

# The Purpose and Limits of Government

by  
Roger Pilon

*Cato's Letters*

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When America's Founders declared the nation's independence in 1776, they drafted a document that has inspired countless millions around the world ever since. For the Declaration of Independence, reflecting "a decent Respect to the Opinions of Mankind," set forth not only the causes that led us to dissolve our political ties but a moral vision that speaks to the ages. In a few brief lines, penned near the start of our struggle for independence, the Founders distilled their philosophy of government: individual liberty, defined by rights to life, liberty, and the pursuit of happiness, secured by a government instituted for that purpose with powers grounded in the consent of the governed.

Yet around the world today we see governments limiting liberty and trampling rights with impunity, even where government purports to be grounded in consent — even in America. Indeed, it is not for nothing that the 20th century has been called the century of government; it is a century that has given us leviathans the classical theorists could only imagine.<sup>1</sup> Thus, the issues America's Founders addressed in their seminal document are with us still. In fact, given the growing movement at century's end to limit at last the leviathans in our midst, one could say that today the Founders' concerns are especially with us.

As we revisit those concerns here, therefore, it is particularly important to learn from the experience of the past two hundred years. Clearly, it was the plan of the Founders to limit government, and to a substantial extent they succeeded; for in the grand sweep of things, America has fared rather better than many other nations that sought also, in their own ways, to limit their governments. But we would be remiss, at least, if we concluded from its relative success that the Founders' plan has worked as it

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Roger Pilon is vice president for legal affairs at the Cato Institute where he holds the B. Kenneth Simon Chair in Constitutional Studies and is director of the Center for Constitutional Studies. This essay is reprinted, with permission, from *Limiting Leviathan*, ed. Donald P. Racheter and Richard E. Wagner (Edward Elgar Publishing, Inc.: Cheltenham, UK, and Northampton, Mass., 1999).

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was meant to work; for the most cursory reading of the writings of the day makes it plain that the Founders intended nothing like our present American leviathan. Indeed, many of the grievances the Declaration lists, which led to our revolt, are today the ordinary stuff of government in America. It would surely pain those who pledged their lives, their fortunes, and their sacred honor to see how far we have come from those heady days of liberty.<sup>2</sup>

With the aid of experience, then, this essay will examine the theory behind the Declaration's universal insights. Its focus will be on the moral order the Declaration sketches and the place of government within that order. The concern throughout will be with that most basic of political ideas — legitimacy. That, of course, was the fundamental concern of the Founders as well,

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**“The Declaration of Independence set forth a moral vision that speaks to the ages.”**

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which the Declaration captured in but two elegantly crafted lines: “. . . That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.” Reason and consent, the two traditional sources of political legitimacy, are there joined for “a candid World” to see. It is for us today to see more clearly how they go together to limit government, lending it a measure of legitimacy in the process. Once we do, and once we see what has become of the Founders' design, as we will briefly at the end of this chapter, we will be in a better position to breathe life back into the principles they so carefully crafted.<sup>3</sup>

## **THE DECLARATION OF INDEPENDENCE**

As the Founders went about their task, their immediate aim, of course, was to justify their decision to declare independence. Toward that end, they set forth a theory of legitimate government, then demonstrated how far English rule had strayed from that ideal. In outlining their theory of legitimacy, however, they could hardly

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have begun with government, for the whole point was to show how government might arise legitimately, not to assume its existence. Had they begun with government, they would have begged the very question they set out to answer.

From the outset, therefore, the Founders were engaged in a tradition of moral and political thought that has come to be called “state-of-nature theory.” Reasoning in that tradition

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begins by assuming a theoretical “state of nature,” a state of affairs we today call “civil society,” where society and social intercourse obtain, but questions about the justification and the proper role of government remain to be answered. The Founders’ plan fell quite naturally, then, into two parts. First, they sketched the moral order in such a world, as derived from principles of reason. Second, they drew forth the political conclusions implied by that moral order. The first few lines in the Declaration’s seminal section thus make no mention of government; that comes only after the moral order has been sketched.<sup>4</sup>

### *We Hold these Truths to be Self-evident*

It is important to appreciate, therefore, that the entire enterprise was rooted in reason. The propositions are asserted not simply as “truths” but as “self-evident” truths — truths of reason. That placed us, right from the start, in the long tradition of natural law — more precisely, as we will see in a moment, in the natural rights branch of that tradition. Standing in opposition to legal positivism — which merely posits law as the will of the sovereign — and moral skepticism — which holds that there are no moral truths or, if there are, we cannot know them — natural law theorists have held both that there are such truths and that they are accessible through ordinary reason.<sup>5</sup>

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Through the ages, that has been a challenging position to assume, to be sure, but the Founders assumed it nonetheless. It should be noted, however, that their beliefs about such matters were generally modest. Unlike moral dogmatists of earlier eras, that is, their abiding concern was not with any overweening moral strictures but, to the contrary, with liberty — with the morality of liberty. They believed, quite simply, that there is a higher law of right and wrong from which to derive the positive law and against which to judge that law at any point in time. And that higher law is, at bottom, the law of individual liberty and, as a corollary, individual responsibility.<sup>6</sup>

### *That all Men are Created Equal*

The argument begins, substantively, with a premise about moral equality — as defined immediately thereafter by our inalienable rights to life, liberty, and the pursuit of happiness. By thus defining the sense in which we are all equal, the Founders made clear what should have been clear in any event, namely, that we are all equal only in the sense that we all have equal natural rights — that no one has rights superior to those of anyone else. Plainly, the Founders could not have meant that we are all equal in fact, whatever that might mean, for such a claim would be absurd. Nor could they have meant to imply the

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kind of egalitarian “rights” that have dominated 20th century thought, which are purchased only at the expense of individual liberty.<sup>7</sup> Indeed, the point of freedom is to enable our myriad differences to flourish, which they can do only under conditions of freedom.

But if the premise of equality was not meant to imply any far-reaching egalitarianism,

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neither was it meant to leave unchallenged those hierarchical views — some in the natural law tradition — that have held that some people are morally superior to others in ways that entail legal consequences. If we are all equal in the limited but crucial sense that we all have equal natural rights to chart our own courses by our own

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**“We do not get our natural rights from government; we are born with those rights; indeed, whatever rights or powers government has are given to it by us.”**

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lights, free from the interference of others, then we cannot be compelled to conform to the morality of others, however “superior” the views of those others may be; the only proviso is that, as we chart our courses, we respect the equal rights in others to do the same. A corollary of the premise of equality, of course, is equality before the law, a phrase that captures well the sense in which the Founders saw us all as equal.

### *That they are Endowed by their Creator with certain Inalienable Rights*

As we move from the Founders’ premise of equality to its implications, we are challenged to reflect on the source of rights. The central point the Founders sought to make here is crucial: we do not get our natural rights from government; we are born with those rights; indeed, whatever rights or powers government has, as the Declaration will shortly say, are given to it by us, who must first have them to give. The central issue here could not be more important: it is whether we are servants of government, beholden to it for our rights, or government is our servant, beholden to us for its powers. That issue would later manifest itself in the Constitution, in the form of the doctrine of enumerated powers — the idea that government’s powers are delegated by the people, who first have them to delegate; are enumerated in the document; and thus are limited by virtue of that delegation and enumeration.<sup>8</sup> But it is found here first, in the

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Declaration, in the fundamental idea of pre-existing rights, rights that pre-exist government — natural rights, which we have “by nature.”

Crucial as that insight is, it does not, of course, address questions about the ultimate source of rights.<sup>9</sup> Rather, it speaks simply to the question of whether rights come from government by posing, in effect, the question of where government would get its rights if not from the people — it being clear that people create and hence come before government. In both logic and time, then, people come first, government second. That was the central point the Founders sought to pin down.

When we turn to the question about the ultimate source of rights, the Founders speak of our being endowed by our Creator with certain rights. Given that the Founders were of diverse religious views, and given especially their belief

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**“It is especially important to note that the Founders couched their moral vision in the language of rights, not in the language of virtue or values or any other moral concept.”**

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in liberty on such matters, it is probably wise not to read too much into that very general way of stating the matter, not least because it was well understood even then that moral theory and moral conclusions were not necessarily grounded in religious beliefs — indeed, were more surely grounded in principles of reason about which reasonable people could, and even must, agree.<sup>10</sup> Thus, reading “Creator” in this broad sense, the basic point the Founders doubtless sought to make was the universal point that we all have certain inalienable rights, regardless of our beliefs or any other natural or accidental features we may have. To hold otherwise — to hold, for example, that rights are in some sense a function of belief — is to undercut the universality the Founders surely meant to convey.

Finally, it is especially important to note that the Founders couched their moral vision in



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the language of rights, not in the language of virtue or values or any other moral concept. Rights are claims against others, which entail correlative obligations requiring others to do or not do various things.<sup>11</sup> Fully fleshed out, as we will see in a moment, the classical theory of rights orders individual acts and social affairs

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**“Rights and correlative obligations are the language of law and liberty.”**

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systematically along three basic lines: the prohibited; the permitted (the optional); and the required. It is objective actions, not subjective mental states, that are the primary concern of rights.

Thus, rights lend themselves especially well to litigation, legal ordering, and liberty, not least because, as claims, they denote adversarial relationships and invite moral justification. To ask of another, “By what right . . . ?”, is tantamount to saying that if that other cannot make good on his claim, then you are free to do as you please. In this and similar ways, the theory of rights sorts out justified from unjustified claims and thus orders human affairs in ways that virtues, values, and other moral notions are unable to do. Rights and correlative obligations, in short, are the language of law and liberty. When they spoke to the purpose of government two lines later, the Founders got it right: to secure liberty through law, not to order virtue or impose values.

***That among these are Life, Liberty, and the Pursuit of Happiness***

In the Declaration, and even in the Constitution and the Bill of Rights, the Founders could hardly have listed or enumerated all of our rights. On one hand, we have an infinite number of rights, owing to the myriad facts that might enter into their descriptions and the possibilities that language permits. But on the other hand, looked at logically, there is really only one right, the right

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to be free, from which all other rights, however described, may be derived.<sup>12</sup> In a brief and general statement, therefore, one wants to try to capture something of the essence of the matter, which the Founders did when they said that “among” our rights are those to “Life, Liberty, and the Pursuit of Happiness.”

For a fuller picture of the Founders’ moral vision, then, it falls to us to flesh out that general statement by repairing to both the theory and the practice of the matter. In this, it is well to draw upon the sources the Founders themselves drew upon: the English common law, which for centuries had been thought to embody “right reason”;<sup>13</sup> and moral philosophers like John Locke, who more than any other can be said to have been the philosopher of the Declaration, especially through his influence on Thomas Jefferson, its principal author.<sup>14</sup> In deriving more narrowly

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**“That distinction between rights and values, implicit in the right to the pursuit of happiness, is the very foundation of a free society.”**

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described rights and doing the casuistry in particular circumstances, however, we need to take care to ensure sound derivation and internal consistency; for a body of rights dubiously entailed by the first principles of the system, or conflicting with one another, will undermine the entire rational foundation. Not every good is held by right, after all; we need to separate the legitimate from the illegitimate claims.

The place to begin, then, is with the Founders’ own words, and in particular with our right to “the Pursuit of Happiness”; for in that formulation, by implication, rests a profoundly important distinction — between rights and values. In so stating the matter, the Founders were saying that each of us has a right not to happiness but to pursue happiness as he sees fit. They did not tell us how to go about that pursuit — save for the premise of equality, which entails the obligation to respect the equal rights of others to

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their own pursuits. Rather, the determination of how to pursue happiness is left to us, to our own subjective lights, our own values. Obviously, given the differences among people in their various interests and values, different people will take different paths. The point, simply, is that we must respect those differences as we lead our own lives. Thus, we have objectivity in rights, subjectivity in values, which is precisely what one would expect in a regime of freedom. Each of us is free to live by his own subjective standards, provided he respects the equal freedom of others. We may criticize the values of others, of course, but we may not impose our values on them.<sup>15</sup>

That distinction between rights and values, implicit in the right to the pursuit of happiness, is the very foundation of a free society. For it entails a regime of rights that can be thought of as constituting a minimal framework within which each of us is free to live, charting his own course — not ordered by others but simply left alone. The idea is well captured in a phrase often attributed to the French *philosophe* Voltaire: “I may disagree with what you say, but I will defend to the death your right to say it.” You have your values, with which I may disagree, but

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**“As long as we respect the equal rights of others, we are both free to choose and responsible for the choices we make, good and bad alike. That is what freedom is all about.”**

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I will defend your right to pursue them. In a free society, each of us may make as much or as little of his life as he wishes and can. As long as we respect the equal rights of others, we are both free to choose and responsible for the choices we make, good and bad alike. That is what freedom is all about.

To ground the theory of rights, however, giving it greater specificity, we look to both the common law and Locke, where we find that in

theory and experience alike, rights are intimately bound up with property. Locke put it well: “Lives, Liberties and Estates, which I call by the general Name, *Property*.”<sup>16</sup> James Madison, the principal author of the Constitution, made a similar point when he wrote: “As a man is said to have a right to his property, he may be equally said to have a property in his rights.”<sup>17</sup> The Founders understood well that all rights, however described, can be thought of as property and, to aid in derivation, reduced to property. If

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**“In a free society, people are free to be virtuous — or not. Indeed, only when virtuous acts are voluntary can they be called virtuous.”**

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everything we hold by right — everything to which we can be said to be “entitled” — can be conceived of as property, then we have a place from which to start when we think about our many rights — and think about the many claims that may turn out not to be rights.<sup>18</sup>

Thus, if the foundation of our rights is property — broadly understood as lives, liberties, and estates — it is but a short step to think of right violations as involving the taking of property, the taking of things that belong free and clear — “by right” — to others. So doing, we can imagine a world in which people are free to live their lives, exercise their liberties, and build and enjoy their estates, provided only that in the process they refrain from taking what belongs to others — the lives, liberties, and estates of those others.

What people may not do, then, is commit torts or crimes: they may not take from others by trespassing on the persons or property of those others or by otherwise taking that property. If they do, they are then obligated to make their victims whole. Thus, when the Founders spoke of “inalienable” rights, they could have meant only that others may not alienate our rights. We may alienate them, however, by committing torts or crimes, for which we are responsible. When

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we do, we alienate our right to those holdings that may be necessary to right the wrong we have done. Thus are rights and obligations alienated or extinguished and new rights and obligations created as we act in the world.<sup>19</sup>

At this stage in the derivation, then, our only obligation is to leave each other alone. Thus, it is particularly important to notice, in the context of the modern welfare state, that in a free society there is no obligation to assist others who may need assistance, although people are at perfect liberty to offer such assistance if they wish. We may think it good that they do — that is our value judgment — but we cannot compel that assistance. For all association must be voluntary, which is why committing torts or crimes — taking people’s lives, liberties, or estates without their consent — is not simply wrong, but violates their rights. Were we to compel assistance, we too would violate rights. In a free society, people are free to be virtuous — or not. Indeed, only when virtuous acts are voluntary can they be called virtuous.<sup>20</sup>

In the world thus far sketched, then, people are free to make as much or as little of themselves as they wish and can. In the ordinary world, however, most people do that not as isolated individuals but through association with others. We come then to the second great font of rights, a corollary of property — promise or contract. As part of our liberty, our right to freely act, each of us has a right to associate with others, provided only that the association be voluntary on all sides. Through such association — ranging from

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**“We can hardly violate rights in the name of securing rights and be thought to be doing so by right.”**

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spot transactions to bargains over time to private clubs, churches, marriages, partnerships, giant corporations, and on and on — people exchange their various holdings and civil society in all of its rich variety arises.

Here too, however, rights and obligations are constantly being alienated and created as

people arrange and rearrange their affairs with others as they think best. The only requirement is that promises or contracts be kept, failing which those who breach or defraud or take or otherwise fail to perform as promised must make their victims whole, as detailed in the various branches of the classic common law that treat such matters. It is especially important to notice in all of this, however, that it is people who order their own affairs, not governments. In fact, to this point in the Declaration the Founders have not even spoken of government. We turn to that next.

### *That to Secure these Rights, Governments are Instituted among Men*

As should be clear from the sketch just completed, the world of rights and obligations envisioned by the Founders is systematic, rich, and varied — and grounded in reason, in the moral principles of liberty, property, and contract that the Declaration implies. Only now, after they

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**“It is not from moral necessity that we move from the state of nature to a realm with government, and we need to be candid about that.”**

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have outlined that world, do the Founders turn to government. Thus, as we move from the state of nature to a world with government, we come at last to fundamental questions about political legitimacy — to questions about the proper scope of government power and, indeed, about the legitimacy of government itself.

The purpose of government, the Founders say, is to secure our rights. That is why we institute it. But is that a proper end of government? And are the powers that serve that end legitimate? More immediately, why would we want to secure our rights through government rather than through some other, private institution? Those are skeptical questions, asking whether even the limited conception of government the

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Founders set forth is legitimate. On the other side, however, there are questions about whether the Founders' conception may be too limited. Are there additional powers, beyond those of enforcement, that legitimately belong to government? Those questions, too, will need to be addressed.

Because the issues here are complex and subtle, we will have to sort them out slowly and carefully, if only in outline. To do that, we take the same course we took above, the course that Locke took when he, too, thought about such questions; but we will press the issues a bit further than Locke did and ask first what rights we would have toward securing our various rights if there were no government, if we were in the state of nature. Call them second-order rights, if you will; they are the rights that come into play only after the first-order rights outlined above have been, or are about to be, violated.

Merely stating the matter, however, reveals its complexity. For we are dealing now with a realm of considerable uncertainty in which principles of reason can go only so far. To be sure, any second-order rights we might have must be derived from our first-order rights to be free: enforcement rights, that is, must be justified with reference to the rights we have to be enforced. But in addition, and apart from the question of

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**“The power government exercises to secure rights is legitimate, even if specific applications of the power may be illegitimate, and even if government’s monopoly claim may not be deeply grounded.”**

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derivation, those second-order or enforcement rights must be exercised in ways that respect the first-order rights of others. Indeed, we can hardly violate rights in the name of securing rights and be thought to be doing so by right.

Thus, while a known criminal has no right not to be arrested and forced to make his victim whole — he alienated his right to be free from arrest and from restitution obligations when he

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committed his crime — a person only suspected of having committed a crime is in an altogether different category. What are our rights toward him? May we arrest him? How strong must our suspicion be before we can? And if we can arrest him, what then? It is here that the shades of gray

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**“Once the bounds of the enforcement power are set as far as they can be by reason, the precise means government may employ toward that end are up to the governed to determine.”**

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that surround uncertainty intrude. It is here that reasonable people can have reasonable differences because we are dealing not with principles of reason but with applications of those principles that take reason to its limits. It is here that subjective values come into play as we try to draw “reasonable” lines concerning where one person’s right ends and another person’s right begins.<sup>21</sup>

All of this suggests, then, that there are certain “natural” springboards, as it were, to legitimate government. It is as if in the very nature of the problem — in particular, in the need to find neutral decision procedures and principles where reason alone will not avail — we find the foundation of government’s legitimacy. We turn to government, that is, because as a practical matter we need to know where the lines are — what our rights are — in the complex and uncertain realm of enforcement, where reason comes to its principled end. To be sure, reason tells us that we have rights of enforcement. And it tells us further that we may, for example, arrest those we have good reason to believe have violated our rights — and may not arrest others; but it does not tell us the precise scope of that or similar rights. Without government and the exclusive power it purports to have to provide uniform answers to such questions, we can imagine a state of some confusion and, indeed, anarchy.



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Yet for all of that, the argument for government enforcement of rights — rather than private enforcement by, for example, competing private enforcement agencies<sup>22</sup> — is prudential, not moral. It is not from moral necessity that we move from the state of nature to a realm with government, and we need to be candid about that. In fact, there is no answer, other than from prudence, to the person who complains that he would rather enforce his own rights and that forcing him to use and pay for public enforcement — that is what government’s monopoly on the power of enforcement amounts to — violates his right to do it himself. He is right.<sup>23</sup> George Washington said as much when he said that “government is not reason, it is not eloquence, it is force.”<sup>24</sup>

It seems, then, that the best that can be said is this: at the least, the enforcement power the Founders assigned to government, apart from its specific applications, is legitimate. In a state of

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**“The majority must justify its claim to rule the minority; the minority does not have to justify its right not to be ruled.”**

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nature, that is, each of us has what Locke called the “Executive Power” — the power to secure his rights.<sup>25</sup> Thus, when government exercises that power on our behalf, it is exercising a power that we would otherwise have a right to exercise ourselves.

None of that goes to the way government exercises the power, of course — to whether it uses force when it should not or fails to use force when it should. Nor does it go to the government’s monopoly claim, its claim to the exclusive exercise of that power. The question, rather, is whether the executive or enforcement or police power as such is legitimate. It is. Thus, to that extent, and that extent only, the power government exercises to secure rights is legitimate, even if specific applications of the power may be illegitimate, and even if government’s monopoly claim may not be deeply grounded.

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*Deriving their Just Powers from the Consent of the Governed*

But if the end for which we institute government — to secure our rights — is legitimate, it does not follow that every means government may employ toward that end is legitimate. Indeed, we have only to look to the “long Train of Abuses” listed in the Declaration to discover powers the Founders thought illegitimate. As we saw above, reason can draw the broad outlines of our enforcement rights; it cannot draw the more specific lines. Yet if people are to have notice and if disputes are to be adjudicated uniformly and fairly, those lines must be drawn.

We come, then, to the place of will or consent in the system. Government is instituted to secure our rights. But once the bounds of that power are set as far as they can be by reason — by the rights reason enables us to derive — the

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**“The Founders were not democrats, as is evidenced by the many measures they took, when it came time to draft a constitution, to restrain popular as well as representational will.”**

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precise powers or means government may employ toward that end are up to the governed to determine. Thus, on behalf of victims, government may arrest and try alleged criminals and, if they are found guilty, impose proper sanctions on them. Reason tells us that. It does not tell us, beyond a certain general level, what arrest or trial procedures are legitimate or what sanctions are proper.<sup>26</sup>

Thus, where reason is silent — or has run its course — we have to turn to some public decision procedure — not simply to make the lines public but because different people will draw the more particular lines at different places. Experience has taught us that if we want to reduce the chances of arbitrary or capricious lines being drawn, it is best to leave the drawing to the collective judgment of the people who

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must live under them. There being no possibility for reason-based lines beyond a certain point, those lines are legitimate, provided they are within the bounds set by reason, simply because they have been consented to. Thus are government's just powers, to the extent permitted by reason, derived from the consent of the governed.

In sum, then, reason tells us that government's power to secure our rights is legitimate — it being no more than the power each of us has to secure his own rights — even if government's claim to have that power exclusively stems from prudence alone. And reason sets the broad scope of that power. Beyond that, however, the more specific powers or means that may be necessary to secure our rights are made legitimate by being derived from the consent of the governed. Thus do reason and consent go together to limit government, lending it a measure of legitimacy in the process.<sup>27</sup>

But are there powers beyond those of enforcement that belong legitimately to government? We come, then, to the other side of the issue, to the side that asks whether the Founders' conception is too narrow, or whether the reading

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**“Given the infirmities of consent theory, it behooves us to submit to political determination only those issues we must — indeed, if the Founders are right, only those issues we may.”**

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just given to the Declaration is too narrow. Does the Declaration permit more power than its plain language and background theory seem to suggest? Let us turn to those questions, starting with the language itself.

To be sure, the phrase under consideration, read by itself, does seem to imply a broader scope for government power than simply securing rights. In fact, by itself, it suggests that any power, whatever its purpose, is just or legitimate, provided only that it has been consented to by

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the governed. Even if that were a proper reading of the phrase, however, it would do little to enhance the scope of legitimate power, for it is all but impossible to satisfy the consent criterion, as a moment's reflection will show. Indeed, we are up against the classic problem of consent theory — it doesn't do the job — which the Founders seemed to have understood better than many do today.

Consent theory starts from an unobjectionable premise — that individuals have a right to rule themselves and a right not to be ruled by others. And that premise has an unobjectionable

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**“The redistributive power amounts to theft by government, plain and simple. Yet around the world today it constitutes the principal business of government.”**

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corollary, central to the theory of rights, that people can bind themselves through their freely given consent, as they do every day when they make promises or sign contracts. But it is one thing for an individual to bind himself, quite another for a group of individuals to bind each other. To be sure, if each member of the group consents, no one can be heard later to complain. But rarely, if ever, do we get unanimity, especially on political questions. We get majorities and minorities; and majorities cannot bind minorities, not if consent is to be the touchstone of legitimacy. Indeed, it is not for nothing that we speak of the tyranny of the majority.

The classic theorists appreciated that problem, of course, which is why some of them proposed the “social contract” as a solution. Through a social contract we agree unanimously to be bound thereafter by majority rule (or by any other fraction of the whole we choose, for that matter). Thus, the initial unanimity ensures legitimacy thereafter, provided the procedures agreed to by all are followed thereafter.<sup>28</sup> Social contract theory works for all manner of private associations because we can point to the consent that individuals give going in. With govern-

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ment, however, very few of the governed are ever in such an original position. In fact, even in America, where we “constituted” ourselves as a people through the consent that constitutional ratification signifies, the process reached only a minute fraction of all those bound by it in the years since. As a practical matter, that may be the best we can do — and it is better than many others have done, to be sure. But it hardly serves as the kind of consent that can bind the minority to the will of the majority.

We come then to the last resort of consent theorists, the idea of “tacit consent”: by staying we tacitly consent to be bound by the will of the majority. Unfortunately, that argument proves both too much and too little. It proves too much because it would render even dictatorial rule legitimate — provided only that the subjects stayed. And it proves too little because it does not render the majority’s rule legitimate. Rather, it places the minority in the position of having to choose between two of its entitlements — its right to stay where it is, and its right not to come under the will of the majority. The majority must justify its claim to rule the minority; the minority does not have to justify its right not to be ruled. Indeed, the argument from tacit consent puts the

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**“America’s Founders set forth a powerful moral vision of individual liberty, individual responsibility, and limited government — government limited to securing our rights.”**

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majority in the place of the gunman who says “Your money or your life.” You may give him your money “voluntarily,” but we would hardly say you consented to do so — much less that he obtained it by right.

To return to the Declaration, then, the idea that the phrase in question should be read as saying that any power of government is legitimate if it derives from the consent of the governed is simply undercut by the facts: even in a democratic regime, “the governed” do not consent

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except in the most attenuated of ways. Indeed, to suppose that a single vote every few years suffices to empower a majority of representatives, under a representational system, to thereafter bind all other citizens to their will is far-fetched, to say the least. Except in the most limited sense, the Founders were not democrats, as is evidenced by the many measures they took, when it came time to draft a constitution, to restrain popular as well as representational will. They understood well, and wrote often, about the problem

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**“It was the doctrine of enumerated powers that was meant to constitute the principal defense against overweening government.”**

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posed by the tyranny of the majority. Indeed, one of the central reasons for having a constitution is to address that problem.

What, then, was the limited sense in which the Founders were democrats? To answer that question, we have simply to consider the alternative — no consent at all. Plainly, that regime can be even more tyrannical than an unrestrained majoritarian regime, as the Founders knew from their experience with English rule. Yet if political consent is a poor imitation of private consent — the consent of ratification, even if unanimous, cannot bind later generations; the consent of periodic elections, which is never unanimous, cannot bind minorities — one wants to give consent no more credit than it can bear. So doing, ratification gets the legal system off the ground, lending it such legitimacy as it can. Subsequent elections decide issues properly within their scope, lending those outcomes such legitimacy as elections can. That is the best consent can do.

Plainly, the more specific aspects of the enforcement power, as discussed above, are properly decided through consent. For the prudential reasons there sketched, they cannot be left to private determination. That being the case, consent, however imperfect, can give us some sense of where to draw the lines in question — and can lend such legitimacy to the deci-

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sions that follow as is lent by their reflecting the consent of those living under them.

Given the infirmities of consent theory, then, it behooves us to submit to political determination only those issues we must — indeed, if the Founders are right, only those issues we may. The Founders spoke to that question by limiting government to the job of securing our rights. All else was to be left to the private sector where free people could lead their lives and solve their problems through voluntary association. There is no reason in principle, then, why so much that is done today through government should not be done privately — and every reason in moral theory why it should be done privately rather than through the inherently coercive institution of government.

But all of this presumes, for the sake of argument, that the phrase under review is rightly read by itself when all the evidence runs the other way. In fact, when placed in context — “that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed” — the phrase takes on the meaning assigned to it earlier. It qualifies the preceding phrase by making it clear

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**“The idea was to limit government from the outset by limiting the things it could do.”**

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that the powers requisite to securing our rights, to be just, must be derived from the consent of the governed. To the extent it can, that is, consent, in the form of original ratification and subsequent elections, makes those powers just. It does not, however, make any other powers, serving other ends, just.

On this natural reading, therefore, government’s power is limited to securing our rights. And it is further limited, and made legal, by the consent of the governed. To read the phrase more broadly — to assume, for example, that there are legitimate powers in addition to those necessary to secure rights — is to raise a fundamental question: Where would those powers

come from? Again, consent alone will not do the job, as just shown. But even if it did, before they could give government any such powers, people must first have the powers themselves, much as they have the enforcement or police power in the state of nature. On that score, however, there are serious problems.

We can see this by noticing that for all their apparent variety, government powers can be reduced to just three morally relevant kinds.

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**“Whereas the Founders had thought of government as a necessary evil, progressives saw government as an engine of good, an instrument to solve “social problems.”**

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There is first the enforcement or police power discussed above — the power to secure our rights. As already noted, that power is legitimate insofar as it is a power that each of us has in a state of nature, the exercise of which, if exercised correctly, would violate no rights.

Second, there is the eminent domain power, the power to take private property for public use provided just compensation is paid to the owner. Known as the “despotic power” in the 17th and 18th centuries, it was so known because, unlike with the police power, none of us could have such a power in a state of nature. Even with just compensation, that is, eminent domain involves a forced association, which the theory of rights forbids. Its rationale as a power of government stems from three considerations: practical necessity (without the power, many believe, public projects could be blocked by a single individual who would be in a position to “extort” unreasonable compensation); just compensation (the owner is made whole while the public is better off); and in the case of the Fifth Amendment’s Takings Clause, for example, constitutional consent (through ratification we all agreed to give the power to government). None of those rationales is deeply satisfying, of course, but taken



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together they do mitigate the despotic character of the power.

Finally, the third basic power of government, especially prominent in the 20th century, is the redistributive power and its regulatory corollary — the power to take from some and give to others. This is a naked power that enjoys no credible rationale whatsoever — not from the theory of rights, at least. None of us has such a power in a state of nature. Nor do any of the eminent domain rationales apply to the redistributive power: there is no practical necessity, no just compensation, and no constitutional consent for the power. In a word, however noble-sounding the purported rationales for its exercise may be, the power amounts to theft by government, plain and simple. Yet around the world today it constitutes the principal business of government.

To return to the Founders' conception of the purpose and limits of government, given the moral vision on which their conception rests, it is hard to square even the eminent domain power

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**“After a few critical opinions that the Court handed down between 1936 and 1938, the Constitution was standing on its head.”**

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with that vision. Yet we know that colonial governments exercised the power, as did later state governments. And we know that when it came time to draft and ratify a Constitution, the Founders included such a power, by implication, in the Bill of Rights. One could chalk this up to expediency, of course. Or one could say that at the end of the day the not-insubstantial rationales that support the power prevailed.

What one could not say, however, is that anything like the redistributive power can be so rationalized. On the Founders' vision, the eminent domain power is a stretch, but constitutional consent, plus the fact that the victim is left whole, may cover that stretch. The redistributive power, by contrast, is not even close. Under no circumstances can it be squared with the moral principles the Founders set forth. In a state of

nature, *A* could not take from *B* to give to *C*. On what possible ground, then, can government step into *A*'s shoes and take *B*'s goods, however noble its motive? Where would government get such a power if not from *A*? But *A* has no such

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**“Today there seems to be almost no subject too personal or too trivial for federal regulatory attention.”**

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power to give. To suggest that mere consent could justify the power is to ignore the rest of the Declaration, and to invest consent with a moral force it simply does not have, as we have just seen. The redistributive power is not simply illegitimate, therefore, but starkly so.

In sum, then, America's Founders set forth a powerful moral vision of individual liberty, individual responsibility, and limited government — government limited to securing our rights. They believed that individuals, families, and organizations of all kinds would flourish if only they were free to do so, if government would provide a legal framework within which that might happen, then step aside. To the extent that their plan has been carried out, they have been proven right. To the extent that their plan has been ignored, both here and abroad, they especially have been proven right. Let us see, very briefly, how the plan has fared in America.

## THE CONSTITUTION

Eleven years after they declared the nation's independence, which American patriots finally won on the battlefield at Yorktown in 1781, the Founders drafted a constitution for the United States that reflected to a large degree the principles the Declaration had set forth. Not everything in the Constitution did that, of course: it took a civil war to end the institution of slavery, for example, which the Constitution implicitly recognized. But for the most part, the document called for a limited national government, which ratification brought into being in 1789.<sup>29</sup>

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In drafting the Constitution, the Founders needed to establish a government at once strong enough to secure our rights, and do the few other things they thought it should do, yet not so strong as to violate rights in the process. Toward that end they gave the national government limited powers, then limited the exercise of those powers through an intricate system of checks and balances. Thus, they divided power between the national and the state governments, leaving most power with the states and the people, then separated national powers among three independent yet interdependent branches of the national government. Congress was given the lawmaking power, for example, but the president could

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**“In short order, both sides would buy into the New Deal’s “democratization” of the Constitution — the expansion of public power over theretofore private affairs.”**

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veto the bills Congress passed. And the courts could decide cases arising under the Constitution, particularly cases raising the question whether the political branches were acting within the scope of their authority and in a manner consistent with the rights of the people — a power that reached state actions as well after the Civil War amendments were ratified.

### *The Doctrine of Enumerated Powers*

But it was the doctrine of enumerated powers that was meant to constitute the principal defense against overweening government. Since all power began with the people, the people could limit their government simply by giving it, through the Constitution, only certain of their powers. That, precisely, is what they did, through enumeration, thus making it clear that the government had only such powers as were found in the document. The very first sentence of the Constitution, following the Preamble, makes the point: “All legislative Powers herein granted shall be vested in a Congress . . .”

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(emphasis added). The point is reiterated in the Tenth Amendment, the final documentary statement of the founding period: “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.” In a word, power was delegated by the people, enumerated in the Constitution, and thus limited.

The idea, plainly, was to limit government from the outset by limiting the things it could do, almost all of which, as Article I, Section 8 of the Constitution indicates, relate to securing rights. In fact, James Madison, the principal author of the Constitution, made the point in 1794 when he rose from the floor of the House to object to a welfare proposal, saying that he could not

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**“The Declaration and the Constitution, as amended, are consistent and elegant statements about the purpose and limits of government.”**

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“undertake to lay [his] finger on that article of the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents.”<sup>30</sup> Notice that Madison was not objecting to benevolence. Rather, he was making a point about constitutional principle: however worthy the end might be, Congress had no power to pursue it since the people, through their Constitution, had given Congress no such power. In 1887, exactly 100 years after the Constitution was drafted, President Grover Cleveland made a similar point when he vetoed a bill to buy seeds for Texas farmers suffering from a drought, saying he could “find no warrant for such an appropriation in the Constitution.”<sup>31</sup>

### *The Climate of Ideas*

Why then, today, do we have a federal leviathan in our midst, redistributing our wealth and regulating virtually every aspect of our lives, making

a mockery of the Founders' vision of limited government? The answers are many, but from a constitutional perspective a few stand out — all relating, not surprisingly, to changes in the climate of ideas, which indicates once again how important ideas are in the shaping of events.<sup>32</sup> Because there will always be those who truly believe in expansive government, seemingly ignorant of the moral implications, to say nothing of those who simply use government to advance their own ends, it is crucial to restrain such people through law — through constitutional law, in particular. But law is not self-enforcing. Nor can it be written in a way that does not require some human interpretation, which is where background ideas come into play and why it is so important to attend to those ideas.

Standing behind the Constitution, of course, was the classical theory of natural rights, derived from principle and grounded in property and contract. That theory came under attack early on when Jeremy Bentham, the father of British utilitarianism, wrote in 1791 that talk of natural rights was “simple nonsense; natural and imprescriptible rights, rhetorical nonsense, — nonsense upon stilts.”<sup>33</sup> Thus began the slow decline of natural rights theory and the rise of the idea that law, policy, and moral judgments generally were to be justified not by their following from some overarching principles of right and wrong, rooted in reason, but by their serving to produce various goods. Utilitarians, for example, called for ignoring or overriding rights if doing so would result in “the greatest good for the greatest number” — even if they never did tell us how to determine whether that criterion was met.<sup>34</sup>

With the decline of natural rights theory and the rise of utilitarianism, our focus shifted gradually from principle to policy, from whether a policy or law or court decision was right to whether it was good or beneficial. That amounted to a shift from reason to will, of course, to shifting from an objective to a subjective standard. And that meant that more issues might be opened to public determination. If a certain prin-

ciplined position on property seemed not to produce the greatest good for the greatest number, for example, why not reconsider that position and even put it to a vote — not least to get some feel for what the “public interest” is, for what the public thinks about the greatest good for the greatest number? Not surprisingly, then, the rise of utilitarianism was followed by an increased interest in expanding the scope of democratic decision making. And, indeed, if the range of public issues was to be expanded and those issues were to be decided not as a matter of right and wrong but as a matter of good or bad, why not have the decisions made by the people?

Although those background developments set in only gradually, they all came to a head, it seems, at the turn of the century, during the Progressive Era, when a fundamental change in our conception of government became increasingly apparent. Whereas the Founders had thought of government as a necessary evil, to be feared and strictly limited, progressives saw government as an engine of good, an instrument to solve the many “social problems” that had arisen as a result of urbanization and industrialization following the Civil War. Spurred on by conceptions of “good government” drawn from German universities and the rise of the new social sciences, progressives were devoted to “social engineering,” to changing and improving society — and people — through government. Indeed, so far-reaching was the change in our conception of government by 1900 that the editors of *The Nation* could write that year, in an essay lamenting the decline of liberalism, that “[t]he Declaration of Independence no longer arouses enthusiasm; it is an embarrassing instrument which requires to be explained away.”<sup>35</sup>

### *The Court Collapses*

Standing athwart progressive efforts to expand government was the Constitution, of course, which judges continued to regard, for the most part, as the bulwark of our liberties. Yet even here, changes in the climate of ideas had begun to chip away at constitutional principle as “policy” found its way slowly into judicial opinions.

Still, principle largely held until the New Deal, when President Roosevelt began his long march to radically expand the role of the federal government. The crisis came after several such efforts were rebuffed by the Supreme Court: it was then, early in 1937, that Roosevelt threatened to pack the Court with six additional members. Not even Congress would go along. Nevertheless, the Court-packing scheme worked as the Court, hearing the message, made the famous “switch in time that saved nine.”<sup>36</sup> After a few critical opinions that the Court handed down between 1936 and 1938, the Constitution was standing on its head.

Upon reflection, it is surprising how little it took to make so radical a change in our political lives; yet just two clauses of Article I, Section 8 — the General Welfare Clause and the Commerce Clause — are the source, respectively, of the federal government’s modern redistributive and regulatory powers. Those clauses were radically reinterpreted by the Court, which then turned to the Bill of Rights, in 1938, to radically reinterpret it. Here, very briefly, is how it was done.

### *Rewriting the Constitution*

The centerpiece of the Constitution, again, is the doctrine of enumerated powers, which limits the federal government to its authorized ends. Consistent with that doctrine, as Madison, Jefferson, and others made clear, the General Welfare Clause could not have afforded Congress an independent power to spend for the general welfare; for under such a reading, Congress would be able to spend for any end, enumerated or not, provided only that it served the “general” welfare, and thus would be able to evade the limits imposed by enumeration.<sup>37</sup> No, the clause was meant to serve as a shield against overweening power, not as a sword of power: it was meant to limit Congress’s spending for enumerated ends by requiring that spending be for the general rather than for any particular or local welfare. It was meant, in short, to limit Congress’s enumerated powers, not to undermine the doctrine of enumerated powers itself.

Nevertheless, in 1936 the Court said, albeit in *dicta*, that Congress did have an independent power to spend for the general welfare;<sup>38</sup> then in 1937 the Court announced that conclusion as part of its holding and added that it would not thereafter police Congress as to whether it was spending for the general or for some particular welfare but would leave it to Congress to police itself.<sup>39</sup> The result, not surprisingly, has been an ever-expanding welfare state as Congress has been unable to resist — when it has not itself abetted — unrestrained demands on the public treasury — all in the name of the “general welfare.”

The story of the Commerce Clause is similar, for it too was meant to be a shield against power, not a sword of power as it is today. In this case, however, the Founders were concerned to restrain not federal but state power, which had been used under the Articles of Confederation to enact protectionist legislation aimed at protecting local manufacturers and merchants against competition from out-of-state interests. Seeking to ensure a national market and a regime of free trade among the states, the Founders gave Congress the power to regulate, or “make regular,” commerce among the states. It was thus a power essentially to negate state efforts at restraining trade — and in fact was so read in the first great Commerce Clause case in 1824<sup>40</sup> — and to enable Congress to take such other measures as might be necessary and proper to ensure free trade.<sup>41</sup>

Unfortunately, that functional account of the clause was gradually replaced over the years by a narrow, textual reading of the words “commerce” and “among,” which left the Court in 1937 with slim precedents as it faced the New Deal’s regulatory juggernaut. Cowed by the Court-packing scheme that year, the justices caved completely by saying that Congress had power to regulate anything that “affects” interstate commerce — which, of course, is virtually everything.<sup>42</sup> With that, the modern regulatory state poured through the opening floodgates until today there seems to be almost no subject too personal or too trivial for federal regulatory attention.



Having thus eviscerated the doctrine of enumerated powers, the Court turned next to the Bill of Rights, which it gutted in a now-famous footnote in a case called *Carolene Products*.<sup>43</sup> Details of the case aside, the doctrine that emerged, which is the foundation of modern constitutional law,<sup>44</sup> is this: we have two kinds of rights — “fundamental” rights, like the right to vote and the free-speech rights that are associated with the democratic process; and “nonfundamental” rights, like rights of property and contract and rights associated with “ordinary commercial transactions.” When legislation or enforcement actions implicate the first category of rights, the Court will give those measures “strict scrutiny” and will most likely find them unconstitutional. By contrast, when measures implicate the second category of rights, they will be given minimal scrutiny by the Court: if they are “rationally related” to some “conceivable” government end, they will pass constitutional muster.

Needless to say, the floodgates were now almost fully opened. With the government’s redistributive and regulatory powers all but plenary after 1937, only our rights could be posed as a brake on federal power. After *Carolene Products*, however, even that brake was eviscerated, for only if we could show that the rights implicated by a given measure were “fundamental” could we hope to get a court to review the matter. The value-laden distinction between two kinds of rights — to say nothing of the distinction between two levels of judicial review — is nowhere to be found in the Constitution, of course.<sup>45</sup> It was written from whole cloth to pave the way for the redistributive and regulatory programs of the New Deal. Indeed, Rexford Tugwell, one of the principal architects of the New Deal, said as much some 30 years after *Carolene Products* was decided: “To the extent that these [New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them.”<sup>46</sup>

With that, the Constitution truly stood on its head. As written, it is a document of enumerated powers, the exercise of which is limited by

both enumerated and unenumerated rights. As it emerged from the New Deal, it was a document of effectively unenumerated powers, the exercise of which would thereafter be limited by rights interpreted narrowly by conservatives on the Court and episodically by liberals on the Court. In short order, that is, both sides would buy into the New Deal's "democratization" of the Constitution — the expansion of public power over theretofore private affairs; the only differences they would have, for the most part, would be over whether there might be any rights to brake that power. Conservatives would have difficulty finding any rights not expressly in the Constitution, thus ignoring the plain language of the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Liberals would ignore rights plainly in the document, such as rights of property and contract, while finding other "rights" not meant to be among even our unenumerated rights.

That, in a nutshell, is the state of modern constitutional jurisprudence in America. The rewriting of the Constitution, without benefit of amendment, goes far toward explaining how political forces bent on expanding government have been able to do so in the face of a document written plainly to prevent that. If we are to restore constitutional government, however, we ourselves must take the first step, for those "political forces" include a large portion of a people who have asked for, and even demanded, all the government we have today — constitutional restraints aside.<sup>47</sup> As a first step, we must stop asking government to do what we had no right to ask it to do in the first place.

But we must also recognize, from a more basic perspective, that constitutions cannot be written in stone: they rightly require some flexibility. That is not to say that any interpretation of our Constitution will do, of course. In fact, most interpretations will not do, for the Founders, through the documents they drafted and the writings they left us, made it quite clear how they meant those documents to be understood. The Declaration and the Constitution, as

amended, are consistent and elegant statements about the purpose and limits of government. They draw a simple yet inspiring picture of human affairs. As we go about the difficult task of limiting the leviathan we have created, we would do well to revisit those documents and relearn the wisdom they contain. At stake are nothing less than our liberty and the legitimacy of our legal affairs.

## NOTES

1. See Paul Johnson (1991), *Modern Times*, New York: Harper Collins Publishers.
2. For useful discussions of the ideological currents surrounding the Declaration, see Bernard Bailyn (1967), *The Ideological Origins of the American Revolution*, Cambridge: Belknap; Carl L. Becker (1922), *The Declaration of Independence: A Study in the History of Political Ideas*, New York: Vintage repr., 1958; and Morton White (1978), *The Philosophy of the American Revolution*, Oxford: Oxford University Press.
3. I have discussed the issue of legitimacy more fully in Roger Pilon (1992), 'Individual Rights, Democracy, and Constitutional Order: On the Foundations of Legitimacy', *Cato Journal*, vol. 11, no. 3, pp. 373–90.
4. In the state-of-nature tradition, the primary source the Founders drew upon, of course, was John Locke (1965), 'Second Treatise of Government', in Peter Laslett (ed.), *Two Treatises of Government*, New York: Mentor. For a more recent argument in that tradition, see Robert Nozick (1974), *Anarchy, State, and Utopia*, New York: Basic Books.
5. In the tradition of moral rationality, see Alan Gewirth (1978), *Reason and Morality*, Chicago: University of Chicago Press; and Roger Pilon (1979), *A Theory of Rights: Toward Limited Government*, Chicago: University of Chicago, unpublished Ph.D. dissertation.
6. A recent work in that tradition is Richard A. Epstein (1995), *Simple Rules for a Complex*

*World*, Cambridge: Harvard University Press.

7. See Maurice Cranston (1967), 'Human Rights, Real and Supposed', in D.D. Raphael (ed.), *Political Theory and the Rights of Man*, Bloomington: Indiana University Press, pp. 43–53; Roger Pilon (1979), 'Ordering Rights Consistently: Or What We Do and Do Not Have Rights To', *Georgia Law Review*, vol. 13, no. 4, pp. 1171–96.
8. I have discussed the constitutional aspects of this point more fully in Roger Pilon (1995), 'A Government of Limited Powers', *The Cato Handbook for Congress*. Washington, D.C.: Cato Institute, pp. 17–34; reprinted as 'Restoring Constitutional Government', *Cato's Letters*, no. 9, Washington, D.C.: Cato Institute (1995).
9. For a discussion of that subject, see the sources at note 5 above.
10. I have outlined such a view, and criticized other methods of justification, in Roger Pilon (1979), 'On Moral and Legal Justification', *Southwestern University Law Review*, vol. 11, no. 4, pp. 1327–44 .
11. See Wesley Newcomb Hohfeld (1946), *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Walter Wheeler Cook (ed.), New Haven: Yale University Press.
12. See H.L.A. Hart (1955), 'Are There Any Natural Rights?' *Philosophical Review*, vol. 64, pp. 175–91.
13. Edward S. Corwin (1995), 'The "Higher Law" Background of American Constitutional Law', Ithaca: Cornell University Press, p. 26.
14. See especially the 'Second Treatise', note 4 above.
15. None of this is to say, of course, that no values are "better" than others or that we cannot reason about values. Clearly, we do reason about values; and we can make powerful *prudential* arguments about which values are superior to others. But in the end, values are subjective in the sense that, unlike rights, they vary from person to person; and in the more analytical sense that

- statements about values are neither true nor false, there being no ultimate criterion of value that is immune to skeptical challenge. I have discussed this issue more fully in Roger Pilon (ed.) (1990), 'The Right to Do Wrong', *Flag-Burning, Discrimination, and the Right to Do Wrong*, Washington, D.C.: Cato Institute, pp. 1–7; repr. in *The Libertarian Reader*, David Boaz (ed.), New York: The Free Press, 1997, pp. 197–201; and Roger Pilon (1997), untitled essay in *E Pluribus Unum? A Symposium on Pluralism and Public Policy*, Washington, D.C.: The American Jewish Committee, pp. 61–64.
16. Locke, 'Second Treatise', note 4 above, p. 123.
  17. James Madison, 'Property', *National Gazette*, vol. 1, no. 44, March 29, 1792, pp. 174–75; repr. in *Letters and Other Writings of James Madison*, vol. 4, Philadelphia: J. B. Lippincott & Co., 1865, pp. 478–80.
  18. I have developed these points more fully in Roger Pilon, 'Ordering Rights', note 7 above.
  19. Sometimes we use the word "forfeit" to mean the same thing as "alienate": by his act, for example, a murderer is said to have forfeited or alienated his right to his liberty and perhaps to his life. Likewise, through promise or contract, we alienate and create rights and obligations on a regular basis, as will be discussed shortly. Often, however, the question whether we can alienate various of our rights is conflated with the question whether a given right, having been alienated to another person, will be secured or enforced. Care must be taken to notice that those are separate questions. In particular, in the nature of things — given the vagaries of life — not every right, including rights we may have alienated to others, can or should be enforced.
  20. I have discussed this issue more fully in Roger Pilon, 'Ordering Rights', note 7 above. See also James M. Ratcliffe (1966)(ed.), *The Good Samaritan and the Law*, Garden City: Doubleday.

21. It is not in the enforcement area alone that pure reason comes to its end and values come to the fore. In fact, to flesh out the theory of rights fully we need to introduce values in the areas of risk, nuisance, and remedies as well. Thus, reason tells us that we may not act in ways that endanger others or constitute a nuisance; and it tells us that if we violate the rights of others in whatever way we must make those others whole. But reason does not tell us how much in the way of risk or noise or odors or what have you we may create; nor does it tell us what precisely must be done by way of remedy for the many wrongs that might arise. As with enforcement, and the uncertainty that surrounds it, value judgments must be made, about which reasonable people may disagree.
22. For a discussion of how that might work, see Nozick, *Anarchy*, note 4 above.
23. See, e.g., Robert Paul Wolff (1970), *In Defense of Anarchism*, New York: Harper & Row.
24. Frank J. Wiltach (1924), *A Dictionary of Similes*, 2nd edition, p. 526.
25. Locke, 'Second Treatise', note 4 above, §13.
26. It is no accident that the Fourth Amendment speaks of the right to be free from "unreasonable" searches and seizures; that it requires "probable" cause before warrants can be issued; and that the Eighth Amendment speaks of "excessive" bail and of "cruel and unusual" punishment. Those areas of the law, in their nature, require value judgments. It would have been highly imprudent for the Founders to have drawn those provisions more precisely.
27. Although the Declaration speaks of just or legitimate *powers*, not just or legitimate *governments*, the legitimacy of government itself, as an institution, is a function, presumably, of our having "instituted" it and hence, to that extent, consented to come under its rule. Just how much that consent serves to lend legitimacy to ongoing governments is a question we take up next, by

implication, when we consider whether consent justifies powers more extensive than the enforcement power and, more generally, whether consent justifies anything in the political context.

28. It is noteworthy that the Constitution's Ratification Clause, Article VII, reflects the social contract model of legitimacy: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution *between the States so ratifying the Same*" (emphasis added). Setting aside the problem posed by the consent coming from state conventions rather than from the people directly, the point to notice is that only those states that had ratified the Constitution could be bound by it. Thus, it took unanimity, among at least nine states, to get the Constitution off the ground; and, as a corollary, that consent bound only those states.
29. I have discussed the issues that follow more fully in Roger Pilon (1993), 'Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles', *Notre Dame Law Review*, vol. 68, no. 3, pp. 507–47.
30. *4 Annals of Congress* 179 (1794).
31. *18 Congressional Record* 1875 (1887).
32. See Richard M. Weaver (1948), *Ideas Have Consequences*, Chicago: University of Chicago Press.
33. Jeremy Bentham (1843), 'Anarchical Fallacies', *Works of Jeremy Bentham*, Richard Doyne (ed.), vol. 2, p. 501.
34. The classic attempt to compute the utilitarian calculus was by Henry Sidgwick (1907), *The Methods of Ethics*, 7th edition, New York: Dover. See also Alan Donagan (1977), *The Theory of Morality*, Chicago: University of Chicago Press, 1977.
35. 'Eclipse of Liberalism', *The Nation*, vol. 71 (1900), p. 105.
36. See Merlo J. Pusey (1973), *The Supreme Court Crisis of 1937*, New York: DaCapo Press.

37. See James Madison (1906), 'Report on Resolutions', *The Writings of James Madison*, Gaillard Hunt (ed.), vol. 6, p. 357; Thomas Jefferson (1899), 'Letter from Thomas Jefferson to Albert Gallatin' (June 16, 1817), *Writings of Thomas Jefferson*, Paul Leicester Ford (ed.), vol 10, pp. 90–1. In 1828, South Carolina's William Drayton observed: "[I]f Congress can determine what constitutes the General Welfare and can appropriate money for its advancement, where is the limitation for carrying into execution whatever can be effected by money?" *4 Congressional Debates* (1828), pp. 1632–34.
38. *United States v. Butler*, 297 U.S. 1, 65–66 (1936).
39. *Helvering v. Davis*, 301 U.S. 619, 640 (1937).
40. *Gibbons v. Ogden*, 22 U.S. (Wheat.) 1 (1824).
41. I have discussed the Constitution's Necessary and Proper Clause, which addresses the means available to Congress in furtherance of its enumerated ends, in Roger Pilon (1993), 'On the Folly and Illegitimacy of Industrial Policy', *Stanford Law & Policy Review*, vol. 5, no. 1, pp. 110–11.
42. *NLRB v. Jones & Laughlin Steel Corp*, 301 U.S. 1 (1973).
43. *United States v. Carolene Products*, 304 U.S. 144, 152 n. 4 (1938). For a discussion of the facts behind the case — the act under review, which the Court upheld, was a blatant piece of special-interest legislation instigated by one part of the milk industry to protect itself against competition from another part of the industry — see Geoffrey P. Miller (1987), 'The True Story of Carolene Products', *The Supreme Court Review*, pp. 397–428.
44. Indeed, footnote four of *Carolene Products* has been called a "great and modern charter for ordering the relations between judges and other agencies of government." Owen Fiss, 'The Supreme Court, 1978 Term — Forward: The Forms of Justice', *Harvard Law Review*, vol. 93, 1979, p. 6.



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45. As the modern doctrine of judicial review has evolved, we can sometimes find as many as four levels of “judicial scrutiny.” I have discussed such a case — *Turner Broadcasting Systems, Inc. v. FCC*, 512 US 622 (1994) — in Roger Pilon (1994), ‘A Modest Proposal on “Must-Carry,” the 1992 Cable Act, and Regulation Generally: Go Back to Basics’, *Hastings Communications and Entertainment Law Journal*, vol. 17, no. 1, pp. 41–63.
  46. Rexford G. Tugwell (1968), ‘Rewriting the Constitution: A Center Report’, *Center Magazine*, March, p. 18.
  47. Perhaps the attitude implicit here was best expressed by no less than President Roosevelt himself, in a 1935 letter 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 *The Public Papers and Addresses of Franklin D. Roosevelt*, Samuel I. Rosenman (ed.), 1938, pp. 91–92.