

HOW CONSTITUTIONAL CORRUPTION HAS LED TO IDEOLOGICAL LITMUS TESTS FOR JUDICIAL NOMINEES†

*Roger Pilon**

I. EXECUTIVE SUMMARY

The 2000 presidential election was widely understood to be a battle for the courts. When George W. Bush finally won, following the Supreme Court's split decision in *Bush v. Gore*, many Democratic activists simply dug in their heels, vowing to frustrate Bush's efforts to fill vacancies on the federal courts. After Democrats took control of the Senate in May of 2001, they began calling explicitly for ideological litmus tests for judicial nominees. And they started a confirmation stall, especially for circuit court nominees, that continues to this day. Thus, eight of Bush's first 11 circuit court nominees went for over a year without even a hearing before the Senate Judiciary Committee, and most have still not come before the committee.¹

As the backlog of nominees grows, Democrats are quite explicit about the politics of the matter: their aim is to keep "highly credentialed, conservative ideologues" from the bench.² The rationales they offer contend that judges today are, and perhaps should be, "setting national policy."³ One such "policy" they abhor is "[t]he Supreme Court's recent 5-4 decisions that constrain Congressional power."⁴ Thus the importance, they say, of placing "sympathetic judges" on the bench, judges who share "the core values held by most of our country's citizens."⁵ Their view, in a word, is that everything is politics, nothing is law.

† This article is the first publication of a revised version of ROGER PILON, CATO INSTITUTE, POLICY ANALYSIS NO. 446, HOW CONSTITUTIONAL CORRUPTION HAS LED TO IDEOLOGICAL LITMUS TESTS FOR JUDICIAL NOMINEES (2002), at <http://www.cato.org/pubs/pas/pa-446es.html> (Aug. 6, 2002).

* Roger Pilon is vice president for legal affairs at the Cato Institute. He holds Cato's B. Kenneth Simon Chair in Constitutional Studies and is the Director of Cato's Center for Constitutional Studies.

¹ Sonya Ross, *Bush Raps Dems' Wrong Politics' on Judges; A Year After He Sent First Nomination, He Pushes for Hearings*, CHI. SUN-TIMES, May 10, 2002, at 35.

² Edward Lazarus, *Picking Judges: Democrats Should Stand Their Ground*, WASH. POST, June 19, 2001, at A21.

³ Joseph A. Califano, Jr., *Yes, Litmus-Test Judges*, WASH. POST, Aug. 31, 2001, at A23.

⁴ Charles E. Schumer, *Judging by Ideology*, N.Y. TIMES, June 26, 2001, at A19.

⁵ *Id.*

The battle between politics and law takes place at many points in the American system of government, but in recent years it has become especially intense over judicial nominations. That is because, as the Democrats rightly observe, judges today do set national policy far more than they used to – and far more than the Constitution contemplates. In fact, it is because the original design has been corrupted, especially as it relates to the constraints the Constitution places on politics, that we have come to ideological litmus tests for judges. The New Deal Court, following President Roosevelt's notorious Court-packing threat, politicized the Constitution, laying the foundation for several forms of judicial activism. After that it was only a matter of time until the judiciary itself had to be politicized. We are bearing the fruit of that constitutional corruption.

That will not change until we come to grips with the first principles of the matter – with the true foundations of our constitutional system. Yet neither party today seems willing to do that. Democrats have an activist agenda that a politicized Constitution well serves. Republicans have their own agenda and their own reasons for avoiding the basic issues. Thus, it may fall to the nominees themselves to take a stand for law over politics, the better to restore the Constitution and the rule of law it was meant to secure.

II. INTRODUCTION

The battle between politics and law takes place at many points in the American system of government, but in recent years it has been especially intense when presidents make nominations to the Supreme Court. With the bitterly contested election of George W. Bush to the presidency, however, the battle has moved even to lower court appointments. And it became more heated still when Democrats, after taking control of the Senate in May of 2001, began calling explicitly for ideological litmus tests for nominees for the federal courts.⁶ The particulars of such a test have not been made clear, apart from a few examples of views nominees must hold if they are to be confirmed. But the very call for such a test raises profoundly troubling questions going to the core of our system of government. Indeed, in the end it is nothing less than the rule of law that is at stake as nominees are increasingly being asked not whether they will apply the law, nor even what the law is, but whether their views are consistent with the purported views of the American people.

To illustrate and develop those points and to show, in particular, how constitutional corruption has led to ideological litmus tests for

⁶ Audrey Hudson, *Democrats to Check Judicial Nominees' Ideology; GOP Sees Effort to Halt Conservatives*, WASH. TIMES, June 27, 2001, at A1.

judicial nominees, this article first surveys the recent political landscape as it pertains to judicial appointments, focusing on the aftermath of the 2000 elections, the Senate confirmation stall now going on, and the rationales Democrats have offered for the stall. What is striking about those rationales is how explicit they have been about the politics of the matter: they make no pretense about defending the rule of law. The article then outlines the relation between politics and law that our Constitution contemplates. It was not that politics was to have little or no place in our system of government; rather, it was that politics – the pursuit of interests through political means – was to be conducted within the bounds set by the Constitution, for if all were politics, nothing would be law. Next, the article shows how we lived under that regime of law for 150 years, for the most part, before politics trumped law during the constitutional revolution of the New Deal. That entails showing how the Court's rewriting of the Constitution, following President Roosevelt's notorious Court-packing threat, effectively politicized the document, bringing us to a point today at which many think it proper that the Court should be "setting national policy," as one leading Democrat recently put it.⁷ Given that view, it is hardly surprising that judicial nominees are now subjected to ideological scrutiny. Finally, the article concludes by looking briefly at what must be done to restore the rule of law.

Before turning to those issues, however, a word should be said about why they have been cast already in partisan terms. It is not that Republicans have been faultless in recent years in the matter of judicial confirmations – far from it. But the present Senate stall, as we will see, is different in both degree and kind from earlier stalls, Republican or Democratic; the issue of ideology is now explicit, closely tracking generally understood party ideologies; and the divisions are now more sharply partisan than ever before, as witness the Senate Judiciary Committee's recent 10-9 vote, along straight party lines, against sending to the full Senate the nomination of Judge Charles Pickering for a seat on the U.S. Court of Appeals for the Fifth Circuit. Moreover, when looked at closely, as we will do shortly, the rationales Democrats are offering for rejecting nominees, unlike those offered in the past by Republicans, tend to be considerably more political than legal. In a word (to be developed more fully below), Democrats today are tending far more than Republicans have in the past to look for result-oriented than for process-oriented judges. For those several reasons, therefore, this article will continue to use the partisan terms of today's debate, notwithstanding that there will always be individual exceptions and that Republicans, too, have more than once politicized the Constitution.

⁷ Califano, *supra* note 3.

III. IDEOLOGICAL LITMUS TESTS

It was widely understood that the 2000 presidential election was a battle for the courts. When President Bush finally won the election following the Supreme Court's decision in *Bush v. Gore*,⁸ many Democrats, outraged at the Court's ruling, and charging that the Court itself had acted politically, simply dug in their heels. The nation's law school faculties, overwhelmingly Democratic if not leftist, exploded in a torrent of anger. On January 13, 2001, 554 professors from 120 law schools took out a full-page ad in the *New York Times* condemning the Court's majority for having acted not as judges but as "political proponents for candidate Bush."⁹ In op-eds, articles, books, and TV appearances, the venom poured forth.¹⁰ Harvard Law School's Randall Kennedy charged that the Court had acted "in bad faith and with partisan prejudice."¹¹ Kennedy's colleague, Alan Dershowitz, wrote that *Bush v. Gore* "may be ranked as the single most corrupt decision in Supreme Court history . . ."¹² And Yale Law School's Bruce Ackerman, claiming that "[w]e are on the brink of a court-packing crisis," went so far as to call for "a moratorium on Supreme Court appointments until the American people return to the polls in 2004."¹³

Thus far in the Bush tenure the Senate has not faced a Supreme Court vacancy. It clearly is in a stall in filling lower court vacancies, however, especially on the courts of appeals. As of the August 2002 recess, there have been 152 vacancies on the 862-member Article III courts during Bush's tenure, for which he has nominated 122 candidates.¹⁴ Only 72 of those 122 nominees have been confirmed, leaving 80 empty seats, 32 of which are "judicial emergency" vacancies according to the Administrative Office of the U.S. Courts.¹⁵ Half the

⁸ *Bush v. Gore*, 531 U.S. 98 (2000).

⁹ *554 Law Professors Say*, N.Y. TIMES, Jan. 13, 2001, at A7 (advertisement).

¹⁰ For a general survey, see Peter Berkowitz & Benjamin Wittes, *The Professors and Bush v. Gore*, WILSON Q., Autumn 2001, at 76, 77.

¹¹ Randall Kennedy, *Contempt of Court*, AM. PROSPECT, Jan. 1, 2001, at 15, 16.

¹² ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 174 (2001).

¹³ Bruce Ackerman, *Foil Bush's Maneuvers for Packing the Court*, L.A. TIMES, Apr. 26, 2001, at B11.

¹⁴ OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, *JUDICIAL NOMINATIONS* [hereinafter *JUDICIAL NOMINATIONS*], available at <http://www.usdoj.gov/olp/judicialnominations.htm> (last updated Aug. 12, 2002).

¹⁵ *Id.* A judicial emergency vacancy is defined as follows:

Any vacancy in a district court where weighted filings are in excess of 600 per judgeship; or any vacancy in existence more than 18 months where weighted filings are between 430 to 600 per judgeship; or any court with more than one authorized judgeship and only one active judge; and any vacancy in a court of appeals where adjusted filings per panel are in excess

seats on the Sixth Circuit today are empty. In fact, at the circuit level the stall is egregious. Only 13 of Bush's 32 circuit court nominees have been confirmed, and 2 of those were Clinton holdovers, re-nominated by Bush as a gesture to the Democrats.¹⁶ More telling still, 8 of those 32 nominees have been hanging since May of last year, never having had even a hearing, much less a vote, leaving 27 empty circuit court seats.¹⁷

In response to Republican criticisms, Patrick Leahy (D-Vt.), chairman of the Senate Judiciary Committee, often says that the Senate has confirmed more nominees at a given point in time than were confirmed during prior administrations.¹⁸ That is true, but it fails to address the objection, because there are more vacancies now and more nominees. To do a fair comparison, one must look not at raw numbers but at percentages. Doing so, the confirmation rates for the first year of recent administrations, taking nominees for district and appellate courts together, are as follows: Reagan 91 percent; Bush (the father) 62 percent; Clinton 57 percent; Bush (the son) 42 percent.¹⁹ When just the circuit court confirmations are looked at, however, we find that only 9 of Bush's 29 first-year nominees were confirmed, or 31 percent, and that includes the 2 Democratic holdovers.²⁰ If one compares the confirmation rates for circuit court nominees for the first two years of recent administrations, both Reagan and Bush the father had 95 percent of their nominees confirmed, while President Clinton's rate was only slightly lower: 86 percent.²¹ To date, the rate for Bush the son is barely 40 percent, again counting the Democratic holdovers.²² Most shocking of all, no president in history has had 8 of his first 11 circuit court nominees left to hang for over a year without even a hearing, yet that is how the Senate has treated that first group of Bush nominees.²³

And we are not talking here about political hacks. In fact, the Bush appellate court nominees who have waited the longest include some of the most accomplished lawyers in the nation. John Roberts Jr., who clerked for then-Associate Justice William H. Rehnquist on his way to becoming the nation's principal Deputy Solicitor General, has argued

of 700; or any vacancy in existence more than 18 months where adjusted filings are between 500 to 700 per panel.

Id.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Patrick Leahy, Letter to the Editor, *Democrats Work Hard to Process Nominations*, WALL ST. J., Nov. 13, 2001, at A23; cf. Roger Pilon, Letter to the Editor, *Leahy's Slow Role on Confirmations*, WALL ST. J., Nov. 19, 2001, at A21.

¹⁹ JUDICIAL NOMINATIONS, *supra* note 14.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

numerous cases before the Supreme Court. Michael McConnell, who clerked for Justice William Brennan, is a gifted legal scholar who has taught at Harvard and at the University of Chicago, and now teaches at the University of Utah. Miguel Estrada came to America as a teenager, speaking virtually no English. Yet he graduated *Phi Beta Kappa* from Columbia College and at the top of his Harvard Law School class before clerking for Justice Anthony Kennedy. Like Roberts and McConnell, he too served in the Justice Department – as a federal prosecutor in New York and an attorney in the Solicitor General’s office in Washington. One could hardly find more qualified candidates for our appellate courts.

The reason such nominees have not had a hearing is because Democrats on the Senate Judiciary Committee have erected an ideological litmus test – which nominees like these cannot pass, presumably – and they are quite explicit about it. In fact, just after control of the Senate shifted to the Democrats, following the defection of Vermont Senator James Jeffords from the Republican Party, Charles Schumer (D-N.Y.), the new chairman of the Judiciary Committee’s Subcommittee on Administrative Oversight and the Courts, announced a series of hearings to examine three questions: should “judicial ideology” play a role in judicial selection; should nominees have the burden of proving their fitness for office; and did the Rehnquist Court’s federalism jurisprudence give rise to a need for the Senate to change the selection process? The first of those hearings was held on June 26, 2001; the second on September 4; the third was postponed following the September 11 terrorist attacks and has yet to be held.

Plainly, those hearings were not aimed at moving the administration’s nominations along. On the contrary, their aim was to stall and to lay a foundation for continuing to stall. In fact, they have been accompanied by a number of quite public statements urging and rationalizing the stall. A week before the first hearing, for example, the *Washington Post* ran an op-ed by Edward Lazarus, once a clerk for Justice Harry A. Blackmun, urging the Senate to reject the “highly credentialed, conservative ideologues” Bush had nominated for the bench.²⁴ Then on the day of that hearing the *New York Times* featured an op-ed by Senator Schumer himself, “Judging by Ideology.”²⁵ And on the Friday before the second hearing was to begin, right after Labor Day, the *Washington Post* ran another op-ed, this by Democratic Party elder Joseph Califano Jr., not-so-subtly titled *Yes, Litmus-Test Judges*.²⁶

In his article, Schumer defends ideological litmus testing by saying, candidly, that it is more honest than rejecting nominees for “small

²⁴ Lazarus, *supra* note 2, at A21.

²⁵ Schumer, *supra* note 4.

²⁶ Califano, *supra* note 3.

financial improprieties from long ago” when we all know that the real reason for rejection is ideological differences.²⁷ He then gives us a glimpse of how testing would work. The importance of ideology in the confirmation decision can vary, Schumer writes, “depending on three factors: the extent to which the president himself makes his initial selections on the basis of a particular ideology, the composition of the courts at the time of the nomination and the political climate of the day.”²⁸ Set aside how one applies those factors, their aim is clear: it is, explicitly, to keep conservatives like Justice Antonin Scalia and Justice Clarence Thomas from our courts. “The Supreme Court’s recent 5-4 decisions that constrain Congressional power,” Schumer says, “are probably the best evidence that the court is dominated by conservatives.”²⁹ Thus, “[t]ilting the court further to the right would push our court sharply away from the core values held by most of our country’s citizens.”³⁰ Never mind, apparently, what the Constitution might say about the scope of congressional power – or anything else, for that matter. What counts, rather, is our citizens’ “core values.”

That glimpse of the Democratic agenda was embellished two months later in the Califano piece. Complaining that gridlock and big money have long kept Congress from legislating on a wide range of urgent matters, Califano notes that concerned citizens have been petitioning the courts with matters they once took to the political branches, making the courts “increasingly powerful architects of public policy.”³¹ Indeed, “[w]ho sits in federal district and appellate courts is more important than the struggle over the budget” or virtually anything else going on today in Washington, Califano writes.³² For we have all learned, he continues, “that what can’t be won in the legislature or executive may be achievable in a federal district court where a sympathetic judge sits.”³³ The Senate, therefore, needs to step in to decide, on explicitly ideological grounds, who will be “setting national policy” from the bench.

That is a striking picture. Everything is politics. Nothing is law. Judges don’t apply law. “Sympathetic judges” make law, like so many legislators, “setting national policy” in the process. Meanwhile, our nominal legislators in the Senate are reduced to vetting our true rulers. Interestingly, the Constitution, which spells out the actual separation of powers and the relation between politics and law in our system of

²⁷ Schumer, *supra* note 4.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Califano, *supra* note 3.

³² *Id.*

³³ *Id.*

government, is mentioned not once in Califano's piece. Doubtless, it is an embarrassment, utterly inconsistent with his picture of a thoroughly politicized judiciary.

Yet for all that, Califano's picture is too close to the truth to be ignored. He has put his finger on just why the confirmation battles today loom so large. What he and his Democratic colleagues have failed to do, however, is explain, much less justify, this flight from constitutional principle. To get at that, we have to go further back.

A. Politics and Law

The main origins of the problem are in the Progressive Era, when the social engineers of the time sought often to do through government – through the exercise of political power – what the Constitution plainly left to be done, under the rule of law, in the private sector. Those efforts accelerated and came to a head during the New Deal when President Franklin Roosevelt, facing a Supreme Court bent on upholding the rule of law, attempted to pack the Court with six new members. The scheme failed, but Roosevelt won the day when a cowed Court began rethinking the Constitution, effectively eviscerating constitutional limits on both federal and state power. The deferential Court that emerged has been called “restrained,” but in truth it was an “activist” court – finding congressional and executive powers nowhere granted, ignoring rights plainly in the Constitution. And that led to even more judicial activism.

To better appreciate that constitutional revolution, however, it would be useful first to sketch the relation between politics and law that the Constitution contemplates. In a limited constitutional republic like ours, the relation between politics and law is set, for the most part, by law – by the law of the Constitution. Drawing upon reason and interest, the Framers drafted a constitution that became law through ratification, a political act that reflected, in large measure, the will of the founding generation. As amended by subsequent acts of political will, the Constitution authorizes the political branches to act pursuant only to their enumerated powers or to enumerated ends. It further limits the exercise of those powers and the powers of the states either explicitly or by recognizing, with varying degrees of specificity, rights retained by the people. And, by fairly clear implication, made explicit in the *Federalist* and shortly thereafter in *Marbury v. Madison*,³⁴ the Constitution authorizes the judiciary to declare and enforce that law of authorizations and restraints consistent with the document itself.

Thus, the scope for “politics” – understood as will or the pursuit of individual or group interests through public or political institutions – is

³⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

limited. Consistent with constitutional rules and limits, the people may act politically to fill elective offices. Those officers may in turn act politically to fill non-elective offices. But once elected or appointed, those officials may act politically only within the scope and limits set by the Constitution. In particular, not everything in life was meant to be subject to political or governmental determination. In fact, the founding generation wanted most of life to be beyond the reach of politics, yet under the rule of law. In a word, our Constitution does not say, "After periodic elections, those elected may do what they wish or pursue any end they wish or any end the people want." On the contrary, it strictly limits, by law, the scope of politics. And it falls to the judiciary, the non-political branch, to declare what the Constitution says that law and those limits are, thereby securing the rule of law.

The aim in all of this, then, is to constrain the rule of man – and politics – by the rule of law. The Framers understood that legitimacy begins with politics, with the people. Thus, "We the people . . . do ordain and establish this Constitution . . ." ³⁵ But once ratification – the initial political act – establishes the rule of law, that law constrains politics thereafter, at least in principle. And it is the non-political judiciary that declares and enforces that law. It is essential, therefore, that the judiciary act non-politically – not from will or interest but from reason, according to law, consistent with the first principles of the system. If it does not, then to that extent the rule of law is undermined and politics trumps law.

B. Law Restrains Politics

That design held, in large part, for 150 years. Not that there were not attempts to upset it right from the start. Indeed, Alexander Hamilton's 1791 Report on the Subject of Manufactures,³⁶ which Congress shelved, was a very early effort to establish a national industrial policy that would have politicized vast areas of American life. Despite the limits imposed by the enumeration of Congress's powers, Hamilton argued that Congress had the power to act for the "general welfare," a power that extended to "the general interests of learning, of agriculture, of manufactures, and of commerce . . ." ³⁷ James Madison, the principal architect of the Constitution, responded sharply: "The federal Government has been hitherto limited to the specified powers, by the Greatest Champions for Latitude in expounding those powers. If not

³⁵ U.S. CONST. pmbl.

³⁶ Alexander Hamilton, *Report on the Subject of Manufactures*, in *INDUSTRIAL AND COMMERCIAL CORRESPONDENCE OF ALEXANDER HAMILTON* 245 (Arthur Harrison Cole ed., 1968).

³⁷ *Id.* at 247.

only the *means*, but the *objects* are unlimited, the parchment had better be thrown into the fire at once.”³⁸

Over the next 150 years we find numerous efforts to expand the business of government and undermine the rule of law, but those efforts were often checked in the political branches themselves – not simply on political but on constitutional grounds. An early example came, not surprisingly, from Madison: faced in 1794 with a bill appropriating \$15,000 for the relief of French refugees fleeing an insurrection,³⁹ he rose on the floor of the House to say that he could not “undertake to lay [his] finger on that article in the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents.”⁴⁰ And when unconstitutional bills did get out of Congress, presidents ranging from Tyler, Polk, Pierce, and Buchanan, before the Civil War, to Arthur and Cleveland, after the war, stood athwart them. Thus, in 1887, 100 years after the Constitution was written, President Cleveland vetoed a bill appropriating \$10,000 for seeds for Texas farmers suffering from a drought,⁴¹ saying “I can find no warrant for such an appropriation in the Constitution”⁴² Politics aside, Cleveland upheld the law. And the Court, too, could be found upholding the law without embarrassment. Thus, in the 1907 case of *Kansas v. Colorado*, it wrote, “[T]he proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers.”⁴³

In all three branches, then, we find numerous examples over this period of fidelity to principle, of law restraining politics. Although government did grow to some extent, it stayed, for the most part, within constitutional bounds. With the rise of progressivism, however, the pressure for active government began to mount as enlightened thought turned increasingly to state and federal legislatures to solve all manner of social and economic “problems.” As the political branches began to respond to such calls, often from narrow interests, it fell increasingly to the courts alone to enforce constitutional limits. Often they did so, as in the 1905 case of *Lochner v. New York*,⁴⁴ which found New York State’s law limiting the hours bakers might work to be in violation of the Constitution’s guarantee of freedom of contract. But sometimes they did

³⁸ Letter from James Madison to Henry Lee (Jan. 1, 1792), in 6 THE WRITINGS OF JAMES MADISON, 1790-1802, at 81 n.i (Gaillard Hunt ed., 1906).

³⁹ Act of Feb. 12, 1794, 6 Stat. 13.

⁴⁰ 4 ANNALS OF CONG. 170 (1794).

⁴¹ H.R. 10203, 49th Cong. (1887).

⁴² 18 CONG. REC. 1875 (1887).

⁴³ *Kansas v. Colorado*, 206 U.S. 46, 89 (1907).

⁴⁴ *Lochner v. New York*, 198 U.S. 45 (1905).

not, as in the 1926 case of *Village of Euclid v. Ambler Realty Co.*,⁴⁵ which upheld comprehensive municipal zoning against the claims of private owners that their rights to use their property consistent with the rights of others were violated by the scheme.

IV. POLITICS TRUMPS LAW

After Franklin Roosevelt was elected, however, the focus of the political activists shifted to the federal government – and in short order, politics trumped law. With both political branches pressing for more government, one could say that it was only a matter of time until either the Supreme Court caved or nature took its course and the political branches conspired to seat sympathetic justices on the Court. Yet in either event – and both occurred⁴⁶ – we would still be left with the basic question of constitutional legitimacy. Even if Roosevelt's Court-packing scheme had not cowed the Court,⁴⁷ that is, or enhanced his ability to staff it with his own people, we would still need to ask: Did Congress, the Executive, and the Court have it wrong for 150 years, when all thought, in essence, that the Constitution authorized only limited government? Or was the radically different doctrine the Court produced in 1937 and 1938 on the mark? One can look at statements of those who effected the revisions for clues.⁴⁸ But one can look also at the revisions themselves to see how utterly inconsistent they are with basic constitutional principles. In either case, the conclusion that the New Deal Court turned the Constitution on its head is inescapable.⁴⁹

⁴⁵ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁴⁶ Between 1937 and 1941, Roosevelt was able to appoint seven justices. FEDERAL BAR ASS'N FOUND., *EQUAL JUSTICE UNDER LAW*, at inside back cover (1965).

⁴⁷ See ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 487-500 (6th ed. 1983); MERLO J. PUSEY, *THE SUPREME COURT CRISIS* (1937).

⁴⁸ Thus, in 1935 President Roosevelt wrote to the chairman of the House Ways and Means Committee, "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation." Letter from Franklin D. Roosevelt to Rep. Samuel B. Hill (July 6, 1935), in 4 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT*, 1935, at 297-98 (Samuel I. Rosenman ed., 1938). And three decades later, Rexford G. Tugwell, one of the principal architects of the New Deal, could be found writing, "To the extent that these new social virtues [i.e., New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them." Rexford G. Tugwell, *A Center Report: Rewriting the Constitution*, CENTER MAG., Mar. 1968, at 18, 20. That is a fairly clear admission that the New Deal was skating not simply on thin ice, but on no constitutional ice at all.

⁴⁹ See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1253-54 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution."); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987) ("I think that the expansive construction of the

The revisions were accomplished in two main steps. First, in 1937 the Court effectively eviscerated the doctrine of enumerated powers, which the Framers had thought would be the principal restraint on federal power. Second, in 1938 the Court bifurcated the Bill of Rights – which was added to the Constitution to afford further protections against federal power and, after the Civil War Amendments were ratified, against state power as well⁵⁰ – giving us a bifurcated theory of judicial review in the process.⁵¹

The doctrine of enumerated powers can be reduced to a simple proposition: if you want to limit power, don't give it in the first place. The first words of Article I speak to the point: "All legislative Powers *herein granted* shall be vested in a Congress . . ." ⁵² By implication, not all powers were granted. Article I, section 8, enumerates Congress's main powers. The Tenth Amendment, the final documentary statement of the founding period, recapitulates the doctrine, as if for emphasis, making it explicit: "The 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."⁵³

The 1937 Court eviscerated the doctrine of enumerated powers by reinterpreting two clauses of the Constitution, the General Welfare Clause and the Commerce Clause.⁵⁴ Both were meant to be shields against power. The Court turned them into swords of power. The General Welfare Clause was meant to be a restraint on the spending power.⁵⁵ Congress could spend for enumerated ends, but that spending had to serve the general welfare as distinct from particular or sectional welfare. In particular, Madison, Jefferson, and others insisted, against Hamilton, that Congress had no *independent* power to spend for the general welfare, for that would have rendered pointless the restraint afforded by enumeration.⁵⁶ As South Carolina's William Drayton observed in 1828, "if Congress can determine what constitutes the general welfare, and can appropriate money for its advancement, where

[Commerce C]lause accepted by the New Deal Supreme Court is wrong, and clearly so . . .").

⁵⁰ See Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361 (1993).

⁵¹ I have discussed the following more fully in Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507 (1993).

⁵² U.S. CONST. art. I, § 1 (emphasis added).

⁵³ U.S. CONST. amend. X.

⁵⁴ See John C. Eastman, *Restoring The "General" to The General Welfare Clause*, 4 CHAP. L. REV. 63 (2001).

⁵⁵ U.S. CONST. art. I, § 8, cl. 1; see Eastman, *supra* note 54.

⁵⁶ See, e.g., James Madison, *Report of the Resolutions*, in 6 THE WRITINGS OF JAMES MADISON, 1790-1802, at 341, 356-57 (Gaillard Hunt ed., 1906).

is the limitation to carrying into execution whatever can be effected by money?"⁵⁷ Yet in 1936, in *United States v. Butler*,⁵⁸ the Court sided with Hamilton, even if its opinion on the question was not central to the case. The next year, however, in *Helvering v. Davis*,⁵⁹ the Court elevated that dicta to law. Congress was now free to spend on any end it thought served the "general welfare." The modern welfare state was thus unleashed.

The Commerce Clause was also meant primarily to be a restraint – but on the states.⁶⁰ Under the Articles of Confederation, states were erecting tariffs and other protectionist measures that had begun to interfere with the free flow of commerce among them. In fact, one of the principal reasons the Framers met to draft a new constitution was to address that problem.⁶¹ They did so through the Commerce Clause, which gave Congress the power to regulate – or make regular – commerce among the states.⁶² And that is how the clause was read in

⁵⁷ 4 REG. DEB. 1632-34 (1828). Drayton continued, "How few objects are there which money cannot accomplish! . . . Can it be conceived that the great and wise men who devised our Constitution . . . should have failed so egregiously . . . as to grant a power which rendered restriction upon power practically unavailing?" *Id.* at 1634. Madison made a similar point on several occasions. See, e.g., James Madison, *supra* note 56.

Money cannot be applied to the *general welfare*, otherwise than by an application of it to some *particular* measure conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made.

Id. at 357. And Jefferson also addressed the issue. See, e.g., Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), in *THE WRITINGS OF THOMAS JEFFERSON*, 1816-1826, at 90, 91 (Paul Leicester Ford ed., 1899).

[O]ur tenet ever was, and, indeed, it is almost the only landmark which now divides the federalists from the republicans, that Congress had not unlimited powers to provide for the general welfare, but were restrained to those specifically enumerated; and that, as it was never meant they should . . . raise money for purposes which the enumeration did not place under their action; consequently, that the specification of powers is a limitation of the purpose for which they may raise money.

Id. at 91; see generally CHARLES WARREN, *CONGRESS AS SANTA CLAUS: OR, NATIONAL DONATIONS AND THE GENERAL WELFARE CLAUSE OF THE CONSTITUTION* (Joseph Cellini ed., 1978) (1932).

⁵⁸ *United States v. Butler*, 297 U.S. 1, 65-66 (1936).

⁵⁹ *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

⁶⁰ U.S. CONST. art. I, § 8, cl. 3.

⁶¹ See the concurrence of Justice William Johnson in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) ("If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.")

⁶² See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Epstein, *supra* note 49; Brief of Amicus Curiae Cato Institute at 12-17,

1824 in the first great Commerce Clause case, *Gibbons v. Ogden*.⁶³ It was not read as giving Congress a power to regulate, for any reason, anything that “affected” interstate commerce, which in principle is everything. Yet that is how the 1937 Court read the clause in *NLRB v. Jones & Laughlin Steel Corp.*⁶⁴ – and with that the modern regulatory state was unleashed.

After those two decisions, Congress’s redistributive and regulatory powers were plenary, in effect, as courts no longer asked that most basic of constitutional questions: Does Congress have the authority to do what it is doing? Yet individuals might still raise rights against the exercise of those powers. In 1938, therefore, the Court attended to that impediment to active government in the notorious filled-milk case, *United States v. Carolene Products Co.*⁶⁵ Famous “footnote four” of the opinion distinguished two kinds of rights and two levels of judicial review. If a measure implicated “fundamental rights” like speech or voting – rights associated with the political process – the Court would exercise “strict scrutiny” and the measure would likely be found unconstitutional. By contrast, if a measure implicated “nonfundamental rights” like property or contract – rights associated with “ordinary commercial transactions”⁶⁶ – the Court would exercise “minimal scrutiny” and the measure would likely be found constitutional. Those distinctions are nowhere to be found in the Constitution, of course. They were created from whole cloth to make the world safe for the expansive programs of the New Deal. Limited government would soon be a thing of the past as one program after another poured through the openings the Court had created.

V. A COURT WITHOUT A COMPASS

The constitutional revolution the New Deal Court wrought was a textbook example of politics trumping law – not on a small scale, as when a judge ignores the law in a narrow case to reach a popular result, but on a massive, structural scale. The very theory and purpose of the Constitution were upended. The American people had delegated limited powers to the national government. The Court rendered those powers effectively unlimited. The people restrained the exercise of that power and, later, the power of the states through a *Bill of Rights*, making it clear in the process that the enumeration of certain rights was not to be

Jones v. United States, 529 U.S. 848 (2000) (No. 99-5739), available at <http://www.cato.org/pubs/legalbriefs/jvsusa.pdf> (last visited Oct. 23, 2002).

⁶³ *Gibbons*, 22 U.S. (9 Wheat) at 1.

⁶⁴ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); see also *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁶⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

⁶⁶ *Id.* at 152. For a devastating critique of the politics behind the *Carolene Products* case, see Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397.

construed as denying or disparaging other, unenumerated rights. The Court rendered that design unintelligible. In a word, heeding the politics of the day, the Court turned a document authorizing limited government into one authorizing effectively unlimited government, making a mockery of the rule of law.

We have lived under that regime for over 60 years now, and the confusions inherent in it are everywhere.⁶⁷ Take just one aspect, the bifurcated judicial scrutiny theory that emerged from *Carolene Products*. It turns out that gender discrimination required a richer theory, so the Court invented mid-level scrutiny.⁶⁸ But when the “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992⁶⁹ were before the Court, a fourth level of scrutiny had to be invented. Now we have “minimal” scrutiny for ordinary commercial transactions, “relaxed” scrutiny for broadcast television, “heightened” scrutiny for cable television, and “strict” scrutiny for newspapers.⁷⁰ Does anyone know what any of that means? One is reminded of nothing so much as medieval geocentric Ptolemaics drawing epicycle upon epicycle to ward off the onslaught of the heliocentric Copernicans.

But that is only one of the confusions of the body of thought today called “constitutional law.” A brief overview of the past 60 years brings out others, related often to the role judges now play.⁷¹ Start with the surfeit of federal and state legislation the New Deal revolution unleashed, most of it aimed at solving all manner of “social problems” – there being, in principle, no end to such problems. Reflecting the hubris that has always attended central planning,⁷² those schemes – whether regulating commerce, agriculture, labor, retirement, land use, education,

⁶⁷ See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 816 (3d ed. 2000). Commenting on the Court’s modern Commerce Clause jurisprudence, Tribe writes, “The Court’s application of its substantial effect and aggregation principles in the period between 1937 and 1995, combined with its deference to congressional findings, placed it in the increasingly untenable position of claiming the power to strike down invocations of the Commerce Clause, while at the same time applying a set of doctrines that made it virtually impossible actually to exercise this power.”

Id.

⁶⁸ See, for example, *United States v. Virginia*, 518 U.S. 515 (1996), the Virginia Military Academy case in which Justice Ruth Bader Ginsburg invoked “heightened scrutiny,” *id.* at 555, and “skeptical scrutiny,” *id.* at 531.

⁶⁹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended at scattered sections of 47 U.S.C.).

⁷⁰ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); see also Roger Pilon, *A Modest Proposal on “Must-Carry,” The 1992 Cable Act, And Regulation Generally: Go Back to Basics*, 17 HASTINGS COMM. & ENT. L.J. 41 (1994).

⁷¹ See Roger Pilon, *A Court Without a Compass*, 40 N.Y.L. SCH. L. REV. 999 (1996).

⁷² See F.A. HAYEK, *THE FATAL CONCEIT: ERRORS OF SOCIALISM* 27 (W.W. Bartley, III ed., 1988).

medicine, campaign finance, and on and on – have grown ever more complex, often because they generate unintended consequences that require still more regulation, the planners claim. The result is the modern administrative state – massive and effectively unaccountable – and a body of “law” that in fact is policy, reflecting the will of the political forces that have triumphed on a given issue on a given day. It is politics as law in its purest form, with almost no subject beyond its reach.

Much of that legislation and regulation has ended up in the courts, of course, with judges asked to make sense of often inconsistent or incoherent policy – fairly inviting them to be parties to the legislation and hence policymakers themselves. Thus, by parsing often obscure statutory or regulatory language, judges end up “setting national policy,” as Califano put it, something judges have traditionally been loath to do.⁷³ But judges have come to set policy more directly as well. For when government activists fail to achieve their goals in the political branches, they often go to the courts, as Califano observed, hoping to find there one of his “sympathetic judge[s].”⁷⁴ Regrettably, the Warren and Burger Courts, already deferring to the legislative pursuit of “social justice,” were often only too willing to step into the fray, thinking themselves a legislature of nine.⁷⁵

To be sure, not everything the post-New Deal courts have done has reflected that kind of ungrounded “activism.” In fact, in many cases the Supreme Court has been “active” in precisely the way it should be – protecting individuals against overweening government, but doing so on the basis of law. Nowhere has that proper form of activism been more in order than in the decisions that brought an end at last to the legal regime known as Jim Crow.⁷⁶ Since the ratification of the Civil War Amendments, the Constitution has been color-blind. It does not permit governments to discriminate among their citizens except on grounds that are narrowly tailored to serve the mission at issue. That is what equal protection is all about. It is a far cry from – indeed, it is the very opposite of – the kinds of preference schemes that have been sanctioned subsequent to the abolition of Jim Crow.⁷⁷

That brings us, however, to what is, without doubt, the most confused area of post-New Deal constitutional law – constitutional

⁷³ Califano, *supra* note 3, at A23.

⁷⁴ *Id.*

⁷⁵ The example with the most far-reaching political consequences, of course, was the abortion decision, *Roe v. Wade*, 410 U.S. 113 (1973). See *infra* note 99.

⁷⁶ See, e.g., *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

⁷⁷ See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). I have discussed these issues more fully in Roger Pilon, *Discrimination, Affirmative Action, and Freedom: Sorting Out the Issues*, 45 AM. U. L. REV. 775 (1996).

rights. No longer willing to say that Congress has no authority over subjects like education, labor, or medicine, the Court has limited itself to parsing regulatory language, as noted above, or to adjudicating endless claims about rights, especially as generated by multiplying legislative schemes. Yet it has adjudicated disputes over rights without a compass or a theory of the matter. At times it has ignored rights plainly recognized by the Constitution.⁷⁸ At other times it has discovered rights in “penumbras” and “emanations” or by consulting “evolving social values,” which conflates rights theory and value theory and hence different domains of morality⁷⁹ – an infirmity that plagues its distinction between “fundamental” and “nonfundamental” rights as well. The result is an ad hoc body of “constitutional rights,” nothing approaching the coherent theory that stands behind and informs the Constitution. When government was limited, the Court, to some extent, could get away without having articulated the Constitution’s underlying rights theory, because with less government there was less opportunity for conflict between government actions and individual rights. When government is ubiquitous, however, conflicts are as well.

The problem antedates the New Deal, of course. In fact, it arose seminally in 1873 in the infamous *Slaughter House Cases*,⁸⁰ which upheld the right of a state-authored monopoly to preclude individuals from pursuing a lawful trade.⁸¹ The decision effectively eviscerated the Fourteenth Amendment’s Privileges or Immunities Clause, which was meant to be the principal font of rights against the states. Thereafter the Court would try to do under the Due Process Clause⁸² and, later, the Equal Protection Clause⁸³ what should have been done under the more substantive, better understood Privileges or Immunities Clause.⁸⁴ For some 65 years, the Court did that job more or less well – correctly in cases like *Lochner*; incorrectly in cases like *Euclid* – but never with a sure grasp of the matter. With the *Carolene Products* overlay and its implicit conflation of rights and values, however, the Court sank into hopelessly confused talk of interests rising to the level of rights, evolving social values, and value-laden balancing tests.⁸⁵

⁷⁸ See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

⁷⁹ See H.L.A. Hart, *Are There Any Natural Rights?* 64 *PHIL. REV.* 175, 186 (1955).

⁸⁰ *Slaughter-House Cases*, 83 U.S. (16 Wall) 36 (1873).

⁸¹ For a fuller discussion, see KIMBERLY C. SHANKMAN & ROGER PILON, *CATO INSTITUTE, POLICY ANALYSIS NO. 326, REVIVING THE PRIVILEGES OR IMMUNITIES CLAUSE TO REDRESS THE BALANCE AMONG STATES, INDIVIDUALS, AND THE FEDERAL GOVERNMENT* (1998), reprinted in 3 *TEX. REV. L. & POL.* 1 (1998).

⁸² U.S. CONST. amend. XIV, § 1.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

Yet those who drafted and ratified the Fourteenth Amendment had it basically right. They harked back to the natural rights tradition that led to our founding document, the Declaration of Independence; to the Constitution, which was written to give force to the Declaration's moral and political theory; and to the common law that had captured that moral theory to a substantial extent.⁸⁶ They understood that we are born with our rights, we do not get them from government; that when we created government we gave it certain powers, thereby giving up certain rights; and that we retained the rest of our rights, as the Ninth Amendment says.⁸⁷ Those are our natural rights, the rights we had against each other, prior to the creation of government, all of which can be reduced, conceptually, to "property" – broadly understood as "Lives, Liberties and Estates," as John Locke put it.⁸⁸ Exercising those rights, we can pursue happiness, creating all manner of contractual relationships in the process. Thus the two great fonts of rights – property, broadly understood, and contract.

The old common law judges generally understood those elementary principles. So did the Founders and the Framers and many judges thereafter, including the four *Slaughter House* dissenters, the lone dissenter in *Plessy v. Ferguson*,⁸⁹ the 1896 decision that upheld the appalling "separate but equal" doctrine, and Thurgood Marshall in his brief in *Brown v. Board of Education*, the 1954 decision that overturned the application of that doctrine to public schools.⁹⁰ They are not terribly difficult principles. Justice Bushrod Washington, riding circuit, stated them simply in 1823 in *Corfield v. Coryell*,⁹¹ considered at the time to be the authoritative interpretation of Article IV's Privileges and Immunities Clause. Contending that it would be "more tedious than difficult" to enumerate the rights protected by the clause, Washington offered illustrative categories, such as "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess

⁸⁶ EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 26 (1955) ("[T]he notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law.").

⁸⁷ I have discussed these issues more fully in Roger Pilon, *The Purpose and Limits of Government*, in *LIMITING LEVIATHAN* 13 (Donald P. Racheter & Richard E. Wagner eds., 1999), reprinted as CATO INSTITUTE, CATO LETTER NO. 13, *THE PURPOSE AND LIMITS OF GOVERNMENT* (1999). See also SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* (1995).

⁸⁸ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 395 (Peter Laslett ed., 1965) (1690).

⁸⁹ *Plessy v. Ferguson*, 163 U.S. 537, 559-60 (1896) (Harlan, J., dissenting).

⁹⁰ For a discussion of this whole line of argument, see Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POLY. 63 (1989).

⁹¹ *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

property of every kind, and to pursue and obtain happiness” – rights “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, from the time of their becoming free, independent, and sovereign.”⁹²

Notice that no “welfare rights” are included in those categories – “rights” to education, health care, subsidies, import restraints, and the like.⁹³ Not only are such “entitlements” no part of the rights the Constitution protects, but as a corollary, when they are created by statute, they conflict with constitutional rights, rights to liberty and property. Thus, such statutes, if federal, are unconstitutional because unauthorized under the doctrine of enumerated powers; but they are also unconstitutional, whether federal or state, because they trample constitutional rights, much as a statute restricting speech would be unconstitutional, and for the same reason.

If we are going to take rights seriously, then, we have to do the serious intellectual work that is required to clarify the Constitution’s structure of rights. For as the Ninth and Fourteenth Amendments make clear, the rights *in* the Constitution are not limited to those the document plainly enumerates⁹⁴ – speech, religion, property, and the like – although even those rights require interpretation and integration within the Constitution’s larger scheme of rights. One could begin that work by noticing the sense in which Washington uses the term “fundamental” in the quote above, then comparing it to the vision of *Carolene Products*. The rights that emerged from *Carolene Products* as “fundamental” reflected the subjective values of the justices who signed the opinion – the idea being to distinguish “more important” from “less important” rights.⁹⁵ Washington, by contrast, speaks of “fundamental” rights in an analytical or logical sense – to distinguish rights that are basic, like property and contract, from those that are derivative.⁹⁶ Both sorts of rights are important, but some are generic, or “fundamental,” whereas others are derived from those basic rights. That is the approach to rights – recognizing that they are rooted not in will or values or politics but in reason – that is required if the theory of rights that informs the Constitution is to be given life and constitutional law given legitimacy.⁹⁷

⁹² *Id.* at 551-52.

⁹³ See Roger Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171 (1979).

⁹⁴ U.S. CONST. amends. IX, XIV.

⁹⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

⁹⁶ *Corfield*, 6 F. Cas. at 551-52.

⁹⁷ I have discussed the theory of rights more fully in Roger Pilon, *A Theory of Rights: Toward Limited Government* (1979) (unpublished Ph.D. dissertation, University of

Unfortunately, we are very far today from that understanding. Post-New Deal liberals, driven by a progressive political agenda, have tended to see rights either as products of transient legislative majorities or, when that route failed, as products of judicial discovery – with liberal judges drawing not from the original understanding of constitutional rights, which seldom served their political ends, but from the value-laden criteria noted above.⁹⁸ The judicial activism that resulted, with judges seeming at times to draw rights from thin air, led to a backlash among conservatives. Rather than challenge the New Deal's constitutional revolution, however, they generally limited their criticism to the rights activism of the courts, which left them free to pursue their own political agenda through the political branches, consistent with the New Deal Court's democratization of the Constitution.⁹⁹ Thus, for conservatives, if a right was not clearly *in* the Constitution, it did not exist. It fell to legislatures, they argued, to create such rights.¹⁰⁰

Both sides in that battle of 40 years and more are wrong. Liberals are wrong to have unleashed the political branches originally, right to turn to the courts for protection from the ensuing majoritarian tyranny, but wrong to ask them to consult anything but law, anything but the theory of rights that informs the Constitution. Liberals are wrong, that is, to ask the courts to ignore rights plainly in the Constitution, yet find rights nowhere to be found, even among our unenumerated rights. But conservatives too are wrong for buying into the New Deal Court's machinations, right to criticize the Court for its subsequent rights activism, but wrong to limit constitutional rights to those fairly clearly *in* the document. Conservatives, after all, can hardly ignore or disparage the Ninth and Fourteenth Amendments, as many do, and still call

Chicago) (on file with author). On the Ninth Amendment, see generally RANDY E. BARNETT, *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (1989).

⁹⁸ For a defense of that conduct, see William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986). I have criticized those views in Roger Pilon, *Remembering and Advancing the Constitutional Vision of Justice William J. Brennan, Jr.: Brennan's Approach to Reading and Interpreting the Constitution*, 43 N.Y.L. SCH. L. REV. 41, 47-57, 72-74 (1999).

⁹⁹ Perhaps the clearest statement of that view is by Robert Bork. ROBERT BORK, *THE TEMPTING OF AMERICA* (1990). Bork draws what he calls the "Madisonian dilemma." *Id.* at 139. America's "first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second [principle] is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule." *Id.* I have criticized that view, as turning Madison on his head, in Roger Pilon, *Constitutional Visions*, REASON, Dec. 1990, at 39-41; Roger Pilon, *Rethinking Judicial Restraint*, WALL ST. J., Feb. 1, 1991, at A10; and Roger Pilon, *On the First Principles of Constitutionalism: Liberty, Then Democracy*, 8 AM. U. J. INT'L L. & POLY 531-49 (1993).

¹⁰⁰ See sources cited *supra* note 99.

themselves “originalists.” As for legislatures creating rights against majoritarian tyranny, neither history nor the theory of the Founders supports that belief. It falls to the judiciary, as Madison said, to be “an impenetrable bulwark against every assumption of power in the legislative or executive.”¹⁰¹

Thus, to summarize, the Constitution today stands thoroughly politicized. Because constitutional principles limiting federal power to enumerated ends have been ignored – at least until very recently, and then in a very limited way – the scope of federal power and the subjects open to federal concern are determined now by politics alone. Because the rights that would limit the exercise of that power are grounded increasingly not in the Constitution’s first principles but in the subjective understandings of judges about evolving social values, they too increasingly reflect the politics of the day. Thus, the rule of law is now largely the rule of politics.

VI. WHAT IS TO BE DONE?

Is it any wonder, therefore, that judicial selection has become politicized too? If judges “set[] national policy,” as Califano says, we should know their policy preferences.¹⁰² If judges find rights through their understanding of evolving social values, we should know whether judicial nominees reflect “the core values held by most of our country’s citizens,” as Schumer says.¹⁰³ If judges, in short, are to be handmaidens in the business of lawmaking – just another class of politician – then by all means scrutinize them on political grounds. That is what we come to when we abandon the rule of law.

Indeed, it is not too much to say that the modern Democratic vision comes down to this: We Democrats, speaking for all Americans, have a political agenda in which all of government needs to be engaged. Congress, the executive, and the states need to be formulating, enacting, and executing measures to solve the people’s problems, for modern government is a service industry, with citizens as its customers. When recalcitrant political forces frustrate that effort, courts need to step in to complete the job. If states are not moving fast enough to reform abortion laws, for example, the Court should be creative and find a way to accomplish that.¹⁰⁴ If the states or Congress are unable to enact

¹⁰¹ 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1789).

¹⁰² Califano, *supra* note 3.

¹⁰³ Schumer, *supra* note 4.

¹⁰⁴ On March 8, 1993, shortly before President Clinton nominated her for the Supreme Court, then Judge Ruth Bader Ginsburg gave the Madison Lecture at the New York University School of Law, speculating that the nation might have been spared the ensuing political maelstrom had the *Roe* Court been more “measured” in its opinion and allowed greater latitude for state reforms that even then were taking place. Ruth Bader

affirmative action measures, or if citizens in a state should use the initiative process to end preference programs there, here too the courts need to help.¹⁰⁵ We all need to work together, modern Democrats believe. Thus, when Congress failed “to enact sensible public health policies regarding tobacco to protect our children from nicotine pushers,”¹⁰⁶ Califano writes, approvingly, that “sent anti-smoking advocates to federal court to draft a settlement agreement with provisions that read like sections of a federal statute.”¹⁰⁷ Given that view of activist government, it is hardly surprising that Califano concludes, “[T]he battle over who fills the record number of judicial vacancies has taken on an importance unimaginable just a generation ago.”¹⁰⁸

But Republicans too often are little better, responding with a message that is less than clear at best, at worst is flatly contrary to the Constitution. To be sure, the more principled members of the party have stood sometimes for constitutional fidelity and “judicial restraint” – not the bogus restraint of deference to the political branches, which the New Deal Court indulged in the face of a duty to act, but the proper restraint that instructs judges to apply rather than make law, even when doing so entails actively opposing the political branches. More often, however, Republicans come across as timid Democrats. Having bought into the New Deal’s surrender of limited government, they are left to spar with Democrats over the scope of constitutional rights. Without a sure grasp of the subject, however, they simply flail at the judicial lawmaking that discovers those rights, whether correctly or not, thinking it perfectly proper if the same rights are created by legislatures. Thus, they come across not as constitutional libertarians but as the true democrats, even if ours is not a true democracy but a constitutional republic.

Yet constitutional fidelity means saying, candidly, that most of what the government is now doing is unconstitutional because it is beyond its authority. That is not easy to say in today’s political climate, of course, and most Republicans, for that reason, have been reluctant to say it. But if the party that purports to be the party of limited government will not say it, who will? To be sure, the deeper problem is that the doctrine of enumerated powers, and Madison’s promise in *Federalist* 45 that the powers of the federal government would be “few and defined,”¹⁰⁹ are not

Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992). For my critique of that speech, see Roger Pilon, *Ginsburg’s Troubling Constitution*, WALL ST. J., June 17, 1993, at A10.

¹⁰⁵ See, e.g., Bill Jones, Secretary of State, *Proposition 209*, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELCTION 30-33 (1996) (enacted as CAL. CONST. art. I, § 31).

¹⁰⁶ Califano, *supra* note 3.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ THE FEDERALIST NO. 45 (James Madison).

only quaint and all but unknown among the public – to say nothing of Congress – but largely unpopular. On national holidays paeans are sung to the Constitution and to the virtues of limited government, but those virtues are honored today mostly in the breach.

Indeed, what is it that seems most to be exercising Senator Schumer – so much so that he called for hearings on that issue alone? It is the Court's recent yet limited efforts to restore constitutional principle, its 5-4 decisions "that constrain Congressional power."¹¹⁰ Echoing that concern in an op-ed in the *Washington Post* last January was Abner J. Mikva, who has served in all three branches of the federal government, most recently as counsel to President Clinton. While urging the Senate not to fill any Supreme Court vacancy that might arise until after the 2004 elections, Mikva listed first among his complaints against today's Court that it "has imposed limits on what areas Congress can regulate."¹¹¹ It is as if the doctrine of enumerated powers – the very centerpiece of the Constitution – were utterly foreign to Schumer, Mikva, and the rest.

Yet the Rehnquist Court's recent federalism jurisprudence has hardly rolled the clock back to 1936, much less reinstated the Madisonian vision. On the contrary, the two cases that most directly revive the doctrine of enumerated powers, *United States v. Lopez*¹¹² in 1995 and *United States v. Morrison*¹¹³ in 2000, barely move the ball. In *Lopez*, the Court found that Congress had exceeded its authority under the Commerce Clause when it criminalized possession of a gun near a school, leaving it to the state to address such issues. In *Morrison* the Court found again that Congress had exceeded its authority, this time under both the Commerce Clause and the Fourteenth Amendment, when it provided federal remedies for gender-based violence, again leaving that issue to be addressed through the general police powers that states possess. In neither case, that is, were problems left unaddressed. The Court simply reasserted the basic constitutional principle that Congress's power is not plenary.

What, then, is a nominee to the bench to say if asked about the scope of Congress's power? The congressional reaction to both *Lopez* and *Morrison* was extraordinary. Indeed, Congress has since reenacted the statute at issue in *Lopez*,¹¹⁴ this time adding a "jurisdictional element" in the hope that it would survive scrutiny under the Commerce Clause. Plainly, the measures at issue in both cases were popular. Should the

¹¹⁰ Schumer, *supra* note 4.

¹¹¹ Abner J. Mikva, *Supreme Patience*, WASH. POST, Jan. 25, 2002, at A25.

¹¹² *United States v. Lopez*, 514 U.S. 549 (1995).

¹¹³ *United States v. Morrison*, 529 U.S. 598 (2000).

¹¹⁴ 18 U.S.C. § 922(q)(2)(A) (Supp. V 1999).

Senate require that a nominee reflect our citizens' "core values," as Schumer insists, constitutional principles notwithstanding? If so, where would the Schumers, Califanos, and Mikvas want a nominee to stand on an issue like flag-burning? Surely, popular sentiment supports legislation banning that. Do they? Democrats have usually opposed such legislation. Yet Justice Scalia – the kind of jurist Schumer expressly rejects – threw out both state¹¹⁵ and federal¹¹⁶ statutes prohibiting flag desecration – on constitutional grounds.

Decisions like those aside, when confirmation questions move from powers to rights, around which so much modern constitutional controversy has swirled, the difficulties only mount for Republican nominees. For again, their antipathy to the rights activism of liberal judges has left many of them reluctant to delve into the first principles of the matter, preferring instead to see judicial restraint as tantamount to deference to the political branches. Unfortunately, their unwillingness to recognize any rights *in* the Constitution except those that are expressly there places them on the wrong side not only of popular opinion but of the Constitution itself.

The problem was brought to the fore very recently as the Senate Judiciary Committee was considering the nomination of Judge D. Brooks Smith for a seat on the Third Circuit. In a May 10, 2002 letter to Smith, Senator Schumer pressed the judge to answer not simply whether he believes the Supreme Court was right in *Griswold v. Connecticut*,¹¹⁷ the 1965 decision that threw out a state statute prohibiting the sale of contraceptives to married couples, but *why* the decision was right or wrong.¹¹⁸ Smith's previous answers had failed to satisfy Schumer because they merely restated the law that flowed from *Griswold* while giving no indication of *how* Smith might have derived the right of privacy, the right at issue in the case, much less apply it to other cases. As Schumer put it: "I am interested in how you personally read and interpret the Constitution."¹¹⁹

When faced with questions like that, Republican nominees have too often responded by saying simply that they would apply the law. That would not do here, of course, for as Schumer went on to say, he was

¹¹⁵ *Texas v. Johnson*, 491 U.S. 397 (1989).

¹¹⁶ *United States v. Eichman*, 496 U.S. 310 (1990). Justice John Paul Stevens, ordinarily thought to be the most liberal member of the present Court, voted to uphold both statutes.

¹¹⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹¹⁸ Letter from Charles E. Schumer, Senator from New York, to Judge D. Brooks Smith (May 10, 2002) (hereinafter *Schumer Letter*) (on file with author).

¹¹⁹ Byron York, *Schumer's Attack*, NAT'L REV. ONLINE, May 14, 2002, at <http://www.nationalreview.com/york/york051402.asp> (last visited May 23, 2002).

asking Smith to treat *Griswold* as a case of first impression.¹²⁰ If he were sitting on the Supreme Court, how would he have decided the case, and why? Were Smith to answer by saying that he would follow the law, that would seem to imply that he would uphold the state statute forbidding the sale of contraceptives. But Smith had already said that he had no quarrel with *Griswold* – “I have always believed there is a right to privacy in the Constitution.”¹²¹ Schumer wanted to know how Smith found that right to privacy.

Thus pressed, Republican nominees must do the work mentioned earlier. Doing so, they can take no guidance from Justice Scalia’s thoughts two years ago in a similar case, *Troxel v. Granville*,¹²² which only illustrates the problem. In *Troxel*, the grandparent visitation case out of Washington State, the Court found an unenumerated right of fit parents to direct the upbringing of their children, a right that trumped the state law at issue, which had authorized state judges to grant visitation rights to grandparents and others, over the objections of the parents. In dissent, Scalia said that although the parental right was among the unalienable rights proclaimed by the Declaration of Independence and the unenumerated rights retained pursuant to the Ninth Amendment, “the Constitution’s refusal to ‘deny or disparage’ [such] rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.”¹²³ Going to the heart of the matter, Scalia concludes, “I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.”¹²⁴

There, in a nutshell, is the judicial deference to the political branches that has robbed the Constitution of its rich natural rights heritage and denied effect to the Ninth and Fourteenth Amendments – surely parts of the Constitution as much as any other of its parts.¹²⁵ Originalism aside, there are at least two additional problems with Scalia’s approach. First, the Constitution does not “refuse” to deny or disparage unenumerated rights. Rather, it fairly *asserts* their existence by instructing us – and judges in particular – that the enumeration of certain rights *shall not be construed* to deny or disparage other rights. That is the natural reading. Second, not only does Scalia defer to

¹²⁰ Schumer Letter, *supra* note 118.

¹²¹ *Id.*

¹²² *Troxel v. Granville*, 530 U.S. 57 (2000).

¹²³ *Id.* at 91 (Scalia, J., dissenting).

¹²⁴ *Id.* at 92.

¹²⁵ See CORWIN, *supra* note 86.

democratic majorities to define and enforce our unenumerated rights – unlike our enumerated rights – but he both misunderstands and undermines the very idea of a right. Rights, by definition, are asserted defensively – not when one is in the majority but when one is in the minority, against a majoritarian threat. Scalia claims that fit parents have a right to direct the upbringing of their children.¹²⁶ Yet he also says that it is up to the legislature to make such rights explicit.¹²⁷ Well, the Washington legislature did act. But it said that there are *not* any such rights. So there are such rights, Scalia says, but by his interpretive methodology there are not such rights. He cannot have it both ways. It cannot be that we have a constitutional right until a state legislature says otherwise. His approach is tantamount to reducing the Ninth Amendment to a nullity. In fact, taken to its logical conclusion, it puts even enumerated rights at risk, since even they require judicial interpretation. After all, the right to burn the flag, which Scalia upheld,¹²⁸ is not to be found *in* the Constitution – except by inference. Where then did Scalia find it when the legislatures – state and federal – had spoken otherwise?

What conservatives of the judicial restraint school have to come to grips with, then, is the full richness of the Constitution, including its natural rights foundations. The Founders did that without embarrassment. And they understood further, with Madison, that the courts were to be an “impenetrable bulwark against every assumption of power in the legislative or executive” branches.¹²⁹ To play that role, however, judges have to understand the underlying theory of rights. They have to be able to show, for example, that *Griswold* does not imply *Roe*, and why there is all the difference in the world between the two cases.

This is not the place to detail that distinction. It is the place to say, however, that once the Constitution is taken seriously, once judicial nominees are able to show the Schumers of the world that they take both individual liberty and majoritarian tyranny seriously, they will be in a good position to turn the tables on those selective libertarians of the left who suddenly lose their love of liberty when contemplating the latest Washington scheme for doing good. If we are going to take the Constitution seriously, we have to take it seriously in its entirety – both its limits on power, through enumeration, and its limits on the exercise of power, through both enumerated and unenumerated rights.

¹²⁶ *Troxel*, 530 U.S. at 91-92.

¹²⁷ *Id.* at 93.

¹²⁸ See *United States v. Eichman*, 496 U.S. 310, 318-19 (1990); *Texas v. Johnson*, 491 U.S. 397, 417-20 (1989).

¹²⁹ 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1789).

VII. CONCLUSION

It is hardly clear, however, that Democrats want to take the Constitution seriously. After all, constitutional corruption has well served their political agenda of active government. But neither is it entirely clear that Republicans want to take the Constitution seriously, for they too have their own agenda for active government. If the Senate remains evenly divided, and Senate Democrats continue their ideological litmus testing, Republican nominees will have only two choices – duck or fight. They can respond evasively to senators' questions, hoping thereby to squeak through the process by garnering enough votes from Democratic “moderates” – an increasingly rare breed. That strategy has two disadvantages: it will likely work best only for those nominees who would be disinclined to disturb the status quo in any event; and by default it cedes the moral high ground to the other side. But for those who care deeply about restoring the Constitution and the rule of law it establishes, there is only one choice – to defend our first principles as a nation. That strategy has two advantages: it seizes the moral high ground from those most responsible for corrupting the Constitution; and it brings to the nation the civics lesson it so sorely needs.