. 218, 230 (1946) ("Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute.") (citations omitted).

124. See generally FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS (R. Epstein & M. Greve eds., 2007).

125. Pub. L. No. 111-148, 124 Stat. 119–1025 (codified as amended in scattered sections of 42 U.S.C.).

the conservative Senior Judge Laurence Silberman sustained the program by appealing to current affairs: “the imperative that Congress be free to forge national solutions to national problems, no matter how local—or seemingly passive—their individual origins.”¹²⁶

Silberman’s claim encapsulates all the modern misunderstandings about the sound organization of federalist systems by wrongly assuming that the advantages of direct monopoly control on economic matters outweigh the benefits of competition between states, which keeps alive the ability to counteract by exit rights the consistent dangers of sovereign risk. Congress, which is held in low repute,¹²⁷ has only compounded the problem, and it is difficult to see how federal legislators can enact the clear solution of reducing the sway the federal government wields over the states. The extensive national power over agriculture and manufacturing, and indeed health care, has facilitated the growth of regulated monopolies—including the massive cartel overseen by the Department of Agriculture—which constitute a grave threat to overall economic prosperity.¹²⁸ Leaving those activities to a fragmented system of state regulation has the exact opposite effect. It hampers the adoption of monopoly regulation by putting states in competition with each other. The right of any business to enter or leave a state imposes cheap and effective restraints on abusive legislation, even if any given state’s own legislative policies leave much to be desired.

Yet states do pose a grave threat in any federal system if they are constitutionally entitled to sever communication and transportation across state lines, which is why exclusive national regulation (subject to constraints against confiscation) is so critical to maintaining a strong free trade zone in the United States. In this case, the usual appeal to “changed circumstances” for

126. *Seven-Sky v. Holder*, 661 F.3d 1, 20 (D.C. Cir. 2011).

127. See Rebecca Riffkin, *2014 U.S. Approval of Congress Remains Near All-Time Low*, GALLUP (Dec. 15, 2014), <http://www.gallup.com/poll/180113/2014-approval-congress-remains-near-time-low.aspx> [<https://perma.cc/ME26-EZ9W>] (“Americans’ job approval rating for Congress averaged 15% in 2014, close to the record-low yearly average of 14% found last year. The highest yearly average was measured in 2001, at 56%. Yearly averages haven’t exceeded 20% in the past five years, as well as in six of the past seven years.”).

128. For a discussion of the cartel risk, see KEITH HYLTON, *ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION* 68–71 (2003). For a discussion of constitutional complications, see EPSTEIN, *supra* note 39, at 170–73.

expanded federal power falls flat on the very functionalist grounds used to justify the broader federal power. Improved networks of communication and transportation enlarge the market for goods and services, reducing the risk of cartelization and thus the need for national regulation for activities undertaken at the state level. But even here the progressive judicial mindset is so committed to cartel formation that state governments often follow the lead of the national government by offering complete protection to cartels that are organized and maintained by state governments.¹²⁹

It should be clear now that the defense of the more restricted reading of the Commerce Clause as it pertains to cross-border transactions and national cartels rests on more than a faithful reading of the text. It also serves one means to limit abusive private practices. To be sure, that approach does not stop the state cartelization mentioned above. To address that issue, it is necessary to turn to matters of takings and due process, which deal with government regulation at both the state and the federal levels.

D. Takings of Private Property

A similar threat to the rule of law comes from the degradation at the hands of the Supreme Court of the protection afforded to owners of the manifold forms of private property. The Fifth Amendment to the United States Constitution provides: “nor shall private property be taken for public use, without just compensation.”¹³⁰ This command applies to all forms of property, whether real or personal, physical or intellectual,¹³¹ not only to the outright taking of property, but also to the taking of partial interests in property, such as mortgages, covenants, easements, leases, and mineral and air rights. Otherwise, the price of any

129. See generally *Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365 (1991) (upholding collusive activity between local zoning authorities and local advertisers to restrict free billboards available to outsiders); *Parker v. Brown*, 317 U.S. 341 (1943) (upholding raisin cartel that exported out of state).

130. U.S. CONST. amend. V.

131. See *Horne v. United States*, 135 S. Ct. 2419, 2427 (2015) (“Nothing in this history suggests that personal property was any less protected against physical appropriation than real property [A patented invention] ‘cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser.’”) (quoting *James v. Campbell*, 104 U.S. 356, 358 (1882)).

economically sensible division of property is the loss of rights against the state. These partial interests are in common use because the permanent nature of real estate allows for its convenient division into multiple interests just mentioned.

In modern times the two radically different readings of the Takings Clause have been reflected in the following two quotations. First, in *Armstrong v. United States*,¹³² a 1960 Supreme Court decision, Justice Hugo Black gave it a strict and forceful application in a case that dealt with the taking of a partial interest in private property, a ship's lien:

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.¹³³

Some eighteen years later in *Penn Central Transportation Co. v. City of New York*,¹³⁴ Justice William Brennan muddied the waters when he denied that any bright-line rule could organize takings law:

While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," [citing *Armstrong*], this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.

132. 364 U.S. 40 (1960).

133. *Id.* at 49.

134. 438 U.S. 104 (1978).

So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.¹³⁵

It is hard to overstate the amount of sheer intellectual and practical confusion introduced by Justice Brennan’s appeal to ad hoc rules. To see why, it is instructive to note first how the two cases arose. *Armstrong* started with a prosaic dispute when a subcontractor placed a lien (as security for payment) against a naval vessel berthed in Maine waters after his contractor had defaulted on a contractual obligation.¹³⁶ These kinds of liens against property improved by the lienholder’s effort are perfectly commonplace and are intended to insure that the boat owner does not receive unjust benefits from uncompensated work done on its property.¹³⁷ The United States dissolved the lien by the simple expedient of sailing the ship out of Maine waters.¹³⁸ The last sentence of Justice Black’s opinion was the affirmation of the proposition that if the boat repairs were for the benefit of the nation, the unfortunate subcontractor should not have to bear a huge fraction of the cost of repair relative to his tiny share of social benefits.¹³⁹ This rule has two great advantages: It promotes fairness among citizens and prevents the government from taking advantage of honest contractors. It does the first by ensuring that one subcontractor who receives only his pro rata share of the protection that the ships provide to the nation will not be required to bear a disproportionate part of the cost. It does the second by ensuring that the government will not overbuild by forcing the costs of construction on innocent parties who have contributed to its success. The

135. *Id.* at 123–24 (citations omitted).

136. See *Armstrong*, 364 U.S. at 41.

137. A mechanic’s lien is: “A guarantee of payment to builders, contractors and construction firms that build or repair structures. Mechanic’s liens also extend to suppliers of materials and subcontractors and cover building repairs as well. The lien ensures that the workmen are paid before anyone else in the event of liquidation. A mechanic’s lien is also known as ‘artisans’ liens’ or ‘materialmen’s liens.’” *Mechanic’s Lien: Definition of “Mechanic’s Lien,”* INVESTOPEDIA, <http://www.investopedia.com/terms/m/mechanics-lien.asp> [<https://perma.cc/MZ7Z-TUMH>].

138. See *Armstrong*, 364 U.S. at 41.

139. See *id.* at 49.

key analytical assumption is that the protection afforded to property covers all divided interests that are created by voluntary agreements from outright ownership of the whole.

Penn Central raised in different guise the identical question in *Armstrong*, namely the proper treatment of divided interests in a single piece of property. New York City imposed a landmark preservation law that prohibited Penn Central from erecting a proposed Breuer tower on top of the old Penn Central Terminal.¹⁴⁰ No one doubts that denying any use of air rights is, if a taking at all, one that is for a public use by preserving open space and vistas. But the question in *Penn Central* was whether the City had to pay for the loss of the air rights attributable to that decision.¹⁴¹ Under New York law, air rights (like construction liens) are a partial interest in property that can be bought, sold, leased, or mortgaged by their owner.¹⁴² This state law creation can function only because its rules allow for the creation and protection of air rights, even though they constitute but a fractional interest of the whole. The question, therefore, was whether the costs of altering the New York skyline should be paid for by the City as a whole or by the landowner. The answer to that question is that the public good should be financed by the public, for the same reason given in *Armstrong*: it is unfair to make one person bear those costs, and inefficient to boot because it encourages over-condemnation by allowing the government to ignore the social costs of its actions. No one doubts that the government can still maintain control over the air rights if the public thinks that it is worth the cost.

Justice Brennan was determined, however, to let the program prosper without forcing the government to pay any compensation. So he muddied the legal waters by introducing supposed ambiguity into the standard accounts of property law that are

140. See *Penn Central*, 438 U.S. at 116–17.

141. See *id.* at 130.

142. For a general discussion of the protection of air rights, see Troy A. Rule, *Airspace and the Takings Clause*, 90 WASH. L. REV. 421, 425–28 (2012). The modern law tends to limit the height to which these air rights attach so that they do not block air transportation. But in the area of effective occupation, these property rights have all the attributes of ownership, lest land be reduced to a two-dimensional object. See also Marc A. Landis & Lonica L. Smith, *Airspace Conveyance Policy Changes*, N.Y.L.J. (June 22, 2009), available at <http://www.phillipsnizer.com/pdf/Article-NYLJ-AirspaceConvPolChgs-ML&LS-6-22-09.pdf> [<https://perma.cc/KFL9-TRDB>].

nowhere reflected in state legal doctrine. He first noted that the takings question had to be evaluated by the parcel “as a whole,” which necessarily undercut the protection of partial interests announced in *Armstrong*. With that incorrect *ipse dixit*, the former clear rule about the taking of a partial interest became a set of “ad hoc” adjustments that depend on a wide range of circumstances, none of which have any textual warrant. To this day, it is not clear whether it is a physical taking for the government to keep someone else from occupying Penn Central’s air rights, or whether it matters if this government action is downgraded to a “regulatory taking.” This is a new ad hoc category that makes it hard to classify what level of protection is given not only to air rights, but also to easements and restrictive covenants, both of which count as partial property interests embedded in the larger whole that can be used, developed, or divided by the owner.¹⁴³ There is much in the takings literature that supports comprehensive government rights to regulate land, by noting extensive colonial practices of regulation.¹⁴⁴ But these accounts never ask the analytical question of which among the various forms of regulation would be protected by an analysis of the Takings Clause that accounts for both police power justifications for land use restrictions and for the common situation in which regulations provide benefits to the parties that are sufficient to count as full, implicit-in-kind compensation.¹⁴⁵ Nonetheless, to this day, no

143. For development of this position, see EPSTEIN, *supra* note 1, at 76–96. See generally Richard A. Epstein, *The Takings Clause and Partial Interests in Land: On Sharp Boundaries and Continuous Distributions*, 78 BROOK. L. REV. 589 (2013); Richard A. Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8 ECON. J. WATCH 223 (2011).

144. The literature on regulatory takings is extensive. Much of the modern work on the topic dates from Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967). See also John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1107–31 (2000); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785–92 (1995). On the other side, see, for example, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1553 (2003); Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far”*, 49 AM. U. L. REV. 181, 241 (1999); Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1213.

145. I develop the complete theory in RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

champion of the modern position can offer a coherent explanation of the phrase “investment-backed expectations” in the context of real property transactions. It is well understood that people acquire property for use and profit, and it is therefore hard to use this test to divide those acquisitions that should be protected from those that should not.

Nonetheless, Justice Brennan introduces this term, which has no textual warrant, in a blithe fashion that upsets every known technique for the valuation of assets, all of which consist of taking all of the positive elements of any bundle of rights, figuring out the value of each of them separately and then summing them up, taking care to worry about any possible interactive feature dealing with individual rights. With respect to real estate, this approach requires at least two forms of classification. The first is an estimation of the fair rental or use value for each period of existing assets. The second consists of determining the option value associated with other rights in the bundle—for example, the rights for further development—that have positive value which could be realized in trade today or in use at some future time. Under this technique, every undivided interest in the bundle is given its full weight. The entire system of property rights would collapse, for example, if mortgages were valued solely with the first annual stream of payments, or indeed with all payments if the various options, including prepayment options, were excluded from the mix. No private system of valuation seeks to do this.

Justice Brennan’s use of the term “investment-backed” expectations has only one function: to allow the state to value all future uses at zero in considering its own initiatives. Thus, he writes:

[T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central’s primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as per-

mitting Penn Central not only to profit from the Terminal but also to obtain a “reasonable return” on its investment.¹⁴⁶

This statement treats the option value for future uses at zero for the purposes of takings law, even though it is positive for private law. By severing the constitutional definition of property from the private law definition of the same subject, he gives the state a degree of freedom that it could never have under a consistent set of definitions. Worse still, he just flatly asserts—in the passive voice, no less—that Penn Central’s “primary expectation” must be the continued operation of the terminal, without explanation as to why so-called “secondary expectations” carry with them a zero value. No one could doubt that any commercial enterprise attaches a positive value to all its assets, which could easily be established if the issue was treated as one of fact, on which testimony could be taken, instead of one of constitutional faith, which is regarded as so evident that no testimony is needed at all. Indeed, one benefit of the system of the security of possession is that Penn Central need not engage in premature development of any asset to protect it from government confiscation. The entire opinion is in intellectual shambles for the way in which it gives an ad hoc and incorrect meaning to the term “private property” under the Constitution.

Justice Brennan does no better in his cryptic reference to public programs “adjusting the benefits and burdens of public”¹⁴⁷ life. He referred to a then-recent 1976 decision written by Justice Thurgood Marshall in *Usery v. Turner Elkhorn Mining Co.*¹⁴⁸ that approved a *retroactive* imposition of a tax on mining companies to fund a compensation program for miners and their survivors who sustained, as many did, death or total disability from pneumoconiosis tied to their employment in the coal mines. The rationale was pure redistribution by spreading, after the fact, these costs to the firms who employed the miners, even if they had complied with all the safety laws then in effect.¹⁴⁹ Justice Marshall said as much when he noted: “But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expecta-

146. *Penn Central*, 438 U.S. at 136.

147. *Id.* at 124.

148. 428 U.S. 1 (1976).

149. For criticism, see Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 721 (1984).

tions.”¹⁵⁰ What Lon Fuller had concluded was a key component of the rule of law—a set of rules that are known, intelligible, internally consistent, and prospective in application—was brushed aside on the ground that everyone could “expect” these foreseeable abuses to happen—which is why constitutional guarantees are imposed in the first place.

Both *Penn Central* and *Turner Elkhorn* flout the rule of law in the way that Fuller defines it. *Penn Central* puts in place an unintelligible scheme of regulation that gives no clear guidance to any rule, while upsetting the normal expectations that individuals have with respect to their own property. *Turner Elkhorn* runs roughshod over the prohibition against retroactive legislation. Right now, land use restrictions in the United States are always tested against Justice Brennan’s slippery three-part formula, as the decision has been cited and applied in around 9,150 cases as of May 26, 2016,¹⁵¹ which is to say in just about any regulatory takings case today. It is now rare to rebuff state and local governments for their ad hoc decisions to grant or deny building permits, or to grant them under onerous conditions, without legal repercussions.¹⁵² The politics of zoning cases are intense, precisely because the unfettered set of government options leaves running room for all parties to make their case, and to do so free of charge. Similarly, in cases like *Turner Elkhorn*, it is far more acceptable, but not free from doubt, to fund special schemes out of general revenues, but it is manifestly incorrect to impose those losses uniquely on prior actors whose conduct was legal when undertaken in light of the concern with settled expectations—which if it can be cast aside in one case, can be ignored in all.

IV. THE LARGER PICTURE

The four areas of constitutional law that I have discussed in this Article appear to address disparate topics. But their responses show a hidden unity, for it is no accident that the con-

150. *Usery*, 428 U.S. at 16.

151. See *Penn Cent. Transp. Co. v. City of New York*, GOOGLE SCHOLAR (last visited May 26, 2016).

152. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (applying *Penn Central*); *Cormier v. Cty. of San Luis Obispo*, 207 Cal. Rptr. 880 (Cal. Ct. App. 1984) (showing extreme deference to local zoning board decisions).

stant refrain of progressive thought works on all sides of these issues. With respect to individual liberties, the progressive suspicion of markets leads to a truncation of property and contract rights and to a willingness to tolerate—and sometimes encourage—retroactive legislation. But at the same time, in nonmarket contexts, such as crime and abortion, progressive forces work in the opposite direction. Thus, rights on abortion are no longer covered by the moral head of the police power (which historically afforded the state extensive discretion in regulating matters of sexuality). At the same time, the entire set of criminal punishments is constitutionalized by an over-reading of the Eighth Amendment's prohibition against cruel and unusual punishments. This shift moves from huge deference to legislative forces to a constant scrutiny of the laws that limit these behaviors, without any strong theory as to why that should be done. In the abortion cases, there is little regard anymore for the protection of innocent life, which lay at the heart of the earlier protections. The shift on these questions has been so profound that it hardly matters that the decided cases are supported by neither constitutional text, nor constitutional structure, nor constitutional history. In these instances, the withdrawal of general social control should be regarded with some uneasiness.

On the matters of economic liberty and private property, there is a strong normative theory that favors competition over monopoly, by showing its superior welfare consequences, but these powerful intellectual regularities are routinely ignored by progressive constitutional theory. The major economic losses that come from the superimposition of the newer regulatory apparatus show that the disregard for the close connection between property rights and the rule of law does not come cheap, given the distortions in economic behavior outlined above. At first blush it often appears that the expansion of federal power and the decline in the protection of property rights and economic liberties are unrelated developments. But in fact the close historical connection, most notably in the Supreme Court's 1936–1937 term, is no accident. Both of these developments paved the way for larger government control over the economy and a further attack on the competitive market system in areas where it functioned well. The test of any system that respects the rule of law is whether it imposes restrictions on the ability of government to resort solely to political influence to determine how to allocate

the costs and benefits of various government programs. The doctrinal positions taken in early Supreme Court cases did far better in trying to adopt fixed and known rules to prevent that abuse of any form of government discretion, which in turn has this desirable social consequence, by giving strong definition of private rights that make it difficult for any party, either public or private, to game the system.

There are good reasons why the size of government is constrained through the democratic process but only if property rights receive explicit and strong constitutional protection. In order to coerce, the dominant government faction has to persuade the public at large to fund its projects through taxation. All these expenses are on the books, so public deliberation is now improved by full information and sound financial incentives. In cases where the benefits are substantial, it is usually possible to gain public support for them. The rule of law, however, is equally important in ensuring that some transactions do *not* take place precisely because the public at large is unwilling to make the direct appropriation for unwise projects that cost more than they are worth. At this point, the rigorous application of clear rules, undiluted by "ad hoc" accommodations, helps protect against wasteful public initiatives for which there is no public support.

It therefore turns out that faithful adherence to the rule of law is not just an abstract ideal. In practice, it also has multiple virtues. In areas where there is no obvious consensus, it encourages democratic deliberation by keeping the courts on the sidelines when they have no clear textual or theoretical reasons for intervention. In these contexts, overreaching undermines judicial legitimacy. But by the same token, sensible judicial intervention on the economic issues does produce positive social results. It increases the credibility of government with the public at large; it prevents the state from using artifice to pick out individual citizens or firms for disproportionate burdens; it disciplines the political process so the government makes wiser decisions about the allocation of public funds; and it improves the deliberative process that is otherwise exposed to factional intrigues led by actors seeking to avoid costs and garner benefits.

Modern critics of classical liberal theory attack it on multiple grounds, none of which are persuasive. The first line of attack is to explain why the very terms by which the theory is expressed

are subject to deep ambiguity. But that critique is ignored when talking about the standard terms used by the administrative state that speak of public interest convenience and necessity, of undue burdens and of reasonable accommodations. These terms too contain some slack, but it would be a mistake to attack them on the ground that they are wholly unintelligible. The correct ground of attack is that these terms all treat balancing tests as the initial line of analysis to the exclusion of all bright-line rules. The difficulty in stating and estimating these variables is greater by far here than it is in the usual context under a negligence standard that has no use for the bright-line rules of a strict liability system.¹⁵³ It is not that the bright-line rules work in all cases. In general they are not sufficient to deal with those cases in which one party deviates from the bright-line rule, thereby forcing reasonable accommodations to be made by any innocent party who has notice of the deviation and an opportunity to correct the situation.¹⁵⁴ But it is quite different to build in reasonableness standards at the ground floor such that there are no clear cases of what is in and out of bounds. Just think of how sporting contests would look if boundary rules were replaced by any form of a reasonableness standard drawn from the law of negligence. Of course in some few cases—for instance, pushing a receiver out of bounds before he can land in bounds—adjustments are made, but the vast majority of potential disputes are resolved by these mechanical rules.

The use of these mechanical rules is important because it reduces the informational stress on both private parties and public officials. It is easier to be rational in a system that is dominated by black and white lines than it is to be rational when multiple variables are in the air at the same time. Of course, people are not rational, at least not all the time, and they have biases and prejudices and make all sorts of mistakes. But what the modern critics of classical liberal theory miss is that the robust nature of the traditional theory lies in the fact that it offers better protection through property rights and decentralized processes than any modern theory that trusts all its powers in

153. See, e.g., Mario J. Rizzo, *Law Amid Flux: The Economics of Negligence and Strict Liability in Tort*, 9 J. LEGAL STUD. 291 (1980).

154. For the economics, see generally Donald Wittman, *Optimal Pricing of Sequential Inputs: Last Clear Chance, Mitigation of Damages, and Related Doctrines in the Law*, 10 J. LEGAL STUD. 65 (1981).

public officials who equally suffer from all these infirmities, while being burdened by the greater challenge of taking upon their own imperfect persons the Herculean task of keeping others from their errors.

None of this needs to be if we return to the fundamentals, which recognize that public law must be built on private law conceptions of property and contract to retain its coherence. That simple insight in turn rests on the belief that the faithful adherence to clear language and clear rules offers the central bulwark of individual liberty against the political struggle and factional discord so common in modern times. It is an inherently unstable political situation if people can obtain rights without cost through the political system that they would otherwise have to purchase in the private market. Yet that is what happens when political leaders can, through the zoning process, impose restrictive covenants on the lands of their neighbors without having to pay for the change. The political dynamic of regulatory takings is identical to that of physical takings. The removal of a price system in the public arena stimulates efforts to acquire rights through regulation without compensation. Over and over again it has to be stressed that the purpose of the just compensation is in part to block those transactions in which it is not worthwhile to acquire rights for public use. The zero compensation requirements under systems of weak property protection stimulate excessive political activities. It is only if traditional principles governing property rights are applied consciously that we can hope to regain the sense of the proper interface between political and judicial action. But that will not happen so long as judges and scholars continue to deny the intellectual coherence of the traditional rules, as in *Penn Central*. Having wrong theories on all these questions erodes the efficiency of government and the confidence of the public at large in its legal and political institutions. That is a high price to pay for the effort to achieve some short-term gains by questionable intellectual constructs and constitutional arguments.