

FOREWORD

Restoring Constitutional Government

Roger Pilon

The Cato Institute's Center for Constitutional Studies is pleased to publish this inaugural volume of the *Cato Supreme Court Review*—an annual critique of the Court's most important decisions from the term just ended, plus a brief look at the cases ahead. What distinguishes Cato's from other such reviews is its perspective: We will examine those decisions and cases in the light cast by the nation's first principles—liberty and limited government—as articulated in the Declaration of Independence and secured by the Constitution, as amended. We take those principles seriously. Our concern is that the Court do the same.

That is no small concern. James Madison, the principal author of the Constitution, drew upon those principles when he promised, in *Federalist* No. 45, that the powers of the new government would be “few and defined.” We've come a long way from that, and the Court has played a major role in the transformation. In this inaugural volume, inspired as it is by our founding principles, it would be useful to set the tone for the essays that follow by recounting here a summary of that transformation and offering a glimpse of what needs to be done to restore limited constitutional government and the freedom it ensures.

First Principles

We are fortunate in America to live under a Constitution dedicated to individual liberty and limited government. For over two centuries the document has served us well, especially in contrast to the experiences of other nations. It has helped us to stay together as a people and to flourish under a fairly stable rule of law. Nevertheless, Jefferson surely was right when he observed that “the natural progress of things is for liberty to yield and government to gain ground.”

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The Constitution was meant to be a check on that progress. It has done so only to a degree. No one today believes that government in Washington, or in the state capitals for that matter, is seriously limited.

Under our system, it falls ultimately to the Supreme Court to say what the law is. Congress and the states may legislate, and federal and state officials may regulate under that legislation and enforce that law. But if the law is challenged, it is up to the judicial branch to determine whether it is legitimate under our basic law, the Constitution. That is why the Court's work is so important. The Court's decisions either secure or undermine our basic law—and the rule of law itself. And the rule of law is all that stands between us and tyranny.

The Founders understood those fundamentals. When they drafted the Declaration they justified our independence by setting forth their philosophy of government. They began with an appeal to natural law and natural rights, to the idea that there is a higher law of right and wrong from which to derive the positive law and against which to judge that law. That was an appeal to reason, yet to nothing more complicated than the idea that we are all equal as defined by our rights to life, liberty, and the pursuit of happiness.

What that means in practice is that we are all free to pursue happiness as we wish, by our own lights, provided we respect the equal rights of others to do the same. There, in a nutshell, is the basic moral order. It was captured in large measure by the classic common law, grounded in property and contract—"property" referring broadly, as John Locke put it, to "Lives, Liberties, and Estates." Edward Corwin, the eminent legal historian, stated the matter well in his seminal volume, *The "Higher Law" Background of American Constitutional Law*: "The notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law."

It was with that moral vision in mind that the Founders went on in the Declaration to say that we create government to secure those rights. But not any government will do. To be legitimate, government's powers must be grounded in the consent of the governed. Thus, legitimate government is twice limited—by its ends, which any of us would have a right to pursue were there no government, and by its means, which must be consented to.

The Constitution

Those principles were given practical force 11 years later when the Framers drafted a new Constitution. Madison's task in that undertaking was to craft a plan that afforded enough power to secure our rights and to provide for a few other ends, yet not so much as to undermine those rights, defeating the very purpose of government. Toward that end he began with a realistic conception of human nature, then struck upon the idea of pitting power against power, institutionalizing the idea through the devices we all know—the division and separation of powers, a bicameral legislature with differently constituted chambers, a unitary executive with veto power, provision for judicial review by an independent judiciary, periodic elections, and the like.

But the centerpiece of his design was the doctrine of enumerated powers. That doctrine holds that power rests originally and rightly with the people, who exercise it by right. When they constitute themselves as a political entity, however, they give some of their powers to the government they create, to be exercised on their behalf, enumerating those powers in the constitution that emerges. The doctrine thus serves three fundamental functions: it justifies power by showing how it arises from those who originally and rightly have it; it shows what powers the government has; and, by implication, it limits power, for if a power is not enumerated in the founding document, the government does not have it. At bottom, then, the Founders' theory of political legitimacy is grounded in their theory of individual rights.

The Preamble of the Constitution reveals the foundation of the doctrine: "We the People," for the purposes listed, "do ordain and establish this Constitution." All power, in short, comes from the people. Then in the very first sentence of Article I the doctrine is made explicit: "All legislative Powers *herein granted* shall be vested in a Congress. . . ." By implication, not all such powers were "herein granted." We find most of Congress's powers enumerated in Article I, section 8, of course. Finally, the Tenth Amendment, the last documentary evidence from the founding period, sets out the most explicit statement of the doctrine: "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, the Constitution establishes a government of delegated, enumerated, and thus limited powers.

The Bill of Rights

Indeed, so central was the doctrine of enumerated powers to the Framers' design that it was thought to render a bill of rights unnecessary. When such a bill was proposed at the convention, Hamilton, Wilson, and others responded, "Why declare that things shall not be done which there is no power to do?" Thus, it was the enumeration of powers, not the enumeration of rights, that was meant to be our *principal* protection against overweening government. The Bill of Rights was an afterthought, made necessary to ensure ratification by the states.

In drafting the Bill of Rights, however, a second objection had to be met—that such a bill would be dangerous. Given that we cannot enumerate all of our rights, there being too many, the failure to do so would be construed, by ordinary principles of legal reasoning, as implying that those not enumerated were not meant to be protected. To address that concern the Ninth Amendment was written: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The rights the Framers enumerated were those that in their experience would most likely be at risk. The others would be protected, they assumed, in the normal course of litigation. And in the early days of the Republic, as recent research has shown, judges were not at all reluctant to afford protection to unenumerated rights.

Taken together, then, the Ninth and Tenth Amendments recapitulate the vision first set forth in the Declaration. The Ninth Amendment makes it clear that we have rights, *enumerated and unenumerated alike*, and that the failure to find a right "in" the Constitution is not to be taken as our not having it. For judges, of course, that puts a premium on understanding the theory of rights that stands behind the Constitution, and that has been one of the great problems for the Court, about which more below. The Tenth Amendment, by contrast, makes it clear that the federal government has *only* those powers that are enumerated in the Constitution or are entailed, as means, under the document's Necessary and Proper Clause. That issue is now back before the Court, of course, having been ignored for some 60 years.

The legal regime that emerged from the founding period, then, was essentially libertarian. The federal government's powers were "few and defined," directed primarily to national concerns like foreign affairs, defense, and interstate commerce. Individuals were left

free to plan and live their own lives, their rights to do so recognized by the Constitution but protected primarily by state governments, where the general police power was left.

Completing the Picture

That picture was still incomplete, however, for the Bill of Rights, which amended the federal Constitution, protected individuals only against federal violations, not against violations by the states. And the great problem at the center of it all was slavery, which the Constitution recognized obliquely—many Framers hoping the institution would die of its own over time. It did not. It took a civil war to end slavery. And it took the Civil War Amendments to apply the Bill of Rights and the promise of the Declaration against the states. In particular, under the Fourteenth Amendment, individuals finally had federal remedies against state violations of their rights, marking a fundamental change in our federalism.

That advance would soon be compromised, however, for in 1873, in the notorious *Slaughterhouse Cases*, a bitterly divided Court eviscerated the Fourteenth Amendment's Privileges or Immunities Clause, which was meant to be the principal font of substantive rights under the amendment. Thereafter the Court would try to do under the Due Process and, later, the Equal Protection Clauses what should have been done under the better understood Privileges or Immunities Clause. The efforts were largely successful, but uneven, primarily because the Court never clearly articulated the theory of rights that informed the clause, a problem that continues to this day.

Nevertheless, individual liberty and limited government continued for the most part. The reasons were several. For one, the ethos in Congress and state legislatures was such that bills expanding government were usually blocked there. When such bills did get through, however, the executive would often veto them. Thus, in 1887, 100 years after the Constitution was written, President Cleveland vetoed a bill appropriating \$10,000 to buy seeds for Texas farmers suffering from a drought, saying, "I can find no warrant for such an appropriation in the Constitution." And of course the courts also did their part, to a large extent, securing the rule of law established by the Constitution.

The Rise of Political Activism

As the 20th century was dawning, however, the climate of ideas in America was changing—and ideas eventually have consequences.

The influences were many: British utilitarianism, with its attacks on American conceptions of natural rights; German schools of “good government” and the social engineering that followed; domestic ideas about democracy—all culminating in the Progressive Era. Elite opinion, especially, was coming to see government not as a necessary evil, as the Founders had conceived of it, but as an engine of good, an instrument for solving all manner of “social problems,” the kinds of problems that had accompanied industrialization and urbanization after the Civil War. Far from fearing government, this vanguard was attracted to it. Better living through bigger government captured the spirit of the age—for every problem, a government solution.

The Constitution did not authorize that much government, of course. And the Court, for the most part, was upholding the law. Thus, in 1905, in the famous case of *Lochner v. New York*, the Court found that a state statute limiting the hours bakers might work violated their freedom of contract. But the decisions in that era were uneven. Thus, in 1926, in the case of *Village of Euclid v. Ambler Realty Co.*, the Court upheld a comprehensive municipal zoning scheme against the claims of private owners that their rights to use their property consistent with the rights of others were violated by the scheme.

With the election of Franklin Roosevelt, however, political activists shifted their focus from the state to the federal level. Still, the Court stood its ground, rejecting one New Deal program after another as unconstitutional. Things came to a head just after Roosevelt was reelected. Facing what he took to be an intransigent Court, Roosevelt unveiled his infamous Court-packing scheme, threatening to pack the bench with six additional members. Not even Congress would go along with the scheme. Nevertheless, a cowed Court got the message. There followed the famous “switch in time that saved nine,” and the Court began rewriting the Constitution.

Democratizing the Constitution

In essence, the Court democratized the Constitution, doing it in two main steps. In a pair of decisions in 1937 it eviscerated the centerpiece of the document, the doctrine of enumerated powers. Then in 1938 it bifurcated the Bill of Rights, giving us a bifurcated theory of judicial review in the process.

The evisceration of enumerated powers involved the Constitution's General Welfare and Commerce Clauses. Both were meant to be shields against power. The Court turned them into swords of power. The General Welfare Clause was meant to be a restraint on the spending power. Congress could spend for enumerated ends, but that spending had to serve the *general* welfare as distinct from any particular or sectional welfare. In particular, Madison, Jefferson, and others insisted, against Hamilton, that Congress had no *independent* power to spend for the general welfare, for that would have rendered pointless the restraint afforded by enumeration. As South Carolina's William Drayton observed in 1828, "If Congress can determine what constitutes the General Welfare and can appropriate money for its advancement, where is the limitation to carrying into execution whatever can be effected by money?" Yet in 1936, in *United States v. Butler*, the Court sided with Hamilton, even if its opinion on the question was not central to the case. The next year, however, in *Helvering v. Davis*, the Court elevated that dicta to "law." Congress was now free to spend on any end it thought served the "general welfare." The modern redistributive state was thus unleashed.

The Commerce Clause was also meant primarily to be a restraint—but on state power. Under the Articles of Confederation, states were erecting tariffs and other protectionist measures that had begun to interfere with the free flow of commerce among them. In fact, one of the principal reasons the Framers met to draft a new constitution was to address that problem. They did so through the Commerce Clause, which gave Congress the power to regulate—or make regular—commerce among the states. In fact, that is how the clause was read in 1824 in the first great Commerce Clause case, *Gibbons v. Ogden*. It was not read as giving Congress a power to regulate, for any reason, anything that "affected" interstate commerce, which in principle is everything. Yet that is how the 1937 Court read the clause in *NLRB v. Jones & Laughlin Steel Corp.*—and with that the modern regulatory state was unleashed.

After those two decisions, Congress's redistributive and regulatory powers were plenary, in effect, as courts no longer asked that most basic of constitutional questions: Does Congress have the authority to do what it is doing? Yet individuals might still raise *rights* against the exercise of those powers. In 1938, therefore, the Court attended to that impediment to active government. In the

famous footnote four of *United States v. Carolene Products Co.*, the notorious filled-milk case, the Court distinguished two kinds of rights and two levels of judicial review. If a measure implicated “fundamental rights” like speech or voting—rights associated with the democratic political process—the Court would exercise “strict scrutiny” and the measure would likely be found unconstitutional. By contrast, if a measure implicated “nonfundamental rights” like property or contract—rights associated with “ordinary commercial transactions”—the Court would exercise “minimal scrutiny” and the measure would likely be found constitutional. Those distinctions are nowhere to be found in the Constitution, of course. They were created from whole cloth to make the world safe for the expansive programs of the New Deal. Limited government would soon be a thing of the past as one program after another poured through the openings the Court had created.

The constitutional revolution the New Deal Court wrought was a textbook example of politics trumping law—not on a small scale, as when a judge ignores the law in a narrow case to reach a popular result, but on a massive, structural scale. The very theory and purpose of the Constitution were upended. The American people had delegated limited powers to the national government. The Court rendered those powers effectively unlimited. The people restrained the exercise of that power and, later, the power of the states through a Bill of Rights, intended to protect both enumerated and unenumerated rights. The Court rendered that design unintelligible. In a word, heeding the politics of the day, the Court turned a document authorizing limited government into one authorizing effectively unlimited government, making a mockery of the rule of law.

An Aftermath of Confusions

We have lived under that regime for over 60 years now and the confusions are everywhere. Take just one aspect, the bifurcated judicial scrutiny theory that emerged from *Carolene Products*. It turns out that gender discrimination required a richer theory, so the Court invented mid-level scrutiny. But when the “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992 were before the Court in 1994, a fourth level of scrutiny had to be invented. Now we have “minimal” scrutiny for ordinary commercial transactions, “relaxed” scrutiny for broadcast television,

“heightened” scrutiny for cable television, and “strict” scrutiny for newspapers. Does anyone know what any of that means? One is reminded of nothing so much as medieval geocentric Ptolemaics drawing epicycle upon epicycle to explain the motions of the planets and ward off the onslaught of the heliocentric Copernicans.

But scrutiny theory is only one of the confusions of the body of thought today called “constitutional law.” A brief overview of the past 60 years brings out others, related mostly to the role judges now play in our system of government. Start with the surfeit of federal and state legislation the New Deal revolution unleashed, most of it aimed at solving all manner of “social problems”—there being, in principle, no end to such problems. Reflecting the hubris that has always attended central planning, those schemes—regulating commerce, agriculture, labor, retirement, land use, education, medicine, campaign finance, and on and on—have grown ever more complex, often because they generate unintended consequences that require still more regulation, the planners claim. The result is the modern administrative state—massive and effectively unaccountable—and a body of “law” that in fact is policy, reflecting the will of the political forces that have triumphed on a given issue on a given day. It is politics as law in its purest form, with almost no subject beyond its reach.

Much of that legislation and regulation has ended up in the courts, of course, with judges asked to make sense of often inconsistent and incoherent policy—fairly inviting them to be parties to the legislation and hence policymakers themselves. Thus, by parsing often obscure statutory or regulatory language, judges end up setting national policy, something they have traditionally been loath to do. But judges have come to set policy more directly as well. For when government activists fail to achieve their goals in the political branches, they often go to the courts, hoping to find there a sympathetic judge. Regrettably, the Warren and Burger Courts, already deferring to the legislative pursuit of “social justice,” were often only too willing to step into the fray, thinking themselves a legislature of nine. A fair amount of what those Courts did was long overdue, of course—nowhere more so than in ending the scourge of Jim Crow. But enough else amounted to nothing less than judicial lawmaking.

Judicial “Activism” and “Restraint”

What such “judicial activism” led to, however, was an equally mistaken reaction that paraded under the label “judicial restraint.”

As a result, in recent years we have had two main theories about the proper role of the Court, liberal and conservative, neither of which reflects the original understanding. Modern liberals, having championed the political activism that led to the New Deal, have continued of course to urge the Court to ignore the doctrine of enumerated powers. And they have continued to call on the Court to be “restrained” in finding rights that might limit their redistributive and regulatory schemes, especially “nonfundamental rights” like property and contract. But at the same time they have asked the Court to be “active” in finding other rights, including spurious “rights” never meant to be included among our unenumerated rights.

Reacting to the Court’s discovery of such “rights,” many modern conservatives have urged judicial restraint across the board. Thus, if liberal programs run roughshod over property or contract rights, rather than ask the Court to protect them—that would encourage judicial activism—much less resurrect the doctrine of enumerated powers—that battle was lost during the New Deal—those conservatives call simply for turning to the democratic process to overturn the programs. Oblivious to the fact that judicial restraint in finding rights is tantamount to activism in finding powers, and ignoring the fact that it was the democratic process that gave us those programs in the first place, too many conservatives have simply bought into the New Deal’s democratization of the Constitution. Theirs is a counsel of despair amounting to a denial of constitutional protection.

No one doubts that in recent decades the Court has discovered “rights” in the Constitution that were never meant to be there, even among our unenumerated rights. But it is no answer to that problem to ask the Court to defer wholesale to the political branches, thereby encouraging it, by implication, to sanction unenumerated *powers* that are no part of the document either. Indeed, if the Tenth Amendment means anything it means that there are no such powers. If the Framers had wanted to establish a simple democracy, they could have. Instead, they established a limited, constitutional republic, a republic with islands of democratic power in a sea of liberty, not a sea of democratic power surrounding islands of liberty.

In a word, then, just as it is improper for the Court to find rights nowhere to be found in the Constitution, thereby frustrating authorized democratic decisions, so too is it improper for the Court to

refrain from asking whether those decisions are authorized and, if so, whether their implementation violates rights guaranteed by the Constitution, enumerated and unenumerated alike. In the end, therefore, the issue is substantive: the Court must apply the law “actively,” but accurately too, and that is a substantive matter. Today, after more than 60 years of constitutional hermeneutics and the cases that have followed, the Court too often loses sight of the Constitution itself, finding comfort instead in the accumulated cases that are called “constitutional law.” In addressing that problem, the words “activism” and “restraint” are more misleading than helpful. What is needed, rather, is a return to the first principles of the matter, to the substance of the Constitution.

Toward Restoration

Enumerated Powers

Fortunately, the Rehnquist Court has begun that process, but only begun it. Over the past decade the Court has asked in several cases whether Congress had the authority to do what it did. Constitutional questions do not get more basic than that. Indeed, Chief Justice Rehnquist himself set the tone in 1995 in *United States v. Lopez*: “We start with first principles. The Constitution creates a Federal Government of enumerated powers.” That ringing a statement hadn’t been heard from the Court since the New Deal. It was a breath of fresh air for those who long to see limited constitutional government and the rule of law restored.

But it was only a breath. Constrained by erroneous precedents, Rehnquist went on to articulate a tripartite theory of the commerce power that enabled Congress to regulate even activities that “substantially affect” interstate commerce. That puts the Court in a business it should not be in—calibrating degrees of affect; it still leaves Congress’s regulatory power virtually plenary; and it is not what the Commerce Clause is about. It fell to Justice Thomas in concurrence to note that the Court was still a long way from the original understanding of the commerce power. Indeed, “The Framers could have drafted a Constitution that contained a ‘substantially affects interstate commerce’ clause had that been their objective,” he wrote. They did not.

The importance of the Court’s having begun this restoration with federalism and, more precisely, with the doctrine of enumerated

powers cannot be overstated. Indeed, the cases have so rattled those who simply assumed that post-New Deal doctrine would be with us forever that they have taken to calling the Rehnquist Court's jurisprudence in this area "activism"—seeming to forget that it was the New Deal Court's activism that gave us that errant doctrine. In its selection of cases, however, as well as its treatment of them, the Court is still at the beginning. One can understand its cautious approach: Leviathan was not created overnight; it will not be dismantled overnight—not by the Court alone, certainly. At the same time, it is crucial that the Court articulate clearly not simply the practical limits it labors under but the fundamental principles before it. And of course its enumerated powers docket should reach well beyond Commerce Clause cases.

Enumerated Rights

Moving from powers to rights, here the Court comes upon what is at once a more promising prospect, as a practical matter, yet a greater intellectual challenge. As noted earlier, the Court has never developed systematically the theory of rights that stands behind the Constitution. What is worse, once democratic theory took hold uncritically, seeming to justify by mere numbers whatever a legislative majority decided, the moral force of an appeal to individual rights diminished. Yet it is precisely the role of the Court to check majorities when their actions are unauthorized by the Constitution or violate rights protected by the Constitution. In that fundamental sense, rights are countermajoritarian notions, which judges are appointed to protect against majoritarian tyranny. And in an individualistic culture such as ours has been from the start—the Declaration, after all, starts with the rights of the individual—it has not been difficult, ultimately, for rights to trump majoritarianism in many areas of life. Not always, to be sure, and not in all areas. But by and large our individualist heritage has remained alive and well. Thus, as a practical matter, restoring constitutional rights may be somewhat easier for the Court to do than restoring the original bounds of the doctrine of enumerated powers.

The difficulties are more likely to be intellectual. For we understand rights and the role of the Court in securing them, for the most part, when rights are easily discerned. When discernment is more difficult, however, problems begin—and judges lose their nerve.

That happens even with enumerated rights. Take property: The Court has had little difficulty upholding the rights of owners to compensation when government takes their property outright. But when *uses* are taken by government regulation, and the owner retains the title, the Court has had difficulty. We all know, from every other area of law, that “property” is a bundle of rights that can be packaged and exchanged in various ways. Yet when the public takes such a package we forget that a private party that did the same thing, assuming the owner agreed to the exchange, would have to compensate the owner. Here too the Court in recent years has revived those basic principles, to some extent, with Chief Justice Rehnquist himself setting the tone in 1994 in the case of *Dolan v. City of Tigard*: “We see no reason why the Takings Clause . . . should be relegated to the status of a poor relation. . . .” But the Court has yet to correctly articulate the theory of the matter, much less apply it consistently, as witness its recent decision in the *Lake Tahoe* case, discussed in this volume.

Unenumerated Rights

Given the difficulty the Court has had, then, even with enumerated rights, it is no surprise that unenumerated rights have fared far worse. Yet in principle, unenumerated rights are no more difficult to secure than enumerated rights. In fact, there is no bright line between enumerated and unenumerated rights. Even enumerated rights, that is, are not self-enforcing: they need to be interpreted and applied in the factual circumstances of the case at hand, as just illustrated with property rights. At that basic, analytical level, then, the distinction between enumerated and unenumerated rights is deceptive and, ultimately, unhelpful—especially if it leads a judge toward legal positivism, one right at a time, and away from the systematic natural rights theory that informs the Constitution.

Moreover, the distinction is especially pernicious if it leads judges to believe that they can recognize and enforce enumerated rights, but it is up to legislative majorities to declare what our unenumerated rights are. There are at least two major errors in that view. First, as noted above, rights are countermajoritarian notions we assert defensively, in opposition to threats from legislative majorities. Imagine if Congress, to clarify religious freedom, specified which were and were not legitimate religions. Second, unenumerated rights

are no less a part of the Constitution than enumerated rights. Given that, it would be anomalous at least to say that an individual had an unenumerated constitutional right but that Congress or a state legislature could override it by mere legislation. We would never say that about enumerated rights. Why do we think it is any different with unenumerated rights? After all, we went for two years without a bill of (enumerated) rights. *All* rights at that time were unenumerated, except those few that were included in the body of the original Constitution. Yet no one imagined that judges were powerless to ensure that enumerated powers be exercised consistent with our natural rights. Certainly no one thought that the absence of enumerated rights meant that we had no rights at all against federal power. Yet that is how most jurists today approach the issue of unenumerated rights.

It is at this point that the idea of a systematic theory of rights comes to the fore. In its entirety, this is a complex subject, to be sure, yet at its core it is relatively simple and straightforward—even commonsensical. In fact, the old common law judges did a fairly good job of tracing it out—before the rise of the modern statutory state and its “law” of public policy. Among other things, the theory of rights is not about securing values, at bottom, for rights and values are very different moral notions. Thus, talk of “interests rising to the level of rights” is ordinarily in error. Nor does one pick values randomly—speech, religious expression, privacy, property—and call them rights—the implication being that if enough people ceased to value them they would cease to be rights.

Rather, rights theory looks to entitlements—in the most basic sense of that idea: one determines one’s rights by determining what it is one holds title to, free and clear. And one starts at the most fundamental level—logically fundamental, not evaluatively fundamental as the *Carolene Products* Court thought, thereby conflating rights and values. That brings us back to Locke’s “Lives, Liberties, and Estates.” Once those are secured in the basic justificatory structure, one then derives more specifically described rights like speech, religious expression, and the like. Thus, as an initial matter, each of us has a right to speak freely because no one else has a right that we not do so, and no one else holds that title. Our title to speak, practice our religion, and so forth is something *we* hold, not something held by someone else, unless of course we’ve done something

to alienate it and vest it in another—moved under another’s sovereignty, made a promise, committed a tort or a crime, and so on. Explicating the theory of rights is thus a deductive exercise, rooted in reason, concerning property—again, broadly understood. (It is no accident that the classic common law was so intimately connected to property.) The theory can tell us, for example, that our neighbor’s addition to his house, which blocks our view, did not violate our rights, for absent an easement indicating otherwise we never had title to that view. In that way it can distinguish legitimate from spurious claims about rights.

What objective reason cannot do, however, is complete the picture. It cannot draw nuisance or endangerment lines, for example, or define “reasonableness” or “probable cause” or tell us what punishments are appropriate. For those kinds of issues we have to introduce subjective values into an otherwise objective, deductive structure, at which point reasonable people can have reasonable differences. In comprehending and developing the theory of rights, then, it is crucial to understand its boundaries and limits. Yet that, again, was never a great mystery for those who understood the difference between law grounded in reason, as natural rights theory was and is, and law grounded in will, as modern democratic theory is.

Those are some of the issues that need to be understood and ordered in working out the theory of rights that informs the Constitution. At bottom, the idea is to ground as much of our law as is possible in reason rather than in values or will or passion. Indeed, it was to avoid the “law” of will that the Framers did *not* give us a democracy—or anything close to it. They roped power in at every turn, hoping that people would thereby be left free, in the private sector, to plan and live their own lives by their own values, not consigned to the tender mercies of the state in everything from day care to education, industry, employment, medical care, and retirement—to say nothing of political speech.

Conclusion

The essays in this and in future volumes of the *Cato Supreme Court Review* will carefully examine the Court’s work—criticizing it where necessary, praising it where deserved—all with an eye toward advancing the principles of a free society as captured by our founding documents. We ourselves may not always get it right. We may

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not always agree among ourselves. But we do agree about the basic task before the Court today. It is to decide cases that come before it in a way that upholds the rule of law the Constitution set in motion over two centuries ago. Given the state of constitutional law today, to say nothing of current conceptions of law, that is often difficult to do. And that is why, in carrying out that task, there is no substitute for returning to first principles.