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Richard A. Posner*

There was a time when an "economic" theory of the Constitution meant the theory, expounded years ago by Charles Beard, that the purpose of the Constitution was to redistribute wealth from the poorer segments of society to the upper class, to which the Framers belonged.¹ This was an extremely narrow view, both of economics (implicitly viewed by Beard as the unmasking of exploitation) and of the Constitution, and is now discredited.² Today when one thinks of how economics might be used to study the Constitution, no fewer than eight distinct (though overlapping) topics come to mind:

(1) The economic theory of constitutionalism; that is, the economic properties, and likely consequences, of requiring a supermajority for some kinds of political change.
(2) The economics of constitutional design — of the constitutive rules of a political system — and thus (a) of the separation of powers within the federal government and (b) of federalism (i.e., the overlapping sovereignty of the federal government and the states).
(3) The economic effects (broadly defined) of specific constitutional doctrines, such as the exclusionary rule or the limitations

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1. See C. Beard, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).
that the Supreme Court has imposed in the name of the First Amendment on suits against the media for defamation, whether or not the doctrines themselves are founded on sound, or on any, economic principles.

(4) The interpretation of constitutional provisions or doctrines that may have an implicit economic logic — for example, freedom of speech, when conceived of as a guarantor of a free market in ideas; the commerce clause, when conceived of as a guarantor of a national common market; and the takings clause, when conceived of as a guarantor of property rights.

(5) Proposals to refashion constitutional law to make it a comprehensive protection of free markets, whether through reinterpretation of existing provisions or through new amendments, such as a balanced-budget amendment.

(6) The problem of "dualism," by which I mean the paradox of the Supreme Court's being passionately committed to liberty in the personal sphere and almost indifferent to liberty in the economic sphere.

(7) The relationship (if any) between the Constitution, as drafted and as interpreted, and the economic growth of the United States.

(8) The extent to which judges should feel themselves free to use economic analysis as an overarching guide to constitutional interpretation (that is, beyond the limits of points (3) and (4)); in other words, the relationship between economics and interpretation.

I shall touch on each of these eight areas, though the touch will at times be light.

I. The Economics of Constitutionalism

Words like "constitution" and "constitutionalism" have multiple rather than single meanings. They can refer to the principle of limited government, to the constitutive rules of government, to the most important rules — constitutive and otherwise — of government, and to legislation that cannot be revised by the ordinary legislative process. It is with the last of these meanings that I shall begin, for it is perhaps the most distinctive feature of the United States Constitution that it can be changed only by a supermajority. This feature raises the question — on which there is a substantial economic literature³ — of what constitutive rules and what rights ought

to be placed beyond the power of a majority to correct. I shall take up that question after first examining a largely unexamined, but I think logically prior, economic problem inherent in the decision to have a written constitution that cannot be changed through the ordinary legislative process. This is the problem of governance by rules over time.

The problem has been discussed extensively in relation to long-term contracts and (a substitute for long-term contracts, as we shall see) public-utility regulation. A contract cannot (in general) be lawfully revoked or modified without the unanimous consent of the parties. In this respect it is more like a constitution, which requires a supermajority to amend, than like a statute, which requires only a majority to amend and is therefore relatively easy to alter as changed circumstances may require. Like a constitution, but unlike a statute, a contract establishes a rule that is difficult to change yet is designed to govern the future.

The name given in the contract setting to governance by rules over time is "contingent contracting" — contracting with reference to contingencies that may never occur. The cost of anticipating and providing explicitly for all possible contingencies is very high; in the case of a contract designed to remain in force for the indefinite future and govern a wide range of social interactions, it is for all practical purposes infinite. So, if some contingency arises, there may very well be no contractually specified response to it. What to do? One possibility is a supplementing interpretation by a court — an effort to supply the solution the parties might have been expected to supply if they had negotiated with reference to the contingency. The difficulty is that if the contingency occurs many years after the contract was made, a court may find it impossible to figure out what the parties would have decided to do about the contingency had they foreseen it and contracted with specific reference to it.

Another possibility is renegotiation by the parties. This solution may be reasonably satisfactory if the situation is one of bilateral monopoly, and thus mutual dependence, which creates pressure for a solution (while also, however, making negotiation costly). But it has seemed inadequate where only one party to the contract is going to have a monopoly when the contingency occurs — for example, where a single firm (street railway, retail supplier of electricity, local telephone company, etc.) is going to confront a mass of unorganized consumers for the indefinite future. That essentially would be the situation in constitutional law if the Constitution just “ran out,”

4. If a constitution can be amended as easily as a statute can be amended, then functionally it is a statute, at least in a country like ours where, unlike in England, custom and tradition are not venerated.


in the sense of being deemed inoperative if problems not foreseen and provided for by the Framers arose, leaving the society's constitutional arrangements to a renegotiation between the government and the people.

Another possible solution — the regulatory solution of having a permanent agency act (in principle, though generally not in practice) as the consumers' representative — is approximated in the constitutional setting by the Supreme Court, which is designed to be independent, so far as possible, from the other branches of government. When viewed so, as a kind of regulatory protector of the citizenry, the Court cannot adopt a narrow interpretation of the constitutional text, because that text will not provide for all possible contingencies, especially ones that arise over a period of what is now two hundred years. On this view, the significance of the constitutional text as a constraint on courts is in setting broad outer bounds to the exercise of judicial discretion rather than in prescribing the actual rules of decision. As a realistic matter, this approach describes much of constitutional law; it is a body of judge-made law, constrained by the constitutional text but not derived from it or prescribed by it in a substantial sense.

The regulatory analogy is reinforced by consideration of the economic tradeoffs between rules and standards as methods of controlling behavior.7 A rule is a precise directive that leaves little discretion to those charged with applying it; a standard provides some direction but delegates considerable discretion to those charged with applying it. A standard is more adaptable to changed circumstances than a rule and is therefore preferred when the indefinite future is being regulated. Public-utility statutes usually (but not always) contain broad standards such as "public convenience and necessity." The Constitution, too, contains many broadly worded provisions that invite or at least permit interpretation as standards — "freedom of speech," "respecting an establishment of religion," "general welfare," "necessary and proper," "due process," "cruel and unusual punishments," etc. — and many of its rule-like provisions have become either obsolete, irksome, or irrelevant (e.g., the right to bear arms, the right to jury trial in civil cases at law if the stakes exceed $20, the requirement that the President be native-born and at least thirty-five years old). The problem with a standard is that often its practical effect is to delegate the real policymaking authority to the persons who administer the standard — in the present setting, the judges. Because of this problem it may well be descriptively more accurate to view the Supreme Court as the

(constrained) agent of the present generation than as the agent of the Constitution’s Framers, the latter view being unrealistic because of an insurmountable agency-cost problem. The Framers are dead; the “instructions” they left, the most important of which are in any event (and inevitably) vague, are losing pertinence with every passing year; and the Framers’ agents—if this is how the judges should be viewed normatively—have weak incentives to be faithful agents. Although, as Professor Landes and I have argued, an independent judiciary is a necessary condition for enforcing legislative “deals” (including the original “deal” embodied in the Constitution and Bill of Rights) in accordance with their original tenor rather than current political preferences, it is not a sufficient condition, because it does not by itself create strong incentives for judges to carry out the will of the Framers rather than their own will.

The question of judicial incentives is a baffling one because judicial employment, especially at the federal level, is hedged with restrictions designed to reduce, though they can never eliminate, the role of self-interest in judicial decisionmaking. One is led to ask such questions as: Why should minorities entrust their protection to judges—what incentive has the judiciary, which is not likely to be drawn predominantly from members of minority groups, to side with those groups rather than the majority? Shouldn’t minorities be expected to do well in the legislative arena, where, as we know, special interest groups, invariably minority groups of some sort, generally do well? About all that can be said in our present and inadequate state of knowledge of judicial incentives is that the stripping away of the usual incentives to self-advancement makes it somewhat more likely that judges will actually try to conform their decisions to the law; so if the law contains protections for minorities, those protections are more likely to be enforced by judges than by legislators. More on this in Part VIII.

Although agency costs are the subject of an extensive economic literature, they have been ignored in economic writing about constitutionalism. Libertarian economists, and (a largely overlapping group) members of the balanced-budget amendment school, often evince an unwarranted faith in the power of the written word to anticipate contingencies and constrain responses to them, making the judges’ role mechanical and their incentives an uninteresting question. Economists and other nonlawyers tend to exaggerate the objectivity of judicial decisions, i.e., the degree to which those decisions are determined by nondiscretionary application of clear and settled principles. Not so Richard Epstein, a lawyer who recognizes the slipperiness of legal text and wants the judges to make new

constitutional law — aggressively designed to promote free markets — by freely interpreting the Constitution. More on his proposal in Part IV.

In analogizing the Constitution to a long-term contract, I do not mean to embrace the fallacy pointed out recently by Russell Hardin of supposing that constitutions rest on the same solidly consensual foundations as contracts between adequately informed adults. Apart from the facts that the Constitution was not ratified by popular vote, that voters are often poorly informed and rarely unanimous, and that many who supported the Constitution did so because it seemed better than the Articles of Confederation rather than because it was their preferred set of arrangements, there is the elementary fact that the vast majority of people who have lived under the Constitution have never had a chance to vote, directly or indirectly, for or against it. Acquiescence is not necessarily consent. For some purposes the Constitution can be analogized to a contract, but it is not a contract.

Having considered the costs created by having rules or standards that are difficult to change — costs in inflexibility in the case of rules, agency costs in the case of standards — I am now prepared to consider when those costs are worth incurring and when therefore the supermajoritarian feature that principally distinguishes constitutions from other forms of legislation should be used to place a subject outside the ordinary political arena.

The easiest case is where inflexibility is unimportant because the required rule is by its nature arbitrary: e.g., two senators from each state. The harder but more important case is where allowing a topic to be the subject of ordinary majority-vote politics would invite very costly rent seeking. If the vote of a simple majority could change the basic form of government or expropriate the wealth of a minority, enormous resources might be devoted to seeking and resisting such legislation. In a sense, a supermajoritarian constitutional provision confines legislative discretion to matters that do not matter all that much; the stakes are not large enough to evoke a disproportionate expenditure of resources on redistributing wealth or utility.

A qualification should be noted: Resources deflected by the Constitution from investment in making fundamental changes or dispossessing minorities of their wealth will be redirected not only into commercial or other presumptively efficient private activity but also into efforts to obtain “ordinary” legislative redistributions. And this brings me to the difficult question that underlies the proposals for a balanced-budget amendment, whether there should be a general...

constitutional prohibition of rent-seeking, or (in other words) purely redistributive, legislation.\textsuperscript{12} A purely redistributive statute by definition does not increase the size of the social pie, but actually shrinks it because resources will be expended on obtaining and resisting the enactment of the statute. So there is an economic argument for outlawing such legislation, and it can be done only by constitutional provision. The counterargument (more on this later) is that courts cannot readily identify purely redistributive legislation, in part because much redistributive legislation may be defensible on efficiency grounds by reference to problems of social peace, free-rider problems, and so forth.

One may be led by this discussion to wonder how a constitution could ever come to contain substantial protections for disfavored minorities, such as criminal defendants or members of fringe religious sects; any minority powerful enough to obtain constitutional protection need hardly fear — one might think — adverse legislation. Three answers come to mind. First, persons who might fear one day becoming members of a disfavored minority might support constitutional protection for minorities even at the cost of extending protection to people they did not like. This does not explain how, for example, the equal protection clause—designed primarily though not exclusively for the protection of racial minorities and in particular blacks—got into the Constitution, but may explain why the clause is drafted in general terms: so that it can cover groups to which members of the majority might someday belong. Moreover (and this is my second point), the interests of minority and majority groups, or of minority groups that in the aggregate form a majority, may be so intertwined that there is majority (more precisely, supermajority) support for a constitutional provision because members of these groups fear that the balance of political power may someday shift against them. Third, special interest groups are not excluded from constitutional deliberation, and a minority group may have the political muscle to obtain a constitutional provision that a majority of voters do not want.

\textbf{II. The Constitutive Principles of the Constitution}

Besides protecting rights, the Constitution establishes the basic constitutive rules of American government (some scholars would regard some of the rights, such as free speech, as constitutive also). I shall discuss these rules under two headings: “separation of powers” and “federalism.”

\textbf{A. Separation of Powers}\textsuperscript{13}

I use this term loosely; I realize that the Framers rejected separa-
tion of powers in its purest form. The most striking example of this rejection is the provision giving the President a veto power over legislation; this makes him a part of the legislative process. The requirement of senatorial advice and consent brings the Senate into the executive process.

These are details, though not unimportant ones; by increasing the number of persons whose views must be taken seriously, the provisions on sharing power reduce the dangers of mistake and impetuosity. The essential point, however, is that the parceling out of legislative, executive, and judicial powers among different branches, with or without much overlap, increases the transaction costs of governing. Effective government requires the concurrence of all three branches. Hence, separation brings about a situation analogous to bilateral (or "trilateral") monopoly. Analogous — not identical. Because none of the branches is a profit maximizer, both the incentives to withhold agreement and the incentives to negotiate to a mutually beneficial solution are different than in the usual case of bilateral monopoly. But it seems a fair guess that the transaction costs of governing are indeed higher than they would be in a unitary system.

They are higher, moreover, for wealth-enhancing programs as well as for redistributive or exploitive ones. This makes unclear as a matter of theory whether the separation of powers results in a net improvement in social welfare compared to a system such as England's, where the executive and legislative powers are combined (in principle in the House of Commons, in practice in the Cabinet) and where the courts, though independent in much the same sense as our courts, do not have power to invalidate legislation. The question has not been examined empirically.

Another wrinkle is that separation of powers can lower as well as raise the costs of government, not only by increasing deliberation (the point I began this section with) but also by enabling a more efficient exploitation of the division of labor. If judges' tenure were subject to the vicissitudes of legislative politics, it would be difficult to attract able people to a career in judging; law would be even less stable than it is, because it would change with changes in the opinions or desires of powerful legislators; and the quality of justice meted out by dependent courts would be low in cases in which the legislature had an interest. It might even be difficult for the legislature to make the interest group "deals" that are such a staple of legislative activity. An independent judiciary is more likely to enforce such a deal according to its original terms than a judiciary that

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*history of the concept, see M.J.C. Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967).*
bends with every breeze from Congress, and an interest group is more likely to make a deal if it has some confidence that it will obtain benefits that extend beyond the two-year term of the enacting Congress.\(^\text{14}\)

Similarly, though less certainly, if Congress took upon itself the executive role, that role might be performed badly (as the Continental Congress discovered), because the effective execution of policy requires unity of command; I say "might" because this is a problem that most parliamentary systems have solved. And some observers believe that experience has demonstrated that courts are not well equipped to make and execute laws outside the scope of traditional judicial power — though that has not kept them from trying, others believe, with great success. The executive branch may be at a comparative disadvantage to the legislative branch in legislating and to the judicial branch in judging; yet this is not certain, either, because much of what the executive branch does is legislating (through the promulgation of regulations) and judging (through administrative agencies and Article I courts).

Despite all these qualifications, I believe that the separation of powers is in part an effort to increase governmental efficiency by tailoring the institutional structure to particular governmental tasks. The consequence may be to offset the effect of separation in raising the transaction costs of government; so government may not be weaker, on balance, than under a system of concentrated powers. It is true that our government does not seem more efficient, in the sense of maximizing the wealth of society, than the governments of other countries at a similar stage of economic development (more on this later). But this may be because the effect of separation of powers in increasing transaction costs and thus reducing the scope (and presumably therefore enhancing the efficiency) of government is offset by its effect in reducing the costs (and thus facilitating the expansion) of government by enabling a more thorough division of labor than in a parliamentary system.

An additional consideration, however, is that the vesting of different governmental powers in different and independent branches places limits (in principle anyway — more on the actualities of the situation in Part VI) on the growth of government. The power of each branch to grow without experiencing a serious loss of control is inherently limited. Unless Congress relaxed the principle of majority rule, it could not accommodate greater legislative business by expanding the number of its members. On the contrary, the more members it had, the higher would be the cost (in communication and negotiation) of reaching agreement, in accordance with the formula for the number of links required to connect up all members of a set (here the set consisting of a majority of the members of each house of Congress): \(n(n-1)/2\). Congress can do only so much by

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\(^{14}\) See Landes & Posner, supra note 8; Crain & Tollison, Constitutional Change in an Interest-Group Perspective, 8 J. LEGAL STUD. 165 (1979).
hiring staff assistants and delegating responsibility to committees. It has done what it can, of course.

The same problem of inherent limitations of capacity (namely large diseconomies of scale) afflicts efforts to expand the decisional capacity of a court system by increasing the number of judges. The creation of intermediate courts is only a partial solution, because problems of delay and lack of coordination become more severe with every increase in the height or width of a judicial hierarchy, and because increases in the number, and reductions in the responsibility, of federal judges make it more difficult to recruit able people to be judges.

The executive branch, being in principle unitary and thus able in principle to impose a rigid hierarchy controlled by a single person, faces the fewest difficulties in expanding to accommodate a larger governmental function. But every enterprise encounters net diseconomies of scale eventually — and governments sooner than other enterprises because economies of scale in the provision of most governmental services are quickly exhausted. Hence, the effect of expanding the executive branch is to diminish control and coordination. Civil service rules further undermine the unity of the executive branch.

B. Federalism

The system of power sharing between the federal government and the states — the system that has come to be called “federalism” — might seem to be just another aspect of the separation of powers. This is true in one sense but not another. It is true in the sense that decentralizing government, like creating specialized branches, may increase efficiency. Federalism enables the massive diseconomies of scale that would be encountered by any effort to govern so large, populous, and complex a society as ours from Washington, D.C., the way France is governed from Paris or England from London, to be avoided. It also encourages experimentation with different methods of providing governmental services and may foster the provision of services tailored to differing local conditions — although these are really just aspects of avoiding diseconomies of scale. Yet federalism does not substantially increase the transaction costs of governing, the way the separation of powers within the fed-
eral government does, because, as we are about to see, the federal
government can always override the states in matters within the
scope of its authority. If the federal government could govern only
with the concurrence of the state governments, we would have a fed-
eration, not a nation, and the transaction costs of governing would
be exceedingly high. But of course federalism is not costless; one
cost is a more complex legal system than if we had a unitary judici-
ary enforcing a uniform body of law.

The point I want to emphasize is the efficiency of parceling out
governmental powers among competing (not merely independent)
institutions. With regard to governmental powers exercised on the
state level, or even more clearly on the local level, there is competi-
tion among governments to provide good service at low (tax) cost;
those governments that do not will tend to lose residents to the
others. (Such competition exists at the international level as well,
but in severely attenuated form.) The competition is not perfect
(what is?). Not only are there costs of relocation, but some taxable
assets are immobile — land, for example. The Framers were there-
fore wise not to stop with creating a competitive structure. In the
commerce clause they authorized Congress to regulate interstate
and foreign commerce and thus to prevent states from imposing
harmful externalities on other states and to internalize beneficial ex-
ternalities; several other provisions also restrict the power of states
to tax or otherwise burden interstate or foreign commerce. The due
process and equal protection clauses of the Fourteenth Amendment
provide some protection to owners of immobile resources, who
without these federal protections might be at the mercy of state ex-
propriation. Consistent with these observations I have tried to con-
struct a theory of federal law in relation to the states that would
define the federal government's mission as one of overcoming the
externalities that a system of competing governments fosters.16 But
in my previous work I treated the sovereignty of the states (limited
as that sovereignty has become as a result of successive amendments
to and interpretations of the Constitution) as being irrelevant to
economic analysis. It is not; it is what assures a genuine competition
among states. If state and local governments merely were adminis-
trative conveniences decreed by the central government, they would
be no obstacle to centralization, i.e., to monopoly government. To
the extent they are independent of the central government they pro-
vide real, if today very limited, competitive alternatives for consum-
ers of governmental services.

This point may seem inconsistent with my previous point that the
federal government can override the states in any area within the
capacious scope of its authority. There is indeed little if any consti-
tutional impediment to the federal government's preempting a spe-
cific area of governance, but the structure of the Senate, as well as
the states' quasi-sovereign status in the constitutional scheme, dis-

16. See R. Posner, The Federal Courts: Crisis and Reform ch. 6 (1985); see also
Easterbrook, supra note 15.
courages a wholesale transfer of functions from the states to the federal bureaucracy. The federal system provides a more secure basis for decentralized government than a formally centralized system that the central government might (or might not) choose, for reasons of convenience, to decentralize administratively.

But like separation of powers in its economies-of-specialization aspect, decentralization is a two-edged sword. It makes government more efficient, but all this means is that it enables government to do more with a given amount of resources. The result may not be a smaller government with the same output of services but an equally large or larger government with a higher output of services — and the higher output may be inefficient because it may take the form of economically unwarranted interferences (redistributive or paternalistic) with free markets and personal liberty.

III. The Economic Criticism of Specific Constitutional Doctrines

Despite what I have said so far, I certainly do not believe that every provision of the Constitution is efficiency enhancing. An example of one that is not is the provision that the President must be at least thirty-five years old. This is rank paternalism. It is true that, for a variety of good economic reasons, voters lack good information about candidates; but the one fact a voter is well able to assess in evaluating a candidate’s qualifications is the candidate’s age. A more important example is the self-incrimination clause of the Fifth Amendment; no economic reason has ever been offered for why government should not be allowed to penalize a person who refuses to give testimony, merely because the testimony might show that the person has committed a crime. And in an age when constitutional tort suits are a reality, the exclusionary rule — an inefficient sanction for violations of the Fourth Amendment’s prohibition against unreasonable searches and seizures — no longer has a persuasive economic justification.17

But a legal doctrine is not beyond the range of fruitful economic analysis just because the doctrine lacks a core of economic good sense, especially if, as is often the case, the doctrine has an implicit economic logic — only a bad one. The greatest triumphs of “law

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17. These two examples, self-incrimination and the exclusionary rule, are discussed in Posner, Excessive Sanctions for Governmental Misconduct in Criminal Cases, 57 Wash. L. Rev. 685 (1982); see also Posner, Rethinking the Fourth Amendment, 1981 Sup. Cr. Rev. 49. A caveat should be entered: Rules conferring broad tort immunities on public officials may, when combined with the Supreme Court’s refusal to recognize respondeat superior (employer’s vicarious liability) in constitutional-tort suits, deprive the tort remedy of much of its practical utility. See id. at 64-68. I add — though it should not be necessary to do so (the qualification should be obvious) — that when I say there is no “economic” reason for a rule or practice or institution, I do not mean there is no reason, period. There may be good reasons that are not economic.
and economics" have come in demonstrating the economic senselessness of well-established legal doctrines in such fields as antitrust and corporation law. So when, as in the Supreme Court's efforts to defend more extensive regulation of broadcast than of print media by reference to the inherent "scarcity" of the electromagnetic spectrum, the Court neglects greater scarcities that afflict the production of newspapers, or when it makes arbitrary distinctions between personal and economic rights (see Part V), its economic blunders should be pointed out — and maybe eventually the doctrines will be changed, just as many antitrust doctrines have been changed under the pressure (it seems) of careful economic thinking.

Here are two more examples of judge-made constitutional doctrines that seem to rest, in part anyway, on bad economic thinking. First, the presumption that due process of law in repossessing property obtained on credit requires a hearing before rather than after repossession is defended by asserting that property rights will be impaired without such a hearing. Second, the principle that legislation which seems irrational must therefore violate the due process or equal protection clauses is defended by reference to a model of the legislative process in which the characteristic product of the process is legislation that promotes the general welfare. In truth, requiring "predeprivation" hearings in credit-sale cases will just raise interest rates, to the detriment of the class ostensibly protected by additional procedural safeguards. And the interest group theory of politics — revived, refined, and expanded by economists — suggests that it is quixotic to invalidate all legislation that is not welfare maximizing. The point is not that no legislation promotes the general welfare, but that the legislative process is a market in which legislation is in effect auctioned off to the highest bidders, and often these are compact interest groups scheming to transfer wealth to themselves from diffuse, uninformed, and for both reasons underrepresented groups, such as consumers and taxpayers. An unknown but possibly quite large fraction of legislation reduces the total wealth of society without making the distribution of that wealth any more "equitable" according to any defensible criterion of distributive justice. A consistent judicial commitment to good-faith "rationality review," designed to identify and invalidate "nakedly" redistributive legislation, would therefore portend an enormous increase in the already overextended role of the courts in our society, and might, indeed, require a return to the Lochner era (see Part V).

A more modest function of economic analysis in relation to noneconomic doctrines is to remind the courts that all legal doctrines have costs. By displaying those costs, whether analytically or quantitatively, the economist can place warranted pressure on the supporters of the doctrines to establish the existence of offsetting benefits. For example, the exclusionary rule leads to overdeter-

rence of police searches. The resulting costs to the legal process, and to the community (in the form of a higher crime rate, because criminal investigations are made more cumbersome and uncertain), cannot easily be justified if there exists — and there does — an alternative sanction, the tort suit, which if properly configured would provide a deterrent more likely to approximate the optimum.20

IV. Implicitly Economic Constitutional Doctrines

A number of provisions of the Constitution seem to have an implicit economic logic. This is perhaps clearest with respect to the “negative” or “dormant” commerce clause, which is to say the interpretation of the commerce clause as forbidding states to erect barriers to interstate commerce unless Congress authorizes them. When so interpreted, the commerce clause becomes a charter of free trade — a subject of detailed economic analysis since Adam Smith — and, relatedly, an element of an efficient federalism. By preserving the sovereignty of the states the Framers of the Constitution created a danger that, like independent nations, states might be pressured by interest groups to establish trade barriers. This would be of no concern if competition among states were perfect, for that would imply that any consumer or supplier in a state who was harmed by such a barrier would move immediately and costlessly to another state; the trade barrier would be ineffective. But as mentioned earlier, interstate competition is not perfect; there are significant immobilities. If Wisconsin, say, forbids the importation of milk in order to protect its dairy farmers, the price of milk in Wisconsin will rise, and although Wisconsin consumers will be hurt, they may lack sufficient political “clout” (being a diffuse and unorganized group) to undo the prohibition, while the costs of relocating to another state may be too great for them to vote against the prohibition with their feet. The “negative” commerce clause is one device (and the privileges and immunities clause in Article IV is another — and one better grounded in the text and history of the Constitution21) for preventing states from abusing their “market power” and thus for ensuring that the federal principle is used to promote rather than retard interstate competition aimed at optimizing the cost and quality of governmental services.

The takings clause of the Fifth Amendment also seems founded on economic considerations — and so indeed does the Fourth Amendment (and not just the exclusionary rule that has been

20. See supra note 17.
grafted onto it by the courts. In forbidding only unreasonable searches and seizures, the Fourth Amendment requires courts to balance the costs, to privacy and property, of searches and seizures against the benefits in reducing the incidence of crime, and therefore to use an essentially economic calculus in applying the amendment to specific conduct. In so arguing, I do not mean to suggest that any time a legal doctrine requires judgments of more and less, as almost any doctrine that speaks in terms of reasonableness does, it is economic in character. All rational activity involves a balancing of pros and cons, and while economics is in its broadest sense the science of rational choice, it does not follow that every rational choice is in an interesting sense economic. Moreover, the things balanced might not be monetizable even in principle, or might be weighted in a manner remote from utilitarian or economic calculation. It is an empty form of economic analysis of law that is content to attach the economic label to every balancing test in law. However, as I have argued elsewhere in discussing the Fourth Amendment, economics does more than identify the interests to be balanced. It teaches that the exclusionary rule leads to overdeterrence by creating a sanction that costs more to society than the social (not private) cost of an illegal search to the criminal defendant, and it teaches that, other things being equal, the graver the crime being investigated the lower should be the level of probable cause that the police need establish in order to be authorized to conduct a search. These are not truisms; they are nonobvious implications of economic analysis.

I even believe that the speech and religion clauses of the First Amendment can be interpreted to require that the government allow the operation of a free market in ideas and religion respectively, so that no regulation of these markets that cannot pass a strict efficiency test should be allowed to stand. Such an interpretation seems broadly consistent not only with the delphic text and equivocal background of these provisions, but with much, though not all, of the vast interpretive superstructures that have been erected on them. Again, I am not suggesting that (for example) just because the courts balance the interest in a fair trial against the interest in freedom of the press in deciding what restrictions can be placed on news coverage of a trial, what they are doing is economics in an interesting sense. But I do think that economics is useful in explaining the situations in which censorship is allowed and not allowed, the differential treatment of commercial and noncommercial speech, and such interpretive concepts under the First Amendment's religion clauses as "neutrality" and "accommodation." But these are stories for another day.

I realize that in speaking of constitutional rights in economic terms I open myself up to the accusation that I am distorting the
meaning of the word “right” by viewing it as instrumental rather than ultimate, a means rather than an end, a ground for resisting governmental action rather than an absolute barrier to it. But the truth is that the boundary of every constitutional right is drawn at the point of balance between conflicting social goals; no right is absolute. The reason that the Constitution’s prohibitions of such practices as torture and slavery seem absolute is that the inevitable balancing act is built into the definition of the practice. “Torture” and “slavery” are not neutral, referential terms; they are the names of the forms of practices (coercing statements and involuntary servitude, respectively) that we abhor. We do not call the methods by which we permit confessions to be extracted against the better judgment of the suspect torture even though it is plain that there would be fewer confessions if all custodial interrogation were forbidden. And we do not call the forms of involuntary servitude that we condone slavery — whether that servitude takes the form of involuntary military service, compulsory labor by prison inmates and prisoners of war, school attendance under compulsory schooling laws, parents making their children perform household chores, dangerous or demeaning work that workers “agree” to do only under the compulsion of economic necessity, or adherence procured only by threat of monetary or injunctive sanctions to a long-term employment contract that has turned disadvantageous to the employee.

I claim, indeed, that both the prohibition against extracting evidence by torture (one meaning that has been given to the Fifth Amendment’s self-incrimination clause) and the prohibition against slavery (the Thirteenth Amendment) can be given an economic grounding. A long history of using torture to extract evidence has shown that it is an inefficient method of criminal investigation and proof. It has very high error costs, creates much gratuitous suffering, and deflects law enforcers from devoting adequate resources to solving difficult crimes; it is sometimes easier to extract a confession from an innocent person by torture than to convict a guilty person. As for slavery, it is abundantly clear that involuntary slavery is the antithesis of the free market model that underlies most concepts of economic efficiency. And while in principle it might occasionally be efficient for a person to sell himself into slavery, at least temporarily (as in eighteenth-century contracts of indentured servitude), so unlikely is such a case today that it makes good sense to ban self-enslavement; the probability is overwhelming that a case ostensibly of self-enslavement would in fact be a case of enslavement by force or fraud.

Much could be said on each of the implicitly economic doctrines of constitutional law, but they have been considered in some detail
elsewhere\textsuperscript{24} and I shall therefore pass on to —

\textbf{V. Proposals to Constitutionalize Laissez-Faire}

I refer to the proposals by legal scholars such as Bernard Siegan and Richard Epstein to interpret the Constitution as a general guarantor of free markets,\textsuperscript{25} and by some economists to strengthen this aspect of our constitutional system by amending the Constitution: for example to require a balanced federal budget in the hope that this would reduce the role of government, and thus increase that of private markets, in the allocation of resources.\textsuperscript{26} Obviously the merit of proposals to reinterpret the Constitution cannot be appraised on economic grounds alone, even if the purpose and substance of the reinterpretation are economic to the core; for, as I shall argue, the first task of interpretation is interpretation, rather than the choice of optimal policies. Yet much of the argument in support of such proposals is of course economic. And economics does not just suggest the desirability of using free markets to allocate resources; it also points out the illogical features in existing interpretations of the "economic" clauses of the Constitution. As Professor Epstein has stressed, to limit the takings clause to the physical seizure of private property and ignore completely the effects of regulation in diminishing or even destroying property values is problematic, because the consequences of the two types of seizure are often the same. True, there are also differences. Many more people are affected by a regulation than by a taking, and therefore the organizing of political resistance is more feasible.\textsuperscript{27} And the costs of rendering compensation are greater the more people

\begin{itemize}
  \item \textsuperscript{24} See R. Posner, \textit{supra} note 5, pt. 7, and references cited therein.
  \item \textsuperscript{25} See, e.g., R. Epstein, \textit{Takings: Private Property and the Power of Eminent Domain} (1985); B. Siegan, \textit{Economic Liberties and the Constitution} (1980); Epstein, \textit{Toward a Revitalization of the Contract Clause}, 51 U. CHI. L. REV. 703 (1984); \textit{Economic Liberties and the Judiciary} (J. Dorn & H. Manne eds. 1987). I believe I was the first to suggest that the discredited "liberty of contract" doctrine could be given a solid economic foundation and as good an jurisprudential basis as the Supreme Court's aggressive modern decisions protecting civil liberties. See R. Posner, \textit{Economic Analysis of Law} § 19.1 (1973). I have never believed, however, that such a restoration of the "Lochner era" (so named because of Oliver Wendell Holmes's magnificent dissent in \textit{Lochner} v. New York, 198 U.S. 45, 74 (1905)) would be, on balance, sound constitutional law. Of course, the idea of using the Constitution as a bulwark against redistributive (collectivist, socialist) policies did not originate with me — it is the idea that underlay the cases of the \textit{Lochner} era. Its leading modern proponent is Friedrich Hayek. See, e.g., F. Hayek, \textit{Law, Legislation and Liberty} (1973); \textit{cf.} Backhaus, \textit{Constitutional Guarantees and the Distribution of Power and Wealth}, 33 PUB. CHOICE 45 (1978); Radnitzky, \textit{The Constitutional Protection of Liberty}, in \textit{Hayek on the Fabric of Human Society} 17 (E. Butler & M. Pirie eds. 1987). For general debate and discussion, see essays and comments in \textit{Constitutional Economics, supra} note 3; \textit{Proceedings of the Conference on Takings of Property and the Constitution}, 41 U. MIAMI L. REV. 49 (1986).
  \item \textsuperscript{26} Probably a forlorn hope: The government can tax and redistribute wealth effectively through regulation, at small budgetary cost. See Posner, \textit{Taxation by Regulation}, 2 BELL J. ECON. & MGMT. SCI. 22 (1971).
  \item \textsuperscript{27} This point is only superficially inconsistent with the proposition stated earlier that compact interest groups are more effective than diffuse ones. An interest group with one member is compact all right (say, the owner of a home that the government would like to take for an official residence), but is likely to be powerless. On the economics of interest group politics, see \textit{infra} note 29.
\end{itemize}
the "taking" affects, holding constant the total value affected. But the differences must be brought into the analysis explicitly before the traditional distinction between physical takings and regulatory impairments can be validated on functional grounds.

Like any form of aggressive constitutionalism, whether left-wing or right-wing, the economic libertarian approach (whether it takes the form of reinterpretation of the existing Constitution, amendment, or both) diminishes the role of democracy—potentially dramatically. The approach does not entail merely a redirection of constitutional protection from so-called personal liberties to economic liberties, for the consistent libertarian believes as strongly in the former as in the latter. To him the "marketplace in ideas" is a reality and not a metaphor, and sexual freedom, provided it does not cause harm to third parties, is as worthy of constitutional protection as freedom to choose an occupation or decide how much rent to charge a tenant. What is envisaged therefore is a drastic curtailment, across the board, in the scope of permissible legislative, executive, and administrative action. Not only much "moral" regulation, but all redistributive measures, would be forbidden unless justifiable on efficiency grounds, as the basic criminal laws can be justified as measures against a crude but highly inefficient form of "rent seeking," or as the charitable deduction from income tax can be justified as a measure for overcoming the free-rider problem that depresses charitable giving below the optimal level. The scope of democratic government would not quite be limited to the selection and oversight of persons administering a small number of relatively uncontroversial governmental functions, such as internal and external security, the prevention of (other) harmful externalities, and the encouragement of beneficial ones. But that is the direction in which the proposal tends. And as both the regulation of morals and the redistribution of wealth are commonplace activities of modern government (whether they should be is a separate question), there is tension between the economic approach on the one hand and democratic political theory—not to mention democratic political practice—on the other.

The tension illustrates how economic analysis challenges conventional pieties. If E.M. Forster was unable to give more than two cheers for democracy, the economic analyst is unlikely to be able to give more than one. The economist recognizes that government can do some things better than the free market can do but he has no reason to believe that democratic processes will keep government from exceeding the limits of optimal intervention. On the contrary, the acute free-rider problem of democratic voting (the benefits of

28. See R. Posner, supra note 5, §§ 7.1, 17.8 at 469.
voting are too small to make it worthwhile to incur the considerable costs of becoming a well-informed voter) ensures that compact interest groups will be able to use the democratic process to redistribute wealth in their favor, often at great social cost.  

So, for Proudhon's "property is theft," the economist is likely to substitute "government is theft." This insight provides the essential underpinning for proposals to constitutionalize laissez-faire.

To grasp the nature and extent of the tension between laissez-faire and democratic political or legal theory it is necessary to distinguish between two fundamental political conceptions that are sometimes confused: limited government and democratic government. The proponents of limited government want the government to be relatively powerless and, partly for this reason, are not much interested in how the people who run the government are chosen; their interest is in preserving a large sphere for private action free of governmental interference. The proponents of democratic government want to make sure that the government is in some sense in the hands of the people and are confident that if it is placed there it can be trusted to promote the general welfare, without having to be limited. Among economists, Bentham was the most emphatic advocate of the position that a democratic government, unimpeded by constitutional limitations, would indeed promote the general welfare. But of course modern economic libertarians do not believe this. They believe that unfettered democratic government leads to the special interest state. They are of the limited-government school, and it might almost be a detail whether the government being limited is democratic or monarchical.

In fact, economists have little to say about forms of government. Because our government is democratic, the economic criticisms of government have focused on democratic government. Economists have pointed out that because an individual's vote in a political election has little instrumental value (one vote is not going to change the outcome), voters have only weak incentives to become informed about the impact of public policy on them unless they can be molded into effective interest groups. The result is a strong bias in favor of legislation that favors such groups, regardless of the general will. This bias is an embarrassment to democratic theory, because, other things being equal, the smaller a group is the easier it will be for its members to organize an effective interest group, while the larger and more diffuse the group is that the interest group seeks to plunder, the harder it will be for the members of the victimized group to concert resistance. But as there is no reason to believe that monarchy or dictatorship or oligarchy or other nondemocratic forms of government are less susceptible to interest

group pressures, the economic criticism may be a criticism of govern-
ment rather than of democracy. And democracy does have im-
portant advantages over the other forms of government. It is the
most risk-averse form (and most people are risk averse), and it
solves better than any other the problem of arranging an orderly
succession of government officials.

The more aggressive one's constitutionalism the more the risk-
averse character of democratic government is compromised, how-
ever, as the locus of power shifts to a small, unelected, life-tenured
committee — the Supreme Court. It is not possible to limit govern-
ment tout court; it is only possible to tell one branch to limit the
others. The branch with this fortunate assignment is part of limit-
ing, not limited, government. A pragmatist must agree with Charles
Evans Hughes that the Constitution is what the judges say it is; the
practical effect of constitutionalizing laissez-faire would be to make
the Justices even more powerful oligarchs than they are today.

This point can be made more concrete by noting that the line be-
tween efficient public policy (which the laissez-faire Constitution
would permit) and purely redistributive policy (which it would for-
bid) is not clear in practice or even in theory. In particular, a good
deal of compelled redistribution of wealth may be the cheapest
method of preserving social peace and so may be cost-justified;
plausible examples are pro-union legislation designed to head off
labor violence, generous welfare allotments designed to head off ri-
ots in the slums, and make-work public employment designed to re-
duce the incidence of crime by enlarging the opportunities of
potential criminals to obtain lawful income, thereby increasing the
opportunity costs of crime. Moreover, some, perhaps much, "im-
moral" behavior between consenting adults may, like pollution,
have third-party effects warranting regulation. Indeed, economists
cannot even agree on what shall count as a third-party effect. If I am
offended by your reading pornography, does this mean that you are
imposing a cost on me and I am therefore entitled on strictly liberta-
rian grounds to advocate a law against the sale of pornography even
to consenting adults? Finally, voluntary democracies, such as con-
donium associations, use majority-voting principles that allow for
some redistribution of wealth among members of the association.

Far from fixing clear limits to the welfare state the libertarian ap-
proach may, paradoxical though this must seem, lay a theoretical
foundation for inferring a constitutional obligation to provide basic,
and perhaps other, government services. After all, the libertarian

30. This point is suggested in an unpublished paper by Professor Frank Michelman
of Harvard Law School. F. Michelman, Remarks at the Annual Meeting of the American
Political Science Association on "The Constitution, Property Rights, and the Welfare
State" (Sept. 4, 1987) (available from Professor Michelman). On the general question of

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approach, at least in the form pressed by its most ardent proponent among lawyers, Professor Epstein, is rooted in the political philosophy of Hobbes and Locke, and latterly of Robert Nozick, all of whom believe that the legitimacy of the state depends on our being able to say that people would give up the liberties they enjoy in the state of nature in exchange for the state's guarantees of internal and external security. The "nightwatchman state" is the consideration for the surrender of these liberties. What if the state fails to carry out its part of the social contract? What if, for example, it provides ineffectual police protection, a common situation in the United States today? Does not the social contract theory that underlies the libertarian approach to constitutional interpretation imply that the state has violated the Constitution (viewed in that approach as the embodiment and guarantor of the social contract)? But why stop with police protection? What about fire protection, public education, and even welfare — all services that the state provides in lieu of private services? To the extent that public provision of these services cannot be justified in laissez-faire terms, Epstein might reply that the Constitution forbids their provision, and hence the issue of their adequate provision does not arise. But as I said earlier, the boundaries of the nightwatchman state are uncertain, and a variety of services not envisaged by Hobbes and Locke, ranging from pollution control to public support of the arts, may be reconcilable with it. Does not the libertarian approach therefore open up vast possibilities for a most aggressive constitutionalism — one that does not just tell the state to leave people alone but tells it to allocate more resources to particular public uses? I fear so.

A final objection to libertarian proposals for reinterpreting the Constitution to make it a charter of laissez-faire is the cost of judicial decisionmaking. Courts have limited competence to make economic (as other) decisions; and once it is recognized that constitutional doctrines are not self-defining or self-enforcing, the risk of heavy error costs and heavy litigation costs in any ambitious expansion of constitutional regulation becomes apparent. Courts seem to do well in developing common law principles that allocate resources efficiently; whether they would do well in shifting the boundary between common law and statutory regulation is more doubtful. The courts may not be competent to oversee the return of the nation to laissez-faire principles, however desirable those principles are.

VI. Personal Versus Economic Liberties: The Double Standard

The recent upsurge of interest in remaking the Constitution into a charter of economic liberties has brought to the fore the fascinating issue of the contemporary dualism in constitutional interpretation.

"positive" as distinct from the more familiar "negative" constitutional liberties, see DeShaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298 (7th Cir. 1987) (and cases cited therein); Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864 (1986).
However, discussion of that issue is not new; indeed, the dualism is not new. Between the 1890s and the late 1930s the Supreme Court was extremely solicitous of infringements of economic liberty but paid little attention to infringements of civil rights or civil liberties; since the 1950s the reverse has been true. No satisfactory explanation for this about-face has ever been offered — though if it is interpreted, as it can be in part, as a change from emphasizing efficiency to emphasizing distributive values, it is consistent with broader changes in the role of government over this interval. The reversal is not total, and indeed recent years have seen an epicyclical movement. The Supreme Court in the name of the First Amendment has partially deregulated commercial advertising, and in the process has gone far to deregulate the legal profession. And in cutting back on some of the excesses of the "Warren Court" in the field of criminal and welfare rights the Court has sometimes employed a rough version of cost-benefit analysis. Nevertheless the tendency to upgrade "personal" rights such as the right to an abortion, and to downgrade "economic" rights such as the right not to have one's property taken without just compensation, the right to occupational liberty, and the right to transact interstate business without discrimination by reason of being a nonresident, persists.

Efforts to justify the contemporary dualism are no more convincing than efforts to explain it. Constitutional provisions protecting personal liberties are no more emphatic or more broadly worded than those protecting economic liberties. Article I, for example, flatly forbids the states to pass any "ex post facto Law," or any "Law impairing the Obligation of Contracts." 31


 Efforts to justify the contemporary dualism are no more convincing than efforts to explain it. Constitutional provisions protecting personal liberties are no more emphatic or more broadly worded than those protecting economic liberties. Article I, for example, flatly forbids the states to pass any "ex post facto Law," or any "Law impairing the Obligation of Contracts." The courts have rewritten the first of these provisions to put "criminal" before "ex post facto," and the second to put "unreasonably" before "impairing." 33 Imag-
ine what a similar program of watering down clear constitutional language would have done to the First Amendment! And it is not true that the Framers thought that personal liberties were worthier of constitutional protection than economic liberties or that the competition of interest groups would somehow produce a social optimum.\textsuperscript{36} Nor is it true that courts know more about the personal and social realm than about the economic realm, though they think they do — confusing the technical with the difficult, as if evaluating the consequences of a rent-control ordinance, which is a form of tax on landlords and the subject of a vast and convergent economic literature, were more difficult than evaluating a tax on newspapers or the ethical implications and social consequences of abortion on demand. It is not even true that racial and religious minorities, women, homosexuals, criminal defendants, advocates of unpopular causes, or other groups whose members make aggressive claims of civil rights and civil liberties necessarily have less political “clout,” and therefore are more needful of judicial protection, than the victims of constitutionally dubious economic regulations. The victims of oppressive economic regulations are mainly consumers, marginal workers (predominantly female or nonwhite), poor tenants, and other people of average or low income who — and this is the most important point — are diffuse, inarticulate, unorganized, and therefore politically weak. That is why they are the victims of redistributive legislation.

Here, by the way, is a possibility for linking up the economic-libertarian approach to the Constitution with the more fashionable approach of John Ely, who argues that the grand design of the Constitution is to assure representation, if need be by judicial action, for persons and groups who are underrepresented in the ordinary political process.\textsuperscript{37} He thinks that blacks, homosexuals, aliens, and adherents to unpopular religions or ideologies are typical examples of underrepresented groups; implicitly he believes that economic interests are well represented. But that is because he either is not familiar with or does not agree with interest group theories of the political process; maybe he also does not realize that corporations are not economic persons but merely conduits to persons (workers, shareholders, employees) who may not be wealthy or well organized. Only some economic interests are well represented — those that are espoused by effective interest groups (e.g., by farmers, retail druggists, physicians, and lawyers). The interests of consumers, taxpayers, marginal workers, victims of crime, and


housewives are seriously underrepresented. And on the other side, the advocacy of personal liberties by "single-interest" groups is often potent politically even though not supported by a majority; it would be incorrect to think that blacks, or supporters or opponents of abortion, or for that matter opponents of teaching the theory of evolution, are not effective interest groups.

VII. The Macroeconomic Effects of the Constitution

I now want to shift gears and consider the overall economic effects of the Constitution. Stated concretely, would the United States be less, more, or just as wealthy if, like England, we had no written constitution? Before taking a stab at this question I must revisit the ambiguity in the idea of a "constitution." Obviously, England has a constitution, in the sense of a set of basic governing arrangements; its parliamentary system is constitutional in this sense even though Parliament could change it without worrying about judicial review. One thing our Constitution did was to create a set of arrangements — the separation of powers system discussed earlier — that was (and is) different from that of England and most of the rest of the world. Another important structural feature is, of course, the federal system, with all its refinements, such as the commerce clause. In addition, the Constitution established a uniquely powerful judiciary to police adherence to these arrangements and enforce the various rights created by the Constitution and later by the Bill of Rights and other amendments. The original Constitution, together with all of its amendments and the interpretive glosses (often radical) that the Supreme Court and the other courts have placed on the written Constitution as it has been amended, is what I shall mean by "the Constitution" in asking what its effects on economic progress have been. A distinct and even more speculative question, which I shall not essay, is what the effects of the Constitution on progress would have been if the courts had adhered to its pristine terms or at least interpreted it with greater restraint than they have shown.

The reasons why some nations are wealthier than others are not well understood.\(^{38}\) Obviously the difference depends in the long run largely on national differences in the rate of economic growth, but that just pushes the inquiry back a step, to the causes of those differences. We know in a general way that economic growth depends on such things as the rate of saving, the rate of investment, receptivity to technological change, changes in the composition of the work force (e.g., because of immigration or emigration), and changing attitudes toward work, but again this knowledge just pushes the inquiry back a step, to why some nations invest more

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than others, and so forth. The role of legal institutions in all this is obscure. It is highly plausible, however, that economic growth will be helped if the government protects property and contract rights through a system of impartial courts enforcing property, contract, tort, and basic criminal law against not only private but also public misconduct (e.g., expropriation). Such protections for economic freedom would seem to encourage hard work and investment for the future — yet even this is not certain, given Mancur Olson’s “destabilization” hypothesis, which is that stable institutions foster interest groups and that war and other sudden shocks may set the stage for rapid economic growth by making it more difficult for interest groups to form.  

I shall put Olson’s hypothesis aside and assume that effective protection of basic economic rights promotes economic growth. Although the basic protection of such rights is traditionally a function of state rather than federal law, the Constitution is not irrelevant to this function. As I mentioned earlier, the Constitution guarantees a limited sovereignty to the states and thereby increases the likelihood that governmental services, notably including the provision of a court system, police, etc., for the protection of basic property (including tort) and contract rights, will be provided efficiently. Given the federal concept — itself a force for efficiency, I have argued — the Constitution has then to make provision for preventing the federal system from degenerating into a loose confederation, riddled with externalities. The commerce clause and the privileges and immunities clause are devices to this end, as is the clause enabling Congress to issue patents and copyrights and the clause giving the federal government a monopoly of bankruptcy law in order to prevent debtors from fleeing to states where they might dominate the government and obtain forgiveness of their debts.

The Constitution has other economic effects. By placing the basic governmental arrangements beyond the power of the normal political process, the Constitution (in its structural aspect) has freed the people’s energies for productive private activities. Basic political questions have simply been removed from the agenda by making the fundamental arrangements too difficult to change. This illustrates a point too often ignored in discussions of rules: Rules can liberate as well as repress. The rules of contract law are another example of this point.

In addition, a government strong enough to maintain law and order, but too weak to launch and implement ambitious schemes of economic regulation or to engage in extensive redistribution, is probably the optimal government for economic growth. The Constitution as originally drafted would have kept the United States...
Government on approximately this even keel, for reasons explained earlier; but judicial interpretations have, by authorizing a "Fourth Branch" of administrative agencies, by expansively construing congressional power over interstate and foreign commerce and congressional power to enact statutes that purportedly promote the general welfare, greatly strengthened the power of the federal government to regulate markets. As discussed earlier, the net impact of the separation of powers on the power of government is uncertain, because while in one respect it reduces that power by increasing the transaction costs within government, in another it increases that power by enabling government to exploit economies of specialization.

Some of the specific rights guaranteed by the Constitution may have had good effects from an economic standpoint. Plausible examples are the religion clauses of the First Amendment, which may have reduced the amount of religious strife in this country — strife antithetical to economic growth because it is destructive, time consuming, and rooted in nonmarket values; the speech and press clauses of the First Amendment, which promote scientific and technical progress by protecting the marketplace in ideas; the takings clause, which protects property rights (though incompletely); and the due process clauses, which forbid the federal government and the states to deprive persons of property without due process of law. The problem is that a glance around the civilized world suggests that a written constitution may not be necessary to secure these rights. Countries at the same level of development as the United States generally are free from serious religious strife, do not restrict the production or dissemination of scientific or technical ideas, and do not confiscate private property without compensation. The compensation is not always adequate — but neither is compensation under the "just compensation" clause of the Fifth Amendment as the clause has been interpreted.

Although the separation of powers envisaged two hundred years ago has been greatly relaxed, the structure of the federal government is still distinguishable, at least in table-of-organization terms, from that of the dominant form of government in other countries at our stage of development — the parliamentary system. In such a system the legislature is supreme. Judges may, and in most advanced nations do, enjoy independence similar to that of our federal judges, but they are not authorized to invalidate legislative acts. The executive is a member of, and serves at the pleasure of, the legislature. There are many variants of the standard arrangement. In England, by virtue of its highly disciplined parties, the Cabinet is supreme. France has a unique system of power sharing between the president and prime minister, and Germany has a constitutional
court. But virtually no advanced country has a system that looks much like our system, even countries whose contemporary governmental structures were influenced by the United States as an occupying power after World War II. The Philippines, along with some South American nations—as well as, of course, all of our own states, with the partial exception of Nebraska, which has a unicameral legislature—has imitated the structure created by the Constitution, but minus its most distinctive and perhaps valuable feature—federalism; and whether with good results can only be conjectured.

It would be perilous to infer from the failure of the leading foreign countries to imitate our system of government that it must not be a good system. But there is no solid evidence that it is superior to a parliamentary system. Whether one tries to imagine what this country would have been like under such a system or to compare it with other countries, holding constant other determinants of wealth and freedom besides constitutional structure, it is hard to be confident that ours is a better—or even, having regard for output rather than input, for accomplishments rather than aspirations, a different—system. We are marginally less collectivist than most advanced countries but the margin is small and there are counterexamples, including Japan, which has a parliamentary system. Such a system might, to be sure, be expected to exhibit faster and wider swings of public policy than would a separated system, and with destabilizing effects. Casual comparison with England supports this conjecture, but most parliamentary systems do not seem to experience such swings and some experience fewer and narrower ones than we. Moreover, studies of England’s surprising decline do not ascribe it to the parliamentary system. And to the extent that a parliamentary system enables government to turn on a dime, this has its upside (corresponding to our system’s downside), illustrated by the swift replacement of Chamberlain by Churchill in 1940 as compared with our inability to replace promptly such faintéants as Buchanan, Andrew Johnson, Wilson, Hoover, and Nixon. So far as size of government is concerned, when due regard is had for regulation as well as expenditures (regulation in effect shifts part of the cost of government from the taxpayer to the shareholders, employees, and consumers of the regulated firm), our government seems to be as large as that of most parliamentary systems and no more efficient.

I come back to my earlier suggestion that federalism may be the most important contribution of American constitutionalism to economic growth. So vast, complex, and heterogeneous is this nation that it is hard to imagine providing basic governmental services efficiently on a uniform, centralized, nationwide basis. Although the federal government is of higher quality than most state governments, it would not be of higher quality if it absorbed every function now performed by state government; this seems to be the lesson of social security. I expect that it would be of lower quality than what

the average of all the governments in this country now is, because
the spur of competition would be missing.

Not only is the upside of our Constitution somewhat uncertain
(despite the last point) from an economic standpoint, but there is a
downside. By making American law more complicated than it would
otherwise be, and by enhancing the prestige of lawyers, the Consti-
tution may have contributed to an exaggerated concern with legality
and legal rights in this country, a concern that is a drag on economic
growth. In addition, the Constitution as interpreted has helped give
us one of the world's most costly and least effective criminal justice
systems. It has also (in the name of equal protection of the laws,
freedom of speech, and religious freedom) interfered profoundly
with the employment policies of American government at all levels,
and this too may have been a source of social costs with little offset-
ting social benefit — though one cannot be confident of this, be-
cause principles of efficiency do not dominate public employment.

VIII. Economics and Interpretation

The last question I shall consider, the role of economics in consti-
tutional decisionmaking, is a question about the proper limits of ad-
judication. Merely because economics may have many insights to
contribute to understanding constitutional questions (as I hope I
have shown), it does not follow that a judge, at any level in the judi-
cial hierarchy, is entitled to use these insights to resolve all such
questions. Although this point is simple and should be obvious, it is
sometimes misunderstood by critics of economic analysis of law and
perhaps by some defenders, and there may be some utility therefore
in repeating and amplifying it.

I am aware of the tension between this part of my paper and the
earlier parts. Earlier I took the hard-nosed approach to judicial in-
terpretation of the Constitution, emphasizing the absence of incen-
tives for judges to act as honest agents, whether of the Framers or of
the present generation. And in the absence of incentives what is the
point of exhorting judges to conform to some preordained concept
of the judicial role? For two hundred years now, the federal courts
in general and the Supreme Court in particular have been "activist."
Often they have pushed their own power just as far as the political
system would permit (and that is far) and sometimes even farther.
What ground is there for expecting any change?

One possible answer is that, with the usual spurs to self-interest
ruled out by the terms and conditions of judicial employment,
judges can be expected to be more than ordinarily concerned with
reputation. If, therefore, the climate of professional opinion
changes (as a result, perhaps, of articles such as this, though of
course the impact of a single article is apt to be minuscule) and judicial activism is seen to be a vice rather than a virtue, we can (without straying from the economic model of human behavior) expect that more judges will forswear or at least reduce activism.

There are two fundamental normative approaches to constitutional adjudication. The first regards the Constitution as essentially an empty vessel into which the judge pours his own ideas of sound policy. No judge avows such an approach, but there are a fair number of judicial decisions that cannot be otherwise explained and there is a fair amount of implicit and explicit scholarly support for it. The age of the Constitution, the generality of many of its provisions, the rejection (indeed infeasibility) of strict construction of constitutional language, the absence of clear-cut “legislative history” for many of the Constitution’s provisions, the tradition, the popularity, and the occasional pragmatic triumphs of judicial activism, the vast accumulation of constitutional precedents (many inconsistent and all subject, in principle, to reexamination by the Supreme Court), the political character of judicial appointments, the rise of interpretive skepticism — this medley of forces and conditions has created a situation in which a Supreme Court Justice can go in virtually any direction that his personal political philosophy moves him without appearing to violate his oath of office. A Justice who took up the invitation thus extended and believed that normative economics (say, the idea of wealth maximization that I have defended) provided the best orientation for public policy would feel himself free — at least insofar as he was able to persuade enough of his brethren to constitute a majority and able to avoid being overruled by constitutional amendment — to decide constitutional cases in such a way as to make constitutional law economically efficient. For such a Justice, economics would provide a virtually complete guide to adjudication.

The other fundamental approach to constitutional adjudication regards the judge as constrained, most of the time anyway, by the text, structure, and history of the Constitution, and by certain general jurisprudential principles such as judicial self-restraint and decision according to precedent (stare decisis), in deciding constitutional cases. Realistic practitioners of this approach recognize that the constraints are far from total; not every decision (to put it mildly) is dictated. Moreover, important constraints, such as the idea of judicial self-restraint, are themselves political principles, chosen by judges rather than prescribed in the constitutional text. And I have stressed that a legislative text cast in general terms — establishing standards rather than rules — invariably delegates substantial discretionary authority to the judges. So text, structure, history, etc., provide starting points but often not ending points for decision. And therefore notions of economic efficiency might legitimately be used to resolve some, perhaps many, constitutional ques-

42. See R. Posner, supra note 16, ch. 7 ("Judicial Self-Restraint").
tions; I have given examples. But the *first* task of constitutional adjudication is interpretation of a written text.

Interpretation is a problem in epistemology rather than economics, though economics is not irrelevant. Economics helps identify the consequences of alternative interpretations, and consequences are an important element in interpretation. One reason that no one will interpret me literally if I say, "I'll eat my hat," is that it would be a painful and protracted experience actually to eat a hat. Also, many honestly interpretive decisions are influenced by judges' implicit economic views and might therefore change if the judges were economically literate and realized for example that usury laws do not help debtors and rent control laws do not help tenants. Moreover, the interest group theory of politics, a theory to which economics has made important contributions, has much to say about the nature of the legislative enactments that courts are called on to interpret. Nevertheless, the act of interpretation is not just a form of economic policy analysis.

The justifications for viewing the task of constitutional adjudication as interpretive rather than (purely) creative or wealth-maximizing have more to do with the theory and practice of politics than with economics. People who are not lawyers, and in fact most lawyers, believe that most courts, most of the time anyway, decide cases in accordance with law, viewed as a body of principles external to the policy preferences of the individual judges. The legitimacy, prestige, and ultimately the authority of the Supreme Court appear to derive in significant part from this belief. If Lincoln was correct that you can't fool all of the people all of the time, this belief had better be true if the Court is to have a bright future, free of debilitating political controversy and popular suspicion. And if this is correct then it would be a serious mistake for the Supreme Court or any other court implicitly or explicitly to embrace the view that constitutional law is merely the expression in legal decisions of judges' views of public policy. It makes no difference whether those views come from Friedrich Hayek or Friedrich Engels.

An economic point reinforces this conclusion. A body of constitutional law tied, albeit by a loose tether, to an unchanging text is likely to be more stable than a body of law that the judges make up as they go along, unless, as in the case of the common law, the values understood to shape their lawmaking are themselves stable. The stability of the constitutional framework has economic value; by reducing uncertainty it facilitates investment. Stability is not the only value served by law, which is why a rigid policy of stare decisis is not optimal; but it is a value and it therefore weighs on the side of a policy of constrained constitutional lawmaking.

Not only is the proper starting point in formulating the principles
of constitutional law the text, structure, and history of the documents that make up the Constitution, and the interpretive principles (broadly conceived) that translate text, structure, and history into contemporary meaning, but sometimes the starting point is the ending point. The Constitution provides that no one is eligible to be President who has not reached the age of thirty-five. This provision is perfectly clear (not because the words are clear, but because the purpose is clear), so whether such a limitation on eligibility is economically efficient (it is not, as I said earlier) is irrelevant to the task of adjudication. Many other provisions of the Constitution, though of course not all of them, are also clear, at least tolerably so, and at least with regard to some of the questions about their meaning. It is reasonably clear for example that capital punishment today does not violate the Eighth Amendment’s prohibition against cruel and unusual punishments. Not only is capital punishment presupposed by the due process clauses of the Fifth and Fourteenth Amendments (the latter promulgated long after the Eighth Amendment); not only was it a common form of punishment throughout the period from the adoption of the Bill of Rights to the adoption of the Fourteenth Amendment; not only are there respectable retributive as well as utilitarian arguments for it; but it has been supported continuously by the vast majority of the people of the United States from the founding of the nation up to the present day, so that it cannot be dismissed as the product of a temporarily inflamed majority. The only candid basis on which it could be held unconstitutional would be that it revolted a majority of Supreme Court Justices. The refusal of two Justices to accept its constitutionality in the face of overwhelming case law merely underscores the fact that the constitutionality of capital punishment is also supported by the principle of stare decisis. These Justices’ steadfast opposition may do them credit as sensitive men of advanced ethical views, but it is difficult to ground in law.

There are, however, many issues of constitutional law to which the documents do not speak with clarity; and with every passing year the documents recede further into the past and speak to us with a fainter voice. Remember that the Framers faced the uncomfortable choice between drafting rules, which would obsolesce rapidly, and standards, which would endure but only because standards, by their very nature, delegate much of the actual policymaking function to the judges who apply the standards in circumstances that the Fram-

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43. But this is the weakest argument for the constitutionality of capital punishment; by assuming that capital punishment would continue to be administered and therefore deciding to require procedural safeguards for its administration, the Framers were not necessarily deciding that it could never be deemed a cruel and unusual punishment.

44. I do not rely merely on the well-known public opinion polls on the death penalty. Polls are unreliable indices of public opinion for a variety of reasons, including the fact that the person polled is not being asked to pay the costs of whatever public policy is being asked about. Yet when the poll data are added to the evidence provided by the unbroken history of statutes in most states imposing the death penalty, there can be little doubt that the death penalty is and always has been “popular” with the vast majority of Americans.
ers did not foresee. This point must not be pressed too far. I do think it is important to insist that the Constitution is a communication from the adopters to the judges and that the judges' duty is to decode the communication as best they can. But often this is difficult or even impossible, and then the judges must have recourse to "interpretive" principles that may actually be substitutes for interpretation in a narrow sense. The Framers both expected the Constitution to endure (this is apparent from the obstacles that they created to amending it) and must have known, being highly intelligent men and, many of them, experienced lawyers, that many of its most important provisions were unspecific and would become even less directive as time passed and social change threw up new and unforeseen problems within the general scope of the provisions. They left many important details to be filled in through the adjudicative process over which the Supreme Court was to preside.

Consider, by way of example, the clause in the First Amendment that forbids Congress to make any law respecting an establishment of religion. "[E]stablishment" is not defined. At the time the First Amendment was drafted and ratified there were established churches in some of the states and of course in England (as there is today). Although the principal purpose of the clause apparently was to confirm the federal government's lack of authority in matters religious, unquestionably the clause by its terms forbids Congress to establish one of the Christian sects as the national church, as Massachusetts, for example, had established the Congregational Church as its state church. Can the clause be interpreted as going further and forbidding Congress to declare Christianity the official religion of the United States? The nation was overwhelmingly Christian in 1789; there were few Jews or acknowledged atheists, and virtually no Moslems; and there is some doubt whether the religion clauses were intended to protect any "infidel." Today the country is vastly more diverse religiously, and an attempt to establish Christianity as the national religion would be enormously resented even in the unlikely event that it could command the assent of a majority of both houses of Congress and avoid or override a presidential veto. Does the concept of "establishment" have sufficient play in its joints that it can be interpreted to forbid the establishment of Christianity, not just the establishment of a particular sect? I think it does, when one considers the general terms in which the establishment clause is


written ("Congress shall make no law respecting an establishment of religion") and its underlying objective of keeping government from taking sides in religious controversies. But I reach this conclusion by interpreting the clause in a manner designed to fit its underlying purposes or principles to current conditions, irrespective of my notions of sound policy, or economically efficient policy, whereas I think that, however abhorrent one may personally find capital punishment, there is no persuasive interpretive route by which to invalidate it under the Constitution.

The task of constitutional interpretation is not exhausted by study of the text, context, and background of the Constitution, for it is influenced by certain large jurisprudential principles, of which the two most important are judicial self-restraint and stare decisis. As I have explained elsewhere, judicial self-restraint, if it is to have any concrete meaning, cannot be equated to caution, prudence, moderation, or refusal to innovate. That would simply run it together with stare decisis. It properly means a disposition to limit the power of the courts (in the realm of federal constitutional law, the power of the federal courts and above all the Supreme Court) vis-a-vis the other organs of government — Congress, the President, the federal administrative agencies, and all branches of state government. It means pulling in the federal judicial horns. The federal courts are overextended today and may eventually find it difficult to maintain their effectiveness unless they learn to defer more to the other branches of government. But the force of the principle of self-restraint is necessarily limited. It cannot properly be used to override relatively clear constitutional directives; otherwise it would nullify the Constitution. It is usable only in very close cases. In my establishment clause hypothetical the restrained solution would be to allow Congress to establish Christianity as the nation's official religion; but I cannot believe it would be the correct solution; the arguments for interpreting the clause to forbid such a measure are powerful. The principle of judicial self-restraint is properly a tie-breaker.

The principle of stare decisis, so far as pertinent here, is that Justices of the Supreme Court should stand by the existing interpretations of the Constitution unless a powerful reason for departing from them is shown. Because it is so difficult to undo a constitutional decision by the amending process, a rigid adherence to precedent in this area would be unsound. This is provided one thinks that a later decision, informed as it is by experience not available to the authors of the earlier decision, is therefore more likely to be right than its predecessors. Either decision — the original, or the overruling — will, if wrong, be equally difficult to correct through the amending process. But the overruling decision is somewhat more likely to be correct than the overruled one, if only because the former will be based on more experience than the latter.

The opposite extreme, which involves treating every constitutional question as being up for grabs however often it has been decided in the past, is also untenable. There are three related reasons for this conclusion. The first is that an area of law will never be settled if opponents of existing doctrines believe that a mere change in the membership of a court will wipe the slate clean and make every legal question one of first impression; and there is value in legal stability, as I said earlier.

Second, the idea of decision according to law, on which popular belief in the legitimacy of constitutional adjudication rests, is weakened if decisions are conceived of as having no binding effect on judges who did not actually vote for them. This suggests that a decision should not be overruled if (1) none of the judges who joined it originally has changed his mind and (2) no relevant circumstances have changed since the original decision, so that it is impossible to say that the original decision may have been correct when decided and has merely become obsolete. These grounds are roughly reciprocal. Usually, (2) will be available only if, through passage of time, few if any participants in the original decision are still on the court. And if (1) is available, chances are that not enough time has elapsed since the original decision for (2) to be.

Third, a decent respect for the possibility that one's own constitutional notions may be wrong should make a judge hesitate to set them up in opposition to the contrary views of many previous judges who have wrestled with the same question and come to a different answer.

There is an obvious tension between the idea of judicial self-restraint and the idea of decision according to precedent. If (the position we are in today) the body of judge-made constitutional law contains a high proportion of aggressive doctrines created during a long period in which judicial activism was in the ascendancy, to make self-restraint effective would require overruling a lot of cases and thereby damage the principle of stare decisis — which is also an important principle. There is no satisfactory general resolution of this tension.

The task of interpretation in light of general jurisprudential principles such as self-restraint and stare decisis is logically prior to the application of economic theory to constitutional adjudication. It would be irresponsible to approach the task of constitutional adjudication by asking how constitutional law can be made to conform to the dictates of economic efficiency, even if, as I believe, efficiency provides the best single guide to public policy in general and judicial doctrine (i.e., common law, state or federal) in particular. The limits of an economic approach to deciding constitutional cases are
set by the Constitution interpreted in light of the principles I have discussed.

Yet within those limits much can be done with economics. Consider again whether capital punishment violates the Eighth Amendment. The case for such a conclusion would be strengthened if it turned out that capital punishment had no incremental deterrent effect over life imprisonment, for this would suggest that it was being imposed out of sheer bloodthirstiness. I do not think the case would be conclusive even so, for one man's bloodthirstiness is another's (Kant's, for example) just retribution. In any event the economic model of crime and punishment suggests, and there is some confirmation in empirical research by economists,\(^49\) that capital punishment does have an incremental deterrent effect. So although the Eighth Amendment has no clear economic interpretation, economics may provide insight into questions that bear on the proper legal interpretation.