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Restoring the Lost Constitution

by Randy E. Barnett

On May 21, 1972, Laszlo Toth, a 33-year-old Australian geologist, slipped into St. Peter's Basilica in Rome. As the crowd attending the Whitsunday Mass waited for the pope's blessing, Toth dashed past the guards, vaulted a marble balustrade, and attacked Michelangelo's Pietà with a sledgehammer, shouting "I am Jesus Christ!" With 15 blows, he removed the Virgin's arm at the elbow, knocked off a chunk of her nose, and chipped one of her eyelids.

Now suppose that, instead of attacking the Pietà, a madman managed to evade security in the National Archives in Washington to attack the original Constitution of the United States on display there. Using a knife, he managed to cut out of the precious parchments whole passages, such as the enumerated powers of Article I, sec. 10—including the Commerce Clause and the Necessary and Proper Clause—and, were they in the original document, the Ninth and Tenth Amendments and the Privileges or Immunities Clause of the Fourteenth Amendment. The nation would surely be appalled by that heinous act.

Yet since the early years of the Republic, the justices of the Supreme Court have accomplished what no madman ever could: redact the Constitution by excising important parts of what it says, thereby expanding federal and state power.

The Supreme Court Cuts Holes in the Text

Just 30 years after ratification, the Marshall Court weakened both the Necessary and Proper Clause and the Commerce Clause. The Necessary and Proper Clause says that Congress shall have the power "to make all laws which shall be necessary and proper for carrying into Execution" the powers specified in the Constitution. In 1819, writing for the Court in *McCulloch v. Maryland,* Chief Justice John Marshall equated the term "necessary" with mere "convenience," thereby converting a matter of constitutional principle into one of legislative policy and effectively removing this textual constraint on legislation from the purview of judicial review.

The Commerce Clause grants Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." In 1824, in *Gibbons v. Ogden,* after affirming that the "enumeration presupposes something not enumerated; and that something . . . *must be the exclusively internal commerce of a State,*" Marshall then proceeded to broaden the powers of Congress beyond commerce between state and state to include as well any commerce that "*concerns* more states than one."

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Federal Reserve chairman Alan Greenspan and Czech president Václav Klaus talk before Greenspan's keynote address to Cato's 21st annual Monetary Conference on November 20.

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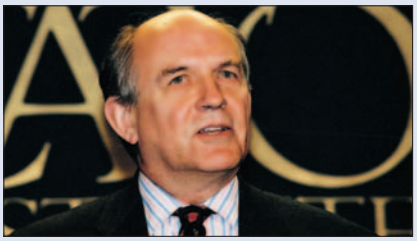

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The next passage to be redacted was a limitation on state power: the Privileges or Immunities Clause of the Fourteenth Amendment, which dictates, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." That clause had been added to the Constitution to empower the national government to protect the civil rights of citizens from violation by state governments—a jurisdiction it previously lacked—and to reverse *Barron v. Baltimore,* which held that the Bill of Rights applied only to the federal government.

In 1873, a mere five years after its ratification, the Privileges or Immunities Clause was functionally ripped from the Constitution by a bare majority of the Supreme Court in *The Slaughter-House Cases,* which concerned whether Louisiana's grant of a monopoly to a state-approved slaughterhouse violated the liberty of other butchers to pursue their lawful occupation. In a five-to-four decision, the majority distinguished two classes of privileges or immunities: national ones that the Court would enforce, such as "the right of free access to [the nation's] seaports" and the right "to demand the care and protection of the Federal government over [one's] life, liberty, and property when on the high seas," and state privileges and immunities that the Court would neglect, which included all the civil rights and liberties that the 39th Congress had tried fruitlessly to protect by enacting this clause.

In the 1903 case of *Champion v. Ames,* the Progressive Era Supreme Court further broadened the Commerce Clause by interpreting the power of Congress "to regulate"—or make regular—commerce between state and state to also include a power *to prohibit* interstate commerce of which Congress disapproved, in this case lottery tickets. The Commerce Clause was thereby converted from a power to eliminate trade barriers erected by states that restricted free trade into a police power over commerce. Later, when that interpretation was coupled with John Marshall's expansive reading of the Commerce Power in *Gibbons,* Congress could reach into a state to prohibit commercial activities so long as those activities "concerned" more states than one.

Though permanently loosening the power of Congress to regulate commerce in this way, in cases such as the now-derided *Lochner v. New York*—which struck down a statutory limit on the number of hours per week that bakers could work—the Progressive Era Supreme Court did occasionally use the Due Process Clause to demand some justification for state legislation restricting the privileges and immunities of citizens. It also scrutinized federal laws to see whether they improperly reached wholly intrastate commerce.

In the 1930s, the Supreme Court began pulling back from even this limited review, first by refusing to scrutinize state laws, essentially restoring the unfortunate reasoning of *The Slaughter-House Cases*. Then, in the 1940s, it expanded federal power. In cases such as *Wickard v. Filburn*—upholding a statute that limited the amount of wheat a farmer could grow on his own farm to feed his own animals—the Court effectively ceded to Congress the power both to regulate and to prohibit all intrastate commerce that "substantially affects" interstate commerce.

With these decisions, the Tenth Amendment was also rendered a dead letter. The Tenth Amendment declares, "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"—a redundant protection given the first section of Article I that specifies, "All legislative powers, *herein granted,* shall be vested in a Congress of the United States." With the Court's virtually limitless interpretations of the Commerce Clause and the Necessary and Proper Clause, the enumerated powers doctrine affirmed in both of those passages was, in effect, removed from the text.

Also eliminated in the 1940s was the Ninth Amendment that reads, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." In the 1947 case of *United Public Workers v. Mitchell,* Justice Reed confusingly asserted, "If granted power is found, necessarily the objection of invasion of those rights reserved by the Ninth and Tenth Amendments, must fail." In other words, so long as the Court found the existence of a power under its boundless interpretation of the Commerce Clause and the Necessary and Proper Clause, the Ninth Amendment was not violated, which meant it could not possibly ever be violated. So it too was now gone from the text.

Over the past 200 years, then, the Supreme Court has done what someone like Laszlo Toth could never do: take a razor to the text of the Constitution to *remake it from the thing it was into something quite different*. If anything is properly labeled "judicial activism," this is it. With those clauses removed, the Constitution enforced by the Court is substantially different from the one that you can view in the National Archives, as amended. At the Court's hands, what was once a system of islands of powers in a sea of individual liberty rights at both the state and the national levels, has become islands of rights in a sea of state and federal power.

The Presumption of Constitutionality

As the Supreme Court gutted the textual limits on the federal government provided by the Commerce Clause, the Necessary and Proper Clause, and the Ninth and Tenth Amendments, and on state governments by the Privileges or Immunities Clause, it adopted in their place what it called a "presumption of constitutionality"—an innovation first employed in the 1931 case of *O'Gorman & Young v. Hartford Fire Insurance*. As Justice Brandeis wrote, "[T]he presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." *O'Gorman* shows that, well before the so-called Revolution of 1937, the Court was deferring to state legislatures.

As the Brandeis quotation suggests, initially the presumption of constitutionality could be rebutted, at least in theory, by those objecting to a statute's constitutionality. By the 1940s, however, the presumption became irrebuttable for all practical purposes, at least with respect

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to economic regulation. Thus, in the 1956 case of *Williamson v. Lee Optical,* the Court upheld a state statute prohibiting anyone but a licensed optometrist or ophthalmologist from selling prescription glasses. When restricting liberty, wrote Justice William O. Douglas, the legislature need not have actually had good reasons; it is enough that it *might* have had good reasons:

> The legislature *might* have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses. Likewise, . . . the legislature *might* have concluded that one was needed often enough to require one in every case. Or the legislature *may* have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert.

With *Lee Optical* as the norm, what then was left of judicial review?

Enter "Fundamental Rights" vs. "Liberty Interests"

After the New Deal, judicial review came to be defined by a single footnote in a 1938 case. I speak, of course, of Footnote 4 of the case of *U.S. v. Carolene Products,* which established three limits on the presumption of constitutionality, notably: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be *within a specific prohibition of the Constitution,* such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." The second and third limits concerned laws that adversely affected discrete and insular minorities or the political process.

Thus, in Footnote 4 the Court enunciated the modern theory of constitutional rights that, after 1941, was to be applied to both state and federal restrictions on liberty: *Adopt a loose conception of necessity and presume all acts of legislatures to be valid, except when an enumerated right listed in the Bill of Rights is infringed (or minorities or the political process is affected), in which event the Court will put the burden on legislatures to show that their actions were both necessary and proper.* Gone is the enumerated powers doctrine and in its place is sole reliance on some of the rights enumerated in the Bill of Rights. The particular rights that happened to be enumerated in the Bill of Rights rendered this strategy ingenious. By following it, the Court could allow legislatures a completely free hand in regulating the economy while putting on the brakes when freedom of speech or the press was threatened—but not, of course, the expressed prohibition of the Second Amendment.

Footnote 4 "Plus"

For 20 years, the Supreme Court stayed within this Footnote 4 framework. Then in the 1965 case of *Griswold v. Connecticut,* it struck down a ban on the use and sale of contraceptives because, it said, the law violated a right of privacy. Trying desperately to remain within the confines of Footnote 4 and his opinion in *Williamson v. Lee Optical,* Justice Douglas attempted, now infamously, to ground this right in the "specific guarantees in the Bill of Rights [that] have penumbras, formed by emanations from those guarantees that help give them life and substance." But neither penumbras nor emanations could conceal the revolutionary impact of *Griswold*: by protecting an unenumerated right, the Court had escaped the straitjacket of Footnote 4. All hell broke loose.

The Court came under withering fire from former New Dealer constitutional scholars who, however much they may have agreed with the outcome, could see no natural stopping point short of a return to the pre–New Deal scrutiny of state and federal legislation. With *Roe v. Wade,* the political stakes were raised enormously, and former New Deal liberals such as Raoul Berger were joined by political conservatives in lambasting the new "judicial activism" of the Court in extending protection beyond the Bill of Rights to some unenumerated rights. In response, the Court eventually adopted the following limitation: Only those unenumerated liberties which were deeply rooted in the history and tradition of the American people, or which were implicit in the concept of ordered liberty, would be protected as "fundamental." All others would be deemed mere "liberty interests" with which Congress and the states could have their way under the post–New Deal rules.

This placed the courts in the business of picking and choosing among the unenumerated rights to distinguish those that were "fundamental" from those that were not. The outcome of such analysis depends almost entirely, however, on how specifically you define the liberty being asserted. The more specifically you define a right—for example, a "constitutional right of homosexuals to engage in acts of sodomy"—the more difficult a burden it is to meet and the more easily the claim can be ridiculed, especially if a particular liberty was unknown at the founding. While "liberty" as a general matter is obviously deeply rooted in our history and traditions, the specific liberty to use contraceptives or drive a taxi obviously is not. Even liberties that existed at the founding, like the liberty to self-medicate, have not to date been deemed "fundamental" by the Court.

Whenever a particular liberty is specified, it is always subject to the easy rejoinder, "Just where in the Constitution does it say that?" And that rejoinder is offered notwithstanding 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." By protecting only (some) enumerated rights, an unadulterated Footnote 4 approach violates the Ninth Amendment's protection of "others retained by the people." And while adding protection of some unenumerated "fundamental rights" to Footnote 4 is a step in the right direction, it too denies and disparages others retained by the people. We can do better. We can enforce the Constitution itself.

"The opinion in *Lawrence* was based, not on the right of privacy, but on a right to liberty. It abandoned the post–New Deal fundamental rights/liberty interests dichotomy."

The Presumption of Liberty

I propose replacing the existing "presumption of constitutionality" and its ad hoc exceptions for certain favored rights with an across-the-board presumption in favor of the liberties or rights retained by the people. According to this approach, it is entirely proper for government to *prohibit wrongful and regulate rightful* acts. By "wrongful," I mean acts that violate the rights of others. Even if an act is rightful, it may properly be regulated or "made regular" provided that such regulations are shown to be necessary to prevent the future violation of the rights of others.

While courts would need to distinguish rightful from wrongful conduct, that has been their business for centuries as judges developed the common law of property, torts, and contracts, which is nothing less than elaborate bodies of doctrine used to identify when the rights of one person have been infringed by another. Distinguishing rightful from wrongful conduct is a far more appropriate role for judges than distinguishing "fundamental" from nonfundamental exercises of liberty.

More challenging, perhaps, would be the need for judges to assess the necessity of otherwise proper regulations of liberty, but that too is what the judiciary must do when protecting First Amendment liberties. After all, the First Amendment neither forbids reasonable time, place, manner regulations on the rightful exercise of free speech nor protects wrongful speech that constitutes fraud or slander. My proposal simply extends the same protection now afforded to the liberties of speech, press, and assembly to all other rightful exercises of liberty.

A mild form of this approach was recently employed by Justice Kennedy in the case of *Lawrence v. Texas*. The opinion in *Lawrence* striking down a state ban on "sodomy" between members of the same sex is potentially revolutionary for two reasons. First, because it was based, not on the right of privacy, but on a right to liberty. "We conclude," wrote Justice Kennedy, that "the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." For the Court the threshold issue was whether the prohibited conduct was an exercise of liberty, or whether instead it was harmful to others—what the Founders would have called "license."

Second, *Lawrence* is significant because it abandoned the post–New Deal fundamental rights/liberty interests dichotomy. The Court never characterized the liberty in question as "fundamental." Nevertheless, having found the conduct to be an exercise of liberty, the Court shifted to the state the burden of justifying its prohibition. The Court then rejected as a sufficient justification for prohibition the asserted "immorality" of the conduct. After all, if the mere opinion of a majority of a state legislature that such conduct is immoral is sufficient to justify prohibiting the exercise of a liberty, the legislature's power would know no limit because no court could gainsay the opinion of the majority that an act is immoral.

Although an important step in the right direction, the reasoning of *Lawrence* will require further development to completely fill the gaps still remaining in the Constitution. Conduct that does no harm whatsoever is one thing. But the law of contracts, property, and torts exists to distinguish those harms we may rightfully inflict on others—such as driving one's competitor out of business by attracting its customers—from those that are wrongfully inflicted—such as blowing up one's competitor's store. A statutory prohibition having no cognizable justification is one thing. But how will the Court treat future cases in which regulations are asserted to be "reasonable" means of benefiting the public? Some means-ends scrutiny will be required.

Those are matters that cannot be evaded, however, if we are to restore the lost Constitution. To justify a presumption of constitutionality, the Supreme Court had to eliminate passages that inconveniently stood in the way. A presumption of liberty would hold Congress to its enumerated powers, and states to their proper police power, while protecting the rights retained by the people and the privileges and immunities of citizens. For, despite the best efforts of the Supreme Court over the past two centuries, all those portions of the text are still to be found in the actual Constitution of the United States. You don't have to take my word for this. You can look it up. ■

Cato Calendar

16th Annual Benefactor Summit
Del Mar, CA • L'Auberge Del Mar Resort and Spa
February 25–29, 2004

Liberty, Technology, and Prosperity
Palo Alto • Crowne Plaza Cabana
March 25, 2004

A Liberal Agenda for the New Century: A Global Perspective
Moscow • Marriott Grand
April 8–9, 2004
St. Petersburg • Grand Hotel Europe
April 12, 2004

Milton Friedman Prize Presentation Dinner
San Francisco • Ritz-Carlton
May 6, 2004

Cato City Seminar
New York • Waldorf-Astoria
June 10, 2004

Cato University
San Diego • Rancho Bernardo Inn
July 24–30, 2004

Arguing for Liberty: How to Defend Individual Rights and Limited Government
Cato University
Quebec City • Chateau Frontenac
October 28–31, 2004
Speakers include Tom G. Palmer, Don Boudreaux, Karol Boudreaux, Monte Solberg, Gene Healy, and David Boaz.

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