

The Affordable Care Act, the Constitutional Meaning of Statutes, and the Emerging Doctrine of Positive Constitutional Rights

Edward Rubin

Repository Citation

Edward Rubin, *The Affordable Care Act, the Constitutional Meaning of Statutes, and the Emerging Doctrine of Positive Constitutional Rights*, 53 Wm. & Mary L. Rev. 1639 (2012), <https://scholarship.law.wm.edu/wmlr/vol53/iss5/5>

THE AFFORDABLE CARE ACT, THE CONSTITUTIONAL
MEANING OF STATUTES, AND THE EMERGING DOCTRINE
OF POSITIVE CONSTITUTIONAL RIGHTS

EDWARD RUBIN*

TABLE OF CONTENTS

INTRODUCTION	1640
I. HOW STATUTES INTERPRET THE CONSTITUTION	1644
A. <i>The Idea of a Constitution</i>	1644
B. <i>The Purposes of a Constitution</i>	1653
C. <i>The Purposes of the U.S. Constitution</i>	1666
1. <i>Strong National Government</i>	1670
2. <i>Liberty</i>	1675
3. <i>Equality</i>	1682
II. POSITIVE RIGHTS AND THE U.S. CONSTITUTION	1684
A. <i>The Idea of Positive Rights</i>	1684
B. <i>Statutes as Declarations of Positive Rights</i>	1693
III. THE PPACA AND POSITIVE RIGHTS	1701
A. <i>The PPACA as a Declaration of Positive Rights</i>	1701
B. <i>Statutory Interpretations as a Response to Criticisms of Positive Rights</i>	1705
CONCLUSION	1715

* University Professor of Law and Political Science, Vanderbilt University.

INTRODUCTION

Why are so many people unwilling to accept the 2010 enactment of the Patient Protection and Affordable Care Act (PPACA or the Act)?¹ The obvious fact that many people do not like the law is not, by itself, an adequate explanation.² Most proposed laws have opponents, often determined and vociferous ones. Once the law is passed, however, its opponents tend to shift from general opposition to more particularized efforts to live with the law, minimize its impact, or undermine its effectiveness. Continued opposition to the law itself is a much rarer phenomenon.

Compare the response to the PPACA with the response to the other one-thousand page statutory behemoth that the Obama administration enacted in its first two years, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).³ Dodd-Frank was hardly an uncontroversial piece of legislation; indeed, it gored the ox of one of the most powerful interest groups in the United States.⁴ Yet it vanished from the public agenda as soon as it was enacted.⁵ One can be quite certain that there are literally thousands of lawyers working assiduously on ways to preserve the practices that the Dodd-Frank Act attempted to terminate or alter, and that there are thousands of other business, law, and public relations executives lobbying the regulatory agencies for favorable

1. Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified as amended in scattered sections of the U.S. Code).

2. See, e.g., Matt Bai, *Check Back in a Generation to See if the Health Law Withstands Challenges*, N.Y. TIMES, Dec. 16, 2010, at A26 (discussing the ongoing challenges to the PPACA).

3. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of 12 U.S.C.). See generally VIRAL V. ACHARYA ET AL., REGULATING WALL STREET: THE DODD-FRANK ACT AND THE NEW ARCHITECTURE OF GLOBAL FINANCE 1-6 (2011) (discussing the reasons for the passage of the Dodd-Frank Act and the response to its passage).

4. The American Banking Association has expressed continued objections to the Dodd-Frank Act. See, e.g., Liz Moyer, *Dodd-Frank Bill Complete, Bankers React*, FORBES STREET TALK (June 25, 2010, 12:01 PM), <http://www.forbes.com/sites/streettalk/2010/06/25/dodd-frank-bill-complete-bankers-react/>.

5. Cf. Maya Jackson Randall & Jessica Holzer, *Dodd-Frank Foes Adopt New Tactics*, WALL ST. J., Apr. 7, 2011, <http://online.wsj.com/article/SB10001424052748704013604576248982186837122.html> (discussing how, after the passage of Dodd-Frank, opponents abandoned efforts to repeal the law instead opting to attack it "piece by piece").

treatment under the new law. But the financial services industry seems content to rely on these typical responses rather than expend its literal and figurative capital on an effort to repeal Dodd-Frank.

In contrast, the political opposition to the PPACA has been intense, not only when it was being debated,⁶ but also after it was enacted into law.⁷ At least twenty-six states have filed lawsuits to overturn portions of the Act,⁸ and legislators in a similar number of states have proposed or incorporated amendments to their state codes that would preclude its operation.⁹ Many Republican politicians made their opposition to the Act the primary focus of their campaigns in the 2010 elections,¹⁰ and once elected, used their majority in the House of Representatives to pass an admittedly symbolic repeal bill.¹¹ Not content with this gesture, they have continued their animadversion against the Act, declaring that this opposition will be the focus of their 2012 campaigns as well.¹²

6. See STAFF OF THE WASH. POST, LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL 1-2 (2010) [hereinafter LANDMARK].

7. See, e.g., Kevin Sack, *G.O.P. Stands on Health Masks Records as Governors*, N.Y. TIMES, Sept. 4, 2011, at A13 (noting the unanimity of Republican presidential candidates' opposition to the PPACA).

8. See, e.g., *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *aff'd in part and rev'd in part*, 648 F.3d 1235 (11th Cir. 2011); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011).

9. See, e.g., Virginia Health Care Freedom Act, VA. CODE ANN. § 38.2-3430.1:1 (2010). In addition, some states have attempted to amend their state constitutions to preclude the PPACA's application. See, e.g., Press Release, Okla. Office of the Attorney Gen., Oklahoma Attorney General-Elect Will File Lawsuit Against Federal Health Care Reform Bill (Jan. 7, 2011), available at <http://www.oag.state.ok.us/agelect.nsf/press.html>.

10. See Kevin Sack, *Health Care Vote Puts Democrats on Defensive*, N.Y. TIMES, Oct. 27, 2010, at A20; Seth E. Masket & Steven Greene, When One Vote Matters: The Electoral Impact of Role Call Votes in the 2010 Elections, Annual Meeting of the Midwest Political Science Association, March 30-April 2, 2011, Chicago, IL. at 3 (2011), <http://static.usnews.com/documents/whispers/104076.pdf> ("The National Republican Congressional Committee, meanwhile, ran ads in 31 targeted districts criticizing Democratic incumbents for their support of the health care reform bill."); cf. Robert J. Blendon & John M. Blenson, *Health Care in the 2010 Congressional Election*, NEW ENG. J. MED. 363, Nov. 11, 2010 (Republican voters strongly oppose ACA).

11. See Repealing the Job-Killing Health Care Law Act, H.R. 2, 112th Cong. § 2(a) (2011). It was symbolic because the Democrat-controlled Senate clearly was not going to enact similar legislation. See David M. Herszenhorn, *Senate Rejects Repeal of Health Care Law*, N.Y. TIMES, Feb. 3, 2011, at A20.

12. See Gail Russell Chaddock, *Health-Care Repeal Fails in Senate: What's the Next GOP Target?*, CHRISTIAN SCI. MONITOR, Feb. 2, 2011, <http://www.csmonitor.com/USA/Politics/>

Potential Republican nominees for President are attempting to outdo each other in their hostility to the PPACA,¹³ and a major disadvantage afflicting Mitt Romney, who might otherwise be the clear front-runner, is that he is poorly positioned to oppose the PPACA because he spearheaded similar legislation as Governor of Massachusetts.¹⁴ Perhaps most significantly, the PPACA seems to have been one of two factors that have led to the remarkably rapid development of a genuine social movement:¹⁵ the now-notorious Tea Party.¹⁶ The Tea Party's success, in turn, has fueled opposition to

2011/0202/Health-care-repeal-fails-in-Senate-What-s-the-next-GOP-target (“[T]oday’s vote is only one skirmish in a struggle over the historic law likely to run into 2012 elections—and especially targeting Senate Democrats up for reelection.”); Herszenhorn, *supra* note 11 (“Republicans said after the votes that they would persist in their efforts to overturn the law. Rejecting assertions that the repeal vote was a ‘futile act,’ Senator John Cornyn of Texas, the chairman of the Republican Senatorial Campaign Committee, declared, ‘These are the first steps in a long road that will culminate in 2012.’”).

13. Mike Glover, *GOP Presidential Hopefuls Hammer Health Care*, USA TODAY (Mar. 27, 2011, 05:04:20 AM), http://www.usatoday.com/news/topstories/2011-03-26-3430543601_x.htm.

14. Theo Emery, *Patrick Gives Romney Praise He May Not Want; Lauds His Role in Health Overhaul*, BOS. GLOBE, Feb. 28, 2011, at A1 (“Governor Deval Patrick praised Mitt Romney yesterday for crafting the successful 2006 health care law in Massachusetts, presenting fresh fodder for Romney’s critics as he struggles to explain to GOP presidential primary voters why he authored a law that became a model for President Obama’s national health care overhaul.”); Kevin Sack, *Romney on Health Care: A Particular Spin*, N.Y. TIMES, Apr. 10, 2010, at A12 (“[A]s he appeals to conservative activists and Republican primary voters, he is trying to draw nuanced distinctions between his Massachusetts law and the federal legislation that shares many of its fundamental elements, including a requirement that people have insurance.”). Romney titled his obligatory candidate’s book *No Apology*. MITT ROMNEY, NO APOLOGY: THE CASE FOR AMERICAN GREATNESS (2010). In the chapter devoted to health care, he struggles to explain why he was not really responsible for the Massachusetts health care law as it emerged; why, in case he was responsible, it is different from the federal law; and why, regardless of what he did in Massachusetts, he opposes that federal law and would seek its repeal. *Id.* at 174, 176-77, 193.

15. That is, the mobilization of people in civil society by policy entrepreneurs or by a collectively developing awareness. *See generally* MANUEL CASTELLS, THE INFORMATION AGE: ECONOMY, SOCIETY, AND CULTURE: THE POWER OF IDENTITY (2d ed. 2010) (mobilization by collectively developing awareness); HANSPETER KRIESI, POLITICAL MOBILIZATION AND SOCIAL CHANGE: THE DUTCH CASE IN COMPARATIVE PERSPECTIVE (1993) (mobilization by collectively developing awareness); GERALD MARWELL & PAMELA OLIVER, THE CRITICAL MASS IN COLLECTIVE ACTION: A MICRO-SOCIAL THEORY (1993) (mobilization by policy entrepreneurs); ANTHONY OBERSCHALL, SOCIAL CONFLICT AND SOCIAL MOVEMENTS (1973) (mobilization by policy entrepreneurs); CHARLES TILLY, FROM MOBILIZATION TO REVOLUTION (1978) (mobilization by policy entrepreneurs); ALAIN TOURAINE, THE VOICE AND THE EYE: AN ANALYSIS OF SOCIAL MOVEMENTS (Alan Duff trans., Cambridge Univ. Press 1981) (1978) (mobilization by collectively developing awareness).

16. *See* SCOTT RASMUSSEN & DOUG SCHOEN, MAD AS HELL: HOW THE TEA PARTY

the Act.¹⁷ Some of the Republicans who oppose the Act are undoubtedly sincere in their personal distaste for it and would oppose it in any case. But legislators who are insincere provide even more impressive evidence of the Act's unpopularity, because they are, in that case, appealing to an accurately perceived revulsion toward the Act among their constituents.

This Article argues that the intense opposition to the PPACA arises from the realization that the Act represents a genuine revolution in the way we think about American citizenship and the nature of our political community.¹⁸ In fact, it is a constitutional revolution, not only in the general sense that it changes the basic moral structure of our government, but in the specific sense that it redefines constitutional doctrine, creating new rights that the Supreme Court will ultimately be called on to enforce. The opposition to the PPACA is intensified by the further recognition that the statute's continued existence is constitutionally relevant. More specifically, people understand, at some politically visceral level, a feature of constitutional law that has been underemphasized in the scholarly literature; namely, that statutes as well as judicial decisions interpret the Constitution.¹⁹ Not every statute is relevant to our understanding of the Constitution, of course, but many significant ones are and the PPACA is a prime example. The Act's passage suggests that the U.S. Constitution guarantees so-called positive rights, such as rights to sustenance, decent housing, an adequate education, and, of course, basic health care.²⁰ The mere fact of its enactment secures the place of these rights on our political agenda and encourages the Supreme Court to declare them part of the Constitution. The Act's continued existence will intensify these tendencies.

MOVEMENT IS FUNDAMENTALLY REMAKING OUR TWO-PARTY SYSTEM 122-23 (2010); KATE ZERNIKE, *BOILING MAD: INSIDE TEA PARTY AMERICA* 69 (2010).

17. See RASMUSSEN & SCHOEN, *supra* note 16, at 122-24.

18. It is thus another factor contributing to the general level of hostility that some sectors of the American public feel toward the current administration. See JOHN AMATO & DAVID NEIWERT, *OVER THE CLIFF: HOW OBAMA'S ELECTION DROVE THE AMERICAN RIGHT INSANE* 136 (2010).

19. See Edward L. Rubin, *How Statutes Interpret the Constitution*, 120 *YALE L.J. ONLINE* 297, 301-02 (2011), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/legislation/how-statutes-interpret-the-constitution/>.

20. See *id.* at 322-23.

This Article begins by explaining how statutes can be regarded as interpretations of the Constitution.²¹ It proceeds to discuss the concept of positive rights, and the way that constitutional interpretation by statute contributes to the recognition of these rights.²² It then argues that the PPACA is a statute of this sort and that this is at least part of the reason why it has aroused such fervent opposition.²³

I. HOW STATUTES INTERPRET THE CONSTITUTION

A. *The Idea of a Constitution*

The standard way of thinking about the relationship between statutes and the Constitution is that the Constitution establishes a general framework for permissible governmental action and the elected government acts within that framework.²⁴ The government must respect those boundaries or risk having its actions struck down by a court when it exceeds them. To allow quotidian governmental action to affect the framework itself, it is thought, would vitiate the entire purpose of having a written constitution.²⁵ This notion is derived from the contract theory of government, which emerged during the seventeenth century, finding its most incisive and memorable advocates in Hobbes and Locke.²⁶ Their view, and what decisively distinguished their theory from the contractual theories of government that prevailed during the Middle Ages,²⁷ was that people in a state of nature exchanged a natural but unsatisfac-

21. See *infra* Part I.

22. See *infra* Part II.

23. See *infra* Part III.

24. See Stephen M. Griffin, *The Problems of Constitutional Change*, 70 TUL. L. REV. 2121, 2127 (1996).

25. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-78 (1803).

26. THOMAS HOBBS, *LEVIATHAN* 142-44 (E.P. Dutton & Co. 1950) (1651); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 106 (Ian Shapiro ed., Yale Univ. Press 2003) (1690); see NORBERTO BOBBIO, *THOMAS HOBBS AND THE NATURAL LAW TRADITION* 1-73 (Daniela Gobetti trans., Univ. of Chi. Press 1993) (1989); C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 263-64 (1962).

27. On medieval constitutionalism, see Jean Dunbabin, *Government*, in *THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT* c. 350-c. 1450, at 477, 515-19 (J.H. Burns ed., 1988).

tory freedom for the advantages of civil order, specifically safety and prosperity.²⁸ It follows from this mode of thought that the Constitution was conceived as embodying or codifying such a social contract.²⁹ To allow governmental action to affect the social contract, according to this view, would be to violate the contract's original terms and destroy its ongoing effect. The people would have sacrificed their natural freedom for an illusory promise and would thus be victims of a sort of high-level bait-and-switch scam.

To see why this account of the U.S. Constitution, conventional though it may be, does not adequately capture the Constitution's meaning, it is necessary to consider a constitution in greater detail. According to the premodern view, and to premodern contractarian thought, the state was regarded as an autonomous entity.³⁰ It was supposed to govern in the interests of the populace, but it was generally regarded as having a divine origin and exercising God-given authority.³¹ The analogy, which was entirely explicit at the time, was between the state and the family; the king, like the father, ruled in accordance with a divinely established order.³² This did not mean that the king himself was chosen by God. Rather, the prevailing view was that he ruled by consent of the people or, more specifically, by consent of the nobility or warrior elite.³³ Nor did it mean that the king could do no wrong; like the father, he was supposed to act in accordance with natural law, that is, the law established by God and promulgated through human reason.³⁴

28. REINHARD BENDIX, *KINGS OR PEOPLE: POWER AND THE MANDATE TO RULE* 21-35 (1978).

29. See, e.g., JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in 2 *THE WRITINGS OF JAMES MADISON: 1783-1787*, at 183, 183-91 (Gaillard Hunt ed., 1901).

30. See BENDIX, *supra* note 28, at 191-200; OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 32-34 (Frederic William Maitland trans., Cambridge Univ. Press 1927) (1900).

31. BENDIX, *supra* note 28, at 32-33; ANTONY BLACK, *POLITICAL THOUGHT IN EUROPE, 1250-1450*, at 137-38 (1992); JOSEPH CANNING, *A HISTORY OF MEDIEVAL POLITICAL THOUGHT 300-1450*, at 45-47 (1996); GIERKE, *supra* note 30, at 32-34.

32. HEINRICH FICHTENAU, *LIVING IN THE TENTH CENTURY: MENTALITIES AND SOCIAL ORDERS* 97-98 (Patrick J. Geary trans., Univ. of Chi. Press 1991) (1984) (describing the family structure underlying this analogy); Janet Nelson, *Kingship and Empire*, in *THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT c. 350-c. 1450*, *supra* note 27, at 211, 219-22.

33. See BLACK, *supra* note 31, at 104-05; 2 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE AGE OF REFORMATION 162-64* (1978); Dunbabin, *supra* note 27, at 515.

34. See 2 THOMAS AQUINAS, *SUMMA THEOLOGICA* 223-24 (Fathers of the English Dominican Province trans., Encyc. Britannica, Inc. rev. vol. 1952) (1485).

Rather, the divine origin of kingship meant that God established the office itself and the authority that the office possessed. Although the king might have obtained his position by popular consent or historical circumstance, the legitimacy of that position derived from God's design.³⁵ Thus the king's regime—the government—had an autonomous basis; it was not a human mechanism or device.³⁶

Pragmatic developments and theoretical considerations supported the idea that government is an autonomous entity. By the end of the Early Middle Ages, kings were functioning as private persons whose position resulted from their location at the top of the feudal hierarchy.³⁷ Accordingly, members of the high nobility were vassals of the king, bound to him by a personal pledge of loyalty, just as these nobles themselves had vassals bound to them by the same means.³⁸ Even Charlemagne, although he attempted to recapture the Roman *imperium*, demanded that all the nobles of his extensive realm take an oath of loyalty to him as their feudal lord.³⁹ The essence of a feudal lord's status was autonomy, which distinguished him from the great mass of unfree serfs; his constraints were his obligations to his overlord.⁴⁰ The king, who had no overlord, was thus entirely autonomous.

The nation-state developed from the feudal monarchy.⁴¹ As it did, it assumed features that were increasingly related to its public functions. The king's household was gradually transformed into the

35. See BLACK, *supra* note 31, at 137-39.

36. This view was not universal; a notable exception is found in the writings of Marsilius of Padua. See MARSILIUS OF PADUA, *THE DEFENDER OF THE PEACE* 44 (Annabel Brett ed. & trans., Cambridge Univ. Press 2005) (1324). Marsilius, however, was "condemned as a heretic" on the basis of his views. Paul E. Sigmund, Jr., Note, *The Influence of Marsilius of Padua on 15th-Century Conciliarism*, 23 J. HIST. IDEAS 392, 392 (1962).

37. 2 MARC BLOCH, *FEUDAL SOCIETY: SOCIAL CLASSES AND POLITICAL ORGANIZATION* 383 (L. A. Manyon trans., Univ. of Chi. Press 1961) (1939); FICHTENAU, *supra* note 32, at 157-59; CHRIS WICKHAM, *THE INHERITANCE OF ROME: A HISTORY OF EUROPE FROM 400 TO 1000*, at 450-51 (2009).

38. See, e.g., F. L. GANSHOF, *FEUDALISM* 74-75 (Philip Grierson trans., Langmans, Green & Co. 1952) (1944).

39. *Id.* at 30-32.

40. *Id.* at 74-75.

41. See generally THOMAS ERTMAN, *BIRTH OF THE LEVIATHAN: BUILDING STATES AND REGIMES IN MEDIEVAL AND EARLY MODERN EUROPE* 35-89 (1997) (reviewing the origins of patrimonial absolutism in Latin Europe).

machinery of governance.⁴² His secretary, who was responsible for the signet ring—by which he signed or authenticated documents—became a secretary of state, responsible for a range of domestic affairs.⁴³ The marshal, who was in charge of the king's stable, became a military commander, the predecessor of the modern European field marshal.⁴⁴ In England, the reeve, who managed the land that the king owned as private property, was assigned to manage affairs in the shires and became the shire reeve, or sheriff.⁴⁵ But, with the exception of England, the increasingly public nature of monarchies was accompanied by the growth of royal absolutism that reaffirmed the king's autonomy in the face of his growing public responsibilities.⁴⁶ Thus, hardworking, conscientious monarchs like Philip II and Louis XIV built the Escorial and Versailles as their private residences because they, together with their residences, embodied the state as a separate entity.⁴⁷ As Louis is famously said to have declared: "I am the State."⁴⁸

The evolution of political theory paralleled these developments. The idea that kingship, and thus government, was divinely ordained as an autonomous institution prevailed well into the seventeenth century.⁴⁹ In fact, Lutheran thought maintained that

42. See Wolfram Fischer & Peter Lundgreen, *The Recruitment and Training of Administrative and Technical Personnel*, in *THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE* 456, 467-68 (Charles Tilly ed., 1975); see generally ERNEST BARKER, *THE DEVELOPMENT OF PUBLIC SERVICES IN WESTERN EUROPE, 1660-1930* (Archan Books 1966) (1944); T. F. TOUT, *CHAPTERS IN THE ADMINISTRATIVE HISTORY OF MEDIAEVAL ENGLAND: THE WARDROBE, THE CHAMBER AND THE SMALL SEALS* 19 (reprt. ed. 1967); W.L. WARREN, *HENRY II*, at 306-08 (1973).

43. See TOUT, *supra* note 42, at 30.

44. See RICHARD MORTIMER, *ANGEVIN ENGLAND 1154-1258*, at 16 (1994); WARREN, *supra* note 42, at 306.

45. See HELEN M. JEWELL, *ENGLISH LOCAL ADMINISTRATION IN THE MIDDLE AGES* 183 (1972); JOSEPH R. STRAYER, *ON THE MEDIEVAL ORIGINS OF THE MODERN STATE* 28 (1970).

46. See JAMES B. COLLINS, *THE STATE IN EARLY MODERN FRANCE* 79-80 (1995); ERTMAN, *supra* note 41, at 89-90; DAVID OGG, *EUROPE IN THE SEVENTEENTH CENTURY* 281-322 (8th rev. ed. 1961).

47. See J.H. ELLIOT, *IMPERIAL SPAIN, 1469-1716*, at 246-48 (1963) (describing the reign of Philip II and Escorial); GARRETT MATTINGLY, *THE ARMADA* 73 (1959) (same); G.R.R. TREASURE, *SEVENTEENTH CENTURY FRANCE: A STUDY OF ABSOLUTISM* 286-87 (Anchor Books ed. 1967) (1966) (describing the reign of Louis XIV and the palace of Versailles).

48. *THE OXFORD DICTIONARY OF QUOTATIONS* 492 (Elizabeth Knowles ed., 6th ed. 2004).

49. See WILLIAM J. BOUWSMA, *THE WANING OF THE RENAISSANCE, 1550-1640*, at 227-29 (2000); TREASURE, *supra* note 47, at 301-03.

kings themselves were chosen by God.⁵⁰ Machiavelli's notorious realism secularized only the strategy that kings should adopt, not the institution of monarchy itself.⁵¹ Even in England, which was moving in the opposite direction from continental absolutism, divine-right monarchy remained the dominant position,⁵² and the concept was propounded in a book written by no less a person than the king himself.⁵³ Hobbes, often regarded as the first modern political theorist, broke with this tradition by arguing that government emerged from a social contract among the people subject to its rule.⁵⁴ Although he reached the same conclusion regarding the powers of government as did the divine right theorists, the Restoration monarchy deeply distrusted his approach because the revolutionary implications of that approach were so apparent.⁵⁵

With Locke, those revolutionary implications were translated into pragmatic political positions.⁵⁶ Locke posited that if government is created by the people through the social contract, then it can properly be regarded as a device or mechanism of the people to achieve their collective goals.⁵⁷ As such, government is no longer part of God's design but rather a human creation, and the ruler is no longer an autonomous entity but instead a servant of the people.⁵⁸ In other words, Locke envisioned the state as an instrumental, rather than a deontological entity. It was no longer an end in itself but a means of achieving ends that are separately deter-

50. See SKINNER, *supra* note 33, at 15-16.

51. See generally NICCOLÒ MACHIAVELLI, *THE PRINCE AND THE DISCOURSES* (Luigi Ricci trans., Modern Library 1940) (1532).

52. For the classic statement, see generally ROBERT FILMER, *PATRIARCHA AND OTHER WRITINGS* (Johann P. Sommerville ed., Cambridge Univ. Press 1991) (1680).

53. See KING JAMES VI AND I: *POLITICAL WRITINGS* 63-64 (Johann P. Sommerville ed., Cambridge Univ. Press 1994) (1549). To be sure, James wrote this when he was James VI of Scotland, but his views remained the same when he acceded to the English throne as James I. See LEANDA DE LISLE, *AFTER ELIZABETH: THE RISE OF JAMES OF SCOTLAND AND THE STRUGGLE FOR THE THRONE OF ENGLAND* 47-48 (2005); DAVID TEEMS, *MAJESTIE: THE KING BEHIND THE KING JAMES BIBLE* 122-23 (2010).

54. HOBBS, *supra* note 26, at 142-44.

55. See A. P. MARTINICH, *HOBBS: A BIOGRAPHY* 223-25, 227 (1999); see also Gordon J. Schochet, *Intending (Political) Obligation: Hobbes and the Voluntary Basis of Society*, in THOMAS HOBBS AND POLITICAL THEORY 55 (Mary G. Dietz ed., 1990).

56. See generally LOCKE, *supra* note 26. *The Second Treatise* can be read as a critique of Hobbes. *Id.* at 7-8, 100.

57. *Id.* at 154-57.

58. *Id.* at 166.

mined by the needs or desires of the citizens who constitute it.⁵⁹ Rousseau advanced this position in his *Social Contract*,⁶⁰ but his notion that the government should serve the people's general will—essentially their altruistic inclinations—rather than their personal interests, coupled with his rejection of representative democracy, circles back to the idea of an autonomous state.⁶¹

Shortly after the publication of Rousseau's *Social Contract* in 1762, the idea that the state should serve the interests of its citizens, as individuals, was forcefully—if briefly—expressed in the Declaration of Independence. The Declaration's best-known language says:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.⁶²

The “unalienable Rights” language attracts attention due to its moral force, as does the “consent of the governed” language, which remains one of the two main justifications for democracy.⁶³ But most significant for present purposes is the idea that the government is specifically defined as a device for securing people's rights, and nothing else. The Declaration goes on, in slightly less famous language, to explain:

59. *Id.*

60. See generally JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Willmoore Kendall trans., Henry Regnery Co. 1954) (1762).

61. See PETER GAY, *THE ENLIGHTENMENT: THE SCIENCE OF FREEDOM* 548-51 (1969); J.B. SCHNEEWIND, *THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY* 474-80 (1998); Jeremy Jennings, *Rousseau, Social Contract and the Modern Leviathan*, in *THE SOCIAL CONTRACT FROM HOBBS TO RAWLS* 115, 115-16 (David Boucher & Paul Kelly eds., 1994).

62. *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

63. See generally DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986) (presenting a consent-based theory of morality); JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (proposing consent-based principles for the structure of society). The other justification is deliberative democracy. See generally AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., MIT Press 1996) (1992).

That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.⁶⁴

These stirring words were translated into pragmatic political terms some thirteen years later in the United States Constitution. Its Preamble, which is equally familiar, states:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.⁶⁵

As in the Declaration, government is envisioned in the Preamble as a device that the people adopt for specific purposes relating exclusively to their individual well being. The wars that previous European monarchs had pursued to win glory are translated into the goal of providing for the defense of the nation and its population. Aside from defense, the specified purposes are promoting justice, tranquility, and general welfare—all benefits for individuals—and the whole document is presented as an action taken by the people.

This, then, is what it means to have a constitution: the government is not an autonomous entity but a device to serve the people whom it governs. Government is constituted—created *ab initio*—as such a device. A natural implication of a constitution's primacy is that it places constraints on the actions that the government is permitted to adopt.⁶⁶ These constraints are enormously important, as I have argued elsewhere,⁶⁷ but they do not define a constitution's basic meaning. An autonomous monarch, like William III of England, might be bound by specific provisions, such as the 1689

64. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

65. U.S. CONST. pmb.

66. See Edward Rubin, *Judicial Review and the Right to Resist*, 97 GEO. L.J. 61, 62-63 (2008) (discussing judicial review as a type of constraint on the rules of a political entity).

67. See *id.* at 97-98 (arguing that without judicial review, ruling branches would not have to submit to any higher law).

Declaration of Rights limiting the king's authority⁶⁸ or the Settlement Act of 1701 prohibiting the king from removing judges at will.⁶⁹ But a government conceived as an instrumentality, a device for serving the people, could be established only by an explicit set of rules that defined all of its powers and procedures.

From this account of a constitution's basic meaning, one can see that the social contract was not essential to the conception of modern constitutionalism; rather, the social contract was a means by which political theorists mediated between that conception and its essentially medieval predecessor. If the idea of a social contract captured a constitution's essence, then the people could contract away all of their rights, thus destroying the government's instrumental character and restoring its autonomous authority. This is, of course, what Hobbes thought,⁷⁰ and why his theory, despite its historical importance, sounds so discordant to modern ears. Even more basically, the instrumentalism of government is an ongoing relationship, not an initial agreement. The point is not simply that the idea of a social contract is a fantasy, as Hume pointed out,⁷¹ but that it is an inapplicable fantasy. It fails to capture the way that a true instrumentality must be continually adapted and transformed to meet the purposes or interests of those whom it is intended to serve. At most, the concept of the social contract makes the government an instrumentality of those who wrote the constitution; this means that once the original generation is gone, the government is not an instrumentality of anyone at all.

The implicit recognition of this disjunction between social contractarianism and modern constitutional thought led both Hegel and Bentham to dismiss contractarianism as irrelevant,⁷² and

68. See STEVE PINCUS, 1688: THE FIRST MODERN REVOLUTION 292-93 (2009).

69. Todd D. Peterson, *Congressional Investigations of Federal Judges*, 90 IOWA L. REV. 1, 39-40 (2004) (discussing the Settlement Act of 1701 and its influence on the Framers of the U.S. Constitution).

70. See generally HOBBS, *supra* note 26.

71. DAVID HUME, A TREATISE OF HUMAN NATURE 533-36 (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1739); DAVID HUME, OF THE ORIGINAL CONTRACT (1748), *reprinted in* SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU 207, 215-16 (Oxford Univ. Press 1946); see Dario Castiglione, *History, Reason and Experience: Hume's Arguments Against Contract Theories*, *in* THE SOCIAL CONTRACT FROM HOBBS TO RAWLS, *supra* note 61, at 95. For an interestingly unconventional view of Hume's approach to this subject, see David Gauthier, *David Hume, Contractarian*, 88 PHIL. REV. 3 (1979).

72. JEREMY BENTHAM, *A Fragment on Government*, *in* A COMMENT ON THE COMMENTARIES

subsequent thinkers have tended to agree with their assessment.⁷³ Social contract theory was not revived in any significant way until Rawls.⁷⁴ But Rawls's version of the theory is distinctly different from the seventeenth-century approach. This is not because he makes the contract entirely hypothetical or conceptual in response to Hume—Kant did that⁷⁵—but because the agreement people reach in the original position, behind the veil of ignorance, does not constitute the government; rather, it establishes the principles of justice.⁷⁶ In Rawls's framework, it is only when people begin to emerge from behind the veil and take account of the specific world in which they will be living that they are able to draft a constitution.⁷⁷ Thus, they are no longer creating a government from some state of nature or original position, as social contract theory would require; rather, they are constructing specific governmental institutions in light of their actual circumstances, which is an entirely different conception.

AND A FRAGMENT ON GOVERNMENT 393, 439-46 (J. H. Burns & H. L. A. Hart eds., Univ. of London Athlone Press 1977) (1796); G. W. F. HEGEL, *OUTLINES OF THE PHILOSOPHY OF RIGHT* 84-93 (Stephen Houlgate ed., T. M. Knox trans., Oxford Univ. Press 2008) (1821). Both argue that the obligations arising from a social contract depend on the institution of promise keeping, which is a product of society rather than a basis for its creation; thus, social contract theory cannot contradict, or provide an alternative to, the real justification for government, which in Bentham's case is utility, and in Hegel's is rational will. See BENTHAM, *supra*, at 446-48; HEGEL, *supra*, at 56-59, 92-93.

73. See, e.g., David Boucher & Paul Kelly, *The Social Contract and Its Critics: An Overview*, in *THE SOCIAL CONTRACT FROM HOBBS TO RAWLS*, *supra* note 61, at 1, 17-18.

74. RAWLS, *supra* note 63, at 11-17. For a subsequent effort to use contract theory in its theoretical or hypothetical form as a basis of morality, see GAUTHIER, *supra* note 63, at 9-11.

75. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 92-93 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1799). Kant, who generally would not advance an argument unless he felt that it would withstand Hume's skepticism, argues that the social contract is not an historical event, but a way of representing the terms on which a rational person would agree to submit herself to government control. Rawls follows this theoretical approach. RAWLS, *supra* note 63, at 11-12 & n.5; see also *id.* at 142-50.

76. RAWLS, *supra* note 63, at 136-42.

77. *Id.* at 196-97 ("Thus I suppose that after the parties have adopted the principles of justice in the original position, they move to a constitutional convention.... Since the appropriate conception of justice has been agreed upon, the veil of ignorance is partially lifted.... [T]hey now know the relevant general facts about their society, that is, its natural circumstances and resources, its level of economic advance and political culture, and so on."); see also JOHN RAWLS, *POLITICAL LIBERALISM* 334-40 (1993).

B. The Purposes of a Constitution

If a government structured by a constitution—that is, a constituted government—is conceived as an instrumentality for serving the people, the next question we can ask is how it should do so. Rousseau thought it should serve the people by embodying their general will, that is, their communal or altruistic inclinations, rather than their actual desires.⁷⁸ By living under a government so constituted, he argued, human nature would be transformed and individuals would join together in a moral unity.⁷⁹ If the government needed to consult individuals about specific policies, Rousseau believed, such consultation must be done directly, not through representatives.⁸⁰ On this basis, he joined Aristotle⁸¹ in arguing that only a small state, in which the people can be assembled as a group, can be a just or moral one.⁸² This second principle is easy for a constituted nation to reject: a theory that applies only to small groups is useless for a modern state.⁸³ But the first principle is even more strongly rejected; if not totalitarian, it is certainly elitist and authoritarian.⁸⁴ A constituted state is one in which the government serves the people by implementing their goals or purposes, not by conceiving of its own goals in an effort to make the people better.⁸⁵ If the state does the latter, it is acting autonomously, according to

78. ROUSSEAU, *supra* note 60, at 38-39.

79. *Id.* at 56 (“Individuals and public alike need someone to guide them. The former must be induced to will in line with reason, the latter must be taught to see clearly what it is willing. When the people has [sic] been taught to do that ... there will be complete cooperation among the parts and, in the end, maximum strength for the whole.”).

80. *Id.* at 100.

81. ARISTOTLE, *THE POLITICS* 403-05 (Trevor J. Saunders ed., T. A. Sinclair trans., Penguin Books rev. ed. 1981) (c. 340 B.C.) (concluding that a large polis will compromise the “essential nature” of the state); *see also* GIOVANNI SARTORI, *DEMOCRATIC THEORY* 250-57 (1962) (discussing the Greek system of “[r]eal self-government” and the concept of the polis).

82. ROUSSEAU, *supra* note 60, at 101 (“*You must have:* a) A very small state, in which the people can easily be assembled, and each citizen can—without going to much trouble—get acquainted with all the others.”).

83. *See* JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 17 (New York, Harper & Bros. 1862).

84. *See* NANNERL O. KEOHANE, *PHILOSOPHY AND THE STATE IN FRANCE: THE RENAISSANCE TO THE ENLIGHTENMENT* 442-49 (1980); Jennings, *supra* note 61, at 115-19.

85. Note that it is the danger of dictating goals, not the danger of extensive state action in general, that is the crux of Isaiah Berlin’s argument against “positive liberty.” ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 132, 165-71 (1969); *see infra* Part II.

its own prerogatives, like premodern kings, who, in at least some cases, had equally benevolent intentions. It is no longer a mechanism or device that serves the people.⁸⁶

But what does it mean to serve the people? Who is to determine what the people's real goals or purposes are? Democratic theory provides one answer: the people themselves define their purposes. Precisely how they do so is a matter of some complexity, of course. In a large, modern state, they cannot follow Aristotle's definition of democracy in which the citizens as a whole make all the important policy decisions in a general assembly, and the public officials needed to implement those decisions—and, incidentally, to set the agenda for the assembly⁸⁷—are chosen by lot.⁸⁸ The contemporary answer, derived from medieval models of collective action,⁸⁹ is that the people vote for representatives, who make the basic decisions and appoint the officials who implement those decisions.⁹⁰ Particular mechanisms of representation vary, of course, but the principle is clear enough.

Constitutionalism, as a theory of government, certainly allows for this method of determining the people's interests, and modern

86. A similar critique can be advanced against Hegel's noncontractarian theory of the state. See HEGEL, *supra* note 72, at 84-86. Hegel was not sympathetic to parliamentary democracy, but this is probably an unfair reading of his theory. See CHARLES TAYLOR, HEGEL 439-41 (1975).

87. On the crucial importance of this role, a matter that Aristotle did not consider, see Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 949, 952 (1962). See also STEVEN LUKES, POWER: A RADICAL VIEW 20-29 (2d ed. 2005) (expanding on Bachrach and Baratz's analysis).

88. ARISTOTLE, *supra* note 81, at 361-64. A democracy, he says, has the following features: (a) Elections to office by all from among all. (b) Rule of all over each and of each by turns over all. (c) Offices filled by lot, either all or at any rate those not calling for experience or skill.... (e) The same man not to hold the same office twice, or only rarely.... (h) The assembly as the sovereign authority in everything, or at least the most important matters, officials having no sovereign power over any, or over as few as possible.

Id. at 363.

89. See ARTHUR P. MONAHAN, CONSENT, COERCION, AND LIMIT: THE MEDIEVAL ORIGINS OF PARLIAMENTARY DEMOCRACY 111-21 (1987); JOHN B. MORRALL, POLITICAL THOUGHT IN MEDIEVAL TIMES 63-65 (3d ed. 1971); GAINES POST, STUDIES IN MEDIEVAL LEGAL THOUGHT: PUBLIC LAW AND THE STATE, 1100-1322, at 61-69 (1964). See generally Gaines Post, *A Roman Legal Theory of Consent*, Quod Omnes Tangit, in *Medieval Representation*, 1950 WIS. L. REV. 66 (discussing the application of the Roman principle of consent to medieval forms of representation).

90. See NORBERTO BOBBIO, DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER 149-52 (Peter Kennealy trans., 1989); MILL, *supra* note 83, at 97-100.

constitutions, of course, rely on it heavily. In fact, representative processes have become so well established as a means of determining the people's interests that it is now difficult to conceive of a constitution that establishes any other form of government.⁹¹ But representative democracy is not typically regarded as sufficient, by itself, to satisfy the demands of constitutionalism, even apart from the defects in the representative process that public choice scholarship has explored.⁹² One reason lies in the view that structure should take precedence over quotidian decision making. If representatives could be relied upon, without reservation, to govern in the people's interests, there would be no reason to prevent those representatives from changing the structure of the process by which decisions are made. That is in fact what occurs in the United Kingdom, where there is no written constitution.⁹³

The question, then, is why constitutional regimes reserve the design of the government's basic structure to the constitution itself. The answer lies in the deeper meaning of a constitution, specifically in its underlying conception of the government as an instrumentality that serves the people's purposes.⁹⁴ If the elected representatives can change the structure of the government, there is no guarantee that the structure they select will serve the people. In fact, there is good reason to think that representatives, once elected, will tend to think of themselves as members of the government and may thus

91. If we go back to the leading political treatises of the ancient world, where constitutionalism was explicitly discussed, we see that the concept was not linked to democracy at all. *See, e.g.*, ARISTOTLE, *supra* note 81; MARCUS CICERO, *The Republic*, in *THE REPUBLIC AND THE LAWS* 1 (Niall Rudd trans., Oxford Univ. Press 1998) (c. 54 B.C.); PLATO, *THE REPUBLIC OF PLATO* (John L. Davies & David S. Vaughan trans., MacMillan & Co. 3d ed. 1950) (c. 380 B.C.); *see also* PLUTARCH, *Lycurgus*, in *LIVES OF THE NOBLE GREEKS* 40 (Edward Fuller ed., Dell Publ'g Co. 1959) (c. 100 B.C.). Aristotle identified six possible regimes that can be created by constitutions: monarchy, aristocracy, *politeia* (constitutional republic), tyranny, oligarchy, and democracy. He regarded the last three, including democracy, as perverted forms of the first three types of government. ARISTOTLE, *supra* note 81, at 187-96.

92. *See generally* DENNIS C. MUELLER, *PUBLIC CHOICE III* (2003). For an analysis of the relationship between public choice theory and law, *see* DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

93. *See, e.g.*, VERNON BOGDANOR, *THE NEW BRITISH CONSTITUTION* 10 (2009); ANTHONY KING, *THE BRITISH CONSTITUTION* 5 (2007). References to the British constitution use the term "constitution" in the more general sense of governmental structure—which every government of course possesses—not in the sense of a binding, foundational document. *See, e.g.*, KING, *supra*, at 2-5.

94. *See supra* notes 65-77 and accompanying text.

act in the government's interest rather than in the interest of the people whom they, in theory, represent.⁹⁵ The same reasoning, however, applies to the decisions that they make within the structure established by the constitution. No structure can guarantee that elected representatives will always act in the desired manner. If a constitution needs to specify the decision-making structure, it also needs to specify some rules guiding the decisions themselves.

What follows is that the constitution itself must ultimately define the people's purposes.⁹⁶ Of course, the constitution cannot specify such purposes on a day-to-day basis. But if the government is to be constituted as an instrumentality serving the people's purposes, the constitution must specify the general criteria by which the people can know whether the government's particular, day-to-day decisions are serving that function. The acknowledged task of any constitution—which is to establish the structure of the government—would be impossible without some sense of the people's real purposes. How could the framers make choices between alternatives, and how could they design the structures by which quotidian decisions are made, without guidance of that sort? One could say that the structure should allow the people to identify their own purposes at any given time to the fullest possible extent, but that only restates the same underlying problem.

The standard way of responding to these concerns is to conceive of the constitution as establishing structure and imposing constraints.⁹⁷ That is, the constitution defines the decision-making

95. See ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* 36-40, 377-92 (Eden Paul & Cedar Paul trans., 2d ed. 1978) (arguing that narrow groups always control the government, this being the "iron law of oligarchy"). For other classic works advancing a similar argument, see JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 284-89 (1942), and MAX WEBER, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77, 81 (H. H. Gerth & C. Wright Mills eds. & trans., 1946). For other studies finding that narrow, self-perpetuating elites govern even our own open, democratic society, see generally ROBERT A. DAHL, *WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961); G. WILLIAM DOMHOFF, *WHO RULES AMERICA?* (1967); C. WRIGHT MILLS, *THE POWER ELITE* (2d ed. 2000).

96. For another discussion of this purposive approach to constitutionalism based on the principle of intentionality rather than instrumentality, see Rubin, *supra* note 19, at 308.

97. Nearly every leading constitutional law casebook and treatise is organized according to this idea. That is, the first part of the book (usually somewhat less than half the book's total length) is devoted to structural issues—the powers of the federal government, separation

process and then places constraints on the results this process reaches. There are, however, two problems with this view. The first is that it relies on the contract theory of government. This is a theory that, as stated previously, was developed to provide a sense of continuity with medieval thought, failed to accurately describe the process of constitution making, and has been regarded as irrelevant for about two hundred years.⁹⁸ Even more seriously, contract theory does not capture the real significance of constitutionalism, which is to transform government from an autonomous entity to an instrumentality. The second problem is that neither structures nor constraints can define the purposes that the constitution is supposed to serve. Choosing constraints, like choosing structures, must be guided by some underlying substantive commitment, some sense of what is essential to the group of people for whom the constitution is designed.

Thus, a constitution's basic meaning—that is, establishing government as an instrumentality that serves the people's purposes—leads to the conclusion that the constitution must specify those purposes. It must contain some sort of substantive principles to guide its design decisions and to provide criteria for the performance of the government that it designs. For people to remain committed to a constitution and to be willing to live within its terms is to remain committed to those purposes and interests. If the people's basic commitments change and if they no longer believe in the animating principles of their constitution, they will abolish it.

of powers, and federalism—while the second half is devoted to constraints on governmental action—mainly due process, equal protection, and the First Amendment. *See, e.g.*, ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (3d ed. 2006) (chapter 1, at 1-32, on historical background; chapters 2-5, at 33-474, on structure; chapters 6-12, at 475-1267, on constraints); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* (8th ed. 2010) (chapters 1-9, at 1-414, on structure; chapters 10-17, at 415-1674, on constraints); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* (16th ed. 2007) (chapters 1-6, at 1-338, on structure; chapters 7-14, at 339-1370, on constraints); JONATHAN D. VARAT, WILLIAM COHEN & VIKRAM D. AMAR, *CONSTITUTIONAL LAW: CASES AND MATERIALS* (13th ed. 2009) (chapter 1, at 16-23, historical background; chapters 2-7, at 24-502, on structure; chapters 8-17, at 503-1962, on constraints). Laurence Tribe's *American Constitutional Law* is somewhat different, organized instead by successive historical models; as it turns out, however, the models follow the same structure-constraint pattern. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3d ed. 2000). Most law schools organize their constitutional courses the same way, with a first-year course on structure, and one or two required or widely taken upper-class courses focusing on constraints.

98. *See supra* notes 69-73 and accompanying text.

Assuming they remain committed to the idea of constitutionalism, they will draft a new constitution with different animating principles.⁹⁹ Alternatively, they might decide to dispense with a constitution entirely, perhaps because they believe that the government should be an autonomous entity rather than an instrumentality. A final possibility is that the constitution remains in effect, or is enacted in the first place, because the government has already become an autonomous entity and finds that the constitution is a useful device for imposing its will upon the people. That was the case with the Soviet Union's constitution;¹⁰⁰ however, because it did not reflect the basic idea that the government is an instrumentality of the people, no serious observer regarded it as a real constitution.

The purposes that the constitution serves must be conceived in general terms. Because they guide the particular provisions of the constitution—the structures and constraints that comprise the constitution's legal, or operative, text—they must stand above those textual provisions. Some scholars and jurists have advanced the claim that a constitution's text should speak for itself, so that it can be interpreted without reference to any principles beyond its operative language.¹⁰¹ Other scholars and jurists claim that the

99. See generally HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* (2000) (describing the constitution design process in Soviet bloc countries following the collapse of the U.S.S.R.); Kim L. Scheppelle, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757 (2006) (describing the operation of new constitutions after regime change in the former Soviet bloc). In a later article, Scheppelle points out that new constitutions drafted after a regime change often pay a great deal of attention to the past, with which the framers are, after all, deeply and painfully familiar, and because they look hesitantly toward an uncertain future. See Kim L. Scheppelle, *A Constitution Between Past and Future*, 49 WM. & MARY L. REV. 1377, 1379 (2008). The point here is that the people will reject the previous constitution if they no longer believe in its purposes, even if they then reenact some or many of its provisions out of a sense of insecurity. See *id.* at 1402-05.

100. See ISAAC DEUTCHER, *STALIN: A POLITICAL BIOGRAPHY* 358-59 (2d ed. 1967); MARTIN MCCAULEY, *THE SOVIET UNION: 1917-1991*, at 104, 124, 159 (2d ed. 1993).

101. See, e.g., Gary Lawson, *On Reading Recipes ... and Constitutions*, 85 GEO. L.J. 1823 (1997); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 37-41 (Amy Gutmann ed., 1997); Seth B. Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1367-72 (2005); Adrian Vermeule & Ernest A. Young, *Commentary, Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L.

constitution should be interpreted in accordance with its original meaning, that is, the meaning that the framers or the ratifiers consciously attached to its provisions when the document was drafted.¹⁰² Legal scholars have widely criticized these theories, generally known as textualism and originalism.¹⁰³ The difficulty with both of them, in terms of this discussion, is that they rely on contract theory. The argument for originalism is that it represents the original agreement, the basis on which people relinquished their natural liberty. Textualism rests on essentially the same argument, because it recommends a mode of interpretation that is completely inconsistent with contemporary thought about how a text should be, and indeed can only be, interpreted;¹⁰⁴ the sole reason to advance

REV. 730 (2000). See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

102. See, e.g., GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION 23-26, 51-56 (1992); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 167-70 (1990); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS 42-47 (1994); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 163, 182-87 (1999); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620-29 (1999); Lino A. Graglia, Essay, "Interpreting" the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1044 (1992); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 260-63 (1988); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 949-53 (1995); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861-62 (1989); John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 296-301 (1996). See generally Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086-87, 1093 (1989).

103. See, e.g., ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 44-50 (1995); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788 (1999); Akhil Reed Amar, *Textualism and the Bill of Rights*, 66 GEO. WASH. L. REV. 1143 (1998); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 899-901, 950 (2003); Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 DUKE L.J. 1, 36-37 (1993); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1281-83 (2001).

104. See, e.g., ROLAND BARTHES, *S/Z* 5-13 (Richard Miller trans., Hill & Wang 1974); UMBERTO ECO, THE ROLE OF THE READER: EXPLORATIONS IN THE SEMIOTICS OF TEXTS 3-5, 39-40 (1979); STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 1-3, 16-17 (1980); HANS-GEORG GADAMER, TRUTH AND METHOD 154-56 (Garrett Barden & John Cumming eds., The Seabury Press 1975); ROMAN INGARDEN, THE LITERARY WORK OF ART: AN INVESTIGATION ON THE BORDERLINES OF ONTOLOGY, LOGIC, AND THEORY OF LITERATURE 16-19 (George G. Grabowicz trans., 1973); WOLFGANG ISER, THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE 15-19 (1978); ROMAN JAKOBSON, ON LANGUAGE 56-60 (Linda R. Waugh & Monique Monville-Burston eds., 1990); JULIA KRISTEVA, REVOLUTION IN

this concept is that the text represents that same original agreement. But, as stated earlier, that is not the right way to regard a constitution.¹⁰⁵ The meaning of a constitution is to establish the government as an instrumentality of the people: not only the people at the time the constitution was drafted, but the people who live under the constitution after the original generation is dead.

Considering how purposes function over time enables us to see the way that they give meaning to constitutional provisions. To have a purpose represents a commitment, a direction, whose application to particular situations is determined as those situations arise. That process proceeds over time, as situations present themselves and as the actors reflect on the meaning of the purposes through continued efforts to apply them.¹⁰⁶ In other words, the meaning of a constitution's purposes cannot be fully known at the time that the constitution is enacted.¹⁰⁷ It is through the historical experience of acting on the basis of these principles that people learn the contours of their commitments.

The process occurs at two different levels, which can be described as pragmatic and conceptual. At the pragmatic level, the situation that arises confronts the actors with unexpected or undesired consequences. Facing those difficulties, they become aware that they did not fully realize what the purpose would require and must now, if they are to remain true to the purpose, accept consequences that they hoped, or assumed, they could avoid. To use a nonpolitical example, suppose a high school student decides that he wants to get into a good college. To do so, he realizes that he needs to improve his grades. What he may have in mind when he commits himself to this purpose is that he will take his work more seriously when he is doing it and concentrate more intensely. When the next semester starts, however, he may realize that he has already been concentrating about as much as is possible for him and that improving his grades will require him to spend more time studying and less time going out at night. He cannot really say he is surprised by this realization; certainly, he was aware when he adopted his purpose that spending more time studying was one way to improve his

POETIC LANGUAGE 100-01 (Margaret Waller trans., Columbia Univ. Press abr. trans. 1984).

105. See *supra* text accompanying notes 70-71.

106. See Rubin, *supra* note 19, at 309-14.

107. *Id.* at 309.

grades and get into a better college. What the situation revealed to him was that he would need to accept this pragmatic consequence he was hoping to avoid in order to remain true to his purpose.

At the conceptual level, the situation confronts the actors with new and unexpected meanings of their purposes. As a result, aspects of each purpose are revealed to the actors that they simply did not conceive of previously. The purpose's scope expands, and the actor perceives that an expanded range of situations is now encompassed within it. Consider another student who adopts the same purpose of getting into a good college and is told by her guidance counselor that colleges are now looking for students who have demonstrated leadership in addition to good grades. This comes as a surprise: she had thought that starting a literary club or being captain of her tennis team was a way to be popular, or to get some extra privileges like a sticker for a better parking lot at school, neither of which was a particular concern of hers. Now she realizes that these activities, which she had previously thought irrelevant or distracting, were in fact encompassed by her purpose.

Treating the constitution as a purposive document—one that conceives of government as an instrumentality for serving the purposes of the people—provides a resolution to the debate between originalist and evolutionary theories by clarifying each position. Originalists tend to elide the important distinction between what was in a person's mind and what that person intended.¹⁰⁸ To return to our two high school students, suppose each of their mothers says: "I want you to try hard to get into a good college," and each has specifically in mind, when saying this, the image of her child taking his or her work more seriously and concentrating more intensely. Perhaps they even specify that strategy out loud. Does that mean that the first child's mother did not intend for him to spend more time studying when he finds out that he needs to, or that the second child's mother did not intend for her to become captain of the tennis team?¹⁰⁹ Originalism, in any serious sense that is free of historical

108. See sources cited *supra* note 102.

109. The presence of the students' mothers in the example addresses a conceptual defect in one of the most important and intriguing modern theories of constitutionalism, Jon Elster's analysis of self-binding action. In his original study, Elster used the example of Ulysses and the Sirens to analyze situations in which a rational actor precommits to a particular course of action because she is concerned that she will make an unwise decision when confronted

fetishism, means to hold true to the purposes of the original speakers, not to take their particular means of expression in a literal manner.¹¹⁰ This is true for the ratifiers of the constitution as well as for the drafters.¹¹¹ Some, and perhaps the majority, of the ratifying voters may have been unsophisticated, and unable to distinguish between first- and second-order intentions, but why should people in the contemporary world feel themselves beholden

with the actual circumstances for which that course of action must be chosen. JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 36-37 (1979). An obvious example is a person's effort to end addiction to a substance, which Elster discussed in his follow-up study. JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 63-77 (2000). In that study, he uses his self-binding theory to determine the meaning of a constitution. *Id.* at 88-174. Laurence Tribe endorses this same rationale in his treatise on constitutional law. TRIBE, *supra* note 97, at 22-23. It is a formidable theory, but the problem with it is that a constitutional regime is not an example of self-binding. The framers of a constitution are not binding themselves in their capacity as framers; indeed they pass out of existence in that capacity once the constitution is ratified. Rather, they are binding different people, those people who will govern in the future.

The public officials who hold power under the constitutional regime are not binding themselves either. As a conceptual matter, these officials are subject to the constitution, which is, of course, external to them. As a practical matter, these officials are subject to the courts, which typically enforce the constitution's provisions. Proposals to abolish judicial review or to end judicial supremacy would make Elster's argument more relevant. *See, e.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 247-48 (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 6-32 (1999); Jeremy Waldron, Essay, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1353, 1406 (1999). But in our current constitutional regime, the instructions that the students are interpreting must be treated as coming from their mothers, not from their own previous decisions.

110. *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 *U. CHI. L. REV.* 519, 548-49 (2003).

111. The concept is thus equally applicable to what Keith Whittington has called the New Originalism. *See* Keith E. Whittington, *The New Originalism*, 2 *GEO. J. L. & PUB. POL'Y*, 599, 609 (2004) ("[T]he new originalism is focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text that was adopted."); *see also* Nelson, *supra* note 110, at 547-49. The asserted advantage of New Originalism is that it moves from private to public meaning and that it replaces the somewhat foolish-looking search through Madison's and Wilson's private correspondence to an inquiry into prevailing attitudes. *See* Whittington, *supra*, at 609-10. But apart from the fact that those prevailing attitudes may be as difficult for us to discern and understand as the views of individuals, this approach does not solve the problem that the ratifiers, like the Framers, are dead, and we have to decide why we should follow them. In fact, this shift exacerbates the problem by removing the element of admiration that we can feel toward people like Madison and Wilson. In addition, New Originalism still fails to tell us whether the relevant people—ratifiers or framers—intended the future to be bound by their present understandings or whether they understood the need for pragmatic and conceptual adaptation.

to the views of this lowest common denominator? The only rationale for doing so is the long-outmoded contract theory of government.¹¹²

An evolutionary approach to the constitution captures the dynamic way that the interpretation of particular constitutional provisions responds to changing situations.¹¹³ The difficulty with such an approach is that it lacks criteria for judgment. If the only stated criterion is the current government's decisions, then the principle of constitutionalism is largely abandoned; if the only actual criterion is the preferences of the officials, presumably judges, charged with the enforcement of the constitution, then the principle is largely debased.¹¹⁴ Taking the constitution's purposes into account provides guidance to those officials about the way they should respond to changing circumstances. In particular, it indicates that these officials should require the other members of government—the elected representatives, in most cases—to accept the pragmatic consequences and the conceptual expansion of the constitution's purposes.¹¹⁵ This is not a formula that will yield definitive answers in complex situations, of course, but it provides a coherent

112. See Wilson R. Huhn, *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, 19 WM. & MARY BILL RTS. J. 291, 314-15 (2010).

113. See, e.g., SOTIROS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 70-76 (2007); RICHARD A. POSNER, OVERCOMING LAW 215-28 (1995); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 229-31 (1980); Rebecca L. Brown, Essay, *Tradition and Insight*, 103 YALE L.J. 177, 180-81 (1993); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10-15 (1979); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 412-15 (1997); Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1041-42 (1977); Nelson, *supra* note 110, at 543-47; Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1100-01 & nn.69-70 (1998); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 885-88 (1996).

114. Judicial review is not necessarily essential to the principle of constitutionalism. As I have argued elsewhere, some entity outside of those who control the government's monopoly of legitimate force must be able to enforce the constitution in order for it to be effective, but that could be an ombudsperson or a separately elected council. Rubin, *supra* note 66, at 92-96. In modern constitutions, however, this entity is almost invariably the judiciary, and this Article assumes that mechanism for the sake of simplicity.

115. Cf. Stephen M. Feldman, *Do Supreme Court Nominees Lie? The Politics of Adjudication*, 18 S. CAL. INTERDISC. L.J. 17, 23 (2008) (discussing politics according to a mutual sense of purpose and reviewing the notion that "adjudication and jurisprudence are interpretive practices" by which the interpreter imposes historic principles on the legal practice).

framework of discourse within which consideration of the constitution's meaning can occur.

The purposive approach to the constitution changes the relationship between the courts and the other branches of government. In particular, it changes the constitutional significance of statutes enacted by elected representatives. According to the prevailing view, these statutes either fall within permissible boundaries established by the constitution, as constitutional courts interpret it, or exceed those boundaries, in which case the courts will strike them down.¹¹⁶ In other words, the relationship between the courts and the other parts of government is one of wary separation. Elected representatives, like wild beasts, are ignored if they remain on the reserve and struck down if they stray outside it. If the constitution is viewed as embodying substantive purposes, however, and those purposes are recognized as revealing their consequences and extent over time in response to new circumstances, then statutes and other actions by elected representatives, such as executive proclamations, can be relevant to that revelatory process. Clearly, these representatives are motivated by the same basic purposes. The courts may be the guardians of those purposes, but the purposes themselves pervade the entire government and, indeed, the entire society. If these purposes were not pervasive, then the society would no longer be willing to consider itself bound by the constitution.

In other words, courts should regard the other parts of government as potentially having something useful or informative to say about the meaning of the purposes that guide constitutional interpretation. This does not mean that the courts should relinquish their role as the final arbiters of constitutional meaning. That position, generally known as departmentalism, is championed by a number of commentators.¹¹⁷ But as I have argued elsewhere,

116. See *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955) (“[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the [statute]. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”).

117. See, e.g., SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 27-53 (1988); David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 *LAW & CONTEMP. PROBS.* 61, 61-63 (2000); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 *VA. L. REV.* 83, 83 (1998); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 *LAW & CONTEMP. PROBS.* 7, 8-9

departmentalism undermines judicial review—the only mechanism that has ever been developed for overturning the decisions of the society’s prevailing power-holders without resort to violence.¹¹⁸ The preferable approach is that the courts, without abandoning their authoritative role, should be attentive to the way that the public officials who govern the society implement the purposes they share with constitutional courts. It is the daily task of these officials to adapt those purposes to circumstances at the pragmatic level, and it is the intermittent—but not infrequent—task of these officials to expand the application of those purposes at the conceptual level. The way officials do so can guide courts in their own efforts to interpret the constitution in accordance with its underlying purposes.

Of course, not all statutes or other governmental actions are relevant to the interpretive process in this way. Some statutes are irrelevant, because they deal with matters unrelated to the constitution’s purposes. Others will in fact violate those purposes and be struck down: if the courts never found any statute in violation of the constitution, judicial review would be an illusion or a charade. The statutes that courts should regard as informative and instructive are, of course, those that advance the constitution’s purposes.¹¹⁹ Whether a particular statute does so is for the courts, as guardians of the constitution, to decide. But the fact that courts have final interpretive authority does not prevent them from maintaining a collaborative relationship with the legislature.¹²⁰ Contrary to contract theory, the actions of elected officials can influence constitutional interpretation, not by displacing the role of the courts, but by informing the courts about possible ways that the constitution’s underlying purposes can be applied and expanded in light of the

(2000); Neal Kumar Katyal, Essay, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1335 (2001); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1268-70 (1996); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 43 (1993); Robert C. Post & Reva B. Siegel, Essay, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 443-45 (2000); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 773 (2002).

118. See Rubin, *supra* note 19, at 301.

119. See *id.* at 304.

120. See *id.* at 308-09.

ever-changing circumstances that every modern government must confront.

C. The Purposes of the U.S. Constitution

In order to interpret the U.S. Constitution according to the framework presented in the previous Section, it is of course necessary to identify the Constitution's animating purposes. This is a historical question, but the historical inquiry involved is not the sort that is typically found in originalist literature. For the reasons stated above, the question is not what the Framers envisioned when they drafted specific provisions.¹²¹ To begin with, it is difficult to know exactly what they thought, and impossible to know whether they would have wanted their thoughts to control subsequent interpretations.¹²² It is even harder to know what the ratifying public thought about any specific constitutional provision.¹²³ More importantly, these considerations are irrelevant. Even if we had perfect knowledge of what the Framers or ratifiers thought, we could not possibly know how they would have adjusted those notions in response to circumstances they did not consider or could not have imagined.

The relevant inquiry instead involves the general principles to which the Framers—and perhaps the ratifiers—were committed, the purposes of the Constitution as a whole. These purposes, unlike specific provisions, are inherently dynamic; they reveal their meaning over time through the pragmatic and conceptual processes that have been described in the previous Section.¹²⁴ In addition, due to their generality, they possess an emotive contour that makes them relevant to subsequent generations.¹²⁵ The general public, and even most public officials, cannot really care about the Framers' thoughts regarding particular constitutional provisions. What they can care about, however, are the overarching purposes that

121. See *supra* notes 104-12 and accompanying text.

122. According to Professor Jefferson Powell, the likelihood is that they did not. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885 (1985).

123. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 11-20 (1996).

124. See Rubin, *supra* note 19, at 309; *supra* Part I.B.

125. See Rubin, *supra* note 19, at 321.

animated the Constitution as a whole. That sense of caring, that commitment, makes people willing to continue and sustain the structure established by the Constitution and accept judicial review of their representatives' decisions.

It is not difficult to identify the purposes that motivated the Framers of the U.S. Constitution and the citizens who ratified it. The three most notable purposes are (1) strong national government, (2) liberty, and (3) equality. These themes are sounded in the Preamble to the Constitution—the only part of the document that states its general principles—the first two explicitly, the third strongly implied by the reference to justice.¹²⁶ Similarly, the quoted language of the Declaration,¹²⁷ which states the premises behind the American Revolution and which the Framers certainly had in mind,¹²⁸ proclaims liberty and equality to be explicit purposes of the Revolution. In addition, it at least implies the need for a strong national government, as government is not only expected to ensure life and liberty, but also the pursuit of happiness.¹²⁹ To be sure, these purposes do not control the entire Constitution, which also includes many technical provisions, rules of the road, and arbitrary choices contained within its text. Some of these clauses represent political compromises, some the brute necessity of setting up a government, and some mere numerology—for instance the minimum ages for the President, senators and representatives, which are all divisible by five.¹³⁰ But consideration of the Constitution's three central underlying purposes mentioned above illuminates many of the most crucial and controversial provisions, especially those that reviewing courts have used to strike down legislative and executive decisions.

The historical record clearly indicates the importance of these themes. The Constitutional Convention was called for the explicit purpose of creating a strong national government to replace the obviously ineffective Articles of Confederation.¹³¹ Liberty, as Bernard

126. See *supra* note 65 and accompanying text.

127. See *supra* notes 62, 64 and accompanying text.

128. See RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 61 (2009).

129. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

130. See U.S. CONST. art. 1, § 2, cl. 2; *id.* art. 1, § 3, cl. 3; *id.* art. 2, § 1, cl. 4.

131. See BEEMAN, *supra* note 128, at 167-69; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 471-83 (1969). Specific problems that had arisen during

Bailyn has observed, meant much more to the Revolutionary generation than freedom from British imperialism; it was a genuine ideology, an abiding commitment that shaped the Framers' attitudes toward all questions of governance.¹³² Liberty was so well recognized by the general populace that it could serve as a rallying cry,¹³³ an organizational title,¹³⁴ and, in the speech that made Patrick Henry famous, a condition more valuable than life itself.¹³⁵ Equality was a similarly central idea to the Framers, as Gordon Wood has argued.¹³⁶ Its importance to the Revolutionary generation can only be understood by recalling the extent to which hierarchy dominated eighteenth-century society and to which patronage and privilege dominated eighteenth-century government.¹³⁷ Writing in the 1830s, Alexis de Tocqueville concluded that Americans, like other democratic peoples, "show a more ardent and more lasting love for equality than for freedom."¹³⁸

the Confederation Period included breaches of civil order, WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* 145-61 (2007); LEONARD L. RICHARDS, *SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE* 4-42 (2002); DAVID D. SZATMARY, *SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION* 37-69, 114-19 (1980); economic dislocation, Richard D. Brown, *Shays's Rebellion and the Ratification of the Federal Constitution in Massachusetts*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 113, 113-27 (Richard Beeman, Stephen Botein & Edward C. Carter II eds., 1987); BEEMAN, *supra* note 128, at 9; HOLTON, *supra* at 179-98, 213-23; Janet Riesman, *Money, Credit, and Federalist Political Economy*, in *BEYOND CONFEDERATION*, *supra*, at 28-61; and the threat of foreign intervention, RAKOVE, *supra* note 123, at 26-28.

132. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 55-93 (rev. ed. 1992).

133. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 n.54 (1994) (describing liberty as part of "a rallying cry for all those who hated government oppression" in the colonies).

134. The Sons of Liberty were a group of secret societies formed to foment the Revolution. See BENJAMIN L. CARP, *DEFIANCE OF THE PATRIOTS: THE BOSTON TEA PARTY AND THE MAKING OF AMERICA* 37, 161-81 (2010).

135. See HARLOW GILES UNGER, *LION OF LIBERTY: PATRICK HENRY AND THE CALL TO A NEW NATION* 96-99, 279-82 (2010).

136. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 232 (1991) ("Equality was in fact the most radical and most powerful ideological force let loose in the Revolution. Its appeal was far more potent than any of the revolutionaries realized. Once invoked, the idea of equality could not be stopped, and it tore through American society and culture with awesome power.").

137. See generally *id.* at 11-92.

138. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 479 (Harvey Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

It is beyond the scope of this Article to consider whether there were other principles guiding the formation and ratification of the Constitution that were as significant as these. An obvious candidate is democracy, but this involves complexities that the term's subsequent success tends to obscure. At the time the Constitution was being drafted, the term "democracy" still carried the negative connotations of mob rule that led Aristotle to characterize it as one of the perverted forms of government.¹³⁹ Many people still regarded democracy as a negative consequence of freedom and equality, rather than as the embodiment of these values.¹⁴⁰ The various nondemocratic features of the constitutional design that Sanford Levinson has noted reflect this ambivalence.¹⁴¹ Of course, the term quickly began to acquire the positive associations that prevail to this day,¹⁴² but as I have argued elsewhere,¹⁴³ this has occurred, at least in part, because it was associated with representative government, which was, and remains, a different concept.¹⁴⁴

139. ARISTOTLE, *supra* note 81, at 187-91. On the eighteenth-century attitude toward democracy, see JENNIFER TOLBERT ROBERTS, *ATHENS ON TRIAL* 175-93 (1994); WOOD, *supra* note 131, at 197-98.

140. *See, e.g.*, BAILYN, *supra* note 132, at 280-301. Bailyn notes that "democracy"—a word that denoted the lowest order of society as well as the form of government in which the commons ruled—was generally associated with the threat of civil disorder and the early assumption of power by a dictator." *Id.* at 282.

141. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 6-7 (2006). Among the features Levinson discusses are the Electoral College, state representation in the Senate, and life tenure for Supreme Court Justices. *Id.* The original Constitution also provided for the election of Senators by the state legislators, a system ended by the Seventeenth Amendment. *Id.* at 49.

142. *See generally* DE TOCQUEVILLE, *supra* note 138; 1 GEORGE GROTE, *A HISTORY OF GREECE; FROM THE EARLIEST PERIOD TO THE CLOSE OF THE GENERATION CONTEMPORARY WITH ALEXANDER THE GREAT* (2d ed. 1907) (presenting Athens, and thus democratic government, in a favorable light, as opposed to previous histories that favored Sparta).

143. Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 717-20 (2001).

144. Other possible candidates for animating principles, like property or capitalism, *see generally* CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (3d ed. 1941), raise additional complexities. For this Article's argument, consideration of strong national government, liberty, and equality as the dominant purposes is sufficient.

1. *Strong National Government*

The way that these values operate as constitutional purposes, as described in the preceding Section,¹⁴⁵ can be illustrated by briefly considering each in turn. When the Framers decided to create a strong national government that featured a chief executive, that acted by majority votes rather than by unanimity, and that possessed compulsory power over the states in a wide variety of areas, they may or may not have considered the possibility that the federal government might establish a national bank, or that a state might try to tax it. They certainly did not draft any language that explicitly addressed either issue.

In *McCulloch v. Maryland*, Chief Justice Marshall upheld the constitutionality of the Second Bank of the United States and struck down a tax that Maryland was trying to impose on it, memorably declaring that the “power to tax involves the power to destroy.”¹⁴⁶ The decision represents a fairly mild way in which purposes develop over time in response to circumstances. Marshall enthusiastically supported the purpose of strong national government.¹⁴⁷ Presented with a new national institution that the Framers had not specifically envisioned, he implemented that purpose by interpreting the powers of the national legislature, in particular the Necessary and Proper Clause, as encompassing that institution.¹⁴⁸ Presented with an unexpected threat to those powers in the form of a state tax, he implemented that same purpose by fashioning a new limit on state authority.¹⁴⁹ Both of Marshall’s decisions in *McCulloch* are more plausibly viewed as an adaptation of the purpose of strong national government to a novel, if not entirely unexpected, situation, than as an interpretation of either the Constitution’s language or the actual intent of its Framers.

Another, more dramatic adaptation of that principle came a short time later during the Nullification Crisis. In response to South

145. *See supra* Part I.B.

146. 17 U.S. (4 Wheat.) 316, 431 (1819).

147. *See* JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 140 (2002); JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 444-45 (1996).

148. *McCulloch*, 17 U.S. at 418-22.

149. *Id.* at 436.

Carolina's Ordinance of Nullification,¹⁵⁰ which declared the federal tariffs of 1828 and 1832 unconstitutional,¹⁵¹ President Jackson issued his "Proclamation to the People of South Carolina," asserting the constitutionality of the tariffs and the illegality of South Carolina's action.¹⁵² To assert that a state could nullify federal law, he wrote, is "incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed."¹⁵³ Jackson's statements are an interpretation of the Constitution. They rest on the explicit language of the Supremacy Clause,¹⁵⁴ but they interpret that Clause in response to circumstances, guided by the constitutional purpose of strong national government. They illustrate the role of nonjudicial actors—here, the President—in interpreting the document, an interpretation reiterated by the Court when the State of Arkansas attempted to, in effect, nullify the Court's earlier decision in *Brown v. Board of Education (Brown I)*.¹⁵⁵ To be sure, the Proclamation was an executive action, not a statute enacted by Congress, but the President is also an elected representative, and a purposive approach suggests that his actions may be equally relevant in revealing the meaning of the Constitution. In any case, Congress effectively codified Jackson's Proclamation in the

150. See DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 402-04 (2007); GLYNDON G. VAN DEUSEN, THE JACKSONIAN ERA, 1828-1848, at 72-73 (1959); SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 378-79 (2005). The Ordinance of Nullification was enacted by a special convention established by the South Carolina legislature.

151. HOWE, *supra* note 150, at 404.

152. H.W. BRANDS, ANDREW JACKSON: HIS LIFE AND TIMES 478-79 (2005); HOWE, *supra* note 150, at 405; VAN DEUSEN, *supra* note 150, at 74-75; WILENTZ, *supra* note 150, at 380-83.

153. VAN DEUSEN, *supra* note 150, at 74. Jackson went on to argue that the federal government represents the people, not the states, and thus a state that secedes "does not break a league, but destroys the unity of the nation." *Id.*

154. U.S. CONST. art. VI, cl. 2.

155. *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958). *Cooper* spoke in terms of obedience to the judiciary and judicial supremacy because the legal rule that the opinion reasserted was the one articulated previously by the Supreme Court in *Brown I* that "in the field of public education the doctrine of 'separate but equal' has no place." 347 U.S. 483, 495 (1954). But the reasoning in *Cooper* is equally applicable to a statute, and although the Court only cited judicial decisions, Jackson's language in his Proclamation reverberates in the Court's unanimous decision: "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.... A Governor who asserts a power to nullify a federal court order is similarly restrained." *Cooper*, 358 U.S. at 18-19.

Force Bill, which it passed the following year.¹⁵⁶ The Proclamation also illustrates the way that purposes guide the adaptation of the foundational document to circumstances at the pragmatic level: it not only removed any residual uncertainty about the effect of federal law but also established the federal government's right to use force to ensure compliance.¹⁵⁷

The same year that he issued the Proclamation, Jackson vetoed the bill rechartering the Second Bank of the United States.¹⁵⁸ Although he undoubtedly had a variety of political motivations, his stated rationale, like his rationale for issuing the Proclamation, was based on his interpretation of the Constitution.¹⁵⁹ The Bank's creation, he wrote, despite Marshall's decision in *McCulloch*, was beyond the power of the federal government.¹⁶⁰ Although no court has ever questioned his authority to veto the bill, his rationale for doing so has not survived: instrumentalities such as the Bank are now regularly created by the federal government and recognized as well within its powers.¹⁶¹ The reason is not that Jackson's understanding of the Constitution's language or the Framers' intentions was obviously wrong. It is because his use of the veto, unlike the Proclamation, was a constitutional interpretation in direct conflict with one of the Constitution's underlying purposes—the creation of a strong national government. Interestingly, Jackson, perhaps aware of this issue in light of the Nullification Crisis, attempted to support his argument by invoking the purpose of equality: the Bank, he argued, was an instrument of privilege.¹⁶² Although that was

156. See WILENTZ, *supra* note 150, at 385-86.

157. See BRANDS, *supra* note 152, at 476-78.

158. Timothy A. Canova, *Black Swans and Black Elephants in Plain Sight: An Empirical Review of Central Bank Independence*, 14 CHAP. L. REV. 237, 310 (2011).

159. BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 405-10 (1957); HOWE, *supra* note 150, at 379-80; VAN DEUSEN, *supra* note 150, at 66; WILENTZ, *supra* note 150, at 369-70.

160. See VAN DEUSEN, *supra* note 150, at 66.

161. See, e.g., Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified as amended at 12 U.S.C. §§ 221-522 (2006)) (establishing the Federal Reserve System).

162. HOWE, *supra* note 150, at 380 (“[W]hen the laws undertake to ... grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government.” (quoting Andrew Jackson, Veto Message (July 10, 1832), in 2 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 576, 590 (James D. Richardson ed., 1897))); see also WILENTZ, *supra* note 150, at 370.

probably correct, the constitutional purpose of equality has not been regarded as preventing the federal government from conferring economic advantages on some groups as opposed to others.

The application of the Constitution's purposes at the conceptual level to subsequent events that the Framers probably could not have imagined is further illustrated by the controversy over federal regulatory legislation. Medieval and early modern government generally left social welfare to private parties and religious institutions.¹⁶³ It was only in response to the industrialization and urbanization of the nineteenth century that European governments began to enact legislation related to social welfare.¹⁶⁴ The United States, for a variety of reasons, responded somewhat more slowly, and that response, because of the American adherence to federalism, came mainly from state governments in the period before the Civil War.¹⁶⁵ Toward the end of the nineteenth century, however, in the so-called Progressive Era, the federal government became much more interventionist, enacting a wide range of social welfare legislation.¹⁶⁶ The Supreme Court reacted by striking down or restricting a number of major federal enactments on Commerce Clause or Tenth Amendment grounds.¹⁶⁷ The Court's interpretation of these

163. For the scope of government in the late medieval and early modern periods, see generally COLLINS, *supra* note 46; ERTMAN, *supra* note 41; DENYS HAY, *EUROPE IN THE FOURTEENTH AND FIFTEENTH CENTURIES* (1966).

164. See, e.g., BARKER, *supra* note 42, at 73-74; HENRY JACOBY, *THE BUREAUCRATIZATION OF THE WORLD* 56-57 (Eveline L. Kaness trans., Univ. of Cal. Press 1973).

165. See BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* 299 (2009); see also SUSAN M. STERETT, *PUBLIC PENSIONS: GENDER AND CIVIC SERVICE IN THE STATES, 1850-1937*, at 4 (2003) (describing the states' central role in distributing pensions due to the lack of "national social welfare payments" pre-New Deal).

166. See JOHN WHITECLAY CHAMBERS II, *THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA, 1890-1920*, at 132-200 (2d ed. 2000); LEWIS L. GOULD, *AMERICA IN THE PROGRESSIVE ERA, 1890-1914*, at 38-67 (2001). See generally STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* (1982).

167. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 309-10 (1936) (striking down the Bituminous Coal Conservation Act as beyond the limits of the Commerce Clause); *United States v. Butler*, 297 U.S. 1, 77-78 (1936) (striking down the Agricultural Adjustment Act on Tenth Amendment grounds); *Hammer v. Dagenhart*, 247 U.S. 251, 273-74 (1918) (striking down the prohibition on goods produced by child labor on Tenth Amendment grounds); *Ill. Cent. R.R. Co. v. McKendree*, 203 U.S. 514, 527 (1906) (striking down quarantine requirement for diseased animals as beyond the limits of the Commerce Clause); *United States v. E.C. Knight Co.*, 156 U.S. 1, 14 (1895) (precluding the Sherman Antitrust Act from being applied

provisions, like its closely associated doctrine of substantive due process,¹⁶⁸ was repudiated by the Court when Franklin Roosevelt's appointees took control in the late 1930s.¹⁶⁹

Although it seems safe to assume that the Framers did not envision a regulatory state, that is not the relevant consideration. Changing circumstances have not only presented us with new problems but have essentially generated a new conception of government. A regulatory state is structured differently from its predecessor, enacts different kinds of legislation, and functions in different ways.¹⁷⁰ The relevant question is whether such a state comports with the underlying purpose of strong national government, and whether that purpose needs to be expanded, at the conceptual level, to encompass this previously unanticipated transformation. Clearly, it does: no modern state can dispense with regulatory legislation and function effectively. The reason that the early twentieth-century Commerce Clause and Tenth Amendment decisions were repudiated was not because the Progressive Era Court misinterpreted the Framers' intentions or the actual constitutional text, but because it misunderstood the Framers' purposes. The recent revival of the Commerce Clause¹⁷¹ only nibbles slightly at the edges of the

to manufacturing on Commerce Clause grounds).

168. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 200-04 (1995).

169. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942) (holding that a farmer who grew wheat for his own consumption was engaged in interstate commerce); *United States v. Darby*, 312 U.S. 100, 113-17 (1941) (concluding that regulation of labor conditions was within the scope of the Commerce Clause, overruling the rule laid down in *Hammer*); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 35-39 (1937) (determining that production is part of interstate commerce and thus that the processes related to it were within the scope of Commerce Clause regulation).

170. For an elaboration of this argument, see generally EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* (2005).

171. See, e.g., *United States v. Morrison*, 529 U.S. 598, 613 (2000) (invalidating the Violence Against Women Act as outside the scope of the Commerce Clause); *Printz v. United States*, 521 U.S. 898, 933-35 (1997) (invalidating on Tenth Amendment grounds the Brady Handgun Violence Prevention Act's provision that state law enforcement officials perform background checks on gun purchasers); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (holding that the Gun-Free School Zones Act exceeded Congress's authority under the Commerce Clause); *New York v. United States*, 505 U.S. 144, 149 (1992) (invalidating on Tenth Amendment grounds the Low-Level Radioactive Waste Policy Amendments Act's requirement that states take title to certain radioactive waste). The law the Court struck down in *Lopez* under the Commerce Clause occupied the outer limits of Commerce Clause authority and had features that distinguished it from the bulk of federal legislation. See

regulatory state; nonetheless, these decisions are vulnerable to criticism on this basis.¹⁷²

2. Liberty

The second purpose, that of securing liberty, clearly encompasses the freedom of speech. If there was any doubt concerning this when the Constitution was drafted, the adoption of the First Amendment removed it immediately.¹⁷³ There is equally little doubt that those who voted for this Amendment understood that it referred to political speech.¹⁷⁴ Although other types of speech, such as commercial speech, artistic speech, or nonverbal speech, may raise difficult questions about the First Amendment's coverage, political speech clearly lies at the Amendment's core.¹⁷⁵ But the pragmatic difficulties that both courts and elected officials have experienced in remaining true to that purpose have proven to be formidable. As Geoffrey Stone recounts in *Perilous Times*, elected officials have regularly enacted statutes punishing popular dissent during periods of war, and the courts have regularly upheld these statutes and convicted those indicted under them.¹⁷⁶

Stone identifies six sets of legal initiatives that fit this pattern: the Alien and Sedition Acts adopted during the first Adams administration's undeclared war with France,¹⁷⁷ the military arrests and

Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 694 (1995). Moreover, the Tenth Amendment decisions have not been followed or have been avoided in subsequent cases. *See, e.g.,* *Pierce County v. Guillen*, 537 U.S. 129, 148 n.10 (2003). *Printz* does not preclude federal agents from enforcing the Brady Act, 521 U.S. at 933; *New York* does not preclude the federal government from taking control of radioactive waste, 505 U.S. at 188.

172. For my argument that they are incoherent, see MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 136-37, 141 (2008).

173. U.S. CONST. amend. I ("Congress shall make no law ... abridging the freedom of speech.").

174. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 632 (1990).

175. *See id.* at 632-34.

176. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 12-13 (2004).

177. *Id.* at 16-17. In this case, the judiciary, which was overwhelmingly Federalist, enthusiastically supported the legislation. *Id.* at 68. The question was not whether the courts would strike down the Alien and Sedition Acts, but whether those accused under the Acts could avoid being tried by those courts. *See generally id.* at 48-66 (providing examples of prosecutions under the Sedition Act and corresponding judicial actions).

newspaper closures during the Civil War;¹⁷⁸ the Espionage and Criminal Syndicalism Acts passed during the First World War;¹⁷⁹ the Smith Act, the anti-Fascist trials, and the internment of Japanese-American citizens during World War II;¹⁸⁰ the McCarthyite hearings and prosecutions during the early years of the Cold War;¹⁸¹ and the various repressive measures adopted during the Vietnam War.¹⁸² In the first five of these situations—that is, during the first 179 years of our nation’s history—the Supreme Court made virtually no effort to control the bellicose frenzy that gripped the nation during times of conflict. The Court did overturn one of the McCarthy-era convictions in *Yates v. United States*, but it waited until a month and a half after Senator McCarthy was dead to do so.¹⁸³ It was not until its 1969 decision in *Brandenburg v. Ohio* that the Court definitively declared that political advocacy during times of war was protected by the First Amendment and could not be criminalized unless it threatened imminent harm.¹⁸⁴ Even then, the defendant whose conviction the case overturned was not a

178. *Id.* at 96, 98, 107-08.

179. *Id.* at 146-47, 224. Adjudicating a free speech case for the first time, a unanimous Supreme Court declared that Eugene Debs, a labor leader and Socialist candidate for President—who garnered nearly one million votes in 1912—could be lawfully imprisoned for ten years for saying that three other Socialists imprisoned under the Espionage Act were “paying the penalty for standing erect and for seeking to pave the way to better conditions for all mankind.” *Debs v. United States*, 249 U.S. 211, 213, 216-17 (1919); see STONE, *supra* note 176, at 196-98.

180. STONE, *supra* note 176, at 251, 272-73. Most notoriously, the Court sustained the internment of Japanese Americans. See *Korematsu v. United States*, 323 U.S. 214, 217-19 (1944). Although not a free speech case, it certainly involved a massive curtailment of the same underlying value, viz. liberty. Several years earlier, the Seventh Circuit upheld a fifteen-year prison sentence imposed on William Pelley, an outspoken anti-Semite and Nazi sympathizer, for saying that the Roosevelt administration could have prevented the Pearl Harbor attack and that the nation was not united in favor of the war. *United States v. Pelley*, 132 F.2d 170, 177 (7th Cir. 1942); see STONE, *supra* note 176, at 264-66.

181. STONE, *supra* note 176, at 313-14. Presented with an opportunity to dampen the anti-Communist frenzy of the era, the Court instead upheld the convictions of twelve members of the Communist Party’s national board under the Smith Act, essentially on the ground that the defendants subscribed to the general tenets of Communism and advocated for the overthrow of the U.S. government. *Dennis v. United States*, 341 U.S. 494, 516-17 (1951); see STONE, *supra* note 176, at 396-410.

182. STONE, *supra* note 176, at 479-500.

183. 354 U.S. 298, 303 (1957). McCarthy died on May 2, and the Court handed down the case on June 17. Moreover, the Court subsequently upheld a Smith Act conviction in 1961. See *Scales v. United States*, 367 U.S. 203, 206 (1961).

184. 395 U.S. 444, 448-49 (1969) (striking down Ohio’s criminal syndicalism law).

Vietnam War protestor, but a member of the Ku Klux Klan¹⁸⁵—hardly a group that was challenging the current war effort.

This lugubrious history shows how formidable the pragmatic difficulties of remaining committed to one's purposes can be. Looking back over the events that Stone has catalogued, few contemporary observers would have any doubt that most, if not all, of these government actions violated the First Amendment, whether on the basis of a textualist, originalist, or evolving theory of constitutional interpretation. But elected representatives adopted those actions and the judiciary upheld them. It was all very well for the Framers, in carrying out their purpose of securing liberty, to declare a right to free speech, but when subsequent political and judicial officials were confronted with the undesired consequences of that declaration—dissent at times of national crisis—these officials were unwilling to accept the consequences. No one could really say that the situations themselves were unexpected: it is unlikely that any of the Framers would have been surprised if they were told that the nation they were creating would end up in a war and that some citizens would oppose that war. But just as our college student, who realizes that he has to study in the evening rather than going out, might find even a readily anticipated consequence of his commitment surprisingly hard to follow in reality, American officials found the consequences of the purpose to which the nation was committed difficult to tolerate.

A similar and, in fact, even greater time lag in carrying out the purpose of liberty involves private sexual relations among homosexuals.¹⁸⁶ The Court did not strike down statutes criminalizing such relations until 213 years after the Bill of Rights was adopted.¹⁸⁷ For most of this time, however, the impediment was not pragmatic, but

185. *Id.* at 444.

186. I have used this example previously. For a fuller discussion see Rubin, *supra* note 19, at 317-18.

187. See *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003). The Court, when it finally acted, was eloquent in arguing that the statute infringes on individual liberty. Writing for the majority, Justice Kennedy began with a paean to liberty itself, *id.* at 562, and went on to say that “[t]he State cannot demean [gays’ and lesbians’] existence or control their destiny by making their private sexual conduct a crime.” *Id.* at 578. *But see* Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1407 (2004) (arguing that the Court’s definition of liberty was limited because it was phrased in terms of private conduct).

conceptual. Homosexual relations, and sexual relations in general, were not regarded as an aspect of liberty when the Constitution was drafted. The Framers were intimately familiar with the Spartan Constitution,¹⁸⁸ which extensively regulated sexual relations between married couples, but they probably did not expect the government they were creating to adopt such policies,¹⁸⁹ and were probably not thinking about homosexual relations at all.¹⁹⁰

The conceptual shift that redefined homosexual relationships as an aspect of human liberty did not begin with the judiciary. Rather, it was the product of changing social attitudes in general and of a social movement in particular. A social movement is the mobilization of people in civil society by policy entrepreneurs or by a collectively developing awareness.¹⁹¹ Examples include the civil rights movement,¹⁹² the environmental movement,¹⁹³ the antiabortion movement,¹⁹⁴ and, most recently, the Tea Party. These movements

188. JAMES MADISON, ALEXANDER HAMILTON & JOHN JAY, *THE FEDERALIST PAPERS* 372-73 (Isaac Kramnick, ed, 1987); BAILYN, *supra* note 132, at 23-25.

189. Their knowledge of this subject came primarily from Plutarch: "In order to the good education of their youth ... [Lycurgus] went so far back as to take into consideration their very conception and birth, by regulating their marriages." PLUTARCH, *supra* note 91, at 55. Lycurgus established a system in which husbands only had contact with their wives at night, so that "they sometimes had children by their wives before they ever saw their faces by daylight." *Id.* at 57. And he "allowed a man who was advanced in years and had a young wife to recommend some virtuous and approved young man, that she might have a child by him." *Id.* at 58. To read accounts like this and nonetheless express admiration for the Spartan Constitution, as the Framers did, *see* WOOD, *supra* note 136, at 64-65, 232, 423, indicates that they simply were not thinking of politics as relevant to marital and sexual matters.

190. The Court took note of this in *Lawrence*. *See* 539 U.S. at 568-69. The Declaration does not complain of any prohibition against homosexual conduct in its list of grievances against King George. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

191. *See supra* note 15.

192. *See generally* DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* (1991); DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970* (1982); ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* (1984).

193. *See generally* ROBERT GOTTLIEB, *FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT* (2005); POWER, JUSTICE, AND THE ENVIRONMENT: A CRITICAL APPRAISAL OF THE ENVIRONMENTAL JUSTICE MOVEMENT (David N. Pellow & Robert J. Brulle eds., 2005).

194. *See generally* KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984); ZIAD W. MUNSON, *THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS* (2008); JAMES RISEN & JUDY L. THOMAS, *WRATH OF ANGELS: THE AMERICAN ABORTION WAR* (1998); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L.L. REV. 373 (2007).

have shaped American politics in dramatic and decisive ways. The gay rights movement,¹⁹⁵ together with a generalized transformation of moral attitudes, began to change the legal landscape in the United States during the 1960s. In 1962, the Model Penal Code removed sodomy from its list of crimes.¹⁹⁶ Illinois, by enacting the code, became the first state to decriminalize homosexual sex between consenting adults.¹⁹⁷ In the following decades, an increasing number of states abolished laws criminalizing homosexual relations between consenting adults, and several of the major states enacted laws prohibiting discrimination on the basis of sexuality in employment and housing.¹⁹⁸ At the federal level, recognition of gay rights began with executive action: President Clinton's "Don't Ask, Don't Tell" Directive,¹⁹⁹ which modified, to the extent possible,

195. For a history of this movement, see generally BARRY D. ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT* (1987); JOHN D'EMILIO, *MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY* (1992); WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003* (2008) [hereinafter ESKRIDGE, *DISHONORABLE PASSIONS*]; WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

196. MODEL PENAL CODE § 213.2 note on status of section (Proposed Official Draft 1962); see ESKRIDGE, *DISHONORABLE PASSIONS*, *supra* note 195, at 121-24.

197. Criminal Code of 1961, §§ 11-2 to 11-3, 1961 Ill. Laws 1983, 2006, *repealed by* Criminal Sexual Assault, Criminal Sexual Abuse—Offenses Created §§ 27-28, 1983 Ill. Laws 7251, 7306; see ESKRIDGE, *DISHONORABLE PASSIONS*, *supra* note 195, at 124-27.

198. See ESKRIDGE, *DISHONORABLE PASSIONS*, *supra* note 195, at 194-228, 265-98.

199. A 1982 policy made open declarations of homosexuality grounds for discharge. DEP'T OF DEFENSE, DOD DIRECTIVE NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (1982). This policy was reiterated by statute in 1993 to forestall President Clinton from opening the military to homosexuals. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571(a), 107 Stat. 1547, 1670-71 (1993) (codified as amended at 10 U.S.C. § 634). Clinton responded by amending Dep't of Defense Directive No. 1304.26 in 1993 to modify Congress's "Don't Tell" with a countervailing "Don't Ask." The language added by Clinton is as follows (indicated by italics):

A person's sexual orientation is considered a personal and private matter, and is not a bar to service entry or continued service unless manifested by homosexual conduct in the manner described in [section 654 of Reference (c)]. Applicants for enlistment, appointment, or induction shall not be asked or required to reveal whether they are heterosexual, homosexual or bisexual. Applicants also will not be asked or required to reveal whether they have engaged in homosexual conduct, unless independent evidence is received indicating an applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual, or words to that effect.

DEP'T OF DEFENSE, DOD DIRECTIVE NO. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION (1993). Congress has since repealed the 1993 statute. See Don't

congressional legislation that essentially prohibited homosexuals from serving in the military.²⁰⁰ It was not until the Obama administration, however, that Congress repealed the prohibition itself.²⁰¹

The Supreme Court's first pronouncement on the constitutionality of laws criminalizing gay and lesbian sexual relations came in *Bowers v. Hardwick*, decided in 1986.²⁰² In upholding the challenged statute criminalizing sodomy,²⁰³ the Court ignored the constitutional purpose of protecting liberty, which it had already extended to other aspects of sexual relations in a number of leading cases.²⁰⁴ It also ignored the constitutionally relevant actions of state legislators, who had encompassed gay and lesbian relations within the purpose of protecting liberty by abolishing the laws against such relations.²⁰⁵ *Bowers* reached its result by characterizing gay and lesbian sex as a perversion, rather than as an aspect of intimate relations.²⁰⁶ It described the earlier right-to-privacy cases as involving "family, marriage or procreation," which is accurate but over literal, and declared that "none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy."²⁰⁷ But the expanding concept of liberty established exactly such a resemblance and the Court should have recognized that resemblance from the rationale of its prior cases as well as from the advancing tide of legislation in the gay and lesbian rights area. That is why the Court, less than twenty years later in *Lawrence v. Texas*, could say that "*Bowers* was not correct when it was decided, and it is not correct today."²⁰⁸

A notable feature of the Court's gay and lesbian rights doctrine is the correspondence between the changing attitudes of nonjudicial

Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

200. See National Defense Authorization Act for Fiscal Year 1994 § 571(a) (1993).

201. See *supra* note 199.

202. 478 U.S. 186 (1986).

203. *Id.* at 187-89.

204. Collectively, these cases were the so-called "right to privacy" cases. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also Mark Strasser, *Same-Sex Marriage and the Right to Privacy*, 13 J.L. & FAM. STUD. 117, 143-44 (2011).

205. See *supra* note 197 and accompanying text.

206. *Bowers*, 478 U.S. at 195-96.

207. *Id.* at 190-91.

208. 539 U.S. 558, 578 (2003).

actors and the Court's reversal of *Bowers* seventeen years later. Many political scientists see such correspondences as indicating that the courts are nothing more than policymakers and that their claim that they are interpreting authoritative legal sources like the Constitution is merely window dressing.²⁰⁹ Dissenting in *Lawrence*, Justice Scalia saw this correspondence as a surrender to popular opinion.²¹⁰ Gerald Rosenberg found that most leading Supreme Court decisions were in fact preceded by legislative trends that would have continued in the same direction had the Court not intervened, and he concluded that expecting the Court to be a social change agent is, as his work's title implies, a "hollow hope."²¹¹

But from the perspective of a purpose-based approach to the Constitution, the relationship can be seen in a different light. As discussed above, purposes only reveal their meaning to those who are committed to them over time.²¹² Although this is a matter of accepting the pragmatic consequences of the purpose in some cases—such as the right of free speech during wartime²¹³—it can also be a matter of developing new understandings about the range of situations to which the purpose applies. In this difficult and often disconcerting enterprise, it is always possible to learn and gain support from those who share that basic purpose. To do so is not a surrender nor an admission of irrelevance, but rather it is the kind of cooperative relationship that is so often needed in these circumstances.

209. See, e.g., LAWRENCE BAUM, *AMERICAN COURTS: PROCESS AND POLICY* 295-323 (5th ed. 2001); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 22-36, 50-51 (1998); VICTOR G. ROSENBLUM, *LAW AS A POLITICAL INSTRUMENT* (1955); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 1-25 (2002); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Donald L. Horowitz, *Social Policy and Judicial Capacity*, in *COURTS, LAW AND JUDICIAL PROCESSES* 34, 34-41 (S. Sidney Ulmer ed., 1981).

210. *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting) ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda.").

211. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 415-19, 430 (2d ed. 2008).

212. See *supra* notes 106-07 and accompanying text.

213. See *supra* notes 175-84 and accompanying text.

3. Equality

The same observations can be made regarding the constitutional purpose of equality, which was reaffirmed and strengthened by the Civil War Amendments.²¹⁴ No one at the time these Amendments were adopted could have had any doubt that they applied to African Americans.²¹⁵ But when *Plessy v. Ferguson* presented the constitutionality of racial segregation at the end of the nineteenth century, the Supreme Court was unwilling to confront the consequences of the Amendments' purpose.²¹⁶ It was certainly apparent that segregation led to devastating inequality. But the South had been rebuilt based on an elaborate system of apartheid,²¹⁷ and the Court in *Plessy* was unwilling to confront the consequences of unraveling that system. When the Court did so half a century later,²¹⁸ it could well have said that *Plessy* was wrong at the time it was decided. But its "all deliberate speed" solution indicated that it still quailed at the consequence that its decision would unravel the South's social system.²¹⁹ The Court would need assistance from elected officials before its effort to implement equality could be even partially successful. This is not to condemn the Warren Court for lack of courage nor to assert, as Rosenberg's argument does, that the judicial decision did not really matter.²²⁰ The point, rather, is that it is often truly difficult to remain true to one's purposes in real-world

214. U.S. CONST. amends. XIII, XIV, XV.

215. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) ("[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy."), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975).

216. 163 U.S. 537, 544 (1896), *overruled by Brown I*, 347 U.S. 483 (1954) (recognizing that "the object of the [Fourteenth A]mendment was undoubtedly to enforce the absolute equality of the two races before the Law" but determining that such an object "could not have intended to abolish distinctions based upon color").

217. See, e.g., EDWARD L. AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION* 132-59 (1992); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* 39-57 (2008); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 11-29 (3d rev. ed. 1974).

218. See *Brown I*, 347 U.S. at 494-95 (overruling *Plessy*'s separate but equal doctrine).

219. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (stating that lower "courts will require that the defendants make a prompt and reasonable start toward full compliance" with the Court's decision in *Brown I*).

220. See ROSENBERG, *supra* note 211.

situations, even when the dictates of those purposes are reasonably clear.

Applying the purpose of equality to women presented a conceptual difficulty, rather than a pragmatic one. The canonical formulation of this purpose in the Declaration of Independence raises the issue: When people in the eighteenth century said “men,” were they really thinking that the term included women? After virtually continuous unequal treatment during all three millennia of recorded history, it was not easy for the nine men on the Supreme Court to recognize the full meaning of equality in terms of gender. In fact, the implementation of the constitutional purpose in this case was carried out by nineteenth century legislatures that enacted married women’s property acts,²²¹ by the Nineteenth Amendment to the Constitution,²²² by a social movement that spanned the nineteenth and twentieth centuries,²²³ and by the Civil Rights Act of 1964,²²⁴ which almost inadvertently included “sex” as an invalid basis for employment determinations.²²⁵ The Court did not strike down a gender classification until 1971²²⁶ and did not apply heightened

221. See ELIZABETH BOWLES WARBASSE, *THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800-1861* (1987); Richard H. Chused, *Late Nineteenth Century Married Women’s Property Law: Reception of the Early Married Women’s Property Acts by Courts and Legislatures*, 29 AM. J. LEGAL HIST. 3, 3-5 (1985); Richard H. Chused, *Married Women’s Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1365-72 (1983).

222. U.S. CONST. amend. XIX.

223. For a history of the Women’s Rights Movement, see generally SARA EVANS, *PERSONAL POLITICS: THE ROOTS OF WOMEN’S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT* (1979); ESTELLE B. FREEDMAN, *NO TURNING BACK: THE HISTORY OF FEMINISM AND THE FUTURE OF WOMEN* (2002); ETHEL KLEIN, *GENDER POLITICS: FROM CONSCIOUSNESS TO MASS POLITICS* (1984); JEAN V. MATTHEWS, *THE RISE OF THE NEW WOMAN: THE WOMEN’S MOVEMENT IN AMERICA, 1875-1930*, at 45-119 (2003); SALLY G. McMILLEN, *SENECA FALLS AND THE ORIGINS OF THE WOMEN’S RIGHTS MOVEMENT* (2008).

224. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

225. CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115-19* (1985) (explaining how the word “sex” was added to Title VII of the Civil Rights bill by a floor amendment in the House proposed by Howard Smith, an inveterate opponent of civil rights legislation, in the hope of rendering the bill politically unacceptable); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 439-42 (1966).

226. See *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (using rational basis review to invalidate an Idaho law that ranked men above similarly situated women in choosing estate administrators).

scrutiny to such classifications until 1976.²²⁷ Unless one is willing to assert that the Court made a mistake in using a higher standard of review in 1976 than it did in 1971, the only plausible explanation is that interpreting a constitutional provision like the Equal Protection Clause involves a learning process. Provisions of this kind cannot be interpreted according to their explicit language or even according to the conscious intent of their framers. Rather, such provisions can only be understood as expressions of underlying purposes that reveal their meaning over time.²²⁸

II. POSITIVE RIGHTS AND THE U.S. CONSTITUTION

A. *The Idea of Positive Rights*

As the preceding Part suggests, the progressive revelation of our Constitution's meaning has moved constitutional doctrine in a particular direction that is consistent with the document's underlying purposes: toward greater equality and greater liberty for citizens. It would not be difficult to demonstrate that doctrine has moved in the direction of a stronger national government as well. This is not to minimize the difficulties of determining what constitutes more equality, more liberty, and a stronger government, nor to deny that the movement has not been steady or consistent. But if we adopt a reasonably long temporal perspective, that movement seems quite clear. It would be difficult to argue, for example, that citizen equality or liberty has not increased over the course of the post-World War II era, between 1945 and 2011, or that the federal government has not become more powerful during that same time.

This observation is admittedly teleological, but only in a cultural sense, not in a philosophical one. It does not adopt Mr. Herbert Spencer's *Social Statics* and reason that human development inevitably moves in a particular direction.²²⁹ Rather, the argument is that our nation, in understanding and developing the purposes to

227. See *Craig v. Boren*, 429 U.S. 190, 197-204 (1976) (using intermediate scrutiny to invalidate an Oklahoma law that established different drinking ages for men and women).

228. See *supra* notes 106-07 and accompanying text.

229. See HERBERT SPENCER, *SOCIAL STATICS OR THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED AND THE FIRST OF THEM DEVELOPED* (Augustus M. Kelley 1969) (1851); *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

which it committed itself at its inception, will move in one direction as long as we maintain our commitment to those purposes. This is certainly not inevitable. Present trends might reverse; the future might even come to resemble the worlds that Aldous Huxley, George Orwell, and Margaret Atwood envisioned.²³⁰ But this does not seem likely at the present time. Of course, our current political scene is filled with controversy, much of which clusters around issues of equality, liberty, and national authority. But these issues have always been controversial, and while current controversies seem particularly intense because they are salient to us, a moment's reflection will suggest that they can hardly be described as more severe than those that occurred in the Civil Rights Era, the Progressive Era, or the Civil War.

An interesting question, then, is where we as a nation might be headed. What new constitutional doctrines will emerge if present trends continue and the meaning of our Constitution's purposes continue to be revealed to us by changing circumstances and continued conceptual development? The answer is perhaps easier for us than it was for the Framers of our Constitution because we no longer represent the world's most advanced thought about these purposes. Political philosophers have been discussing the developing conception of liberty and equality for many decades, and in doing so have often focused on the idea of positive rights, sometimes called second-generation rights.²³¹ A number of nations have already codified these rights in their own constitutions,²³² and they are

230. See MARGARET ATWOOD, *THE HANDMAID'S TALE* (1986) (envisioning a fundamentalist dystopia); ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932) (envisioning a capitalist dystopia); GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949) (envisioning a totalitarian dystopia).

231. See, e.g., JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 30-31 (2d ed. 2003); WILLIAM F. FELICE, *TAKING SUFFERING SERIOUSLY: THE IMPORTANCE OF COLLECTIVE HUMAN RIGHTS* 144 (1996); JAMES GRIFFIN, *ON HUMAN RIGHTS* 12, 96 (2008); PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 20-21 (2d ed. 2003); JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* 111 (2d ed. 2007); HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 35-53 (2d ed. 1996).

232. Perhaps the one that has received the most attention is South Africa. Its Constitution of 1996 contains the following provisions: Article 24's right to a healthful environment; Article 26's "right to have access to adequate housing"; Article 27's rights to "have access to a. health care services, including reproductive health care; b. sufficient food and water; and c. social security"; and Article 29's right to education. S. AFR. CONST., 1996, available at <http://www.info.gov.Za/documents/constitution/>. Articles 30 and 31 grant group rights. *Id.*; see

prominently featured in the United Nations Universal Declaration of Human Rights.²³³ Although the recognition of such rights would represent a major and highly controversial development for American constitutional law, it is by now a fairly well-marked path that we can follow. Perhaps the fact that we, unlike our forebears, would not play the leading role in this enterprise might discourage us from pursuing it. But we should certainly not make our decisions on the basis of a sense of wounded pride, and we will hardly assume leadership of any sort by refusing to change or by oscillating back and forth along the boundaries of the same rights that we have already recognized. In the end, moreover, it may turn out that we still have something to teach the world about the mechanisms by which positive rights can be secured.

Positive rights are generally defined as legally enforceable claims to food, shelter, health care, education, and sometimes employment.²³⁴ They are called positive rights because they require the

Richard I. Goldstone, *A South African Perspective on Social and Economic Rights*, 13 HUM. RTS. BRIEF 4, 4-6 (2006); Mark S. Kende, *The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 CHAP. L. REV. 137, 142-47 (2003). For a discussion of the modern trend towards increasing acceptance of positive rights around the world, see SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 21-26 (1991) (examining the democratization of Latin America and Asia after the 1970s); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 868-72 (1986) (discussing the German constitution); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 521-29 (1992).

233. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948). Articles 2-21 articulate a full set of negative rights, including a few that might be regarded at the outer edge of this concept, such as the right to asylum in Article 14. *Id.* art. 2-21. Articles 22-26 specifically affirm positive rights: the right to social security, the right to employment, the right to rest and leisure, the right to health and well-being, and the right to an education. *Id.* art. 22-26. Article 25 is most relevant to this discussion. It reads:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Id. art. 25. For the background of the Universal Declaration, see MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* xv-xxi (2001); JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* ix-xiv (1999).

234. See John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1745 (2009); Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*,

state to take initiatives and, more mundanely, but perhaps more significantly, to appropriate funds.²³⁵ They stand in contrast to negative rights, which forbid the state from taking action of some kind.²³⁶ Thus, to grant citizens a right to freely exercise their religion, the state, at least in theory, need not take any action at all; all it need do is avoid taking certain actions.²³⁷ To grant citizens a right to decent housing, in contrast, requires the allocation of resources to ensure a material condition. The term second-generation rights derives from the idea that negative rights were the original, or first-generation, rights, and that positive rights come later.²³⁸ Third generation rights, incidentally, are those that can be asserted by a group of people regarding the conditions of the group, such as its ability to maintain its language.²³⁹ Second-generation rights, like first-generation rights, are typically asserted by individuals.²⁴⁰

73 ALB. L. REV. 1459, 1464 (2010).

235. Mark Tushnet, Essay, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985, 999 (2009).

236. The terminology comes from a seminal article by Isaiah Berlin. See BERLIN, *supra* note 85, at 121-22; see also *infra* notes 363-68 and accompanying text.

237. Cf. Faisal Bhabha, *Institutional Access-to-Justice: Judicial, Legislative and Grassroots Dimensions*, 33 QUEEN'S L.J. 139, 157 n.63 (2007).

238. The origins of negative rights are often traced back to the Middle Ages. See BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW*, 1150-1625, at 28-29, 343 (1997); RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* 5-7 (1979); Arthur Stephen McGrade, *Ockham and the Birth of Individual Rights*, in *AUTHORITY AND POWER: STUDIES ON MEDIEVAL LAW AND GOVERNMENT PRESENTED TO WALTER ULLMANN ON HIS SEVENTIETH BIRTHDAY* 149, 149-53 (Brian Tierney & Peter Linehan eds., 1980); Arthur Stephen McGrade, *Rights, Natural Rights, and the Philosophy of Law*, in *THE CAMBRIDGE HISTORY OF LATER MEDIEVAL PHILOSOPHY: FROM THE REDISCOVERY OF ARISTOTLE TO THE DISINTEGRATION OF SCHOLASTICISM, 1100-1600*, at 738, 738-42 (Norman Kretzmann, Anthony Kenny & Jan Pinborg eds., 1982). Other scholars argue that rights originated in the early modern period, see MACPHERSON, *supra* note 26, at 263-69, or the Enlightenment, see LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* 26-32 (2007), which is certainly the latest plausible date. Positive rights, on the other hand, are generally regarded as a product of twentieth-century thought. See G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7, 12 (2011). See generally DONNELLY, *supra* note 231.

239. They are also called group rights. See DONNELLY, *supra* note 231, at 204-24; FELICE, *supra* note 231, at 1-3; GRIFFIN, *supra* note 231, at 256-76; WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 1, 35 (1995); Michael Hartney, *Some Confusions Concerning Collective Rights*, in *THE RIGHTS OF MINORITY CULTURES* 202, 202 (Will Kymlicka ed., 1995); Darlene M. Johnston, *Native Rights as Collective Rights: A Question of Group Self-Preservation*, in *THE RIGHTS OF MINORITY CULTURES*, *supra*, at 179.

240. Natsu Taylor Saito, *Beyond Civil Rights: Considering "Third Generation" International*

A fairly substantial body of scholarly literature argues that positive rights should be recognized as part of our Constitution.²⁴¹ Generally, such arguments have focused on the meaning of specific constitutional clauses.²⁴² The argument here is that positive rights are the next phase in the revelation of our purposes, an expression and embodiment of our evolving understanding of equality and liberty. Positive rights would not necessarily represent a further strengthening of the national government, because state governments could fully satisfy positive rights, and, indeed, these rights fall securely into the areas that are classically reserved to the states.²⁴³ But as a practical matter, the national government is likely to take a leading role in advancing these rights.²⁴⁴ The result is that the national government will be strengthened, not in the fairly trivial sense that it will add additional functions, but in the deeper sense that it will play a more important role in the lives of many of its citizens.

Although the Constitution does not have minimal housing or elementary and secondary education clauses, we can certainly find

Human Rights Law in the United States, 28 U. MIAMI INTER-AM. L. REV. 387, 395 (1997).

241. *E.g.*, CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 207 (2004); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2346-47 (1990); Albert M. Bendich, *Privacy, Poverty, and the Constitution*, 54 CALIF. L. REV. 407, 407-08 (1966); Michael J. Gerhardt, *Essay, The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 412-13 (1990); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1295 (1984); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1278 (1993); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 966 (1973) [hereinafter Michelman, *In Pursuit of Constitutional Welfare Rights*]; Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9-11 (1969) [hereinafter Michelman, *On Protecting the Poor*]; Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 659-60; Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 4-5 (2005); William E. Forbath, *Review Essay, Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1771-73 (1994) (reviewing CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993)).

242. *See, e.g.*, Michelman, *On Protecting the Poor*, *supra* note 241, at 11 (suggesting the Equal Protection Clause).

243. *See* Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1057-59 (1993); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999).

244. *See infra* Part II.B.

a basic commitment to positive rights in the previously quoted and overly familiar words of the Declaration and the Preamble.²⁴⁵ The Declaration not only mentions liberty but also the pursuit of happiness.²⁴⁶ The Preamble speaks of establishing justice, promoting the general welfare, and securing the blessings of liberty.²⁴⁷ The text of the Constitution, and specifically the Fourteenth Amendment, is certainly capacious enough to include positive rights.²⁴⁸ This is not to say that the language compels recognition of these rights. The conclusion that positive rights represent a plausible interpretation of the Constitution relies on the interpretative approach outlined in the preceding Part,²⁴⁹ namely, that the Constitution is in essence an intentional or purposive document, and that the meaning of those purposes is only revealed over time.²⁵⁰

To expect explicit language regarding positive rights is a brute anachronism, akin to asking why the Constitution excludes the air force from the nation's military powers, or why the Cruel and Unusual Punishment Clause fails to mention prisons.²⁵¹ Positive rights belong to the realm of changing circumstances, the first way

245. See *supra* notes 62-65 and accompanying text.

246. See *supra* note 62 and accompanying text.

247. See *supra* note 65 and accompanying text.

248. See U.S. CONST. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person ... the equal protection of the laws.”).

249. See *supra* Part I.C.

250. See Rubin, *supra* note 19, at 302-14.

251. This may seem like a simplistic example, but the point is apparently lost on Justice Thomas. He has repeatedly insisted that the Eighth Amendment's Cruel and Unusual Punishment Clause was not intended to apply to prisons. See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 19 (1992) (Thomas, J., dissenting) (“Surely prison was not a more congenial place in the early years of the Republic than it is today; nor were our judges and commentators so naive as to be unaware of the often harsh conditions of prison life. Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment.”); see also *Farmer v. Brennan*, 511 U.S. 825, 859 (1994) (Thomas, J., concurring in the judgment) (reaffirming his view that the Eighth Amendment does not apply to prisons); *Helling v. McKinney*, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting) (same).

The difficulty is that there were no prisons in the United States, and perhaps the world at that time: Philadelphia's Walnut Street prison, a pioneering effort, was established the same year the Eighth Amendment was enacted. See BLAKE MCKELVEY, *AMERICAN PRISONS: A STUDY IN AMERICAN SOCIAL HISTORY PRIOR TO 1915*, at 7 (1936); DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 61 (rev. ed. 1990).

that purposes reveal their meaning over time,²⁵² because they only become possible once government, at either the state or federal level, has developed administrative capacities. They also belong to the realm of developing conceptions, the second mode of revelation.²⁵³ The people who drafted the Constitution, and those who ratified it, grew up under an autocratic colonial regime whose control seemed all the more oppressive because it treated them so much more harshly than it treated its own citizens in the mother country.²⁵⁴ Their immediate concern was to end the oppressions that were so salient to them and then to create a new government for themselves that would never repeat those oppressions. We all recognize the time-bound character of the Declaration's list of grievances, and the Third Amendment's prohibition on quartering soldiers in private homes,²⁵⁵ an outmoded military device that modern governments, even totalitarian ones, no longer employ. Just as our founding documents explicitly address issues that are no longer of concern, they also omit issues that were not of concern at the time but have arisen during the centuries that followed.

The literature on this subject has widely discussed the way that positive rights advance the purposes of equality and liberty. One common rationale is grounded on the central role of political participation in our democratic system: as Bruce Ackerman has pointed out, people are not required to participate, but the system as a whole depends heavily on their willingness to do so.²⁵⁶ In addition, we regard political participation as an inherent value, something that many people find deeply important and believe should be robustly protected.²⁵⁷ Positive rights are then regarded as

252. See Rubin, *supra* note 19, at 309-15 (considering examples of such changing circumstances and how such changes reveal the meaning of purposes over time).

253. See *id.* at 315-18 (discussing examples of such developing conceptions and how those conceptions reveal the meaning of statutes over time).

254. EDWARD COUNTRYMAN, *THE AMERICAN REVOLUTION* 105 (1985).

255. U.S. CONST. amend. III.

256. Cf. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 302 (1980).

257. See HANNAH ARENDT, *THE HUMAN CONDITION* 22-25 (1958); AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* 141-42, 374-78 (1993); CAROL C. GOULD, *RETHINKING DEMOCRACY: FREEDOM AND SOCIAL COOPERATION IN POLITICS, ECONOMY, AND SOCIETY* 81, 84-85 (1988); PAUL HIRST, *ASSOCIATIVE DEMOCRACY: NEW FORMS OF ECONOMIC AND SOCIAL GOVERNANCE* 74-75 (1994); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 128-33 (1996); PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY*

instrumental to participation: people are unlikely to participate if they lack the basic necessities of life, and they cannot participate effectively if they are uneducated.²⁵⁸ To put the point another way, if people are disenfranchised by starvation, they are certainly not equal to their more prosperous co-citizens, and their essential liberty to participate has been infringed.²⁵⁹

A second way that positive rights are connected to equality and liberty is noninstrumental. We often think of equality as involving the difference between the richest and the poorest members of society, sometimes measured by a device called the Gini Coefficient.²⁶⁰ This is normatively troublesome as a basis for positive rights, however, because it appears to valorize envy.²⁶¹ A different notion of equality posits that everyone is entitled to minimally adequate material conditions of life.²⁶² The connection with equality is that these minimally adequate conditions represent the recognition that every person is a valuable human being, a citizen of Kant's kingdom of ends.²⁶³ It is possible, moreover, to connect this notion back to the

314-18 (1992).

258. See Sotirios A. Barber, *Welfare and the Instrumental Constitution*, 42 AM. J. JURIS. 159, 177-78 (1997); Peter B. Edelman, Essay, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 34 (1987); Charles A. Reich, *The Liberty Impact of the New Property*, 31 WM. & MARY L. REV. 295, 298-99 (1990).

259. This rationale excludes a positive right to employment, which must be distinguished from the negative right to work. If one has the basic necessities of life, being unemployed certainly does not interfere with one's political participation.

260. See JAMES FOSTER & AMARTYA SEN, ON ECONOMIC INEQUALITY 29-31 (rev. ed. 1997); see also AMARTYA SEN, INEQUALITY REEXAMINED 104 (1992).

261. The usual view of moral philosophers is that envy is something to be avoided. See JOSEPH EPSTEIN, ENVY: THE SEVEN DEADLY SINS 1 (2003); FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY 52 (Keith Ansell-Pearson ed., Carol Diethe trans., 1994) (1887); RAWLS, *supra* note 63, at 530-41.

262. See, e.g., FELICE, *supra* note 231, at 18; NICKEL, *supra* note 231, at 94-95, 100; Michelman, *In Pursuit of Constitutional Welfare Rights*, *supra* note 241, at 975, 985. Shue articulates this point:

This book is about the moral minimum—about the lower limits on tolerable human conduct, individual and institutional. It concerns the least that every person can demand and the least that every person, every government, and every corporation must be made to do. In this respect the bit of theory presented here belongs to one of the bottom corners of the edifice of human values. About the great aspirations and exalted ideals, saintly restraint and heroic fortitude and awesome beauties that enrich life, nothing appears here....

This is a book only about where decent life starts.

SHUE, *supra* note 231, at ix.

263. See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* (1785), *reprinted*

differences between rich and poor, but in a more morally attractive way, by noting that wealth has decreasing marginal utility. Whether one is starving or has enough to eat makes an enormous difference in one's life; whether one has enough to eat or whether one can dine on caviar and truffles makes less of a difference. In short, the gap between someone who is starving and a rich person is much greater than the gap between someone who has just enough to eat and that same rich person.²⁶⁴ Thus, satisfying minimal needs significantly increases social equality.

With respect to liberty, we could invoke Franklin Roosevelt's sonorous phrase that a basic component of human freedom is freedom from want, but this is uncomfortably close to a play on words.²⁶⁵ A somewhat more concrete formulation asserts that liberty involves the absence of external constraints that unnecessarily interfere with one's ability to live as one desires.²⁶⁶ Suppression of one's speech or prohibition of one's religion certainly has this effect, but so do hunger, homelessness, or illness. The point here is not that these conditions stop a person from doing other things—the instrumental approach—but rather that these conditions are, in themselves, experienced as constraints. To develop this claim more fully, the word “unnecessarily” would need to be unpacked. For present purposes, it is sufficient to note that constraints like property rules can be seen as necessary interferences because simply taking someone else's property, such as a car, interferes with that person's liberty to use that property. Providing everyone with the basic necessities of life does not have such an effect on others, at least in a reasonably prosperous society such as our own.²⁶⁷

in ETHICAL PHILOSOPHY 1, 39-44 (James W. Ellington trans., 1983).

264. More precisely, the difference in the gap between the starving person and the rich person, on the one hand, and the minimally fed person and the rich person on the other, is larger than the difference between the starving person and the minimally fed person. Thus, providing minimal sustenance increases equality by an amount greater than its cost. An even stronger connection with equality could be demonstrated if the difference between the starving person and the minimally fed person could be shown to be greater than the difference between the minimally fed person and the rich person, but this point is unclear.

265. “Unless There Is Security Here at Home, There Cannot Be Lasting Peace in the World” — Message to the Congress on the State of the Union, 1944-45 PUB. PAPERS & ADDRESSES OF FRANKLIN DELANO ROOSEVELT 34 (Jan. 11, 1944).

266. *E.g.*, DONALD VANDEER, PATERNALISTIC INTERVENTION: THE MORAL BONDS OF BENEVOLENCE 30 (1986).

267. *But see* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 169-72 (1974) (arguing that

B. Statutes as Declarations of Positive Rights

Based on the long-acting trend toward the expansion of equality and liberty rights, on the arguments in the preceding Part,²⁶⁸ and on the new constitutions that other nations are drafting,²⁶⁹ it might seem that the recognition of positive rights would be the next major development in American constitutional law. But a survey of current constitutional doctrine casts serious doubt on this conclusion. The contemporary Court, while not overtly hostile to rights claims, seems to prefer retrenchments and clarifications to major innovations.²⁷⁰ Moreover, after strongly indicating in a series of cases decided during the 1970s and 1980s that it would not recognize positive rights,²⁷¹ the Court in 1989 explicitly declared

taxation for purposes other than physical security is equivalent to compelled labor); *see also infra* note 376 and accompanying text (discussing this claim). For the present, we can distinguish between taxation, which only reduces the total resources available to a person by a specified amount, and compulsion to perform specific actions. *See* Linda Sugin, *A Philosophical Objection to the Optimal Tax Model*, 64 TAX L. REV. 229, 259 (2011). Under this assumption, a tax would be a constraint on liberty only if it were so onerous that it interfered with the person's range of action. *Id.* Thus it may be necessary to restrict positive rights to reasonably prosperous countries. Another option is to impose the obligations internationally. *See, e.g.,* FELICE, *supra* note 231, at 106-11 (describing how international law could help solidify the emerging normative framework for global human rights); SHUE, *supra* note 231, at 155-74 (recommending minimum requirements by which national governments could advance human rights transnationally).

268. *See supra* Part II.A.

269. *See supra* notes 231-32 and accompanying text.

270. For example, the Warren Court established basic criminal procedure protections regarding police searches and interrogations. *See* *Miranda v. Arizona*, 384 U.S. 436 (1966) (applying Fifth Amendment self-incrimination requirements to the states and to police interrogations generally and enforcing these requirements through the exclusionary rule); *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying Fourth Amendment search and seizure requirements to the states and enforcing these requirements through the exclusionary rule). Recent decisions have either limited those protections, *see, e.g.,* *Florida v. Powell*, 130 S. Ct. 1195 (2010) (right to counsel during interrogation does not need to take the precise form of the warnings prescribed in *Miranda*); *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (resident can give consent to a warrantless search that incriminates an absent owner) or extended them in minor ways, *see, e.g.,* *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (police must adapt *Miranda* warnings when interrogating a juvenile and provide additional explanation when necessary for understanding); *Georgia v. Randolph*, 547 U.S. 103 (2006) (police may not conduct a warrantless search of a residence on the basis of one resident's consent if another resident objects). There are of course, exceptions to the pattern. *E.g.,* *Lawrence v. Texas*, 539 U.S. 558 (2003) (reversing prior decision and striking down state laws criminalizing homosexual sex).

271. *Harris v. McRae*, 448 U.S. 297, 318 (1980) (no right to medical care); *San Antonio*

that it would not do so in *DeShaney v. Winnebago County Department of Social Services*.²⁷² Justice Rehnquist, writing for a six-Justice majority, said:

[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.²⁷³

As noted above, however, the court system is not the only institution that interprets the Constitution.²⁷⁴ Legislatures do so as well when they enact statutes that advance the Constitution's purposes. To reiterate, this is not because they change the political climate, enabling the courts to reach decisions that would have been politically unacceptable prior to the statutory enactments. That effect undoubtedly occurs, but its judicial results are difficult to justify in normative terms. Rather, statutes affect judicial interpretation of the Constitution because the statutes themselves are interpretations. They represent the legislature's contribution to the interpretive process by which the meaning of the Constitution, as a purpose-based document, is revealed to us over time.²⁷⁵ Thus, if we want to know the current state of constitutional thinking about positive rights, we need to look to statutes as well as to decided cases.

The relevant statutory enactments occur at both the federal and state levels, of course. State enactments are just as important as federal ones in understanding how statutes interpret the Constitution. The Constitution fully applies to the states, and when

Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (no right to an education); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (no right to housing); Dandridge v. Williams, 397 U.S. 471, 484 (1970) (no right to minimal sustenance).

272. 489 U.S. 189, 196-97 (1989).

273. *Id.* at 195.

274. See, e.g., *supra* notes 117-30 and accompanying text.

275. See Rubin, *supra* note 19, at 308-09.

people perceive something to be a moral imperative, they will strive to implement it at every level of government. In fact, as indicated above, much of the legislation that contributed to our understanding of equality for women, racial minorities, and homosexuals was enacted by the states.²⁷⁶ This Part will focus on federal legislation, however. To some extent, this is simply for brevity of presentation. In addition, however, a major element in the analysis, for reasons that will appear below, is the nationwide reach of federal legislation, one feature that state legislation cannot possess.

At the federal level, there have been a number of major enactments that implement the Constitution's purposes by establishing positive rights. The first comprehensive federal legislative effort to provide Americans with the basic necessities of life was the Social Security Act.²⁷⁷ Franklin Roosevelt famously structured this Act, against the advice of his economic advisors, as an insurance program funded by payroll taxes, rather than as a welfare program, to preclude its repeal or retrenchment.²⁷⁸ His political judgment, in this area as in so many others, was unerring. The usual account of why this strategy worked is that the Social Security Act's old age payments were conceived of as a property right that people had earned rather than as a form of welfare.²⁷⁹ A related reason for the program's success was that it did not grant universal benefits but applied only to the presumptively virtuous people who had worked for a living before they reached the required age.²⁸⁰ Although not structured as insurance, the Social Security Act's disability benefits possess this second characteristic as well. These benefits are available only to those who can demonstrate that they are unable to work; in other words, people who would work if they possibly could.²⁸¹ Again, the Social Security Act's provisions for disability

276. See *supra* notes 196-97, 214, 222 and accompanying text.

277. Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

278. See NANCY J. ALTMAN, *THE BATTLE FOR SOCIAL SECURITY: FROM FDR'S VISION TO BUSH'S GAMBLE* 82-83 (2005); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940*, at 132 (1963).

279. See, e.g., LEUCHTENBURG, *supra* note 278, at 132-33.

280. See *id.* at 132.

281. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 23-24 (1983).

benefits move toward a regime of positive rights without expressly acknowledging this intention.²⁸²

The federal effort to ensure that every American has sufficient food can be conceived as a universal welfare right, and suffers from political vulnerability as a result. The effort is colloquially known as the Food Stamp Program after the device used to distribute funds to needy Americans so that they can purchase a minimally adequate amount of food for themselves and their families.²⁸³ Franklin Roosevelt's Secretary of Agriculture, Henry Wallace, established the first Food Stamp Program in 1939, permitting people on relief to purchase orange stamps that could be used to pay for food at a discounted rate.²⁸⁴ The Program ended in 1943 and was not revived by the Truman administration.²⁸⁵ In 1959, Congress passed a federal food stamp act,²⁸⁶ which the Kennedy administration implemented on a pilot basis in 1961.²⁸⁷ In 1964, as part of his War on Poverty, Lyndon B. Johnson urged and obtained enactment of the current Food Stamp Act,²⁸⁸ a comprehensive law providing food relief to needy Americans.²⁸⁹ The 1964 Act required the states to develop eligibility standards and provided that people who met those standards could purchase food stamps that could be redeemed

282. See generally ALTMAN, *supra* note 278; DANIEL BÉLAND, *SOCIAL SECURITY: HISTORY AND POLITICS FROM THE NEW DEAL TO THE PRIVATIZATION DEBATE* (2005).

283. Patti S. Landers, *The Food Stamp Program: History, Nutrition Education, and Impact*, 107 J. AM. DIETETIC ASS'N 1945, 1945 (2007). See generally RONALD F. KING, *BUDGETING ENTITLEMENTS: THE POLITICS OF FOOD STAMPS* (2000).

284. Landers, *supra* note 283, at 1946.

285. *Id.* In part, Truman may have declined to revive the program because he owed his vice-presidential nomination in 1944—and thus his presidency—to the fact that Wallace, the front runner for the vice-presidential nomination, was perceived as too radical by the power brokers in the Democratic Party. See CONRAD BLACK, *FRANKLIN DELANO ROOSEVELT: CHAMPION OF FREEDOM 1945* (2003); JAMES MACGREGOR BURNS, *ROOSEVELT: THE SOLDIER OF FREEDOM 1945-50* (1970); DAVID MCCULLOUGH, *TRUMAN 1945-53* (1992). The Eisenhower administration had declined to implement the program. *Id.* at 424.

286. Act of Sept. 21, 1959, Pub. L. No. 86-341, § 11, 73 Stat. 606, 608-09.

287. See Karen Terhune, Comment, *The Reformation of the Food Stamp Act: Abating Domestic Hunger Means Resisting "Legislative Junk Food,"* 41 CATH. U. L. REV. 421, 421 (1992). The Eisenhower administration had declined to implement the program.

288. See Food Stamp Act of 1964, Pub. L. No. 88-525, §§ 5-7, 78 Stat. 703, 704-05 (codified as amended in scattered sections of 7 U.S.C.).

289. Brendan Mahiren, Recent Development, *The U.S. and Them: Cutting Federal Benefits to Legal Immigrants*, 48 WASH. U. J. URB. & CONTEMP. L. 319, 325 (1995).

for amounts of food whose value exceeded the amount they had paid for the stamps.²⁹⁰

The Program grew rapidly and has been the subject of repeated federal enactments. Some of these enactments expanded the program and made it easier for people to use. The Food Stamp Act of 1977 provided that eligible citizens would be given food stamps directly, eliminating the requirement that they buy the stamps.²⁹¹ The Electronic Benefit Transfer Interoperability and Portability Act of 2000 began the process of replacing the stamps with an authorization card that could draw on funds that the federal government deposited in a designated account.²⁹² This was partially to realize the efficiencies that electronic funds transfers had already demonstrated in the private sector, and partially to remove the stigma attached to the program by replacing the *sui generis* stamps with a payment device resembling the credit cards that everyone else used.²⁹³ There were also a variety of efforts to limit the program by reducing fraud, eliminating certain categories of participants such as students, illegal aliens, and the voluntarily unemployed, and reducing the level of benefits.²⁹⁴ Overall, however, participation increased rapidly, reaching a total of 29 million Americans by 2008.²⁹⁵ In that same year, Congress passed the Food, Conservation,

290. Food Stamp Act of 1964 §§ 4-5.

291. Food Stamp Act of 1977, Pub. L. No. 95-113, sec. 1301, § 7(b), 91 Stat. 958, 967 (codified as amended at 7 U.S.C. § 2016 (2006)); *see also* H.R. REP. NO. 95-464, at 238-39 (1977) (reviewing the testimony offered in favor of eliminating the purchase requirement provision).

292. Electronic Benefit Transfer Interoperability and Portability Act of 2000, Pub. L. No. 106-171, sec. 3, § 7(k), 114 Stat. 3, 3-4 (codified as amended at 7 U.S.C. § 2016 (2006)).

293. Martha B. Coven, Essay, *The Freedom to Spend: The Case for Cash-Based Public Assistance*, 86 MINN. L. REV. 847, 892 (2002).

294. *See* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act of 2001, Pub. L. No. 106-387, 114 Stat. 1549A, 1549A-23 to 1549A-25 (2000) (reducing funding levels); Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105, 2315 (1996) (declaring ineligible any person who voluntarily quits a job or cuts back a job to less than thirty hours per week); Food Stamp Act of 1977, Pub. L. No. 95-113, 91 Stat. 913, 964-67 (requiring recipients to register for work and not leave existing employment without good cause, excluding students who are claimed as dependents by a noneligible household and requiring them to register for work when school is in recess for more than 30 days, and excluding illegal aliens). Many of these provisions once again indicate our strong national preference for those who work. *See* KATHERINE S. NEWMAN, *NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY* 86-89 (1999).

295. Sheila Fleischhacker & Joel Gittelsohn, *Carrots or Candy in Corner Stores?: Federal*

and Energy Act, increasing the funds for the program by more than \$10 billion over the next ten years. The 2008 Act also changed the program's name to the Supplemental Nutrition Assistance Program,²⁹⁶ thereby creating the sprightly acronym of SNAP—another attempt to reduce the stigma associated with the program. When George W. Bush vetoed the legislation, Congress passed it over his veto, an unusual occurrence indicating the level of support for the 2008 Act, as well as the hostility toward Bush.

In short, over the past fifty years, the federal government has gradually instituted a statutory program that provides at least a certain level of food security to a large number of Americans. The Food Stamp Program's dramatic expansion and political resilience suggest that the nation is gradually recognizing that there is a right to sustenance.²⁹⁷ Exclusions from the eligibility rules have generally been based on conditions that do not detract from the commitment to ending hunger in America; these exclusions are concerned with people who do not need the assistance, such as students, or people who are not considered American citizens, such as illegal aliens.²⁹⁸ But the program has not been fully successful in achieving its goals, and it remains a subject of controversy.²⁹⁹ As supporters' repeated efforts to reduce the stigma associated with providing assistance to the poor indicates, there remains continued resistance to the idea that everyone in the nation is entitled to a minimally adequate amount of food.

Facilitators and Barriers to Stocking Healthier Options, 7 *IND. HEALTH L. REV.* 23, 36 (2010).

296. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 4002, 122 Stat. 923, 1092 (codified in scattered sections of 7 U.S.C.).

297. Writing in the *William and Mary Law Review*, Charles Reich put the point as follows:

[T]he idea that food stamps are a privilege has been invalidated by changing reality. Our original condition was a world in which people could support themselves by working on the land. Now we live in a world in which you starve unless you can obtain a contract with an organization. We might see food stamps as a barely adequate substitute for the free land that is no longer available. As individuals, we have exchanged free land for social insurance. Minimal support must now be part of the social contract because large organizations have monopolized the means of survival.

Reich, *supra* note 258, at 299.

298. See sources cited *supra* note 294.

299. See JOEL BERG, *ALL YOU CAN EAT: HOW HUNGRY IS AMERICA* 32-34 (2008); PETER K. EISINGER, *TOWARD AN END TO HUNGER IN AMERICA* 38-39, 63 (1998).

Federal support for the provision of housing can be described as bifurcated between the Social Security model and the Food Stamp model. The federal government does not build or manage civilian housing units directly but rather provides various forms of financial support to institutions that undertake such activities. It offers some of this financial support through three federal organizations, colloquially known as Fannie Mae, Ginnie Mae, and Freddie Mac, which guarantee home mortgages or create a secondary market for them, thus inducing financial institutions to issue more mortgages and to lower the eligibility requirements for the mortgages they issue.³⁰⁰ Although these organizations were established, in part, to provide affordable housing for low- and moderate-income families,³⁰¹ their support is only available to people who can qualify for a private mortgage.³⁰² This generally requires the recipients to be employed or have some other fairly significant and reliable source of income. Being limited to the virtuous, like Social Security, the programs grew to massive proportions.³⁰³ Because they were at least partially responsible for the recent financial meltdown,³⁰⁴ criticism of these programs has been legion, but such criticism has largely concerned their administrative and fiscal mismanagement, not their underlying goal of helping wage earners become homeowners.³⁰⁵

300. The first of these institutions, the Federal National Mortgage Association (FNMA or Fannie Mae), was established in 1934 under the authority of the National Housing Act, Pub. L. No. 73-479, § 301, 48 Stat. 1246, 1252-53 (1934). For an account of Fannie Mae's origins and operation, see Oakley Hunter, *The Federal National Mortgage Association: Its Response to Critical Financing Requirements of Housing*, 39 GEO. WASH. L. REV. 818 (1971). The Housing and Urban Development Act of 1968 established the second of these institutions, the Government National Mortgage Association (GNMA or Ginnie Mae), to extend Fannie Mae's mortgage support to government employees and veterans. Pub. L. No. 90-448, § 801, 82 Stat. 476, 536. The Emergency Home Finance Act of 1970 established the last of these institutions, the Federal Home Loan Mortgage Corporation (FHLMC or Freddie Mac), to supplement Fannie Mae. Pub. L. No. 91-351, § 303, 84 Stat. 450, 452-53.

301. Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 AM. U. L. REV. 1489, 1500 (2011).

302. *Id.* at 1503.

303. JAMES R. BARTH ET AL., *THE RISE AND FALL OF THE U.S. MORTGAGE AND CREDIT MARKETS: A COMPREHENSIVE ANALYSIS OF THE MARKET MELTDOWN* 175-79 (2009).

304. Boyack, *supra* note 301, at 1524.

305. See, e.g., VIRAL V. ACHARYA ET AL., *GUARANTEED TO FAIL: FANNIE MAE, FREDDIE MAC, AND THE DEBACLE OF MORTGAGE FINANCE* 31-40 (2011); PETER J. WALLISON & BERT ELY, *NATIONALIZING MORTGAGE RISK: THE GROWTH OF FANNIE MAE AND FREDDIE MAC* 28-47 (2000); Ron Feldman, *Improving Control over Fannie Mae and Freddie Mac*, in *SERVING TWO MASTERS, YET OUT OF CONTROL: FANNIE MAE AND FREDDIE MAC* 139, 140-42 (Peter J. Wallison

A second type of federal housing support consists of funds that the federal government provides to state and local public housing programs. After 1965, the Department of Housing and Urban Development (HUD) directed this support.³⁰⁶ Very often, these are need-based programs, which means that eligibility for their benefits is the mirror image of the mortgage-related programs: having too much income, rather than too little, excludes potential recipients.³⁰⁷ There has been a somewhat dizzying succession of statutes, but the major ones have been specifically designed to provide decent housing for all Americans, regardless of income.³⁰⁸ Unlike the mortgage support programs, however, the need-based programs have been underfunded,³⁰⁹ reflecting our ambivalence about this goal. The general view is that these programs have been largely ineffective and have in some cases contributed to residential segregation.³¹⁰ Nonetheless, new attempts continue to be made, and the goal of providing adequate housing for all has been reiterated, rather than repudiated, in the successive enactments.³¹¹

ed., 2001).

306. HUD was created by the Housing and Urban Development Act of 1965. Pub. L. No. 89-117, 79 Stat. 451.

307. For example, a relatively recent statute, the Cranston-Gonzalez National Affordable Housing Act of 1990, provides: “[N]ot less than 90 percent of ... the families receiving such rental assistance [must be] families whose incomes do not exceed 60 percent of the median family income for the area.” 42 U.S.C. § 12744 (2006).

308. See, for example, the Cranston-Gonzalez National Affordable Housing Act of 1990, Pub. L. No. 101-625, 104 Stat. 4079; the Housing and Urban Development Act of 1965 (establishing HUD as part of Johnson’s War on Poverty); the Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (marking the first major federal initiative as part of Truman’s Fair Deal).

309. See SUSAN J. POPKIN ET AL. A DECADE OF HOPE VI: RESEARCH FINDINGS AND POLICY CHALLENGES, 10, 13 (2004); Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697 (1993); Thomas A. Reiner & Julian Wolpert, *Funding Caps*, 45 PUB. ADMIN. REV. 391 (1985)

310. See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 195-96* (1993); Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 490-93 (1995) (book review). Another common criticism is that federally funded urban renewal projects disrupt inner-city communities. See generally JAMES ROBERT SAUNDERS & RENAE NADINE SHACKELFORD, *URBAN RENEWAL AND THE END OF BLACK CULTURE IN CHARLOTTESVILLE, VIRGINIA: AN ORAL HISTORY OF VINEGAR HILL* (1998).

311. The Cranston-Gonzalez Act both acknowledged past failures and reiterated the government’s ongoing aspiration: “[T]he Nation has not made adequate progress toward the goal of national housing policy, as set out in the Housing Act of 1949 ... and reaffirmed in the Housing and Urban Development Act of 1968, which would provide decent, safe, sanitary, and

III. THE PPACA AND POSITIVE RIGHTS

A. *The PPACA as a Declaration of Positive Rights*

This brings us to the issue of health care. The federal government, of course, mounted a major effort to provide medical services to American citizens with the enactment of the Medicare and Medicaid programs in 1965.³¹² Medicare functions largely as an adjunct to Social Security. It provides medical benefits to people who are sixty-five or older and have paid the Social Security payroll tax.³¹³ It also provides benefits to those under sixty-five who are receiving Social Security disability insurance.³¹⁴ Again, this means that the benefits go to wage earners or disabled former wage earners.³¹⁵ Medicaid, in contrast, is a needs-based program to provide health care to the poor.³¹⁶ As with most other programs of this sort, it is administered by the states, with the federal government's role consisting of providing money and setting criteria.³¹⁷ The two programs thus exhibit the same bifurcation as the federal housing program, the bifurcation that divides Social Security from SNAP.³¹⁸ Once again, statutory law is moving toward the implementation of positive rights, that is, toward the idea that every American has a right to food, shelter, health care, and education. And,

affordable living environments for all Americans." 42 U.S.C. § 12721(1).

312. Health Insurance for the Aged and Medical Assistance, Pub. L. No. 89-79, 79 Stat. 286 (1965) (codified as amended in scattered sections of 42 U.S.C.); see also SUE A. BLEVINS, *MEDICARE'S MIDLIFE CRISIS* 39-52 (2001); JONATHAN ENGEL, *POOR PEOPLE'S MEDICINE: MEDICAID AND AMERICAN CHARITY CARE SINCE 1965*, at 44-51 (2006); THEODORE R. MARMOR, *THE POLITICS OF MEDICARE* 59-81 (1973); JONATHAN OBERLANDER, *THE POLITICAL LIFE OF MEDICARE* 17-35 (2003) (detailing early political campaigns for national health insurance and the political battle over health insurance for the elderly, which ultimately led to Medicare's enactment).

313. Jennifer L. Wright, *Unconstitutional or Impossible: The Irreconcilable Gap Between Managed Care and Due Process in Medicaid and Medicare*, 17 J. CONTEMP. HEALTH L. & POL'Y 135, 141 (2000).

314. *Id.*

315. BLEVINS, *supra* note 312, at 3-12; MARILYN MOON, *MEDICARE: A POLICY PRIMER* 181-84 (2006).

316. BLEVINS, *supra* note 312, at 4.

317. See ENGEL, *supra* note 312, at 48-51; LAURA KATZ OLSON, *THE POLITICS OF MEDICAID* 30-31, 121-23 (2010).

318. See *supra* notes 277-305 and accompanying text.

once again, as in other areas, the movement in health care is halting and incomplete at the present time because of our cultural and political ambivalence about providing assistance unrelated to work.³¹⁹

The Obama administration's PPACA is a further step down this now-familiar, if somewhat tortuous, path.³²⁰ One would need a very carefully developed set of criteria to demonstrate that the PPACA is a larger step than Medicare and Medicaid. It is a step being taken in less prosperous times, to be sure, but the mid-1960s were not exactly a period of tranquility or consensus. Why, then, has this statute proven so controversial, so incendiary that its opponents have refused to accept defeat after the bill's passage? And why has it generated a powerful social movement organized around its repudiation? One explanation may be that people sense its potential for establishing a regime of positive rights. In other words, it heralds a revolution in our constitutional system, a new way of thinking about the relationship between citizens and their government. Although the nation has been moving incrementally in this direction since the 1960s, the PPACA is perceived as representing a dramatic acceleration of the trend. Three of the Act's central features explain this largely accurate perception.

First, the PPACA is universal, rather than being limited to a particular segment of the population.³²¹ Proponents of the Act may well have imagined that this feature would be politically advantageous because the Act provides benefits for nearly all Americans and appears to avoid the stigma of a welfare program. But many perceive the Act's universality as threatening because it is so all encompassing. It seems somehow larger than a social program. However path-breaking Medicare and Medicaid were, these programs possessed a reassuring specificity: they helped particular

319. See BLEVINS, *supra* note 312, at 41; ENGEL, *supra* note 312, at 131-32, 240-43; BEAUFORT B. LONGEST, JR., *HEALTH POLICYMAKING IN THE UNITED STATES* 179-80 (5th ed. 2010); OBERLANDER, *supra* note 312, at 195-96; OLSON, *supra* note 317, at 234-40; DAVID G. SMITH & JUDITH D. MOORE, *MEDICAID POLITICS AND POLICY, 1965-2007*, at 372-78 (2008); CAROL S. WEISSERT & WILLIAM G. WEISSERT, *GOVERNING HEALTH: THE POLITICS OF HEALTH POLICY* 385-96 (3d ed. 2006).

320. See *supra* note 317 and accompanying text.

321. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2702, 124 Stat. 119, 156 (2010).

groups of people, with particular attributes, even if those groups were rather large.³²² In contrast, the PPACA applies to everyone.

Second, the PPACA is uniform. It puts the wage earners and the poor in the same boat.³²³ Previous programs were typically directed to one group or the other: Social Security, home mortgage support, and Medicare provided insurance- or financing-type benefits for wage earners, while food stamps, public housing, and Medicaid provided welfare-type benefits to the poor.³²⁴ As indicated above, that bifurcation runs through nearly all the social legislation of the past half century.³²⁵ Combining the two groups seems to offend many people because it is perceived as minimizing the difference that they are so anxious to maintain. The Tea Party's hilarious-sounding plaint—" [K]eep your government hands off my Medicare"³²⁶—in fact reveals a serious concern. People may believe that Medicare, like Social Security, is something they have earned, not something they are being given by the government. The government, therefore, is merely processing the payments that they regard themselves as legitimately entitled to, like a financial institution that returns one's investment with interest. Combining Medicare payments with unearned benefits for the poor within a single program challenges this dubious but deeply felt distinction. The PPACA tears the fig leaf of earned benefits off social legislation and reveals the naked wealth redistribution that lies underneath.

The third trait that makes the PPACA controversial is that it is strongly normative. It has been presented as the right thing to do, and not simply as a good idea, not merely a social program but a moral imperative.³²⁷ Claims of this sort can infuriate one's

322. See BLEVINS, *supra* note 312, at 4.

323. Patient Protection and Affordable Care Act § 2702.

324. See *supra* Part II.B.

325. See *supra* Part II.B.

326. Bob Cesca, *Keep Your Goddamn Government Hands Off My Medicare!*, HUFFINGTON POST (Aug. 5, 2009, 6:45 PM), http://www.huffingtonpost.com/bob-cesca/get-your-goddamn-governme_b_252326.html; Clarence Page, *"Keep Government Out of My Medicare?" Not Easy*, CHI. TRIB. (Aug. 9, 2009, 11:24:49 AM), <http://newsblogs.chicagotribune.com/pagespage/2009/08/medicare-fantasies.html>.

327. Dan Gilgoff, *Obama Appeals to National Morality in Health Care Reform Speech*, U.S. NEWS & WORLD REP., Sept. 10, 2009, <http://www.usnews.com/news/blogs/god-and-country/2009/09/10/obama-appeals-to-national-morality-in-healthcare-reform-speech>; Jeff Zeleny & Carl Hulse, *Obama Calls Health Plan a 'Moral Obligation'*, N.Y. TIMES, Aug. 19, 2009, <http://www.nytimes.com/2009/08/20/us/politics/20obama.html>; Interview by Jake Tapper with

opponents and induce them to formulate their own countervailing claims of right. In the case of the PPACA, this claim is that the Act's compulsory insurance provision,³²⁸ the individual mandate, infringes on people's personal liberty by forcing them to enter into contracts with private parties.³²⁹

What makes these three features of universality, uniformity and normativity significant for present purposes is that they possess the characteristics of a constitutional right. The right of free speech, for example, exhibits the same three features; it applies to everyone, it operates for everyone in the same essential way,³³⁰ and it can be regarded as a moral imperative, not just a good idea. All of the social legislation described above can be regarded as an interpretation of the Constitution, the first steps toward the recognition of positive rights to food, shelter, health care, and education.³³¹ But the PPACA is more obviously a constitutional interpretation than these other statutes; given its subject matter, it is perhaps inappropriate to say that it looks, acts, and quacks like a right, but that is in fact the case. The PPACA thus simultaneously challenges the courts to think about establishing positive rights as a matter of constitutional law and facilitates any effort the courts would choose to make along these lines. It encourages judges to reverse *DeShaney* and hold the Due Process Clause guarantees minimal levels of safety and security.³³² At some level, those who oppose this sea change in our

Barack Obama, President of the United States, in Jamestown, N.C. (Oct. 11, 2011), *available at* <http://abcnews.go.com/Nightline/transcript-abc-news-jake-tappers-exclusive-interview-president/story?id=14764446&singlepage=true>; *see also* HEALTH CARE STORIES FOR AMERICA <http://stories.barackobama.com/healthcare> (last visited Mar. 19, 2012) (website sponsored by President Obama on which people document their health care problems, and described as stories that "put a human face on the health care crisis").

328. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119, 242 (2010).

329. Of course, there is not much need to explain why this claim appears in the lawsuits challenging the Act. *See, e.g.*, sources cited *supra* note 8. There are not many grounds for challenging the constitutionality of social welfare legislation, and any decent lawyer faced with such an uphill climb will grab anything that may be of assistance.

330. *See* U.S. CONST. amend. I ("Congress shall make no law ... abridging the freedom of speech.").

331. *See supra* Part II.B.

332. *See supra* notes 268-70.

constitutional structure understand this, and that is what is getting them so agitated.³³³

This emerging right to health care can be compared with the emerging right to education that some commentators have perceived.³³⁴ We appear to have the sense as a society that the provision of elementary and secondary education should be universal and uniform, and that it represents a moral imperative. This sense is reflected in compulsory education statutes,³³⁵ but these statutes, although they seem to impose a greater constraint than the individual mandate, have not engendered the same furious opposition as the PPACA. One reason, certainly, is that education can be regarded as conceptually different from social welfare.³³⁶ Suffice it to say that cultural values of this sort often explain why some people see great differences in things that seem homologous to others. Another possible explanation is that education was made compulsory over an extended period of time, and by individual state enactments, not all at once through high-profile federal legislation.³³⁷

B. Statutory Interpretation as a Response to Criticisms of Positive Rights

The Supreme Court is far from alone in condemning the idea of positive rights. Many scholars have been highly critical of this concept, even as a basis for amending the Constitution.³³⁸ Very few are prepared to treat the doctrine of positive rights as a plausible reading of the Constitution as it stands. The criticisms, however, do not account for the role that statutes play as interpretations of the

333. Cf. LANDMARK, *supra* note 6, at 2-3 (describing other things that are making opponents of the Obama administration upset).

334. *E.g.*, Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 552 (1992).

335. See Melodye Bush, *Compulsory School Age Requirements*, EDUC. COMM'N OF THE STATES 1 (last updated June 2010), <http://www.ecs.org/clearinghouse/86/62/8662.pdf> (describing state compulsory education statutes).

336. To explain exactly why would take us back to sixteenth-century Geneva and maybe fifth-century Athens, which is a bit far afield for this Article.

337. See Bush, *supra* note 335, at 1-3.

338. See, *e.g.*, Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 878-93 (2001).

Constitution. As noted above, a purposive view of the Constitution joins legislators with judges as fellow interpreters of the document.³³⁹ This cooperative relationship can provide at least a partial answer to the major criticisms that have been advanced against judicial recognition of positive rights. The PPACA serves as a prime example of the kind of legislation that can play this interpretive role and thus counters standard objections advanced against positive rights. Its potential for doing so may be another source of the anger that the Act has elicited among some segments of our society.

We can distinguish three major objections to the idea of positive rights: a pragmatic objection, based on the difficulty of implementing such rights; a political objection, based on positive rights' possible interference with the democratic process; and a philosophical objection, based on the concept of rights itself.

The pragmatic criticism maintains that positive rights are really policy decisions masquerading as judicially enforceable principles, and that courts are ill equipped to make decisions of this sort.³⁴⁰ This argument, although hardly without precedent, is now firmly associated with the Legal Process School, specifically with its insistence that each governmental institution has inherent strengths and weaknesses that should determine the allocation of authority.³⁴¹ As Lon Fuller argued, policy decisions made through adjudication are polycentric: they involve balancing a variety of interacting forces, each of which affects the other.³⁴² Courts, in contrast, are most adept at deciding between two opposing parties presenting arguments designed to advance their own positions.

Considering the allocation of financial resources gives this argument further specificity. The recognition of positive rights could require massive allocations of funds that are not within the judiciary's power to provide or its ability to control. Negative rights simply tell the government to stop doing something;³⁴³ they cost the government no money and might even save it money as it shuts

339. See *supra* text accompanying notes 113-19.

340. See, e.g., Cross, *supra* note 338, at 879-80, 887-93.

341. See Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1482 (2011).

342. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-98 (1978) (defining "polycentric" problems).

343. See *supra* notes 235-36 and accompanying text.

down a censorship office or disestablishes state churches. But positive rights generally involve the kinds of services that constitute large portions of a governmental budget.³⁴⁴ One possible result is that these funds would not actually be allocated, reducing the judiciary's positive rights rulings to precatory, ineffective declarations that would undermine courts' ability to enforce the negative rights that represent their established role. Another possible result is that political branches would in fact allocate the funds—but courts would lack the administrative machinery to monitor them.

These concerns are not as serious as they sound, however. To some extent, they may reflect a simplified, even pre-administrative image of government that no longer applies. Many negative rights can only be implemented by affirmative programs that require serious allocations of funds.³⁴⁵ Assuming that the national government accepts the legitimacy of a court's ruling, significant enforcement expenditures may be needed to implement it. School desegregation is an obvious example, and the prohibition on school prayer is another. One might imagine stationing a federal marshal in each noncompliant school, which would certainly cost money, but a more realistic approach would involve mediation and re-training sessions that could also be expensive. Either way, a school district is spending money on enforcing the "negative rights" of equality or liberty.

In addition, a modern state runs complex institutions, and ensuring that those institutions meet constitutional standards may require significant expenditures and extensive management. The desegregation of public schools is an example here as well, as is the reform of state prisons that Malcolm Feeley and I studied.³⁴⁶ With respect to prisons, the Constitution establishes a negative right to be free from "cruel and unusual punishment."³⁴⁷ In a modern state, however, this cannot be implemented by simply firing the guy with the leather mask and the carving knives; it requires that pris-

344. See *supra* notes 234-35 and accompanying text.

345. For arguments that no significant differences exist between positive and negative rights, see STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 35-58 (1999); Barber, *supra* note 258, at 163-65.

346. See MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998).

347. U.S. CONST. amend. VIII.

ons—which the government is unlikely to close—be systematically restructured. The decisions that Feeley and I studied ultimately enforced the prisoners' negative rights by requiring that trained guards be hired, medical services provided, food services reorganized, and new approaches to internal discipline designed.³⁴⁸ All of this costs money and required extensive management by courts.³⁴⁹ In fact, the courts managed the prison reform process rather well, and the special masters that the courts hired to assist them³⁵⁰ were often the very same type of people that a reform governor might have hired to clean up state prisons if such efforts had been politically viable.

To the extent that the cost and administrative burdens of implementing positive rights remain a concern, however, partnership between the legislatures and the courts in constitutional interpretation would go a long way toward alleviating that burden. Hypothetically, finding a right to sustenance when a large portion of the nation's populace is starving and the government has taken no steps to solve the problem is indeed a daunting task. It is also an unlikely one. If elected officials—we are assuming a democracy with judicial review, of course—do not perceive any obligation to resolve the situation, it is unlikely that the courts will come to the realization that the Constitution's purposes require the recognition of this right on their own. But if, as in the United States, the legislature has already taken extensive steps to alleviate hunger³⁵¹—if it has in fact perceived that allowing citizens to starve is unacceptable in a way that courts can treat as an interpretation of the Constitution—then the courts can recognize that right without creating excessive administrative difficulties for themselves. The courts' orders could be directed to the already-established government agency responsible for administering the food relief program. The effect of these orders would be to expand that program, possibly in fairly minor ways, and, in any case, in ways that would be administratively and financially manageable.

348. FEELEY & RUBIN, *supra* note 346, at 362-75.

349. *Id.*

350. *Id.* at 308-11.

351. *See supra* notes 283-97 and accompanying text.

Moreover, the standards that the courts impose can sometimes be derived from those that the political branches themselves employ. In our study of the prison reform cases, Feeley and I found that the courts based their remedies on the standards developed by the American Correctional Association (ACA).³⁵² The ACA was not a governmental body, but its standards represented the prevailing practices of most non-Southern states and could therefore be used as a means of correcting the cruel and unusual prison practices that prevailed in the South.³⁵³

Constitutional courts, as David Strauss and others have observed, are generally incrementalist institutions.³⁵⁴ They develop constitutional doctrine through a process that resembles their development of common law.³⁵⁵ Defining rights through a partnership with the legislature—although preserving courts' power to make the final decision—comports with this general methodology. Such an approach means that courts are unlikely to act in a situation where the political branches have not taken any measures in the direction of that action.³⁵⁶

But this approach also means that constitutionally relevant legislation provides an invitation, and perhaps ultimately an insistence, that courts reconceptualize their interpretations of the Constitution along the indicated lines. The extensive and widely supported social welfare legislation of the last half century is an example of such invitation and insistence. The PPACA, because it is universal, uniform, and normative, presents perhaps the strongest inducement to the recognition of positive rights in this long line of legislation.³⁵⁷ It indicates that the *DeShaney* decision may have made sense in 1840, or even 1880, but is now an anachronism.³⁵⁸ Its passage refutes the assertion that the Due Process Clause, or the Equal Protection

352. See FEELEY & RUBIN, *supra* note 346, at 103-05, 162-66, 370-72.

353. See *id.* at 162-63.

354. See, e.g., Strauss, *supra* note 113, at 925, 927-31.

355. See *id.* at 925, 927.

356. Thus, slippery slope arguments, e.g., Ilya Somin, *A Mandate for Mandates: Is the Individual Health Care Insurance Mandate Case a Slippery Slope?*, 75 LAW & CONTEMP. PROBS. (forthcoming 2012), reveal a profound misunderstanding of the way constitutional law functions in reality.

357. See *supra* notes 320-33 and accompanying text.

358. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (denying the existence of positive rights under the Fourteenth Amendment's two central clauses).

Clause, “cannot fairly be extended to impose an affirmative obligation on the State.”³⁵⁹

The political challenge to the concept of positive rights involves our theory of democracy. This challenge suggests that the implementation of positive rights by courts strips elected officials representing the populace of the power to make basic policy decisions and grants that power to unelected judges.³⁶⁰ This is, of course, another version of the famous counter-majoritarian difficulty that the Legal Process School developed and championed.³⁶¹ The Legal Process School’s answer was to restrict judicial invalidation of democratically chosen policies to areas where the democratic process had failed, either because of defects in its procedures—malapportionment or restrictions of the franchise, for example—or because a “discrete and insular” minority was excluded from participation in the process.³⁶² Although this approach has certainly been challenged, it cannot be readily dismissed and would seem to loom quite large when positive rights such as the right to food, housing, or health care are considered.

Here again, however, recognizing the role of statutes in interpreting the Constitution alleviates much of the concern. When the courts act in partnership with the legislature, they can be seen as supporting democracy, rather than undermining it.³⁶³ In that case, the operation of the democratic process has established the basic direction and the essential meaning of the Constitution as determined by its purposes. The role of the courts is consistent with the role that the Legal Process School would assign to them—to correct

359. *See id.*

360. Curt Bentley, Comment, *Constrained by the Liberal Tradition: Why the Supreme Court Has Not Found Positive Rights in the American Constitution*, 2007 BYU L. REV. 1721, 1741-44.

361. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (2d ed. 1986); Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 201-02 (2002).

362. *See* JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 75-76 (1980); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 119-21, 148-49 (1980).

363. *See* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1301-10 (2005) (discussing how judicial review can support democracy).

defects in the process or protect excluded minorities.³⁶⁴ Judicial decisions could state that food relief, already extensive, should be universal, or that the government must provide decent shelter for the homeless, or that egregious underfunding of the public schools in particular areas must be remedied. Of course, the courts must be willing to invalidate governmental action in some cases; otherwise, judicial review is ineffectual. But if that invalidation can be characterized as clarifying, extending, and improving rights that the political branches have already established, concerns about the conflict between positive rights and democratic decisionmaking would be greatly reduced.

A more theoretical, and perhaps more difficult, response to this concern involves the meaning of the term “democracy.” This word has gradually evolved from a description to a slogan and, in the process, we have become somewhat slovenly about its use. In our society, “democracy” refers to a system of government in which officials elected by the national or regional majorities of the populace are authorized to make decisions.³⁶⁵ As a matter of critical morality, do we really mean that these officials can make any decision? Would we—that is, each person acting as a critical observer—be willing to attach normative force to the decisions that emerged from such a system if the majority of the populace were Nazis? When we speak in favor of “democracy” per se, are we simply assuming that such a situation would never occur as a matter of moral luck or empirical magic? Or, would we insist that there are some limits on the choices that the populace can make?

As a matter of our own historical experience as a nation, those limits can be located in our written Constitution. Accordingly, we regard judicial review as a part of the government process that we—once again, as critical observers—find normatively acceptable. But judicial review must be based on an interpretation of the Constitution, and that interpretation, as argued above, should be based on the basic purposes that animated the creation of that foundational document.³⁶⁶ The advantage of this approach to

364. See, e.g., BICKEL, *supra* note 361, at 16-17.

365. DAVID HELD, *MODELS OF DEMOCRACY* 1 (3d ed. 1996); ALAIN TOURAINE, *WHAT IS DEMOCRACY* 7 (David Macey trans., 1997).

366. See *supra* Part I.C.

interpretation is that it incorporates respect for the electoral process at the same time that it disciplines that process. With respect to the PPACA, utilizing this approach means that the statute should be regarded as a template for judicial decisions that clarify or extend the PPACA's operation.

The third objection to positive rights is philosophical; it is the objection voiced by Isaiah Berlin, who developed the negative-positive terminology.³⁶⁷ Berlin posited that negative rights give people the liberty to do what they want, but positive rights tell them what to do in the name of liberty.³⁶⁸ Like Rousseau's theory of the general will,³⁶⁹ Berlin's idea assumes that people have a real or authentic self that is not necessarily reflected in their actual decisions. This then allows someone, possibly a ruler exercising a monopoly of legitimate force, to compel people to take certain actions against their present will because those actions appear to be in their own best interest. As Berlin says, "this entails ... that [the people] would not resist [the ruler] if they were rational and as wise as [that ruler] and understood their interests"³⁷⁰ as that ruler did. Once the ruler takes this view, Berlin goes on to say, the ruler is:

in a position to ignore the actual wishes of men or societies, to bully, oppress, torture [the people] in the name ... of their "real" selves, in the secure knowledge that whatever is the true goal of man (happiness, performance of duty, wisdom, a just society, self-fulfillment) must be identical with his freedom—the free choice of his "true" albeit often submerged and inarticulate, self.³⁷¹

This is a powerful statement that relates directly to the current controversy over the PPACA. The thrust of the legal objections, an explicit theme of the more general political opposition, and one of the rallying cries of the Tea Party seems to be that the Act forces people to do things they do not want to do out of a misplaced sense of paternalism, a do-gooder intrusiveness on people's real

367. BERLIN, *supra* note 85, at 121-22.

368. *Id.*

369. *See* ROUSSEAU, *supra* note 60, at 35, 38-39.

370. BERLIN, *supra* note 85, at 133.

371. *Id.*

freedom.³⁷² Specifically, the criticism directed at the provision that compels people to buy health insurance is based on an argument that it is beyond the power of the federal government to compel them to enter into private contracts.³⁷³ The two federal district courts that have invalidated part or all of the Act have relied on this rationale, although the Fourth and Eleventh Circuits reversed or vacated these judgments.³⁷⁴ That rationale, moreover, would seem to be supported by the argument proposed above, because it is grounded on liberty, one of the constitutional purposes that has been identified as a basis for positive rights.

But this philosophical objection fails, both in the specific context of the PPACA and generally. The response in connection with the PPACA is eminently nonphilosophical. The Act does not compel people to do anything; it simply imposes a tax.³⁷⁵ The fact that the tax is structured as an insurance contract is irrelevant; the basic distinction is between paying money and performing some task that involves specific allocations of time and external supervision. Robert Nozick argues that a tax is forced labor because most people earn their income from work.³⁷⁶ But this is close to being a play on words, because paying a tax simply does not equate to being compelled to perform a particular action; it is simply the contribution that members of a society are required to make as individuals in order to achieve their collective purposes. From the time that knights bought their way out of the feudal obligations to perform military service,³⁷⁷ the payment of money has always been understood in our society as an alternative to compelled behavior, not a form of it.

372. See, e.g., RASMUSSEN & SCHOEN, *supra* note 16, at 13-14.

373. Robert Moffit, *Obamacare and the Individual Mandate: Violating Personal Liberty and Federalism*, HERITAGE FOUND. (Jan. 18, 2011), <http://www.heritage.org/research/reports/2011/01/obamacare-and-the-individual-mandate-violating-personal-liberty-and-federalism>; see also Andrew MacKie-Mason, *Individual Mandate and Individual Liberty*, SOURCE 4 POLITICS (Feb. 16, 2011, 3:30 PM), <http://source4politics.blogspot.com/2011/02/individual-mandate-and-individual.html> ("In their rhetoric and in the press, the opponents of the mandate are employing the language of individual liberty. We need to strike down the mandate, they argue, because if we don't then Congress can dictate our entire lives.").

374. See sources cited *supra* note 8.

375. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(b), 124 Stat. 119, 243 (2010) (to be codified at 26 U.S.C. § 5000A).

376. NOZICK, *supra* note 267, at 169.

377. This practice was referred to as scutage or a shield tax. See FRANCES GIES, *THE KNIGHT IN HISTORY* 100-03 (1984).

Although Quakers are not required to serve in the armed forces and Christian Scientists cannot be compelled to receive medical care,³⁷⁸ Quakers cannot refuse to pay taxes used to support the armed forces, and Christian Scientists cannot object to paying taxes that provide health care services to those who choose to avail themselves of such services. The liberty-based challenge is more appropriately directed to compulsory vaccination programs or to the alleged “death panels” that opponents claimed were in the Act in an effort to tap into Berlin’s theme more directly.³⁷⁹

Quite apart from the specifics of the PPACA, however, Berlin’s philosophical objection to positive rights does not apply to the programs of a modern administrative state. Regulatory programs are not designed to compel people to act against their wishes and in accordance with the ruler’s concept of their better selves. Rather, in a democratic system at least, the purpose of such programs is to enable people to act collectively in a way that they are disempowered from acting individually. In some cases, individuals lack the power to bargain with owners of capital, in other cases they lack the knowledge to manage the complexities of the modern world, and, in others, the problems are simply beyond the limits of any individual action.

We do not like to concede the level of dependence that the modern world has imposed on us in exchange for its many benefits, but our dependence is beyond dispute. Most of us would be dead in a few days if the water supply system of our nation failed. If it were in the hands of a private entrepreneur who could threaten to cut off the supply, he could compel us to give him our possessions, our houses, and our children. Our inevitable dependence on others in this complex, modern world is the real rationale behind the administra-

378. See *United States v. Seeger*, 380 U.S. 163 (1965) (recognizing that conscientious objectors may be exempted from military service based on personal codes of morality); see also *Cruzan v. Director, Mo. Dep’t of Pub. Health*, 497 U.S. 261 (1990) (general right to refuse unwanted medical care); *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92 (1914) (same).

379. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (recognizing right to refuse treatment but upholding Massachusetts law requiring vaccination on grounds of compelling state interest); Jim Rutenberg & Jackie Calmes, *False ‘Death Panel’ Rumor Has Some Familiar Roots*, N.Y. TIMES, Aug. 13, 2009, <http://www.nytimes.com/2009/08/14/health/policy/14panel.html>; Angie Drobnic Holan, *PolitiFact’s Lie of the Year: ‘Death Panels,’* POLITIFACT (Dec. 18, 2009, 5:15 PM), <http://www.politifact.com/truth-o-meter/article/2009/dec/18/politifact-lie-year-death-panels>.

tive state, not the desire to force people to act in the name of their better or more authentic selves.

CONCLUSION

If the courts were to recognize positive rights, they would not be forcing people to do anything other than possibly paying more taxes. Rather, they would be providing the people with guarantees that the purposes of the Constitution will be fulfilled. Those purposes, as their meaning has been revealed to us through time, changing circumstances, and developing conceptions, now demand that every American be provided with the basic necessities of life—food, shelter and health care—and with education, the basic necessity to do anything more than merely survive in this modern world. The PPACA, considered by itself as a piece of legislation, represents an important step in this direction. But the PPACA also represents a major interpretation of the Constitution, demonstrating what statutes can do when they comport with the Constitution's purposes. As such, it points forward to a new era of constitutional doctrine, an era when positive rights will be recognized as part of the document's essential meaning. That is what makes some people so angry about it.