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The Presumption of Constitutionality and the Demise of Economic Liberties

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Articles

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Abstract

For over two centuries the United States Supreme Court has embraced a presumption of constitutionality that places the burden of proof on those challenging the constitutionality of governmental actions. Usually, the presumption is stated as a given, but when explained it is most often said to be founded in republicanism and due respect for the co-equal branches of government. Thus, the presumption constitutes a deference to the constitutional interpretations of the elected branches of government. This majoritarian view of the Constitution's foundational principle is counter to the dominant view of the Constitution's founders. They designed a government constituted of numerous constraints on the democratic excesses experienced during the period of the Articles of Confederation. Among those constitutional constraints is a

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Supreme Court with responsibility to safeguard liberty by assuring constitutional compliance by state governments and the other two branches of the national government.

Because the presumption requires that the government show only a rational basis for its actions, the Supreme Court has abandoned its deference to executive and legislative interpretations of the Constitution when confronted with what a majority of the justices consider to be particularly important rights claims, first in First Amendment cases and later where other rights are found to be fundamental or particular groups of people are affected. While this selective abandonment of the presumption of constitutionality reflects an acknowledgement of the libertarian foundations of the Constitution, the presumption remains the default, resulting in variable scrutiny of constitutional claims depending on the rights asserted and the individuals asserting those rights. This levels of scrutiny-hierarchy of rights and peoples approach requires courts to independently assess the importance of government actions relative to individual rights claims, thereby intruding on the policy making role of the legislative and executive branches while creating a hierarchy of rights and peoples. Because the Court has continued to presume the constitutionality of laws said to be adjusting the benefits and burdens of economic life, economic liberty claims are seldom successful. The overarching contention of this Article is that the Constitution allows for no hierarchy of rights or peoples and therefore requires a default presumption of unconstitutionality. The courts should strictly scrutinize every constitutional rights claim.

TABLE OF CONTENTS

INTRODUCTION

A productive economy, not to mention a fulfilling social and personal life for every citizen, depends on the rule of law. Knowing what the law is, even if one disagrees with it, allows individuals and groups to invest both monetary and nonmonetary assets in every aspect of life with some assurance of reward proportionate to the wisdom of actions taken. Essential features of the rule of law in the United States are the constitutions, both state and federal, that define the extent and limit the exercise of governmental powers.

The U.S. Constitution enumerates the powers of the national government, imposes some limits on state governments, and guarantees individual liberties against infringements by both national and state governments. As with any law's provisions, the national government's enumerated powers, the federal government's structural design and the federal system, and the rights guarantees require constant interpretation by those authorized to exercise government power. At least since *Marbury v. Madison*, though not without some controversy,[1] the Supreme Court of the United States has had the final say on whether the other branches of government and the states have complied with these constitutional mandates.

The Court has generally exercised this deciding authority with caution and deference to the interpretations of the other two branches of government. Almost since the ratification of the Constitution, this deference has taken the form of a presumption of constitutionality—a supposition that the actions of the Executive and Congress are authorized by the Constitution, leaving those who would claim otherwise with the burden of proving unconstitutionality. Various rationales for this presumption have been offered, but in most judicial opinions, the presumption of constitutionality is stated, without explanation, as an uncontested, fundamental maxim of judicial review.

This Article contends that the presumption of constitutionality erodes constitutional government by allowing the legislative branch of government to judge its own compliance with the Constitution. It further argues that the Supreme Court's exceptions to the doctrine, particularly since the *Carolene Products* case, have created a levels of scrutiny approach based on hierarchies of rights and peoples lacking

1. Not everyone agrees that the Framers intended for the Supreme Court to have the power of judicial review. Although I believe the evidence strongly supports the intended existence of that power, the debate can be taken up elsewhere. The reality of more than two centuries of jurisprudence is Supreme Court and lower court review of the constitutionality of actions taken by the other branches and by the states.

any foundation in the Constitution. Interpretation of a Constitution intended to guarantee individual liberties through a combination of a Bill of Rights and structural constraints on government power should start from a presumption of unconstitutionality with government carrying the burden of proving otherwise.

Following the introductory material in Part I, this Article proceeds as follows: Part II poses a question implicit in the Supreme Court's frequent suggestion that unelected courts should defer to elected legislators and officials: Is the U.S. Constitution fundamentally majoritarian or libertarian? Part III examines other explanations for the presumption of constitutionality. Part IV discusses the presumption's origins in the first century and in the doctrines of Supreme Court caselaw. Part V then examines the role of the presumption in saving the New Deal from early judicial resistance. Part VI discusses how the famous footnote four in Justice Stone's *Carolene Products* opinion invited the creation of exceptions to the presumption, and Part VII examines the evolution of those exceptions in the form of hierarchies of rights and persons. Part VIII discusses the levels of scrutiny approach that resulted from the hierarchies of rights and peoples. Part IX explains how this combination created, by default, lesser constitutional rights. Part X examines the example of property rights. Finally, part XI explores the 21st century cases in which a few justices have expressed skepticism of the presumption of constitutionality, followed by a conclusion.

I. BACKGROUND

Why should it be presumed that the political branches of any government will abide by their constitutionally prescribed and limited powers? The Framers of the U.S. Constitution devoted an entire summer to designing a government that could effectively promote the general welfare yet be constrained from engaging in the abuses of legislative and executive power they witnessed all around them. They were committed to popular sovereignty as the only source of legitimacy in a government instituted to secure the unalienable rights of life, liberty, and the pursuit of happiness, but they well understood from experience the inevitable excesses of democracy.[2] To limit those excesses, the Framers designed a Constitution with numerous

2. Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 69, 76 (Richard Beeman et al. eds., 1987) (concluding that the Framers were as concerned with the "excesses of democracy" as they were with remedying the "obvious impotence of the Confederation").

constraints on majority rule. Given this overarching objective to constrain democratic abuse of power, why would a court with constitutional responsibility to interpret and enforce the law, including the law of the Constitution, defer to national or state political branch claims of constitutionality?

Supreme Court case law over more than two centuries reflects that the Court has asked itself that question many times. Constitutional challenges come to the Court framed as claims that Congress has exceeded its enumerated powers, that one of the three branches of the national government has exceeded its authority or intruded on the authority of another, or that either the national or a state government has infringed on constitutionally guaranteed individual rights. Although the presumption of constitutionality is not conclusive, it burdens the challenger to prove unconstitutionality. It is a heavy burden, seldom met, because, in most circumstances, the Court requires only that the challenged government action be shown to be rationally related to a legitimate public purpose.

But even modestly competent legislators or other public officials can conceive of plausible public purposes for actions intended to serve personal and family interests or the interests of influential constituents. Moreover, in the 21st century, with political campaigns spending tens of millions of dollars in contributions, the pressures to reward supporters are higher than ever. These realities of everyday democratic politics, in combination with the abuses of power that led to the many constitutional constraints on anticipated democratic excess, have led the Court to occasionally question the presumption of constitutionality. This is particularly so when individual liberties are at stake because those liberties are meant to limit government even when its actions are otherwise constitutional.

Almost from the beginning, but particularly over the last century, the Court has been faced with persuasive rights claims that would lack judicial remedy if the constitutionality of legislative and executive actions was routinely presumed. But rather than abandon the presumption of constitutionality entirely as inconsistent with the rule of law and constitutional government, the Court has carved out various exceptions in the form of what it calls levels of scrutiny that vary with the importance of the governmental purpose (as determined by the Court), the nature of the individual rights affected, and the characteristics of the people affected. The resultant hierarchies of governmental interests, individual rights, and identity groups have no foundation in the Constitution. Economic liberty claims have suffered as a consequence.

II. IS THE U.S. CONSTITUTION LIBERTARIAN OR MAJORITARIAN?

Writing nearly a century ago, Edward Corwin observed:

> Probably no maxim of judicial review is encountered in the decisions more frequently than that which says that a statute may be declared unconstitutional only in "a clear case"; or as it is also phrased, that all legislative acts are 'presumed to be constitutional' until shown to be otherwise, and that all "reasonable doubts" concerning their constitutionality will be resolved in their favor.[3]

Although Corwin went on to note that some among his contemporaries thought the maxim honored more in its breach than its observance—"a mere courteous and smoothly transmitted platitude" in the words of W.F. Dodd[4]—today it serves as the underpinning for a philosophy of judicial review that undermines the rule of law, makes many rights contingent, and engages courts in the legislative function. When legislation is presumed to be constitutional the general rule that legislative enactments need only have a rational basis serves, as intended, to limit judicial intervention in matters of public policy. But the levels of scrutiny regimen that has emerged to counter the rights-denying consequence of the presumption of constitutionality requires courts to balance policy alternatives against one another and to balance public purposes against individual liberties—exactly what the presumption was thought to prevent.

When Corwin wrote, those skeptical of the judiciary's commitment to the maxim of presumed constitutionality were notably influenced by the Supreme Court's ruling in *Lochner v. New York*,[5] but also by numerous state high court invalidations of economic legislation found to violate constitutional protections of contract, property, due process, and equal protection.[6] The courts had, in Dodd's view,

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3. Edward S. Corwin, *Judicial Review in Action*, 74 U. PA. L. REV. 639, 645 (1926). *See also* CORWIN ON THE CONSTITUTION 194, 198 (Richard Loss ed., 1981).

4. W.F. Dodd, *The Growth of Judicial Power*, 24 POL. SCI. Q. 193, 194 (1909).

5. Lochner v. New York, 198 U.S. 45, 58 (1905) (invalidating a law limiting work in bakeries to ten hours per day).

6. *See, e.g.*, Kellyville Coal Co. v. Harrier, 69 N.E. 927, 928 (Ill. 1904) (invalidating an act forbidding certain employers from deducting from employees' wages, except for lawful money, as depriving equal protection of the law); Toledo, St. Louis & W. R.R. Co. v. Long, 82 N.E. 757, 758 (Ind. 1907) (invoking equal protection to invalidate a state act governing how companies must pay a certain class of employees); State v. Mo. Tie & Timber Co., 80 S.W. 933, 938 (Mo. 1904); Jordan v. State, 51 Tex. Crim. 531, 538 (Tex. Ct. App. 1907) (holding that acts requiring all employers to compensate employees in money violate rights of liberty and property); Starne v. People, 78 N.E. 61, 63 (Ill. 1906) (invalidating a statute requiring mine owners to provide washrooms at the top of each coal mine for the use of their employees as improper discrimination in favor of miners); *In re* Aubry, 36 Wash. 308, 317 (1904) (holding that a statute

"reached the point of treating as unconstitutional practically all legislation which they deem[ed] unwise."[7] While it may be that at least some of the judges thought the laws they found to be unconstitutional to be unwise, and occasionally they may have opined on policy matters, their opinions were seldom devoid of legal and constitutional argument.

Although one invites cancellation in today's climate of unquestionable truths and unspeakable heresies, looking back at the majority opinion in *Lochner* reveals not only competing economic theories arguing for different public policies but also a Court facing and seeking to address a key constitutional question. After recognizing that both individual liberties and the states' police powers coexist in the Constitution, Justice Peckham summarized the legal issue faced by the Court:

> Therefore, when the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employee), it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state.[8]

If the Constitution both recognizes state police power and guarantees individual rights to be free from governmental coercion—which it unarguably does—there is no avoiding this question in the exercise of judicial responsibility. How the question is answered will have practical consequences; more expansive individual rights mean less government authority and vice versa. However, as Peckham observed, "it must . . . be conceded that there is a limit to the valid exercise of the police power by the state. . . . Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power. . . ."[9]

In dissent, Justice Holmes objected that "this case is decided upon an economic theory."[10] But while economic theory may argue for one or another resolution of a constitutional question, it does not

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regulating the trade of horseshoeing and requiring the person practicing such trade to obtain a certificate from a board of examiners was invalid as infringement on liberty and property and denial of equal protection. *But see* Dodd, *supra* note 4 (providing a contemporary critique of these and other cases).

7. Dodd, *supra* note 4, at 195.

8. *Lochner*, 198 U.S. at 54.

9. *Id.* at 56.

10. *Id.* at 75 (Holmes, J., dissenting).

resolve which interpretation is legally correct. The New York statute either infringed upon a right guaranteed by the Fourteenth Amendment or it did not. Holmes sought to resolve that question with reference to "the natural outcome of a dominant opinion,"[11] while the *Lochner* majority relied on their understanding of the constitutional balance between liberty and police power. The conflicting opinions were not a disagreement over economic theory but rather two fundamentally different understandings of the core principles of the Constitution.

Holmes expressed concern for "the right of a majority to embody their opinions in law"[12] while Peckham asked, "are we all . . . [to be] at the mercy of legislative majorities?"[13] Is it a majoritarian or a libertarian Constitution? If majoritarian, as Holmes argued, legislative enactments are invalid only when they "infringe fundamental principles as they have been understood by the traditions of our people and our law."[14] If libertarian, as Peckham argued, the Court could not permit the police power to "be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint."[15]

Justice Harlan also dissented, but unlike Holmes, he offered a clear statement of the constitutional issue the court faced:

> Granting then that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the state may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void?[16]

However, Harlan then avoided the question he had posed by asserting that "the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power."[17] Here he indulged what has been understood for over two centuries as a presumption of constitutionality. He continued:

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11. *Id.* at 76.
12. *Id.* at 75.
13. *Id.* at 59 (majority opinion).
14. *Id.* at 76 (Holmes, J., dissenting).
15. *Id.* at 56 (majority opinion).
16. *Id.* at 68 (Harlan, J., dissenting).
17. *Id.*

> If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. . . . In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional.[18]

Like Holmes, Harlan took the majority's ruling to be a judgment on the wisdom of the New York law rather than on its constitutionality. Justice Peckham devoted several paragraphs of his opinion to a discussion of the health and safety arguments made in support of the New York law and other similar regulations of employment. However, his purpose was not to pass judgment on the merits of those arguments, but rather to demonstrate that virtually any regulation of the conditions of employment might be claimed to protect the health, safety, and morals of employees. "This is not a question of substituting the judgment of the court for that of the legislature,"[19] insisted Peckham.

> If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? and that question must be answered by the court.[20]

If a core purpose of the Constitution is to establish a government in which the default premise is that the majority should be allowed to impose its will, then Holmes and Harlan had the better case. But if the core principle of the Constitution is the establishment of a government to secure liberty, as Jefferson proclaimed in the Declaration of Independence, then the *Lochner* majority at least addressed the right question.

While it is true that the resolution of many cases pitting rights claims against assertions of governmental power has policy consequences, it does not follow that the judges necessarily seek to achieve those consequences. *Lochner* was and is condemned because it limited the authority of the states to confer protections and benefits upon workers. But notwithstanding recent pleas for the appointment of empathetic judges,[21] sympathy for the plight of workers is not a

18. *Lochner*, 198 U.S. at 68 (Harlan, J., dissenting).

19. *Id.* at 56–57 (majority opinion).

20. *Id*. at 57.

21. For example, in an interview published in *The New York Review*, then-Justice Stephen Breyer stated: "This empathy, this ability to envision the practical consequences on one's contemporaries of a law or a legal decision, seems to me to a crucial quality in a judge." Ioanna Kohler, *On Reading Proust: Stephen Breyer,*

constitutional argument. It is a policy argument made by those accusing the majority of usurping the legislative function. The presumption of constitutionality advocated for by Justice Harlan tilts the resolution of the issue posed by Justice Peckham in favor of majoritarian sovereignty and against individual liberty.

III. THE CASE FOR A PRESUMPTION OF CONSTITUTIONALITY

Although the Court usually asserts the presumption of constitutionality maxim without explanation, a few possible justifications emerge from the case law.

Perhaps the most frequently articulated justification is that the courts owe due respect to the judgments of their coequal branches of government. Whether respect is due as a simple matter of good manners and conflict avoidance or for a reason of constitutional relevance is generally left unsaid, leaving the reader to wonder what any constitutional relevance might be.[22]

A second justification—seldom expressly argued, but often implied—is that the three branches of government are coequal in their authority to interpret the Constitution. While there is no question that every public official has frequent occasions to assess whether contemplated actions are true to their oath to support the Constitution, the constitutionally prescribed limits on the legislative and executive powers would be mere parchment barriers without judicial oversight.[23]

A third explanation that occasionally emerges is judicial uncertainty about the constitutional question at hand. But if the judicial responsibility is to say what the law is, as Chief Justice Marshall proclaimed in *Marbury v. Madison*,[24] how can the judge allow uncertainties to be resolved by the entity whose actions are being questioned? The frequent assertion that the three branches are coequal means that each branch has equal authority to perform its unique constitutional functions, not that all three branches share those functions equally.[25]

Interviewed by Ioanna Kohler, NEW YORK REVIEW (Nov. 7, 2013), https://tinyurl.com/2p8tn6j7 [https://perma.cc/H3A6-B2QN].

22. An exception is Justice Jackson's opinion in *United States v. Five Gambling Devices*, in which he wrote that deference to the legislature is not just a "polite gesture." United States v. Five Gambling Devices, 346 U.S. 441, 449 (1953).

23. *See* Marbury v. Madison, 5 U.S. 137 (1803); Ogden v. Saunders, 25 U.S. 213 (1827) (majority opinions penned by Chief Justice Marshall).

24. *Marbury*, 5 U.S. at 177.

25. *See* West Coast Hotel v. Parrish, 300 U.S. 376, 405 (1937) (Sutherland, J., dissenting) (explaining that the functions of the three branches of government are distinct).

A fourth justification has been that deference is a recognition of the legislature's superior institutional competence in making factual determinations relevant to setting public policy. Although the Court's due process jurisprudence and the many balancing tests it has engendered invite judicial weighing of policy alternatives, the performance of the judicial function requires no factual inquiries beyond establishing the applicability of specific constitutional provisions to the cases that come before the Court.

A fifth and most frequent justification for the presumption of constitutionality is the promotion of republican principles—namely, deference to the judgment of those elected to both legislative and executive positions.[26] As discussed in the following section, this justification rests on a majoritarian understanding of the Constitution and stands in opposition to a libertarian, rights-protecting understanding.

Scholarly commentary on the presumption of constitutionality is not abundant, but commentary that exists tends to be rooted in either a majoritarian or libertarian understanding of the Constitution. Majoritarians endorse some version of James Bradley Thayer's 1893 assertion that the Court should only hold a statute unconstitutional when its unconstitutionality is "so clear that it is not open to rational question."[27] Libertarian arguments reflect Randy Barnett's 2004 assertion that there should be a presumption of liberty with the government bearing the burden of justifying any restrictions of constitutional rights.[28]

Where Thayer argued for deference to legislative interpretations of law (the third rationale above),[29] the courts have more often deferred on questions of fact (the fourth rationale above). Andrew Hessick contends that the presumption, as presently applied, does not serve what he perceives to be the Court's objectives: due respect for the legislative branch, rulemaking by elected officials rather than unelected courts, and deference to the legislature's superiority as a law-making institution. He concludes that those objectives would be better served by reverting to Thayer's deference on questions of law.[30] Edward Dawson takes a more explicit majoritarian approach, arguing that the strength of the presumption should vary with the

26. *See generally* Parsons v. Bedford, 28 U.S. 433 (1830).

27. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 141 (1893).

28. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 275 (2004).

29. Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 533 (2012) (concluding that "there are few academic Thayerians anymore" and that there are "no orthodox Thayerians" currently on the federal bench).

30. Andrew F. Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1449 (2010).

challenged statute's margin of passage. Where the margin is narrow, judicial intervention can serve as a sort of democratic tiebreaker. But where the margin is wide, the presumption assures that the majority view prevails, including on questions of constitutional interpretation.[31]

Barnett's view is joined by David Burke, who argues that the presumption of constitutionality is "contrary to the principles underlying the theory of constitutional government and poses a formidable obstacle to the safeguarding of individual liberty."[32] As a correction for the diminished protection of liberty described by Barnett and Burke, Michael Lawrence has suggested adapting the time, place, and manner concept of First Amendment law to all liberty-based challenges to legislation. He would require the government to prove either that "(1) the asserted interest is not a liberty interest (broadly defined); (2) the restriction is not a substantial burdening of the liberty interest, or (3) it is a reasonable time, place, and manner restriction of the liberty interest."[33]

Barnett's presumption of unconstitutionality has never been embraced by the Supreme Court, although Barnett argues that Justice Kennedy applied a presumption of liberty in *Lawrence v. Texas*.[34] As this Article demonstrates, the Court's discomfort with the implications of a comprehensive presumption of unconstitutionality has led the Court to a jerry-rigged jurisprudence of hierarchical rights and preferred groups of peoples accompanied by judicial engagement in public policy decisions. Lawrence's proposal seeks to fit neglected liberties into the Court's contrivance, but a better approach would be to reconsider the presumption of constitutionality as Barnett urges.

IV. THE MAXIM TAKES ROOT WITH THE SUPREME COURT

Five years before Chief Justice Marshall's opinion in *Marbury v. Madison* confirming the power of judicial review, Justices Chase and Iredell observed that the constitutionality of legislation should be presumed in the event the federal courts have the authority to

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31. Edward C. Dawson, *Adjusting the Presumption of Constitutionality Based on Margin of Statutory Passage*, 16 U. PA. J. CONST. L. 97, 134 (2013).

32. David M. Burke, *The "Presumption of Constitutionality" Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty*, 18 HARV. J.L. & PUB. POL'Y 73, 76 (1994).

33. Michael Anthony Lawrence, *Government as Liberty's Servant: "The Reasonable Time, Place, and Manner" Standard of Review for All Government Restrictions on Liberty Interests*, 68 LA. L. REV. 1, 55–56 (2007) (emphasis omitted) (citation omitted).

34. Lawrence v. Texas, 123 S. Ct. 2472 (2003); Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2002 CATO SUP. CT. REV. 21, 21 (2003).

declare legislative acts unconstitutional. In *Calder v. Bull*,[35] Chase declared that "if I ever exercise the jurisdiction [to review the constitutionality of legislative acts] I will not decide any law to be void, but in a very clear case."[36] Notwithstanding that the Framers sought to constrain the ubiquitous abuses of legislative power since the Revolution, Chase wrote: "It is not to be presumed that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws; unless for the benefit of the whole community; and on making full satisfaction."[37] Anticipating *Marbury*, Iredell stated:

> If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case.[38]

Iredell did go on to frame the constitutional question much as Justice Peckham would a century later in *Lochner*. After stating that laws could not be pronounced void because contrary to "the ideas of natural justice," Iredell wrote: "There are then but two lights, in which the subject can be viewed: 1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2nd. If they transgress the boundaries of that authority, their acts are invalid."[39]

In *Marbury*, Chief Justice Marshall gave no suggestion that courts should give deference to legislative interpretations of the Constitution. While he was restrained in asserting the power of judicial review as requisite to fulfilling the judicial function of resolving everyday legal disputes—"to say what the law is"[40] as it pertains to the case at hand, he was adamant that a government of constitutionally limited powers must not be allowed to exceed those powers. He posed the question for the court in much the same way Justice Iredell did five years earlier and Justice Peckham would a century later:

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35. Calder v. Bull, 3 U.S. 386 (1798).

36. *Id.* at 395. At issue in the case was whether a state legislative act allowing for a second judicial proceeding in which the plaintiffs' previously adjudicated inheritance was revoked constituted an unconstitutional ex post facto law. *Id.* at 387. Although the Court ruled that the Ex Post Facto Clause applies only to criminal laws, his concluding reference to "full satisfaction" reflected the then general concern that property interests be protected from legislative expropriation. *Id.* at 390, 394. Indeed, part of his argument for limiting the Ex Post Facto Clause to criminal laws was that the Constitution's prohibition on the impairment of contracts would be unnecessary if the Ex Post Facto Clause provides the same guarantee. *Id.* at 394.

37. *Id.* at 394.

38. *Id.* at 399 (Iredell, J., dissenting).

39. *Id*.

40. Marbury v. Madison, 5 U.S. 137, 178 (1803).

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . . It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.[41]

Marshall did not contradict himself when seven years later, in *Fletcher v. Peck*,[42] he declared that "[t]he question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case."[43] His point was not that courts should defer to legislative interpretations of constitutional provisions, but rather that courts should not impose statutory interpretations about which they have doubts. In declaring an act of the legislature to have transcended its constitutional authority, judges should hold "a clear and strong conviction of their incompatibility with each other."[44] Later in the opinion, Marshall suggested why deference to legislative interpretations of their own powers does not comport with the fundamental objectives of the Constitution:

> Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The

41. *Id.* at 167–77; *see* Thayer, *supra* note 27 (finding ample support for Marshall's formalist view); Bayard *v.* Singleton, 3 N.C. 42 (N.C. 1787); THE FEDERALIST No. 78, at 261 (Alexander Hamilton) (Henry C. Lodge ed., 1904); 1 THE WORKS OF HONOURABLE JAMES WILSON 460 (Bird Wilson ed., 1804); Kamper v. Hawkins, 3 Va. 20 (1788); Vanhorne's Lessee *v.* Dorrance, 2 U.S. 304 (Pa. Dist. 1795); Lindsay *v.* Comm'rs, 2 S.C.L. 38 (S.C. 1796); Whittington *v.* Polk, 1 H. & J. 236 (Md. 1802).

42. Fletcher v. Peck, 10 U.S. 87 (1810).

43. *Id.* at 128.

44. *Id.*

> restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.[45]

Seventeen years later, in *Ogden v. Saunders*,[46] Marshall acknowledged that constitutional questions are to be addressed "with profound and respectful reverence" while reasserting the Court's constitutional responsibility.[47] "[I]f it be right that the power of preserving the constitution from legislative infraction, should reside anywhere, it cannot be wrong, it must be right, that those whom the delicate and important duty is conferred [upon] should perform it according to their best judgment."[48] In performing that duty, Marshall offered what today would be labeled either a textualist or an originalist theory of constitutional interpretation:

> To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;—is to repeat what has been already said more at large, and is all that can be necessary.[49]

Although he agreed with the majority that a New York bankruptcy law, as applied to a contract entered into after the enactment of the law, did not violate Article I, Section 10's prohibition on state impairment of the obligation of contracts, Marshall did not suggest that he was deferring to the state legislature's interpretation of the constitutional clause. However, in language often cited in subsequent opinions, Justice Washington, stating what he believed to be the "honest sentiments of each and every member of this bench," concluded his opinion by acknowledging his doubts on the question of constitutionality and averring:

> [I]f I could rest my opinion in favour of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative

45. *Id.* at 137–38.
46. Ogden v. Saunders, 25 U.S. 213 (1827).
47. *Id.* at 332 (Marshall, C.J., dissenting).
48. *Id.*
49. *Id.*

> body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt.[50]

The early arguments for judicial restraint in holding legislative enactments unconstitutional rested on two related but fundamentally different ideas. Justice Chase expressed both in *Calder*: With reference to the judicial responsibility to say what the law is, he proclaimed that he would "not decide any law to be void, but in a very clear case,"[51] thus placing the burden of persuasion on the party claiming that a legislative enactment is unconstitutional. His reason for thus assigning the burden was his presumption that Congress and state legislatures would not pass laws that deprived citizens of vested rights "unless for the benefit of the whole community; and on making full satisfaction."[52] This presumption was remarkable for its time. Much of the Constitutional Convention had been devoted to the design of constraints on legislative abuses of power. Federalism, the separation of powers, a bicameral Congress, the executive veto, judicial review, and subsequently a bill of rights were designed, in part, to constrain democratic excess. That a decade later, it would be presumed that legislatures would be respectful of their constitutional limitations contradicted the experiences of the founding generation. In fairness to Chase, his assertion that vested rights would only be deprived for the benefit of the whole and with full satisfaction suggests that he was thinking in the narrow property rights context of the case at hand and, more particularly, of the recently ratified Fifth Amendment's Public Use and Just Compensation clauses.[53]

Justice Washington's rationale in *Ogden* was similar. After expressing his doubts on the constitutionality question, he attributed the presumption of constitutionality to "a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body."[54] In light of the founding history, only a generation removed and still in the memory of a few, the presumption was no more plausible than when Chase suggested it. By the time Harlan wrote in *Lochner*, the claim that legislatures should be presumed to comply with the Constitution was usually left unspoken, perhaps because legislatures were no better behaved in the 19th century. Nothing more than judicial doubt on the question of constitutionality required deference to

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50. *Id.* at 270 (majority opinion).
51. Calder v. Bull, 3 U.S. 386, 395 (1798).
52. *Id.* at 394.
53. U.S. CONST. amend. V, cl. 5 ("[N]or shall private property be taken for public use, without just compensation.").
54. *Ogden*, 25 U.S. at 270.

the legislature. Harlan suggested that legislatures would not run rampant because they would have "to meet the responsibility of unwise legislation."[55] But the wisdom of legislation says nothing about its constitutionality. A law may effectively address pressing public problems but be unconstitutional because it is outside the authority of the legislature or in violation of constitutional liberties.

A few years before Washington wrote in *Ogden*, Chief Justice Marshall had occasion in *Cohens v. Virginia*[56] to reiterate his understanding of the courts' responsibilities to review the constitutionality of both federal and state legislation. Expressing an understanding that allowed for no presumption one way or the other and called upon judges to resolve any doubts they may harbor, Marshall wrote:

> It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.[57]

Through the 19th century, a presumption of constitutionality was reaffirmed by the Supreme Court and by numerous state courts, usually in the form stated by Justice Story in the 1830 case *Parsons v. Bedford, Breedlove & Robeson*.[58] "No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution."[59] In his *Commentaries on the Constitution of the United States*,[60] published three years after his opinion in *Parsons*, Story elaborated at length on his views on constitutional interpretation. Although he hinted that the burden of demonstrating constitutionality should be on the government in stating that "whenever it is a question of power, it should be approached with infinite caution, and affirmed only upon the most

55. Lochner v. New York, 198 U.S. 45, 68 (1905).
56. Cohens v. Virginia, 19 U.S. 264 (1821).
57. *Id.* at 404.
58. Parsons v. Bedford, 28 U.S. 433 (1830).
59. *Id.* at 449.
60. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (2d ed. 1833).

persuasive reasons," he went on to urge a liberal rather than strict approach by the courts.[61]

By way of illustrating the strict approach with which he disagreed, Story cited Thomas Jefferson's proposed canons of interpretation. First, Jefferson argued that because the "capital and leading object of the constitution was, to leave with the states all authorities which respected their own citizens only, and to transfer to the United States those, which respected citizens of foreign or other states; to make us several as to ourselves, but one as to all others," courts should "lean to the general jurisdiction" in matters relating to the latter and lean "in favour of the states in the former."[62] This canon, Story contended, was "contradicted by the provisions of the constitution" granting national authority over citizens of the respective states.[63] Rather than rely on a general theory of interpretation, he argued that "every clause ought, at all events, to be construed according to its fair intent and objects, as disclosed in its language."[64] Second, Jefferson urged what today would be labeled an originalist canon of interpretation:

> On every question of construction [we should] carry ourselves back to the time, when the constitution was adopted; recollect the spirit manifested in the debates; and instead of trying, what meaning may be squeezed out of the text, or invented against it, conform to the probable one, in which it was passed.[65]

To which Story rhetorically and uncharitably responded: "Now, who does not see the utter looseness, and incoherence of this canon."[66]

Further illustrating what Story labeled the "strict" interpretation theory, he cited St. George Tucker's *Blackstone Commentaries* on much the same theme as Jefferson. With respect to questions relating to the relative powers of the federal and state governments, Tucker advised that the constitution "be construed strictly, in all cases, where the antecedent rights of a state may be drawn in question."[67] With respect to issues "of personal liberty, of personal security, or of private property," Tucker counseled that strict construction should also apply "because every person, whose liberty or property was thereby

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61. *Id.* § 405.

62. Letter from Thomas Jefferson to William Johnson (June 12, 1823), https://tinyurl.com/57czrc9k [https://perma.cc/5YN6-EABT].

63. Story, *supra* note 60, § 407 n.1.

64. *Id.*

65. Letter from Thomas Jefferson to William Johnson, s*upra* note 62.

66. STORY, *supra* note 60, § 407 n.1.

67. *Id.* § 410 (quoting 1 BLACKSTONE'S COMMENTARIES app. 151 (St. George Tucker ed., Philadelphia, Birch & Small 1803)).

rendered subject to the new government, was antecedently a member of a civil society, to whose regulations he had submitted himself, and under whose authority and protection he still remains, in all cases not expressly submitted to the new government."[68] Story's counter to Jefferson's and Tucker's first argument, quoting Chief Justice Marshall in *Martin v. Hunter's Lessee*,[69] was that no deference is owed to the states because "[t]he constitution of the United States . . . was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by the people of the United States."[70] While Story acknowledged it "not only natural, but just, to presume [in construing a grant, or surrender of powers by the people to a monarch] . . . that the parties had not in view any large sense of the terms, because the objects were a derogation permanently from their rights and interests," he insisted:

> [I]n construing a constitution of government, framed by the people for their own benefit and protection, for the preservation of their rights, and property, and liberty; where the delegated powers are not, and cannot be used for the benefit of their rulers, who are but their temporary servants and agents; but are intended solely for the benefit of the people, no such presumption of an intention to use the words in the most restricted sense necessarily arises.[71]

Thus, at least for Justice Story, the presumption of constitutionality summarily stated in *Parsons* was founded on a particular understanding of the nature of the U.S. Constitution. Like Holmes writing many years later in *Lochner*, Story's presumption of constitutionality was founded on a majoritarian philosophy which, when applied to federalism issues, required majorities of the national electorate to prevail over the inevitably divergent majorities in the several states, and when applied to questions of individual liberty, accepted as a default principle that legislative restrictions on liberty had been agreed to when the government was constituted.

The presumption of constitutionality was reiterated by Chief Justice Waite in the 1878 *Sinking-Fund Cases*.[72] Echoing Marshall's opinions in *Marbury*, *Cohens*, and *Ogden*, Waite proclaimed the Court's "duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States."[73] But he went on to state that

68. *Id.* § 410 (quoting BLACKSTONE'S COMMENTARIES, *supra* note 67, at app. 151).
69. Martin v. Hunter's Lessee, 14 U.S. 304 (1816).
70. STORY, *supra* note 60, § 417 (quoting *Martin*, 14 U.S. at 324).
71. *Id.* § 413.
72. Sinking-Fund Cases, 99 U.S. 700 (1878).
73. *Id.* at 718.

"[e]very possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."[74] His explanation for the presumption was that "[o]ne branch of the government cannot encroach on the domain of another without danger."[75] Waite's clear implication was that Congress and the judiciary—and presumably the executive—share authority to assess the constitutionality of legislation and other actions of government. Rather than view the separation of powers as a separation of distinct functions, Waite's explanation implied a government of equally shared functions—at least the function of constitutional interpretation. Of course, it is undeniable that both Congress and the executive implicitly express their judgment as to the constitutionality of their actions by undertaking those actions, but they have no responsibility to explain or justify their implicit interpretations. Nor does the history of legislative and executive abuses of power give reason to be confident in the sincerity of those interpretations, notwithstanding their having taken an oath to support and defend the Constitution.

The presumption of constitutionality applied by the Supreme Court to the acts of Congress was also relied upon by numerous state courts in interpretating their state constitutions. In the 1884 case of *Grenada v. Brogden*,[76] Justice Harlan applied the presumption in the context of a state law challenged as unconstitutional under the Mississippi constitution. "If there were room for two constructions, both equally obvious and reasonable," wrote Harlan:

> [T]he court must, in deference to the legislature of the state, assume that it did not overlook the provisions of the constitution. . . . Our duty, therefore, is to adopt that construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the constitution.[77]

In support, Harlan cited Thomas Cooley's 1868 *Treatise on the Constitutional Limitations*,[78] one of the most frequently cited legal authorities of the late 19th century. As stated by Harlan, the presumption spoke not to doubts about the mandates of the Constitution, but rather to doubts about the meaning of the statute in issue. Such doubts were to be resolved in favor of an interpretation that brought the legislation within the court's interpretation of the constitutional

74. *Id.*
75. *Id.*
76. Grenada Cnty. Supervisors v. Brogden, 112 U.S. 261 (1884).
77. *Id.* at 268–69.
78. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Boston, Little, Brown, & Co. 1868).

authority of the legislature. Justice White applied the same presumption in interpreting a California statute a year later in *Hooper v. California*.[79] As noted above, by the time of *Lochner* 21 years later, Harlan was prepared to defer to the legislature's interpretation of its own constitutional authority.[80]

As early as 1899, Harlan, speaking for the Court, stated the presumption of constitutionality in terms similar to those he would employ in his *Lochner* dissent. In *Henderson Bridge Co. v. City of Henderson*,[81] a bridge company claimed that a tax imposed on their bridge by the City was an unconstitutional taking of private property. The case turned on whether the City had jurisdiction over that portion of the bridge supported by piers in the navigable Ohio River. Harlan wrote:

> [For the tax to be a violation of the Fourteenth Amendment,] the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that taxation . . . is really spoliation under guise of exerting the power to tax. . . . All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments.[82]

Three years later, in a case involving amendment to state insurance regulations, the Court, with Harlan not participating, stated the presumption in the more limited sense of interpreting legislation to be in compliance with the Court's interpretation of the Constitution if possible. Justice Brown wrote:

> [W]e do not find it necessary to express an opinion whether, if the act of 1887 were plainly applicable upon its face to antecedent policies, it would be objectionable as impairing the obligation of contracts entered into between the insurance company and insured, inasmuch as we are clearly of opinion that it should not be held to apply to such unless its language imperatively demand it.[83]

Brown went on to declare:

> Were the act of 1887 more ambiguous than it is . . . we should still be disposed to apply the cardinal rule of construction, that where the language of an act will bear two interpretations, equally

79. Hooper v. California, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality.").

80. Lochner v. New York, 198 U.S. 45, 68 (1905).

81. Henderson Bridge Co. v. Henderson City, 173 U.S. 592 (1899).

82. *Id.* at 614–15.

83. Knights Templars' & Masons' Life Indem. Co. v. Jarman, 187 U.S. 197, 204–05 (1902).

> obvious, that one which is clearly in accordance with the provisions of the Constitution is to be preferred.[84]

Under this version of the presumption, the issue is not the content of constitutional liberties or the extent of constitutional limitations on legislative authority but, rather, the meaning of the legislation. Indeed, it is not really a presumption that the legislature acted constitutionally, but rather the Court doing the legislature the favor of explaining how the law can conform to the Court's interpretation of the Constitution.

In several cases over the following three decades, the Court gave a similar meaning to the presumption of constitutionality. In *United States v. Jin Fuey Moy*,[85] Justice Holmes stated that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."[86] In *United States v. Delaware & Hudson Co*[87] Justice White wrote:

> It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.[88]

In *United States v. Standard Brewery*,[89] Justice Day cautioned that "in considering an act of Congress[,] . . . a construction which might render it unconstitutional is to be avoided."[90]

After noting that "research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an Act of Congress unconstitutional" in *Blodgett v. Holden*,[91] Justice Holmes, writing for himself and three others in a split decision on the constitutionality of a provision of the Revenue Act of 1924, further declaimed that doing so "is the gravest and most delicate duty that this Court is called upon to perform."[92] For that reason, he disagreed with the opinion of Justice McReynolds, written on behalf of the other half of the Court, finding that

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84. *Id.* at 205.
85. United States v. Jin Fuey Moy, 241 U.S. 394 (1916).
86. *Id.* at 401.
87. United States ex rel. Att'y Gen. v. Delaware & Hudson Co., 213 U.S. 366 (1909).
88. *Id.* at 407.
89. United States v. Standard Brewery, Inc., 251 U.S. 210 (1920).
90. *Id.* at 220.
91. Blodgett v. Holden, 275 U.S. 142 (1927).
92. *Id.* at 147–48 (Holmes, J., concurring).

the challenged provision was unconstitutional.[93] Holmes thought such a finding should be avoided, consistent with the "rule [that] is settled" that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."[94] The disagreement anticipated the Court's coming split over the constitutionality of several New Deal statutes. Of the four justices believing the law in *Blodgett* to be unconstitutional, Butler, McReynolds, and Van Devanter would be among those ruling to invalidate New Deal legislation. Among the four wishing to avoid the constitutional question—by ruling that Congress intended for it to have only prospective application—Holmes and Brandeis would be among the justices ruling to uphold New Deal legislation.

V. HELPING SAVE THE NEW DEAL

While the Supreme Court's invalidation of several early New Deal statutes is generally attributed to policy disagreements on the part of a then-majority of the Court, with a subsequent change in the Court's membership shifting the balance in favor of New Deal policies, the justices' understanding of the presumption of constitutionality was an important factor. The 4-4 split in *Blodgett* reflected a difference of opinion about the basis of the presumption. Of those justices still on the Court ten years later when it overruled in *West Coast Hotel v. Parrish*[95] its invalidation of a federal minimum wage law in *Adkins v. Children's Hospital*,[96] Holmes and Brandeis understood the presumption to be founded in the separation of powers and deference to the constitutional interpretations of the executive and legislative branches. For their part, McReynolds, Butler, and Van Devanter merely presumed that legislation should be interpreted, if possible, as in conformance with constitutional requirements.

Although Chief Justice Hughes would join the majority in *West Coast Hotel*, he provided a clear explanation of the more limited understanding of the presumption in the 1934 case *Borden's Farm Products v. Baldwin*.[97] In *Borden's Farm*, the plaintiff challenged as a violation of due process and equal protection a New York law mandating a one cent lower minimum price for milk sold by dealers not having a "well advertised trade name."[98] Noting that the state

93. *Id.* at 144 (plurality opinion).
94. *Id.* at 148.
95. West Coast Hotel v. Parrish, 300 U.S. 379 (1937).
96. Adkins v. Children's Hospital, 261 U.S. 525 (1923).
97. Borden's Farm Products Co. v. Baldwin, 293 U.S. 194 (1934).
98. *Id.* at 200.

"invoke[d] the presumption which attaches to the legislative action," Hughes explained that the presumption is one "of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption. It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault."[99] "With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights," observed Hughes, "it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support."[100]

Chief Justice Hughes was well familiar with assertions of constitutional rights violations. In the prior term, he had written the majority opinion in *Home Building and Loan v. Blaisdell*[101] ruling that the Minnesota Mortgage Moratorium Law did not unconstitutionally impair obligations of contract—nor violate the Due Process and Equal Protection Clauses. "We are of the opinion that the Minnesota statute as here applied does not violate the contract clause of the Federal Constitution," wrote Hughes.[102] "Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned."[103] Later that term, he would agree with the majority in *Nebbia v. New York*[104] that a New York law authorizing the Milk Control Board to fix minimum and maximum prices for milk did not violate the constitutional rights to due process and equal protection. In that case, Justice ROBERTS stated for the majority:

> With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. . . . Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.[105]

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99. *Id.* at 209 (citations omitted).
100. *Id.* at 210.
101. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).
102. *Id.* at 447.
103. *Id.* at 447–48.
104. Nebbia v. New York, 291 U.S. 502 (1934).
105. *Id.* at 537–38.

Although in neither case did the majority reiterate the presumption of constitutionality, the assertion in both cases that policy-making is not the judiciary's business served as a proxy for the presumption while suggesting that the dissenting justices would find the laws unconstitutional on the basis of policy disagreements.

Dissenting in *Blaisdell*, Justice Sutherland suggested a presumption but related it to the interpretation of a challenged statute rather than to the interpretation of the constitutional provision on which the challenge was based. "[I]f the meaning [of the statute] be at all doubtful," he wrote, "the doubt should be resolved, wherever reasonably possible to do so, in a way to forward the evident purpose with which the provision was adopted."[106] Sutherland and his fellow dissenters believed the purpose was clearly to alter the contractual obligations of mortgagees. "Few questions of greater moment than that just decided have been submitted for judicial inquiry during this generation," warned Sutherland.[107] "He simply closes his eyes to the necessary implications of the decision who fails to see in it the potentiality of future gradual but ever-advancing encroachments upon the sanctity of private and public contracts."[108] Dissenting in *Nebbia*, Justice McReynolds argued that in interpreting the Constitution, the Court should look not to the "peculiar conditions"[109] that motivated the legislature to enact a statute, but rather to the purposes of the constitutional provision under which legislation is challenged. "The Fourteenth Amendment wholly disempowered the several states to 'deprive any person of life, liberty, or property, without due process of law.' The assurance of each of these things is the same," wrote McReynolds.[110] "If now liberty or property may be struck down because of difficult circumstances, we must expect that hereafter every right must yield to the voice of an impatient majority when stirred by distressful exigency."[111]

Although the laws at issue in *Blaisdell* and *Nebbia* were upheld as constitutional exercises of legislative authority, other New Deal laws suffered a different fate. For example, in *Railroad Retirement Board v. Alton*,[112] the Court invalidated a law mandating pension programs for railroad employees. Justice Roberts observed that whether the Court believes a statute "unwise and prejudicial to both public and private interest" or "a valuable social plan," it must sustain the law "if

106. *Blaisdell*, 290 U.S. at 453 (Sutherland, J., dissenting).
107. *Id.* at 448.
108. *Id.*
109. *Nebbia*, 291 U.S. at 544 (McReynolds, J., dissenting).
110. *Id.* at 545–46.
111. *Id.*
112. R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935).

it be fairly within delegated power" or "if the provisions go beyond the boundaries of constitutional power we must so declare."[113]

In *Panama Refining v. Ryan*,[114] the Court ruled that an executive order prohibiting interstate and foreign trade in petroleum goods produced in excess of state quotas was not authorized by the National Industrial Recovery Act and was, therefore, unconstitutional legislating by the executive. "The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good," wrote Chief Justice Hughes for the majority.[115] "The point is not one of motives, but of constitutional authority, for which the best motives is not a substitute."[116] In dissent Justice Cardozo reframed the oft-stated presumption that "when a statute is reasonably susceptible to two interpretations, by one of which it is unconstitutional and by the other valid, the court prefers the meaning that preserves to the meaning that destroys."[117] From the plaintiffs' perspective, it was their interests, not the government's, that the law threatened to destroy.

Later in the same term, the Court ruled in *Schechter Poultry v. United States*[118] that another provision of the National Industrial Recovery Act (the Live Poultry Code) was an unconstitutional delegation of Congress's legislative authority. Perhaps remembering Justice Holmes' words from *Lochner*, Chief Justice Hughes declared it "not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it."[119] On the question of whether the Constitution provides the authority exercised, he wrote:

> Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extraconstitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment—"The

113. *Id.* at 346.
114. Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935).
115. *Id.* at 420.
116. *Id.*
117. *Id.* at 439 (Cardozo, J., dissenting).
118. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
119. *Id.* at 549.

> powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[120]

Other Congressional enactments were invalidated by the Court the following year. For example, in *United States v. Butler*,[121] the Court found unconstitutional a tax levied under the Agricultural Adjustment Act. Although the majority suggested that the power to tax and spend for the general welfare was not limited to expenditures in the performance of Congress's enumerated powers, it found the tax in question to be a pretext for exercising regulatory authority reserved to the states. Writing for the majority, Justice Roberts stated that "[the] very presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law," but declared that "under our frame of government . . . [the courts are the only place] provided where the citizen may be heard to urge that the law fails to conform to the limits set upon the use of a granted power."[122] Having, thus, suggested that in making that determination the court should defer to some extent to Congress's opinion on constitutionality, he then reframed the presumption as calling for deference to "the wide range of discretion permitted to the Congress" in the promotion of the general welfare.[123]

In dissent, after stating that "courts are concerned only with the power to enact statutes, not with their wisdom," Justice Stone offered a different perspective on the presumption of constitutionality in stating "that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."[124] Suggesting that the majority was giving the Constitution a "tortured construction," Stone went on to argue that the presumption of constitutionality rested on far more than looking for plausible interpretations of statutes that would render them constitutional.

> [I]nterpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, "to obliterate the constituent members" of "an indestructible union of indestructible

120. *Id.* at 528–29 (quoting U.S. CONST. AMEND. X).
121. United States v. Butler, 297 U.S. 1 (1936).
122. *Id.* at 67.
123. *Id.*
124. *Id.* at 78–79 (Stone, J., dissenting).

> states" than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nationwide economic maladjustment by conditional gifts of money.[125]

As was the case in *Marbury v. Madison*, judges tend toward humility when invalidating legislative acts. Chief Justice Marshall claimed no superior understanding of the Constitution, but merely that in performing the judicial function, in resolving disputes properly before the courts, it falls to the judiciary to say what the law is, including the law of the Constitution. Justice Sutherland assumed the same posture in his opinion for the majority in *Adkins*. He declared the judiciary's duty to rule on questions of constitutionality "one of great gravity and delicacy."[126] After suggesting that legislation "[having] borne the scrutiny of the legislative branch" warrants a presumption of validity "until overcome beyond rational doubt," Sutherland went on to observe that the Constitution emanates directly from the popular sovereign and is thus supreme in relation to a Congressional statute which he describes as "an act of an agency of this sovereign authority."[127] He belies his purported deference to Congress's implicit determination of constitutionality in asserting that "there is . . . no such thing as absolute freedom of contract. . . . [F]reedom of contract is . . . the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."[128] In other words, Sutherland, in the spirit of the *Lochner* era, would place the burden on the legislature to justify constraints on liberty, not on the individual to overcome a presumption of constitutionality.

In overruling *Adkins*, Chief Justice Hughes wrote that "courts are both incompetent and unauthorized to deal . . . with the wisdom of the policy adopted [or] with the adequacy or practicability of the law enacted to forward it."[129] Because the "[l]egislature is primarily the judge of the necessity of such an enactment, . . . every possible presumption is in favor of its validity, and . . . though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."[130] The dissenters did not disagree with Hughes' description of the role of the judge, but they challenged the argument that their being precluded

125. *Id.* at 87–88 (quoting the majority opinion).
126. Adkins v. Children's Hosp., 261 U.S. 525, 544 (1923).
127. *Id.*
128. *Id.* at 546.
129. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398 (1937) (quoting Nebbia v. New York, 291 U.S. 502, 537–38 (1934)).
130. *Id.*

from policymaking under the separation of powers required them to presume that the legislature, the branch of government authorized to make public policy, has correctly answered the judicial issue of constitutionality. Justice Sutherland wrote:

> The people by their Constitution created three separate, distinct, independent, and coequal departments of government. The governmental structure rests, and was intended to rest, not upon any one or upon any two, but upon all three of these fundamental pillars. It seems unnecessary to repeat, what so often has been said, that the powers of these departments are different and are to be exercised independently. The differences clearly and definitely appear in the Constitution. Each of the departments is an agent of its creator; and one department is not and cannot be the agent of another. Each is answerable to its creator for what it does, and not to another agent. The view, therefore, of the Executive and of Congress that an act is constitutional is persuasive in a high degree; but it is not controlling.[131]

Ten years later, in *Carter v. Carter Coal Co*.,[132] Sutherland explicated at length his understanding of the Court's unavoidable responsibility to say what the law of the Constitution is. "[T]he Constitution itself is in every real sense a law—the lawmakers being the people themselves . . . It is by that law, and not otherwise, that the legislative, executive, and judicial agencies which it created exercise such political authority as they have been permitted to possess."[133] Because by its terms, the Constitution is declared to be the supreme law of the land with the necessary result that Acts of Congress are not the supreme law of the land, Sutherland explained:

> [A court] clothed by [the Constitution] with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior statute whenever the two conflict.[134]

Citing both *Adkins* and *Schechter*, he went on to allow that "the opinion of the lawmakers that a statute passed by them is valid must be given great weight, but their opinion, or the court's opinion, that the statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry."[135]

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131. *Id.* at 405 (Sutherland, J., dissenting).
132. Carter v. Carter Coal Co., 298 U.S. 238 (1936).
133. *Id.* at 296.
134. *Id.* at 296–97.
135. *Id.* at 297 (citations omitted).

The tide turned for the New Deal the following year. In addition to upholding a state minimum wage law in *West Coast Hotel v. Parrish* and thus overruling *Adkins v. Children's Hospital*, the Court upheld provisions of the Railway Labor Act as valid under Congress's power to regulate interstate commerce in *Virginian Railway v. System Federation No. 40*,[136] and ruled in *Wright v. Vinton Branch of Mountain Trust Bank of Roanoke*[137] that the Bankruptcy Act as amended in 1935 did not offend the Due Process Clause of the Fifth Amendment. In the former case, Justice Stone concluded that "it was for Congress to make the choice of the means by which its objective of securing uninterrupted service of interstate railroads was to be secured," a judgment "not open to review" by the Court.[138] In *Wright*, he was more explicit in relying on the presumption of constitutionality:

> If we were in doubt as to the intention of Congress, we should still be led to that construction by a well-settled rule: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[139]

Thus, through the 19th and early 20th century, the Court consistently purported to adhere to a presumption of constitutionality without offering much in the way of explanation for why it was doing so. Justice Chase argued in *Calder v. Bull* that it should not be presumed that the legislators would exceed their authority,[140] but experience belies that claim. Although Chief Justice Marshall and others suggested that judicial review is a delicate business, he established in *Marbury* that the courts have a duty to address issues of constitutionality.[141] In *Ogden v. Saunders*, Justice Washington suggested that doubts about constitutionality are a reason to defer to the legislature,[142] but Marshall had previously made clear in *Cohens v. Virginia* that it was the judges' responsibility to resolve any doubts.[143] In *Parsons v. Bedford* and in his *Commentaries on the Constitution*, Justice Story argued that deference was due to a government acting at the behest of the people,[144] an anticipation of the majoritarian arguments Justice Holmes would make later. Justice Waite in the

136. Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515 (1937).
137. Wright v. Vinton Branch of Mountain Tr. Bank, 300 U.S. 440 (1937).
138. *Virginian Ry. Co.*, 300 U.S. at 539.
139. *Wright*, 300 U.S. at 461 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).
140. Calder v. Bull, 3 U.S. 386, 394 (1798).
141. *See supra* text accompanying note 41.
142. *See supra* text accompanying note 49.
143. *See supra* text accompanying note 57.
144. *See supra* text accompanying notes 59–60.

Sinking Fund Cases and Justice Harlan in *Grenada v. Brown* asserted that the presumption is implicit in the separation of powers and Justice Stone in *United States v. Butler* argued that only self-restraint can check judicial abuses of power.[145] Chief Justice Hughes in *West Coast Hotel* questioned the competence of the judiciary, but he was speaking of judicial competence to judge public policy, not judicial competence to perform the legal task set forth by Marshall in *Marbury*.

More often than not, reference to a presumption of constitutionality obscured what the Court was actually talking about. Usually, as with Hughes in *West Coast Hotel*, the presumption was not that the legislative act was constitutional, but rather that the means chosen were rationally related to the legislature's policy objectives. That is a presumption of rationality, not of constitutionality. Whether the means chosen were forbidden by the Constitution[146] or violative of constitutional rights[147] remained to be determined by the courts, as did the question of whether legislation came within Congress's enumerated powers. To the extent the Court was deferring to a legislature's determination of constitutionality, it was embracing a wholly different understanding of the separation of powers than that implicit in *Marbury*. While it is true that legislators and other government officials, whether elected or unelected, take an oath to uphold the Constitution and thereby are implicitly interpreting the Constitution with every action they take, it does not follow that their implicit or explicit interpretations should have any bearing on the Court's interpretation of the Constitution. They are situated no differently than an ordinary citizen who disagrees with a court's judgment on the legality of their behavior.

The Court's frequent failure to distinguish between a presumption of rationality and a presumption of constitutionality is best explained by the Court's gradual invention of substantive due process. Although the *Lochner* era version of substantive due process has been long rejected as judicial intrusion on the legislative process, a more modest version articulated by Justice ROBERTS in *Nebbia v. New York* persists. "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction," wrote ROBERTS, "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose."[148] Once the Court accepted that due process requires legislative means to be rationally

145. *See supra* text accompanying notes 72–75, 77, 124.

146. For example, an ex post facto law or a taking of property without compensation.

147. For example, a prohibition of free speech or a denial of trial by jury.

148. Nebbia v. New York, 291 U.S. 502, 537–38 (1934).

related to legitimate governmental purposes, it forced the judiciary into making policy judgments.

The ongoing critique of *Lochner* and other pre-New Deal cases purports to rest on a belief that the doctrine of substantive due process serves as cover for judicial usurpation of the legislative function. It was and remains a fair critique and warrants a presumption of constitutionality where the Court's only question is whether legislative means are rationally related to legitimate legislative ends. But because the Due Process Clauses have been the vehicles for applying the Bill of Rights to the states and for enforcing unenumerated rights against both the national and state governments, the Court has further obscured the difference between a presumption of rationality and a presumption of constitutionality by constructing hierarchical systems of rights and persons warranting varying levels of judicial scrutiny.

VI. THE INFLUENCE OF A FOOTNOTE

In 1938, the Supreme Court issued what has turned out to be one of its most consequential opinions, albeit the consequential part was pure dicta and buried in a footnote. In *United States v. Carolene Products*,[149] the Court ruled that the Filled Milk Act did not violate the Fifth Amendment and was a proper exercise of Congress's power to regulate interstate commerce. On the commerce issue, Justice Stone wrote that "Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals, or welfare,"[150] a statement consistent with *Nebbia* and other cases in which Congress was required to show only a rational relationship between legislative mandates and constitutionally permitted legislative objectives. With "public health, morals, or welfare" as the constitutionally permitted objectives, the Court's review was highly deferential to Congress. On the Fifth Amendment issue, the Court was similarly deferential, but in a footnote suggested exceptions to the long-standing presumption of constitutionality.

The petitioner's Fifth Amendment claim alleged violations of equal protection and due process. The Court observed that the Fifth Amendment contains no guarantee of equal protection,[151] though in support of its ruling, it cited *Hebe Co v. Shaw*[152] in which the Court had upheld a similar state regulation of filled milk against a

149. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).
150. *Id.* at 147.
151. *Id.* at 151.
152. Hebe Co. v. Shaw, 248 U.S. 297 (1919).

Fourteenth Amendment equal protection challenge.[153] There, Justice Holmes stated that the constitutionality of a statute encompassing "some innocent articles or transactions" is "not to be denied" unless, in light of "the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat."[154] In *Carolene Products*, Justice Stone saw "no persuasive reasons for departing from that ruling here, where the Fifth Amendment is concerned; and since none is suggested, we might rest wholly on the presumption of constitutionality."[155] Later in the opinion, Stone reiterated a presumption of constitutionality when, after recounting the hearings conducted in the Ohio legislature prior to the enactment of the law challenged in *Hebe* and Congressional hearings in advance of the enactment of the Filled Milk Act, he wrote:

> Even in the absence of such aids, the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[156]

It is the foregoing statement to which Stone attached his consequential footnote four. There he suggested the possibility of a "narrower scope for operation of the presumption of constitutionality" in particular circumstances.[157] One such circumstance, he posited, might be "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced

153. Perhaps Stone was anticipating the Court's later ruling in *Bolling v. Sharpe* that the Fourteenth Amendment equal protection guarantee is "incorporated" into the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954).

154. *Hebe*, 248 U.S. at 303.

155. United States v. Carolene Prods. Co., 304 U.S. 144, 148 (1938).

156. *Id.* at 152. Stone would reiterate the presumption a third time when he wrote:

> But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.

Id. at 154.

157. *Id.* at 152 n.4.

within the Fourteenth."[158] Another might be where "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation. . . ."[159] A third circumstance calling for more "exacting scrutiny,"[160] Stone suggested, might be where "statutes [are] directed at particular religious, or national, or racial minorities."[161] With respect to the latter Stone asked, rhetorically, "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[162]

Justice Stone's footnote opened the door to and suggested a pathway for the emergence of the levels of scrutiny analysis that pervades constitutional law today. In fact, the Court had previously departed from its presumption of constitutionality in the cases now identified with and widely condemned as part of the *Lochner* era. The vast majority of challenges to the constitutionality of state and federal legislation alleged infringements on property and contract rights. Even most cases claiming the violation of equal protection involved legislation and regulation limiting the freedom of contract or the exercise of property rights. In *Lochner* and other cases both before and after, the Court insisted that, whatever the policy merits of the allegedly offending legislation, it was their duty to invalidate laws infringing the property guarantees of the Fifth and Fourteenth Amendments and, by implication, state laws violating the Contracts Clause of Article I, Section 10. In doing so, the majority in those cases anticipated Justice Stone's first candidate for more exacting scrutiny—specific prohibitions of the Constitution. They took the presumption of constitutionality to be a rule addressed to the interpretation of statutes, not of the Constitution. Proponents of more expansive state police power regulation and federal regulation to promote the general welfare insisted that while property and contract rights are necessary to the economy, they must give way to the judgment of democratically elected legislators unless legislation is proven to be without rational basis. In other words, democratically approved legislation is presumed constitutional—unless it violates Stone's third exception regarding discrete and insular minorities, and the burden is with challengers to prove otherwise.

158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*

The presumption of constitutionality was repeated more often over the last several decades than from *Calder v. Bull* in 1798 to *Carolene Products* in 1938. But today, its application is limited by the levels of scrutiny analysis suggested by Justice Stone in his *Carolene Products* footnote.

Since the New Deal, the Court and most commentators have disparaged the so-called *Lochner* era constraints on legislative authority in defense of property and contract rights as an inappropriate imposition of judicial policy preferences. For example, in 1963, in *Ferguson v. Skrupa*,[163] Justice Black observed that the Court had rejected the "time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy."[164] While that had become the standard critique of *Lochner*, with Holmes often cited in support, it did not accept Justice Peckham's assertion that the Court was not agreeing or disagreeing with legislative policies but rather enforcing what it perceived to be constitutional rights.

To his credit, Black would dissent when the Court applied the same "natural law due process philosophy" in *Griswold v. Connecticut*[165] that he believed it had relied upon in the repudiated *Lochner* era cases.[166] He accused the Court of "reinstat[ing] the *Lochner* . . . line of cases, cases from which this Court recoiled after the 1930's, and which had been I thought totally discredited until now."[167] Black went on to observe that "[a]pparently my Brethren have less quarrel with state economic regulations than former Justices of their persuasion had."[168] In the latter observation Black recognized the hierarchy of rights that was established following on Stone' suggestion in his *Carolene Products* footnote that some rights claims might warrant elevated scrutiny. Though not mentioned by Justice Black in his *Griswold* dissent, Stone's suggestion that more probing scrutiny might be warranted in claims by discrete and insular minorities also led the Court to establish a hierarchy of peoples. Where Black sought to distance the Court from policy decisions, both hierarchies derived from *Carolene Products* have no foundation in the Constitution, leaving the Court to implement its own visions of the public good.

The influence of the *Carolene Products* footnote was almost immediate. In the 1939 case of *Schneider v. State of New Jersey*,[169]

163. Ferguson v. Skrupa, 372 U.S. 726 (1963).
164. *Id.* at 729.
165. Griswold v. Connecticut, 381 U.S. 479 (1965).
166. *Id.* at 515 (Black, J., dissenting).
167. *Id.* at 524.
168. *Id.*
169. Schneider v. State, 308 U.S. 147 (1939).

Justice Roberts wrote that "[m]ere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of [First Amendment] rights so vital to the maintenance of democratic institutions." [170] When such laws are challenged, continued Roberts, "the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."[171] A year later, Justice Murphy cited *Schneider* and *Carolene Products* in stating:

> Abridgment of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. . . . Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions.[172]

In the 1942 case of *Skinner v. Oklahoma ex. rel. Williamson*,[173] noting that it gave "large deference which the rule of the foregoing cases requires" to an Oklahoma statute mandating sterilization of habitual criminals, the Court stated that "[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[174] In concurrence, Justice Stone, citing his own *Carolene Products* footnote, observed that "[t]here are limits to the extent to which the presumption of constitutionality can be pressed."[175]

Three years later, in *Thomas v. Collins*,[176] the Court invalidated a Texas law requiring labor organizers to obtain an organizer's card as an infringement of free speech. Writing for the Court, Justice Rutledge acknowledged the Court's "duty . . . to say where the individual's freedom ends and the State's power begins."[177] Making that choice, said Rutledge, is "now as always delicate, . . . perhaps more so where the usual presumption supporting legislation is balanced

170. *Id.* at 161.
171. *Id.*
172. Thornhill v. Alabama, 310 U.S. 88, 95–96 (1940).
173. Skinner v. Oklahoma, 316 U.S. 535 (1942).
174. *Id.* at 541.
175. *Id.* at 544 (Stone, J., concurring).
176. Thomas v. Collins, 323 U.S. 516 (1945).
177. *Id.* at 529.

by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment."[178] Citing *Carolene Products*, he concluded that this preferred place "gives these liberties a sanctity and a sanction not permitting dubious intrusions."[179]

Implicit in establishing that at least some rights warrant relaxation of the presumption of constitutionality was a shifting of burden from the complainant to the government. In his *Thomas* opinion, Justice Rutledge suggested what the government's burden might be in such cases:

> [A]ny attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation.[180]

Implicit in the last sentence, of course, is that other rights rest on softer ground. Rutledge's reference to "clear and present danger" reflected that the Court had already elevated free speech as a right warranting enhanced protection from legislative interference. Stone's *Carolene Products* footnote invited the elevation of other preferred rights.

In concurring with the Court's validation of an ordinance prohibiting the use of loudspeakers emitting "loud and raucous" noises in public places in the 1949 case *Kovacs v. Cooper*,[181] Justice Frankfurter explained at length his objection to the idea that free speech occupies a "preferred position" as a constraint on the police powers of the states.[182] Suggesting that the phrase has "uncritically crept into some recent opinions of this Court," he deemed it "a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive validity."[183] Frankfurter went on to object that, though not first propounded in *Carolene Products*,[184] the preferred position concept

178. *Id.* at 529–30.
179. *Id.* at 530.
180. *Id.*
181. Kovacs v. Cooper, 336 U.S. 77 (1949).
182. *Id.* at 90 (Frankfurter, J., concurring).
183. *Id.*
184. Frankfurter attributed the phrase to *Herndon v. Lowry* and other rulings reflecting the earlier opinions of Justice Holmes. Herndon v. Lowry, 301 U.S. 242 (1937). Holmes' views on freedom of expression, said Frankfurter,

> arose from a deep awareness of the extent to which sociological conclusions are conditioned by time and circumstance. . . . [Because] he also

derived legitimacy from Stone's footnote, notwithstanding that "[a] footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine, . . . did not purport to announce any new doctrine, . . . [and] did not have the concurrence of a majority of the Court."[185] The footnote did not, argued Frankfurter, "assert a presumption of invalidity against all legislation touching matters related to liberties protected by the Bill of Rights and the Fourteenth Amendment. It merely stirred," he suggested, "inquiry whether as to such matters there may be 'narrower scope for operation of the presumption of constitutionality' and legislation regarding them is therefore 'to be subjected to more exacting judicial scrutiny.'"[186]

Frankfurter's insistence that Stone was not asserting "a presumption of invalidity" against legislation affecting all rights guaranteed by the Bill of Rights and the Fourteenth Amendment reflected his view that a presumption of constitutionality should continue to guide the Court's review of federal and state legislation. A presumption of invalidity would necessarily shift the burden of proof to the government and thereby greatly limit the scope of government power. The rejection of the *Lochner* era protections of property and contract rights was rooted in the Court's conclusion going back to the New Deal that serious economic problems warranted and required a forceful government response. Rights claims of individuals could not be allowed to stand in the way of legislative remedies intended to promote the broader public interest, at least not economic rights claims.

Only four years after Frankfurter's 1949 opinion, Justice Jackson reaffirmed the presumption of constitutionality in no uncertain terms. For him, it was not just a matter of deferring to legislatures

> realized that the progress of civilization is to a considerable extent the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other beliefs, for him the right to search for truth was of a different order than some transient economic dogma. And without freedom of expression, thought becomes checked and atrophied. Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. Accordingly, Mr. Justice Holmes was far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics.

Kovacs, 336 U.S. at 95 (Frankfurter, J., concurring).

185. *Kovacs*, 336 U.S. at 90–92. It should be noted that *American Federation of Labor v. Swing* is among the cases cited and authored by Frankfurter as having relied upon *Carolene Products*. American Federation of Labor v. Swing, 312 U.S. 321 (1941).

186. *Kovacs*, 336 U.S. at 92 (Frankfurter, J., concurring).

on matters of public policy but also interpretating the Constitution itself. "This Court does and should accord a strong presumption of constitutionality to Acts of Congress," wrote Jackson.[187] "This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power."[188]

VII. HIERARCHIES OF RIGHTS AND PEOPLE

The presumption of constitutionality persists to this day as a fundamental maxim of interpretation. But, inspired by Stone's footnote, the Court has gradually identified a range of preferred rights and groups of citizens whose rights claims, even beyond those found to be preferred, warrant more exacting scrutiny. That not every right guaranteed in the Bill of Rights and the Fourteenth Amendment occupied a preferred position was quickly confirmed following Frankfurter's 1949 opinion. In the 1955 case of *Williamson v. Lee Optical*,[189] for example, the Court reversed a lower court ruling that a law prohibiting the provision of eyeglasses by persons not licensed as an optometrist or ophthalmologist violated the Due Process Clause of the Fourteenth Amendment. Acknowledging that "[t]he Oklahoma law may exact a needless, wasteful requirement in many cases," Justice Douglas declared it "for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement."[190] Although part of Stone's rationale for suggesting that some rights might occupy a preferred position was (as reflected in his concern for the limited political influence of discrete and insular minorities) that the democratic process sometimes fails to serve the public good, nowhere in the opinion was it suggested the law might well have been enacted to benefit optometrists and ophthalmologists to the disadvantage of others seeking to engage in the business of fitting eyeglasses. Precisely the sort of special interest legislation the Framers sought to suppress.

Once the Court began creating exceptions to the presumption of constitutionality, there was a need for a different standard against which to assess constitutionality. Drawing on the earlier free speech cases and considering the matter in the abstract, the Court developed new standards as it filled in the categories of claims suggested

187. United States v. Five Gambling Devices, 346 U.S. 441, 449 (1953).
188. *Id.*
189. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).
190. *Id.* at 487.

by Stone's footnote. In *Roth v. United States*,[191] for example, Justice Brennan suggested that one factor should be the importance of the interests affected by exercising a claimed right. Although the Court ruled that obscene speech is not protected by the First Amendment because it lacks any redeeming social importance, Brennan wrote that "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests."[192] Applying the presumption of constitutionality, a court would defer to the legislature's declaration of more important interests—inherent in the enactment of a limit on expression. But, having elevated speech to a preferred position, it fell to the Court, not the legislature, to proclaim what, if any, interests were more important than free expression.

Three years later, the presumption of constitutionality was relied upon in upholding a statute denying social security benefits to aliens deported from the United States. Writing for the Court, Justice Harlan observed:

> [O]nly the clearest proof could suffice to establish the unconstitutionality of a statute [revoking] a noncontractual governmental benefit. . . . [T]he presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it.[193]

Chief Justice Warren and Justices Black, Douglas, and Brennan dissented, with Black reiterating his long-standing objection to "natural law due process" which in this case, he argued, allowed the Court "a judicial foray into the field of governmental policy."[194] Although Black, unlike his fellow dissenters, viewed the Court's revival of substantive due process as a license to create constitutional rights from thin air, in this case, his objection was that it allowed the court to validate legislation "violat[ing] specific Bill of Rights safeguards."[195] A decade later, an alien plaintiff like Nestor might have had better luck. In *Graham v. Richardson*,[196] Justice Blackmun, writing

191. Roth v. United States, 354 U.S. 476 (1957).
192. *Id.* at 484.
193. Flemming v. Nestor, 363 U.S. 603, 617 (1960).
194. *Id.* at 626 (Black, J. dissenting). Black suggested the Ex Post Facto Clause, the Bill of Attainder Clause, and the First Amendment as possible rights infringements. *Id.*
195. *Id.*
196. Graham v. Richardson, 403 U.S. 365 (1971).

for a unanimous Court, declared that "the Court's decisions have established that classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny."[197] Citing *Carolene Products*, Blackmun described aliens as a "prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate."[198]

The following year, in *Poe v. Ullman*,[199] the Court dismissed for want of justiciability a claim that a Connecticut law prohibiting the use of contraceptives violated the plaintiffs' rights under the Due Process Clause. In a lengthy dissent, Justice Harlan urged:

> Where . . . we are dealing with what must be considered "a basic liberty, . . . [t]here are limits to the extent to which the presumption of constitutionality can be pressed" . . . and the mere assertion that the action of the State finds justification in the controversial realm of morals cannot justify alone any and every restriction it imposes.[200]

The justiciability problem encountered in *Poe* was overcome four years later in *Griswold v. Connecticut*, a case in which the justices offered various theories for recognizing a constitutional right of privacy that, among other things, included a right for a marital couple to use contraceptives. Writing for the Court, Justice Douglas acknowledged the presumption of constitutionality in stating: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[201] However, he continued, because the law in question "operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation," the Court could not presume the law to be constitutional.[202] Looking to "penumbras, formed by emanations from" specific guarantees in the Bill of Rights, Douglas established that the right to privacy was among those rights having a "preferred position" and allowing for a "narrower scope for operation of the presumption of constitutionality."[203] Other justices offered different theories for declaring privacy

197. *Id.* at 372. The court ruled only that the Equal Protection Clause applies to aliens as well as citizens. *Id.* at 377.

198. *Id.* at 372 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938)).

199. Poe v. Ullman, 367 U.S. 497, 545 (1961).

200. *Id.* at 545 (Harlan, J., dissenting) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541, 544 (1942)).

201. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

202. *Id.*

203. *Id.* at 484.

a fundamental right,[204] all having the same effect of creating a presumption of unconstitutionality in the case.

At the same time, the presumption of constitutionality remained firmly in place in cases involving economic liberty claims. In *McGowan v. Maryland*,[205] the Court upheld a Sunday closing law that exempted some businesses against an equal protection claim. Chief Justice Warren stated:

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[206]

In the 1962 case of *Goldblatt v. Town of Hempstead*,[207] the Court upheld as a legitimate exercise of the police power a regulation the plaintiffs claimed resulted in an unconstitutional taking of their private property. "Indulging in the usual presumption of constitutionality," wrote Justice Clark, "we find no indication that the prohibitory effect of [the ordinance] is sufficient to render it an unconstitutional taking if it is otherwise a valid police regulation."[208] In support, he summarized Justice Stone's *Carolene Products* opinion as holding that the "exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it."[209] He also referenced Justice Douglas's statement in *Bibb v. Navajo Freight Lines*[210] that a state's exercise of police power is presumed to be constitutionally valid, notwithstanding that in *Bibb*, the Court invalidated a state regulation of truck mudflaps based on the Court's conclusion that the burden on interstate commerce was excessive.[211]

Although the Court "indulged" in the presumption of constitutionality in *Goldblatt*, it abandoned the presumption when assessing

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204. Justice Goldberg thought the Ninth Amendment guaranteed a right of privacy. *Id.* at 488–93 (Goldberg, J., concurring in the judgment). Justice Harlan thought the right derived from the Fourteenth Amendment Due Process Clause guaranteeing rights "implicit in the concept of ordered liberty." *Id.* at 500 (Harlan, J., concurring in the judgment). In dissent, Justice Black renewed his objections to "natural law due process." *Id.* at 522 (Black, J., dissenting).

205. McGowan v. Maryland, 366 U.S. 420 (1961).

206. *Id.* at 425–26.

207. Goldblatt v. Hempstead, 369 U.S. 590 (1962)

208. *Id.* at 594.

209. *Id.* at 596 (citing United States v. Carolene Prods. Co., 304 U.S. 144 (1938)).

210. *Id.* (citing Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959)).

211. *Bibb*, 359 U.S. at 529.

the constitutionality of a Connecticut residency requirement for the receipt of welfare benefits. "At the outset," wrote Justice Stewart for the majority, "we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification."[212] In dissent, Justice Harlan insisted that "a strong presumption of constitutionality attaches to statutes of the types now before us."[213] Chief Justice Warren, also in dissent, quoted Justice Cardozo in the 1937 case of *Helvering v. Davis*:[214] "Whether wisdom or unwisdom resides in the scheme of benefits set forth . . . is not for us to say. The answer to such inquiries must come from . . . [the legislature], not the courts. Our concern here, as often, is with power, not with wisdom."[215] Stewart's explanation for not deferring to the admittedly legitimate policy concerns of the Connecticut legislature was that the plaintiffs were exercising their constitutional right to travel:

> We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. It suffices that [here Stewart quotes himself from *United States v. Guest*:] "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."[216]

The plaintiffs' claims were, thus, fitted into the *Carolene Products* preferred position exception to the presumption of constitutionality. The state's burden was no longer to offer a rational basis for the law, which the state had done, but rather to show the law "to be necessary to promote a compelling governmental interest."[217]

In the 1966 case of *Harper v. Virginia State Board of Elections*,[218] Justice Douglas, writing for the Court, ruled that a poll tax violated the Equal Protection Clause of the Fourteenth Amendment. He distinguished the Court's earlier ruling in *Lassiter v. Northampton County Board of Elections*[219] upholding a literacy test for voting on the grounds that "unlike a poll tax, the 'ability to read and write has some relation to standards designed to promote intelligent use of

212. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
213. *Id.* at 675 (Harlan, J., dissenting).
214. Helvering v. Davis, 301 U.S. 619 (1937).
215. *Shapiro*, 395 U.S. at 655 (Warren, J., dissenting) (quoting *Helvering*, 301 U.S. at 644).
216. *Id.* at 630 (majority opinion) (quoting United States v. Guest, 383 U.S. 745, 757–58 (1966)).
217. *Id.* at 634.
218. Harper v. Virginia State Bd. Of Elections, 383 U.S. 663 (1966).
219. Lassiter v. Northampton Cnty. Bd. Of Elections, 360 U.S. 45 (1959).

the ballot.'"[220] Having observed that "the right to vote in state elections is nowhere expressly mentioned [in the Constitution]," Douglas implied not that the right to vote is fundamental and therefore in a preferred position, but rather that the poll tax simply failed the rational basis test for presumptive constitutionality.[221] However, he went on to note that in *Yick Wo v. Hopkins*,[222] "the Court referred to 'the political franchise of voting' as a 'fundamental political right, because preservative of rights'" and in *Reynolds v. Sims*,[223] the Court "said, '[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.'"[224] Douglas then added that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored."[225] Both of these references suggested that even if a rational basis for the tax were offered, such as funding the costs of running elections, the Court would impose a more demanding test for constitutionality either because the right to vote is fundamental or because wealth is a suspect classification. Indeed, Douglas concluded his opinion by stating that the Court has "long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."[226]

In dissent, Justice Black objected that the Court was again imposing the natural law due process theory of the *Lochner* era and that by silently overruling two recent cases, the Court was effectively amending the Constitution.[227] Justice Harlan also dissented, describing as "captivating phrases" Douglas' description of the "electoral franchise" as "precious" and "fundamental" and his description of the requirement to pay a fee as "capricious."[228] But he insisted that those assertions are "wholly inadequate to satisfy the standard governing the adjudication of the equal protection issue: Is there a rational basis for Virginia's poll tax as a voting qualification?"[229] Both Black and Harlan would have ruled that the complainants failed to

220. *Harper*, 383 U.S. at 665 (quoting *Lassiter*, 360 U.S. at 51).
221. *Id.* at 665.
222. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
223. Reynolds v. Sims, 377 U.S. 533 (1964).
224. *Harper*, 385 U.S. at 667 (first quoting *Yick Wo*, 118 U.S. at 370; and then quoting *Reynolds*, 377 U.S. at 561–62).
225. *Id.* at 668 (citation omitted).
226. *Id.* at 670.
227. *Id.* at 670–72, 675 (Black, J., dissenting) (citing Breedlove v. Suttles, 302 U.S. 277, 283 (1937); Butler v. Thompson, 341 U.S. 937 (1951)).
228. *Id.* at 683 (Harlan, J., dissenting).
229. *Id.*

overcome the presumption of constitutionality. However, only two years later, Justice Black endorsed a hierarchy of rights in stating that "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . to cast their votes effectively . . . rank among our most precious freedoms."[230] For that reason, he concluded, the state must show a compelling interest,[231] that is, meet a higher burden of proof, for the law to be constitutional.

VIII. LEVELS OF SCRUTINY

In the 1969 case of *Kramer v. Union Free School District No. 15*,[232] Chief Justice Warren was explicit in stating that where the right to vote is at issue, the Court applies a higher standard of review than called for by the usual presumption of constitutionality:

> [T]he deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable. . . . The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people.[233]

Justice Stewart, in dissent, saw no reason to abandon the presumption of constitutionality: "Although at times variously phrased, the traditional test of a statute's validity under the Equal Protection Clause is a familiar one: a legislative classification is invalid only 'if it rest(s) on grounds wholly irrelevant to achievement of the regulation's objectives.'"[234]

Justice Douglas' suggestion in *Harper* that laws having harsher impacts on the indigent than the wealthy are disfavored and thus warrant closer scrutiny gained support from the Court's ruling in

230. Williams v. Rhodes, 393 U.S. 23, 30 (1968).
231. *Id.* at 31.
232. Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969).
233. *Id.* at 627–28.
234. *Id.* at 636 (Stewart, J., dissenting) (quoting Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947)).

Williams v. Illinois[235] invalidating, as a violation of equal protection, incarceration beyond the maximum term specified by statute to satisfy the monetary provisions of the sentence. Writing for the Court, Chief Justice Burger acknowledged that the practice of imprisonment for nonpayment of fines had a long tradition, but stated that "the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in this country" which called for a reassessment of "ancient practices."[236] He cited the earlier case of *Griffin v. Illinois*[237] in which the Court ruled that "[d]estitute defendants must be afforded an adequate appellate review as defendants. . . ."[238] A similar concern for the consequences of indigency influenced the Court's ruling in *Gideon v. Wainwright*[239] that all defendants in state criminal trials are entitled by the Fourteenth Amendment to legal counsel, although the decision was grounded on the conclusion that the right to counsel is fundamental and therefore incorporated as an aspect of due process.[240]

In a concurring opinion in *Williams*, Justice Harlan discussed at length the reasons for presuming constitutionality in some cases and not in others. Noting "[t]he reluctance of the Court to carry its 'equal protection' approach to its most logical consequences," Harlan suggested it was because a presumption of constitutionality would yield an unacceptable result.[241] "While legislation usually will not be deemed arbitrary if its means can arguably be supposed to be related to a legitimate purpose . . . and generally the burden of demonstrating the existence of a rational connection between means and ends is not borne by the State," wrote Harlan, "the presumption of regularity that comes with legislative judgment is one that is not equally acceptable in all instances, nor is it blind to the nature of the interests affected."[242] Citing *Skinner v. Oklahoma*,[243] he stated "there are limits to the extent to which the presumption of constitutionality can be pressed where a 'basic liberty' is concerned."[244] He cited *Flemming v. Nestor*[245] in noting "the breadth of latitude to be accorded to a legislative judgment when the interest was that of a 'noncontractual

235. Williams v. Illinois, 399 U.S. 235 (1970).
236. *Id.* at 240.
237. Griffin v. Illinois, 351 U.S. 12 (1956).
238. *Williams*, 399 U.S. at 241 (citing *Griffin*, 351 U.S. at 19).
239. Gideon v. Wainwright, 372 U.S. 335 (1963).
240. *Id.* at 343–44.
241. *Williams*, 399 U.S. at 262 (Harlan, J., concurring in the result).
242. *Id.*
243. Skinner v. Oklahoma, 316 U.S. 535 (1942).
244. *Williams*, 399 U.S. at 262 (Harlan, J., concurring in the result) (quoting *Skinner*, 316 U.S. at 541).
245. Flemming v. Nestor, 363 U.S. 603 (1960).

benefit under a social welfare program.'"[246] There "the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."[247] "The implication of *Flemming*," wrote Harlan, "is . . . that the deference owed to legislative judgment is not the same in all cases."[248] "[T]his Court will squint hard at any legislation that deprives an individual of his liberty—his right to remain free."[249] Quoting himself from *Poe v. Ullman*, Harlan concluded:

> [T]he "balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society, having regard to what history teaches" is not such that the State's interest here outweighs that of the individual so as to bring into full play the application of the usual salutary presumption of rationality.[250]

Two years later, in his first term on the Court, Justice Rehnquist wrote the first of many opinions critical of the Court's levels of scrutiny approach and its "departure from . . . the traditional presumption of constitutionality accorded to legislative enactments."[251] In *Weber v. Aetna Casualty*,[252] the Court invalidated as a violation of equal protection a Louisiana workers' compensation law denying equal recovery rights to dependent, unacknowledged, illegitimate children. Justice Powell, writing for the majority, recognized that "the latitude given state economic and social regulation is necessarily broad, [but]," he asserted, "where state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny."[253] Powell's reference to "economic and social regulation" was by then a customary way of saying, without saying, that economic liberties (property and contract rights) warranted less scrutiny than 'fundamental' liberties. In addition to confirming this hierarchy of rights, Powell suggested that illegitimacy warrants heightened review. "Courts are powerless to prevent the social opprobrium suffered by these hapless children," he stated, "but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by

246. *Williams*, 399 U.S. at 262 (Harlan, J., concurring in the result) (quoting *Flemming*, 363 U.S. at 611).

247. *Id.* at 263 (quoting *Flemming*, 363 at U.S. at 611).

248. *Id.*

249. *Id.*

250. *Id.* (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

251. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 181 (1972) (Rehnquist, J., dissenting).

252. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

253. *Id.* at 172.

no legitimate state interest, compelling or otherwise."[254] In dissent, Justice Rehnquist objected to the Court's "departure from . . . the traditional presumption of constitutionality accorded to legislative enactments. Nowhere in the text of the Constitution, or in its plain implications, is there any guide for determining what is a 'legitimate' state interest, or what is a 'fundamental personal right.'"[255]

In the 1973 case of *San Antonio Independent School District v. Rodriguez*,[256] Justice Stewart, in a concurring opinion, provided perhaps the Court's most fulsome explication of its equal protection jurisprudence to that date. Although Stewart did not reference an article by Frank Michelman published in the *Harvard Law Review* and previously cited by Justice Harlan in *Williams v. Illinois*, his explanation of the Court's levels of scrutiny analysis looked much like Michelman's.[257] Stewart first recounted what he called "no more than a specific application of one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law."[258] Quoting Chief Justice Warren from *McGowan v. Maryland*, Stewart wrote:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[259]

Stewart then explained under what circumstances the presumption of constitutionality would give way to stricter scrutiny of an equal protection claim:

> Under the Equal Protection Clause, this presumption of constitutional validity disappears when a State has enacted legislation whose purpose or effect is to create classes based upon criteria

254. *Id.* at 175–76.
255. *Id.* at 181 (Rehnquist, J., dissenting).
256. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
257. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 59–61 (Stewart, J., concurring); *see also* Frank Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Williams v. Illinois, 399 U.S. 235, 240 (1970) (Harlan, J., concurring).
258. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 60 (Stewart, J., concurring).
259. *Id.*

> that, in a constitutional sense, are inherently "suspect." Because of the historic purpose of the Fourteenth Amendment, the prime example of such a "suspect" classification is one that is based upon race. . . . But there are other classifications that, at least in some settings, are also "suspect"—for example, those based upon national origin, alienage, indigency, or illegitimacy. Moreover, quite apart from the Equal Protection Clause, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications.[260]

Presumably applying that formula, the majority in *San Antonio v. Rodriquez* concluded that the Texas school funding system did not violate equal protection, notwithstanding a significant difference in available revenue among school districts. The dissenting justices objected that the Texas system denied a fundamental right—education—and affected a suspect class—the poor. Justice Brennan disputed the majority's conclusion that for a right to be fundamental, it must be "explicitly or implicitly guaranteed by the Constitution," a view Justice Black, were he still alive, would have commended.[261] Brennan argued that because "education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association . . . any classification affecting education must be subjected to strict judicial scrutiny. . . ."[262] Justice Marshall, in a lengthy and impassioned dissent, challenged the Court's understanding of the formula explained by Justice Stewart as establishing "two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality."[263] Marshall argued that the Court's prior cases revealed "a spectrum of standards . . . comprehend[ing] variations in the degree of care with which the Court will scrutinize particular classifications, depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[264] Reflecting on his dissent in *Weber*, Justice Rehnquist was surely asking himself where in the Constitution Marshall would find guidance for determining legitimate state interests or fundamental personal freedoms and, more significantly, how to weigh their relative importance.

In 1973, the Court invalidated a New York law precluding aliens from permanent positions in the competitive class of the state civil

260. *Id.* at 61 (citations omitted).
261. *Id.* at 62 (Brennan, J., dissenting) (quoting the majority opinion).
262. *Id.* at 63.
263. *Id.* at 98 (Marshall, J., dissenting).
264. *Id.* at 98–99.

service, reaffirming its ruling in *Graham* that alienage is a suspect class warranting strict scrutiny. After concluding that the law was both over and under inclusive, the Court stated "[o]ur standard of review of statutes that treat aliens differently from citizens requires a greater degree of precision."[265] Noting later in his dissent that the Court cited *Carolene Products* footnote four in support of its ruling,[266] Justice Rehnquist first observed that "[t]he Fourteenth Amendment . . . contains no language concerning 'inherently suspect classifications,' or, for that matter, merely 'suspect classifications.'"[267] Suggesting that "[i]t would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road," Rehnquist concluded that "unless the Court can precisely define and constitutionally justify both the terms and analysis it uses, . . . the Court can choose a 'minority' it 'feels' deserves 'solicitude' and thereafter prohibit the States from classifying that 'minority' differently from the 'majority.'"[268] He described it as a "'ward of the Court' approach to equal protection."[269]

IX. SECOND CLASS LIBERTIES

Notwithstanding the gradually expanding ranges of suspect classes and fundamental rights, the Court continued to adhere to the presumption of constitutionality in cases involving economic liberty claims. In *Usery v. Turner Elkhorn Mining*,[270] employing another phrase frequently used to avoid acknowledging that property and contract rights are expressly guaranteed in the Constitution, the Court stated:

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.[271]

In concurrence, citing *Carolene Products*, Justice Powell wrote the Constitution does not "require legislation on economic matters be compatible with sound economics or even with normal fairness.

265. Sugarman v. Dougall, 413 U.S. 634, 642 (1973).
266. *Id.* at 655 (Rehnquist, J., dissenting).
267. *Id.* at 649.
268. *Id.* at 657.
269. *Id.*
270. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).
271. *Id.* at 15.

As a result, economic and remedial social enactments carry a strong presumption of constitutionality."[272]

The Court's sleight of hand in using terms like 'the burdens and benefits of economic life' and 'economic and remedial social enactments' should have been transparent. Most of the laws the Court was applying its levels of scrutiny analysis founded in *Carolene Products* involved challenges to 'economic and social enactments' and affected the 'burdens and benefits of economic life.' The vast majority of legislative enactments have to do with economic and social life and have economic burdens and benefits. The regulation of handbill distribution in *Schneider v. New Jersey* sought to control littering and disruptions to passersby. The sterilization law in *Skinner v. Oklahoma* sought to reduce the social costs of criminal recidivism. The regulation of labor organizing in *Thomas v. Collins* had a purpose of limiting disruptions in the workplace and preventing fraudulent solicitation. The residency requirement in *Shapiro v. Thompson* was, on its face, a regulation of the burdens and benefits of economic life. Similarly, the law in *Weber v. Aetna Casualty* was an explicit legislative policy on the distribution of economic benefits. The New York prohibition of employment of aliens in some state positions at issue in *Sugarman v. Dougall* was also an explicit legislative regulation of the benefits and burdens of economic life. The same can be said of most cases yet to be discussed. None of this is to say that the Court got it wrong in any of the preceding cases. Rather, the point is that labeling challenged legislative enactments as 'economic and social' or as 'affecting the benefits and burdens of economic life' fails utterly to distinguish laws presumed to be constitutional from those not benefitting from the presumption. Constitutional rights are guaranteed against governmental intrusion without regard to legislative purposes, almost all of which are economic or social in purpose and affect the burdens and benefits of individual lives.

In the 1976 case of *United States v. Watson*,[273] the Court upheld a conviction for the possession of stolen mail, although the defendant had been arrested by postal authorities without a warrant. The Court upheld the conviction, noting that "[b]ecause there is a 'strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is "reasonable," . . . [o]bviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional.'"[274]

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272. *Id.* at 44 (Powell, J., concurring in part and concurring in judgment in part) (citing United States v. Carolene Products Co., 304 U.S. 144, 148 (1938)).

273. United States v. Watson, 423 U.S. 411 (1976).

274. *Id.* at 416 (quoting United States v. Di Re, 332 U.S. 581, 585 (1948)).

Although he agreed that "a presumption of constitutionality attaches to every Act of Congress," Justice Marshall objected in dissent that "the doctrine of deference that the Court invokes is contrary to the principles of constitutional analysis practiced since *Marbury v. Madison.*"[275] "Our function in constitutional cases is weightier than the Court today suggests," urged Marshall: "where reasoned analysis shows a practice to be constitutionally deficient, our obligation is to the Constitution, not the Congress."[276]

Having relied on the presumption of constitutionality in a case alleging the infringement of an express constitutional right, the Court invalidated in *Craig v. Boren*[277] a state law restricting the sale of 3.2 percent beer to males, but not females, between the ages of 18 and 21. Making no suggestion that there is a fundamental right to consume or sell beer, the Court, in an opinion by Justice Brennan, ruled that the Idaho law violated the Equal Protection Clause because "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[278] In dissent, Justice Rehnquist objected to "the Court's enunciation of this standard, without citation to any source."[279] Brennan did cite *Reed v. Reed*,[280] in which the Court had invalidated another Idaho statute making men the presumptive administrators of estates, but there the Court relied on the usual rational basis test requiring that legislative classifications "must be reasonable, not arbitrary" and not "wholly unrelated to the objective of [the] statute."[281]

The *Craig v. Boren* decision would become precedent for an intermediate level of judicial inquiry into constitutional claims between rational basis review and strict scrutiny. Although Justice Stevens concurred in the *Craig* ruling, he insisted in a concurring opinion that:

> There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.[282]

275. *Id.* at 442–43 (Marshall, J., dissenting).
276. *Id.*
277. Craig v. Boren, 429 U.S. 190 (1976).
278. *Id.* at 197.
279. *Id.* at 217 (Rehnquist, J., dissenting).
280. Reed v. Reed, 404 U.S. 71 (1971).
281. *Id.* at 75–76.
282. *Craig*, 429 U.S. at 211–12 (Stevens, J., concurring).

Dissenting in *Craig*, Chief Justice Burger pointed out that the Court had "only recently recognized that our duty is not 'to create substantive constitutional rights in the name of guaranteeing equal protection of the laws,' . . . even interests of such importance in our society as public education and housing, . . . because they have no textually independent constitutional status."[283] Although he acknowledged that the majority had not gone "so far as to make gender-based classifications 'suspect,'" he objected to their being made "a disfavored classification."[284] "Without an independent constitutional basis supporting the right asserted or disfavoring the classification adopted," said Burger, there is "no substantive constitutional protection other than the normal . . . protection afforded by the Equal Protection Clause."[285] In other words, he would have applied the rational basis test founded in the presumption of constitutionality.

In addition to gender-based classifications, statutes discriminating between legitimate and illegitimate children have come to be subjected to heightened, but not strict, scrutiny. In *Weber v. Aetna Casualty*, Justice Powell suggested that heightened scrutiny would be appropriate in such cases.[286] The following year, in his summary of the Court's levels of review analysis in *San Antonio v. Rodriquez*, Justice Stewart included illegitimacy among the suspect classes warranting strict scrutiny.[287] But in *Mathews v. Lucas*,[288] the Court described the appropriate standard of review of classifications based on legitimacy as in the "realm of less than strictest scrutiny."[289] In *Trimble v. Gordon*,[290] the Court quoted that language from *Mathews* but also quoted the Court's statement that the required scrutiny "is not a toothless one."[291] While the Court declined to include illegitimacy among its previously identified suspect classes warranting strict scrutiny and declared that the "courts should accord substantial deference to a State's statutory scheme of inheritance,"[292] the Court endorsed its earlier decisions in *Weber* and *Mathews* applying heightened (or intermediate) scrutiny. Describing the Court's approach to equal protection as "a cat-o'-nine-tails to be kept in the judicial closet

283. *Id.* at 216–17 (Burger, C.J., dissenting) (quoting McGowan v. Maryland, 366 U.S. 420, 425–26 (1961)).
284. *Id.* at 217.
285. *Id.*
286. Weber v. Aetna Cas & Sur. Co., 406 U.S. 164, 172 (1972).
287. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 60 (1973) (Stewart, J., concurring).
288. Mathews v. Lucas, 427 U.S. 495 (1976).
289. *Id.* at 510.
290. Trimble v. Gordon, 430 U.S. 762 (1977).
291. *Id.* at 767 (quoting *Mathews*, 427 U.S. at 510).
292. *Id.* at 771.

as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass 'arbitrary,' 'illogical,' or 'unreasonable' laws,"[293] a dissenting Justice Rehnquist wrote that the majority opinion's "crowning irony . . . is its assertion that 'the judicial task here is the difficult one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in this area.'"[294]

A year after objecting in *Weber* that the presumption of constitutionality sometimes distracted the Court from its responsibilities as set forth in *Marbury v. Madison*, Justice Marshall joined Justice Brennan's concurrence in the Court's invalidation of an East Cleveland, Ohio, zoning ordinance that prohibited a grandmother from sharing her home with her two grandsons who were cousins, not siblings. In *Moore v. East Cleveland*,[295] in an opinion by Justice Powell, a plurality of the Court ruled that the ordinance infringed the appellant's "freedom of choice in matters of marriage and family life" and thus violated the Due Process Clause of the Fourteenth Amendment.[296] Citing Justice Harlan's dissent in *Poe v. Ullman*, Powell stated that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[297] With only three other justices signing on to Powell's opinion, a fifth vote was required, and it was provided by Justice Stevens, whose argument ran counter to the Court's by-then well-established distinction between fundamental and economic liberties. Stevens traced the history of zoning from *Village of Euclid v. Ambler Realty Co*.,[298] in which the Court ruled "that a city could use its police power, not just to abate a specific use of property which proved offensive, but also to create and implement a comprehensive plan for the use of land in the community, [thus] vastly diminish[ing] the rights of individual property owners," to the most recent local zoning ordinances.[299] He found no precedent for the East Cleveland regulation in issue. The ordinance, Stevens concluded, "constitutes a taking of property without due process and without just compensation."[300]

Dissenting in *Moore*, Justice White described "the general principle that 'liberty may not be interfered with, under the guise of

293. *Id.* at 777 (Rehnquist, J., dissenting).
294. *Id.* at 782 (quoting the majority opinion).
295. Moore v. City of E. Cleveland, 431 U.S. 494 (1977).
296. *Id.* at 499.
297. *Id.* (citing Poe v. Allman, 367 U.S. 497, 554 (1961)).
298. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
299. *Moore*, 431 U.S. at 513–14 (Stevens, J., concurring).
300. *Id.* at 521.

protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect'" as a means-ends test requiring "that any statute restrictive of liberty have an ascertainable purpose and represent a rational means to achieve that purpose, whatever the nature of the liberty interest involved."[301] "Earlier in the century," White observed, "[t]his approach was part of the substantive due process doctrine . . . and . . . made serious inroads on the presumption of constitutionality supposedly accorded to state and federal legislation."[302] That changed in the 1930s and 1940s, "particularly . . . with respect to legislation seeking to control or regulate the economic life of the State or Nation."[303] But, said White, there is "[n]o case I know of . . . [that] has announced that there is some legislation with respect to which there no longer exists a means-ends test as a matter of substantive due process law."[304] If there were, he cautioned, "a protected liberty could be infringed by a law having no purpose or utility whatsoever."[305] Having thus established that there must be some limits on legislative power, White challenged Powell's method for determining those limits. He accepted as settled the Court's identification of certain rights as fundamental, but he questioned Powell's inclusion as fundamental "any right or privilege that in his estimate is deeply rooted in the country's traditions."[306] Relying on this as a test, said White, would grant "a far too expansive charter for this Court."[307] "[It] would broaden enormously the horizons of the Clause . . . and very likely [result in] invalidating a wide range of measures that Congress and state legislatures think appropriate to respond to a changing economic and social order."[308]

During the same term of the Court, Chief Justice Burger offered his accounting of the Court's standards of review jurisprudence in a dissenting opinion in *Nixon v. Administrator of General Services*.[309] In the highly-publicized case, the Court upheld the Presidential Recordings and Materials Preservation Act against four distinct constitutional challenges.[310] Burger contended that the majority was wrong

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301. *Id.* at 547 (White, J., dissenting) (quoting Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923)).

302. *Id.* at 547–48.

303. *Id.* at 548.

304. *Id.*

305. *Id.*

306. *Id.* at 549.

307. *Id.*

308. *Id.* at 549–50.

309. Nixon v. Adm'r Gen. Servs., 433 U.S. 425 (1977).

310. *Id.* at 444–45, 455, 465, 468, 484. In an opinion authored by Justice Brennan, the Court held that the Act did not violate principles of separation of powers,

on every question. "In the usual case, of course," wrote the Chief Justice, "legislation challenged in this Court benefits from a presumption of constitutionality. To survive judicial scrutiny a statutory enactment need only have a reasonable relationship to the promotion of an objective which the Constitution does not independently forbid, unless the legislation trenches on fundamental constitutional rights."[311] Among the circumstances calling for "more demanding scrutiny," Burger included "where the very legitimacy of the composition of representative institutions is at stake," where "fundamental constitutional rights, such as freedom of speech" are threatened, where "governmental rights or benefits [are denied] because of race," and where "legislation directly imping[es] on the basic tripartite structure of our Government."[312]

In support of the latter rationale, Burger quoted Justice Miller's opinion from the 1880 case of *Kilbourn v. Thompson*,[313] in which Miller cautioned that exercises of power by one branch directly affecting the independence of another "should be watched with vigilance, and when called in question before any other tribunal . . . should receive the most careful scrutiny."[314] This recognition of the importance of the separation of powers to the Constitution's overarching protection of liberty was similar to Justice Powell's emphasis in *San Antonio v. Rodriquez* on the importance of federalism:

> Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. . . . [I]t would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.[315]

Although both Chief Justice Burger in his *Nixon* dissent and Justice Stewart in his *San Antonio* concurrence identified alleged infringements of fundamental rights as a reason for abandoning the presumption of constitutionality in favor of heightened scrutiny, neither addressed the Court's exclusion of economic liberties from those

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infringe on the former president's privacy interests or violate his First Amendment rights, constitute a bill of attainder, or work an impermissible intrusion on the doctrine of presidential privilege. *Id.*

311. *Id.* at 506 (Burger, C.J., dissenting).

312. *Id.*

313. Kilbourn v. Thompson, 103 U.S. 168 (1880).

314. *Nixon*, 433 U.S. at 507 (Burger, C.J., dissenting) (quoting *Kilbourn*, 103 U.S. at 192).

315. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973).

found to be fundamental. This was so notwithstanding Stewart's having addressed the question five years earlier in *Lynch v. Household Finance Corp*.[316] An issue in that case was whether the federal courts had jurisdiction to hear all suits arising under the Constitution or laws of the United States (as provided in one statute) or only such suits in which a minimum amount in controversy could be alleged and proved (as provided in a subsequently enacted statute).[317] To resolve this apparent conflict, the Court in *Hague v. CIO*[318] had distinguished between proprietary rights claims subject to the amount in controversy minimum and personal rights claims for which an amount in controversy could not be established.[319] In *Lynch*, Justice Stewart proclaimed:

> [T]he dichotomy between personal liberties and property rights is a false one. . . . Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.[320]

The foregoing quote from Stewart's opinion for the majority in *Lynch*, an opinion from which there were three dissenters, none challenging his insistence on the equivalence of personal and economic liberties, has received much attention among economic freedom advocates but has been paid little regard in the Court's succeeding opinions. Writing for the Court in the 1978 case of *Duke Power v. Carolina Environmental Study Group*,[321] Chief Justice Burger upheld a statute limiting the liability of private nuclear energy companies in the event of a catastrophic accident. The plaintiffs alleged that the act violated constitutional rights to property, due process, and equal protection. Burger wrote:

> The liability-limitation provision . . . [is] as a classic example of an economic regulation—a legislative effort to structure and accommodate "the burdens and benefits of economic life. . . . It is by now well established that [such] legislative Acts . . . come to the Court with a presumption of constitutionality, and that the burden is on

316. Lynch v. Household Fin. Corp., 405 U.S. 538 (1972).
317. *Id.* at 540–41.
318. Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939).
319. *Id.* at 531.
320. *Lynch*, 405 U.S. at 552.
321. Duke Power Co. v. Carolina Env't Study Grp., Inc., 438 U.S. 59 (1978).

> one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." That the accommodation struck may have profound and far-reaching consequences, contrary to appellees' suggestion, provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational.[322]

Concluding that the plaintiffs lacked standing, Justice Stewart concurred in the result without comment on the merits.[323]

Through the following two decades, the Court adhered to its levels of scrutiny analysis, strictly scrutinizing claims involving fundamental rights or suspect classifications, granting heightened but not strict scrutiny to others, while presuming constitutionality in challenges to 'economic and remedial social enactments' and those adjusting 'the burdens and benefits of economic life.' In a 1980 plurality opinion in *City of Mobile v. Bolden*,[324] upholding the at-large election of city commissioners, Justice Stewart recognized that strict scrutiny effectively reversed the presumption with respect to constitutionality in confirming that "a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional."[325] But "where a state law does not impair a right or liberty protected by the Constitution," wrote Stewart, "there is no occasion to depart from 'the settled mode of constitutional analysis of legislat[ion] . . . involving questions of economic and social policy.'"[326]

Also in 1980, in *Railroad Retirement Board v. Fritz*,[327] upholding amendments to the Railroad Retirement Act that provided different benefits for current and former employees, Justice Rehnquist observed for the majority that "the Court in cases involving social and economic benefits has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn."[328] Dissenting in *Fritz*, Justice Brennan acknowledged the presumption of constitutionality but insisted, quoting from

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322. *Id.* at 83–84 (1978) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).

323. *Id.* at 94 (Stewart, J., concurring in the result).

324. City of Mobile v. Bolden, 446 U.S. 55 (1980).

325. *Id.* at 76. Stewart also acknowledged in a footnote that "[t]he presumption of constitutional validity that underlies the settled mode of reviewing legislation disappears, of course, if the law under consideration creates classes that, in a constitutional sense, are inherently 'suspect.'" *Id.* at 76 n. 23.

326. *Id.* (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973)).

327. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980).

328. *Id.* at 175.

Mathews v. Lucas, that the resulting rational-basis standard "is not a toothless one."[329]

Three years later in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*,[330] while upholding the retroactive imposition of pension liabilities against a due process challenge, Justice Brennan wrote:

> We . . . explained [in *Usery v. Turner Elkhorn Mining Co.*] that the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means. . . .[331]

Then, in 1985, the Court spoke directly to the economic right claimed to be infringed rather than just the nature of the allegedly offending legislation. Writing for the Court in *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*,[332] Justice Marshall explained that in asserting an impairment of contract claim, the plaintiff must first demonstrate that "the [allegedly offending] statute alters contractual rights or obligations."[333] If so, the "court next determines whether the impairment is of constitutional dimension," by which Marshall meant that the impairment had to be substantial, not just minimal.[334] If the impairment is substantial, "a court must look more closely at the legislation."[335] But if "the contract is a private one, and when the impairing statute is a federal one, . . . inquiry is especially limited, and the judicial scrutiny quite minimal."[336] Marshall then reasserted the severely limited scope for constitutional right of contract claims by concluding that "[t]he party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and 'establish that the legislature has acted in an arbitrary and irrational way.'"[337]

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329. *Id.* at 184 (Brennan, J., dissenting) (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)).

330. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984).

331. *Id.* at 729.

332. Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451 (1985).

333. *Id.* at 472.

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* (quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984)).

X. EBB AND FLOW OF PROPERTY RIGHTS

Writing in 1992, Daniel Mandelker and Dan Tarlock argued that the presumption of constitutionality had eroded with respect to state and local land use regulation.[338] Much of their evidence for such erosion came from state court decisions, but they did point out that the presumption as applied to land use regulation was first recognized by the U.S. Supreme Court in *Village of Euclid v. Ambler Realty* in 1926.[339] Over the intervening years the Court generally applied the presumption from *Euclid* in takings cases with mixed results, largely due to Justice Holmes' unhelpful statement in *Pennsylvania Coal v. Mahon*[340] that "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[341] Although space and the reader's patience preclude a comprehensive review of the Supreme Court's confused takings jurisprudence, a few examples will illustrate how the security of property rights has ebbed and flowed with the Court's shifting application of the presumption of constitutionality.

Although a taking was found in *Mahon*, Holmes' "too far" language left ample room for deference to legislative regulations of private property. In the 1954 case of *Berman v. Parker*,[342] the Court suggested that courts should allow legislatures wide discretion in the regulation of private property. At issue was the condemnation of private properties under the District of Columbia Redevelopment Act of 1945. Although the legislation was enacted by Congress, Justice Douglas was explicit in describing it as an exercise of police power, giving the ruling direct application to state regulations of land use. Douglas wrote:

> An attempt to define . . . [the police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation,

338. *See generally* Daniel Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land Use Law*, 24 URB. LAW. 1 (1992).
339. *Id.* at 7.
340. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
341. *Id.* at 415.
342. Berman v. Parker, 348 U.S. 26 (1954).

> whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs.[343]

There was nothing in Douglas' opinion to suggest that the Court should be the main guardian of constitutionally guaranteed property rights.

In the 1974 case of *Village of Belle Terre v. Boraas*,[344] the Court upheld, against an equal protection challenge, a prohibition on groups of more than two people, unrelated by blood, marriage, or adoption, from occupying a single residence. Asserting that the ordinance affected no fundamental rights, Justice Douglas declared that in dealing with "economic and social legislation," the Constitution requires only that "the law be 'reasonable, not arbitrary' and bears 'a rational relationship to a [permissible] state objective.'"[345] A dissenting Justice Marshall agreed with the majority that "[t]he police power which provides the justification for zoning is not narrowly confined" and should be afforded "considerable latitude in choosing the means," but he objected that because two fundamental personal rights were at issue, the ordinance should be subjected to strict scrutiny.[346]

Although not finding that property rights, like those at issue in *Village of Belle Terre*, are personal rights also warranting strict scrutiny, in the 1980 case of *Agins v. City of Tiburon*,[347] the Court did demand of land use regulators something more than the lenient rational basis test of the presumption of constitutionality. "The application of a general zoning law to particular property effects a taking," wrote Justice Powell, "if the ordinance does not substantially advance legitimate state interests."[348] This test was repeated in subsequent Supreme Court cases,[349] but was abrogated in *Lingle v. Chevron*,[350] not on the ground that the less demanding rational basis test should apply, but rather because, wrote Justice O'Connor, "this formula

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343. *Id.* at 32.

344. Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974).

345. *Id.* at 8 (alteration in original) (first quoting F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); and then quoting Reed v. Reed, 404 U.S. 71, 76 (1971)).

346. *Id.* at 13–14 (Marshall, J., dissenting). Marshall argued that the rights to freedom of association and privacy were infringed. *Id.*

347. Agins v. City of Tiburon, 447 U.S. 255 (1980).

348. *Id.* at 260.

349. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987) (noting that Justice Scalia wrote that "an easement would be lawful land-use regulation if it substantially furthered governmental purposes"). The property owner prevailed not just because the regulation failed to further a legitimate governmental purpose but because the Court found zero "nexus between the condition and the original purpose of the building restriction." *Id. See also* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

350. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

prescribes an inquiry in the nature of a due process, not a takings test, and that it has no proper place in our takings jurisprudence."[351] She explained that a substantially advancing legitimate state interests test "reveals nothing about the *magnitude or character of the burden"* imposed on property rights or "how any regulatory burden is *distributed* among property owners."[352]

Whatever the purported standard of review, after *Agins*, the Court gave hope to economic liberties advocates by ruling favorably on property rights claims in a few cases. In 1987, the Court found a temporary taking in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[353] In dissent, Justice Stevens insisted that the ordinance warranted a "strong presumption of constitutionality. . . . A presumption of validity is particularly appropriate in this case because the complaint did not even allege that the ordinance is invalid, or pray for a declaration of invalidity or an injunction against its enforcement."[354] In response to Justice Stevens' argument, Justice Rehnquist observed that the Takings Clause "is designed not to limit the governmental interference with property rights *per se,* but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."[355]

Five years later, in *Lucas v. South Carolina Coastal Council*,[356] the Court found an unconstitutional taking where a prohibition on beachfront construction deprived the property owner of all economic value in his lot. In a footnote, Justice Scalia commented on the Court's "abiding concern for the productive use of, and economic investment in, land," and added that "there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause."[357] Whether or not Scalia believed "exceedingly close scrutiny" is on a par with "strict scrutiny," it was a rare suggestion that property rights are not to be viewed as second-class rights. In dissent, Justice Blackmun argued that in the absence of "'some factual foundation of record' that contravenes the legislative findings, . . . 'the presumption of constitutionality must prevail.'"[358]

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351. *Id.* at 540.
352. *Id.* at 542.
353. First Eng. Evangelical Lutheran Church v. County of L.A., 482 U.S. 304 (1987).
354. *Id.* at 327 (Stevens, J., dissenting).
355. *Id.* at 315 (majority opinion).
356. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
357. *Id.* at 1019 n.8.
358. *Id*. at 1046 (Blackmun, J., dissenting) (quoting O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251, 257–58 (1931)).

In *Dolan v. City of Tigard*,[359] a dissenter, this time Justice Stevens, would again object that land use regulations, as exercises of the police power, warrant a presumption of constitutionality. Objecting that the Court was "resurrect[ing] . . . a species of substantive due process that it firmly rejected decades ago" by "abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city," Stevens contended that "exactions associated with the development of a retail business are . . . a species of business regulation that heretofore warranted a strong presumption of constitutional validity."[360] In response, Chief Justice Rehnquist, writing for the Court, accused Stevens of relying on a law review article (heaven forbid) for the proposition that "business regulations" warrant a "strong presumption of constitutionality."[361] "Simply denominating a governmental measure as a 'business regulation,'" said the Chief Justice, "does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights."[362]

The Court's 1998 ruling in *Eastern Enterprises v. Apfel*[363] appeared to further the rise of economic liberties in the Court's hierarchy of constitutional rights. At issue was a law requiring a former operator in the coal industry to fund health benefits for retired miners who had worked for the operator before it left the industry. Justice O'Connor, writing for a plurality, looked to *Usery v. Turner Elkhorn Mining*, in which the Court had upheld similar legislation against a due process challenge. "In rejecting the operators' challenge [in *Usery*]," said O'Connor, "we explained that 'legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.'"[364] The difference in the case at hand, she contended, was the retroactive nature of the operator's liability.

Concurring in the judgment, Justice Kennedy observed that "for centuries our law has harbored a singular distrust of retroactive statutes."[365] "Even though prospective economic legislation carries with it the presumption of constitutionality," he wrote, "[i]t does

359. Dolan v. City of Tigard, 512 U.S. 374 (1994).

360. *Id.* at 405 (Stevens, J., dissenting).

361. *Id*. at 392 (majority opinion) (referencing John D. Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for A Rationale*, 52 CORNELL L.Q. 871, 923 (1967)).

362. *Id.* (quoting Justice Stevens' dissent).

363. E. Enters. v. Apfel, 524 U.S. 498 (1998).

364. *Id.* at 524 (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).

365. *Id.* at 547 (Kennedy, J., concurring in the judgment and dissenting in part).

not follow . . . that what Congress can legislate prospectively it can legislate retrospectively."[366] Justice THOMAS also wrote a concurring opinion in which he observed that, but for the Court's ancient ruling in *Calder v. Bull* that the Ex Post Facto Clause applies only in a criminal context, the obvious constitutional remedy for retroactive legislation is the Article 1, Section 9, Clause 3 prohibition of such laws.[367] As noted previously, *Calder* stands among the earliest precedents for the presumption of constitutionality, a conclusive presumption once a provision of the Constitution is ruled, as in *Calder*, to have no application. In expressing a willingness to reconsider *Calder*, even two hundred years later, THOMAS was clearly indicating his frustration with the second-class status of property rights under the Court's takings jurisprudence.[368]

Justice Stevens dissented in *Eastern Enterprises*, objecting that the appellant had "not carried its burden of overcoming the presumption of constitutionality accorded to an Act of Congress, by demonstrating that the provision is unsupported by the reasonable expectations of the parties in interest."[369]

Seven years later, Stevens took the opportunity to reassert the presumption of constitutionality on behalf of the majority in *Kelo v. City of New London*.[370] At issue was whether an eminent domain taking of private property to be subsequently transferred to a private developer under a city plan for economic development violated the public use requirement of the Fifth Amendment Takings Clause. "The disposition of th[e] case," wrote Stevens, "turns on the question whether the City's development plan serves a 'public purpose.' Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field."[371] Having asked whether the plan served a 'public purpose,' Stevens later declared that "[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[372] In dissents, both Justice O'Connor and Justice THOMAS objected to the Court's equation of 'public purpose' with the constitutional language of

366. *Id*. at 547–48 (quoting *Usery*, 428 U.S. at 16–17).

367. *Id.* at 538 (THOMAS, J., concurring).

368. *Id*. at 539 ("In an appropriate case, therefore, I would be willing to reconsider *Calder* and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the *Ex Post Facto* Clause.").

369. *Id*. at 553 (Stevens, J., dissenting).

370. Kelo v. City of New London, 545 U.S. 469 (2005).

371. *Id.* at 480.

372. *Id*. at 483.

'public use.' In giving extreme deference to the legislature, argued O'Connor, "all private property is now vulnerable to being taken and transferred to another private owner . . . who will use it in a way that the legislature deems more beneficial to the public. . . ."[373]

XI. SOME 21ST CENTURY SKEPTICISM

While the Court's takings jurisprudence, albeit far from unanimous, sometimes suggested a new appreciation for economic liberties, the presumption of constitutionality of so-called economic and social legislation remained an oft-repeated principle. A striking example is Justice O'Connor's 1988 opinion in *Kadrmas v. Dickinson Public Schools*,[374] joined by Chief Justice Rehnquist and Justices White, Scalia, and Kennedy. In a challenge to a North Dakota law allowing some, but not all, school districts to charge a fee for school bus transportation, Justice O'Connor wrote: "Social and economic legislation like the 1979 statute carries with it a presumption of constitutionality that can only be overcome by a clear showing of arbitrariness and irrationality."[375] She then went on to describe in some detail the Court's levels of scrutiny regime wherein constitutionality is no longer presumed in some cases: "[A] statute provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,'" otherwise it will be upheld if "rationally related to a legitimate governmental purpose."[376] O'Connor observed that the Court had declined to strictly scrutinize statutes having different effects on the wealthy and poor or to treat education as a fundamental right.[377] She acknowledged that the Court had given heightened scrutiny where statutes discriminated on the basis of gender and illegitimacy but noted that the Court has "not extended this holding beyond the 'unique circumstances,' . . . that provoked its 'unique confluence of theories and rationales.'"[378]

During the same term, however, Justice Scalia implied that, in many cases, the Court had mistakenly relied on the presumption of constitutionality for decades, if not centuries. In dissenting from the Court's ruling in *Morrison v. Olson*[379] that the independent counsel appointed under provisions of the Ethics and Government Act did

373. *Id*. at 494 (O'Connor, J., dissenting).
374. Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450 (1988).
375. *Id.* at 451.
376. *Id*. at 457–58.
377. *Id*. at 458.
378. *Id.* at 459 (quoting Plyler v. Doe, 457 U.S 202, 239, 243 (1982)).
379. Morrison v. Olson, 487 U.S. 654 (1988).

not violate the Appointments Clause, Article III, or the separation of powers, Scalia commented:

> It is rare in a case dealing . . . with the constitutionality of a statute passed by the Congress of the United States, not to find anywhere in the Court's opinion the usual, almost formulary caution that we owe great deference to Congress' view that what it has done is constitutional, and that we will decline to apply the statute only if the presumption of constitutionality can be overcome.[380]

He went on to effectively commend the majority for not mentioning the presumption of constitutionality "in the present case *because it does not apply*."[381] Scalia acknowledged that "[w]here a private citizen challenges action of the Government on grounds unrelated to separation of powers . . . we ordinarily give some deference, or a presumption of validity, to the actions of the political branches in what is agreed, between themselves at least, to be within their respective spheres."[382] "But," he asserted, "where the issue pertains to separation of powers, and the political branches are (as here) in disagreement, neither can be presumed correct."[383] In support, Scalia quoted James Madison from Federalist No. 49: "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers. . . ."[384] Neither Congress nor the President, said Scalia, "is entitled to the benefit of the doubt."[385]

A decade later, in *District of Columbia v. Heller*,[386] Justice Scalia suggested that the presumption of constitutionality applied even more narrowly. While agreeing with Justice Breyer's observation in dissent that the firearms regulation at issue would pass rational-basis scrutiny, Scalia disputed that such scrutiny was appropriate in assessing the constitutionality of the D.C. ordinance. "[R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws," wrote Scalia, but "[o]bviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to

380. *Id.* at 704 (Scalia, J., dissenting).
381. *Id.*
382. *Id.*
383. *Id.* at 704–705.
384. *Id.* at 705 (quoting THE FEDERALIST No. 49 (James Madison)).
385. *Id.*
386. District of Columbia v. Heller, 554 U.S. 570 (2008).

keep and bear arms."[387] Citing *Carolene Products* footnote four, he declared that "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."[388] Of course, the same could be said of the Takings Clause, the Impairment of Contracts Clause, the Privileges or Immunities Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Article IV.

If the presumption of constitutionality has no application where private citizens challenge a law on separation of powers grounds, as Scalia suggested in *Morrison v. Olson*, the same exemption from the presumption should apply where private citizens challenge a law on federalism grounds. Both the separation of powers within the national government and the division of powers between the national and state governments are divisions of power among coequals and serve to protect citizens from abuses of governmental power. Two exceptions to the Court's long-standing endorsement of enactments purporting to exercise Congress's power to regulate interstate commerce may have reflected some sympathy for giving federalism-based challenges heightened review. Or perhaps better stated as shifting the burden of proof by giving the government less benefit from the presumption of constitutionality.

In *United States v. Lopez*,[389] the Court invalidated the Gun-Free School Zones Act as not within Congress's Commerce Clause authority. After reviewing the entire history of the Court's Commerce Clause jurisprudence, including the expansive 'affecting commerce' test of *Wickard v. Filburn*,[390] Chief Justice Rehnquist acknowledged that "our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause."[391] Because permitting Congress to regulate "trivial impact[s] . . . [could serve] as an excuse for broad general regulation of state or private activities," the Chief Justice stated "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."[392] In a plea for greater deference to Congress, a dissenting Justice Souter insisted:

387. *Id.* at 628 n.27.
388. *Id.*
389. United States v. Lopez, 514 U.S. 549 (1995).
390. Wickard v. Filburn, 317 U.S. 111 (1942).
391. *Lopez*, 514 U.S. at 559.
392. *Id.* (quoting Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968)).

> The practice of deferring to rationally based legislative judgments "is a paradigm of judicial restraint." . . [I]t reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices.[393]

Souter ignored the reality that political accountability is no guarantee for constitutional liberties. If it was, there would be no need for the Bill of Rights.

Souter drew a parallel between the majority's invalidation of the Gun-Free School Zones Act and the long-condemned substantive due process and Commerce Clause decisions of the *Lochner* era. "It was not merely coincidental," he contended, "that sea changes in the Court's conceptions of its authority under the Due Process and Commerce Clauses occurred virtually together, in 1937."[394] Citing *Carolene Products*, Souter argued that "[i]n the years following . . . [the *Lochner* era], deference to legislative policy judgments on commercial regulation became the powerful theme under both the Due Process and Commerce Clauses . . . , and in due course that deference became articulate in the standard of rationality review."[395] In Commerce Clause cases, observed Souter, deferential, rational basis review culminated in the Court's upholding the 1964 Civil Rights Act as a regulation of interstate commerce reflecting "the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments."[396] What the Court was doing in taking this "backward glance at both the old pitfalls," concluded Souter, was "treat[ing] deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation."[397] Yet such gradations of rights and persons were precisely what the Court had been doing for decades in its selective abandonment of the presumption of constitutionality.

In *United States v. Morrison*,[398] the Court relied on *Lopez* in invalidating the Violence Against Women Act. Writing for the Court, Chief Justice Rehnquist described the presumption of constitutionality as requiring "[d]ue respect for the decisions of a coordinate branch of Government . . . [and] invalidat[ion of] a congressional

393. *Id.* at 604 (Souter, J., dissenting) (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993)).
394. *Id.* at 606.
395. *Id*.
396. *Id.* at 607.
397. *Id.* at 608.
398. United States v. Morrison, 529 U.S. 598 (2000).

enactment only upon a plain showing that Congress has exceeded its constitutional bounds."[399] But, said Rehnquist:

> "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." . . . "[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question and can be settled finally only by this Court."[400]

Citing *Marbury v. Madison*, Rehnquist wrote that "[u]nder our written Constitution . . . the limitation of congressional authority is not solely a matter of legislative grace."[401] In a concurring opinion, Justice THOMAS reiterated his displeasure with "rootless and malleable standard[s]," stating that "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers. . . ."[402] As he had in *Lopez*, Justice Souter lamented what he viewed as the majority's revival of *Lochner* era thinking, labeling it a "new system of congressional deference subject to selective discounts."[403]

Over the last decade, the role and relevance of the presumption of constitutionality have remained a subject of disagreement on the Court—usually debated in the context of levels of scrutiny analysis. In *Schuette v. Coalition to Defend Affirmative Action*,[404] for example, the Court declined to invalidate an amendment to the Michigan Constitution prohibiting affirmative action in public education, employment, and contracting. In a plurality opinion, Justice Kennedy declined to embrace what the lower court labeled the "political process doctrine" as the grounds for invalidating the Michigan constitutional amendment. The lower court's idea derived from the suggestion in *Carolene Products* footnote four that discrete and insular minorities might sometimes be precluded from effectively asserting their interests in the political process, a suggestion central to John Hart Ely's thesis in *Democracy & Distrust*[405] and seemingly embraced in previous Supreme Court cases.[406] A dissenting Justice SOTOMAYOR

399. *Id.* at 607.

400. *Id.* at 614 (first quoting *Lopez*, 514 U.S. at 557; and then quoting Heart of Atlanta Motel v. United States, 379 U.S. 241, 273 (1964)).

401. *Id*. at 616.

402. *Id*. at 627 (THOMAS, J., concurring).

403. *Id*. at 638 (Souter, J. dissenting).

404. Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291 (2014).

405. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Harv. Univ. Press, rev. ed. 1980).

406. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385 (1969); Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982).

noted that *Carolene Products* "focused on the vital importance of safeguarding minority groups' access to the political process" three decades before the idea expressed in the cases relied upon by the lower court, asserting that the *Carolene Products* Court "explained that while ordinary social and economic legislation carries a presumption of constitutionality, the same may not be true of legislation that offends fundamental rights or targets minority groups."[407] In a concurring opinion, Justice Scalia challenged SOTOMAYOR's reading of *Carolene Products*. The idea that courts should strictly scrutinize laws affecting discrete and insular minorities, he pointed out, "derived from dictum in a footnote."[408] "I say derived from that dictum (expressed by the four-Justice majority of a seven-Justice Court)," Scalia continued, "because the dictum itself merely said '*[n]or need we enquire* . . . whether prejudice against discrete and insular minorities may be a special condition.'"[409]

The debate was renewed two years later in *Whole Woman's Health v. Hellerstedt*,[410] in which the Court invalidated as an undue burden a Texas law's requirement that abortion providers have admitting privileges at a hospital located no more than 30 miles from their abortion facility. Justice Breyer, writing for the majority, concluded that the court of appeals erred in stating that a state law is constitutional if it does not present a substantial obstacle to abortion of a nonviable fetus and if "it is reasonably related to (or designed to further) a legitimate state interest."[411] The lower court was wrong, said Breyer, "to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue."[412] Justice THOMAS dissented "to emphasize how today's decision perpetuates the Court's habit of applying different rules to different constitutional rights . . . and the Court's increasingly common practice of invoking a given level of scrutiny—here, the abortion-specific undue burden standard—while applying a different standard of review entirely."[413] THOMAS argued:

> The undue-burden standard [as applied in abortion cases] is just one variant of the Court's tiers-of-scrutiny approach to constitutional adjudication. And the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a

407. *Schuette*, 572 U.S. at 366–67 (SOTOMAYOR, J., dissenting).
408. *Id*. at 325 (Scalia, J., concurring in the judgment).
409. *Id.* (quoting U.S. v. Carolene Products, 304 U.S. 144, 153 n.4 (1938)).
410. Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016).
411. *Id.* at 597.
412. *Id.* at 608.
413. *Id.* at 629 (THOMAS, J., dissenting).

> given right—be it "rational basis," intermediate, strict, or something else—is increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separates [sic] our constitutional decisions from judicial fiat.[414]

THOMAS pointed out that although "tiers of scrutiny have become a ubiquitous feature of constitutional law," they did not "begin in earnest" until the 1960s.[415] But, he noted, "[t]he Constitution does not prescribe tiers of scrutiny."[416] "Eighty years on," wrote THOMAS:

> [T]he Court has come full circle. The Court has simultaneously transformed judicially created rights like the right to abortion into preferred constitutional rights, while disfavoring many of the rights actually enumerated in the Constitution. But our Constitution renounces the notion that some constitutional rights are more equal than others. A plaintiff either possesses the constitutional right he is asserting, or not—and if not, the judiciary has no business creating ad hoc exceptions so that others can assert rights that seem especially important to vindicate. A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment. Unless the Court abides by one set of rules to adjudicate constitutional rights, it will continue reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear.[417]

CONCLUSION

Justice THOMAS' condemnation in *Whole Woman's Health* of the Court's levels of scrutiny-hierarchy of rights and people approach to constitutional interpretation and enforcement should be heeded by everyone concerned for constitutional government and the rule of law. Although THOMAS does not attempt to explain the origins of the Court's approach, it should be apparent from the foregoing review of just a smattering of Supreme Court opinions that the source of the Court's elaborate judicial review framework described by THOMAS is the presumption of constitutionality.

It may be polite to suggest that your fellow public officials in the other two branches of government and in the state governments will always abide by the Constitution. But it is not difficult to assert noble public purposes to be served by legislation and regulation that also happens to benefit public officials, advantage those whose support

414. *Id.* at 638.
415. *Id.*
416. *Id.*
417. *Id.* at 643.

they require, or disadvantage and even discriminate against others. Nor is it difficult to rationalize a relationship between such measures and their purported public purposes. Has any advocate for legislative or regulatory advantage ever been heard to proclaim, except behind closed doors, such advantages as the justifications for a favored law or regulation? Yet the Supreme Court has for over two centuries insisted, as a general rule, that legislative and executive actions should be presumed constitutional.

With that oft-repeated but seldom justified maxim as the default principle, the Court has often faced the realities of national and state governments limited only by self-restraint. Over the course of its long history, the Supreme Court has encountered many cases in which the presumption of constitutionality would yield clearly unacceptable results if constitutional rights and limited government were to have any meaning. When the legislative and executive branches of government are presumed to act in accordance with the Constitution, whether motivated by a sincere desire to promote the public welfare or by self-interest and service to the rent seekers who populate K Street and every state capital, constitutional liberties exist at the mercy of political will. So, too, do the constitutional structures of separation of powers, federalism, and bicameralism that serve to protect those liberties.

Rather than abandon the presumption of constitutionality as contrary to the founding generation's experience with abuses of power and the Framers' provision of various checks on such abuses in the Constitution, the Court employed what today might be called workarounds. Because during the *Lochner* era, the Court had, in the mind of its critics, employed a presumption of unconstitutionality in reviewing New Deal legislation, finding suitable workarounds was difficult. But the Court had given heightened scrutiny in some free speech cases on the theory that freedom of expression is essential to democratic governance. Thus, the idea of more and less important rights, with the former warranting heightened scrutiny, had been introduced well before Justice Stone penned his fateful footnote in *Carolene Products*.

Contributing to the policy-driven jurisprudence lamented by Justice THOMAS in his *Whole Woman's Health* dissent are the balancing tests that have inevitably followed from the Court's levels of scrutiny-hierarchies of rights and persons approach. The very ranking of rights and persons reflects judgments about what and who is more or less important as a matter of public policy. The resulting levels of scrutiny analysis requires varying standards of review that obliges courts to make policy choices. Determining whether the government has a

compelling interest as required under strict scrutiny requires courts to weigh the importance of the range of public policy justifications for a particular rights-affecting law and in some contexts, to weigh the importance of the private rights claims against the importance of the public's asserted interest. The same is true where courts must assess whether the government has asserted a substantial interest as required by heightened or intermediate scrutiny. The presumption of constitutionality is said to insulate courts from interfering in policy judgments appropriate to the legislative and executive branches. Ironically, the Court's levels of scrutiny-hierarchy of rights and persons approach now requires courts to address the policy choices the presumption of constitutionality was meant to avoid.

As Justice THOMAS pointed out in *Whole Woman's Health*, echoing Chief Justice Rehnquist's dissent in *Weber v. Aetna Casualty*, there is nothing in the Constitution to support the levels of scrutiny-hierarchies of rights and people approach developed by the Court after *Carolene Products*. Rehnquist's solution was a general reinvigoration of the presumption of constitutionality, particularly as it relates to unenumerated rights claims founded in due process. But the recognition of unenumerated rights is not a product of the abandonment of the presumption of constitutionality, although shifting the burden of proof to the government allows for those rights claims to be more consequential. Whether such unenumerated rights are judicial inventions or grounded in the Constitution is not relevant to the argument set forth in this paper. Whatever rights the Constitution guarantees are compromised to a presumption of constitutionality. The remedy, particularly for those rights that have been deemed of lesser standing, is abandonment of the presumption of constitutionality so that government bears the burden of justifying constraints on all constitutional liberties.

In his opinion for the Court in the 2022 case of *New York State Rifle & Pistol Association, Inc. v. Bruen*,[418] Justice THOMAS made clear that the Court's hierarchy of rights jurisprudence, with its associated judicial balancing of interests, derives from the presumption of constitutionality. In invalidating a New York law requiring a showing of proper cause for licensure to carry a handgun in public, the Court rejected the "two-step test" employed by numerous lower courts in the wake of the Court's rulings in *District of Columbia v. Heller*[419] and *McDonald v. Chicago*[420] upholding an individual right to bear arms under the Second Amendment. In rejecting the two-step approach

418. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).
419. District of Columbia v. Heller, 554 U.S. 570 (2008).
420. McDonald v. Chicago, 561 U.S. 742 (2010).

"that combines history with means-end scrutiny," THOMAS wrote, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[421] He thus rejected the presumption of constitutionality in favor of a presumption of unconstitutionality.

There is nothing in THOMAS' argument that would limit a presumption of unconstitutionality to the Second Amendment. The Court "declined to engage in means-ends scrutiny [in *Heller* and *McDonald*] because," observed THOMAS, "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[422] He then quoted, again from *Heller*, language with application to every constitutional right: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."[423] THOMAS acknowledges "that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—[but] it is not deference that the Constitution demands here."[424] By "here" he means the Second Amendment, but the same must be said of every constitutional right. Constitutional rights, as the Court stated in *Heller*, are "the very *product* of an interest balancing by the people" and it "surely elevates above all other interests the right[s] of law-abiding, responsible citizens. . . ."[425]

421. *Bruen*, 142 S. Ct. at 2125–26.
422. *Id*. at 2129 (quoting *Heller*, 554 U. S. at 634).
423. *Id*.
424. *Heller*, 554 U.S. at 635.
425. *Id.*