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Federalism, Separation of Powers, and Individual Liberties

Dennis G. LaGory

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I. Introduction: Goals and Government

> We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[1]

The Framers began the Constitution with this statement of purpose because the philosophical tradition that spawned their political temperament viewed the preservation of liberty as the chief objective of government.[2] This tradition hypothesized that man, prior to the formation of organized society, lived in a state of perfect freedom and equality.[3] In this state, all men possessed natural liberty. According to William Blackstone, one of the eighteenth century's most respected legal scholars, natural liberty consisted of three absolute personal rights: (1) personal security, which "consists in a person's . . . uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation;"[4] (2) personal liberty, which "consists in the power of loco-motion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint;"[5] and (3) property, which "consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution."[6]

Men possessed these rights in full measure, subject only to the

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1. U.S. Const. preamble.

2. *See* J. Locke, Two Treatises of Government ¶ 124 (P. Laslett ed. 1952) (1st ed. 1690).

3. *See id.* ¶ 4.

4. 2 W. Blackstone, Commentaries on the Laws of England *129 (footnote omitted).

5. *Id.* at *134.

6. *Id.* at *138 (footnote omitted).

limitations of natural law, which provided that no person should harm another in the exercise of his liberty.[7] But natural law was often honored more in the breach than the observance, which rendered primeval existence uncertain and dangerous. In the state of nature, the strong tended to dominate the weak. Self-aggrandizement raged unchecked because of commonly accepted rules of conduct, impartial judges to interpret those rules, and police to enforce these judicial interpretations.[8] Therefore, men agreed to surrender a portion of their natural liberty in order to secure a greater measure of it through the protection of government.[9] The corollary of this theory was that if the government so formed failed in its trust, if it destroyed the people's residuum of liberty, it put itself "into a state of war with the people, who are thereupon absolved from any further obedience."[10]

The foregoing was merely an hypothesis. No empirical evidence of such occurrences had ever been discovered. The Framers, assembled in Philadelphia during the summer of 1787, converted this theory into the foundation for the government of a republic of four million persons. Most of them had been instrumental in bringing this theory's corollary to pass; they had led the Nation in a long and bloody war of independence from Great Britain. In justifying the war, they gave this theory its most succinct and eloquent expression:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just Powers from the consent of the governed, that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.[11]

Having won its independence, the Nation, under the ineffectual Articles of Confederation, reverted to a situation very much like the chaotic state of nature. There was no commonly accepted law or any power strong enough to check the unbridled self-aggrandizement of the states. Personal security and property were threatened by hostile Indians to the west, hostile nations to the east, and the likes of Daniel Shays within. The principal dilemma facing the Framers was how to form a government strong enough

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7. *See* J. LOCKE, *supra* note 2, ¶ 6.
8. *See id.* ¶ 124-26.
9. *See id.* ¶ 97.
10. *See id.* at 222.
11. The Declaration of Independence para. 1 (U.S. 1776).

to control these anarchical tendencies, but not strong enough to threaten personal liberty. Their solution to this dilemma was to grant the national government an impressive array of powers fully adequate to maintain order, but to diffuse those powers in such a way that no one sector of the government possessed enough power to tyrannize the people. The two chief methods the Framers used to allocate power have come to be known as federalism and the separation of powers.

Federalism is the vertical allocation of power between the states and the national government. Under this system, every person is a citizen both of the state in which he or she resides and of the nation as a whole. The laws of both centers of power operate directly on the individual. The Nation's legislative power is divided between the states and the central government, with each also possessing its own executive and judicial apparatus. The powers of the national government are enumerated in the Constitution; those not enumerated reside in the states. The law of the national government, operating within its sphere of enumerated powers, is the supreme law of the land and preempts conflicting state law.

The separation of powers is the horizontal allocation of governmental power within the states and the national government. This concept recognizes, as did Aristotle and Montesquieu, three distinct functions of government: legislative, executive, and judicial. The gravamen of this doctrine is that those functions should be exercised by separate, independent, and co-equal departments in order to avoid dominance by any one over the others.

The Framers explained how this dual allocation of power operates to preserve liberty:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[12]

The remainder of this Essay inquires whether the Framers solved their dilemma satisfactorily—whether federalism and the separation of powers have preserved individual liberty. Should these allocations of power be found to preserve liberty effectively, then it will necessarily follow that they contribute to the functioning of our government. Many have complained that federalism and the separation of powers duplicate governmental efforts unnecessa-

12. THE FEDERALIST No. 51, at 325 (A. Hamilton or J. Madison) (H. Lodge ed. 1888).

rily, rendering our government contentious, slow to respond to crises, and inefficient. The Constitution, however, "recognizes higher values than speed and efficiency."[13] If these principles preserve individual liberty, they do far more than merely aid the functioning of our government—they justify its very existence.

II. Federalism as a Protector of Individual Liberty

> In the American republics the central government has never as yet busied itself except with a small number of objects, sufficiently prominent to attract its attention. . . . When the central government which represents the majority has issued a decree, it must entrust the execution of its will to agents over whom it frequently has no control and whom it cannot perpetually direct. The townships, municipal bodies, and counties form so many concealed breakwaters which check or part the tide of popular determination. If an oppressive law were passed, liberty would still be protected by the mode of executing that law.[14]

The major threat to individual liberty was seen as abuse of the legislative process. A tyrannical majority, it was feared, might use acts of Congress to divest the states and the states' residents of their rights. The major bulwarks against such tyranny were the narrow scope of the national government's powers and the broad authority the states still retained. Therefore, the Bill of Rights, which contained a much more comprehensive enumeration of individual liberties than those enunciated by Blackstone, limited only the actions of the national government and did not apply to the states.[15] The scope of state sovereignty encompassed "the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States."[16] In such a milieu, the states, as the Framers had expected,[17] served as the primary forum for the vindication of individual liberty.

Excepting the rare occasions when a state law was invalidated because it was determined to have infringed on a vested right protected by the contracts clause,[18] this state of affairs prevailed into

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13. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

14. 1 A. de Tocqueville, Democracy in America 271-72 (F. Bowen rev. ed. 1945).

15. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833).

16. City of New York v. Miln, 36 U.S. (11 Pet.) 102, 139 (1837).

17. *See* The Federalist No. 45, at 290 (J. Madison) (H. Lodge ed. 1888) (stating that "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liherties, and properties of the people").

18. *See, e.g.*, Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

the third quarter of the nineteenth century. Even the broad language of the fourteenth amendment was, at first, given a narrow construction that did not prevent the states from enacting legislation affecting the lives, liberty, and property of their citizens.[19]

This situation did not last. By the end of the century, the federal judiciary began to employ the due process clause of the fourteenth amendment to overturn social and economic regulations enacted by the states.[20] These substantive due process cases involved the conflict of two of Blackstone's absolute rights—personal security and property. Whereas the states enacted legislation to protect the personal security of their citizens, the Constitution was interpreted to preclude them from doing so when the property rights of regulated corporations were abridged.

The Great Depression, however, generated a belief that strong social and economic measures were necessary and permissible. Faced with President Franklin Roosevelt's threat to upset the separation of powers by "packing" the Supreme Court, the federal bench abandoned this unpopular line of cases.[21] This seeming triumph of state power was heralded as a victory for yet another benefit of federalism: "It is one of the happy incidents of our federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[22]

This reemergence of state power did not cause a return to unbridled state power. The Nation had grown into a continental economic unit. Advances in transportation and communications demanded uniform national regulations. The central government could no longer be concerned with a "small number of objects sufficiently prominent to attract its attention."[23] The federal judiciary, having abandoned strict scrutiny of state social and economic legislation, did not abandon review of state legislation under the fourteenth amendment. Recognizing the homogenizing tendencies resulting from the growing mobility of our citizens and the growing standardization of our industrial society, the Supreme Court discerned a new tyrannical majority. This was not the unpropertied mass that troubled the Framers, but rather millions of upstanding, middle-class citizens whom the Court feared might impose an op-

19. *See, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873).
20. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).
21. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).
22. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
23. 1 A. DE TOCQUEVILLE, *supra* note 14, at 271.

pressive conformity on society's disadvantaged and its dissenters. The Court, therefore, began to redefine personal liberty, giving it a broader scope and applying it uniformly throughout the Nation. Provisions of the Bill of Rights, found to be "implicit in the concept of ordered liberty,"[24] were incorporated into the due process clause of the fourteenth amendment and thus immunized from state abridgement.[25] New "penumbral rights" were recognized and protected, including the right to vote,[26] the right of interstate travel,[27] the right of privacy,[28] freedom of association,[29] and freedom of personal choice in matters concerning family life.[30] The equal protection clause was interpreted to prohibit not only discrimination based on race,[31] but also certain kinds of discrimination based on sex,[32] illegitimacy,[33] and alienage.[34]

The Supreme Court did not act alone in forging this new national standard of personal liberty. Congress, with its already broad commerce powers supplemented by the affection and aggre-

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24. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

25. The following provisions of the Bill of Rights have been incorporated into the due process clause of the fourteenth amendment:

First Amendment Rights: Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause); De Jonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly and petition); Near v. Minnesota, 283 U.S. 697 (1931) (freedom of the press); Gitlow v. New York, 268 U.S. 652 (1925) (freedom of speech).

Fourth Amendment Rights: Wolf v. Colorado, 338 U.S. 25 (1949) (protection against unreasonable searches and seizures).

Fifth Amendment Rights: Ashe v. Swenson, 397 U.S. 436 (1970) (collateral estoppel); Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination).

Sixth Amendment Rights: Duncan v. Louisiana, 391 U.S. 145 (1968) (right to a jury trial); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation clause); Gideon v. Wainwright, 372 U.S. 335 (1963) (rigbt to counsel); Irvin v. Dowd, 366 U.S. 717 (1961) (right to an impartial jury); *In re* Oliver, 333 U.S. 257 (1948) (right to a public trial and notice).

Eighth Amendment Rights: Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (cruel and unusual punishments clause).

26. Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1965).

27. Shapiro v. Thompson, 394 U.S. 618 (1969).

28. Griswold v. Connecticut, 381 U.S. 479 (1965); *see also* Roe v. Wade, 410 U.S. 113 (1973) (recognizing right to privacy in child bearing decisions); Boddie v. Connecticut, 401 U.S. 371 (1971) (recognizing right to privacy in marital decisions).

29. NAACP v. Alabama, 357 U.S. 449 (1958).

30. Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

31. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 294 (1954).

32. *See, e.g.*, Reed v. Reed, 429 U.S. 71 (1971).

33. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972).

34. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971).

gation doctrines, began to employ those powers to promote its own conception of personal liberty.[35] Using both its commerce power and its taxing and spending power, Congress has attached conditions to state receipt of federal grants-in-aid. These conditions have created enforceable individual rights to state services funded by those grants, which the poor, the illiterate, and the handicapped have pursued in the courts.[36]

Individual liberty, as presently understood, would hardly be recognizable to the Framers. The virtually exclusive champion of this new liberty has been the national government. This point is clearly illustrated by the Supreme Court's recent decision in *Shaw v. Delta Air Lines, Inc.*[37] The State of New York, through its Human Rights Law,[38] sought to serve as a laboratory by ensuring more comprehensive employee benefits to pregnant workers than would have been available under The Civil Rights Act of 1964.[39] The Court held that those provisions were preempted by ERISA, which had incorporated the Civil Rights Act's standards.[40] Thus, Congress, acting pursuant to its commerce power, can place a limit on the rights a state may grant its citizens. In this case, the boundary line for New York's enhancement of its residents' personal security was drawn at the property rights of multistate corporations. The Court stated that "[a]n employer with employees in several States would find its [disability] plan subject to a different jurisdictional pattern of regnlation in each State, depending on what benefits the State mandated."[41]

Unquestionably, individual liberty is being preserved in 1987—but is it being preserved by federalism? Many commentators have suggested that state power actually diminishes liberty.[42] Others fear that recent decisions will "relegate the States to precisely the trivial role that opponents of the Constitution feared they would occupy."[43]

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35. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

36. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 930-31 (1985).

37. 463 U.S. 85 (1983).

38. N.Y. EXEC. LAW §§ 290-301 (McKinney 1982 & Supp. 1987).

39. *Shaw*, 463 U.S. at 88. The Court had held that discrimination based on pregnancy did not constitute sexual discrimination under Title VII of the Civil Rights Act of 1964. *See* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

40. *Shaw*, 463 U.S. at 109.

41. *Id.* at 107.

42. Neuman, *Federalism and Freedom: A Critique*, in THE AMERICAN POLITICAL ARENA: SELECTED READINGS 7 (J. Fiszman ed. 1966).

43. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 575 (1985) (Powell, J., dissenting) (footnote omitted).

Despite the decline of state power, recent Supreme Court decisions indicate that the states still play an important role in preserving individual liberty—not the expanded liberty of selective incorporation, penumbral rights, and federal entitlements, but rather the core liberties that the Framers first entrusted to their care. In *Heath v. Alabama*,[44] for example, the state's right to protect its citizens' personal security against crime prevailed over a criminal's double jeopardy defense.[45] The Court noted that a state's power to "undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment."[46] In *Hillsborough County v. Automated Medical Laboratories, Inc.*[47] county regulations concerning blood plasma donors, which were stricter than Federal Drug Administration (FDA) standards, were held not to be preempted by the federal regulations.[48] In reaching this decision, the Court relied on "the presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause."[49] In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[50] the Court allowed the State of Washington to protect a citizen's reputational interest by awarding punitive damages for negligent defamation resulting from the defendant's issuance of a false credit report.[51]

The Court relies on federalism to secure individual rights in certain cases in which it defers to the inherent powers and superior factfinding ability of the state legislature. *Hawaii Housing Authority v. Midkiff*[52] involved a state's use of its power of eminent domain to redistribute property held by a few large landowners to a large number of potential homeowners.[53] In upholding the state's authority to redistribute property, the Court analogized Hawaii's situation to that faced by the former colonies after the American Revolution.[54] The Court then stated that, "[r]egulating oligopoly

44. 106 S. Ct. 433 (1985).
45. *Id.* at 440.
46. *Id.* at 438.
47. 471 U.S. 707 (1985).
48. *Id.* at 716.
49. *Id.* at 715.
50. 472 U.S. 749 (1985).
51. *Id.* at 763.
52. 467 U.S. 229 (1984).
53. *Id.* at 232-34.
54. *Id.* at 241-42 (footnote omitted).

and the evils associated with it is a classic exercise of a State's police powers."[55] This case represents federalism in its most pristine form. The state, dealing with problems peculiar to its own citizens, enacts legislation to advance one of the absolute personal rights of the individual—the right to hold property. The Hawaiian oligopolists, like the savages who first forsook the state of nature to form a government, were forced to surrender a part of their own liberty for the greater protection of everyone's liberty.[56]

The allocation of power between the state and federal governments may protect individual liberty better today than it did in the early years of the republic. Although the federal government has provided new fora for the vindication of an ever expanding concept of liberty, the states still retain ample powers to protect the original liberty envisioned by the Framers.

III. Separation of Power as a Protector of Individual Liberty

> The Constitution, in distributing the powers of government, creates three distinct and separate departments. . . . This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands.[57]

To the Framers such a commingling of powers constituted "the very definition of tyranny."[58] To guard against this tyranny, they rejected a specific constitutional provision mandating a separation of powers and chose to create a government with a structure incapable of concentrating too much power in the hands of any one branch.

Originally, Congress was considered to be the department against whose "enterprising ambition . . . the people ought to indulge all their jealousy and exhaust all their precautions."[59] Accordingly, the Supreme Court has often struck down statutes that constituted impermissible legislative incursions into the executive sphere.[60]

In recent years, however, much has been made of the self-ag-

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55. *Id.* at 242.
56. *See* J. Locke, *supra* note 2.
57. O'Donoghue v. United States, 289 U.S. 516, 530 (1933) (citation omitted).
58. The Federalist No. 47, at 300 (J. Madison) (H. Lodge ed. 1888).
59. *Id.* No. 48, at 309 (J. Madison).
60. *See* Buckley v. Valeo, 424 U.S. 1, 140 (1976); *see also* Bowsher v. Synar, 106 S. Ct. 3181 (1986).

grandizing tendencies of the executive and judicial branches. The growth of executive power since the New Deal has led many to fear an "Imperial Presidency." Despite this growth, there was sufficient strength in the judicial branch to block President Truman's attempt to exercise legislative powers against the steel companies.[61] The Court again asserted its strength in *United States v. Nixon*,[62] a case in which President Nixon claimed absolute privilege and defied a district court subpoena by refusing to reveal the contents of certain private communications.[63] In rejecting the President's claim, the Court stated, "The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the functions of the courts under Art[icle] III."[64]

The natural litigiousness of Americans, coupled with the ever increasing number of laws and lawyers, has prompted many to assert that the courts are threatening to become "super legislatures." While judicial activism is undoubtedly high, the bench still manages to exercise a significant degree of restraint when incursions into the prerogatives of the coordinate branches are involved. For several years, the courts have deferred to legislative determinations in cases involving social and economic legislation.[65] During the Vietnam Era, for example, the Supreme Court regularly declined to review lower court determinations that actions challenging the legality of the war constituted nonjusticiable political controversies.[66] The courts also maintain the separation of powers through the doctrine of standing, which requires plaintiffs who challenge a governmental action to be harmed directly thereby. To hold otherwise would "pave the way generally for suits challenging, not specifically identifiable governmental violations of law, but the particular programs agencies establish to carry out their legal obligations."[67]

Because the separation of powers doctrine operates to protect individual liberties on a systemic level, many cases in this area

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61. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952).
62. 418 U.S. 683 (1974).
63. *Id.* at 703.
64. *Id.* at 707.
65. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc. 348 U.S. 483 (1955).
66. *See, e.g.*, Mora v. McNamara, 389 U.S. 934 (1967).
67. Allen v. Wright, 468 U.S. 737, 759 (1984). This judicial restraint may become more prevalent in the future. *See* Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).

tend to be abstract. Threats to individual liberty are not as dramatically presented because the whole purpose of the doctrine is to check the inordinate growth of a governmental department's power before it becomes sufficiently large to pose a dramatic threat. However, *INS v. Chadha*[68] illustrates how the separation of powers doctrine preserves individual liberty. *Chadha* involved an alien's challenge to provisions of the Immigration and Nationality Act[69] that allowed the House of Representatives to veto the United States Attorney General's suspension of his deportation.[70] While the majority decision focused on the constitutionality of the legislative veto, Justice Powell's concurring opinion saw the Act as allowing an unconstitutional assumption of judicial powers by Congress.[71] In his concurrence, he thoroughly catalogued the ways in which the Act had deprived Chadha of his rights. Justice Powell argued that the House's ability to veto the suspension of a deportation order could deny an individual a fair hearing. Congress was not bound by any substantive criteria of the statute or any procedural rules. An individual's rights, therefore, would be contingent on the whim of the majority.[72]

IV. CONCLUSION

In a world that the Framers hardly could have anticipated, the Constitution remains a singularly effective instrument for the preservation of individual liberty. In its allocation of power between the states and the federal government, it provides Americans with multiple champions of their rights—the federal government, which protects a liberty that is constantly evolving to adapt traditional

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68. 462 U.S. 919 (1983).
69. 66 Stat. 216, *codified as amended at* 8 U.S.C. § 1254(c)(2) (1982).
70. *Id.* at 928.
71. *Id.* at 960 (Powell, J., concurring).
72. *Id.* at 966. Justice Powell stated:

> The impropriety of the House's assumption of this function is confirmed by the fact that its action raises the very danger that the framers sought to avoid—the exercise of unchecked power. In deciding whether Chadha deserves to be deported, Congress is not subject to any internal constraints that prevent it from arbitrarily depriving him of the right to remain in this country. Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights. The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to "the tyranny of a shifting majority."

Id. (footnotes omitted).

values to new realities, and the state governments, which protect the basic liberties to which mankind has always been entitled.

In its allocation of power between the branches of the federal government, the Constitution provides us with a polity possessing powers adequate to provide for our security and prosperity. Yet these powers are sufficiently diffused to pose no irresistible threat to individual liberty. In protecting liberty, the Constitution continues to legitimize itself as a compact for the governance of a free people.

DENNIS G. LAGORY