
AGAINST ARBITRARY GOVERNMENT AND THE
AMORAL CONSTITUTION

BY CLARK M. NEILY III*

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* Senior Attorney, Institute for Justice and Director of the Institute’s Center for Judicial Engagement. J.D. 1994, University of Texas School of Law; B.A. 1990, University of Texas. I would like to thank the clients of the Institute for Justice for their conviction, their courage, and the honor of representing them in court.

I. INTRODUCTION

The most important debate in constitutional law today is within the conservative-libertarian movement over the proper role of courts in mediating personal freedom and government power. At one end of the spectrum are those who support robust judicial review and the protection of rights not specifically enumerated in the text of the Constitution; at the other are those who favor judicial restraint and deference to majoritarian politics. This tension parallels an even more fundamental debate about the relationship of the individual and the state. Simply put, does the state exist to serve the interests of individuals or do individuals exist to serve the interests of the state?

The Founders had a clear answer to that question, which they expressed “to a candid world” in the Declaration of Independence.¹ “We hold these truths to be self-evident,” they begin: not debatable, not relative, not purely a matter of subjective preference or social mores, but *self-evident*—that is, objectively true in all settings, for all people, for all time.² And what are these objective, self-evident truths? That individuals have certain natural rights to which they are all equally entitled, and that the purpose of government is to secure those rights. It did not give them to us, and it cannot (legitimately) take them away.

The reason America has the longest-running constitution in the world is because the Founders got it right. Government exists to protect individual liberty. It does not exist to enable some people—be they monarchs or majorities—to arbitrarily impose their will on others. Accordingly, while government may regulate the exercise of individual rights, it may only do so for good reason. How do we know what constitutes good reason? That is the question Tim Sandefur tackles with keen insight and characteristic verve in *The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty*.

Sandefur begins with a metaphor borrowed from Abraham Lincoln about a shepherd driving a wolf away from a sheep’s throat, an act “for which the sheep thanks the shepherd as a liberator while the wolf denounces him . . . as the destroyer of

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

2. *Id.*

liberty.”³ It is clear, Lincoln quips, that “the sheep and the wolf are not agreed upon a definition of the word liberty.”⁴ Neither are we agreed upon the definition of liberty today or the proper role of our constitutional shepherd, the judiciary, in protecting it. The result has been a haphazard jurisprudence of liberty filled with glaring inconsistencies, disingenuous rationalizations, and an assortment of morally indefensible holdings by the Supreme Court.

Sandefur’s thesis is simple, but he must prune back a thicket of bad reasoning and errant precedent to make space for it. In a nutshell, his argument is this: to develop an operational grasp of the Constitution, one must understand and accept the moral framework in which it is situated. The best explication of that moral framework is the Declaration of Independence, which Sandefur calls the “conscience” of the Constitution.⁵ Above all else, the Declaration stands for the primacy of liberty over any form of political power, including democracy.⁶

Various groups have challenged this ordering of values during our nation’s history, particularly the pro-slavery movement and political Progressives. The latter finally upended the Founders’ hierarchy during the New Deal by persuading the Supreme Court to replace it with their own government-centric vision of the Constitution.⁷ Unfortunately, modern conservatives like Robert Bork have helped cement that inversion by embracing—indeed, exalting—the progressive jurisprudence of judicial restraint and the presumption of constitutionality.

The Conscience of the Constitution reminds us that for the Framers, limited government was not merely a goal, but a moral imperative. Any attempt to interpret and apply the Constitution without appreciating that fact is bound to fail. And fail we have. We failed countless men and women held to bondage on American soil for centuries before the Civil War; we failed their

3. TIMOTHY SANDEFUR, *THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY I* (2014) [hereinafter SANDEFUR] (quoting Abraham Lincoln, Address at Sanitary Fair, Baltimore, Maryland (Apr. 18, 1864) in ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859–1865, 589, 589–90 (Don E. Fehrenbacher ed., 1989)).

4. *Id.*

5. *Id.* at 2.

6. *Id.*

7. See, e.g., RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006); Randy E. Barnett, *The Wages of Crying Judicial Restraint*, 36 HARV. J.L. & PUB. POL’Y 925 (2013).

sons and daughters by abandoning the promise of freedom embodied in the Reconstruction Amendments; we failed generations of women by excluding them from the polity and from much of civil society; and we fail our fellow citizens every time we permit government to restrict their freedom without sufficient justification.

In short, we have treated the Constitution as if it were an amoral document, one that was made, as Justice Holmes famously claimed, “for people of fundamentally differing views.”⁸ That would have shocked the authors of our founding documents, who believed they were expressing universal truths, not merely their personal opinions. But Holmes’s view has gained ascendancy, particularly among modern conservatives who pride themselves—often mistakenly, as we shall see—on being “strict constructionists.” As Sandefur laments, this moral relativism means “[t]he Constitution’s real promise thus remains imperfectly redeemed.”⁹ Amen.

II. IN THE BEGINNING

Like siblings sent off to live with different parents after a divorce, the Declaration of Independence and the Constitution have grown apart over the years, becoming increasingly unfamiliar to one another and sometimes awkward in each other’s presence. No doubt that would have appalled members of the Founding generation, who endured great hardships to provide themselves a blank slate upon which to write their plan for “a new nation, conceived in Liberty.”¹⁰ The Declaration of Independence and the Constitution *together* comprise our nation’s founding documents.¹¹ The Declaration provides the moral framework for understanding the Constitution and a compass to help guide us when applying it to situations the Framers could never have foreseen.¹²

8. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

9. SANDEFUR, *supra* note 3, at 160.

10. Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), in ABRAHAM LINCOLN, *supra* note 3, at 536, 536.

11. SANDEFUR, *supra* note 3. See generally Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN. ST. L. REV. 413 (2006) (surveying debate regarding the Declaration’s place in constitutional law).

12. See Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL’Y 489, 507–08 (2004) [hereinafter *Liberal Originalism*] (describing the Declaration and Constitution as “a political system with worldwide ramifications”).

Some find this talk of “frameworks” and “compasses” gauzy and undisciplined. But they are wrong. America has the shortest constitution of any major country. That helps make it more accessible, but the price of brevity is detail. For example, government may not take a person’s life, liberty, or property without due process of law,¹³ but we are not told just what process is “due” in any given setting. Judges hold their offices during “good Behaviour”¹⁴ and the Fourth Amendment prohibits searches that are “unreasonable,”¹⁵ but again, the Constitution provides no definition or elaboration of those terms.

Even where the Constitution appears to speak with greater precision—stating that Congress “shall make no law” respecting an “establishment” of religion or “abridging” the freedom of speech¹⁶—difficult line-drawing questions inevitably arise, such as whether states may display religious monuments¹⁷ and whether burning an American flag should be considered protected speech or punishable conduct.¹⁸ The answers to those questions cannot be derived from the plain text of the Constitution. Indeed, as Professor Kermit Roosevelt—whose excellent book on judicial activism Sandefur discusses and critiques at some length—correctly notes, “the words of the Constitution alone seldom decide difficult cases.”¹⁹ Instead, you must have what Cato Institute scholar Roger Pilon likes to call “a theory of the matter.”²⁰

Sandefur’s theory of the matter is that the Declaration of Independence provides the key to understanding the Constitution and that any attempt to divorce the two inevitably

13. U.S. CONST. amend. XIV, § 1.

14. U.S. CONST. art. III, § 1.

15. U.S. CONST. amend. IV.

16. U.S. CONST. amend. I.

17. Sometimes yes, sometimes no. *Compare* *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that display of monument inscribed with the Ten Commandments on grounds of state capitol did not violate Establishment Clause), *with* *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005) (holding that display of Ten Commandments in county courthouses violated Establishment Clause).

18. Speech. *Texas v. Johnson*, 491 U.S. 397 (1989).

19. KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* 38 (2006).

20. Roger Pilon, *Facial v. As-Applied Challenges: Does It Matter*, *CATO SUP. CT. REV.*, 2008–2009, at vii, ix, available at http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2009/9/foreword-pilon_0.pdf [perma.cc/V8BZ-JV7H].

leads to error and injustice.²¹ The Declaration’s essential point, he says, was to make clear which understanding of liberty prevails on American soil: the sheep’s liberty to live free of wolfish violence and coercion, or the wolf’s “liberty” to do as it will with the sheep.²² “The wolf is wrong to imagine that he has a fundamental right to rule others, or that the sheep’s rights are simply whatever the wolf decides to allow.”²³ The Declaration of Independence makes clear that “America’s constitutional order is premised on the opposite principle: on the basic right of each person to be free.”²⁴ Importantly, this freedom is not limited to a mere handful of discrete rights. As Sandefur explains, the Founders understood that “[l]iberty does not come in discrete quanta; it is a general absence of interference. It is, in Jefferson’s words, ‘unobstructed action according to our will, within the limits drawn around us by the equal rights of others.’”²⁵

But “freedom,” “liberty,” and even “rights” are notoriously malleable terms whose meanings have been made obscure by two centuries of constitutional dialogue and debate. A more precise way of conceptualizing the issue—one that neatly frames not only those two centuries of debate here in America, but the centuries-long debate among political philosophers throughout the world—is whether there is a right to be free from the *arbitrary* exercise of government power.

As Sandefur explains, “[a]n arbitrary act is one that does not accord with a rational explanatory principle: one that has no connection to a legitimate purpose or goal. It may lack reasons to explain it, or be supported by illegitimate reasons.”²⁶ These two distinct meanings of the word “arbitrary” encompass a crucial point in the context of judicial review, because it is the second connotation that captures most unconstitutional government action, not the first.

For example, when the state of Florida requires an occupational license to perform interior design work, it is not because the legislature set out to regulate architects, got confused about who does what, and accidentally imposed

21. SANDEFUR, *supra* note 3, at 3–4.

22. *Id.* at 2.

23. *Id.*

24. *Id.*

25. *Id.* at 9 (quoting Letter from Thomas Jefferson to Isaac H. Tiffany (Apr. 4, 1819), in THOMAS JEFFERSON: POLITICAL WRITINGS 224, 224 (Joyce Appleby & Terence Ball eds., 1999)).

26. *Id.* at 73.

licensing on interior designers instead of architects. That would be arbitrary in the first sense of the word: a mistake with no reason to explain it. Instead, when the Florida legislature imposed licensing on interior designers it did so consciously, deliberately, and for a manifestly illegitimate reason: namely, economic protectionism for industry insiders, including particularly members of the politically influential American Society of Interior Designers (ASID).²⁷

If the definition of arbitrary government power is the naked assertion of authority to restrict another's freedom, then state-sanctioned chattel slavery is its ultimate manifestation. Thus, it is not surprising that the first sustained challenge to the Declaration's recognition of "inalienable rights" came from the pro-slavery movement.²⁸ Sandefur recounts how "[a]ttacks on the principles of the Declaration began at an early point in American history" with defenders of slavery calling them "self-evident lie[s]."²⁹ Because it is impossible to reconcile human bondage with the proposition that "all men are created equal" and are equally endowed with the right to "Life, Liberty, and the pursuit of Happiness,"³⁰ pro-slavery advocates fought to sever the link between the Declaration of Independence and the Constitution.³¹

Of particular concern to defenders of slavery was the proposition that the Due Process Clause—which Sandefur correctly reminds us actually refers to due process of *law*³²—"prohibits all arbitrary government action, including unjustified restrictions of individual liberty."³³ Thus interpreted, the Due Process Clause would have provided a powerful weapon with

27. See, e.g., DICK M. CARPENTER II, DESIGNING CARTELS: HOW INDUSTRY INSIDERS CUT OUT COMPETITION (Inst. for Justice ed. 2007), available at www.ij.org/images/pdf_folder/economic_liberty/Interior-Design-Study.pdf [perma.cc/ZZP9-MA3A] (explaining and documenting ASID's strategy for enacting protectionist interior design licensing requirements); see also *Florida Interior Design*, INST. FOR JUSTICE, www.ij.org/locke-v-shore [perma.cc/44H4-HEDP] (last visited Nov. 30, 2014) (documenting a partially successful challenge to Florida's interior design law).

28. SANDEFUR, *supra* note 3, at 22.

29. *Id.* (quoting CONG. GLOBE, 33rd Cong., 1st Sess., app. 214 (1854) (Sen. Petit)).

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

31. See *Liberal Originalism*, *supra* note 12, at 498–507 (2004).

32. SANDEFUR, *supra* note 3, at 71. As Sandefur explains, not everything that government purports to do—even pursuant to a law enacted through valid legislative procedures—is necessarily "law." *Id.* at 78. Instead, "the ingredients of [true] law include generality, regularity, fairness, rationality, and public orientation." *Id.* at 79. A "law" that lacks these ingredients is not truly a law at all. *Id.*

33. SANDEFUR, *supra* note 3, at 71.

which to attack federal legislation, including the Fugitive Slave Law, designed to help perpetuate the peculiar institution.³⁴ But the requirement to provide due process—whether procedural, substantive, or both—did not apply to the states and therefore threatened neither to eradicate the institution of slavery itself nor enshrine, at the level of government where it was most urgently needed, a constitutional prohibition against the arbitrary exercise of government power. Those would be the jobs of the Thirteenth and Fourteenth Amendments, respectively.

III. FROM RECONSTRUCTION TO *LOCHNER*

Ratified in 1865, the Thirteenth Amendment ended legal slavery in America.³⁵ But many in the South were determined to keep newly free blacks, or “Freedmen,” in a state of constructive servitude, and they responded with a web of regulations that came to be known as the “Black Codes.”³⁶ These laws prohibited everything from Freedmen owning guns for self-defense, to leaving their master’s property in search of better economic opportunities without permission, to restricting their ability to enter into contracts.³⁷

The Black Codes represented a frontal assault on the very notion of personal sovereignty, and they infuriated Republicans in Congress, who pledged to eliminate them and stamp out slave culture once and for all.³⁸ Their initial response was to enact a series of federal laws, including the Civil Rights Act of 1866, which provided that all persons born in the United States have the same right “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.”³⁹ After doubts were

34. *Id.* at 42–43.

35. U.S. CONST. amend. XIII.

36. SANDEFUR, *supra* note 3, at 100–01; *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 162 (1998) (noting southern governments’ attempts to “resurrect[] de facto slavery through the infamous Black Codes”).

37. W.E.B. DU BOIS, BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880, 167–78 (Harcourt, Brace and Co., 1st ed. 1935), *available at* <http://archive.org/stream/blackreconstruc00dubo#page/172/mode/2up> [perma.cc/R498-GTVL].

38. *See* CONG. GLOBE, 39th Cong., 1st Sess., 1151 (1866) (Rep. Thayer).

39. Civil Rights Act of 1866, ch. 31, 14 Stat. 27; *see also* Freedmen’s Bureau Act, ch. 200, 14 Stat. 173, 176–77 (1866) (protecting right to bear arms).

raised about the constitutionality of those laws, Congress proposed the Fourteenth Amendment to empower the federal government, including particularly the federal courts, to protect the basic civil rights of all Americans.⁴⁰

The Supreme Court, however, had other plans, and it rendered the Fourteenth Amendment practically meaningless in the aptly named *Slaughter-House Cases*.⁴¹ As Sandefur recounts, *Slaughter-House* involved a challenge to a Louisiana law requiring butchers to slaughter cattle at a single, privately owned facility.⁴² This state-sanctioned monopoly “put hundreds of small-scale butchers out of business,”⁴³ who then sued the state, arguing that the Louisiana law deprived them of their right to earn a living in violation of the Fourteenth Amendment’s proscription against any state law that shall abridge “the Privileges or Immunities of citizens of the United States.”⁴⁴

In a 5–4 opinion that misquoted relevant text,⁴⁵ twisted precedent, and flatly ignored the abuses the Fourteenth Amendment was plainly designed to correct, the Supreme Court held that the Privileges or Immunities Clause prevents the states from infringing only a small handful of rights that “owe their existence to the Federal government,” such as the right of “free access to [America’s] seaports” and to “demand the care and protection of the Federal government . . . when on the high seas.”⁴⁶ This was a preposterous reading of the Privileges or Immunities Clause, and Sandefur provides a fresh and sophisticated critique of the majority opinion.⁴⁷ Inevitably, “[t]he *Slaughter-House* Court’s withdrawal of the protections promised by the Fourteenth Amendment was a calamity for civil rights, and along with similar rulings it prepared the way for what historian

40. STAFF OF S. COMM. ON THE JUDICIARY, 99TH CONG., AMENDMENTS TO THE CONSTITUTION: A BRIEF LEGISLATIVE HISTORY 30–32 (Comm. Print 1985), available at www.senate.gov/artandhistory/history/resources/pdf/SPrt99-87.pdf [perma.cc/QPT9-BWTC].

41. 83 U.S. 36 (1872).

42. SANDEFUR, *supra* note 3, at 65.

43. *Id.*

44. U.S. CONST. amend. XIV, § 1; *Slaughter-House Cases*, 83 U.S. at 74.

45. See, e.g., Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 646–48 (1994) (identifying and discussing Justice Miller’s misquotations of constitutional text in *Slaughter-House*).

46. *Id.* at 79.

47. SANDEFUR, *supra* note 3, at 63–68.

Douglas Blackmon calls a ‘torrent of repression’ and the practical reestablishment of slavery.”⁴⁸

But a truth as profound as the one expressed in the Declaration of Independence—that all human beings have a natural right to be free from arbitrary government oppression—is not so easily extinguished. Disagreements soon arose among lower courts about whether the Constitution really allows government to restrict people’s freedom for no good reason.

That question was presented with particular clarity in a trio of cases involving the humble non-dairy spread we call margarine. Invented in the latter half of the nineteenth century, oleomargarine, as it was then known, quickly drew the ire of the dairy industry, which used its political muscle to suppress competition.⁴⁹ Laws enacted at the behest of Big Dairy included mandatory disclosures, prohibitions against coloring oleomargarine yellow to make it look more like butter, and outright prohibitions against the shipment or sale of margarine.⁵⁰

Professor Noga Morag-Levine recounts that between 1882 and 1887, the high courts of three states—Missouri, New York, and Pennsylvania—handed down decisions in cases challenging the constitutionality of oleomargarine bans.⁵¹ She explains that the defendants in all three cases “offered to present expert testimony regarding the wholesomeness of the product they sold.”⁵² All three trial courts *excluded* that testimony as irrelevant, a decision with which only the New York Court of Appeals ultimately disagreed.⁵³ Based on evidence presented by the would-be seller, it appeared “quite clear” to the New York Court of Appeals that the true object of the law was not to prevent fraud or protect the public, but rather “to drive [oleomargarine] from the market.”⁵⁴ Somewhat surprisingly (at least by modern standards), the government’s lawyer did not dissemble on this point. Instead,

48. SANDEFUR, *supra* note 3, at 68 (quoting DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 93 (2008)).

49. Adam Young, *The War on Margarine*, THE FREEMAN, June 2002, http://fee.org/the_freeman/detail/the-war-on-margarine [perma.cc/6E5P-2CGP].

50. *Id.*

51. Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, 2013 U. Ill. L. Rev. 59, 72 (2013).

52. *Id.* at 72–73.

53. *Id.* at 73.

54. *People v. Marx*, 2 N.E. 29, 32 (N.Y. 1885).

The learned counsel for the [state] frankly [met] this view and claim[ed] . . . that even if it were certain that the sole object of the enactment was to protect the dairy industry in this state against the substitution of a cheaper article made from cheaper materials, this would not be beyond the power of the legislature.⁵⁵

Here in one passage is the great unresolved tension in American constitutional law, and the essence of Sandefur's book: May government restrict one person's freedom simply to promote the selfish interests of another, and is it any of the judiciary's business? The Supreme Court's treatment of that issue over the years has been a jurisprudential game of pin the tail on the donkey, with judges stumbling around in blindfolds to avoid confronting the true object of government regulation and only occasionally peeking out to see what the government is really up to. We call this the rational-basis test, and it made an early appearance (though not by name) in—surprise!—a margarine case.

*Powell v. Pennsylvania*⁵⁶ involved a prosecution for selling margarine in violation of state law.⁵⁷ In an opinion by Justice Harlan, the Court began by recognizing that the Fourteenth Amendment protects “the privilege of pursuing an ordinary calling or trade” and that the law in question would violate that right unless it had a “real or substantial relation” to a legitimate government interest, such as protecting public health or preventing fraud.⁵⁸ At trial, the defendant sought to prove that the margarine he sold was “a wholesome and nutritious article of food,” but the trial court deemed that evidence irrelevant and excluded it.⁵⁹ The Supreme Court affirmed.⁶⁰ Applying “[e]very possible presumption” in favor of the validity of the statute, the Court held that whether margarine presents any *actual* health risk is a “question[] of fact and of public policy which belong[s] to the legislative department to determine.”⁶¹ In other words, truth doesn't matter; the mere assertion of a legitimate government interest will suffice.

55. *Id.* at 32–33.

56. 127 U.S. 678 (1888).

57. *Id.* at 679.

58. *Id.* at 684.

59. *Id.* at 682.

60. *Id.* at 687.

61. *Id.* at 684–85.

Of course, courts do not usually accept assertions of fact that are false or unsubstantiated, so it is hardly surprising that the *Powell* Court's indifference to reality would not be the last word on the subject. The most famous rejoinder came seventeen years later in *Lochner v. New York*,⁶² where the Court split over the constitutionality of a law limiting the number of hours bakers could work in any one day or week.⁶³ As Sandefur explains, the 5–4 majority “found no reason to believe the maximum-hours rule actually protected the public or the bakery workers.”⁶⁴ Because the law restricted the bakers’ freedom “without advancing any public goal,”⁶⁵ the law was an arbitrary—and therefore unconstitutional—exercise of government power.⁶⁶

Though the case is reviled by most conservatives and nearly all liberals, Sandefur correctly asserts that “*Lochner* was a textbook application of the classical liberal principles embodied in the Declaration of Independence and the Constitution.”⁶⁷ Distilled to its essence, *Lochner* stands for two propositions: First, the government must have a public-spirited reason for restricting people’s freedom. Second, courts should not accept uncritically the government’s naked assertions to that effect. Unfortunately, that commitment to defending the principle of non-arbitrariness would soon be replaced by the Progressive vision of the rubber-stamp judiciary championed in Justice Holmes’s *Lochner* dissent.⁶⁸

IV. THE PROGRESSIVE INVERSION

The Founders were classical liberals for whom individual freedom was the ultimate political value. For them, the point of government was to create a society where people could pursue their own goals and interests so long as they respected the equal right of others to do the same.⁶⁹

The Progressive vision of government is very different. Progressives believe the role of government is to improve the

62. 198 U.S. 45 (1905).

63. *Id.* at 52–53.

64. SANDEFUR, *supra* note 3, at 131.

65. *Id.*

66. *Lochner*, 198 U.S. at 64.

67. SANDEFUR, *supra* note 3, at 131.

68. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

69. ROGER PILON, *The Purpose and Limits of Government*, CATO’S LETTER NO. 13, 1999, at 9, available at www.cato.org/sites/cato.org/files/pubs/pdf/cl-13.pdf [perma.cc/TYK4-D63C].

human condition by ensuring particular outcomes, especially in the distribution of resources and opportunities. Because those resources and opportunities belong where the government thinks they ought to belong—and not simply wherever they happen to end up as a result of individual decisions and actions—Progressives have little patience for individual rights. As recounted by Professor David Bernstein, Woodrow Wilson “dismissed talk of ‘the inalienable rights of the individual’ as ‘nonsense.’”⁷⁰ “‘The object of constitutional government,’ according to Wilson, was not to protect liberty, but ‘to bring the active, planning will of each part of the government into accord with the prevailing popular thought and need.’”⁷¹

As Sandefur notes, “Progressive politicians presided over a dramatic expansion of government programs—everything from minimum-wage legislation to laws banning alcohol and segregating people by race—aimed at transforming people’s very nature.”⁷² Courts often resisted those efforts when they impinged on individual liberty by employing robust concepts of due process, property rights, and freedom of contract. In *Buchanan v. Warley*,⁷³ for example, the Supreme Court struck down a residential segregation ordinance in Louisville, Kentucky, not on equal-protection grounds, but on the grounds that it violated due process “by depriving the plaintiffs of liberty and property without a valid police power justification.”⁷⁴ Similarly, laws prohibiting parents from sending their children to private schools or teaching them in any language other than English were struck down not only as a violation of parents’ freedom to “direct the upbringing and education” of their children,⁷⁵ but also as an unjustified interference with the occupational freedom of teachers⁷⁶ and the private schools’ property rights.⁷⁷

Unfortunately, the justices were not always consistent in their protection of individual liberty from the Progressives’ utopian social policies, failing, for example, to prevent one of the most immoral programs in the history of America: eugenic

70. DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 92 (2011).

71. *Id.*

72. SANDEFUR, *supra* note 3, at 127.

73. 245 U.S. 60 (1917).

74. BERNSTEIN, *supra* note 70, at 81; *see also Buchanan*, 245 U.S. at 82.

75. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925).

76. *Meyer v. Nebraska*, 262 U.S. 390, 400–01 (1923).

77. *Pierce*, 268 U.S. at 535–36.

sterilization.⁷⁸ As Professor Bernstein notes, “[c]oercive eugenics was a quintessentially Progressive movement in that it reflected ideological commitments to anti-individualism, efficiency, scientific expertise, and technocracy.”⁷⁹ And when that policy reached the Supreme Court, in the tragic and appalling case of *Buck v. Bell*,⁸⁰ it was that champion of judicial deference to democratic will, Justice Oliver Wendell Holmes, Jr., who wrote the opinion upholding Virginia’s compulsory sterilization law and condemning Carrie Buck—and thousands of other young men and women—to a childless future.⁸¹ As Holmes callously quipped in his breezy, page-and-a-half opinion, “Three generations of imbeciles are enough.”⁸²

According to Sandefur, this indifference to human dignity and the importance of self-determination is neither surprising nor anomalous.⁸³ On the contrary, “[i]n a Progressive world of process and moral agnosticism, judicial review exists not primarily to protect substantive rights, or to promote pre-political ideas of justice, but to sustain the machinery of collective decisionmaking.”⁸⁴ As a pithy expression of this moral agnosticism, Sandefur offers a famous Holmes quote in which he tells a friend, “If my fellow citizens want to go to Hell . . . I will help them. It’s my job.”⁸⁵ But in fact, that is not quite right. What Holmes really means is, “If some of my fellow citizens want to send *other fellow citizens*—like Carrie Buck—to Hell, I will help them.” Let there be no mistake: when Holmes and his fellow Progressives talk about self-government, they are not talking about the individual right to make bad decisions about one’s own life. They are talking about a so-called “collective right” possessed by majorities to make bad decisions about other

78. See generally *Buck v. Bell*, 274 U.S. 200 (1927).

79. BERNSTEIN, *supra* note 70, at 96.

80. 274 U.S. 200 (1927).

81. *Id.* at 205–08. Carrie Buck was an unwed teenage mother, which was part of the state’s reason for sterilizing her. *Id.* at 205. Holmes describes Buck’s daughter Vivian as an “illegitimate and feeble-minded child.” *Id.* Contrary to Holmes’s description, Vivian was not feeble-minded. Roberta M. Berry, *From Involuntary Sterilization to Genetic Enhancement: The Unsettled Legacy of Buck v. Bell*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 401, 419–20 (1998). And it appears she was conceived not in an act of promiscuity, as the state claimed, but rape. *Id.* at 413.

82. *Buck*, 274 U.S. at 207.

83. See SANDEFUR, *supra* note 3, at 25–26.

84. *Id.* at 128.

85. *Id.* at 127 (quoting Letter from Oliver Wendell Holmes Jr. to Harold Laski (Mar. 4, 1920), in 1 HOLMES–LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1925, 248, 249 (Mark DeWolfe Howe ed., 1953)).

people's lives and enforce those sometimes horrifyingly immoral decisions through the coercive power of law. They are talking about the wolf's liberty to have his way with the sheep.

Sandefur refers to this as the "Progressive inversion of constitutional priorities."⁸⁶ Together, the Declaration of Independence and the Constitution establish a system in which "[l]iberty is the goal at which democracy aims, not the other way around."⁸⁷ Progressives, by contrast, "see the Constitution as concerned primarily with fostering democracy and enabling the majority to create its preferred society through legislation."⁸⁸ It may come as a surprise, then, to discover who has taken up the banner of this morally agnostic, government-friendly jurisprudence: modern conservatives.

V. CONSERVATIVE PROGRESSIVISM: DENYING AND DISPARAGING UNENUMERATED RIGHTS

Perhaps no issue more profoundly divides the libertarian and conservative wings of the limited-government movement than the status of "unenumerated" rights and the doctrine of substantive due process that the Supreme Court (occasionally) uses to protect them. Sandefur's thoughtful discussion of those points represents a tremendous contribution to one of the most interesting and important debates in American constitutional law.

The Constitution spells out approximately two dozen specific individual rights—mostly in the Bill of Rights, but some in the body of the Constitution as well, such as Article I's command that no state shall pass any "Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts."⁸⁹ But do we have other rights besides those specifically set forth in the Constitution, and if so, is it appropriate for courts to enforce these "unenumerated" rights? That debate is nearly as old as the Constitution itself, as Sandefur explains in summarizing the competing opinions of Justices Samuel Chase and James Iredell in the 1798 case *Calder v. Bull*.⁹⁰

86. *Id.* at 154.

87. *Id.* at 2.

88. *Id.* at 121.

89. U.S. CONST. art. 1, § 10, cl. 1.

90. 3 U.S. 386 (3 Dall.) (1798).

Though they agreed on the holding of the case—that the Ex Post Facto Clause did not apply to a Connecticut law granting a new hearing to the losing party in a probate case—they clashed over whether “the Constitution imposes certain inherent restrictions on legislatures” beyond those expressly set forth in the text.⁹¹ Chase believed the answer must be yes because legislatures are necessarily limited in the “objects” they can pursue.⁹² Thus, the legitimate ends of legislative power “will limit the exercise of it.”⁹³ So what are the legitimate ends of legislative power, or what we today call the police power? They include protecting people and property from violence, securing liberty, and otherwise promoting the general welfare.⁹⁴ Illegitimate ends of government—policies the government simply may not pursue because it has no legitimate authority to do so—include taking property from one person and giving it to another, punishing citizens for innocent acts, and allowing individuals to judge their own cases.⁹⁵ As Chase explains, it is simply not reasonable to suppose that anyone would entrust a legislature with such powers, “and, therefore, it cannot be presumed that they have done it.”⁹⁶

Justice Iredell disagreed. He argued that unless a given law contravenes some specific constitutional provision, courts “cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.”⁹⁷ This certainly sounds reasonable at first blush, and indeed many conservatives embrace Iredell’s position as a laudable expression of judicial modesty. In practice, however, the idea that courts should only strike down laws that violate specific constitutional provisions produces results “that are often embarrassing, and sometimes horrifying.”⁹⁸

Tragically, one can illustrate that observation with any number of historical examples, but consider just one: was *Buck v. Bell* correctly decided? Was there really no legitimate constitutional objection to the forced sterilization of some 60,000 young people, most of them impoverished, uneducated, and politically

91. SANDEFUR, *supra* note 3, at 88; *Calder*, 3 U.S. at 387.

92. *Calder*, 3 U.S. at 388.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 399 (Iredell, J., concurring).

98. SANDEFUR, *supra* note 3, at 153.

disenfranchised? Was their only recourse to the ballot box?⁹⁹ It is difficult to find anyone who will say yes, at least in public, to any of those questions. But that is the practical consequence of Justice Iredell's position, of which perhaps the most influential modern exponent was Judge Robert Bork.¹⁰⁰

Bork's writings, particularly his book *The Tempting of America*, profoundly influenced an entire generation of conservative scholars, judges, and policymakers. As Sandefur recounts, the "temptation" to which Bork is referring is that of "judges to implement their political preferences as constitutional law and thus intrude on the power of the majority."¹⁰¹ Bork believes (along with Justices Iredell and Holmes) that "in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities."¹⁰² Indeed, the only "areas of life" where majorities are *not* entitled to rule are those explicitly carved out by the Bill of Rights or some other unambiguous constitutional provision.¹⁰³

But there are a host of problems with that Manichean perspective. First and foremost, "the Ninth Amendment declares that this is the wrong way to read the Constitution: it says that the fact that some rights are specified must *not* be interpreted to deny the existence or importance of other rights."¹⁰⁴ Second, it ignores the text of the Fourteenth Amendment, particularly the requirement that no state "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."¹⁰⁵ Bork, like most conservatives, prides himself on being a faithful textualist; yet, like most conservatives, he has no theory about how to interpret the Privileges or Immunities Clause. Instead, he famously likened it to an "ink blot," arguing, mistakenly, that the clause "has been a mystery since its

99. While the Supreme Court has never officially overruled *Buck v. Bell*, most commentators would likely agree that the decision was effectively overruled by *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), when the Court struck down an Oklahoma law mandating sterilization of certain recidivist criminals.

100. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 264–65 (1990).

101. SANDEFUR, *supra* note 3, at 128.

102. BORK, *supra* note 100, at 139.

103. See SANDEFUR, *supra* note 3, at 128.

104. *Id.* The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

105. U.S. CONST. amend. XIV, § 1, cl. 2.

adoption.”¹⁰⁶ He makes the same false claim about the Ninth Amendment later in the book, asserting risibly, that, “[t]here is almost no history that would indicate what the [N]inth [A]mendment was intended to accomplish.”¹⁰⁷ In reality, “Madison, Hamilton, and others wrote at length about what the amendment was intended to accomplish, making clear that it was designed to ensure that nobody would think the Bill of Rights lists all individual rights.”¹⁰⁸

Bork also rejects the use of substantive due process to protect unenumerated rights, claiming there is no “intellectual structure” to support that approach.¹⁰⁹ But again he is wrong, and Sandefur devotes two full chapters to demonstrating the doctrine’s ample historical pedigree—which dates back to the “law of the land” provision in Magna Carta¹¹⁰—and refuting its many detractors, the volume of whose critiques far exceeds their depth.¹¹¹ Of course, it would rarely be necessary to invoke the concept of substantive due process if the Privileges or Immunities Clause of the Fourteenth Amendment and the doctrine of enumerated federal powers embodied in the Tenth Amendment were given their proper constitutional significance. Properly interpreted and applied, those two provisions alone would suffice to protect people from a vast range of illegitimate state and federal action, respectively.

And then there is the inability to answer the question about *Buck v. Bell*. Was it rightly decided? Silence. What about the Court’s decision to strike down Oregon’s requirement that all children attend public schools in *Pierce v. Society of Sisters* and its conclusion that parents have a right—nowhere mentioned in the text of the Constitution—to guide the upbringing of their own children?¹¹² Was that an example of the justices imposing their own personal policy preferences on a legislature that had determined, contrary to the Court’s holding, that in fact the child is “the mere creature of the State”?¹¹³ More silence.

106. BORK, *supra* note 100, at 166.

107. *Id.* at 183.

108. SANDEFUR, *supra* note 3, at 129.

109. *Id.* at 95 (quoting ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 55 (2003)).

110. *Id.* at 72.

111. *Id.* at 95–120.

112. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

113. *Id.* at 535.

Judge Bork had no good answer to these and myriad other questions because “despite his reputation for moralistic conservatism, [he] was actually a relativist: the majority has virtually unlimited freedom to adopt its (entirely subjective) moral preferences as law, and to impose those preferences on others”—including Carrie Buck.¹¹⁴ It won’t do. These are difficult issues, not easy ones as Bork and company try to pretend. You won’t get the right answers to hard questions by “ink blotting” inconvenient constitutional provisions, nor can the Constitution be properly understood outside the moral and political framework set forth in the Declaration of Independence.

VI. THE MORAL CONSTITUTION

After showing why the Constitution and the Declaration of Independence must be read together, Sandefur wisely avoids any sweeping prescriptions or promises that all will be easy and well if we simply follow that precept. The truth is there will always be hard questions in constitutional law, and any theory that purports to eliminate them is certain to be wrong. But there are better and worse ways of coming at those questions, and Sandefur offers three suggestions and a trenchant closing observation.

First, we must “eliminate the double standard by which some rights are given meaningful judicial protection while other, equally important rights are treated like poor relations and accorded practically meaningless rational-basis scrutiny.”¹¹⁵ Second, “courts should reexamine the Progressive inversion of constitutional priorities” and recognize that while democracy “is a valuable part of the constitutional structure, limits on freedom must be justified by some genuine public purpose and must be no greater than necessary to accomplish that goal.”¹¹⁶ Finally, “a jurisprudence rooted in this nation’s substantive commitment to liberty must have a healthy respect for the natural-rights

114. SANDEFUR, *supra* note 3, at 129.

115. *Id.* at 154 (citation omitted) (internal quotation marks omitted); *see also* CLARK M. NEILY III, *TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION’S PROMISE OF LIMITED GOVERNMENT* 33–63 (2013) (describing court-created dichotomy between “meaningful” and “meaningless” rights and critiquing rational basis test).

116. SANDEFUR, *supra* note 3, at 154.

philosophy on which the Constitution was based.”¹¹⁷ Contrary to the perception of Progressive constitutional relativists on the left and the right, “Americans in general share, and rightly share, a belief in the basic truth of the principles enunciated in the Declaration of Independence.”¹¹⁸

Sandefur concludes with this astute critique of the moral relativism that has guided constitutional doctrine for nearly a century: “A society in which some people claim the right to control the lives of others experiences not harmony, cooperation, and freedom, but bitterness, hostility, and strife.”¹¹⁹ Looking around today, can anyone in good conscience say otherwise?

117. *Id.*

118. *Id.* at 154–55.

119. *Id.* at 159.