THE "PRESUMPTION OF CONSTITUTIONALITY" DOCTRINE AND THE REHNQUIST COURT: A LETHAL COMBINATION FOR INDIVIDUAL LIBERTY

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I. INTRODUCTION

The ideological transformation of the United States Supreme Court over the last decade—the result of five successive appointments to the high court by former Presidents Bush and Reagan[1]—and a handful of recent decisions overruling both dated and not-so-dated Supreme Court precedent have generated a considerable debate about the Rehnquist Court's respect for and adherence to the doctrine of *stare decisis*. At the close of the 1990-91 Term, critics of the Rehnquist Court, as well as one of its then-sitting Justices, levelled charges that the new conservative majority was "[r]ecklessly reversing precedents" by converting previous dissents into majority opinions simply because they finally had the votes to do so.[2]

The Rehnquist Court can and should be assailed for a plethora of questionable decisions it has rendered over the last several Terms. But it is equally clear that its critics have unjustly accused the Rehnquist Court of running roughshod over precedent. It would be an exercise in futility to attempt to demonstrate that the doctrine of *stare decisis* is either in danger of being abandoned by the Rehnquist Court or in any greater jeopardy today than in years past, since the critics cannot, empirically speaking, honestly attribute to the Rehnquist Court a greater inclination than either the Warren or Burger Court to overrule precedent expressly. The disparity between the frequency with which the Warren, Burger, and Rehnquist Courts each expressly overruled precedent is statistically insignificant. In fact, the rate at which the Rehnquist Court has expressly overruled precedent is *less*

1. President Bush appointed Clarence Thomas (October 18, 1991) and David H. Souter (October 3, 1990) to be Associate Justices. President Reagan appointed Anthony M. Kennedy (February 11, 1988), Antonin Scalia (September 25, 1986), and Sandra Day O'Connor (September 22, 1981) to be Associate Justices and appointed Justice William H. Rehnquist (September 25, 1986) to be Chief Justice.

2. *See Supreme—But Also Court*, N.Y. TIMES, June 30, 1991, § 4, at 14 ("Recklessly reversing precedents: That is not the role assigned to the Supreme Court."); Payne v. Tennessee, 501 U.S. 808, 844 (1991) (overruling South Carolina v. Gathers, 490 U.S. 805 (1989), and Booth v. Maryland, 482 U.S. 496 (1987)) ("Power, not reason, is the new currency of this Court's decisionmaking. . . . Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did." (Marshall, J., dissenting)); *see also* Stephen L. Carter, *An Old Soldier of Liberalism Musters Out*, WALL ST. J., July 1, 1991, at 13 (noting the "We have the votes" mentality which pervaded the Warren Court and observing that this same "arrogance" seems to be "infecting the Rehnquist court to the unfortunate glee of people on the right who ought to know better"); Edwin M. Yoder, Jr., *The Rehnquist Ascendancy: The Radical Agenda of a Triumphant Chief Justice*, WASH. POST, June 30, 1991, at C1 (Rehnquist "seems bent on unraveling the[ ] judicial knitting [of liberal activists] with as little bother over judicial art as they devoted to knitting it in the first place").

than that of both the brazenly activist Warren Court and the less audacious but nonetheless activist Burger Court.[3]

More important than mere numbers, though, is the fact that, in conjunction with the trails they blazed, the cumulative effect of the Warren and Burger Courts' reversals of precedent was to revolutionize the role of the Federal Government—in particular the courts—in areas such as law enforcement, judicial process, education, and civil rights. And despite the rhetoric to the contrary, the Rehnquist Court can hardly be accused of engaging in a reckless upheaval of this precedent. The most that can be said is that the Rehnquist Court has curbed what it perceives to be, rightly or wrongly, some excesses of its predecessors. Ostensibly, what genuinely upsets the critics of the Rehnquist Court is that the Court has abandoned precedents of which they had grown fond, whereas the Warren and Burger Courts repudiated precedents which the critics were only too delighted to see abandoned anyway.

Unfortunately, by dwelling on both the virtue of the doctrine of *stare decisis* and the alleged but unsubstantiated propensity of the Rehnquist Court to overrule precedent, the critics of the Rehnquist Court are, and have been, apt to overlook the significance of another established doctrine which guides the Court in its deliberations. This doctrine, which forms the starting point for constitutional review of legislative measures and is in unprecedented fashion revered by the Rehnquist Court, is the "presumption of constitutionality" doctrine. Under this doctrine, the Court presumes as an initial matter that a challenged Federal or State enactment constitutes a valid exercise of power and then imposes on the party challenging the validity of the enactment the burden of rebutting the presumption.

3. During the 16 Terms (1953-54 to 1968-69) that Earl Warren presided as Chief Justice, the Supreme Court expressly overruled 54 precedents (3.4 per Term) in the course of 39 decisions (2.4 per Term). *See* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 16, 99th Cong., 1st Sess. 2122-2125 (1987) [hereinafter CONSTITUTION-ANALYSIS]. During the 17 Terms (1969-70 to 1985-86) that Warren Burger served as Chief Justice, the Court expressly overruled 65 precedents (3.8 per Term) in the course of 50 decisions (3.0 per Term). *Id.* at 2125-27; *id.* at 207 (Supp. 1988). And during the first seven full Terms (1986-87 to 1992-93) that William Rehnquist led the Court, it expressly overruled just 18 precedents (2.6 per Term) in the course of 14 decisions (2.0 per Term). *Id.* at 207-08 (Supp. 1988); Office of Pol'y Development, U.S. Dep't of Justice, *Stare Decisis and the Conservative Court: Respect for Both Precedent and the Constitution?* 3-4 (draft of May 28, 1992) (compiling and analyzing cases from 1988-89 through 1991-92 Terms in which the Supreme Court expressly overruled precedent.).

Perhaps because on its face the doctrine appears so unassuming, the "presumption of constitutionality" doctrine has not engendered anything like the wrath that has befallen other Supreme Court dogma. This is surprising and unfortunate, because the doctrine is contrary to the principles underlying the theory of constitutional government and poses a formidable obstacle to the safeguarding of individual liberty.

The lack of controversy over an inherently flawed doctrine might well be attributed to the fact that, for the better part of the past century, the Court was quite amenable to the notion that, even where none of the guarantees specifically provided for in the Constitution was implicated by a given legislative enactment, the Court could, and indeed *must*, nonetheless evaluate the substance of that enactment to determine whether the legislature had transcended the limits of its powers.[4] Consequently, whatever menace the "presumption of constitutionality" doctrine may have posed to the protection of individual liberty prior to the Rehnquist Court era was alleviated in part by the fact that a party challenging the validity of a presumptively valid legislative enactment could rebut the presumption not only by establishing that the enactment was prohibited by some specific guarantee embodied in the Constitution, but alternatively by demonstrating that the enactment was prohibited by some unenumerated right which could be drawn from or read into the undefined contours of the Due Process Clause of the Fifth or Fourteenth Amendment.

This notion of "substantive due process"[5] which animated the Court's fundamental rights jurisprudence for so long, however,

4. *See* Mugler v. Kansas, 123 U.S. 623, 661 (1887) ("It does not at all follow that every state statute enacted ostensibly for the promotion of [public morals, public health, or public safety] is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every presumption is to be indulged in favor of the validity of a statute . . . the courts must obey the constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. . . . They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.").

5. The legitimacy of "substantive due process" as a constitutional doctrine has been a source of cantankerous debate among scholars. One of the more prominent critics of the doctrine is Robert Bork, who has written that prefacing the phrase "substantive due process" with the term "doctrine" "implies too much of rationality and intellectual rigor." ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 43 (1990) [hereinafter BORK-TEMPTING]; *see also* Daniel R. Ortiz, *Privacy, Autonomy, and Consent*, 12 HARV. J.L. & PUB. POL'Y 91, 91 (1989) ("The constitutional value [of privacy] derives from an oxymoron: substantive due process."); United States v. Carlton, 114 S. Ct.

has been almost entirely disavowed by the Rehnquist Court, which is now guided in its deliberations by a misguided theory of majoritarian democracy. This theory, as articulated by Chief Justice Rehnquist in his extrajudicial writings, is that, except to the extent that asserted rights "are well founded in the Constitution," principles of majority rule, judicial self-restraint, and textual fidelity all preclude the members of the Court from "roam[ing] at large in the realm of public policy and strik[ing] down laws that offend their own ideas of what laws are desirable and what laws are undesirable."[6] Accordingly, the Court has admonished would-be rights advocates who might have the audacity to advance as worthy of protection an unenumerated and previously unrecognized right that, except where legislative enactments are in apparent conflict with one of the "readily identifiable" guarantees embodied in the Constitution—in which case a heightened standard of review is warranted—prudence dictates that the Court defer to the popularly elected and politically accountable members of the political Branches and greatly resist any attempt to "expand the substantive reach" of the Due Process Clause.[7] Thus far, the Court has heeded its own advice and spurned efforts to add new rights to the catalogue of unenumerated rights

2018, 2027 (1994) ("substantive due process is 'an oxymoron' rather than 'a constitutional right' " (Scalia, J., concurring in the judgment)).

Commentators continue to quarrel, of course, over whether the selection of the Due Process Clause as the primary vehicle for the protection of such rights can be reconciled with the Framers' intent. *See, e.g.*, Robert E. Riggs, *Substantive Due Process In 1791*, 1990 WIS. L. REV. 941, 946. To the extent that Bork and others argue that the Framers did not intend the Due Process Clause to be a source of "substantive" rights, they are most likely correct. *See, e.g.*, BORK-TEMPTING, *supra*, at 43; RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 193-94 (1977) [hereinafter BERGER-JUDICIARY] ("Whether one can determine 'precisely' what due process meant . . . is not nearly so important as the fact that one thing quite plainly *it did not mean*, in either 1789 or 1866; it did not comprehend judicial power to override legislation on substantive or policy grounds."); United States v. Carlton, 114 S. Ct. at 2027 ("I believe that the Due Process Clause guarantees *no* substantive rights, but only (as it says) process" (Scalia, J., concurring in the judgment)). But to the extent that Bork argues that, irrespective of the provision invoked by the Court, "there is no principled way" for judges to safeguard rights other than those which are "clearly specif[ied]" in "constitutional materials," he is incorrect. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971).

6. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 313-14, 318 (1987) [hereinafter REHNQUIST-SUPREME COURT].

7. *See* Bowers v. Hardwick, 478 U.S. 186, 191, 195 (1986); *see also* Collins v. City of Harker Heights, 112 S. Ct. 1061, 1068 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.").

previously afforded protection by the Court under the rubric of "substantive due process."[8]

To be sure, the Rehnquist Court pretends to continue to evaluate under a rational basis standard of review the substance of legislative enactments which do not clearly implicate enumerated rights.[9] The rational basis standard, though, has proven to be wholly ineffective at curbing legislative excesses with respect to social and economic legislation,[10] and there is no reason to suspect that it will prove to be any more effective with respect to legislation implicating rights deemed to be more "personal" in nature; in fact, the available evidence suggests otherwise.[11] More important than the intrinsic ineffectiveness of the rational basis standard of review, however, is the fact that the "presumption of constitutionality" doctrine has produced a schizophrenic and constitutionally defective mode of analysis for the adjudication of rights which is logically flawed, textually untenable, inimical to the Framers' intent, and (ironically) detrimental to the democratic process.

The objective of this article is to illustrate that the judicially invented "presumption of constitutionality" doctrine, particularly

8. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (opinion of Scalia, J.) ("the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause"); Bowers v. Hardwick, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made law having little or no cognizable roots in the language or design of the Constitution."); *see also* Michael J. Phillips, *The Nonprivacy Applications of Substantive Due Process*, RUTGERS L. REV. 537, 599 (1990) (footnotes omitted) ("[Recent cases] suggest that the practice of classifying certain rights as fundamental for due process purposes and applying strict or intermediate scrutiny to laws restricting those rights is on the wane. Thus, the number of such rights is unlikely to grow appreciably in coming years and may well decline.").

9. *See* Reno v. Flores, 113 S. Ct. 1439, 1449 (1993) ("Of course, the INS regulation must still meet the (unexacting) standard of rationally advancing some legitimate governmental purpose [.]"); *but see* Michael H. v. Gerald D., 491 U.S. 110, 129-130 (1989) (opinion of Scalia, J.) (not purporting to apply even a rational basis test) ("It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted.").

10. *See* Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1367 (1990) [hereinafter Note-*Resurrecting Economic Rights*] (pointing out that since 1937 the Court has "not once str[uck] down a law on economic due process grounds" and noting that "[e]conomic and social legislation must now survive only a rational basis test"). In the somewhat related context of the Equal Protection Clause, under which economic and social classifications are evaluated under a rational basis standard of review, there is an adage that the rational basis standard translates into "minimal scrutiny in theory and virtually none in fact," whereas the standard of strict scrutiny for racial classifications is " 'strict' in theory and fatal in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

11. *See supra* note 9.

when linked with and buttressed by the Rehnquist Court's notion of majoritarian democracy and approach to the adjudication of constitutional rights, operates to countenance an exercise of power by both Congress and the States which was wholly unintended by the Framers, is unsupported by the Constitution itself, and imperils individual liberty. Part II examines how the "presumption of constitutionality" doctrine can be a menace to individual liberty, and Part III proposes an alternative mode of analysis which better conforms to the principles of government espoused by the Framers. Finally, Part IV sets forth a preemptive reply to the sure-to-be-heard objection that the mode of analysis proposed in Part III is unacceptable because it places "economic" rights on equal footing with "personal" rights.

II. THE "PRESUMPTION OF CONSTITUTIONALITY" DOCTRINE

Except where a legislative enactment clearly implicates one of the specific guarantees embodied in the first eight Amendments[12] or perhaps involves separation of powers considerations,[13] the judicially invented "presumption of constitutionality" doctrine forms the starting point for constitutional review. This doctrine was articulated in the early Nineteenth Century case of *Ogden v. Saunders*:[14]

> It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt.[15]

12. *See, e.g.*, Forsyth County. Ga., v. Nationalist Movement, 112 S. Ct. 2395, 2401 (1992) ("there is a 'heavy presumption' against the validity of a prior restraint"); Simon & Schuster, Inc. v. Members of New York State Crime Victims Board, 112 S. Ct. 501, 508 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.").

13. *See* Morrison v. Olson, 487 U.S. 654, 704-05 (1988) (Scalia, J., dissenting) ("[The] important and unusual premise [of the presumption of constitutionality of statutes passed by Congress] that underlies our deliberations . . . is not recited by the Court in the present case *because it does not apply*. Where a private citizen challenges action of the Government on grounds unrelated to separation of powers, harmonious functioning of the system demands that we ordinarily give some deference, or a presumption of validity, to the actions of the political branches in what is agreed, between themselves at least, to be within their respective spheres. But where the issue pertains to separation of powers, and the political branches are (as here) in disagreement, neither can be presumed correct.").

14. 25 U.S. (12 Wheat.) 213 (1827).

15. *Id.* at 270. Chief Justice Marshall had in Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), announced a principle similar in substance but lacking the "presumption" element. In *Fletcher*, Marshall stated:

> The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. . . . [I]t is not on slight implication

Since *Ogden*, the "presumption of constitutionality" doctrine has been reiterated so many times that it is now invoked by the Court in almost mechanical fashion, accompanied by the incessant recitation of the need for due respect for a coordinate branch of government.[16] In fact, the doctrine is so elementary to the Court's jurisprudence that the Court regularly invoked it even during the *Lochner* era, albeit with somewhat less rigidity than it does so today.[17]

A. *Asserted Justification for the Doctrine*

The weakness of the "presumption of constitutionality" doctrine is perhaps best illustrated by Chief Justice Rehnquist's attempted defense of it. In a passage from his generally engaging book about the Supreme Court, Rehnquist writes:

> It has always seemed to me that this presumption of constitutionality makes eminent good sense. If the Supreme Court wrongly decides that a law enacted by Congress is constitutional, it has made a mistake, but the result of its mistake is only to leave the nation with a law duly enacted by the popularly chosen members of the House of Representatives and the Senate and signed into law by the popularly chosen President.

> and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

10 U.S. (6 Cranch) at 128.

16. *See, e.g.*, Concrete Pipe & Products of California, Inc., v. Construction Laborers Pension Trust for Southern California, 113 S. Ct. 2264, 2287 (1993) ("It is now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality"); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985) (citations and internal quotation marks omitted) ("Judging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform, and we begin our analysis here with no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government."); *cf.* Federal Communications Commission v. Beach Communications, Inc., 113 S. Ct. 2096, 2101-02 (1993) ("On rational-basis review, a [legislative] classification . . . comes to us bearing a strong presumption of validity."); *see also* Morrison v. Olson, 487 U.S. 654, 704 (1988) (Scalia, J., dissenting) (citations omitted) ("It is rare in a case dealing, as this one does, with the constitutionality of a statute passed by the Congress of the United States, not to find anywhere in the Court's opinion the usual, almost formulary caution that we owe great deference to Congress' view that what it has done is constitutional, and that we will decline to apply the statute only if the presumption of constitutionality can be overcome.").

17. *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525, 544 (1923) (invalidating act of Congress providing for the fixing of minimum wages for women and children in the District of Columbia); United States v. Butler, 297 U.S. 1, 67 (1936) (invalidating act of Congress authorizing taxes to be assessed on agricultural commodities and providing for benefit payments to be directed to farmers) ("Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law.").

> But if the Supreme Court wrongly decides that a law enacted by Congress is not constitutional, it has made a mistake of considerably greater consequence; it has struck down a law duly enacted by the popularly elected branches of government not because of any principle in the Constitution, but because of the individual views of desirable policy held by a majority of the nine justices at that time.[18]

This excerpt poignantly illustrates Rehnquist's misconception of the nature and purpose of a written Constitution. The gist of Rehnquist's argument is that the sanctioning by the Court of a usurpation of power by Congress is of "considerably [less] consequence" than an error on the part of the Court in denying a presumably constitutionally authorized exercise of power by Congress.

What Rehnquist fails to recognize, though, is that while the laws that Congress enacts reflect (presumably) the will of the majority, these laws derive their legitimacy not from the Court's endorsement but from the Article I power-granting clauses, clauses which reflect the preexisting consent of the people regarding the manner in which they elected to be governed. In other words, when the Court "mistakenly" capitulates to the temporary majority on a particular matter, it has allowed Congress to contravene and amend by mere legislative decree the explicit commands of the Constitution, an outcome which the Framers cannot be said to have endorsed.[19] Granted, when the Court "mistakenly" invalidates legislation which the Constitution might in fact authorize, it has denied to the majority its right to govern in relation to the particular matter at hand. In the author's opinion, however, it is the "mistaken" sanctioning of the usurpation of power, rather than the "mistaken" invalidation of presumably constitutionally authorized legislation, which is of "considerably greater consequence."

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18. REHNQUIST-SUPREME COURT, *supra* note 6, at 318.

19. *See* THE FEDERALIST No. 78, at 469-70 (Alexander Hamilton) (C. Rossiter ed., 1961) ("[I]t is not to be inferred . . . that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing constitution, would on that account be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act.").

First, the powers defined in Article I identify the entire, complete, and sum total of power which the people consented to grant to Congress. Thus, the powers in Article I are fixed and may not be added to by a majority, or for that matter even all, of the members of Congress. Second, the Court is most likely to invalidate an otherwise constitutionally valid exercise of power only when no legitimate government interest has been identified by Congress or can be conceived of by the Court, or when the means adopted by Congress are either not conducive to the end sought to be achieved or are too broad in scope. It is true that the Court may err in making these judgments, but it must be remembered that the Constitution merely *authorizes* Congress to exercise a given power; it in no way *requires* Congress to exercise such power. As a consequence, simply because Congress *may* exercise a power does not mean that it *must* do so. And absent the articulation of a legitimate government interest and the use of means adapted to the desired end, by no means should Congress be permitted to exercise that power simply because it can point to some open-ended power clause in Article I.

Third, once the Court mistakenly sustains a legislative enactment which the Constitution does not authorize, the only available remedy is for Congress to repeal the law in question. Once a court, particularly the Supreme Court, sustains a given law as a valid exercise of power, though, Congress has absolutely no incentive to repeal that law and thereby diminish its power, particularly when the law in question reflects the sentiments of a majority in Congress and presumably the sentiments of a majority of the people as well. What is more, even assuming that Congress might vote to repeal a judicially ratified law, there is always the possibility that the President might veto any such attempt, particularly if repeal of the law would diminish the power of the Executive Branch. In that case, of course, Congress would need a supermajority in both the House and Senate to override the veto. As a practical matter, then, there is little remedy for the erroneous sustainment of a constitutionally invalid law.

In contrast, when the Court mistakenly invalidates what might have been an otherwise constitutionally valid exercise of power, there are at least two possible remedies. First, Congress is free to reenact the same or a substantially similar law so long as it identifies a legitimate government interest or adopts means better adapted to the desired end. To be sure, the makeup of a later

Congress may be quite different from that of the Congress which passed the earlier bill. Accordingly, the substitute bill may fail. All that means, though, is that the will of a majority of Congress has prevailed. The second remedy is for Congress to submit to the States for their consideration a constitutional amendment which would remove any and all doubt about the ability of Congress to adopt a measure such as that mistakenly invalidated by the Court.

In sum, then, Rehnquist's argument reduces to whether we should opt to err on the side of allowing Congress to bypass the amendment process, exceed its fixed powers, and breach the Constitution, or whether we should opt to err on the side of liberty when Congress is incapable of demonstrating that a given state of facts warrants a particular legislative response which will impair individual rights. Not only is it self-evident that the latter alternative is the only credible choice, but it is manifest that the latter alternative poses less of a threat to our system of government than the former, and it is also arguable that the latter alternative is one to which the Framers subscribed:

> [T]he supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature, may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system.[20]

B. *The Doctrine Operates as an Impermissible Burden-Shifting Mechanism*

The second difficulty with the "presumption of constitutionality" doctrine is that it serves as a burden-shifting mechanism which impermissibly places on the individual challenging a particular law the onus of establishing "beyond all reasonable doubt" the unconstitutionality of the law. It is impermissible because, as both the Framers and the ratifying States clearly understood, a legitimate government can acquire its powers only from the voluntary, consensual relinquishment of those powers possessed, as an original matter, by the people. Therefore, all legitimate governments may rightfully possess and exercise only that

20. *See id.* No. 81, at 484 (Alexander Hamilton).

measure of power with which the people freely and consensually granted and enshrined in a written constitution:

> [T]he powers granted under the Constitution [are] derived from the people of the United States . . . [and] every power not granted thereby remains with them, and at their will . . . [and] no right, of any denomination, can be cancelled, abridged, restrained, or modified except in those instances in which power is given by the Constitution for those purposes.[21]

Accordingly, given the fact that the defined and limited power vested in Congress "derives" entirely from the people, and since all residual—*i.e.*, undefined and limitless—power "remains" with the people, common sense compels the conclusion that, rather than enabling Congress whimsically to wield power *except* to the extent that an individual can prove that its exercise was expressly *not* granted or is expressly prohibited, it is entirely fitting to place Congress in the position of having to establish that a power it claims to possess and has in fact exercised was actually "granted" by the people and is specifically embraced by one of the power-granting provisions of the Constitution.

Interestingly, Raoul Berger has espoused a similar notion, though in a slightly different context. With regard to the exercise of judicial review, Berger explains that "under a Constitution which delegates and limits power, the burden is on a claimant to point to the source of his power—failing which, it is a usurpation."[22] The powers of Congress, no less than those of the Supreme Court, have as their sole origin a Constitution which delegates and limits power. It necessarily follows, then, that the burden lies with Congress to point to the source of its power. That is, the "presumption" should be that a law is not authorized by the Constitution unless and until Congress (*i.e.*, the "claimant") can establish otherwise.

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21. 1 ELLIOT'S DEBATES 327 (1836) (resolution of Virginia Convention). *See also id.* (resolution of New York Convention) ("[A]ll power is originally vested in, and consequently derived from, the people. . . . [E]very power, jurisdiction, and right, which is not by the said Constitution clearly delegated . . . remains to the people of the several states."); *id.* at 334 (similar resolution of Rhode Island Convention); *id.* at 498 (Address to the People of the State of New York by the Hon. John Jay) ("The proposed government is . . . to exercise no rights but such as the people commit to them."); THE FEDERALIST No. 22, at 152 (Alexander Hamilton) (C. Rossiter ed., 1961) ("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("governments are instituted among men, deriving their just powers from the consent of the governed").

22. BERGER-JUDICIARY, *supra* note 5, at 353.

It is important to point out that this rule that a duly enacted law is "presumptively" inconsistent with the Constitution does not render the citizenry free to disregard the law before the government has an opportunity to confirm its validity in a court. Adherence by Congress to the legislative steps provided for in the Constitution should be all that is necessary for compliance with a validly enacted, but judicially unreviewed, law. If an individual objects to the enactment of a particular law, then that individual may assail the validity of that law in court. Arguably, an individual who objects to a particular law but fails to challenge it might be said to have impliedly consented to its provisions, though this implied consent does not preclude him from challenging the law at a later date.[23] If no one initiates a challenge to a particular law, then the citizenry by its collective inaction could be said to have similarly impliedly consented. Nonetheless, since no provision was made for the Constitution to be amended by prolonged silence or by the application of equitable doctrines such as laches or estoppel, and since a law gains no legitimacy by the mere passage of time, it is inappropriate for the Court to suggest—as it has—that the level of deference to be accorded a law is a function of the date of its enactment.[24]

Not only has the Court declined to impose upon Congress the burden of pointing to the source of its power, but it has gone one step further and "never require[d] [Congress] to articulate its reasons for enacting a statute."[25] In addition, the Court has declared that, although "[t]he legislative steps outlined in Art. I are not empty formalities," the existence of these steps "does not

23. *See id.* at 351-52 ("[I]t is never too late to challenge the usurpation of power; one gains no title by prescription against . . . the sovereign people.").

24. *See* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985) ("Indeed one might think, if anything, that more deference is called for here; the statute in question for all relevant purposes has been on the books for over 120 years.").

25. Federal Communications Commission v. Beach Communications, Inc., 113 S. Ct. 2096, 2102 (1993); *see also* McDonald v. Board of Election Commissioners, 394 U.S. 802, 809 (1969) ("Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent"). *Compare* Nordlinger v. Hahn, 112 S. Ct. 2326, 2334 (1992) ("[T]he Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification.") *with* Mississippi University for Women v. Hogan, 458 U.S. 718, 730 (1982) (invalidating—under a heightened, intermediate level of review—as a violation of the Equal Protection Clause a state-supported university's nursing program policy of limiting its enrollment to women in light of its conclusion that the State had "failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification").

mean that legislation must always be preceded by debate."[26] So long as "there are 'plausible reasons' for Congress' action," the Court has explained, " '[judicial] inquiry is at an end.' "[27] Furthermore, the Court has noted, legislative action "may be based on rational speculation unsupported by evidence or empirical data."[28] This "paradigm of judicial restraint"[29] further directs that "if any state of facts reasonably may be conceived to justify" a legislative determination,[30] then it is "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision."[31] Not surprisingly, the Court has acknowledged that a "facial challenge" to a legislative measure is "the most difficult challenge to mount successfully," since the challenger must both "establish that no set of circumstances exists under which the Act would be valid"[32] and "negative every conceivable basis which might support it."[33]

This approach is flawed in three respects. First, the Constitution merely *authorizes* Congress to exercise power with respect to certain objects; there is no provision in the Constitution which *requires* Congress to exercise any or all of these powers or to exercise them to their fullest extent. On the other hand, there is a requirement that the powers Congress is authorized to exercise be implemented by means which are both "necessary and proper."[34] Moreover, even the meager and minimally probative "rational basis" standard championed by the Court itself requires that the government have at least a legitimate interest which is to

26. Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 958 n.22 (1983).

27. Federal Communications Commission v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993) (quoting Railroad Retirement Board v. Fritz, 449 U.S. 166, 179 (1980)).

28. Federal Communications Commission v. Beach Communications, Inc., 113 S. Ct. 2096, 2102 (1993).

29. *Id.* at 2101.

30. McGowan v. Maryland, 366 U.S. 420, 426 (1961); Federal Communications Commission v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

31. Flemming v. Nestor, 363 U.S. 603, 612 (1960); *see also* Railroad Retirement Board v. Fritz, 449 U.S. 166, 179 (1980); Federal Communications Commission v. Beach Communications, Inc., 113 S. Ct. 2096, 2102 (1993).

32. United States v. Salerno, 481 U.S. 739, 745 (1987); *see also* Reno v. Flores, 113 S. Ct. 1439, 1446 (1993).

33. Federal Communications Commission v. Beach Communications, Inc., 113 S. Ct. 2096, 2102 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

34. *See* U.S. CONST., art. I, § 8, Cl. 18.

be advanced by means having a reasonable relation to that interest. Given these standards, then, if Congress makes a determination that a given set of circumstances necessitates a legislative response, one would expect—and rightfully demand—to find an articulation of the facts, *i.e.*, "evidence or empirical data," giving rise to the legislative response, as well as a rationalization of the connection between the means chosen and the ends sought to be achieved. Arguably, a legislative body which enacts legislation either without debate or with a silent or hollow legislative record is ostensibly hiding behind furtive motives or acting without a clearly discernible and legitimate purpose.

A second flaw is that in the absence of the legislature's articulating facts which prompted enactment of the law and rationalizing the connection between the means employed and the ends sought to be achieved, the individual who wishes to challenge a law is confronted with the enormous task of hypothesizing every "plausible" state of facts which "reasonably may be conceived to justify the law. Then the individual must endeavor to establish that *none* of these imagined states of facts support the law and, if unsuccessful in that regard, that the means employed bear no reasonable relation to the end sought to be achieved. Such a burden is wholly impermissible because one cannot, in the absence of a legislative articulation, be expected to presume to know what *actually* prompted Congress to act as it did.

The third, and perhaps most significant, flaw is that when the Court conjures up a state of facts, actual or hypothesized, which "reasonably may be conceived to justify" a law, but which Congress itself did not articulate, it both infuses itself into public policy and impedes the very democratic process which the Court insists it is trying to preserve by declining to upset legislative judgments. When the legislative record is silent (or when it articulates a state of facts which either no longer can be regarded as true or which by itself does not support the law) and the Court assumes a "plausible" state of facts which "reasonably may be conceived to justify" a law, this in effect means that the members of the Court deem the facts asserted by them to be sufficient as a matter of public policy to support the legislative decision. This is so despite the fact that Congress may have silently rejected the assumed facts as an insufficient justification for the law, or despite the fact that Congress may not have considered, or even been aware of, the assumed facts—facts which Congress, after becom-

ing aware of and considering, may have rejected as an insufficient justification for the law.[35]

The same may be said when the Court, rather than conceiving of a state of facts itself, invokes a state of facts—one perhaps not even considered by Congress—advanced by the Executive Branch as a sufficient justification for the law. It is, of course, quite plausible that the Executive Branch has an agenda quite different from that of Congress and therefore not implausible that Congress would reject the reasons advanced by the Executive Branch as an insufficient justification for the law.

In either case, however, the Court has both impermissibly introduced itself into and unnecessarily preempted the political and legislative processes, processes which were designed to enable the citizens to hold the members of the two elected Branches personally and politically accountable for the views they express and the positions they take with respect to matters of public policy. The political and legislative processes, of course, provide opportunities for both candid and open public policy debate within and between the elected Branches as well as participation by the public at large in matters of public policy. However, when the Court substitutes its own judgment, or the judgment of the Executive Branch, for that of Congress—to the extent that a silent or incomplete legislative record evinces any sort of judgment at all—it not only lets Congress off the proverbial hook by deciding for itself these sometimes controversial issues, but actually creates a perverse incentive for members of Congress to avoid the unnecessary expenditure of "political capital" by imbuing the legislative record with their personal—and perhaps politically perilous—justifications for various policy determinations.[36] As a consequence, by declining to impose on

35. *See, e.g.*, Federal Communications Commission v. Beach Communications, Inc., 113 S. Ct. 2096, 2103 (1993) ("There are at least two possible bases for the [statutory] distinction; either one suffices."); *id.* at 2104 ("The assumptions underlying the[ ] rationales [advanced by the Court] may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immunize' the congressional choice from constitutional challenge."); Nordlinger v. Hahn, 112 S. Ct. 2326, 2333 (1992) ("We have no difficulty in ascertaining at least two rational or reasonable considerations of difference or policy [.]"); Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955): ("The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of glasses.").

36. *Cf.* William B. Reynolds, *The Challenge for Constitutional Respect in America*, 11 HARV. J.L. & PUB. POL'Y 13, 16, 20 (1988) [hereinafter Reynolds-*Challenge*] ("The rise of the law-making judge was a convenient development for those legislators who privately favored the controversial policy choices being made by the judiciary but who could never have risked voting for those choices had they been embodied in a congressional bill. As a

Congress the burden of embellishing the legislative record with its explicit reasons for adopting various measures, the Court has impaired, rather than safeguarded, the democratic process by insulating members of Congress from the full measure of political accountability to which they should be held.

Simply put, the onus should be on Congress to expressly articulate its reasons for taking legislative action. After all, Congress is presumably aware of why it does what it does when it does it. As a consequence, requiring Congress to articulate its reasons for adopting legislation would impose an insignificant, but justifiable, burden on its members while at the same time both provide for greater electoral accountability and diminish the "most difficult challenge" that an individual faces when contesting legislative action. Granted, there will be, given the nature of the legislative process, rarely, if ever, any single overriding reason for a legislative decision which is ascribed to by all—or even a majority of—the members of Congress who approved the measure. Nonetheless, so long as at least one of the expressly articulated reasons ascribed to by some members of Congress is constitutionally adequate, then judicial inquiry truly is "at an end." This is because it would be nonsensical, as well as impracticable, to impose upon the Court the requirement that it tally the number of legislators who ascribed to each articulated reason and determine whether any one reason was supported by a majority or whether any one reason garnered more support than others.[37]

Instead, the Court's task is simply to look to the law itself and discover the clearly articulated reasons asserted in support of the law. If it should find a silent or barren legislative record, a record replete with factual premises which can no longer be regarded as correct, or a record containing findings which by themselves cannot support the legislative judgment, then the only constitutionally defensible course of action for the Court is to invalidate the law and, in a sense, "remand" the matter back to Congress for its consideration. Congress may respond by simply declining to adopt substitute legislation, or it may attempt to restore the *status*

result, many of those who theoretically had the most to lose by these extraordinary assertions of judicial power were all too happy to acquiesce.").

37. It may also be the case that the reason or reasons advanced by Congress in support of a law may not correspond with those advanced by the Executive Branch. Just as nothing in the Constitution requires that the validity of a law hinges on the harmonization of purpose within Congress, however, neither does it require that the reasons proffered by Congress must correspond with those advanced by the Executive Branch.

quo ante, in which case all it need do is to provide an amply thorough and reasoned legislative record.

C. *The Doctrine Rests on a Flawed Theory of Majoritarian Democracy*

A third difficulty with the "presumption of constitutionality" doctrine is that the "decent respect due" Congress and its determination regarding the constitutionality of the laws it passes squares neither with the Framers' distrust of the legislative body nor with Alexander Hamilton's observation that in a constitutional system of delegated authority it "cannot be the natural presumption" that the members of Congress are to be regarded as "the constitutional judges of their own powers" or that "the construction [Congress] put[s] upon [its powers] is conclusive upon the other departments" where "it is not to be collected from any particular provisions in the Constitution."[38] In theory, of course, Congress's construction of its powers is not "conclusive" upon the Court, because the Court can exercise its duty of judicial review. In reality, however, given the Court's tremendously deferential standard of review and its theory of majoritarian democracy, the Court's application of the "presumption of constitutionality" doctrine imposes such a tremendous burden on an individual challenging an exercise of power by Congress that its construction of its powers is, if not "conclusive," at least so nearly the case that the disparity between theory and reality is, for purposes of analytical review, essentially irrelevant.[39]

1. *The Rehnquist Court's Theory of Majoritarian Democracy*

Unlike Congress and the President, which are animated by an affirmative vision of power, the Rehnquist Court may be said to be animated by a negative vision of power. For example, the members of Congress propose, hold hearings on, debate the merits of, and vote on legislation. The President, in addition to signing and vetoing legislation, recommends legislation to Con-

38. THE FEDERALIST No. 78, at 467 (C. Rossiter ed., 1961); *see also* Stephen Macedo, *Majority Power, Moral Skepticism, and The New Right's Constitution*, in ECONOMIC LIBERTIES AND THE JUDICIARY 111, 126 (James A. Dorn & Henry G. Manne, eds. 1987) [hereinafter ECONOMIC LIBERTIES] ("There is no presumption in the Constitution in favor of legislatures and against judges, or in favor of majority power and against individual rights and liberties.").

39. Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 44, 56-57 (1989) ("The Court's desire to avoid judicial value impositions combined with its commitment to deferring to majoritarian decisionmaking produces a sweeping judicial deference.").

gress and enforces the laws which Congress ultimately passes. In contrast, the Rehnquist Court for the most part sits idly by while Congress and the President exercise and augment their powers. Only when an exercise of power is plainly proscribed by a specific guarantee in the Constitution does the Court then act.

This passive role of acquiescence, however, is not what the Framers contemplated when they devised our scheme of government. Instead, the Framers imagined that the Court would patrol the established boundaries of power and keep Congress "within the limits assigned to [its] authority."[40] The rationale advanced by the members of the Court and others to justify a contrary approach is that, except where there is a textual basis for doing so, the policy choices, *i.e.*, value judgments, made by the electorally accountable members of Congress should not be displaced by the value judgments of the unelected, life-tenured members of the judiciary.[41] This rationale, however, does not provide a theory of how the Constitution should be construed; indeed, it provides only a theory of how the Court should *not* construe it. As one eminent scholar has remarked:

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40. THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (C. Rossiter ed., 1961).

41. *See, e.g.*, William H. Rehnquist, *Point, Counterpoint: The Evolution of American Political Philosophy*, 34 VAND. L. REV. 249, 263-64 (1981) [hereinafter Rehnquist-*Political Philosophy*] ("If we do not . . . contain the courts, in some way, from negating a law that, although unwise in the eyes of some, is nonetheless rendered unconstitutional only by a considerable stretch of judicial imagination, we risk [allowing] . . . nonelected judges, rather than the elected representatives of the people, [to] have the final say about the extent to which policies enacted or administered by representatives of the majority may infringe on the judicially declared liberties and rights of individuals."). *See also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) [hereinafter Scalia-*Lesser Evil*] ("A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect 'current values.' Elections take care of that quite well."); BORK-TEMPTING, *supra* note 5, at 5 ("[J]udges must consider themselves bound by law that is independent of their own views of the desirable. They must not make or apply any policy not fairly to be found in the Constitution or a statute."); BERGER-JUDICIARY, *supra* note 5, at 296 ("Substitution by the Court of its own value choices for those embodied in the Constitution violates the basic principle of government by consent of the governed."); *but see* Michael Moore, *The Written Constitution and Interpretivism*, 12 HARV. J.L. & PUB. POL'Y 3, 13-14 (1989) ("The true heir of originalism ought to be an activist interpretive theory. If you really want to do what the Framers had in mind, if you want to respect their vision of a written constitutionalism, then you have to allow judges to figure out a theory of liberty, equality, and the other values referred to by the grand clauses of the Constitution. That will turn out to involve substantial theory-building of a moral kind, but that is, after all, what the document seems to demand."); Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 293 (1990) (Scalia, J., concurring) ("the point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate," are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory").

> The Rehnquist Court lacks a theory for how the Constitution should be interpreted, and instead approaches judicial review based on an oft-stated desire to avoid judicial value imposition. Thus, the Court's jurisprudence is largely defined negatively, by what it wants to avoid. Without a method of constitutional interpretation, but being committed to judicial neutrality, the Court frequently defers to government decisionmaking, and its implicit view of its institutional role is highly majoritarian, as is evidenced by its decisions repeatedly siding with the elected branches of government.[42]

Presumably, the Rehnquist Court senses that a theory of constitutional interpretation which is based on both majority rule and the notion that only those values "well founded in the Constitution" can be judicially protected in a principled manner is objective.[43] Aside from the fact that a number of recent decisions rendered by the Rehnquist Court amply demonstrate that an agreed-upon meaning cannot be attributed to even the enumerated, and supposedly objective, guarantees in the Constitution,[44] the members of the present Court fail to realize that a hypnotic-like allegiance to majority rule constitutes a value judgment in itself.[45] More important, though, the Framers did not embrace this value judgment with the same enthusiasm, and it is not consonant with the theory of government they contemplated.[46]

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42. Chemerinsky, *supra* note 39, at 46.

43. REHNQUIST-SUPREME COURT, *supra* note 6, at 318; *see* James Bopp, Jr & Richard E. Coleson, *Webster and the Future of Substantive Due Process*, 28 DUQ. L. REV. 271, 280, 281 (1990) (observing that "the new working majority" is both "intent on making substantive due process more objective and less result-oriented" and "concerned about the danger of constitutionally illegitimate decisions, resulting from a failure to supply a firm grounding for a decision in the history and text of the Constitution").

44. *See, e.g.*, Alexander v. United States, 113 S. Ct. 2766 (1993) (5-4 portion of opinion holding that First Amendment not violated when entire inventory of adult entertainment business owner was forfeited under RICO statute, even though the balance of defendant's expressive materials had not been adjudged obscene); Zobrest v. Catalina Foothills School District, 113 S. Ct. 2462 (1993) (5-4 opinion holding that Establishment Clause not violated by providing a sign-language interpreter to a deaf child attending a parochial high school); Lee v. Weisman, 112 S. Ct. 2649 (1992) (5-4 opinion holding that the inclusion of a nonsectarian prayer in a public school graduation ceremony violates the Establishment Clause of the First Amendment); Maryland v. Craig, 497 U.S. 836 (1990) (5-4 opinion holding that the Confrontation Clause of the Sixth Amendment does not prohibit a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television).

45. *See* Macedo in ECONOMIC LIBERTIES, *supra* note 38, at 121 ("Judicial deference . . . is not an avoidance of choice. Rather, it is a choice of majority power over individual liberty and a presumption against constitutional rights. This choice of political values is as 'fundamental' and important as any choice can be, and it needs to be defended or abandoned, not hidden under the guise of skepticism, deference, and neutrality.").

46. *See* Chemerinsky, *supra* note 39, at 74-75 (footnote omitted) ("[T]he [F]ramers openly and explicitly distrusted majority rule; virtually every government institution they created had strong anti-majoritarian features. Even more importantly, the Constitution

2. *The Framers' Perspective on Majoritarian Democracy*

Certain members of the Rehnquist Court seem to imply that majority rule is somehow synonymous with democracy[47] and that, therefore, majority rule is an end unto itself, rather than simply a single component of democracy, with life, liberty, and property rights, as well as equality before the law, forming equally fundamental components of democracy.[48] As a result, the Court appears to have as the basis for its constitutional philosophy a mere tautology—majority rule is inherently virtuous because more people than not happen to agree at a given time on a particular matter.[49] In other contexts, this might be described as "power not reason" or "might makes right."

It is of course true that the Framers envisioned that the government they established would ultimately have to be implemented by means of majority rule. Nonetheless, the Framers were also cognizant that majority rule *simpliciter* was not a viable option:

> Complaints are every where heard . . . that measures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an inter-

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exists primarily to shield some matters from easy change by political majorities. . . . If judicial review is always slightly suspect because it is not expressly mentioned in the Constitution's text, majority rule should be even more so because the Constitution seems so heavily oriented against it."); Alex Kozinski, *Foreword* to ECONOMIC LIBERTIES, *supra* note 38, at xi, xv ("the [Constitution] reflects deep concern about the excesses of governmental power and the unbridled will of the majority"). Macedo in ECONOMIC LIBERTIES *supra* note 38, at 120 ("[T]he conservative invocation of Original Intent has less to do with reverence for the ideas of the Founders than with a political preference for majority power over individual rights and liberty. Underlying the New Right's jurisprudence is a majoritarian impulse that, far from being in accord with the intentions of the Framers, is deeply at odds both with the text and structure of the Constitution and the project of constitutionalism itself.").

47. *See* Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. at 2884-85 (Scalia, J., joined by Rehnquist, C.J., and White and Thomas, JJ., concurring in part and dissenting in part) ("[T]he American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. . . . But if in reality our process of constitutional adjudication consists primarily of making value judgments . . . then a free and intelligent people's attitude towards us can be expected to be (*ought* to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better.").

48. *See* Chemerinsky, *supra* note 39, at 71, 76 (deriding Bickel's definition of " 'democracy' as majority-rule" as neither "the only possible way, nor necessarily the preferable way, to define democracy," and adding that "many political scientists define democracy as including protection of substantive values").

49. *See id.* at 88 ("[T]he [Court's] opinions often imply that [it] is siding with the elected branches of government because of a commitment to majority rule. But this sounds tautological: the Court prefers majoritarian decisionmaking because it is majoritarian.").

> ested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true. . . .
>
> When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our enquiries are directed.[50]

To guard against such majority-driven impulses of passion, the Framers established a tripartite system of government, the powers of which are divided among three equal, separate, and largely independent branches, a division which was "admitted on all hands to be essential to the preservation of liberty."[51]

The Framers were mindful, however, that a mere division of power among the three branches alone would be an inadequate protection against attempted usurpations of power.[52] Accordingly, they crafted an intricate array of checks and balances which are designed to preserve the integrity of the branches themselves, the system as a whole, and the rights of individuals.[53] These checks and balances supply each Branch with the "necessary constitutional means" and "personal motives" to thwart the

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50. THE FEDERALIST No. 10, at 77-78, 80 (James Madison) (C. Rossiter ed., 1961).

51. *Id.* No. 51, at 348 (James Madison); *see also id.* No. 78, at 466 (Alexander Hamilton) ("The complete independence of the courts of justice is peculiarly essential in a limited constitution."); *id.* No. 47, at 302-03 (James Madison) ("where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted"); Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 870 (1991) ("The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government."); Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, in ECONOMIC LIBERTIES, *supra* note 38, at 39, 41 ("Our Constitution reflects a general distrust toward the political process of government—a high degree of risk aversion. That is why it wisely spreads the powers of government among different institutions through a system of checks and balances.").

52. THE FEDERALIST No. 48, at 313 (James Madison) (C. Rossiter ed., 1961) ("a mere demarkation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments [by one branch upon another] which lead to a tyrannical concentration of all the powers of government in the same hands").

53. *See, e.g., id.* No. 73, at 443 (Alexander Hamilton) ("[T]he [veto] power . . . furnishes an additional security against the enaction of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.").

impetuous or unauthorized exercise of power by another Branch.[54]

Without a doubt, some of the most important checks and balances provided for in the Constitution are the numerous checks and balances fashioned by the Framers to guard against Congress's enactment of laws which are either improvident or unauthorized by the Constitution.[55] These checks and balances provide unmistakable evidence that the Court's reverent regard for majority rule—and concomitant disregard for individual rights—is misguided. The constitutional hurdles which a proposed bill must clear to become a law, in conjunction with the judicial hoop through which the law as enacted must finally pass, bespeak a strong anti-majoritarian disposition on the part of the Framers, as well as a cynical regard for the operation of the Legislative Branch. James Madison underscored this cynicism with his observation that "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."[56] So wary of the "legislative department" was Madison that he urged that "it is against the enterprising ambition of th[e] [legislative] department that the people ought to indulge all their jealousy and exhaust all their precautions."[57] The Framers' system follows this advice.

First, the Framers organized a bicameral legislature consisting of a House of Representatives and a Senate to afford a partial "remedy" for the "inconveniency" that in a republican form of government "the legislative authority, necessarily, predominates."[58] As a condition precedent to a bill being considered by the President and signed into law, a majority of both the House

54. *Id.* No. 51, at 321 (James Madison); *see also id.* No. 73, at 442 (Alexander Hamilton) ("the necessity of furnishing each [branch] with constitutional arms for its own defense, has been inferred and proved").

55. *See id.* No. 73, at 443 (Alexander Hamilton) (observing that the President's veto power was designed "to encrease the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design"); *id.* No. 78, at 467 (Alexander Hamilton) ("the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority").

56. *Id.* No. 48, at 309.

57. *Id.*

58. *Id.* No. 51, at 322 (James Madison); *id.* ("The remedy for this inconveniency is, to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society, will admit.").

and the Senate must approve the bill.[59] The obvious virtue of this bicameral legislature is that legislative measures must be proposed, studied, revised, debated, and voted upon by two independent, deliberative bodies, neither of which can impose its collective will without the assent of the other and each of which represents a different set of interests.[60]

Because they were painfully aware that the establishment of a bicameral legislature would by itself provide an insufficient check and balance,[61] the Framers entrusted to the President, as head of the Executive Branch, the power to veto any bill which might be passed by a majority of both the House and the Senate. The veto power both confers upon the President the requisite means of defending the Executive, as well as the Judicial, Branch against the "depredations" of the Legislative Branch[62] and serves as an "additional security" against the adoption of "improper" laws.[63] The rationale underlying the veto power, of course, is not that the individual judgment of the President is superior to the collective judgment of the members of Congress. Rather, the bases for the veto power, which are equally applicable to the power of judicial review, are that Congress itself is prone to error[64] and that for every additional tier of review a lesser degree of error and a more judicious measure will result.[65]

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59. *See* U.S. CONST., art. I, § 7, Cl. 2.

60. *See* THE FEDERALIST No. 58, at 357 (James Madison) (C. Rossiter ed., 1961).

61. *See id.* No. 51, at 322-23 (James Madison) ("It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require . . . that it should be fortified.").

62. *Id.* No. 73, at 442 (Alexander Hamilton).

63. *Id.* at 442.

64. *Id.* at 443 ("The propriety of the [veto] does not turn upon the supposition of superior wisdom or virtue in the executive, but upon the supposition that the legislative [body] will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of the other members of the government . . . that impressions of the moment may sometimes hurry it into measures which itself, on maturer reflection, would condemn.").

65. *See id.* ("The oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest."). *See also* Epstein in ECONOMIC LIBERTIES, *supra* note 51, at 41 ("By focusing exclusively on the defects he finds in the judicial part of the process, [Justice Scalia] tends to ignore the powerful defects that pervade the legislative part of the process. . . . To provide no (or at least no effective) check on the legislature's power to regulate economic liberties is to concentrate power in ways that are inconsistent with the need to diversify the risk. . . . Once we realize that all human institutions (being peopled by people) are prey to error, the only thing we can hope to do is to minimize those errors so that the productive activities of society can go forward as little hampered as possible.").

Of course, the power conferred upon the President to veto bills passed by Congress may be exercised for any reason. Consequently, the power to veto what the President believes to be a pernicious or unconstitutional bill necessarily entails the power to veto a bill which may be beneficial and constitutional. Though fully aware that the veto power would operate in this manner, the Framers were nonetheless of the opinion that "there would be greater danger of [the President] not using his power when necessary, than of using it too often, or too much."[66] The Framers insisted that "the advantage of preventing a number of bad [laws]" would "amply compensate[ ]" for "[t]he injury which may possibly be done by defeating a few good laws."[67]

If a bill is vetoed, Congress reserves the right to vote on the bill a second time and attempt to override the veto. Rather than allow Congress to override a veto by a simple majority, though, the Framers instead directed that the House and Senate can override a veto only if two-thirds of *both* chambers reapprove the measure.[68] Significantly, by requiring a supermajority in both the House and the Senate, the Framers ensured that a substantial minority could effectively control the legislative outcome.

The cumulative effect of these checks and balances is, of course, to filter the collective will of a perhaps impulsive majority through a succession of colander-like review mechanisms and yield a more judicious measure. The Framers were not concerned merely with the wisdom of legislation, however; they were concerned also with the constitutional legitimacy of legislation. As a result, once a bill clears the three legislative and executive hurdles, the bill—now a law—must, if challenged, endure the fourth and final check and balance. This is the independent determination by the judiciary as to whether a particular law conforms to the Constitution.[69] Although no provision in the Constitution provides in *express* terms for a duty on the part of the Court to invalidate legislative enactments which are inconsistent with the commands of the Constitution, both the clear, un-

66. THE FEDERALIST No. 73, at 444-45 (Alexander Hamilton) (C. Rossiter ed., 1961).

67. *Id.* at 444.

68. *See id.* at 446 ("It is to be hoped that it will not often happen, that improper views will govern so large a proportion as two-thirds of both branches of the Legislature at the same time; and this too in defiance of the counterpoising weight of the executive.").

69. THE FEDERALIST No. 78, at 466 (Alexander Hamilton) (C. Rossiter ed., 1961) ("it must be [the duty of the courts] to declare all acts contrary to the manifest tenor of the constitution void").

mistakable intentions of the Framers[70] and the inherent nature of constitutional government[71] provide an irrefutable basis for the conclusion that such a duty was bestowed upon the Court.[72]

3. *Debunking the Myth of the Counter-Majoritarian Difficulty*

Coupled with the three checks and balances in the law-creating process, which demonstrate that the Framers harbored a distrust of the legislative process and majority rule *simpliciter*, this final check and balance of judicial review clearly establishes that the Framers were less enamored with the idea of allowing a majority of Congress to wield its power at will than they were anxious to effectuate as many safeguards as possible to thwart the "enterprising ambition" of Congress and keep Congress within the confines of its Article I powers. It has frequently been suggested that the power of a court to veto legislative enactments presents a "counter-majoritarian difficulty."[73] Such a proposition,

70. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 15-16 (2d ed. 1986) [hereinafter BICKEL-DANGEROUS] ("It is as clear as such matters can be that the Framers . . . specifically, if tacitly, expected the federal courts to assume a power . . . to pass on the constitutionality of actions of the Congress and the President, as well as of the several states. Moreover, not even a colorable showing of decisive historical evidence to the contrary can be made."). *See also* BERGER-JUDICIARY, *supra* note 5, at 355 ("judicial review *was* contemplated and provided for by the Framers, albeit limited to policing constitutional boundaries and divorced from participation in policymaking").

71. *See* THE FEDERALIST No. 81, at 482 (Alexander Hamilton) (C. Rossiter ed., 1961) ("[T]here is not a syllable in the plan, which *directly* empowers the national courts to construe laws according to the spirit of the constitution . . . . I admit, however, that the constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention; but from the general theory of a limited constitution."). *See also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) ("the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument"); *compare* BORK-TEMPTING, *supra* note 5, at 24 ("The good news about *Marbury* is that Marshall placed the Court's power to declare laws unconstitutional directly upon the fact that the United States has a written Constitution.").

72. Even some of those delegates who objected to the notion of the judiciary in a policy role clearly anticipated that the judiciary would, in accordance with its role as the interpreter of the laws, negative those laws which contravened the Constitution. *See, e.g.*, 5 ELLIOT'S DEBATES: THE MADISON PAPERS CONTAINING DEBATES ON THE CONFEDERATION — SUPPLEMENT TO ELLIOT'S DEBATES 151 (1845) [hereinafter ELLIOT'S DEBATES-SUPPLEMENT] (Delegate Gerry expressing doubt about "whether the judiciary ought to form a part of [a council of revision], as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality"); *id.* at 346-47 (Delegate Martin refusing to give the judiciary "a double negative" and remarking that "as to the constitutionality of laws, that point will come before the judges in their official character").

73. BICKEL-LEAST DANGEROUS, *supra* note 70, at 16.

however, simply fails to appreciate the nature of a written constitution and is both analytically unsound and contrary to the Framers' intent.

Those who suggest that the power of a court to veto legislative enactments presents a "counter-majoritarian difficulty" do not similarly suggest that a bicameral legislature, the Presidential veto, and a requirement for a supermajority of Congress to override a veto present similar "difficulties." Given the operation and underlying rationales of these other checks and balances, however, it is untenable to suggest that the judicial veto presents a "counter-majoritarian difficulty" which is distinct from or more "difficult" than whatever "difficulty" may be posed by the three checks and balances provided for in the law-enacting process. In each case, the purpose and effect of the check and balance is to inhibit a majority from converting its collective will and moral judgments into legislative commands absent a consensus among the three independent, coequal, and coordinate branches of government that the law in question is wise and constitutional.

To be sure, one might argue that whatever checks and balances the Framers crafted with respect to the Legislative and Executive Branches, whose leaders are elected (and therefore are politically accountable), the rationale underlying these checks and balances has no bearing on the propriety of unelected and life-tenured members of the Court to nullify the will of the President and a majority of Congress. That is, the Presidential veto, for example, is consistent with majoritarian principles because it is exercised by a popularly elected and politically accountable official, whereas the judicial veto is inconsistent with those principles because it is exercised by unelected and life-tenured judges. This argument, however, cannot survive serious scrutiny.

First, the argument necessarily embraces Alexander Bickel's argument that judicial review is "undemocratic" and "a counter-majoritarian force."[74] Even accepting as true for the moment the

74. *Id.* at 16, 17. The title of Bickel's book is taken, ironically enough, from one of Hamilton's more exceptional essays in which he rationalizes the "permanent tenure" of Supreme Court Justices, the "peculiarly essential" notion of "[t]he complete independence of the courts of justice," and "the right of the courts to pronounce legislative acts void, because contrary to the constitution." THE FEDERALIST No. 78, at 466-67 (C. Rossiter ed., 1961). Hamilton describes the judiciary as the branch "least dangerous to the political rights of the constitution," *id.* at 465-66, as well as "the weakest of the three departments." *Id.* at 465. Taken out of context, these remarks might well be construed to suggest that the Framers did not anticipate that the judiciary would play a significant role in the new scheme of government. Read *in* context, however, these remarks clearly suggest that

spurious assumption that democracy and majoritarianism truly are synonymous terms, Bickel's argument rests on the false premise that the Court itself is not in some sense of the term a majoritarian institution and that, therefore, any action it takes is contrary—or "counter"—to majoritarian principles. One must remember, however, that prior to taking their seats on the bench, Federal judges must first be nominated by a popularly elected and politically accountable President and confirmed by a majority of the popularly elected and politically accountable members of the Senate following public—and increasingly politicized—confirmation hearings.[75] Moreover, Congress may remove Federal judges from the bench, since they "hold their Offices" not "for life" but only "during good Behaviour."[76] As a result, judges are ultimately accountable to the people through their elected representatives.

So while Federal judges may neither be directly elected by nor be held directly accountable to the people, there is at least some element of majoritarianism at work in the nomination-confirmation-impeachment process.[77] To be sure, the judiciary is less majoritarian in nature than some of the other institutions which form our government, but the judiciary is at least equally—if not more—majoritarian than other institutions, namely the multitude of administrative agencies which regulate with relative impunity.[78] Consequently, majority rule "is not a unitary concept" which can be invoked as the sole basis for "choos[ing] among" the various institutions.[79]

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the judiciary was regarded as the "weakest" and "least dangerous" precisely because the Framers recognized the fact that the other two Branches, due to the nature of—as well as their tendency to augment—their powers, would necessarily predominate.

75. Chemerinsky, *supra* note 39, at 82 (footnote omitted) ("Presidential appointments assure that the Court's ideology, over time, will reflect the general sentiments of the majority in society. . . . The Senate's rejection of almost twenty percent of nominees for the Supreme Court in American history has served as another majoritarian influence.").

76. U.S. CONST., art. III, § 1. *See* Nixon v. United States, 113 S. Ct. 732, 738-39 (1993) ("[J]udicial review [of the Senate's impeachment proceedings] would be inconsistent with the Framers' insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature. . . . Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers.").

77. *See* Chemerinsky, *supra* note 39, at 82.

78. *Id.* at 83.

79. *Id.* at 82, 83; *id.* at 82 ("Majority rule is . . . a continuum of arrangements ranging from constant direct democracy to officials who are only indirectly electorally accountable. The House of Representatives, the Senate, the President, cabinet agencies, and federal judges all occupy various points on this continuum [.]").

Second, even assuming that the Court possesses none of the attributes which typify our majoritarian institutions, majoritarian principles are simply not compromised when the Court invalidates a law which, though duly enacted by a majority of Congress and approved by the President, is not sanctioned by the Constitution. In fact, a judicial veto under such circumstances is not only consistent with majoritarian principles but dictated by such principles. This is true because although a duly enacted law embodies the will of a majority of representatives on a given matter at a *given* time, the Constitution reflects the consent of the people regarding the manner in which they elected to be governed with respect to all matters *at all times.* Because statutes derive their legitimacy only from the Constitution,[80] it is the duty of judges to "adhere" to the Constitution and "disregard" those statutes which do not conform to its requirements.[81]

The exercise of this duty, then, does not presume that the power of the courts is "superior" to the power of Congress.[82] Indeed, the propriety of the judicial veto is based on the fact that "the power of the people is superior to both; and that where the will of the legislature declared in the statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former."[83] As a consequence, when a majority of the Court invalidates a legislative determination because that determination contravenes the Constitution, it is untenable to maintain that that action is contrary—or "counter"—to democracy and majoritarian principles.[84]

To be sure, underlying the determination that the judicial veto is consistent with majoritarian principles and not inimical to a democratic form of government is the assumption that when the Court invalidates (or for that matter sustains) a legislative act, it has correctly interpreted the Constitution. As a result, the con-

80. THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (C. Rossiter ed., 1961) ("A constitution is in fact, and must be, regarded by the judges as a fundamental law.").

81. *Id.* at 468; *id.* ("the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority").

82. *See id.*

83. *Id.*

84. *See, e.g.*, Macedo in ECONOMIC LIBERTIES, *supra* note 38, at 126 ("Judicial review is not an anomalous blotch on a democratic scheme of government. Contrary to what the conservatives hold, judicial review is an integral part of a scheme of constitutionally limited government"); Chemerinsky, *supra* note 39, at 76 ("judicial review is democratic when it reinforces the fundamental rights that are part of American democracy").

clusion that the judicial veto is consistent with majoritarian principles begs to some extent the question of what is the correct way to interpret various provisions of the Constitution. However, because the Court's interpretation of the Constitution is so heavily influenced by its theory of majoritarian democracy, it is impossible to divorce completely the Court's interpretation of the Constitution from both its flawed theory of majoritarian democracy and the misguided doctrines—such as the "presumption of constitutionality" doctrine—which stem from its theory. Moreover, if one accepts that the judicial veto is inherently "undemocratic" and "a counter-majoritarian force," then it must also be accepted that *any* exercise by the Court of its veto power is suspect, because every law that the Court construes had to be approved by a majority of the popularly elected members of Congress and signed into law by a popularly elected President.

Third, in stark contrast to the Court's discomfort with the notion that a body of unelected and life-tenured Justices is empowered to inhibit the will of a majority of the people's representatives, the Framers believed that vesting the Justices with permanent tenure was "an indispensable ingredient" to both an independent judiciary and the preservation of the constitutional system they established.[85] Insulating judges from political influences and considerations would be the only way the judiciary could have its desired effect of countering constitutionally forbidden, but majority-driven, exertions of power:

> This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. . . . [I]t is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the consti-

85. THE FEDERALIST No. 78, at 466 (Alexander Hamiltion) (C. Rossiter ed., 1961); *id.* ("[T]he general liberty of the people can never be endangered from [the judiciary]: I mean, so long as the judiciary remains truly distinct from both the legislative and executive. . . . [Liberty] would have every thing to fear from [the judiciary's] union with either of the other departments . . . . as nothing can contribute so much to its firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and in a great measure as the citadel of the public justice and the public security.").

> tution, where legislative invasions of it had been instigated by the major voice of the community.[86]

Clearly, then, the Framers were attentive to the harm which Congress could, if left unchecked, inflict upon individual rights and the constitutional structure.

Moreover, it is equally clear that the Framers did not regard the judicial invalidation of legislative acts as so much a *power* on the part of the Court—let alone a usurpation of power—as a *duty* to effectuate the will of the people as expressed in the Constitution.[87] Rather than being inimical to democracy and majoritarian principles, then, the judicial veto is simply the last in a series of related, comprehensive measures the Framers designed to deter or invalidate unconstitutional and improvident attempts at power by Congress.

In addition, as a practical matter, the "decent respect due" Congress and its determination regarding the constitutionality of the laws it passes does not accord with practice because Congress does not always take into account—and sometimes simply disregards—whether a particular law in consistent with the Constitution.[88] Nor does the notion of "respect due" Congress square with common sense, since the Court's "presumption of constitutionality" doctrine does not appear to consider the circumstance where a two-thirds majority of both the House and the Senate is forced to override a Presidential veto exercised on constitutional grounds. In that event, the Court would face a circumstance in which two equal and coordinate Branches have opposing views on the validity of a legislative enactment and would be hard-

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86. *Id.* at 469-70.

87. *See supra* notes 55, 69-72, 80-86, and accompanying text.

88. *See* Reynolds-*Challenge*, *supra* note 36, at 19-20 ("[W]e find Congress repeatedly enacting whatever compromise can be fashioned to appease the most vocal special interest groups on Capitol Hill, while giving little or no consideration to the most elementary constitutional questions. . . . One [illustration of this] . . . was the proposed Equal Rights Amendment at the time of its reintroduction in 1982. When one of the principal sponsors . . . appeared before [a committee] and was repeatedly asked about the constitutional effects of the Amendment, his testimony was that he was not at all sure about the effects, but that we have a Supreme Court to settle such questions."); Chemerinsky, *supra* note 39, at 97-98 ("Was the almost unanimous Senate condemnation of the Supreme Court's decision in the flag burning case [Texas v. Johnson, 491 U.S. 397 (1989)] the result of the Senators' own constitutional analysis?"); *see also War Powers Act Called Unlawful, But Not Apt To Go*, WASH. TIMES, May 4, 1993, at A6, col. 5 ("Most lawmakers agree that the War Powers Resolution is an unconstitutional infringement on a president's authority, says Sen. John Warner . . . . 'But it's on the books and it gives Congress a foothold we're not likely to yield up.' "); *cf.* S. REP. No. 711, 75th Cong., 1st Sess. 18 (1937) ("When [President Roosevelt] attached his signature to the Railroad Pension Act, [he] was quoted as having expressed his personal doubt as to the constitutionality of the measure.").

pressed to justify according greater "respect" to one or the other.[89]

Yet if the Court were to differentiate between a law which has the support of both Congress and the President and a law which has the support of only Congress and attach a lesser weight to the presumption—or perhaps no presumption at all—in the latter case, this course would be open to objection. A law garners no additional constitutional strength simply by virtue of the fact that it was supported by *both* Congress and the President. Nor, for that matter, is the constitutional validity of a law proportional to the level of support it attained in Congress. A law passed by a unanimous vote is no more constitutionally legitimate than a law which was opposed by 49 Senators and 217 Representatives. This is so because the words of the Constitution are fixed and because the interpretation of the Constitution, as well as the determination of whether laws made in pursuance thereof conform to its requirements, "is the proper and peculiar province of the courts,"[90] not of Congress or the President.

D. *The Doctrine is Antithetical to the Text and Structure of the Constitution*

A fourth difficulty with the judicially invented "presumption of constitutionality" doctrine is that not only does it fail to comport with the nature of written constitutions generally, but it also simply fails to comport with the structure and design of the express provisions in the United States Constitution specifically.

1. *Article I and the Tenth Amendment*

With respect to the ends of delegated power, James Madison provided assurances that the powers granted to Congress were "few and defined,"[91] and that the authority of Congress extended to "certain enumerated objects only."[92] These certain enumerated objects did not, of course, contemplate the exercise of powers which touched only upon the internal affairs of the States. Rather, Congress was delegated the power to act only with respect to matters which by their nature were national in scope.[93]

89. *See supra* note 13.
90. THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (C. Rossiter ed., 1961).
91. THE FEDERALIST No. 45, at 292 (C. Rossiter ed., 1961).
92. *Id.* No. 39, at 245.
93. *See id.* No. 14, at 102 (James Madison); *see also id.* No. 17, at 118 (Alexander Hamilton).

The States were to retain control over those objects which were not "*exclusively* delegated to the United States."[94]

The Framers deemed this notion of power divided between sovereigns, *i.e.*, federalism, much like the concept of the separation of powers, to be an integral component of both individual liberty and effective government.[95] There were, of course, a few delegates who were apprehensive that, when coupled with the more general power to adopt "all Laws which shall be necessary and proper for carrying into Execution" the specified powers,[96] the nature of the express powers conferred on the national government would render it too powerful.[97] One delegate observed that the national government had been granted powers which appeared to be "coextensive with every possible object of human legislation."[98] In fact, so strong were the objections of three delegates to the powers conferred on the national government in the proposed plan that, following the rejection of a proposal to afford the States an opportunity to offer amendments to the pro-

94. *Id.* No. 32, at 198 (Alexander Hamilton) (emphasis added); *see also id.* No. 83, at 497 (Alexander Hamilton) (the "specification of particulars evidently excludes all pretension to a general legislative authority; because an affirmative grant of special powers would be absurd as well as useless, if a general authority was intended"); *id.* No. 45, at 292-93 (James Madison) ("Those [powers] which are to remain in the state governments are numerous and indefinite. . . . The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the state."). *Cf.* 2 ELLIOT'S DEBATES, *supra* note 21, at 199 (remarks of Gov. Huntingdon during Debates in the Convention of the State of Connecticut) ("While I have attended in Congress, I have observed that the members were quite strenuous advocates for the rights of their respective states, as for those of the Union. I doubt not but that this will continue to be the case; and hence I infer that the general government will not have the disposition to encroach upon the states.").

95. *See, e.g.*, 1 ELLIOT'S DEBATES, *supra* note 21, at 467 (remarks of James Wilson) ("The state governments are necessary and valuable. No liberty can be obtained without them."); *see also* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (citations and internal quotation marks omitted) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power. The constitutionally mandated balance of power between the States and the Federal Government was adopted to ensure the protection of our fundamental liberties. . . . [A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

96. U.S. CONST., art I., § 8, Cl. 18.

97. *See, e.g.*, 1 ELLIOT'S DEBATES, *supra* note 21, at 496 (objections of George Mason) ("Under their own construction of the [Necessary and Proper Clause], the Congress may . . . extend their power as far as they shall think proper; so that the state legislatures have no security for the powers now presumed to remain to them."). Unfortunately, this prediction has proved to be all too accurate. *See* New York v. United States, 112 S. Ct. 2408, 2419 (1992) ("The Court's broad construction of Congress' power under the Commerce and Spending Clauses has of course been guided, as it has with respect to Congress' power generally, by the Constitution's Necessary and Proper Clause.").

98. 1 ELLIOT'S DEBATES, *supra* note 21, at 503 (Letter from the Hon. Richard Henry Lee to Edmund Randolph, Governor of Virginia).

posed constitution which would be considered by a second convention, they announced that they would be unable to give their assent to the plan as proposed and refused to sign the document.[99] Nonetheless, most other delegates signed the proposed plan and submitted it to the States for ratification.

After nearly a year of protracted debate, eleven of the thirteen States (all except North Carolina and Rhode Island) ratified the Constitution. Not surprisingly, however, the ratifying conventions of the States had numerous reservations about the proposed Constitution, with several conventions expressing the view that "certain amendments and alterations" should be made to the Constitution in order to "remove the fears, and quiet the apprehensions, of many of the good people" of the States, not the least of which was a provision which "explicitly declared that all powers not expressly delegated by the [proposed constitution] are reserved to the several states, to be by them exercised."[100] As explained in more detail below, the First Congress ultimately acceded to this plea and adopted a Bill of Rights, the Tenth Amendment of which embraces this principle of federalism with its proviso that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[101]

To the dismay of many, not the least of whom would surely be the Framers, the Tenth Amendment, as well as the principle underlying it, has with rare exception been rendered a dead letter. As the Court once stated, the Tenth Amendment "states but a truism that all is retained which has not been surrendered."[102] In addition, the Court concluded, "[t]here is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment."[103] Nor was there anything in the history of the Tenth Amendment to suggest "that its purpose was other than to allay

99. *See* 5 ELLIOT'S DEBATES-SUPPLEMENT, *supra* note 72, at 552-53 (Delegates Randolph, Mason and Gerry stating objections).

100. 1 ELLIOT'S DEBATES, *supra* note 21, at 322 (Massachusetts); *see also id.* at 326 (New Hampshire); *id.* at 327 (New York) ("that every power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the [Federal Government], remains to the people of the several states, or to the respective state governments, to whom they may have granted the same"); *id.* at 334 (Rhode Island).

101. U.S. CONST., amend. X.

102. United States v. Darby, 312 U.S. 100, 124 (1941).

103. *Id.*

fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers."[104] More recently, the Court explained that although the Tenth Amendment "restrains the power of Congress," this limit "is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology."[105] Instead, the Court asserted, the Tenth Amendment "confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States."[106]

While in theory the Court's logic is in some sense accurate, the Tenth Amendment is much more than either a mere truism or tautology. This can easily be demonstrated by resorting to a mathematical equation. If we assume that "X" equals all powers that can be exercised by both the State and Federal Governments, "Y" equals State powers, and "Z" equals Federal powers, then we are left with a formula whereby Y + Z = X. In the Court's opinion, "Y" is the equivalent of "X" - "Z". With "X" being a constant value (which it must be), it must necessarily be the case that as "Z" increases, "Y" will decrease by the same amount so that the equation remains in equilibrium. Consequently, this equation states "but a truism" that all of "X" which is not delegated to "Z" is reserved to "Y". The critical error made by the Court, however, is that it disregards the fact that the powers delegated to the Federal Government were "few and defined" and extended to "certain enumerated objects only." These powers embraced only a narrow and fixed spectrum. As a result, rather than simply embracing only those powers which Congress has either not been delegated or elected not to exercise, the residuum of powers reserved to the States ("Y") encompass a "numerous" body of powers, powers which cannot be assumed by—or given up to[107]—the Federal Government simply by virtue of its decision to exercise them.

However, as we have seen—and as Madison warned—Congress has, with a wink and a nod from the Court, "every where extend[ed] the sphere of its activity, and draw[n] all power into its

104. *Id.*
105. New York v. United States, 112 S. Ct. 2408, 2418 (1992).
106. *Id.*
107. *Id.* at 2431 ("Where Congress exceeds its authority relative to the States . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials.").

impetuous vortex."[108] Due to its extraordinarily broad construction of the powers that the Framers did expressly confer on the Federal Government, the Court has permitted Congress to exercise powers that the Framers did not delegate to that body and that accordingly were deemed to be reserved to the States. Incredibly, the Court has even conceded this much itself:

> The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities.[109]

Inasmuch as the Court admits, then, that some of the activities in which Congress engages, particularly those relating to its commerce[110] and spending powers,[111] would be "unimaginable" to the Framers, it is therefore unnecessary to establish that the Tenth Amendment has been plundered by virtue of the Court's willingness to accede to Congress's inexcusable transgression of State sovereignty. Rather, the only point to be made is that while it is far too late in the day to restore fully the balance of power that the Framers imagined they had provided, the Court should, particularly in light of its unequivocal admission, decline to continue to acquiesce in Congress's attempts to claim and exercise more power than it was granted.[112] One way to remedy this is to abrogate the "presumption of constitutionality" doctrine and place the burden squarely on Congress to prove that a power it

108. THE FEDERALIST No. 48, at 309 (C. Rossiter ed., 1961).

109. New York v. United States, 112 S. Ct. 2408, 2418 (1992); *see* Rehnquist-*Political Philosophy*, *supra* note 41, at 257-58.

110. *See* New York v. United States, 112 S. Ct. 2408, 2418-19 (1992) (citations omitted) ("The volume of interstate commerce and the range of commonly accepted objects of government regulation have . . . expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them.").

111. *Compare* South Dakota v. Dole, 483 U.S. 203, 207 (1987) (upholding statute authorizing the withholding of Federal highway funds from States which allow individuals under the age of 21 to purchase or possess in public alcoholic beverages) ("objectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained through the use of the spending power") (citation omitted) *with* United States v. Butler, 297 U.S. 1, 75 (1936) ("If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of § 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states.").

112. *Cf.* BERGER-JUDICIARY, *supra* note 5, at 352 ("Usurpation—the exercise of power not granted—is not legitimated by repetition.").

desires to exercise is clearly within the powers expressly assigned to it by the Framers and the ratifying States.

2. *The Doctrine Has Rendered Congress Essentially Omnipotent with Respect to the Selection of Means*

Perhaps the most significant flaw in the "presumption of constitutionality" doctrine is its permissiveness. As applied by the Court, the doctrine allows Congress to employ virtually any means it desires to effectuate a granted power. As the Court noted long ago, the "power [to regulate commerce], like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[113] And only when a legislative enactment implicates one of the specific guarantees of the first eight Amendments may there be a "narrower scope for operation of the presumption of constitutionality."[114] If, however, legislation does not implicate one of the specific guarantees, then the strength of the "presumption of constitutionality" is at its apex.

To be sure, the Court does evaluate under at least a rational basis standard all means adopted by Congress to effectuate a legitimate end. As we have seen, however, the Court's rational basis standard in its due process analysis has not resulted in a single invalidation of an economic or social regulation since the *Lochner* era. Consequently, such a "rigorous" level of review can hardly be deemed adequate to safeguard individual rights fully. More important, though, the "presumption of constitutionality" itself (as applied to the means Congress adopts to achieve its goals), as well as the "narrower scope" of the "presumption" as applied to legislation implicating constitutional guarantees, both misconstrues the Necessary and Proper Clause and is contrary to the Framers' and the First Congress's understanding of the nature of the Bill of Rights.

a. *Necessary and Proper Clause*

The Necessary and Proper Clause provides sensibly enough that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution"[115] the powers expressly granted. Nonetheless, the addition of this

113. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).
114. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
115. U.S. CONST, art. I, § 8, Cl. 18.

Clause created considerable, and justified, anxiety for some of the Framers.[116] It is, of course, quite correct that if the Framers failed to include a provision expressly granting to Congress the authority to enact those laws which were "requisite" or "necessary," then the powers which *were* expressly granted to Congress would "by unavoidable implication" include such authority.[117]

The Framers did not provide for a provision expressly granting to Congress the authority to enact those laws which were "necessary"; instead, they provided for a provision expressly granting to Congress the authority to enact those laws which were "necessary and proper." The use of the conjunctive "and" rather than the disjunctive "or" compels the result that all means adopted by Congress must satisfy *both* standards. Of course, were "necessary" and "proper" synonymous terms, then it would necessarily follow that any means which is "necessary" is also "proper." But because "necessary" and "proper" are *not* synonymous terms, and because it cannot be supposed that the Framers would have employed both terms had they thought they were synonymous, it does not necessarily follow that all means which are "necessary," *i.e.*, "conducive to the exercise of a power granted by the constitution,"[118] are "proper" as well. Moreover, while the term "necessary" sug-

116. THE FEDERALIST No. 33, at 201-02 (Alexander Hamilton) (C. Rossiter ed., 1961) ("The[ ] [Necessary and Proper Clause and the Supremacy Clause] have been the sources of much virulent invective and petulant declamation against the proposed constitution . . . as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated—as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane."). *See also* 5 ELLIOT'S DEBATES-SUPPLEMENT, *supra* note 72, at 553 (Elbridge Gerry stating that he could "get over all" his objections to the proposed Constitution "if the rights of the citizens were not rendered insecure" by, *inter alia*, "the general power of the legislature to make what laws they may please to call 'necessary and proper' "); discussion, *supra* note 97.

117. *See* THE FEDERALIST No. 44, at 285 (James Madison) (C. Rossiter ed., 1961) ("Had the Constitution been silent [with respect to this power], there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it, is included.").

118. United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1510, 1511 (1976) ("of, relating to, or having the character of something that is logically required"; "that cannot be done without").

gests a quantitative measurement,[119] the term "proper" suggests in many respects a measurement which is qualitative in nature.[120]

With respect to the "necessary" requirement, Chief Justice Marshall was on the mark when, in the first case expounding upon the Necessary and Proper Clause, he observed that "it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power."[121] Significantly, however, Marshall did not advert to the "proper" qualifier. Simply put, the mere fact that any one of a number of possible means might, with varying degrees of success, be "conducive" to a given end has no bearing on the issue of whether the means selected is "proper."

In the seminal case of *McCulloch v. Maryland*,[122] however, Marshall opined at great length on the proper understanding of the Necessary and Proper Clause and explained that "the only possible effect" of the term "proper" was "to *qualify*" the meaning given to the term "necessary."[123] As for the sense that was to be attributed to the Necessary and Proper Clause as a whole, Marshall fashioned a construction that endures to this day:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.[124]

With respect to the quantitative aspect of legislation, Marshall resolved that as long as a law "is really calculated to effect any of the objects entrusted to the government," the Court should not "pass the line which circumscribes the judicial department" and "tread on legislative ground" by attempting to undertake an inquiry

119. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819) ("The word 'necessary' . . . has not a fixed character peculiar to itself. It admits of all degrees of comparisons; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary.").

120. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1817 (1976) (defining "proper" to mean, *inter alia*, "sanctioned as according with equity, justice, ethics, or rationale"; "socially appropriate: according with established traditions and feelings of rightness and appropriateness").

121. United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805).

122. 17 U.S. (4 Wheat.) 316 (1819).

123. *Id.* at 419 (emphasis added).

124. *Id.* at 421; *see also* New York v. United States, 112 S. Ct. 2408, 2419 (1992) (citing *McCulloch* for its construction of the Clause).

"into the degree of [the law's] necessity."[125] Assuming that a law was conducive to an end entrusted to Congress, Marshall stated that the Court would invalidate a legislative measure adopted by Congress only if it is "prohibited" by the Constitution.[126]

The "qualification" to Congress's implied powers to which Marshall alluded, then, is solely a determination of whether a given measure is prohibited by the Constitution, rather than a determination of whether that same measure is in fact authorized by the Constitution, *i.e.*, whether it can honestly be adjudged to be both "necessary" *and* "proper." Under this approach, if the measure is not prohibited by a specific guarantee in the Constitution, then redress may be obtained only from the legislature. In attempting to alleviate the fears of some delegates and States with regard to the Necessary and Proper Clause, however, Madison announced that, should Congress "misconstrue" the Clause, "the success of the usurpation" would "in the first instance . . . depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts."[127] Only "in the last resort," Madison continued, would a remedy be "obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers."[128]

Significantly, at the time Madison composed these words, the Constitution did not contain the Bill of Rights, the guarantees of which could be read into the Necessary and Proper Clause. Consequently, for Congress to "usurp" its power and "misconstrue" the Clause, Congress would have had to adopt measures which implicated only the Clause itself. By suggesting that the courts would, "in the first instance" and without the benefit of textually based proscriptions, thwart a legislative "usurpation" of power, Madison necessarily contemplated that the Necessary and Proper Clause would serve as a substantive restraint upon the exercise of Congress's power.[129]

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125. 17 U.S. (4 Wheat.) at 423.

126. *Id.*

127. THE FEDERALIST No. 44, at 286 (C. Rossiter ed., 1961).

128. *Id.*

129. *See* Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 419 (E. Hickok, Jr. ed., 1991) [hereinafter HICKOK-BILL OF RIGHTS].

> Madison demonstrated that to read these provisions to allow the measure like the Sedition Act [of 1798] would render the Constitution's specific enumeration of federal powers quite illusory: "It must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers."

Congress and the States did, of course, ultimately adopt and ratify the Bill of Rights, the few specific guarantees of which the Court has staked out as a boundary which Congress may not transgress in the exercise of its power. Admittedly, if one accepts the notion that, except to the extent that the few specific guarantees in the Constitution provide otherwise, the implied powers embodied in the Necessary and Proper Clause embrace the universe of all conceivable means which to any degree further the objects entrusted to the national government, then it would follow that Congress has not "misconstrued" the Clause when it adopts measures which do not implicate these scant guarantees. As a result, the Court would, given this construction of the Necessary and Proper Clause, have no occasion to invalidate such measures. If, on the other hand, it can be established that the sum of (1) the implied powers embodied in the Clause and (2) the powers prohibited (or the few specific guarantees provided for) in the Constitution do not constitute the universe of all conceivable means which might to any degree further the objects entrusted to Congress, then it follows that there is a certain quantum of power which, though not prohibited by a specific guarantee in the Constitution, is not both "necessary" *and* "proper."

To the extent, then, that Congress attempts to exercise any portion of this quantum of power, it will have necessarily "misconstrued" the Necessary and Proper Clause. As a consequence, should the Executive Branch either acquiesce or participate in this "usurpation," the duty to nullify the attempted exercise of unauthorized power belongs, "in the first instance," to the Court. The paramount question is, of course, whether there is a certain quantum of power which, though not prohibited by a specific guarantee in the Constitution, the Framers did not intend to be exercised by Congress pursuant to the Necessary and Proper Clause, and, more important, how these powers are to be identified so that they may be circumscribed.

The evidence is compelling, if not conclusive, that the Court's practice of defining the implied powers of Congress negatively (*i.e.*, all but which is prohibited by a specific guarantee in the Constitution) rather than positively (*i.e.*, that which is in fact au-

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Only in the second section of his analysis did Madison turn to the First Amendment. For Madison, the discussion of the First Amendment merely supplemented his main point, that Congress lacked the delegated power to regulate subversive speech.

Id. at 426-27.

thorized by the Necessary and Proper Clause) is inimical to the Framers' understanding and intention that certain powers, though not specifically proscribed, were not to be exercised by Congress. This understanding and intention is explicitly and unmistakably made clear in the debate surrounding the want of and need for a bill of rights, a debate which did not commence until the last week of the Constitutional Convention and which did not come to fruition until after the Constitution had been submitted to and ratified by the States and after the First Congress had convened.

The first convention delegate to suggest that a bill of rights be incorporated into the Constitution was George Mason, who stated that "[i]t would give great quiet to the people."[130] Nonetheless, a proposal to draw up a bill of rights was rejected, as were two subsequent attempts to add particular provisions, one of which would have declared that "the liberty of the press should be inviolably observed."[131] However, because it was observed that "[t]he power of Congress d[id] not extend to the press," the provision was rejected.[132] One final proposal at the close of the convention which would have allowed the States to offer amendments to be considered by a second convention was also rejected.[133]

In an attempt to allay the fears of those who objected to the proposed Constitution, Alexander Hamilton, James Madison, and John Jay authored a series of authoritative essays, known collectively as *The Federalist Papers*, which both attempted to rationalize various provisions of the proposed Constitution and articulated the need for the formation of the Federal Government. One essay addressed the significant objection that the proposed Constitution did not include a specific declaration of rights. In that essay, Hamilton not only asserted that a bill of

130. 5 ELLIOT'S DEBATES-SUPPLEMENT, *supra* note 72, at 538.

131. *Id.* at 545; *see also id.* at 550 (provision declaring that "a trial by jury shall be preserved as usual in civil cases" was rejected on the grounds, *inter alia*, that "such a clause in the Constitution would be pregnant with embarrassments").

132. *Id.* at 545.

133. *See id.* at 552 (Delegate Randolph "animadverting on the indefinite and dangerous power given by the Constitution to Congress" and supporting his proposition that "amendments to the plan might be offered by the state conventions, which should be submitted to, and finally decided on by, another General Convention"); *id.* at 553 (Delegates Mason and Gerry concurring in Randolph's view).

rights was "unnecessary,"[134] but cautioned that a bill of rights would be "dangerous"[135] as well:

> [A bill of rights] would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?[136]

Despite this effort to explain away the need for a bill of rights, the States were unswayed by the rhetoric. As a result, most of the States which ratified the proposed Constitution took the initiative to append to their formal ratifications various recommendations of changes, not the least of which was a declaration of rights. These declarations of rights incorporated, and in most cases surpassed, the specific rights now provided for in the Bill of Rights.[137] Nonetheless, the recommended changes were not made a part of the original Constitution, and their omission was the determining factor in the decision of two States, Rhode Island and North Carolina, to decline initially to ratify the proposed Constitution.[138]

Just as significant as the fact that the Constitution as adopted did not contain a bill of rights is the fact that the Article I powers of Congress as ratified in 1788 are precisely the same Article I powers that survive today. Since the defined and limited powers

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134. THE FEDERALIST No. 84, at 513 (C. Rossiter ed., 1961) ("[Bills of rights] have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations [.]"). *See also* 1 ELLIOT'S DEBATES, *supra* note 21, at 497-98 (John Jay, in an address to the people of New York on the proposed Constitution) ("We are told, among other strange things, that the liberty of the press is left insecure by the proposed Constitution; and yet that Constitution says neither more nor less about it than the Constitution of the state of New York does. . . . It is absurd to construe the silence of this, or of our own Constitution, relative to a great number of rights, into a total extinction of them. Silence and blank paper neither grant nor take away any thing.").

135. THE FEDERALIST No. 84, at 513 (C. Rossiter ed., 1961).

136. *Id.* at 513-14.

137. *See* 1 ELLIOT'S DEBATES, *supra* note 21, at 322-36 (Massachusetts, New Hampshire, Virginia, New York, North Carolina, Rhode Island).

138. *Id.* at 331-32 (resolution of North Carolina) ("*Resolved*, That a declaration of rights, asserting and securing from encroachments the great principles of civil and religious liberty, and the unalienable rights of the people, together with amendments to the most ambiguous and exceptionable parts of the said Constitution of government, ought to be laid before Congress, and the convention of the states that shall or may be called for the purpose of amending the said Constitution, for their consideration, previous to the ratification of the Constitution aforesaid, on the part of the state of North Carolina.").

of Congress have not been augmented via the amendment process, it necessarily follows that the nature and extent of the powers that the Framers intended for Congress to exercise in 1788 are the same powers to which Congress should be limited today. Had the Bill of Rights not been adopted though, it is incontrovertibly clear that, in light of the Court's theory of majoritarianism, its "presumption of constitutionality" doctrine, its concomitant indifference to Congress's usurpation of power, and its negative rather than positive construction of the Necessary and Proper Clause, were the Court presented with a challenge to a law implicating one of the specific guarantees contained in the first eight Amendments, the Court would have no choice but to uphold the law as a "necessary and proper" measure within the "discretion" of Congress to adopt. Otherwise, since the law would not be "prohibited" by a specific provision of the Constitution, the Court would be vulnerable to the now familiar charge that it had "pass[ed] the line which circumscribes the judicial department" and "tread[ed] on legislative ground" by undertaking an inquiry "into the degree of [the law's] necessity."[139]

Far from being "unnecessary," then, the Bill of Rights has proved to be an indispensable element of individual liberty. It cannot seriously be doubted that, given the Court's negative construction of the Constitution, all the specific guarantees now provided for in the Bill of Rights would be insecure and subject to the "reasonable" or "rational" whims of an impassioned majority. James Madison, who had at one time disdained the idea of a bill of rights himself, admitted that the argument that a bill of rights was unnecessary because Congress's powers are "enumerated" was "not entirely without foundation."[140] Nonetheless, Madison stated, the argument was "not conclusive to the extent which has been supposed."[141] He observed that even if Congress were to keep within the limits of its Article I powers, Congress "has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent."[142] The discretionary powers of which Madison spoke were, of course, those found in the Necessary and Proper Clause.[143] Madison suggested that it would at least occasionally be the case that laws "considered necessary and

139. *See supra* note 125 and accompanying text.
140. 1 ANNALS OF CONG. 438 (J. Gales ed. 1789) [hereinafter ANNALS].
141. *Id.*
142. *Id.*
143. *Id.*

proper by Congress" would in fact be "neither necessary nor proper,"[144] and offered an example to prove his case:

> [Congress] has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of [Congress]: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.[145]

The Fourth Amendment, of course, guards against the particular abuse of power which Madison described. However, had those Federalists who objected to a bill of rights prevailed, and had Congress actually adopted the measure described by Madison, the Court (were it to decide to invalidate the measure) would be incapable of invoking the Fourth Amendment—or *any other* provision prohibiting the exercise of such power—as textual support for its decision.

The same rationale, of course, applies equally well to the other guarantees embodied in the first eight Amendments. Had none of these "unnecessary" guarantees been adopted, the Court would have been denied the benefit of any textual guidance whatsoever. But as one constitutional scholar has noted, "in the absence of a bill of rights, a Federalist who believed in the judicial protection of rights would have had to envision enforcing only . . . unenumerated rights."[146] And it is clear from the debates that the Federalists did not oppose a bill of rights because they were opposed to liberty and individual rights, but because, *inter alia,* they believed that both liberty and individual rights were adequately safeguarded by the enumeration of delegated powers. As noted previously, however, the scope of these delegated powers has gone far beyond what the Framers intended.

In light of the Court's sanction of this usurpation of power, it is abundantly clear that the suspicions of the proponents of a bill of rights that "more than delegated-powers provisions were needed to constrain the powers of government" have been confirmed.[147]

144. *Id.*

145. *Id.*

146. Randy Barnett, *James Madison's Ninth Amendment,* in 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 1, 20 (R. Barnett ed., 1989) [hereinafter 1 BARNETT-RETAINED].

147. *Id.* at 19.

Moreover, to effectuate the intent of the Framers and safeguard the guarantees which were believed to be "unnecessary" and are now protected by the first eight Amendments, the Court would be forced to read into the Necessary and Proper Clause these same guarantees. Incredibly, the Court, in one of its landmark cases, intimated that it had the uncanny ability to do just that. In the *Legal Tender Cases*,[148] the Court reflected on the nature of the Amendments:

> Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.[149]

The Court did not reveal, however, what technique would have enabled it to determine that the exercise of powers implicating the guarantees specifically mentioned "cannot be said to have been necessary and proper" if in fact those guarantees had not been specifically provided for in the Bill of Rights. The advantage of hindsight no doubt lessened the need for analytical adeptness.

Surely, however, Congress could quite easily demonstrate that the adoption of a measure implicating one of these guarantees advances to at least some degree a legitimate legislative end.[150] An attempt by the Court to undertake an inquiry "into the degree of the law's necessity," though, would constitute an encroachment upon "legislative ground." Accordingly, if the Court were to invalidate the measure as an improper exercise of power, it would be obliged, in the absence of a textual guidepost such as the Bill of Rights, to select arbitrarily those guarantees which a majority of its members were willing to read into the Necessary and Proper Clause. Though such a technique would likely result in the preservation of some of the guarantees now embodied in the Bill of Rights (and possibly a few additional ones), it is both improbable that all the specific guarantees that the Framers *did* provide for would be preserved and inconceivable that the whole

148. 79 U.S. (12 Wall.) 457 (1870).

149. *Id.* at 535.

150. *See* ANNALS, *supra* note 140, at 729-30 (debate in First Congress regarding amendment declaring that "no religion shall be established by law, nor shall the equal rights of conscience be infringed").

host of rights "retained" in the Ninth Amendment would be safeguarded.

Further, had none of the "unnecessary" guarantees in the Bill of Rights been adopted, the rule that a "narrower scope" for the operation of the presumption of constitutionality doctrine applies when a legislative enactment implicates one of the specific guarantees would be wholly inapplicable. By definition, then, the strength of the "presumption" would be the same for each act of Congress. In addition, although it is true that the Court does evaluate under at least a rational basis standard all means which are adopted by Congress to effectuate a legitimate end, the record establishes that this standard of review is applied so leniently that it can hardly be deemed adequate to safeguard individual rights. Assuming, then, that the Bill of Rights had not been adopted, it is plain to see that, absent a disposition on the part of the Court to read into the Necessary and Proper Clause an arbitrary selection of guarantees which a majority of its members deemed worthy of protection, the "presumption of constitutionality" doctrine would have tolerated an inordinate amount of power—and a corresponding curtailment of liberty—by Congress, the exercise of which would have been even more "unimaginable" to the Framers than that which the Court has heretofore condoned.

b. *The Ninth Amendment*

Of course, it may be argued that, with respect to the specific guarantees that the Framers did provide for in the first eight Amendments, the Court has, albeit with less enthusiasm than some had hoped, preserved individual liberty within the context of these Amendments, and that if additional barriers to the exercise of power by Congress are indeed desired, then the people may avail themselves of the amendment process expressly provided for in the Constitution.[151] Unfortunately, by confining it-

151. *See, e.g.*, BERGER-JUDICIARY, *supra* note 5, at 318 ("[The] Article V [amendment process] constitutes the *exclusive* medium of change, under the long-standing maxim that to name a particular mode is to exclude all others. . . . Because arguments to the contrary are couched obliquely—for example, 'each generation of citizens must in a very real sense interpret the words of the Framers to create its own Constitution'—one is apt to overlook that these arguments are for 'change' outside Article V, by the judicial 'interpreters' rather than the people. Libertarians, in short, would read the exclusivity of Article V out of the Constitution and cede to the Court a power that is to be exercised only by the people, and then only in accordance with its terms. The 'shackles' from which libertarians would free us had the sanction of the people expressed through their State con-

self to the specific guarantees of the first eight Amendments, the Court has eviscerated the Ninth Amendment and validated the fears of those who objected to a bill of rights on the ground that, since a comprehensive enumeration of rights was not possible, the addition of a bill of rights containing only a partial enumeration of rights would be more dangerous than the omission of a bill of rights altogether.[152]

Madison characterized as "one of the most plausible arguments" he had ever heard the objection that a partial enumeration of rights "would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure."[153] Despite this, Madison believed that such a result could be "guarded against"[154] and formulated a provision to ensure that the unenumerated rights would not be rendered insecure:

> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[155]

Subsequently, a House Committee, composed of a single member of Congress from each of the eleven States, was ordered to consider this provision, as well as the other amendments "which ha[d] occurred" to Madison,[156] and report back to the House. Some three weeks later, the entire House commenced debate on the amendments as proposed by the Committee, including the provision noted above, the language of which had been modified by the Committee to read:

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ventions, whereas judicial revision represents only the will of judges who would circumvent submission of a change to the people.").

152. *See, e.g.*, ANNALS, *supra* note 140, at 442 (Rep. Jackson) ("There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the Government.").

153. *Id.* at 439.

154. *Id.*

155. *Id.* at 435.

156. *Id.* at 433.

> The enumeration in this Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.[157]

The amendment was approved by the House as modified and, along with sixteen other proposed amendments, forwarded to the Senate for its consideration. One month later, the Senate and the House finally reached agreement on twelve amendments,[158] the eleventh of which was approved in its present form:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.[159]

After formal approval by Congress, the States had an opportunity to debate and ratify the twelve amendments, and on December 15, 1791, Virginia became the eleventh State to ratify amendments three through twelve, those amendments now known as the Bill of Rights.[160]

Although the importance of the Ninth Amendment and its underlying rationale were not lost upon its Framers and ratifiers, the Ninth Amendment was, aside from a few fleeting references to it, ignored by the Court for more than 170 years until it was revived, albeit in inept fashion, in *Griswold v. Connecticut*.[161] However, this lack of interpretation by the Court was not unusual; it was not until early in this century that most of the specific guarantees in the Bill of Rights garnered much attention or respect themselves. Only in the last several decades have many of the specific guarantees attained their current prominence.

157. *Id.* at 754. The only objection to the amendment as proposed was that, since "the word 'disparage' was not of plain import," the word "impair" should be substituted in its place. *Id.* (Representative Gerry). The motion was not seconded, however, and there was no further debate about the proposed amendment.

158. *Id.* at 88.

159. U.S. CONST. amend. IX.

160. Because the first two proposed amendments were not ratified by the required number of States, they did not become a part of the Bill of Rights. The second proposed amendment, the Federal Pay Amendment, was, following ratification by Michigan as the 38th State to ratify, certified by the Archivist of the United States as the Twenty-Seventh Amendment to the Constitution. *See* 1992 U.S. CODE CONG. & ADMIN. NEWS F3, F6. This Amendment provides that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." *Id.* at F6.

161. 381 U.S. 479, 484 (1965) (Justice Douglas announcing that the various guarantees embodied in the Bill of Rights, including the Ninth Amendment, "have penumbras, formed by emanations from those guarantees that help give them life and substance"); *see also id.* at 487 (Goldberg, J., concurring) (writing separately "to emphasize the relevance of th[e] [Ninth] Amendment to the Court's holding").

The Ninth Amendment's rebirth, however, was short-lived. Aside from its appearance in post-*Griswold* right-to-privacy cases,[162] the Court has had no occasion to rely upon the Ninth Amendment, or the rationale upon which it is grounded, as a basis for a subsequent decision. In fact, no majority of the Court has ever assigned a definitive meaning to the 21 words contained in the Amendment.[163] As a consequence, the Ninth Amendment, much like the Privileges or Immunities Clause of the Fourteenth Amendment, is regarded as little more than a constitutional oddity which, given the more than 200 years that have transpired since its adoption, has little prospect of ever winning from the Court the respect it deserves.

It is incumbent upon the members of the Court to bear in mind, however, that the Ninth Amendment, like the rest of the Bill of Rights, was ratified by the States, was adopted as part of the Constitution, and *remains* a part of the Constitution to this day. As Chief Justice Marshall explained nearly 200 years ago: "It cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it."[164] And since there is nothing in the text of the Ninth Amendment to suggest, let alone require, that it was "intended to be without effect," it "must therefore [be] assume[d] that in the minds of the framers of the Ninth Amendment, other rights than those 'enumerated' did, and supposedly do now, exist."[165]

Unless the Ninth Amendment is repealed, then, it is the duty of the Court to give full effect to its terms. To be sure, the Ninth Amendment is an enigma of sorts, and it may be a formidable task—a task made no less difficult by the Court's 200-year virtual disregard of the provision—to assign to its text the precise meaning intended by its Framers. But if the Framers had intended to assign to the Court only those tasks which were rudimentary, it would either have so provided or employed throughout the Constitution language better suited for the occasion. Moreover, as

162. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152 (1973).

163. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 n.15 (1980) (opinion of Burger, C.J.) (plurality opinion characterizing the Ninth Amendment as "some sort of constitutional 'saving clause,' which, among other things, would serve to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined").

164. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

165. Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, in 1 Barnett-Retained, *supra* note 146, at 93, 96.

Justice Scalia has noted, "[i]t is rare . . . that even the most vague and general text cannot be given some precise, principled content—and that is indeed the essence of the judicial craft."[166]

Even if it is assumed that the Ninth Amendment is that "rare" case, the Court's duty to assign a meaning to its words is not abated. Instead, the Court must simply do the best that it can by resorting to those means it traditionally employs to interpret constitutional text. It would be—and has been—an unconscionable abdication of duty for the Court to refrain from giving meaning to the Ninth Amendment simply because it fears that the interpretation it finally settles upon may not in fact be the precise interpretation intended by the Framers.[167] The ultimate question is, of course, what meaning can and should the Court attribute to the Ninth Amendment?

In recent years, the meaning of the Ninth Amendment has been the focus of considerable debate,[168] not to mention a lively topic of discussion between Senators and Supreme Court nominees.[169] Not surprisingly, there are nearly as many theories about the elusive meaning of the Ninth Amendment as there are theorists. There is, however, general agreement among most scholars that the Ninth Amendment, just like the first eight Amendments, was intended to serve as a restraint only on the

166. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989); *see* Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, in 1 BARNETT-RETAINED, *supra* note 146, at 337, 339 ("There are two possible courses to follow. One is to throw up your hands and say that no action is possible, because you haven't been told exactly how to act. The other is to take the Ninth Amendment as a command to use any rational methods available to the art of law, and with these in hand to set out to discover what it is you are to protect."). *See also* Simeon C.R. McIntosh, *On Reading the Ninth Amendment: A Reply to Raoul Berger*, in 1 BARNETT-RETAINED, *supra* note 146, at 219, 232 ("The enumerated rights might seem to enjoy an obvious degree of determinacy, when compared to the unenumerated rights. However, such supposed determinacy can be quite deceiving. On the one hand, it may appear that the ninth amendment has introduced into American constitutional theory a hopeless indeterminacy without any criteria for its identification and application, but [it] holds no greater indeterminacy than any of its sister amendments[.]").

167. *But cf.* BORK-TEMPTING, *supra* note 5, at 39 ("that the ratifiers of the [Privileges or Immunities Clause] presumably meant something is no reason for a judge, who does not know what that something is, to make up and enforce a meaning that is something else").

168. *See generally, e.g.*, 1 BARNETT-RETAINED, *supra* note 146; 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (R. Barnett ed. 1993) [hereinafter 2 BARNETT-RETAINED]; *Symposium on Interpreting the Ninth Amendment*, 64 CHI. KENT L. REV. 37 (1988); United States Dep't of Justice, Office of Legal Policy, *Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and the Privileges or Immunities Clause* 8-27 (1987) [hereinafter DOJ-*Wrong Turns*].

169. *See generally* 2 BARNETT-RETAINED, *supra* note 168, App. B, at 427-508 (Testimony of Recent Supreme Court Nominees Concerning the Ninth Amendment, Unenumerated Rights and Natural Law).

exercise of power by the newly created and untested Federal Government.[170] It is at this point, however, that agreement ends. As one might expect, some commentators have suggested that, in light of the "incorporation" or "absorption" of most of the specific guarantees of the first eight Amendments into the Due Process Clause of the Fourteenth Amendment, it would be logical to "incorporate" or "absorb" the unenumerated Ninth Amendment rights as well.[171] As cogently explained by one commentator, however, it would be "nonsensical" to do so since the rights retained by virtue of the Ninth Amendment "are defined by the limits of the federal government's enumerated powers."[172] Moreover, the effect of such an application, the commentator noted, would be to "deprive [the States] of the bulk of their police powers."[173]

With respect to the meaning that can and should be attributed to, as well as the role that can and should be devised for, the Ninth Amendment, the views among commentators differ markedly. One of the more interesting positions is that of Raoul Berger. As an initial matter, Berger admits that the rights enumerated in the first eight Amendments *and* the unenumerated rights retained by the people "exist."[174] But since, in his opinion, a right "retained" by the people and not "described" "has not been embodied in the Constitution," only the specific

170. *See, e.g.*, Cooper in HICKOK-BILL OF RIGHTS, *supra* note 129, at 427; Barnett in 1 BARNETT-RETAINED, *supra* note 146, at 47; BORK-TEMPTING, *supra* note 5, at 93 ("As an original matter, of course, the Bill of Rights was entirely a set of guarantees directed against the power of the national government."); Norman Redlich, *Are There "Certain Rights . . . Retained by the People"?*, in 1 BARNETT-RETAINED, *supra* note 146, at 127, 141; Eugene M. Van Loan III, *Natural Rights and the Ninth Amendment*, in 1 BARNETT-RETAINED, *supra* note 146, at 149, 175-76; Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, in 1 BARNETT-RETAINED, *supra* note 146, at 291, 316; *but see* Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, in 1 BARNETT-RETAINED, *supra* note 146, at 243, 248 (contending that it is "analytically incorrect, and historically ironic, to view the ninth amendment as creating rights that may be asserted against either a state or the federal government, because the amendment neither creates new rights nor alters the status of pre-existing rights").

171. *See, e.g.*, Redlich in 1 BARNETT-RETAINED, *supra* note 170, at 141-42 ("The adoption of the Fourteenth Amendment in 1868 provides the constitutional basis for judicial enforcement of [the ninth] amendment[ ] against the states."); Van Loan in 1 BARNETT-RETAINED, *supra* note 170, at 176 ("There is no reason why the ninth amendment rights should not be subject to the same process of absorption.").

172. Cooper in HICKOK-BILL OF RIGHTS, *supra* note 129, at 427; Raoul Berger, *The Ninth Amendment*, in 1 BARNETT-RETAINED, *supra* note 146, at 191, 216 ("To transform [the Ninth Amendment] into an instrument of control over state government by recourse to the fourteenth amendment blatantly perverts the meaning of the framers, both in 1789 and in 1866.").

173. Cooper in HICKOK-BILL OF RIGHTS, *supra* note 129, at 427.

174. Berger in 1 BARNETT-RETAINED, *supra* note 172, at 212.

rights in the first eight Amendments are "constitutional" rights.[175] Since the "retained" rights are not "constitutional" rights, Berger necessarily concludes that the "retained" rights may not be enforced by the courts against either a State *or* the Federal Government.[176] Instead, the Ninth Amendment, in Berger's judgment, simply affirms the notion that rights "exist independently" of government and constitute an area of "no-power."[177] Though intriguing, Berger's view of the Ninth Amendment cannot withstand scrutiny.

First, Berger's judgment that the "retained" rights constitute an area of "no-power" is wholly incompatible with his conclusion that the courts are powerless to enforce the "retained" rights. Since the Framers intended the courts to be "an impenetrable bulwark against every assumption of power" by Congress[178] and designed them to keep Congress "within the limits assigned to [its] authority,"[179] it is untenable to assert that, should Congress in fact attempt to exercise a power which it was not granted, a judicial remedy is nonetheless unavailable. Absent a judicial remedy, one commentator has asked, "by what mechanism is [Congress] to be prevented from ignoring its constitutionally defined boundaries" if the Ninth Amendment is construed as "merely declar[ing] certain areas to be off limits for the exercise of the federal government's power"?[180] The answer is, of course, that the only "mechanism" would be Congress's self-restraint, which is no answer at all, because it would, in direct contravention of the Framers' intentions, permit Congress to become "the constitutional judge" of the scope of its powers under Article I.[181]

Berger's "no-power" theory is all the less plausible when it is recalled that the Framers did not purport to define the scope of the power of the Federal Government with reference to what it was *forbidden* to do, but rather with reference to what it was *permitted* to do. In other words, the powers of Congress were locked into place by virtue of the enumeration of its powers in Article I, and the addition of the Bill of Rights had no substantive effect (*i.e.*, no diminishing effect) on the scope of those powers. As a

175. *Id.*
176. *Id.*
177. *Id.* at 200.
178. ANNALS, *supra* note 140, at 439.
179. THE FEDERALIST No. 77, at 462 (Alexander Hamilton) (C. Rossiter ed., 1961).
180. Massey in 1 BARNETT-RETAINED, *supra* note 170, at 305.
181. THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (C. Rossiter ed., 1961).

consequence, had either no bill of rights or an exhaustive list of specific rights been provided, the scope of power which Congress was authorized to exercise would be the same.

As an example, assume for the sake of argument that the Framers had omitted the Free Press Clause from the First Amendment. The omission of this "described" right from the first eight Amendments would mean that it was absorbed into the unenumerated "retained" rights of the Ninth Amendment. It would have been unimaginable to the Framers that, because "no power [was] given [to Congress] by which restrictions [on the liberty of the press] may be imposed,"[182] the omission of the Free Press Clause from the First Amendment would or should be construed to translate into an implicit enlargement of the powers of Congress with respect to the press. But because under Berger's theory the "retained" rights are not "constitutional" rights, the Court would be powerless to enforce the "retained" right embodied in the Free Press Clause. Instead, the "existence" of this retained right would simply be an "affirmation" that it constitutes an area of "no-power." Absent a judicial remedy, though, this affirmation is wholly illusory, since Congress would be left free to ignore its "constitutionally defined boundaries" with impunity.

Similarly, it would have been unimaginable to the Framers that, since the addition of a bill of rights was "unnecessary" to begin with, the specific enumeration of one or more—or even all—of the "retained" rights would or should be construed as having a further diminishing effect upon the scope of Congress's powers.[183] Under Berger's theory, though, had the Framers "described" an additional right, the Court would be authorized to enforce that right against the Federal Government, since it would then be a "constitutional" right "embodied" in the Constitution. Ostensibly, the essence of Berger's theory—which resembles in large part the "substantive due process" theory of the Rehnquist Court—is that, rather than being a function of the powers "described" in Article I, the scope of Congress's power is a function of the specific prohibitions "described" in the first eight Amendments.[184]

182. *Id.* No. 84, at 513-14 (Alexander Hamilton).

183. *But see* Berger, *The Ninth Amendment: The Beckoning Mirage* in 2 BARNETT-RETAINED, *supra* note 168, at 308 ("Forming 'exceptions' to the delegated powers, [the first eight Amendments] diminished [those] powers.").

184. *See* Cooper in HICKOK-BILL OF RIGHTS, *supra* note 129, at 427 ("Modern judicial opinions dealing with alleged violations of individual rights by the federal government

Berger's theory reduces, then, to the argument that the failure of the Framers to "describe" all of the retained rights effectively renders the Court powerless to secure any of these rights. As noted earlier, those who opposed a bill of rights did so on the ground that a partial and incomplete enumeration of rights would result in the "dangerous" implication that the rights "which were not singled out" were intended to be "assigned into the hands" of the Federal Government, thereby rendering them "insecure." Berger's theory affirms that the fears expressed by those opposed to a bill of rights were wholly justified. It is nothing less than a complete disavowal of the intent of the Framers.

Second, Berger's judgment that the courts are not authorized to enforce the "retained" and unenumerated rights rests on the flawed premise that, since they were not described with specificity, the "retained" rights were not "embodied" in the Constitution. Berger concludes that a challenge to a legislative enactment on the ground that it infringes a "retained" right does not trigger Article III jurisdiction.[185] As support for his argument, Berger relies primarily, if not exclusively, upon Madison's statement that, if the proposed amendments were "incorporated into the Constitution," the courts "will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."[186] The essence of Berger's argument is that only those rights "described" in the first eight Amendments were "expressly stipulated for." The correctness of Berger's position depends, then, on whether when Madison spoke of the rights "expressly stipulated for" he was referring to only those rights "described" in the first eight Amendments.

In light of the context in which Madison made his statement, though, it is not at all clear—and quite unlikely—that Madison was in fact limiting himself to the rights "described" in the first eight Amendments. This uncertainty stems in part from the fact

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rarely even allude to the question of whether the government has the delegated power to take the challenged action. Instead, such opinions typically assume the existence of federal power and then look to see whether some provision of the Bill of Rights prohibits its exercise."). *Cf.* Edward J. Erler, *The Ninth Amendment and Contemporary Jurisprudence* in HICKOK-BILL OF RIGHTS, *supra* note 129, at 438 ("It is . . . never necessary to specify the unenumerated rights protected by the Ninth Amendment since the burden of justifying the exercise of governmental power rests with those who are exercising the power to justify that exercise in terms of delegated power.").

185. Berger in 1 BARNETT-RETAINED, *supra* note 172, at 200.

186. ANNALS, *supra* note 140, at 439. *See* Berger in 1 BARNETT-RETAINED, *supra* note 172, at 213.

that Madison referred to the "rights expressly stipulated for . . . by the declaration of rights." By referring to the declaration of rights generally, it would appear that Madison was alluding to all of the proposed amendments, including the provision which was later designated the Ninth Amendment. Because the Ninth Amendment itself "expressly stipulated for" the "retained" rights, it can be plausibly argued that Madison meant to include the "retained" rights as well.

More persuasive, though, is the fact that the statement on which Berger so heavily relies immediately follows Madison's justification for and reference to the provision which would eventually be designated the Ninth Amendment, a provision which, Madison noted, was necessary to ensure that "those rights which were not singled out" would not be rendered "insecure."[187] The only plausible inference that may be drawn from Madison's use of the phrase "those rights" is that the Framers clearly believed that there were particular rights in addition to and distinct from the rights which had been specifically "described" in the first eight Amendments. Because the Framers believed that those rights were as equally deserving of security as the specifically "described" rights, they understood that, to guard against the implication that those rights "were intended to be assigned into the hands of the General Government,"[188] their security should be provided for in some manner. Since those rights to which Madison referred were too numerous to describe individually, though, the Framers had no alternative but to classify "those" rights as "retained" rights. As a consequence, one may credibly argue that the Framers believed that they had "expressly stipulated for" those rights by classifying them as the "retained" rights.

Most important, however, Berger's argument that only the specifically "described" rights of the first eight Amendments are subject to judicial enforcement is inimical to both the express language of the Ninth Amendment and the Framers' understanding of the function of that Amendment. With respect to its language, the Ninth Amendment commands that the enumeration of the rights in the first eight Amendments "shall not be construed to deny or disparage" those rights, too numerous to describe specifically, "retained" by the people. As noted below, the Framers believed that the "described" and the "retained"

187. ANNALS, *supra* note 140, at 439.
188. *Id.*

rights were, with a few exceptions,[189] cut from the same cloth. The only difference was that the "described" rights were distributed among various amendments whereas the "retained" rights were collectively assembled in a separate amendment. If, as Berger concludes, however, only the specifically "described" rights may be enforced, that means that as "a practical matter" the "retained" rights of the Ninth Amendment may, "whatever their substance," be "freely invaded by a Congress vigorously exercising its express or implied powers."[190] The obvious conflict between the explicit command of the Ninth Amendment and the practical consequence of Berger's conclusion has not gone unnoticed:

> [Berger's] conclusion meets an immediate and formidable obstacle in the language of the ninth amendment itself. If the reserved rights are not to be denied or disparaged by the enumeration of other rights, but only the enumerated rights may be judicially enforced, the reserved rights necessarily shrivel. If this is not disparagement, then the concept has been drained of all meaning.[191]

In maintaining that the "retained" rights are neither "constitutional" in nature nor capable of judicial enforcement, then, Berger renders the explicit language of the Ninth Amendment a nullity.

Berger's conclusion not only contravenes the plain language of the Ninth Amendment but also does violence to the Framers' intentions. As noted earlier, those who opposed a bill of rights

189. With respect to the amendments which had been recommended by the States, Madison observed that some of them embraced "those rights which are exercised by the people in forming and establishing a plan of Government," while others, like the provision guaranteeing a trial by jury, specified "positive rights" which stem from "the nature of the [social] compact." *Id.* at 437. In a sense, these "positive" rights are in fact "created" rights in that absent government they would not otherwise exist. By definition, however, the "natural" rights to which Madison alluded "pre-exist" government. Consequently, the "natural" or "pre-existent" rights of every individual may be "denied" or "disparaged" only to the extent that the people have consented. It is the security of the "great residuum" (*id.* at 438) of these "natural" and "pre-existent" rights for which the Framers endeavored to provide. To be sure, a few of these "natural" rights are "described" with specificity (*e.g.*, speech, religion), but the great bulk of the "pre-existent rights of nature" which were "retained" by the people are "embodied" in the Ninth Amendment.

190. Massey in 1 BARNETT-RETAINED, *supra* note 170, at 305-06; *see also id.* at 307 ("It would be richly ironic to find [the Ninth Amendment] undeserving of judicial protection, for it would declare the principle that the rights thereby reserved were simply reserved for oblivion whenever the federal government chose to eradicate or ignore them."). *See generally* Floyd Abrams, *The Ninth Amendment and the Protection of Unenumerated Rights*, 11 HARV. J.L. & PUB. POL'Y 93, 94 (1988).

191. Massey in 1 BARNETT-RETAINED, *supra* note 170, at 306; *accord* Caplan in 1 Barnett-Retained, *supra* note 170, at 282-83; *see also* Black in 1 Barnett-Retained, *supra* note 166, at 346-47.

were apprehensive that an incomplete enumeration of rights would lead to the conclusion that "those rights which were not singled out" were "intended to be assigned into the hands" of the Federal Government and were "consequently insecure." Madison sought to placate their fears by assuring them that the Ninth Amendment would guard against such a result by obviating the need to describe each and every inherent, "pre-existent" right. In other words, "[t]he Ninth Amendment was offered precisely to 'compensate' . . . for the absence of an extended list of rights."[192] "[I]n contract terms," one commentator has analogized, "the Ninth Amendment 'clause' served as the 'consideration' for not insisting on a more elaborate statement of rights."[193] If those Framers who were troubled by a less-than-complete enumeration of rights had any idea that the "retained" rights would be rendered "insecure"—*i.e.*, accorded less stature than the "described" rights and rendered wholly unenforceable because the failure to "describe" them would be deemed a failure to have "embodied" them in the Constitution—then surely they would have insisted that only a complete enumeration of the "great rights of mankind" would suffice. Settling for a less-than-complete enumeration of rights, though, suggests that those Framers deemed Madison's proposal to be both sincere and sufficient.

Refusing to enforce the "retained" rights in the same manner and to the same extent as the "described" rights, then, is either an affirmative "breach" of the Ninth Amendment "contract" or a tacit admission that Madison deceived some of the Framers into believing that the Ninth Amendment was the constitutional equivalent of a comprehensive enumeration of those rights not "described" in the first eight Amendments. As there is no evidence that Madison intended to deceive by exchanging an empty promise for the valuable consideration of foregoing "a more elaborate statement of rights,"[194] we are left with the unsettling reality that the Ninth Amendment "contract" has been

192. Barnett in 1 BARNETT-RETAINED, *supra* note 146, at 34.

193. *Id.*; *see also* Abrams, *supra* note 190, at 93 ("[The Ninth Amendment] is a construction amendment, one adopted for the very narrow purpose of responding to a very important, but narrow, objection to the adoption of the Bill of Rights: the risk that the enumeration of any rights might be construed to exhaust the full spectrum of rights the Framers believed were inherently held by people in a free society.").

194. In fact, even if it could be established that Madison intended to deceive the Framers, this "concealed intention" was not ratified because "ratification requires disclosure of material facts" and "a surrender of recognized rights may not be presumed but must be proved." BERGER-JUDICIARY, *supra* note 5, at 155.

"breached" with impunity by a bare majority of the people's representatives and that the only party which can enforce the "contract"—the Court—is unwilling to do so.

At the other end of the spectrum are those theorists who assert that the Court is empowered to "develop,"[195] "find[ ],"[196] or "define"[197] rights under the Ninth Amendment. Theorists of this ilk would enforce the "fundamental" and "natural rights of man,"[198] those rights which are "essential ingredient[s] of the free society established by our Constitution,"[199] or the "great and principal rights of man."[200] Though the formulation and enforcement by the courts of previously unenforced unenumerated rights would have the obvious virtue of limiting the power of Congress, thereby at least partially restoring the Framers' intentions, the difficulties presented by this rights-based approach are substantial and counsel against its adoption.

First, such a rights-based approach offers judges absolutely no guidance in "defining," "finding," and "developing" such rights. In fact, at least one such theorist notes that "the textual fidelity required to support a claimed ninth amendment natural right is minimal" and admits that "it is uncommonly difficult to find within [the Amendment] a coherent package of guaranteed rights susceptible to judicial protection without reference to unmanageable, standardless, and amorphous extrinsic sources."[201] Another theorist concedes similarly that "there exists no purely objective set of criteria" and that the criteria which do exist are "loose."[202] If the members of the Court are to formulate rights which have little or no textual foundation and adopt an approach for which there are only "loose" standards, though, then they must necessarily engage in a wholly arbitrary and subjective exercise of judgment.[203] In fact, one "rights" theorist has can-

195. Van Loan in 1 BARNETT-RETAINED, *supra* note 170, at 177.

196. Massey in 1 BARNETT-RETAINED, *supra* note 170, at 320.

197. Redlich in 1 BARNETT-RETAINED, *supra* note 170, at 146-47.

198. Van Loan in 1 BARNETT-RETAINED, *supra* note 170, at 177.

199. Redlich in 1 BARNETT-RETAINED, *supra* note 170, at 146.

200. Massey in 1 BARNETT-RETAINED, *supra* note 170, at 320.

201. Massey in 1 BARNETT-RETAINED, *supra* note 170, at 293, 332; *id.* at 319 (the "gossamer nature" of "natural rights" makes it "virtually impossible to discern [such rights] by application of neutral principles").

202. Redlich in 1 BARNETT-RETAINED, *supra* note 170, at 146.

203. Scalia-*Lesser Evil*, *supra* note 41, at 863 ("It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are 'fundamental to our society.' ").

didly acknowledged that, to "define" the retained rights, "judges must, of course, make personal judgments."[204]

In contrast to Berger's generally objective, albeit liberty-limiting, described-rights approach, then, a rights-based approach to the Ninth Amendment which attempts to enforce a "cornucopia of undefined rights"[205] is inherently subjective and susceptible to arbitrary abuse by indiscriminate judges. Accordingly, if the primary gauge of whether an asserted Ninth Amendment right is "great and principal" is the inherently subjective personal judgment of a judge, then the scheme of rights deemed to be "essential ingredients" of our society will embrace a whole host of alleged "rights" as varied as the personal predilections of the multitude of judges will allow. To "winnow the substantial from the frivolous,"[206] though, it has been suggested that certain "limiting principles" be adopted, one of which is the principle that any right "found" in the Ninth Amendment should be a right "generally recognized by a significant portion of contemporary society as one inextricably connected with the inherent dignity of the individual."[207]

Wholly apart from the difficulty posed by employing an amorphous "inherent dignity" standard, this asserted principle is neither "limiting" nor "principled." First, if judges are to determine which rights are generally recognized or preferred, they must first construct a hierarchical scheme of rights. Because a hierarchical scheme of rights is necessarily predicated on the value assigned to each right, judges must either assign a value to the asserted right themselves or attempt to discern what value is "generally" assigned to the asserted right. But because each member of society will have a relatively unique scheme of values—and hence a relatively unique scheme of preferred rights—insisting that only rights which are "generally recognized" or "generally preferred" may be enforced simply begs the questions of "preferred" (by whom?) and "recognized" (by how "significant" a portion of society?). Merely denying that a "significant portion" of contemporary society necessarily means "a majority" and leaving unanswered how "significant" a portion of society

204. Redlich in 1 BARNETT-RETAINED, *supra* note 170, at 147.

205. Caplan in 1 BARNETT-RETAINED, *supra* note 170, at 247-48.

206. Massey in 1 BARNETT-RETAINED, *supra* note 170, at 333.

207. *Id.* at 320; *see also* Redlich in 1 BARNETT-RETAINED, *supra* note 170, at 146 ("unlike other portions of the Bill of Rights, [the Ninth Amendment] should be viewed as dealing not with absolute rights but generally with preferred rights").

must in fact "recognize" an asserted right[208] constitutes a wholly inadequate and unprincipled response for several reasons.

First, a "rule of law"—if one dare call it that—which enforces "generally" recognized or preferred rights suffers from the same debilitating defect manifested by the Court's theory of majoritarianism: the notion that certain rights either exist or are worthy of respect only because a certain—or under a rights-based approach an uncertain—"portion" of society has so directed. In refusing to respect individual liberty for what it is—*individual* liberty—and declining to protect rights based upon their inherent value to the individual and not to society, both approaches are antithetical to the Framers' understanding that the inalienable and inherent rights of individuals exist because we exist as individuals and not because they are derived "from the generosity of the government"[209] or from the benevolence of a "significant portion of contemporary society." In fact, the only discernible difference between the two approaches is that under a rights-based approach the threshold level of "recognition" which a given right must amass is less—though it is not clear how much less—than the threshold level of "recognition" upon which the Court now insists. The weakness in the underlying principle, however, is the same.

Second, if a significant portion of contemporary society prefers a particular right but a law is nonetheless enacted which "denies" or "disparages" that right, or a law enacted in another era is not repealed, then presumably a *more* significant portion of society does not prefer and has chosen not to recognize that right. However, if a constitutional enforcement mechanism for the protection of a scheme of rights is predicated not upon the value assigned to those rights by the individual desiring to exercise them, but upon the relative value assigned to those rights by "contemporary" society, then it is not at all clear why the courts

208. Massey in 1 BARNETT-RETAINED, *supra* note 170, at 320 n.137; *see also* Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 S. CAL. L. REV. 1239, 1297-98 (1990) [hereinafter Hill-*Political Dimension*] (suggesting that in cases where "the language of the Constitution is [not] dispositive," a construction of the Constitution's "open-textured clauses" is permissible "insofar as such construction reflects a dominant consensus at the time of decision," but not defining what constitutes a "dominant consensus" except to say that it "may, depending on the circumstances, be substantially less than that necessary for successful navigation of the amendment route").

209. *President Clinton's Independence Day 1993 Proclamation, reprinted in* WASH. POST, July 2, 1993, at A17.

should capitulate to the *less* significant portion of society and nullify the will of the *more* significant portion.

Third, even assuming that the underlying principle of a rights-based approach is not flawed and that it is appropriate for a judge to enforce "generally" preferred or recognized rights, there is simply no objective, reliable method for determining how "significant" a portion of society prefers or recognizes an asserted right. Moreover, even if such a method existed, any selection of a threshold level of societal support upon which a judge would insist—and below which the judge would deem an insubstantial level of societal support—would be wholly arbitrary and have no basis in either the Constitution or principles of individual liberty.

Last, since the rights-based approach described above focuses on the level of recognition that contemporary society affords an asserted right, it is likely to be the case that, as society "evolves," rights which had not been previously protected will find sanctuary in the courts. While the protection of additional individual liberties would certainly be a welcome change, the problem with focusing on the level of recognition that contemporary society affords an asserted right is that such a mode of constitutional "analysis" is "a two-way street that handles traffic both to and from individual rights."[210] As a consequence, just as the Court retreated from its protection of economic rights and liberties in the 1930s, so too could it retreat from the scheme of rights it presently protects if some future "contemporary" society chooses to "prefer" or "recognize" other rights instead. Consequently, while those individuals who constitute at any given time the "significant" portion of contemporary society will no doubt approve of the scheme of rights which are protected, it would be naive for them to believe that they can deny or disparage the rights preferred by others "without endangering [their] own."[211]

In the event that the "rights" which judges "find" in the Ninth Amendment are by their nature negative—*i.e.*, embrace the notion that individual liberty means the right to be free from government interference—then of course the articulation and enforcement of such rights will likely promote individual liberty. The second difficulty with a rights-based approach, however, is

210. Scalia-*Lesser Evil*, *supra* note 41, at 856.

211. Joseph Sobran, *Seductive allure of the power to tax*, WASH. TIMES, July 11, 1993, at B1, col. 1.

that, because under a rights-based approach the determination of Ninth Amendment rights is largely a function of a judge's subjective notion of what "generally preferred" rights are "great and principal" and "essential ingredients" of our society, the power to articulate and enforce unenumerated negative rights necessarily entails the power to articulate and enforce unenumerated positive rights as well. As a consequence, a rights-based approach to the Ninth Amendment leads to the unsettling potentiality that a judge who endeavors to read rights into the Ninth Amendment—rather than read powers out of Article I—may reason that, rather than only embracing rights which are by their nature negative, individual liberty embraces some rights which are by their nature positive. In other words, some judges may believe that, instead of merely embodying the principle that, except as provided for in Article I, individuals are to be free from government interference, at least some of the unenumerated rights guarantee entitlements to some tangible government benefit.[212]

Not surprisingly, at least one commentator has suggested that "a constitutional right to a decent material basis for life" and "a constitutional justice of livelihood" can be derived from the Ninth Amendment.[213] Because the Ninth Amendment, just like the first eight Amendments, is a bulwark of "individual liberty" as opposed to a bulwark of "public rights,"[214] though, such a construction of the Ninth Amendment would constitute an extraordinary departure from the Framers' intentions, as well as result in a contraction of rather than an expansion of individual liberty. The proposition that an individual has a constitutional right to those goods and services which will provide "a decent material basis for life" means that that individual need not necessarily exert any of his own effort to produce those goods and services nor produce other goods and services of comparable value which can then be exchanged for others. Since someone must produce the goods and services, though, asserting that an indi-

212. *See* Bennett Patterson, THE FORGOTTEN NINTH AMENDMENT 58 (1955) [hereinafter PATTERSON-FORGOTTEN] ("We can conceive that there is a possibility that th[e] great declaration of individual liberty [embodied in the Ninth Amendment] might be distorted into support for the advocacy of extreme socialism, such as the right to food, housing, medicine, etc.").

213. Charles Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1104-1105 (1986); *see also* Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, in 2 BARNETT-RETAINED, *supra* note 168, at 115, 146 (noting that Black "has led the way in reading the ninth amendment as a possible charter for the positive entitlements of the welfare state").

214. PATTERSON-FORGOTTEN, *supra* note 212, at 58.

vidual has a constitutional right to those goods and services is equivalent to asserting that that individual has a constitutional entitlement to the effort that other members of society must expend to produce the goods and services, as well as that the others who produce the goods and services have a constitutional obligation to do so.

In the state of nature, though, no one individual can, absent either a mutual agreement to the contrary or a voluntary charitable act, rightfully claim an entitlement to the effort—or product thereof—of another individual.[215] More important, nothing is to be found in the Constitution generally or the Ninth Amendment specifically which can be construed to suggest that the natural balance of rights and obligations which exists between individuals was intended to be thrown out of equilibrium by imposing upon some individuals the additional obligation of producing that quantity of goods and services which will provide "a decent material basis for life" for others. In fact, such a scheme of rights, entitlements, and obligations is antithetical to the principle of individual liberty.[216] To be sure, it might be said that if one individual has a constitutional right to "a decent material basis for life," then all individuals have that right and therefore the natural equilibrium of rights and obligations is not altered. But since it is impossible for every individual to contribute equal effort and resources, and since an enhanced obligation translates into a diminished entitlement, it follows that for some individuals the bounty of constitutional "rights" will be more abundant under such a scheme than it is for others.

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215. *See* THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES cxxi (J.C. Hamilton ed. 1866) (quoting Alexander Hamilton's "A Full Vindication") (" 'All men have one common original, they participate in one common nature, and consequently have one common right. No reason can be assigned why one man should exercise any power or pre-eminence over his fellow creatures more than another, unless they have voluntarily vested him with it.' "); Roger Pilon, *Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty*, in ECONOMIC LIBERTIES, *supra* note 38, at 183, 193 ("If our basic right is one of sovereignty, of sovereignty over what is ours—our lives, liberties, and estates—then any authority in another over what is ours must have arisen in such a way as to be consistent with our basic moral right. To be legitimate, that is, any such power must have been consented to by those over whom it is exercised, just as with any ordinary contract. . . . Only *we* have the right to alienate our sovereignty, in whole or in part. When others alienate our sovereignty without our consent, they take what is ours, they alienate our unalienable rights.").

216. *See, e.g.*, AYN RAND, THE VIRTUE OF SELFISHNESS 96 (1965) [hereinafter Rand-Virture] ("Any alleged "right" of one man, which necessitates the violation of the rights of another, is not and cannot be a right.").

The third difficulty with focusing on the "rights" of individuals rather than on the "powers" of government is that it wholly undermines the theory of the Constitution—that the Federal Government is a government of limited and defined powers—since it measures the power of the government with reference to what it is forbidden to do rather than with reference to what it is authorized to do. Consequently, a rights-based approach, though substantially more charitable than Berger's approach, is similarly defective since it focuses on the wrong facet of the powers-rights equation. Accordingly, should a judge construe the (indefinite) scope of the "retained" rights too narrowly and fail to "find" a number of those rights which the Framers failed to single out but did not intend to "deny" or "disparage," then it will necessarily be the case that, if measures are sustained which do in fact deny or disparage such rights, the power of Congress has been arbitrarily enlarged beyond its constitutional limits.

In contrast, a judge who adopts a powers-based approach and attempts to "find" among the "described" powers of Article I the power which Congress claims it was granted will be considerably less likely to make the same error. Because the criteria for a powers-based approach—Article I, the measure itself, and the legislative record—are for the most part objective, judicial errors under a powers-based approach are far less likely to occur than under a rights-based approach. Moreover, under a powers-based approach judges can allude to some tangible, textual evidence to justify their rulings, while under a rights-based approach judges can hope to do no better than engage in philosophical musings.

3. *Privileges or Immunities Clause*

Up until this point, the analysis has focused principally upon the Court's application of the "presumption of constitutionality" doctrine with respect to legislative measures enacted by Congress. The "presumption of constitutionality" doctrine, though, is applied with equal force by the Court with respect to legislative measures adopted by the States.[217] The rationale the Court ad-

217. *See, e.g.*, Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 462 (1988) (internal quotation marks omitted) ("Social and economic legislation . . . carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality."); Rivera v. Minnich, 483 U.S. 574, 578 (1987) (citation omitted) ("A legislative judgment that is not only consistent with the 'dominant opinion' throughout the country but is also in accord with 'the traditions of our people and our law' is entitled to a powerful presumption of validity when it is challenged under the Due Process Clause of the

vances in support of its application of the doctrine—deference to popularly elected and politically accountable members of the legislature except where the constitutional text and history provide otherwise—is the same.[218] Moreover, the Court employs the same standard to evaluate the validity of State legislative measures which are alleged to have impaired unenumerated rights.[219] In fact, there are only two constitutionally relevant distinctions which can be drawn between the exercise of Federal and State power. But because these distinctions flow from the Constitution itself and not from any judicially invented doctrine, it follows that the "presumption of constitutionality" doctrine as applied to State measures is equally illegitimate and must similarly be abjured by the Court.

The first distinction is that, unlike Congress, which is limited to a few, certain enumerated powers, the States possess a quantum of power which is numerous and indefinite. And since the Tenth Amendment specifically provides that the States possess the power to regulate with respect to all those objects which were not entrusted to Congress, it would be contrary to the text of the Constitution and inimical to the intent of the Framers to require the States to point to the source of their power aside from the Tenth Amendment.

The second distinction is that those provisions which serve as either implicit or explicit substantive restraints upon the scope of Congress's power—the Necessary and Proper Clause and the first nine Amendments—were not intended to restrain the power of the States.[220] To be sure, prior to the adoption of the Reconstruction-era Amendments, the only limitations on the

Fourteenth Amendment."); *cf.* New York State Club Association v. City of New York, 487 U.S. 1, 17 (1988) ("Legislative classifications . . . are presumed to be constitutional, and the burden of showing a statute to be unconstitutional is on the challenging party, *not* on the party defending the statute.").

218. *See supra* note 41.

219. *Compare* Reno v. Flores, 113 S. Ct. 1439, 1447 (1993) (immigration regulation) ("the alleged right certainly cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' " (quoting United States v. Salerno, 481 U.S. 739, 751 (1987), quoting in turn Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))) *with* Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986) (sodomy law) ("fundamental liberties" are those which are " 'implicit in the concept of ordered liberty' " or " 'deeply rooted in this Nation's history and tradition' " (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), and Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (opinion of Powell, J.))); *see also infra* note 266 and accompanying text.

220. *See* Barron v. The Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833). Chief Justice Marshall, writing for a unanimous Court, rejected the idea that the Takings Clause of the Fifth Amendment served as a restraint on State power:

scope of the States' power for which the Framers provided were contained in Section 10 of Article I, and neither Congress nor the courts had any additional authority to encroach upon the States in the exercise of their police powers and management of their domestic affairs. The Fourteenth Amendment, of course, portended a momentous shift in the balance of power between the Federal and State governments, as well as provided the basis for the judicial invalidation of State laws which impair fundamental rights.

Section 1 of the Fourteenth Amendment states that "[a]ll persons born or naturalized in the United States" are deemed to be "citizens of the United States" and declares, in pertinent part, that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Unfortunately, the text of the Fourteenth Amendment does not make clear just what these "privileges" and "immunities" are. What is clear, though, is that, just as the enigmatic Ninth Amendment bars Congress from enacting any law which would operate to "deny" or "disparage" the indeterminate body of rights "retained" by the people, the Privileges or Immunities Clause bars the States from enacting any law which would operate to "abridge" the indefinite mass of "privileges" and "immunities" of citizens of the United States. It has been rather remarkably suggested, however, that the history of the Fourteenth Amendment "affords no basis for reading into § 5 [of the Fourteenth Amendment] the judicial power of enforcement it so plainly withheld."[221] Instead, it is argued, the "discretion" to enforce the provisions of the Fourteenth Amendment is "*entirely* confided to Congress."[222] This argument is wholly lacking in merit.

As an initial matter, Section 5 of the Fourteenth Amendment does no more than provide that "Congress shall have the power to enforce, by appropriate legislation, the provisions of th[e] [Amendment]." Since the only powers that Congress may exercise are those expressly enumerated, it is elementary that the Framers of the Fourteenth Amendment had to grant explicitly to Con-

> Had the framers of the[ ] amendments [in the Bill of Rights] intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention.

Id. at 250. Although the Court's decision in *Barron* was undoubtedly correct and remains good law, the Court's subsequent interpretation of the Fourteenth Amendment has rendered *Barron* essentially irrelevant.

221. BERGER-JUDICIARY, *supra* note 5, at 229.

222. *Id.* at 228.

gress the power to enforce that Amendment. Granted, the absence of any express delegation to the courts of authority to enforce the Fourteenth Amendment could be construed as an intention (but only a silent one at that) to "withhold" such authority—but only if Section 5 is read in isolation. Reading it in isolation, however, overlooks the Article III directive that the judicial power "extend[s] to all Cases . . . arising under th[e] Constitution."[223] Unless one believes that an "abridgement" by a State of a privilege or immunity of a citizen does not give rise to a case "under the Constitution," then it necessarily follows that the courts have the power to enforce the Fourteenth Amendment. To withhold this power from the courts, the Framers of the Fourteenth Amendment would have had to do so in express terms—and there is not one word in the Amendment which suggests that this was their intention.

This conclusion is all the more compelling when one takes into consideration the particular phraseology employed in Section 1 of the Amendment. As originally proposed by Representative Bingham and approved by the Joint Committee on Reconstruction, Section 1 would have merely "empowered Congress 'to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty and property.' "[224] Thus, absent any affirmative legislation by Congress, the States would have been left unrestrained with respect to their capacity to continue to deny to their citizens their inalienable rights. As ultimately proposed and ratified, however, Section 1 itself commands that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[225] In other words, the Framers adopted language which rendered Section 1 self-executing. With or without the enactment of "appropriate legislation" by Congress, the States are barred in either case from abridging the privileges and immunities of citizens of the United States.

Were this not the case, a State could with impunity effectively abridge a privilege or immunity of a citizen of the United States, thereby transgressing at will an explicit constitutional command.

223. U.S. CONST., art. III, § 2, Cl. 1.
224. DOJ-*Wrong Turns*, *supra* note 168, at 59-60.
225. U.S. CONST., amend. XIV, § 1.

Such a construction would not only fly in the face of the explicit language of Section 1 but would also diminish the status of its guarantees from constitutional to merely statutory, since the guarantees for which the Framers provided would be dependent upon the willingness and ability of Congress to adopt "appropriate legislation." This would convert the Fourteenth Amendment into nothing more than a hollow promise. Moreover, any legislation adopted by Congress could be repealed or amended by any subsequent session of Congress, thereby producing a scheme of inalienable rights susceptible to complete or partial revocation by the then-prevailing majority. Finally, reading Section 5 to require legislation by Congress before the substantive guarantees of Section 1 could be enforced is contrary to the notion that "[t]he great object" of Section 1 was "to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[226] Because such a construction is so incompatible with the language employed by, as well as the intent of, the Framers of the Fourteenth Amendment, it must be rejected.

Establishing that the Court possesses plenary judicial power to enforce the provisions of the Fourteenth Amendment is of little solace, though, if the "privileges" and "immunities" which the Framers intended to be safeguarded are left unidentified. At first glance the "privileges" and "immunities" of citizens of the United States would appear to be as indeterminate as the rights "retained" by the people by virtue of the Ninth Amendment. In contrast to the unilluminating history surrounding the adoption of the Ninth Amendment, however, the voluminous history surrounding the adoption of the Fourteenth Amendment provides substantial evidence of the nature and scope of the privileges and immunities which the Framers anticipated would be embodied in and safeguarded by the Privileges or Immunities Clause.

Unfortunately, when the Court had the opportunity in the *Slaughter-House Cases*[227] to construe the Privileges or Immunities Clause and to give it the substantive content which its Framers intended it to have, it exercised its inherent power of judicial review in such a manner as to "ruthlessly eviscerate[ ]" the Clause

226. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (Senator Howard).

227. 83 U.S. (16 Wall.) 36, 74 (1873) ("[I]t is only the [privileges and immunities of the citizens of the United States] which are placed by this clause under the protection of the Federal Constitution, and that [those of the citizen of the State], whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.").

"of practically all operative meaning."[228] Advocates of the Privileges or Immunities Clause have recommended that the Court rethink its abjuration of the Clause, with some even suggesting that *Slaughter-House* be overruled.[229] Others view the Clause as "one of those blessed constitutional provisions that by being ignored has not caused a single bit of trouble."[230] Still others submit that, whatever might be the proper construction of the Clause, prudence dictates that "there is much to be said for continuing the present predictability of 'privileges or immunities' jurisprudence, and not engaging in a disruptive roll of the dice."[231]

However laudable the view that the Court should overrule *Slaughter-House* and revive the Privileges or Immunities Clause, the fact remains that the Court is virtually certain not to overrule that vagabond of constitutional decisions or revive the Clause,[232]

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228. Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 71, 73 (1989) [hereinafter Levinson-*Reflections*]; *cf.* BORK-TEMPTING, *supra* note 5, at 37 ("[Justice] Miller was following a sound judicial instinct: to reject a construction of the new amendment that would leave the Court at large in the field of public policy without any guidelines other than the views of its members . . . . What is striking about the *Slaughter-House Cases* is not the caution displayed by the majority but rather the radical position of the four dissenters.").

229. *See, e.g.*, Levinson-*Reflections*, *supra* note 228, at 73-74; Charles Rice, *The Bill of Rights and the Doctrine of Incorporation*, in HICKOK-BILL OF RIGHTS, *supra* note 129, at 11, 15; *see also* Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 68 (1989) (observing that "it may be idle to think in terms of overruling the *Slaughter-House Cases*," but arguing that Brown v. Board of Education, 347 U.S. 483 (1954), "might have been an opportunity to revive the Privileges or Immunities Clause as the core of the Fourteenth Amendment"); *compare* BORK-TEMPTING, *supra* note 5, at 166.

230. Lino A. Graglia, *Do We Have an Unwritten Constitution?—The Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 83, 83 (1989) [hereinafter Graglia-*Unwritten*].

231. *See* J. Harvie Wilkinson III, *The Fourteenth Amendment Privileges or Immunities Clause*, 12 HARV. J.L. & PUB. POL'Y 43, 52 (1989); *id.* at 51 ("The danger . . . is the often-made observation that the Privileges or Immunities Clause may be something like a dormant volcano. . . . A dormant volcano may not be very exciting, but once it erupts the excitement may prove a bit much.").

232. Approximating the Ninth Amendment in terms of constitutional insignificance, the Clause has been invoked by a majority of the Court only once as the basis for the invalidation of a State law, and that decision was promptly overruled. *See* Colgate v. Harvey, 296 U.S. 404, 430, 432 (1935) (invalidating a Vermont law that levied a four percent tax on income derived from loans made outside the State but which exempted entirely like income derived from certain money loaned within the State) ("The right of a citizen of the United States to engage in business, to transact any lawful business, or to make a lawful loan of money in any state other than that in which the citizen resides is a privilege equally attributable to his national citizenship."), *overruled by* Madden v. Kentucky, 309 U.S. 83 (1940); *see also, e.g.*, Hague v. Committee for Industrial Organization (CIO), 307 U.S. 496 (1939) (invalidating Jersey City, New Jersey, ordinance which prohibited the distribution of printed matter, etc., in any street or public place) (three Justices invoking Privileges or Immunities Clause and two Justices invoking Due Process Clause); Oregon v. Mitchell, 400 U.S. 112, 148 (1970) (upholding provision of the Voting Rights Act Amendments of 1970 which prohibits States from disqualifying voters in Presidential elections

particularly in light of the fact that it has accomplished by other means at least some of what was intended to be accomplished by the Clause itself.[233] More to the point, though, it is wholly immaterial whether the Court invokes the Privileges or Immunities Clause or continues to invoke the Due Process Clause of the Fourteenth Amendment as the basis for invalidating State legislative enactments which abridge an individual's inalienable rights so long as it evaluates those enactments in light of the principles which underlie the Privileges or Immunities Clause. The problem is that the haphazard mode of analysis employed by the Court to evaluate State laws is irreconcilable with these principles.

To establish that the Court's approach to the adjudication of individual rights under the Fourteenth Amendment is not fully in accord with the intent of the Framers, it is of course necessary to attempt to ascertain the intent of the Framers. This analysis will commence at the point at which there is general agreement among the commentators and proceed from there.

Commentators almost universally agree that the history of the Fourteenth Amendment reveals an intention by the Framers to "go beyond" the rights identified in *Slaughter-House*, though they disagree as to "how far beyond" the *Slaughter-House* rights they intended to go.[234] There is general agreement, however, that at the very least, the Framers intended to provide protection for the rights embodied in the Civil Rights Act of 1866,[235] designed to prevent discrimination with respect to certain substantive

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for failure to meet state residency requirements) ("The right to vote for national officers is a privilege and immunity of national citizenship." (Douglas, J., concurring in part and dissenting in part)); *id.* at 285 ("Freedom to travel from State to State . . . is a privilege of United States citizenship." (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part)).

233. *See, e.g.*, BERGER-JUDICIARY, *supra* note 5, at 48-49 ("One of the ironies that bestrews the path of the Court is that the censorship abjured by [Justice] Miller [in *Slaughter-House*] under 'privileges or immunities' really became unlimited under the converted due process clause."); Wilkinson, *supra* note 231, at 49-50 ("What could not be accomplished through the Privileges or Immunities Clause was soon achieved through the Due Process Clause of the Fifth and Fourteenth Amendments in the line of cases exemplified by *Lochner*.").

234. DOJ-*Wrong Turns*, *supra* note 168, at 94.

235. BERGER-JUDICIARY, *supra* note 5, at 20 ("all are agreed [that] it was the purpose of the [Fourteenth] Amendment to embody and protect" the Civil Rights Act of 1866); *see also, e.g.*, Graglia-*Unwritten*, *supra* note 230, at 88 ("The evidence is clear that the[ ] [States] thought they were providing additional protection for blacks by constitutionalizing the 1866 Civil Rights Act [.]").

rights[236] but believed to be constitutionally infirm. A literal reading of the Civil Rights Act, though, compels the conclusion that the substantive and fundamental rights enumerated therein are not to be protected in and of themselves, but are to be protected only to the extent that white citizens enjoy them. By its terms, then, the Civil Rights Act does not bar the wholesale denial of any or all of the rights described therein, but merely bars their denial on unequal terms.

In contrast, the Privileges or Immunities Clause expressly commands that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." A literal reading of the Clause compels the conclusion that there are certain privileges and immunities, *i.e.*, substantive and inalienable rights, which the States are constitutionally obliged to respect *in toto*. By its terms, then, the Clause prohibits the States from denying to any class of citizens their right to exercise the substantive rights embraced by the Clause. An attempt by a State to abridge a particular privilege or immunity of one class of citizens without purporting to abridge the same privilege or immunity with respect to other citizens would, of course, trigger the protections of the Equal Protection Clause.[237] As an initial matter, though, a State may not abridge any privilege or immunity of any citizens, irrespective of class.

This basic difference in the operative effect of the language employed by the Framers of both the Civil Rights Act and Section 1 of the Fourteenth Amendment should consequently dispel any lingering notion that the Civil Rights Act and Section 1 are "congruen[t]" measures or that the "impact" and "effect" of Section 1 were to merely "constitutionaliz[e]" the Civil Rights Act.[238] Rather, the Civil Rights Act can at best be described as a partial and incomplete legislative effectuation of the Section 1 mandate.

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236. *See* Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified, as amended, at 42 U.S.C. §§ 1981, 1982) ("[All citizens of the United States] shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.").

237. U.S. CONST., amend XIV, § 1.

238. DOJ-*Wrong Turns*, *supra* note 168, at 66, 68; *see also, e.g.*, BERGER-JUDICIARY, *supra* note 5, at 33 (purpose of the Fourteenth Amendment was to "constitutionalize" the Civil Rights Act of 1866).

The more disputed issue is whether the Framers intended to include within the Privileges or Immunities Clause the specific guarantees of the first eight Amendments. The simple answer is that, while the legislative history may fall "far short" of the " 'conclusive demonstration' " that was attributed to it by Justice Black,[239] the legislative history at least permits the conclusion that the Privileges or Immunities Clause embraces the guarantees embodied in the first eight Amendments. First, the principal sponsor of Section 1 of the Fourteenth Amendment, Representative John Bingham, spoke at length about the effect of the decision in *Barron v. The Mayor and City Council of Baltimore*,[240] insisted that it was "absolutely essential to the safety of the people" that the Bill of Rights be enforceable against the States, and proposed an amendment which would, *inter alia*, "punish all violations by State officers of the bill of rights."[241]

Second, when Representative Thaddeus Stevens introduced the proposed amendment to the House of Representatives, he intimated that Section 1 embraced the guarantees in the Bill of Rights by suggesting that the amendment would afford a remedy for the fact that various power-restraining provisions of the Constitution applied only to Congress.[242] Finally, when Senator Howard, who served on the Joint Committee on Reconstruction,[243] submitted the proposed amendment to the Senate, he stated—this time explicitly—that Section 1 did indeed embrace the specific guarantees embodied in the Bill of Rights:

> To the[ ] privileges and immunities [identified in *Corfield v. Coryell*[244]], whatever they may be—for they are not and cannot

239. BERGER-JUDICIARY, *supra* note 5, at 137 (quoting Adamson v. California, 332 U.S. 46, 74 (1947) (Black, J., dissenting)).

240. 32 U.S. (7 Pet.) 243 (1833); CONG. GLOBE, *supra* note 226, at 1089 (noting that *Barron* "involv[ed] the question whether the [Fifth Amendment was] binding upon the State of Maryland and to be enforced in the Federal courts").

241. CONG. GLOBE, *supra* note 226, at 1090, 1292.

242. *Id.* at 2459 ("I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or another, in our [Declaration of Independence] or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect.").

243. *Id.* at 2765 (Sen. Howard presenting to the Senate "the views and the motives which influenced" the Committee).

244. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, Circuit Justice) ("[The Privileges and Immunities Clause of Art. IV, § 2 embraces] those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union .... [T]hese fundamental principles ... [may] be all comprehended under the following general heads: Protection by the govern-

> be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution.[245]

Despite the magnitude of this evidence, some commentators nonetheless maintain that the Framers had no intention of imposing upon the States the burden of complying with the guarantees embodied in the first eight Amendments. The primary argument in support of this contention is that, since the Framers ultimately incorporated one of these guarantees into the Fourteenth Amendment (the Due Process Clause) and expressly declined to incorporate another (the Takings Clause), "the framers [had] ample reason to conclude that 'due process' alone was to be 'incorporated.' "[246] On its face, this argument appears reasonable and even logical. When the circumstances surrounding the rejection of the Takings Clause are taken into account, however, it becomes clear that the argument cannot withstand scrutiny.

First, the rejection (by a vote of 7-5) of the Takings Clause by the Joint Committee on Reconstruction came in the form of a rejection of an amendment offered by Bingham to one of the sections of a proposed but ultimately rejected constitutional amendment.[247] Significantly, none of the sections of this proposed amendment included a Due Process Clause—or, for that

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ment; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeus corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities.").

245. CONG. GLOBE, *supra* note 226, at 2765; *id.* at 2766 ("[t]he great object of [Section 1] is . . . to restrain the power of the States and compel them at all times to respect these great fundamental guarantees").

246. BERGER-JUDICIARY, *supra* note 5, at 150-51.

247. Bingham's proposed amendment would have altered the proposed Section 1 to read as follows:

> No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude; *nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation.*

See BENJAMIN KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 83, 85 (1914 & reprint 1969) [hereinafter KENDRICK-RECONSTRUCTION] (proposed amendment in italics).

matter, a Privileges or Immunities Clause—at the time the proposed Takings Clause was rejected.[248] In fact, had the Committee actually adopted Bingham's amendment, the Takings Clause would have been the only specific guarantee in the Bill of Rights provided for in the proposed amendment. In any event, because the motivation for the rejection is not made clear, "[i]t would be straining at a gnat to deduce"[249] from the rejection of the Takings Clause that the Committee members had thereby intended to manifest an intention to reject the Bill of Rights in its entirety. Indeed, it might well have been the case that some of the seven individuals who rejected the "incorporation" of the Takings Clause were apprehensive that the "enumeration" of only one of the guarantees embodied in the first eight Amendments might lead to the dangerous "implication" that the other guarantees were not intended to be applied against the States since they "were not singled out."

Second, on the same day that Bingham's proposed amendment was rejected, the Committee (by a vote of 10-2) adopted Section 5 of a proposed constitutional amendment, the language of which both exactly mirrors—with the exception of the first sentence defining citizenship, added later—Section 1 of the ultimately adopted Fourteenth Amendment.[250] Thus on the same day that the Committee rejected the Takings Clause as part of an ultimately rejected constitutional amendment, the Committee adopted the Privileges or Immunities Clause. Significantly, the rejection of the Takings Clause by the Committee occurred before Howard and Stevens uttered their remarks in their respective chambers of Congress regarding the scope of the Privileges or Immunities Clause.[251] In fact, Senator Howard explicitly referred to the Takings Clause as one of the privileges and immunities not to be abridged by the States:

> [I]t has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.

248. *Id.* at 83-84.

249. *Cf.* BERGER-JUDICIARY, *supra* note 5, at 162.

250. *Compare* KENDRICK-RECONSTRUCTION, *supra* note 247, at 87 *with id.* at 106.

251. The rejection of the Takings Clause occurred on April 21, 1866 (*see id.* at 82, 85), and Stevens and Howard made their remarks on May 8, 1866, and May 23, 1866, respectively.

> Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. . . . [T]hey stand simply as a bill of rights in the Constitution . . . [and] the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of [Section 1] is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.[252]

Consequently, whatever may have motivated the seven members of the Committee who rejected Bingham's proposed amendment, their ambiguous intentions are trumped by the collective knowledge of the members of Congress that the Privileges or Immunities Clause was deemed to embrace the Takings Clause, as well as all the other "personal rights guarantied and secured by the first eight amendments of the Constitution."

Berger also argues that the rejection by the First Congress of a proposed amendment which would have prohibited the States from abridging "free speech"[253] establishes that the Court acted illegitimately when it assumed in *Gitlow v. New York*[254] that "freedom of speech" was "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from abridgement by the States":[255]

> [T]he one time the American people had the opportunity to express themselves on whether free speech was 'so rooted in the tradition and conscience of our people as to be ranked as fundamental' was in the First Congress, which drafted the Bill of Rights in response to popular demand. There they voted down interference with State control.[256]

Aside from the fact that the intentions of the First Congress have no bearing on the question of the intentions of the Thirty-Ninth Congress, Berger's conclusion that "the American people" did not regard free speech as a fundamental right is wholly untenable.

First, Berger's assertion that the consideration by the First Congress of denying to the States the power to abridge free speech was the "one" instance when "the American people had

252. CONG. GLOBE, *supra* note 226, at 2765-66.
253. *See* ANNALS, *supra* note 140, at 755.
254. 268 U.S. 652 (1925).
255. *Id.* at 666.
256. BERGER-JUDICIARY, *supra* note 5, at 272 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

the opportunity to express themselves" on the importance of that right conveniently overlooks the fact that, at the same time it considered this proposed amendment, the First Congress—after being implored to do so by the States—also passed another amendment denying Congress the power to abridge speech. The adoption by Congress and the ratification by the States of this amendment irrefutably establishes that "the American people" had emphatically "expressed themselves" on the question of whether free speech is a fundamental right.

Second, Madison pointed out that the catalyst for a bill of rights was the desire to provide security for "those great and essential rights" which were believed to be "in danger"[257] not from the States, but from the newly created Federal Government. In fact, Madison himself remarked that his proposed amendment would provide a "double security" against the impairment by the States of the fundamental guarantees embodied in his proposed amendment.[258] Consequently, the most feasible explanation is that the Senate perceived that the States had already provided adequate protection for these rights in their own constitutions or laws.

Aside from the difference of opinion over the intentions of the Framers, the only other serious objection to the application of the first eight Amendments against the States is that principles of federalism and State sovereignty are undermined.[259] As an initial matter, it should be noted that this objection is based ostensibly on policy rather than historical grounds. In any event, this objection is without merit because it implies that the States, except to the extent they have otherwise provided in their constitutions, possess some inherent power to abridge or can assert some legitimate reason for abridging the guarantees embodied in the first eight Amendments. A construction of the Privileges or Immunities Clause which provides for the application of the first eight Amendments to the States, however, is not only compatible with the history of Section 1, but is mandated by the notions of indi-

257. ANNALS, *supra* note 140, at 746.

258. *Id.* at 441.

259. *See, e.g.*, Michael Kent Curtis, *Privileges or Immunities, Individual Rights, and Federalism*, 12 HARV. J.L. & PUB. POL'Y 53, 53, 61 (1989); Rice in HICKOK, *supra* note 229, at 15, 14 (the Court's application of the Bill of Rights against the States "has imposed an artificial uniformity which obliterates th[e] division of power[ ] [between the Federal and State governments] in important areas"); *see also* BORK-TEMPTING, *supra* note 5, at 95 ("The application of the Bill of Rights to the states . . . has done much to alter the moral tone of communities across the country.").

vidual liberty to which any government claiming legitimacy must ascribe.

It is important to recall that it was the States themselves which insisted that a bill of rights be added to the Constitution. Granted, as originally conceived, the Bill of Rights was intended to be enforced only against the Federal Government, the powers of which were deemed by the States to be dangerously broad and susceptible to potentially lavish interpretation. This design was not, of course, the result of some sinister plot by the States to disable the Federal Government so that the States alone could wield an exclusive license to impair these rights. Rather, it was a plan by the States, which at the time were believed to have afforded adequate protection to their citizens with respect to these rights, to ensure that these "essential"[260] rights were not placed in jeopardy by virtue of the grant of power to the Federal Government. Given the tremendous importance the States attached to these rights, it is manifest that the States cannot now assert that there is some legitimate basis for supposing that the States cannot be denied the power to abridge these rights. The States can advance no possible rationale, for instance, which would justify an abridgement of speech or religious freedom, tolerate an unreasonable search or seizure, or authorize a cruel or unusual punishment.

The evidence in its entirety, then, suggests that it is at least permissible to construe the Privileges or Immunities Clause as embracing all the guarantees embodied in the first eight Amendments. To be sure, beginning in the 1920s[261] the Court came to view the Due Process Clause of the Fourteenth Amendment as a

260. 1 ELLIOT'S DEBATES, *supra* note 21, at 327 (Virginia); *id.* at 328 (New York) ("inalienable"); *id.* at 331 (North Carolina) ("great" and "unalienable"); *id.* at 334 (Rhode Island) ("natural" and "unalienable"); *see also* ANNALS, *supra* note 139, at 746 (Madison) ("great and essential"); *id.* at 753 (Livermore) ("essential").

261. It has been suggested that the Court's decision in Chicago, B. & Q.R.R., 166 U.S. 226 (1897), represented the first instance in which the Court "incorporated" a provision of the Bill of Rights, namely the Takings Clause of the Fifth Amendment, into the Due Process Clause of the Fourteenth Amendment. *See* Levinson-*Reflections*, *supra* note 228, at 73; CONSTITUTION-ANALYSIS, *supra* note 3, at 953-54. This suggestion, however, is tainted by one key fact: conspicuously absent from Harlan's opinion is any reference whatsoever to the Takings Clause of the Fifth Amendment. It was unnecessary for Harlan to rely on the Takings Clause to arrive at his decision. He made it perfectly clear that the requirement of "just compensation" for the taking of private property by a State was a quintessential component of "due process" itself, and not simply an independent, supplementary protection: "The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation." 166 U.S. at 236-37. Consequently, it would have been superfluous for Harlan to "incorporate" into the Due Process Clause a guarantee which,

conduit through which the various guarantees of the Bill of Rights could be enforced against the States. But the Court has never adopted the view that the first eight Amendments to the Bill of Rights should be "incorporated" or "absorbed" into the Fourteenth Amendment in their entirety, although it did come perilously close to doing so at one point in its history.[262] Instead, the Court has determined that only those guarantees which are either "implicit in the concept of ordered liberty"[263] or "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[264] qualify for protection. Employing this convoluted "selective incorporation" approach, the Court has heretofore determined that nearly all the specific guarantees of the Bill of Rights are enforceable against the States[265] to the same degree and manner as they are enforceable against the Federal Government.[266]

The "selective incorporation" method adopted by the Court comports neither with the text nor the history of the Fourteenth Amendment, and represents nothing more than a wholly arbitrary judicial preference for some of the specific guarantees as opposed to others. Moreover, because the Court declined to adopt an all-or-nothing approach with respect to the Bill of Rights and instead adopted a wholly arbitrary "ordered liberty" standard, it left the door open for challenges to state laws which implicate "rights" other than those specifically described in the first eight Amendments. This is not meant to suggest that the Court should decline to adopt a mode of analysis which provides protection for privileges and immunities which are not embodied in either the Civil Rights Act of 1866 or the first eight Amendments. To the contrary, the evidence plainly permits the conclusion that the Privileges or Immunities Clause embraces

though not provided for in express terms, was already believed to be embodied in the Due Process Clause itself.

262. *See* Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., joined by Douglas, J., dissenting) ("one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states."); *id* at 123-24 (Murphy, J., joined by Rutledge, J., dissenting) ("I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment.").

263. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

264. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

265. This process began with *Gitlow v. New York*, 268 U.S. 652 (1925).

266. *See* Malloy v. Hogan, 378 U.S. 1, 10-11 (1964) (citation omitted) (noting that the Court "has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights' ").

unenumerated rights which can and should be protected by the Court.

The Framers of the Fourteenth Amendment relied heavily on Justice Washington's construction of the terms "privileges" and "immunities" in *Corfield v. Coryell*.[267] And although Justice Washington identified several of the "fundamental" privileges and immunities, he made it clear that his catalog of privileges and immunities was not exhaustive: "These, and many others which might be mentioned, are, strictly speaking, privileges and immunities."[268]

Similarly, Senator Howard, who on behalf of the Reconstruction Committee explained that all of the privileges or immunities contemplated by Justice Washington—as well as the guarantees embodied in the first eight Amendments—were embraced by the Privileges or Immunities Clause, informed the Senate that the privileges and immunities "are not and cannot be fully defined in their entire extent and precise nature."[269] Plainly, then, the Framers understood that the mass of privileges and immunities embraced by the Clause was not limited to only those specifically described in the Civil Rights Act of 1866 and the first eight Amendments. Most important, however, Howard emphasized that "[t]he great object" of Section 1 was "to restrain the power of the States and compel them at all times to respect" all of these "great fundamental guarantees."[270] Accordingly, it is both permissible and appropriate for the Court to safeguard the unenumerated rights embodied in the Privileges or Immunities Clause.

Just as with the rights "retained" in the Ninth Amendment, though, there is no principled way for a judge who has adopted a rights-based mode of analysis to determine what the unenumerated privileges and immunities might be. The standard of "ordered liberty" affords judges little or no guidance. Consequently, the same difficulties with which a rights-based approach under the Ninth Amendment is fraught are equally applicable to an approach under the Privileges or Immunities Clause which endeavors to discern the precise contour of the privileges and immunities embodied therein. It is perhaps best, then, to refrain

267. *See supra* notes 244-45 and accompanying text; *see also* DOJ-*Wrong Turns*, *supra* note 168, at 34.

268. *See supra* note 244.

269. CONG. GLOBE, *supra* note 226, at 2765.

270. *Id.* at 2766.

from attempting to "develop," "find," and "define" the unenumerated privileges and immunities and instead adopt a rule of construction which establishes a constitutional presumption of liberty and places the burden on the States to justify an exercise of their broad, albeit ill-defined, police powers.

After all, since the precise intentions of the Framers of the Fourteenth Amendment are so uncertain, any particular construction of the Privileges or Immunities Clause is likely to be erroneous, the difference only being the magnitude of the error. If the Court is to construe the Privileges or Immunities Clause erroneously, though, would it not be better to err in favor of individual liberty rather than in favor of "some common impulse of passion" which is "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community,"[271] and for which the requisite need cannot be established?

III. An Alternative Mode of Analysis for the Adjudication of Individual Rights

As demonstrated in Part II, the Court's approach to the adjudication of individual rights is fundamentally flawed. Exposing the flaws in the Court's mode of analysis, though, serves no useful purpose if one does not propose a viable alternative. Consequently, this Part proposes a mode of analysis which more accurately reflects the history of and conforms to the principles of the Constitution.

First, with respect to the powers to be exercised by Congress, the Court must deem the Tenth Amendment to be a fixed demarcation of the division of power between the Federal and State governments rather than a mere "tautological" barrier which vacillates according to the scope of power Congress desires to exercise.[272] To this end, the Court must more scrupulously adhere to the Framers' intentions by construing literally the "few and defined" expressly delegated powers in Article I; the Court has already admitted that its own construction of these powers would have been "unimaginable" to the Framers.[273]

Of course, an inquiry into the ends of power with respect to which Congress may rightfully legislate implicates federalism considerations more than it does individual rights. The more

271. The Federalist No. 10, at 78 (James Madison) (C. Rossiter ed., 1961).
272. *See supra* note 105 and accompanying text.
273. *See supra* note 109 and accompanying text.

pertinent question, then, is whether the means employed by Congress to effectuate a desired end are compatible with certain other provisions of the Constitution, namely the Necessary and Proper Clause and the proscriptions embodied in the first nine Amendments. As Madison once keenly observed, "[i]t must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers."[274]

As discussed in Part II, however, the Court has lamely construed the Necessary and Proper Clause to tolerate the implementation of any means which Congress deems to be conducive to a desired end so long as the means adopted is not prohibited by the Constitution. At the time of its adoption, however, the Constitution did not include the prohibitions which now form the Bill of Rights. The omission of a bill of rights was due principally to the fact that many of the Framers considered a bill of rights to be unnecessary since Congress had not been furnished with the power to legislate with respect to the rights for which protection was sought. It necessarily follows that, since the Framers neither conferred upon Congress the power to adopt legislation which would implicate the rights for which protection was sought nor adopted provisions expressly proscribing the exercise of such power, an exercise of power which does in fact implicate any of the rights presently embodied in the first nine Amendments would not have been regarded by the Framers as both "necessary" and "proper." Accordingly, the Necessary and Proper Clause itself impliedly serves as a substantive restraint upon the means which may be employed by Congress in the exercise of its enumerated powers.

By its terms, the Necessary and Proper Clause does not identify which particular exercises of power do or do not satisfy the standard set forth therein. Nonetheless, it was left, "in the first instance," to the Executive and Judicial Branches to rectify "misconstructions" of the Necessary and Proper Clause by Congress. To this end, the Court has adopted the first eight Amendments as the standard against which to measure the validity of

274. *See supra* note 129; *see also* 2 BARNETT-RETAINED, *supra* note 168, App. A, at 421 (reproducing Madison's speech before Congress on the constitutionality of the Bank of the United States) ("If . . . Congress, by virtue of the power to borrow, can create the means of lending, and, in pursuance of these means, can incorporate a Bank, they may do any thing whatever creative of like means.").

congressional measures which are alleged to impair individual rights. At least to some extent, the Court has succeeded in safeguarding from improvident exercises of power the guarantees embodied in the first eight Amendments. Unfortunately, the Court has, out of a contrived notion of fidelity to the text of the Constitution, declined to safeguard with equal—or, for that matter, any—zeal the rights "retained by the people" by virtue of the Ninth Amendment. While the Court has had little difficulty construing and giving effect to the explicit and presumably more unambiguous guarantees embodied in the first eight Amendments, it has declined to construe and give effect to the Ninth Amendment. Yet that Amendment is as much a part of the Constitution as the first eight Amendments and employs language which is equally unambiguous.

The text of the Ninth Amendment commands clearly enough that the "retained" rights are not to be "denied" or "disparaged." Granted, we can do no more than speculate as to what rights are "retained" by virtue of the Ninth Amendment. What we do know, though, is that the Framers both understood that there were other rights in addition to the ones described with particularity and directed that these "retained" rights were not to be "denied" or "disparaged." When the Court evaluates a congressional measure by looking exclusively to the specific guarantees embodied in the first eight Amendments, though, it necessarily "disparages" and "denies" the "retained" rights. Not only is this approach inimical to the explicit textual mandate, but it yields a result which renders ineffectual the precaution taken by Madison to guard against the possibility that the enumeration of certain rights would dangerously imply that those rights which were not singled out were not intended to be safeguarded.

The culprit for this misguided approach to the adjudication of individual rights is the judicially invented "presumption of constitutionality" doctrine which stems from the Court's tangled notion of majoritarian democracy. Rather than burdening the Federal Government with the duty of pointing to the source of its power, the "presumption of constitutionality" doctrine instead assigns to the individual challenging a particular law the responsibility of establishing that the law is in fact inconsistent with the Constitution. Unlike the heightened standard of review which is invoked when a law implicates one of the enumerated guarantees in the first eight Amendments (or a right which a majority of the

Justices adjudge to be fundamental in light of their arbitrary notions of "ordered liberty"), this rational basis standard dictates that, the individual challenging the law must successfully negate every conceivable basis which might support the law, even including those which Congress neither relied upon nor perhaps even contemplated as a basis for the law. In fact, under this "standard" of review, Congress need not articulate or advance any reason at all for its actions.

This rational basis standard thus fails to produce any meaningful review of legislation, places too onerous a burden on the individual, and impedes the democratic process by shielding members of Congress from the full measure of political accountability to which they should be subjected. Beyond this, there is not a syllable in the Constitution which directs the Court to evaluate legislation enacted by Congress under a bifurcated scheme of review, the level of which depends on the relative importance assigned to a given right by judges. In fact, both the neutrality of the Necessary and Proper Clause and the directive contained in the Ninth Amendment that the "retained" rights are not to be denied or disparaged compel the conclusion that all rights should be evaluated under the same level of scrutiny.

For all these reasons, the Court should abandon its ill-conceived "presumption of constitutionality" doctrine. In its place, the Court should adopt a constitutional "presumption of liberty"[275] which accords equal deference to each of the individual rights particularly described or retained in the first nine Amendments. Had the Framers described with particularity each right with respect to which Congress has not been granted the power to legislate (*i.e.*, powers which are not deemed both "necessary" and "proper"), then it would be a rudimentary task to ascertain whether a particular measure is valid. But because our Constitution is a constitution of delegated powers and not one of reserved rights, and because the Framers understood that there was a body of "retained" but unenumerated rights which were not to be "denied" or "disparaged," it is incumbent upon the Court both to presume the existence of this indeterminate, yet

275. *Accord* Barnett in 1 BARNETT-RETAINED, *supra* note 146, at 41 ("the Ninth Amendment can be viewed as establishing a general constitutional presumption in favor of liberty"); *compare* Kozinski in ECONOMIC RIGHTS, *supra* note 46, at xv ("The suspicion of unchecked governmental power, and the excesses to which it could lead, created a heavy presumption against laws that restricted individual rights, whether they involved liberty or property.").

potentially vast, body of "retained" rights and to enforce these unenumerated rights with the same fervor as it does the enumerated rights embodied in the first eight Amendments.[276]

This does not mean, of course, that the Court should itself strive to identify or describe with particularity the "retained" rights. Since under the "presumption of liberty" doctrine "the burden of justifying the exercise of governmental power rests with those who are exercising the power to justify that exercise in terms of delegated power," it follows that it is "never necessary to specify the unenumerated rights protected by the Ninth Amendment."[277] In fact, it has been suggested that "the impulse to define the unenumerated rights" is what "has led to the intrusive use of government power not derived from any provisions of the Constitution."[278] Rather than succumb to the temptation of "defining" the "retained" rights, then, the Court should instead treat the Necessary and Proper Clause and the Ninth Amendment, collectively, as a rule of construction which presumes that an exercise of power by Congress in some way abridges, denies, or disparages the one original, fundamental right—from which all of the enumerated and retained rights are necessarily derived—of each individual to engage in "self-sustaining and self-generated action," the purpose of which is "the support, the furtherance, the fulfillment and the enjoyment of his own life."[279]

The Government may, of course, rebut this presumption, but only if it can point to the source of its power which authorizes a particular measure. First, it must establish that the objects with respect to which it has elected to exercise power may in fact be plausibly derived from the delegated powers in Article I, most of which are unambiguous and straightforward. For example, Congress may, *inter alia*, "establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies," "coin Money," "establish post Offices and post Roads," "declare War," "raise and support Armies," and "provide and maintain a Navy." Others powers which are not "expressly" enumerated can—and, of course, must—be "read into" Article I. For instance, Congress

276. Barnett in 1 BARNETT-RETAINED, *supra* note 146, at 41 ("According to the presumptive method, . . . the unenumerated rights of the Ninth Amendment that protect individual liberty operate identically to enumerated rights.").

277. Erler in HICKOK-BILL OF RIGHTS, *supra* note 184, at 438.

278. *Id.* at 439; *id.* ("Those who wish to define the unenumerated rights—whether by analogy or some functional or structural construction—are simply disparaging the rights guaranteed by the Ninth Amendment.").

279. RAND-VIRTUE, *supra* note 216, at 93-94.

has the express power to both "raise and support Armies" and "provide and maintain a Navy." It would, however, be entirely contrary to the Framers' intent to deny to Congress the power to "provide and maintain" an Air Force; the Framers, of course, could not have foreseen the development of jet aircraft. Because they resolved to equip Congress with plenary power to provide for the national defense, it is entirely proper to "imply" a power to "provide and maintain" an Air Force.

On the other hand, the Framers were familiar with the concept of intrastate commerce (*i.e.*, commerce within a State) but expressly provided that Congress could regulate only with respect to interstate commerce (*i.e.*, commerce among the several States) and foreign commerce. Accordingly, it is both inimical to the Framers' intentions and a breach of fidelity to the text of the Constitution to allow Congress to regulate with respect to the internal economic affairs of the States. Moreover, it is a ruse—comparable in absurdity to the "emanating penumbras" of the Bill of Rights discovered by Justice Douglas—to sanction such regulation on the pretense that economic activities "once considered purely local have come to have effects on the national economy."[280] All economic activity, of course, has such effects. The Commerce Clause, however, speaks not in terms of "effects on the national economy" but in terms of commerce "among the several States." Presumably, had the Framers wanted Congress to exercise power over all economic activity which affects the national economy, they would either have employed language which better conveyed that intention or at least chosen not to employ language which identifies two specific categories of commerce, thus excluding all others. Consequently, while the power of Congress to regulate, for example, the airline, railroad, shipping, trucking and telecommunications industries cannot be doubted, the power of Congress to regulate industries active only in intrastate commerce is highly suspect.

Having established that the objects with respect to which it has elected to exercise power may in fact be plausibly derived from the delegated powers in Article I, Congress must then identify and describe with some particularity the constitutionally legitimate Federal interest(s) which a particular measure is designed

280. New York v. United States, 112 S. Ct. 2408, 2419 (1992).

to protect or promote.[281] If Congress is unable—or simply fails—to identify such an interest, then Congress may not exercise the desired power. This is not to suggest that a purported interest must be "substantial" or "compelling," since even an insubstantial interest may, so long as it is legitimate, come within the legislative prerogative of Congress. Nonetheless, because Congress cannot transform an illegitimate interest into a legitimate one merely by decree, judges must certify that the interests asserted by Congress are in fact legitimate.

Even on the assumption, however, that Congress indeed has the power to regulate all industries and businesses, the fact that Congress may regulate certain aspects of these industries and businesses does not mean that Congress may regulate every aspect of them. Accordingly, while Congress may be able to identify, for example, a legitimate Federal interest warranting the adoption of uniform health and safety standards for the transportation of persons and cargo, it would be unable to identify a constitutionally legitimate Federal interest warranting the adoption of either industry-specific or generally-applicable wage, labor, and price regulations for transportation industries.

The identification and description of the asserted interest(s) serves at least two important functions. First, it strips away from judges, to a large extent, the capacity to shape and influence public policy. Under the "presumption of liberty" doctrine, judges must confine their inquiry into the validity of legislation to only those specific interests which Congress has in fact identified and described. Consequently, judges are not free to speculate about other "plausible" or "conceivable" interests which might support a particular measure. Instead, judges must find that at least—but not necessarily more than—one of the specific interests identified and described by Congress is legitimate and provides sufficient justification for the measure. If all the interests identified and described by Congress are illegitimate, judges will be constrained to invalidate the measure, "remanding" the matter back to Congress, the members of which are then free to

281. Even though Congress may establish that a legitimate Federal interest exists, unless the Constitution speaks to that interest Congress has no power to act. *See* 2 BARNETT-RETAINED, *supra* note 168, App. A, at 424 (reproducing Madison's Speech on the Constitutionality of the Bank of the United States) ("[N]o power . . . not enumerated c[an] be inferred from the general nature of Government. Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the Constitution.").

either decline to adopt substitute legislation or draft substitute legislation which identifies a legitimate interest.

This leads to the second important function of the "presumption of liberty" doctrine, which is that Congress will be denied both the opportunity to adopt legislation for no reason at all and the capacity to thrust upon judges the task of conjuring up "plausible" or "conceivable"—and perhaps quite controversial—rationales for a given measure, rationales which Congress itself perhaps did not consider. Instead, individual members of Congress will be obliged to announce openly and publicly their various motivations for proposing or supporting legislation. Knowing in advance that judges will not sustain legislation for reasons not identified and described by Congress itself, members of Congress may feel constrained to imbue the legislative record with their purported justifications for measures they support to forestall the possibility that a given measure will encounter judicial resistance. A declaration of purpose, then, will not only foster the democratic process by providing for a fully informed and public debate, but ensure that members of Congress will have a record to which they can ultimately be held accountable.

Finally, Congress must demonstrate that a measure it has adopted to effectuate a desired end is both "necessary" and "proper." To evaluate whether a given measure satisfies this standard, a judge must first examine the relationship between the means chosen and the end to be achieved. A given means will satisfy this standard if it directly advances or promotes one or more of the legitimate interests identified by Congress. If a particular means does not directly advance or promote a legitimate interest identified by Congress, the only conclusion to be drawn is that the means directly advances or promotes either an illegitimate interest or a legitimate interest not identified by Congress. As a consequence, the measure must be invalidated.

The "necessary" prong of this standard does not dictate that only those means which not only directly advance but entirely accomplish the objective as well are valid. Congress is free to legislate incrementally, though it does so at its own peril. Should Congress elect to legislate in increments which are too modest (*i.e.*, underinclusive), the protections afforded under the Equal Protection Clause may be triggered. On the other hand, should Congress be too zealous and adopt a measure which is too far-reaching (*i.e.*, overinclusive), then that measure may be held in-

valid because it is not sufficiently tailored to the stated objective. As noted earlier, the rights "retained" by virtue of the Ninth Amendment operate "identically" to the enumerated rights. To pass muster under the First Amendment, of course, a measure which implicates free speech interests must be "narrowly tailored"—a standard which requires that a measure "target[ ] and eliminate[ ] no more than the exact source of the 'evil' it seeks to remedy."[282] If "retained" rights are not to be "denied" or "disparaged," then it follows that measures implicating such rights must satisfy this standard as well. And since, by definition, an overinclusive measure targets and eliminates "more than" the exact source of the evil sought to be remedied, that measure is necessarily invalid.

After having established that a given means directly advances or promotes a legitimate interest identified by Congress, the judge must next determine whether the means is "proper"—whether the means employed by Congress in some way abridges, denies, or disparages individual rights. Since the only proper purpose of government is "to protect man's rights,"[283] it is only proper for Congress to employ means which do no more than ensure that the manner in which an individual exercises rights does not violate the equal right of any other individual to engage in like action. Accordingly, any measure adopted by Congress which goes further than this objective is inimical to the principles of individual liberty embodied in the Constitution and must therefore be invalidated.

With respect to State legislation, the mode of analysis is substantially similar, the principal difference being that since the Tenth Amendment reserves to the States a quantity of power which is "numerous and indefinite," it would be meaningless to require a State to establish that the objects with respect to which it may exercise its power can in fact be plausibly derived from the "numerous and indefinite" powers reserved by the Tenth Amendment. Consequently, although the "presumption of lib-

282. Frisby v. Schultz, 487 U.S. 474, 485 (1988); *id.* ("A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.").

283. RAND-VIRTUE, *supra* note 216, at 33; *see also* Macedo in ECONOMIC LIBERTIES, *supra* note 38, at 130 ("[the people] gave to government only the power to better 'preserve' their natural rights to 'liberty and property' "); John Stuart Mill, ON LIBERTY (1859), *reprinted in* PREFACES TO LIBERTY: SELECTED WRITINGS OF JOHN STUART MILL 250-51 (Bernard Wishy ed. 1959) ("[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection.").

erty" doctrine applies to the States, it is not to be invoked until the second stage of the analytical process, the point at which the State must identify and describe with some particularity the legitimate interest(s) which a measure is designed to protect or promote. From this point on, the process is analytically identical.

Just as with legislation enacted by Congress, then, legislation enacted by a State must directly advance or promote a legitimate interest identified by the State and do no more than ensure that individuals engage in "self-sustaining and self-generated action" not violative of the equal right of any other individual to engage in like action. With this principle in mind, then, it follows that, contrary to the notion to which the Court subscribes, "majority sentiments about the morality" of particular conduct do not provide an independently adequate basis upon which to sustain legislation if the conduct in question poses no objective and identificable harm to the interests of the State's citizens.[284] Although the so-called police powers of a State are broad, these powers contemplate only measures specifically aimed at preserving the lives, health, safety, and property of the State's citizens, as well as peace within the citizens' communities.

Even accepting as true, then, the observation that all laws are based on "notions of morality,"[285] the more salient observation is that while some laws based on "notions of morality" can fit comfortably within the sweep of the so-called police powers, others simply do not. This is because some measures are aimed not at proscribing conduct by third parties which poses an objective, identifiable harm to the interests of the State's citizens, but are instead designed to impose standards of personal behavior which are paternalistic in nature or which exemplify the standard of personal behavior which a majority (presumably) of the people advocate. Except to the extent that some of these measures are designed to simply protect us from ourselves, none curbs conduct which poses a direct harm to the interests of other citizens of the State.

In defense of such laws, Robert Bork has stated that if certain conduct "causes those in the majority moral anguish" or "moral pain," then a law which proscribes conduct to which "the Consti-

284. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) ("the presumed belief of a majority of the electorate . . . that homosexual sodomy is immoral and unacceptable" is an "[]adequate rationale to support [a] law" proscribing sodomy).

285. *Id.*

tution does not speak" must be enforced by a judge since the judge "has no way to choose between" the "gratification" of the majority and the "gratification" of the individual desiring to engage in the proscribed conduct.[286] Yet if mere "moral anguish" and "moral pain" are independently adequate bases upon which to sustain legislation which proscribes certain forms of behavior and conduct, why shouldn't *any* conduct which produces "moral anguish" and "moral pain" for any individual similarly be proscribed? How is it that "moral pain" and "moral anguish" are transformed into cognizable injury only when a supposed majority of the citizens sense such pain and anguish? Laws are not designed to deter injury which is inflicted only upon members of whatever majority is prevailing at the time. Rather, laws are designed to deter injury which may be inflicted upon any member of society at any given time. For that reason, laws proscribing murder, arson, or rape are valid not because the "notions of morality" ascribed to by a supposed majority of a State's citizens dictate such proscriptions or because such conduct causes "moral pain" or "moral anguish," but because such conduct poses an objective, identifiable threat to the interests of every citizen and because each citizen is entitled, as part of the social contract, to have these interests protected.

IV. The False Dichotomy between "Economic" Rights and "Personal" Rights

Some critics will object to the mode of analysis articulated in Part III because it neither purports to differentiate between "economic" rights and "personal" rights nor appears to require that laws implicating "personal" rights be subject to more rigorous scrutiny than laws implicating "economic" rights. It is of course quite true that an approach to the adjudication of individual rights which adopts a constitutional "presumption of liberty" for its analytical starting point will neither differentiate between "economic" and "personal" rights nor require that laws implicating "personal" rights be subject to more rigorous scrutiny than laws implicating "economic" rights. For two important reasons this must necessarily be the case.

First, since in actuality "economic" rights *are* "personal" rights, it is conceptually impossible to differentiate between "economic"

286. Bork-Tempting, *supra* note 5, at 258.

and "personal" rights. The right of an individual to engage in a lawful occupation of one's own choosing[287] or contract freely with others for goods and services is no less "personal" in nature than the right of an individual to, *inter alia*, use a contraceptive device[288] or marry.[289] The mere fact that what are termed "economic" rights may directly or indirectly involve money or other tangible property does not mean that the personal nature of these rights is somehow transformed into an impersonal right.

Moreover, not only is it conceptually impossible to differentiate between "economic" and "personal" rights, but it is similarly impossible to say that any of these rights is of inherently greater importance and hence more deserving of protection than others. Merely asserting that the right to speak freely is a fundamental right "does not furnish an adequate ground for downgrading all economic rights."[290] Other individuals may deem the right to contract freely to be of equal—or perhaps considerably greater—importance to them than more "personal" rights.[291]

Since the relative value assigned by an individual to each inherently equal right is a function of that individual's own unique ambitions, interests, experiences, upbringing, and education,

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287. *See* Jones v. Temmer, 829 F. Supp. 1226 (D. Col. 1993) (denying due process, equal protection, and privileges or immunities challenges to Colorado law requiring any individual desiring to obtain a certificate and operate a taxicab to demonstrate both that "existing service in an area is substantially inadequate" and that "existing companies cannot provide adequate service"—criteria that no aspiring cab companies have been able to meet since 1947).

288. Griswold v. Connecticut, 381 U.S. 479 (1965); *see also* Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating on equal protection grounds a Massachusetts law which prohibited anyone but a registered physician from prescribing or furnishing a contraceptive device, and then only to a married person).

289. Loving v. Virginia, 388 U.S. 1 (1967) (invalidating Virginia law which prohibited interracial marriages). *But see* Reynolds v. United States, 98 U.S. 145 (1879) (upholding Act of Congress criminalizing bigamy).

290. Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 46, 48.

291. *Id.* at 46 ("[M]ost men would probably feel that an economic right, such as freedom of occupation, was at least as vital to them as the right to speak their minds. Mark Twain would surely have felt constrained in the most fundamental sense, if his youthful aspiration to be a river-boat pilot had been frustrated by a State-ordained system of nepotism.") (citing Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552 (1947)). Judge Kozinsi has voiced a similar sentiment:

> I would be the last to denigrate the importance of freedom of speech and religion, the right to participate fully in the political process, or the right to be free from arbitrary arrest, conviction and punishment. But it is not clear to me that these rights are any more important than rights pertaining to property. I can certainly conceive of rational people who, if pressed to a choice, would be willing to give up the right to wear a jacket with obscene words on it in order to retain the right to construct a building or run a railroad.

Kozinski *in* ECONOMIC LIBERTIES, *supra* note 46, at xvii.

there is no principled, objective method by which judges can determine which rights are "more fundamental" than others. Consequently, rather than attempting to determine which rights are fundamental and which are not, judges must instead simply acknowledge that a right being asserted as fundamental by an individual *is* fundamental to that individual. So long as the exercise of that right neither interferes with the right of other individuals to exercise those rights deemed fundamental to them nor poses an objective, identifiable harm to others, then any law which abridges, denies or disparages that right should be deemed invalid.

Second, even if it were theoretically possible to differentiate between "economic" rights and "personal" rights, any effort to do so would be contrary to both the intentions of,[292] as well as the language employed by,[293] the Framers. Madison argued that "property, as well as personal rights, is an essential object of the laws" and insisted that "[i]n a just and a free government . . . the rights both of property and of persons ought to be effectually guarded."[294] Accordingly, in addition to providing protection for a number of "personal" rights such as speech and religion, the Constitution also prohibits the States from "impairing the Obligation of Contracts"[295] and requires that "just compensation" be paid when "private property [is] taken for public use."[296] The body of rights "retained" in the Ninth Amendment and the mass of "privileges" and "immunities" embodied in the Fourteenth Amendment are not fully defined. But given both the "natural

292. *See, e.g.*, Kozinski in ECONOMIC LIBERTIES, *supra* note 46, at xv ("it [cannot] be seriously disputed that the Founding Fathers were men to whom property was important and who were intensely aware of the need to safeguard property rights from majoritarian abuse"); James A. Dorn, *Judicial Protection of Economic Liberties*, in ECONOMIC LIBERTIES, *supra* note 38, at 1, 2 ("the Founding Fathers who shaped the Constitution were classical liberals; they viewed life, liberty, and *property* as inalienable rights that preexist the written law or positive legislation"); *compare* Scalia-*Lesser Evil*, *supra* note 41, at 856 ("Our modern society is undoubtedly not as enthusiastic about economic liberties as were the men and women of 1789; but we should not fool ourselves into believing that because we like the result the result does not represent a contraction of liberty.").

293. *See, e.g.*, Kozinski in ECONOMIC LIBERTIES, *supra* note 46, at xiv ("[The Constitution] certainly safeguards [the individual's] right to speak, pray, and be secure from unwarranted government intrusion into his home. But it shows at least equal concern for the individual's right to the fruits of his endeavors."); Note-*Resurrecting Economic Rights*, *supra* note 10, at 1374 ("a mandate [to protect economic rights] seems clear in light of the four property-protecting clauses of the Constitution and the views of the framers of the Constitution and the fourteenth amendment").

294. ELLIOT'S DEBATES-SUPPLEMENT, supra note 72, at 580-81.

295. U.S. CONST., art. I, § 10, cl. 1.

296. U.S. CONST., amend. V.

rights background" of the Constitution[297] and the fact that "[t]he framers were heirs to th[e] libertarian philosophical tradition" of Locke,[298] it is beyond question that both these provisions contemplate both "economic" and "personal" rights.

Most important, though, there is no language in the Constitution to which critics of "economic" due process can point that directs the Court to evaluate laws implicating "economic" rights under a different standard than laws implicating "personal" rights. In fact, the one provision of the Constitution which simultaneously addresses both "property" rights and "liberty" rights—the Due Process Clause—makes no distinction between the importance of or the respect to be accorded these rights. Instead, the Due Process Clause impartially instructs that no person may be "deprived of life, liberty, or property, without due process of law."[299] As a consequence, any theory of individual rights which seeks to differentiate between "economic" rights and "personal" rights is both unprincipled and unconstitutional.[300]

297. Dorn in ECONOMIC LIBERTIES, supra note 292, at 15; Macedo in ECONOMIC LIBERTIES, *supra* note 38, at 123 ("Th[e] absence [of a bill of rights] was not the consequence of any skepticism on the part of the Framers about the existence of broad natural rights.").

298. Note-Resurrecting Economic Rights, *supra* note 10, at 1371; Kozinski in ECONOMIC LIBERTIES, *supra* note 46, at xv ("the Framers were deeply influenced by natural rights thinkers such as Locke and Montesquieu"); Macedo in ECONOMIC LIBERTIES, *supra* note 38, at 130 ("John Locke, the political thinker who exercised the greatest influence on the republic's founding generation, argued that men gave up none of their natural rights when entering political society.").

299. U.S. CONST., amend V, XIV. *See* BERGER-JUDICIARY, *supra* note 5, at 267 ("Neither the Fifth nor the Fourteenth Amendment drew a distinction between 'liberty' and 'property,' [and] the Framers would have regarded the current reading of the Fifth Amendment as 'constituting severer restrictions as to Liberty than Property' as a 'strange anomaly.' "). *See also* United States v. Carlton, 114 S. Ct. 2018, 2027 (1994) ("The picking and choosing among various rights to be accorded 'substantive due process' protection is alone enough to arouse suspicion; but the categorical and inexplicable exclusion of so-called 'economic rights' (even though the Due Process Clause explicitly applies to 'property') unquestionably involves policymaking rather than neutral legal analysis.") (Scalia, J., concurring in the judgment).

300. *See* Hill-*Political Dimensions*, *supra* note 208, at 1285-86 ("if constitutional protection is to be given to rights deemed fundamental though not enumerated, it is difficult to perceive a principle that would justify the complete exclusion of claims founded on property"); *compare* Antonin Scalia, *Economic Affairs As Human Affairs*, in ECONOMIC LIBERTIES, *supra* note 38, at 31, 31-32 [hereinafter Scalia-*Economic Affairs*] ("[I]n the real world a stark dichotomy between economic freedoms and civil rights does not exist. Human liberties of various types are dependent on one another, and it may well be that the most humble of them is indispensable to the others — the firmament, so to speak, upon which the high spires of the most exalted freedoms ultimately rest.") *with* Dorn in ECONOMIC LIBERTIES, *supra* note 292, at 7 ("The Framers' views of the judicial function as one of protecting property—understood to include both economic and personal liberties—makes it difficult to understand how the modern Court can justify its discrimination against economic liberties and its failure to safeguard private property rights.").

In fact, the Supreme Court has itself acknowledged that "the dichotomy between personal liberties and property rights is a false one."[301] As if often said, though, actions speak louder than words. Ever since the Court abruptly abandoned in 1937[302] its decades-long —and shamelessly exaggerated[303]—practice of protecting under the "liberty" and "property" components of the Due Process Clause "economic" rights,[304] the Court has stead-

301. Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) ("Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.").

302. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (sustaining Washington law providing for a minimum wage for women and overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923)) ("The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. . . . [T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."). *See also* McCloskey, *supra* note 290, at 36 ("The judicial reaction against economic due process after 1937 is unique in the history of the Supreme Court. . . . [I]t is hard to think of another instance when the Court so thoroughly and quickly demolished a constitutional doctrine of such far-reaching significance.").

303. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 567-68 (2d ed. 1988) ("[The *Lochner* era should be so characterized only with great caution—and with a recognition that '*Lochnerizing*' has become so much an epithet that the very use of the label may obscure attempts at understanding. While the Supreme Court invalidated much state and federal legislation between 1897 and 1937, more statutes in fact withstood due process attack in this period than succumbed to it."); S. REP. No. 711, 75th Cong., 1st Sess. 18 (1937) ("In 148 years, from 1789 to 1937, only 64 acts of Congress have been declared unconstitutional—64 acts out of a total of approximately 58,000[.] . . . . With this record of fact, it can scarcely be said with accuracy that the legislative power has suffered seriously at the hands of the Court.").

304. *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (invalidating Louisiana law prohibiting any person within the State from contracting with an insurance company located and organized outside of the State which had not complied with the laws of the State relating to its business) ("The 'liberty' mentioned in [the Fourteenth Amendment] means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."); Lochner v. New York, 198 U.S. 45, 53 (1905) (invalidating New York law making it unlawful for a bakery owner to permit an employee to work more than sixty hours per week or ten hours per day) ("The general right [of the employer] to make a contract in relation to his business is part of the liberty protected by the 14th Amendment of the Federal Constitution. . . . The right to purchase or to sell labor is part of the liberty protected by this amendment . . . ."); Coppage v. Kansas, 236 U.S. 1, 14 (1915) (invalidating Kansas law making it unlawful to condition employment on agreement not to join a union); Ribnik v. McBride, 277 U.S. 350, 357-58 (1928) (invalidating New Jersey law fixing the fee an employment agent could charge for

fastly declined and repeatedly disavowed any desire to reestablish judicial protection of "economic" rights.[305]

Despite its hasty retreat from "economic" rights, the Court nonetheless continued to provide protection for individual rights of a more "personal" nature.[306] Just as it did during the *Lochner*

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services); New State Ice Co. v. Liebmann, 285 U.S. 262, 278-79 (1932) (invalidating Oklahoma statute requiring a showing of "necessity" for the manufacture, sale, or distribution of ice before a license to do so would be issued).

305. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) (upholding Act of Congress prohibiting the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream) ("Even in the absence of such aids [as legislative findings and reports of legislative committees] the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423-25 (1952) (upholding Missouri law making it a crime for an employer to deduct wages from an employee's pay for time spent—up to four hours—voting in elections) ("The liberty of contract argument pressed on us is reminiscent of the philosophy of [*Lochner*]. Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."); Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955) (upholding Oklahoma law making it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances) ("The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the [fitting] requirement. . . . [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."); Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) (upholding Kansas law making it a misdemeanor to engage in the business of debt adjusting unless as an incident to the lawful practice of law; implicitly disavowing the application of even the "rational relation" standard articulated in *Williamson*) (internal quotation marks, footnotes omitted) ("[W]e emphatically refuse to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas.").

306. *See, e.g.*, Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957) (holding that mere past membership in the Communist Party did not, consistent with the Due Process Clause, warrant an inference by New Mexico's Board of Bar Examiners that applicant to the bar was of "bad moral character") (citations and footnote omitted) ("[A]ny qualification must have a rational connection with the applicant's fitness or capacity to practice law. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church."); Kent v. Dulles, 357 U.S. 117, 125-26, 128-30 (1958) (holding that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment"). *See also* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (invalidating on equal protection grounds an Oklahoma law authorizing the sterilization of "habitual criminals") ("We are dealing here with legislation which involves one of the

era, though, the Court relied solely on the "liberty" prong of the Due Process Clause—until 1965, that is, when the Court rendered its landmark opinion in *Griswold v. Connecticut*.[307] At issue in *Griswold* was the validity of a Connecticut statute that both proscribed the use of contraceptives by any person and prohibited any person from aiding, abetting, or counselling another person to do so. Although some assail *Griswold* as simply a reincarnation of *Lochner*,[308] Justice Douglas, author of the Court's opinion, bent over backwards to distinguish, however disingenuously, *Lochner* and its doctrine:

> Overtones of some arguments suggest that [*Lochner*] . . . should be our guide. But we decline that invitation as we did in [*West Coast Hotel Co. v Parrish*] . . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.[309]

To preserve this contrived distinction, Douglas had to resist the temptation to rely solely on the "liberty" prong of the Due Process Clause of the Fourteenth Amendment. Instead, Douglas attempted to establish that the asserted right was somehow embraced by one or more provisions of the Bill of Rights which could then be "incorporated" or "absorbed" into the Due Process Clause of the Fourteenth Amendment.

The only impediment for Justice Douglas, of course, was the fact that none of the provisions of the Bill of Rights made any explicit—or even remotely implicit—reference to marriage or contraception. For the inventive Justice Douglas, though, this trivial detail was not determinative:

> The [Court's precedents] suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and sub-

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basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. . . . Any experiment which the State conducts is to [the individual's] irreparable injury. He is forever deprived of a basic liberty.").

307. 381 U.S. 479 (1965).

308. *See* BORK-TEMPTING, *supra* note 5, at 99 ("*Griswold*, as an assumption of judicial power unrelated to the Constitution is . . . indistinguishable from *Lochner*.").

309. 381 U.S. at 481-82. *But see* United States v. Carlton, 114 S. Ct. 2018, 2027 (1994) ("But *economic* legislation was not the *only* legislation subjected to 'exacting review' in those bad old days [of the *Lochner* era], and one wonders what principled reason justifies 'discarding that bad old approach *only as to that category*.'") (Scalia, J., concurring in the judgment) (emphasis in original).

> stance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one . . . . The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and affects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'[310]

Applying this "analysis" to the interest asserted, Justice Douglas effortlessly concluded that the marital relationship fell "within the zone of privacy created by several fundamental constitutional guarantees" and that the law was invalid because it had "a maximum destructive impact upon that relationship."[311]

Ironically, in reaching his conclusion, Douglas relied heavily upon two vintage cases from the *Lochner* era—*Meyer v. Nebraska*[312] and *Pierce v. Society of the Sisters*.[313] Significantly, Douglas, though perhaps not intentionally wanting to do so, falsely attributed to both *Meyer* and *Pierce* the notion that the Court "made applicable to the States by the force of the First and Fourteenth Amendments" the rights articulated in those cases.[314] Although the opinions in both *Meyer* and *Pierce* contain broadly stated principles, in neither case can a reference to the First Amendment be found. Indeed, *Meyer* and *Pierce* were decided under—and entirely dependent upon—the "liberty" and "property" components of the Due Process Clause of the Fourteenth

310. 381 U.S. at 484.

311. *Id.* at 485.

312. 262 U.S. 390, 399 (1923) (invalidating Nebraska law proscribing the teaching of any language other than English to all children enrolled in any school, public or private, that had not advanced beyond the eighth grade) ("Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.").

313. 268 U.S. 510, 535 (1925) (invalidating Oregon law providing for mandatory public school education of children between the ages of 8 and 16) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state [.]").

314. 381 U.S. at 482.

Amendment.[315] And as Douglas well knew, it was not until the case of *Gitlow v. New York*[316]—decided one week after *Pierce*—that the Court first suggested — and then only assumed for the purposes of that case — that the freedom of speech and freedom of the press guarantees of the First Amendment were "among the fundamental 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[317]

None of this is meant to suggest that the result in *Griswold* cannot be supported—the law was a blatantly unconstitutional exercise of power seriously interfering with the "liberty" of individuals—or that the Court is powerless to enforce unenumerated rights; rather, it merely illustrates the fact that in his ill-conceived attempt to disavow and renounce *Lochner*, Douglas had to take a small "liberty" with history. More significant than the fact that Douglas's discovery of constitutional "penumbras" and "emanations" was intellectually suspect, though, is the fact that his theory actually provides support for, rather than weakens, the position of those who advocate a reincarnation of "economic" substantive due process. Duplication of Douglas's model with respect to asserted "economic" rights clearly establishes that the "liberty of contract" right can be found "emanating" in the "penumbras" of certain enumerated rights, namely the Contracts Clause and the Takings Clause, not to mention the undefined body of "retained" rights in the Ninth Amendment, the mass of "privileges" and "immunities" embodied in the Fourteenth Amendment and the "right of association" drawn from the First Amendment.[318]

To be sure, the Court has since repudiated Douglas's theory of "penumbras" and "emanations" and instead chosen once again

315. In fact, perhaps the most interesting aspect of *Pierce* is that not a single parent was a party to the suit. Nonetheless, the Court found that the due process "property" interests of the two private schools that sought relief were sufficient for purposes of allowing the schools to assert the rights of third-party parents. Justice McReynolds pointed out that the "property" interests of the schools were "threatened with destruction through the unwarranted compulsion which [the state is] exercising over present and prospective patrons of their schools." 268 U.S. at 535. In this regard, the "property" rights focus of *Pierce* not only made for a perfect fit with the jurisprudence of the *Lochner* era, but further demonstrates just how contrived Douglas's distinction was.

316. 268 U.S. 652 (1925); see *supra* note 265 and accompanying text.

317. *Id.* at 666.

318. *See, e.g.*, Hill-*Political Dimensions*, *supra* note 10, at 1274-75 ("If the aim in *Griswold* was to recognize non-economic liberties without endorsing economic *Lochnerism*, the solution adopted was singularly ill-chosen; surely, given the will, all of economic *Lochnerism* and more can be found in penumbras formed by emanations from the takings and contract clauses.").

simply to rely on the "liberty" and "property" components of the Due Process Clause themselves, as well as the meaning assigned to them, to determine whether asserted rights are worthy of enhanced judicial protection. Nonetheless, the Court continues to review under a mere rational basis standard laws implicating "economic" rights.[319] By subjecting laws implicating either enumerated rights or unenumerated "personal" rights to a heightened standard of review (*i.e.*, a "lesser"—or perhaps no—presumption of constitutionality) while at the same time subjecting laws implicating "economic" rights to only a rational basis standard of review, the Court has divided the conceptually indivisible body of individual rights into two distinct and separate bundles of rights. Justice Scalia, who rejects the notion that there is a dichotomy between "economic" rights and "personal" rights,[320] nonetheless suggests that this bifurcated scheme of review is perfectly acceptable to him because it has diminished the amount of mischief in which the Court might otherwise have engaged.[321]

If the Court is to adopt a principled approach to the adjudication of individual rights, though, it must adopt an approach which is neutral and which applies a single standard of review to laws which implicate any right, irrespective of its perceived "personal" or "economic" nature. To be sure, the direction in which the Rehnquist Court is headed may result in the adoption of such a neutral approach. Unfortunately for us, the single standard of review adopted by the Rehnquist Court will be the ineffectual rational basis standard. While this approach would "avoid a constitutional double standard" with respect to unenumerated "personal" and "economic" rights, it would do so "at the expense of a total blindness to the constitutional status of individual liberty."[322] Moreover, it would only serve to perpetuate the "constitutional double standard" between enumerated rights and unenumerated—but "retained"—rights since it entails a mode of

319. Dorn in ECONOMIC LIBERTIES, supra note 292, at 7 ("The rational-basis test is certainly not a valid justification since it amounts to subjecting minorities to the will of majorities with no test to see if the resulting legislation is consistent with fundamental property rights."); *id.* at 13 ("Instead of actively securing rights to property and contract, as envisioned by the Framers, the judiciary under the rational-basis test has yielded to majoritarianism.").

320. *See supra* note 300.

321. *See* Scalia-*Economic Affairs*, *supra* note 300, at 35 ("I must believe that as bad as some feel judicial 'activism' has gotten without substantive due process in the economic field, *absent* that memento of judicial humility it might have gotten even worse.").

322. Macedo in ECONOMIC LIBERTIES, *supra* note 38, at 134.

analysis which is rights-based rather than powers-based. Consequently, it would render meaningless the Framers' painstaking efforts to circumscribe the powers of Congress under Article I.