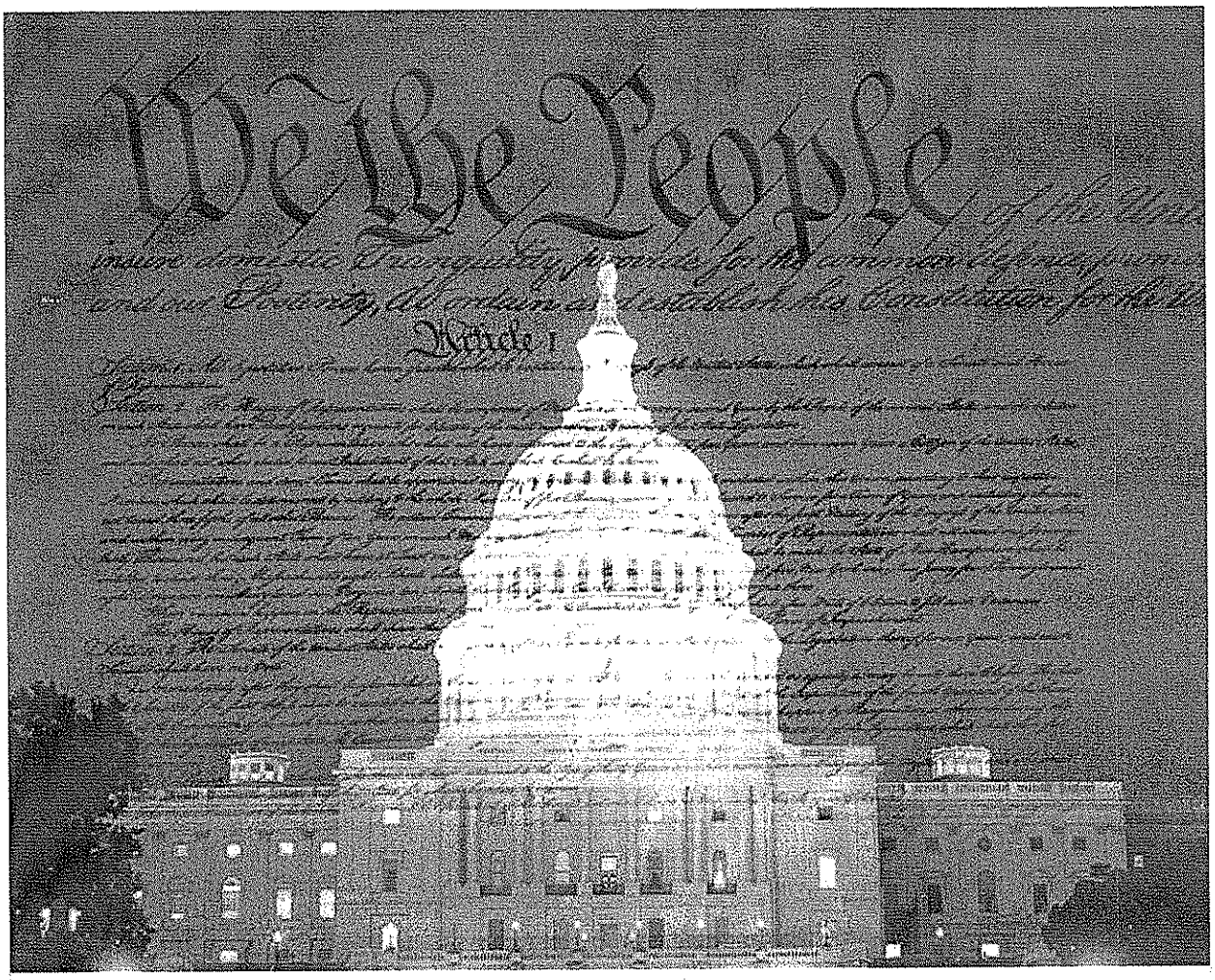


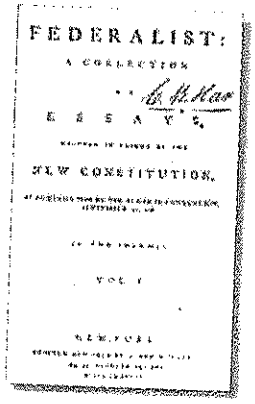
Individual Liberty and the Constitution

Issues of liberty were once the provenance of the states. Today they are defined by the modern elites who have turned the Constitution and the Bill of Rights into documents their creators would not recognize.

by Robert Bork

TO CONSIDER LIBERTY IN RELATION TO the Constitution is to enter upon a subject of some ambiguity. Which Constitution are we to consider? The document has undergone dramatic shifts in its coverage and in its meaning over the course of our history. The unamended document ratified in 1787 had little explicit to say about individual liberties. Aside from provisions such as those barring states from discriminating against persons from other states, bills of attainder, ex post facto laws, and the suspension of the writ of habeas corpus without the consent of Congress, individual liberty was to be protected by the structure of the federal government. The states were largely left to deal with issues of liberty as they saw fit.

The Federalists, who favored the proposed Constitution, regarded its structural features as crucial. As James Madison pointed out in his famous 10th essay in *The Federalist*, the primary source of danger was the propensity of men to form factions, enabling a majority to oppress minorities. He argued that the sheer size of the population, coupled with the diversity of commercial interests, would make it harder for a national majority faction to form. Other safeguards were the enumeration of powers to which the national government would be confined (a false hope), and the provision of different terms of office for the president, the Senate, and the House of Representatives. Different election dates would supposedly make the formation of stable majority factions very difficult.


FEDERALIST:
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The anti-Federalists were, or said they were, dissatisfied with these protections. They demanded a Bill of Rights as well. Some of them apparently were less interested in a Bill for its own sake than in citing its absence as a reason to reject the Constitution. To counter that tactic, the Federalists promised that a Bill of Rights would be put forward promptly after ratification of the main document. The anti-Federalists expressed fear that the unamended Constitution would allow the rise of an "aristocracy." What they did not foresee was that the meaning of the Bill of Rights would alter dramatically with changes in the political and cultural climate. Thus, it is one of the ironies of our history that it was the adoption of a Bill of Rights in 1791, together with the establishment of judicial review in *Marbury v. Madison* (1803), and the subsequent application of the Bill of Rights to the states through the 14th Amendment, that ultimately led to a virtually omnipotent aristocracy, one that has rewritten major features of the Constitution, including the Bill of Rights itself.

IT IS TRUE, OF COURSE, that radical changes affecting individual liberty have occurred with respect to congressional powers enumerated in Article I, Section 8 of the Constitution. But those changes are different in kind and origin than those displayed in the alterations of the meaning of the Bill of Rights. The idea of confining Congress to the enumerated powers of Article I, Section 8 (an idea reinforced by the 10h Amendment) is dead and cannot be revived. Contrary to some conservative fantasies, federalism was not killed by New Deal justices who perverted this aspect of the Constitution, but by the American people and the realities of national politics. The public wants a large and largely unrestrained national government, one capable of giving them what they want, irrespective of the limitations inherent in the enumeration of powers, and they will, sooner or later, get justices who will allow them such a government. The great engine of constitutional reform is mortality. (The boast that our Constitution has lasted for more than 200 years is largely empty. In no branch of government—legislative, executive, or judicial—are we living under the Constitution and the first 10 amendments as these were understood when ratified, respectively, in 1787 and 1791.)

The decline of federalism as a judicially enforced doctrine has had profound effects upon individual liberty, both positive and negative. When states were the primary source of legislation, persons who found the laws oppressive could migrate to other states to gain additional freedom. Though that was true in many aspects of life, perhaps the most obvious instance was the migration of blacks from southern to northern states during and after World War II. It was close to an impossibility to avoid *federal* law by migrating.

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Not everybody could move state to state, however, and federalism, under the name of "states' rights" was used for years to block national civil rights legislation, frustrating attempts to improve the individual liberties of black citizens. Federal intervention outlawed the Black Codes of the South and, applying the 1964 Civil Rights Act through a very expansive reading of the Commerce Clause, did much to ban even private racial discrimination. Today, the vitality of federalism is reduced to the occasional limitation of some federal power that has absolutely no relation to an enumerated power. Such cases tend to be trivial. Obviously, the invocation of federalism in such circumstances is mainly symbolic, an almost

nostalgic celebration of constitutional law as originally envisaged.

The Bill of Rights continues to have far more visible relevance to individual liberties than do the structural safeguards stressed by Madison. The Bill serves, moreover, as a weather vane, reflecting the beliefs and moods of the dominant social class of the time. It seems in our early history not to have been important in either function, for it lay unused by the Supreme Court until 1856. Perhaps that was because the Bill of Rights was not taken terribly seriously at the outset. Thomas Jefferson treated it cavalierly enough. When it was adopted, his report of events to the governor of Virginia placed it after fairly trivial matters, such as the authorization of some lighthouses. Joseph Story's acclaimed *Commentaries on the Constitution of the United States* (1833) gives the Bill of Rights only the most cursory description, hardly more than a repetition of the text. The Bill played little or no role in the courts and only belatedly entered the political debate over the Alien and Sedition Act. Jefferson's first response was that the suppression of political speech was the function of the states rather than the national government, though he ultimately shifted his argument to the First Amendment's guarantee of free speech.

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The Bill of Rights made a disastrous debut in the Supreme Court in 1856 with *Dred Scott v. Sandford*, which invented a constitutional right to own slaves that could be asserted against the federal government. This was based, among other things, on the Due Process Clause of the Fifth Amendment. This was what we would call today a decision by judicial activists, which means that it was not plausibly related to the actual text or history of the Constitution. Because the decision is perhaps best explained by the fact that seven of the nine justices were southerners, *Dred Scott* does not tell us a great deal about individual liberty as the Constitution then understood it. The activist decisions that followed the Civil War—this time directed against state legislation—reveal more.

After *Dred Scott*, the Bill of Rights and the 14th Amendment were relatively quiescent until the latter third of the 19th century and the early 20th century, when occasional decisions upheld the liberties of businesses, defined as freedom from vexatious economic regulations. Although the idea of liberty, in one of its many forms, lies behind various decisions under the Bill of Rights, the idea is most clearly seen in cases where the Court does not and cannot plausibly relate its decision to any actual text.

Of these, the most notorious was the 1905 decision in *Lochner v. New York* striking down a state law setting maximum hours for bakers to work. The Court had earlier invented an amorphous "right to contract," an individual liberty that is nowhere to be found in the Constitution itself. Justice Rufus Peckham, purporting to apply the 14th Amendment's Due Process Clause, said that statutes such as the one before the Court were "mere meddlesome interferences with the rights of the individual." Though it is now impolitic, indeed a major gaffe, to say so, Peckham had a point—not a constitutional point but a philosophic one. He spoke for individual liberty in economic affairs and there is no reason in terms of philosophy to prefer other freedoms to economic freedoms. If the Court insists upon deciding cases according to philosophy rather than law—which it should not do—then it should consider reviving *Lochner*.

Judge Learned Hand put the point well.

> I cannot help thinking that it would have seemed a strange anomaly to those who penned the words in the Fifth [Amendment] to learn that they constituted severer restrictions as to Liberty than Property....I can see no more persuasive reason for supposing that a legislature is *a priori* less qualified to choose between "personal" than between economic values; and there have been strong protests, to me unanswerable, that there is no constitutional basis for asserting a larger measure of judicial supervision over the first than over the second.

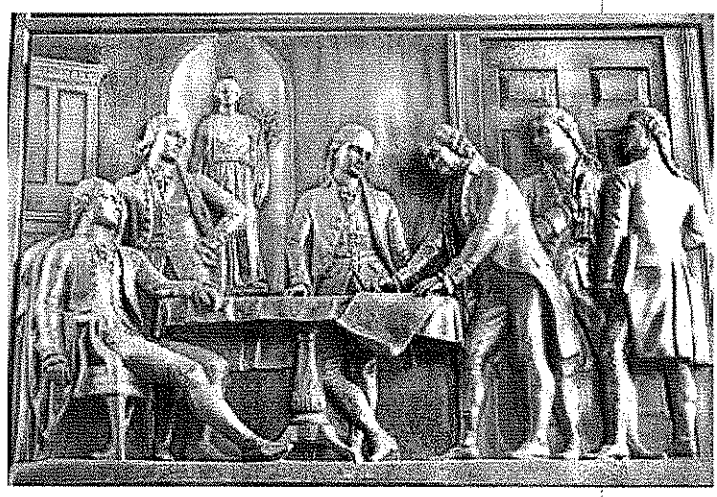
The distinction between personal and economic liberties is obviously false. Property does not claim

liberty, people who own property do; contracts do not seek liberty, people who want to enter into agreements do. And those rights are every bit as "personal" as the right to abortion and homosexual sodomy, which the Court today upholds. There are moral and prudential differences that a legislature might choose to recognize, but the distinction between the two forms of liberty according to the arbitrary labels of "personal" and "economic" is irrational. It arises not from any constitutional argument but from the different moods and values of the dominant social classes of Peckham's time and ours.

The post-Civil War era was a period of robust economic expansion, and the class of businessmen and entrepreneurs, the elites of the time, set the values the Court protected. In our time, the dominant class consists of intellectuals (very broadly and loosely defined) and knowledge workers. Its members tend to look down on business and to elevate freedom of speech and personal morality over the economic freedoms required by a healthy economy. The Court may not follow the election returns, as Mr. Dooley claimed, but it follows, and reinforces, the values of the classes that enjoy social prestige.

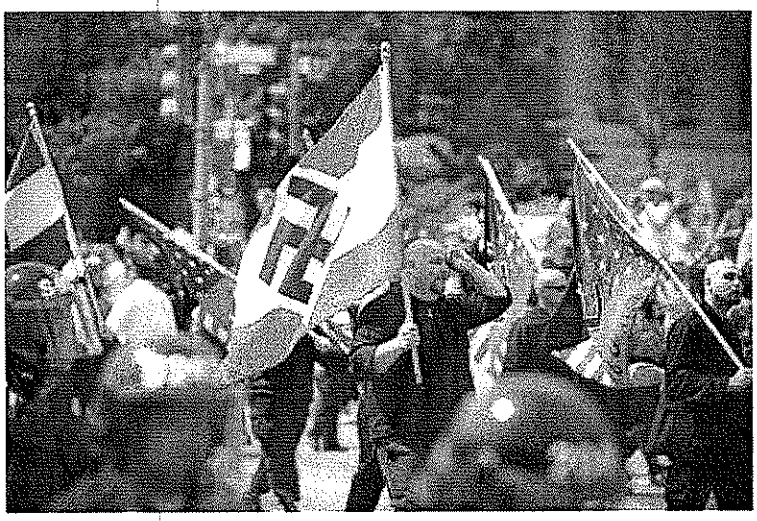
It is also noticeable that the modern Court strikes down laws with far greater frequency than did the Courts of the latter years of the 19th century and the first half of the 20th. The result is the much greater potency of what we may call intellectual class values. There appear to be several reasons for the increased intervention of the judiciary into our politics and practices of governance. The first is the Court's decision in the mid-20th century to begin incorporating the Bill of Rights, originally only a set of checks on the federal government, into the 14th Amendment, as guarantees of liberty against state governments. The occasions for constitutional scrutiny were thereby vastly multiplied. Second was the decision in *Brown v. Board of Education* (1954) outlawing segregation laws. The significance of that decision was that the Court believed it was accomplishing a great moral good without any justification in the Constitution, and had prevailed over fierce opposition. I and others have argued that the decision could have been rooted in the Constitution, but the important point is that the Court did not think so and was thus encouraged to engage in further social reform with only lip service, if that, to the actual Constitution.

It quickly became apparent that further reform would consist of a move to the left. That is to say, it would involve centralization and the erosion of freedom in economic affairs and enormous permissiveness in social and moral matters. The Supreme Court fought a rearguard action to preserve federalism against New Deal economic legislation, provoking Franklin Roosevelt's Court-packing plan. That plan failed in Congress, largely because of Roosevelt's obvious disingenuousness: he presented the need for additional justices as a remedy for a Court grown old and unable to keep up with the demands of the work, when his transparent motive was to create a Court that would uphold New Deal legislation. Deaths and resignations shortly accomplished his goal in any event. Since then the Court has rarely interfered with economic regulations, no matter how irrational or implausibly related to acknowledged federal powers such as the regulation of interstate commerce, taxation, and spending.



THE IDEA OF LIBERTY AS THE CONSTITUTION—or rather, a majority of the Court—understands it, moved to matters of individual choice in the personal and moral sphere. As Irving Kristol put it, the liberal ethos "aims simultaneously at political and social collectivism on the one hand, and moral anarchy on the other." We have seen that the Court willingly gave up the struggle against collectivism, including the economic variety. We will now turn to its encouragement of moral anarchy.

Moral anarchy is usually discussed as favoring liberty. It should not be. As such things as incessant vulgarity, obscenity and pornography, rap music celebrating the violent abuse of women and the killing of police proliferate, persons who want to live and raise families in a decent environment are deprived



of a crucial liberty—one that they have tried to preserve through laws and regulation, only to find themselves overruled by courts entranced by the liberal ethos Kristol described. A few of the areas in which this is most clearly perceived are speech, religion, and sexuality.

The older idea of the speech protected by the First Amendment was stated by a *unanimous* Court in 1942 in *Chaplinsky v. New Hampshire*:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

The liberty of the individual was thus subject to only minor restraints but even those were soon abandoned. In *Cohen v. California* (1971), for example, the Court afforded First Amendment protection to a man who wore into a courthouse a jacket bearing the inspiring words "F... the Draft," saying "[O]ne man's vulgarity is another's lyric." Moral relativism thus became the essence of individual liberty as the Constitution understands it.

Cohen was no aberration. I wrote in 1990 that "It is unlikely, of course, that a general constitutional doctrine of the impermissibility of legislating moral standards will ever be framed." I was wrong. Case after case struck down convictions for, and thus validated, shouting obscenities in public places, the vilest pornography, even computer-simulated child pornography, which is becoming impossible to distinguish from live sex with children. The change in the understanding of free speech is demonstrated by the fact that in the early obscenity prosecutions, defendants' lawyers did not even bother to invoke the First Amendment. Now it is so routinely invoked that the Supreme Court was led to say that nude dancing, because it is "expressive," is entitled to considerable constitutional protection.

No other subject displays a greater divergence from the original constitutional understanding of individual liberty than that of religion. The modern Court has shown an unremitting hostility to public manifestations of religious belief. The idea that religion poses a unique danger lay behind the 1968 decision in *Flast v. Cohen*. It had been the universal rule that no one had standing to sue for an alleged constitutional violation merely by reason of being a citizen or taxpayer. Standing required that the litigant show concrete injury to himself. Dissatisfaction with governmental action would not suffice. That rule prevented the courts from becoming battlegrounds for abstract ideologies. In *Flast*, however, the plaintiff was granted standing as a taxpayer to challenge the expenditure of federal funds to aid religious schools. No other provision of the Constitution or its amendments can be enforced by a plaintiff alleging only that he is unhappy with a governmental action.

Not only have standing rules been abandoned in religious cases, but there has also been an almost unlimited expansion in the scope of the Establishment Clause of the First Amendment ("Congress shall make no law respecting an establishment of religion..."). The result has been a steady flow of cases (most often brought by the ACLU, which has an acute institutional allergy to religion, particularly to Christianity) outlawing crèches on public property, prayer in public schools, moments of silence before the start of the school day (some child might be praying undetected), the display of the Ten Commandments in a high school, a teacher reading the Bible in school during his free time, the recitation of a short

nonsectarian prayer at a middle school commencement, etc. and etc.

Perhaps one reason for the constitutional objections to religion is that serious religions attempt to place restrictions on their members' behavior. Restrictions deriving from religious belief are, if not identical, at least first cousins to moral restraints imposed by law. In the eyes of the moral relativist, they are as objectionable as any moral imperative enforced by the state. For those who believe that individual liberty as the Constitution understands it is tantamount to moral relativism, therefore, religious restrictions must be ruled unconstitutional. In truth, however, there is absolutely no constitutional basis for the Court's anti-religion campaign. As scholarship, particularly Philip Hamburger's book *Separation of Church and State,* makes irrefutably clear, the Establishment Clause of the First Amendment means only that government may not establish an official church of the sort found in many European nations. Amusingly enough, when one justice pointed this out, another accused him of using an 18th-century concept of establishment. Since the First Amendment was written, proposed, and ratified in the 18th century, the attempted refutation hardly seems germane, much less fatal to the point being made. The fact is that today there is not the remotest possibility of an establishment of religion anywhere in the United States, which means that the clause should be considered utterly obsolete, and certainly should not be used to launch attacks on ordinary and consensual religious practices that happen to take place in public.

A similar shift in individual liberty is observable in matters of sexuality. In *Poe v. Ullman* (1961), a case seeking to challenge Connecticut's ban on contraceptive use, Justice Harlan could write confidently that "Adultery, homosexuality, and the like are sexual intimacies which the State forbids." He contrasted these valid restrictions with efforts to regulate marital intimacies through the criminal law. When the statute came back before the Court in *Griswold v. Connecticut* (1965), Justice William O. Douglas's opinion relied heavily upon Harlan's rationale in creating a right of privacy for married couples. That right predictably expanded in later cases, first to cover anyone wishing to purchase and use contraceptives, and then to other matters, including abortion.

But Harlan's dictum that acts such as adultery and homosexual sodomy could legitimately be proscribed seemed to hold. In *Bowers v. Hardwick* (1986) the Court by a majority of one upheld a law criminalizing homosexual sodomy, but it was Justice Harry Blackmun's dissent that forecast the shape of constitutional liberty to come. He first denied that the right of privacy invented in *Griswold* was confined to relations within the family: "We protect those rights not

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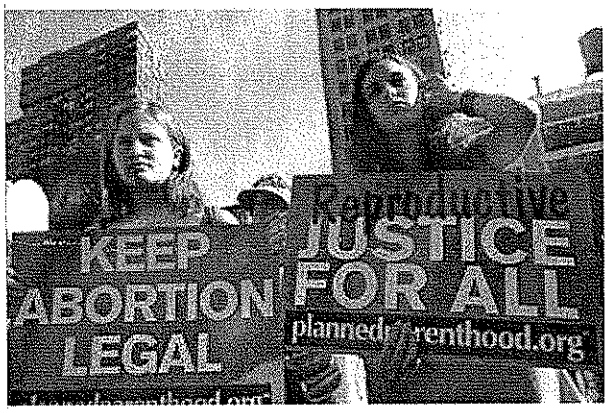
because they contribute in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life." Not satisfied with this extraordinary elevation of the individual above any claims of the family, Blackmun went on: "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" This is to deny that society, much less kin, friends, or colleagues, have any valid claim upon the individual. That is a revolutionary, not to say sophomoric, notion of liberty.

THE COURT'S CELEBRATION OF rampant individualism appears to have limits, at least for the time being. In *Washington v. Glucksburg* (1997), the justices refused to create a constitutional right to assisted suicide. This seems to fly in the face of cases such as *Eisenstadt v. Baird* (1972) where the Court upheld the right of persons, married or not, to purchase contraceptives because of the individual's right to be "free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." The Court in *Glucksburg* actually spoke of the sanctity of human life and the state's "unqualified interest in the preservation of human life." This, coming from a Court that finds a virtually unlimited right to abortion, seems, at the very least, ironic.

It is not to be supposed that this continual evolution of the Constitution is entirely the work of the judiciary. Nor is it the work of the American public. The evolution proceeds, after all, by invalidating laws and actions that are the work of the electorate's elected representatives. It is unmistakably the case

that the Court's work sometimes follows and sometimes leads opinion trends in America's "elites"—university faculties, journalists, entertainers, foundation staffs, mainline churches, and governmental bureaucracies. These elites and the courts rely upon each other. The elites guide the judiciary and make the judges' decisions acceptable to the public, while the judiciary gives finality to elite opinion in a way that cannot be overturned by legislation. The aristocracy that the anti-Federalists feared has been created and empowered in large part by the very Bill of Rights they demanded as a bulwark against aristocracy.

There are heavy costs to this development. One is the decline of individual liberty as the Constitution originally understood it. The first freedom, implicit and taken for granted in the design of the Constitution,



is the power of individuals to participate in making the laws by which they are governed. When an activist judiciary steadily creates rights it calls "constitutional" but which have no plausible roots in the historic Constitution, that liberty is just as steadily decreased. Justice Scalia put it well in a dissent: "What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have regarded as constitutional for 200 years, is in fact unconstitutional?... Day by day, case by case, [this Court] is busy designing a Constitution for a country I do not recognize."

Though it is not usually discussed in those terms, an activist Court also attacks the individual's interest in federalism and his nation's sovereignty. Ideas of morality and appropriate policies vary, sometimes drastically, by states and regions. Constitutional rulings often obliterate such differences and do so with flat rules about rights that leave no room for compromise and the normal processes of democracy. Citizens lose both their freedom to leave a jurisdiction whose policies they dislike and the political freedom to try to change those policies at the ballot box. These were liberties the original Constitution assumed. Perhaps even further from the contemplation of the Founders is the recent inclination of a majority of the Court to create a transnational Constitution by reliance on foreign judicial decisions, legislation, and even resolutions and treaties the United States has not adopted or ratified.

WHAT ARE THE PROSPECTS FOR individual liberty as the Constitution of the future will understand it? It is always perilous to predict the future by extrapolating from existing trends. On the other hand, the trends being discussed have persisted in virulent form for more than 60 years and there is little sign that they will halt or be reversed. The dominant social class is likely to remain the knowledge or intellectual class. Judges who belong to that class and find its assumptions congenial have become used to making policy regardless of the understanding of what they were doing by the men who made the Constitution law. National elections have not changed much. Justices appointed by Republicans vote in much the same way as those appointed by Democrats; the Court that gave us *Roe v. Wade* was comprised overwhelmingly of Republican appointees, and Republican justices have continued to reaffirm and to extend the rule of that case for more than 40 years.

As the example of *Roe* suggests, constitutional litigation and decisions can be highly divisive and harmful to our politics. Individual liberty will continue to diminish by increments as the judiciary takes more and more of the ability to govern from the hands of voters. One would have to be unconscious or supremely credulous not to see, for example, that the Court is chipping away at the death penalty with a view to its ultimate extinction, in defiance both of the Constitution and the voters of many states, and that its homosexual sodomy rulings were designed to lay the groundwork for a constitutional right to same sex marriage. The most pernicious aspect of this process is that the public is gradually led to believe that elite values are actually in the Constitution or to recognize that voters have no way of correcting the Court and so come docilely to accept the loss of their liberties.

The potential for more divisive and erroneous constitutional ruling in the future increases as America becomes an increasingly diverse society. Robert Putnam's study, confirming what even casual observation suggests, found that as diversity increases, the sense of community and trust decline. John Jay recognized the advantages of a fairly homogenous society when he wrote in the second issue of *The Federalist*, "Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs ...." He went on to say that this country "should never be split into a number of unsocial, jealous, and alien sovereignties."

Given America's diversity today—lacking the unifying traits that impressed Jay and increasingly split into a number of distrustful groups—can anyone imagine that our original Constitution could be written and ratified today? More than this, can anyone imagine that these groups will not seek to amend the Constitution by court rulings? Group rights are likely to trump many individual liberties. We have seen this already with affirmative action laws and procedures and court rulings that ratify them. Judge Learned Hand wrote in 1942: "[T]his much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting on the courts the nurture of that spirit, that spirit in the end will perish." Moderation in our politics and the clamor for new rights is already decreasing. Group rights defined and enforced by courts are not a recipe for either individual liberty or social peace.

Nor are peace and liberty to be found in the modern elite values or in the judicial behavior that accepts them. For these elite values are deeply incoherent, as can be witnessed everywhere in the culture. Maureen Mullarkey notes the parallel in this respect between "conceptual art" and constitutional law:

> Man is made for meaning, a communal achievement realized in concert with what used to be called natural law. Only when language is judged a product of arbitrary will rather than of cognition can it be "left to the viewer to construct meaning." The assent to intellectual anarchy, popularized in the arts, reached its apogee in *Planned Parenthood v. Casey*'s famous defense of individualized deduction: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life."
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> Only the mad, quarantined by unshared, idiosyncratic conceptions of reality, suffer that kind of freedom. The privatization of meaning signals something larger than an art-world posture. Antirational, it thwarts the basis for making the distinctions on which decisions, aesthetic and moral, rest.

She also remarks, "the resentment of rationality and of socially embraced patterns of meaning." Individual liberty will not find a secure home in a world where this resentment prevails.

What the original Constitution and Bill of Rights had to say about individual liberty is a far cry from what the judicially amended Constitution has to say and will say in the future. When considering the prospects for liberty, we should bear in mind that absolute authority, a disdain for the historic Constitution, and philosophic incompetence are a lethal combination. The only solution apparent would appear to be the political defeat of our current elites accompanied by a defection of some members of the elites from their present monolithic attitudes. That may seem a utopian fantasy, but changes in the culture and the reading of the Constitution have occurred in the past. Though these changes have proved largely deleterious, they demonstrate that change is not only possible, but inevitable. Unless we assume that the culture war is irretrievably lost, and with it an increasing number of our liberties, our responsibility is to return our constitutional understanding as closely as possible to the first principles of the Founders' plan.

Robert H. Bork *is a distinguished fellow at the Hudson Institute. His books include* Slouching Towards Gomorrah: Modern Liberalism and American Decline *(1996; reissued 2003) and* Coercing Virtue: The Worldwide Rule of Judges *(2003).* *This essay is the fifth in a ten-part series being published in successive issues of* The American Spectator *under the general title, "The Future of Individual Liberty: Elevating the Human Condition and Overcoming the Challenges to Free Societies." The series is supported by a grant from the John Templeton Foundation. The opinions expressed in this series are those of the authors and do not necessarily reflect the views of the John Templeton Foundation.*