

## 7 The Constitution and Our Debt to the Future

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### I. A New Breed of Public Law

**C**ONGRESS GAVE BIRTH TO THE NATION'S MAJOR FEDERAL environmental statutes during a period of intense and extraordinarily fertile social upheaval, as America's young people struggled to reclaim their government and parents fought to recover their children's respect. The first generation of statutes, passed as the Vietnam War was winding down, launched a forty-year revolution in the way Americans treat their environment, propelling unprecedented advancements in pollution control and the preservation of natural resources. Yet somewhere along the line – it is difficult to pinpoint a single event or moment – this progress began to unravel. We learned that the environment of our country was irrevocably linked to the global environment and that frightening changes were under way in the atmosphere as an overload of fossil fuel and other emissions disrupted the planet's climate. The developing world was intent on catching up with the United States and Europe economically but lacked the regulatory infrastructure to moderate the impact of industrialization. Our country backed away from global leadership on environmental issues because energy producers convinced politicians that this role cost too much.

These fateful decisions could not have come at a worse time, as we are belatedly beginning to realize. The world confronts accelerating climate change, an environmental crisis that makes efforts to conquer previous challenges look like mere dress rehearsals. So much has changed – globalization of business, invention of the Worldwide Web, discovery of the human genome – and yet so much has remained the same: disillusionment with government, the false dichotomy of jobs versus environment, the

overpowering resistance of corporations to regulation. We strain to find ways for our weakened government institutions – from Congress to the president to the career civil service – to steer the nation out of these blind alleys and back on to the high road.

As the chapters in this volume argue, the reforms necessary to meet these grave challenges must go “beyond environmental law” to a conceptual plane where even the most basic and routine assumptions are revisited. To re-create the atmosphere of revolutionary change that gave birth to modern environmental protection, we must push beyond incremental tinkering. New ideas must be incubated, embraced, enacted, and implemented. This chapter addresses the threshold question in American law: how should we read the U.S. Constitution to justify these new breeds of environmental law? In a nutshell, I urge reexamination of the historical interpretations of Congress’s constitutional authority to protect the environment. Instead of justifying federal intervention solely as a product of the national government’s interest in fostering interstate commerce, Congress should invoke its authority to safeguard and promote the general welfare of the nation.

The National Environmental Legacy Act (Legacy Act or Act) proposed by Professor Alyson Flournoy in the first chapter of this book epitomizes a new generation of law because it would reject actions that would make humankind’s consumption of natural resources unsustainable over the long term. Her proposal would prohibit any use of federally owned property unless the full gamut of natural resources that exist on that land could be replenished in time for future generations to use them. Activities on privately owned land that could destroy natural resources on federal property might also be prohibited. Professor Flournoy proposes a multidecade horizon for such evaluations of sustainability, with the consumption of natural resources reevaluated on an enduring basis through an iterative cycle of decision making.

To the extent that the Legacy Act would require federal managers to conserve natural resources owned by the government, the proposal would fall under the Constitution’s grant to Congress of explicit authority to control what happens on federal lands in article IV, section 3, which states that it “shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>1</sup> But to fully guarantee the sustainable use of federally owned

natural resources would require a crucial addition step not explicitly addressed by Professor Flournoy: prohibiting activities on nonfederal land if those uses would violate the Act's mandates. That extension of the Legacy Act would necessitate a broader search for constitutional authority.

This chapter argues that a reexamination of the constitutional grounding is essential as we design and enact the next generation of environmental law. As the political scientist Terry Davies has observed in the context of responding to another next-generation problem, the regulation of nanotechnology,

[the current system] was designed to deal with the problems of steam engine technology in the context of a pre-computer economy. It was based on assumptions that most problems are local, that programs can be segmented and isolated from each other, that technology changes slowly and that all important problems have been identified. All of these concepts are no longer valid, if they ever were.<sup>2</sup>

Grappling with these kinds of problems will require extracting ourselves from the outmoded framework of the existing constitutional foundation for environmental law – namely article I, section 8, of the Constitution, commonly known as the Commerce Clause, which reads: “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>3</sup> The arguably fatal flaw in this section of the document is that the most common usage of the word “commerce” is the “exchange or buying and selling of commodities.”<sup>4</sup> As Congress expanded the federal government's reach into areas of public law long dominated by the states, the Supreme Court kept pace, broadening its interpretation of the Commerce Clause to encompass activity that could potentially affect the economy, whether or not those activities actually involved the exchange of money.<sup>5</sup> This jurisprudence may be broad enough at the moment to encompass the Legacy Act and other next-generation efforts, although in recent years, the Supreme Court has begun to put the brakes on its historically expansive approach to the ambit of federal authority in relationship to the states. But as the transactions governed by the law – for example, mining today that will make land use unsustainable in thirty years, deployment of nanotechnology today that will cause disruption of ecosystems a hundred years hence, or carbon emissions that occurred twenty years ago but will trigger climate changes that threaten

our children's children – Commerce Clause justifications appear increasingly fragile and even begin to teeter on the edge of falling of their own weight.

Rooting environmental law in the analysis of its economic effects has also weakened its effectiveness to an extraordinarily corrosive extent. The long-standing assumption that the pros and cons of environmental policy must be rationalized in terms of money reached its apex three decades ago, with the militant application of cost-benefit analysis to regulatory decisions. Supporters of America's strong laws reacted instinctively to these developments by attacking that methodology on its own terms.<sup>6</sup> But it did not occur to us to think about whether our tacit acceptance of the Commerce Clause as the constitutional foundation for environmental and other health and safety laws was the genesis of these developments. Although the Clause does not lead inexorably to reliance on cost-benefit analysis, the parallel between the two is striking. Cost-benefit analysis excludes nonmarket values that are not easily quantified, just as the Commerce Clause focuses on the economic implications of a decision to the exclusion of other, transcending concerns, such as the protection of future generations' health and welfare.

At first and maybe even at second blush, my reasoning will appear to push against the strong tide of immutable constitutional theory when reformers of environmental law have much more pressing and immediate work to do. But I am convinced that this apparently quixotic exercise is well worth the effort. The widespread tendency to employ economics as the primary lens through which we justify health, safety, and environmental regulation has turned the missions of the major environmental laws on their heads, compelling us to consider whether the marketplace will address the problem, as opposed to whether and to what extent the government has responsibility for protecting public health and the environment.

Americans count on their government to prevent a growing number of international disasters – from pandemics to global terrorism to water shortages – and do not conceive of these protections as justified only with respect to “free market,” economic concerns. Not only did the framers of the Constitution recognize these expectations; they embraced them in article I, section 8, which authorizes Congress to “provide for the general Welfare” by taxing, spending, and making all “necessary and proper” laws.<sup>7</sup> If commerce at its most fundamental level is comprised of the exchange of commodities

and money, then the term refers to a “marketplace” at a specific point in time. Yet ideas like preserving natural resources for future generations or otherwise preventing pollution that could harm our children and their children demand a significantly more attenuated frame of temporal reference than has applied to the more immediate interventions that characterize much of environmental law.

## II. The Narrowing Future of the Commerce Clause

Historically, the Supreme Court embraced a broad definition of Congress’s Commerce Clause authority, keeping step with national political developments that expanded the federal role in every aspect of domestic policy, beginning with the New Deal and reaching an apex in the Vietnam War and Watergate era.<sup>8</sup> The furthest reaches of the test ultimately developed by the Court had two crucial elements: (1) the activities Congress sought to regulate could involve “non-economic” transactions so long as (2) those activities had a “substantial” effect on interstate commerce.<sup>9</sup> The Court was more willing to curtail Congress when it perceived that the federal government was manhandling the states. For example, it outlawed federal attempts to “commandeer” state government resources in *New York v. United States*, a case involving the siting of a low-level radioactive waste facility.<sup>10</sup> But because all major environmental laws afford the states the opportunity to volunteer to assume delegated authority to implement federal regulatory requirements, and sweeten the deal with grants to support those state programs, *New York v. United States* seemed to address an extreme example of federal overreaching without much significance for the future.

The 1995 decision in *United States v. Lopez*<sup>11</sup> shook complacency about the Court’s willingness to read Congress’s Commerce Clause authority so broadly. The case involved a search for guns in a high school senior’s locker to provide evidence for a criminal case under the federal Gun-Free School Zones Act of 1990. In a tense, 5–4 majority opinion, Chief Justice Rehnquist argued that the Act had “nothing to do with ‘commerce’ or any sort of economic enterprise” and that it did not contain any self-limiting jurisdictional provision ensuring its limited application to activities that substantially affected commerce.<sup>12</sup> Justice Breyer’s dissent gave full-throated voice to the liberal justices’ view that the opinion was a startling departure from precedent. Chiding the majority for shifting direction on the Court’s

long-standing and expansive definitions of commerce, he warned that its effort to distinguish between economic and noneconomic activity would not only create turmoil in the lower courts but also involve judges in second-guessing Congress in ways that exceeded their appropriate constitutional role.<sup>13</sup>

Despite these warnings, the dissent's supporters in the academy and in practice read *Lopez* as confined to federal incursions into the traditionally state-dominated realm of criminal enforcement. They argued that if Congress merely took the trouble to include detailed "findings" in each new statute that specified how the conduct at issue would substantially affect interstate commerce, it would satisfy the standards set out by the narrow federalist majority on the Court.<sup>14</sup> But the narrow conservative majority on the Court took another swipe at the problem five years later in *Morrison v. United States*, striking down a statute that gave battered women the right to bring tort suits in the federal courts.<sup>15</sup> This time, Congress had minded its manners, making extensive findings regarding the adverse impact of gender-motivated violence on interstate commerce. Justices Rehnquist, Scalia, Thomas, Kennedy, and O'Connor were not satisfied, holding that the Constitution imposes real limits on Congress's Commerce Clause authority when noneconomic activities such as assault are involved.<sup>16</sup> This conclusion demonstrated a serious intention to curb expansive federal regulation of purely intrastate activities. As Professor Robert Percival has written:

*Morrison* thus raises the prospect that Congress cannot constitutionally regulate intrastate activity that the Court deems noneconomic in character. This could mean that Congress lacks the power to prohibit endangered species from being killed by activity that is not characterized as economic in nature, such as recreational dirt-biking.<sup>17</sup>

Sharp exchanges over the constitutionality of congressional efforts to extend federal regulatory protections to waters existing solely intrastate underscored these fears. The 5-4 decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANNC)*<sup>18</sup> involved a proposal by a consortium of municipalities to use land containing artificially created ponds as a disposal site for baled solid waste. The consortium received all applicable state and local permits but was denied a federal permit to fill some of the ponds with debris.

Because the sensitive areas were isolated from hydrological systems that crossed state lines, the consortium argued that Congress had no constitutional authority to regulate them. The federal government responded that the wetlands were habitat for migratory birds that were pursued across state lines by millions of hunters and bird-watchers annually, establishing the required nexus with interstate economic activity under the Commerce Clause.

The Supreme Court majority (Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) ostensibly based its decision to overturn the permit on its interpretation of the statute. But it warned that extending the statute to habitat for the birds would "push to the limit of congressional authority" under the Constitution, even going so far as to suggest that, if the federal government asserted any analogous claims of jurisdiction in the future, it would be required to identify the "precise object or activity that, in the aggregate, substantially affects interstate commerce."<sup>19</sup> Excusing federal policy makers from this potentially heavy burden, the majority continued, "would result in a significant impingement of the States' traditional and primary power over land and water use."<sup>20</sup>

In dissent, Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer) accused the majority of undermining federal power under the Commerce Clause to regulate activities that "substantially affect" interstate commerce: "[T]o constitute a proper exercise of Congress' power over intrastate activities that 'substantially affect' interstate commerce, it is not necessary that each individual instance of the activity substantially affect commerce; it is enough that, taken in the aggregate, the *class of activities in question* has such an effect."<sup>21</sup> As with the dissenters, environmentalists widely perceived the case and its close successor, *Rapanos v. United States*,<sup>22</sup> as disasters that gutted Clean Water Act wetlands protections because they enmeshed the Army Corps and other federal officials in lengthy deliberations of whether wetlands were isolated. The constitutional implications of the decision remain unclear, although Congress is considering legislation to broaden the Army Corps' jurisdiction to extend to isolated wetlands regardless of the presence of migratory birds, potentially setting up another Commerce Clause challenge before the Court.<sup>23</sup>

Should the Court decide to attempt a realignment of Commerce Clause precedent to include only demonstrably economic effects, undermining not just environmental law but also many other bodies of law, the work will be

arduous and could take many years to accomplish. Not only would such an effort require the Court to craft clear rules separating economic from non-economic behavior, it could mean distinguishing between behavior that has intrastate ramifications from behavior that has interstate ramifications.<sup>24</sup> As Justice Souter reminded his colleagues in *Morrison*, the Court had a similar misadventure in *National League of Cities v. Usery*,<sup>25</sup> when a similarly narrow majority attempted to distinguish between traditional state functions immune from federal control and circumstances in which states behaved more like commercial actors and were subject to federal regulation. Confusion over the Supreme Court's rules ultimately spawned three hundred incoherent decisions by the lower federal courts. The chaos so alarmed Justice Blackmun that he switched his vote only nine years later, holding with a similarly narrow majority in *Garcia v. San Antonio Metropolitan Transit Authority* that Congress was well within its Commerce Clause authority when it regulated the labor conditions of state and local workers.<sup>26</sup>

At the moment, the Court is evenly balanced between conservatives (Justices Roberts, Scalia, Thomas, and Alito) and moderate liberals (Justices Stevens, Breyer, Ginsburg, and Sotomayor), with Justice Kennedy most often casting the swing vote. This narrow division makes it difficult to predict whether the conservatives could attract enough votes to continue their crusade against overreaching federal laws. If they decide to persist, however, next-generation statutes like the Legacy Act could prove even more vulnerable to constitutional challenge than more traditional, long-standing statutes. Because the proposals are geared toward protecting the interests of future generations, the intended beneficiaries – natural resources and lives not yet extant – have no current economic or market-based value. No one alive today can engage in transactions – commercial or noncommercial – with beings not yet in existence. Activities that endanger them lack any nexus to commerce as the term is commonly understood, and conversely, Congress lacks any authority to burden present generations with this imaginary debt to the future. Admittedly, parsing the temporal dimensions of federal statutes to ensure that they benefit only people alive today could prove an intellectual exercise that makes debates over intra- versus interstate effects look like child's play. Yet it is easy to imagine Justice Scalia warming to such work.

From this broader perspective, we can discern Commerce Clause ideas as a fault line that will dog all efforts to address emerging environmental



problems. Reliance on the federal authority to promote marketplace vigor sets the stage for the supposed trade-off between jobs and the environment and between public health and prosperity. Democrats insist that we can find better ways to protect the environment, therefore sacrificing less economic growth.<sup>27</sup> Republicans claim that environmental regulations waste money, stifle small business, and cripple the nation's competitiveness.<sup>28</sup> The common ground for both arguments is the view that environmental protection and the economy are in a relationship that demands their trade-off against each other. The proposition that we owe it to future generations to preserve natural resources is likely to prove exceptionally controversial. In fact, opponents will argue that, when we enhance monetary wealth by consuming resources, we provide the economic resources needed by future generations to buy their way out of any irreversible environmental trouble. Or, to phrase the argument another way, resources in and of themselves have no value until they are bought and sold. Refraining from buying and selling them has absolutely nothing to do with encouraging the promotion of commerce, which the national government has always done by stabilizing markets, not by enforcing fanciful prohibitions against market transactions.

Professor Flournoy refers to these arguments as the spend-down ethic, explaining that they implicitly reject any moral or ethical commitment to preserve resources for future generations (see Chapter 1 in this volume). Instead, this ethic posits that ownership of resources and control over how rapidly they are consumed are the sole prerogative of those now living on the planet. Under Professor Flournoy's analysis, unless we take decisive action to fundamentally modify our patterns of consumption, the spend-down ethic will win the day. And it is difficult to articulate an economic reason for making ourselves uncomfortable. Rather, the motivation must come from an ethical sense that we must be responsible stewards for our children's future. And, as it turns out, the framers had similar ideas in mind when they gave Congress aspirational, or affirmative, authority.

### III. Safeguarding the General Welfare

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings

of Liberty for ourselves and our Posterity, do establish this Constitution for the United States of America.

– Preamble to the U.S. Constitution

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

– Article 1, section 1, U.S. Constitution

### ***A. The States' Police Power***

The argument that the federal government's efforts to deal with long-term threats to public health and the environment should be lifted from the constraints of the Commerce Clause and placed under the umbrella of the national government's efforts to promote the general welfare is best supported by the Supreme Court's line of cases confirming the states' police power to combat comparable threats. At the time of the American Revolution, this concept was captured in the Latin phrase *salus populi supreme lex est*, or "the safety of the people is the supreme law." States have a long and noble history of regulating practices that could threaten public health, beginning as early as the 1700s, when smallpox inoculations were common in the New England colonies, extending through the sanitarian movement in America's major cities during the late nineteenth and early twentieth centuries, covering the campaign to eradicate polio during the 1950s and up to the present day when the threat of AIDS has challenged their capacity to the breaking point.<sup>29</sup>

The *Slaughter-House Cases* decided by the Supreme Court in 1872 typify this jurisprudence.<sup>30</sup> At issue was a Louisiana law granting a monopoly to a single slaughterhouse on the grounds that it would be easier to control the practices that led such places to spread disease through the careless disposal of animal carcasses and other wastes. The Court treated the case as a showdown between state police-power prerogatives and the recently enacted Fourteenth Amendment grant of "privileges and immunities" to citizens of the United States<sup>31</sup> – in this instance, the chosen slaughterhouse's competitors and their privilege to continue in business. Owners of competing slaughterhouses challenged the law, alleging that their privileges and

immunities were violated by the state's grant of a monopoly to a competitor. In response, the Supreme Court cited the "power here exercised by the [Louisiana] legislature," which "in its essential nature" has always belonged to the states."<sup>32</sup> The Court continued:

This is called the police power: and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise. . . . Upon it depends the security of the social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.<sup>33</sup>

The *Slaughter-House Cases* established the premise that the states are presumed to have broad police powers and that the question for the federal courts is whether they have gone too far in exercising those. But the strength of this holding weakened over time both because the state law at issue came to be viewed as a cynical exercise in post-Reconstruction patronage and because the threat of epidemics and other urgent public health emergencies waned.

Once the urgency and barely contained terror of cholera and similar diseases was brought under control by better sanitation and medical breakthroughs such as vaccination, state public health officers turned to what Professor Wendy Parmet calls "endemic" threats to public health, such as working conditions and occupational exposure to harmful substances.<sup>34</sup> The federal courts balked, largely because the new targets provoked state efforts to control industrial practices, considered anathema from the late 1800s to the New Deal. The low point in this jurisprudence was the Supreme Court's 1905 decision in *Lochner v. New York*,<sup>35</sup> which overturned the State of New York's efforts to control the hours that bakers were allowed to work. Despite the dissent's citation of ample evidence demonstrating the severe harm to bakery workers caused by exposure to flour dust, intense heat, and long hours of work in a standing position,<sup>36</sup> the Court refused to even recognize the state law as an exercise of police power, instead dismissing it as a "labor law" that interfered with the constitutional right of freedom to contract.<sup>37</sup>

As the New Deal era unfolded, World War II was fought and won, and America settled into the postindustrialization era, the Supreme Court repudiated *Lochner* in a series of decisions. But these cases stopped mentioning

the police power and were instead rationalized as federal deference to the states' prerogatives. For example, *West Coast Hotel Co. v. Parrish*<sup>38</sup> upheld a Washington statute requiring that women be paid a minimum wage, holding that,

[i]n dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.<sup>39</sup>

Similarly, in *Day-Brite Lighting v. Missouri*, the Court upheld a Missouri statute allowing workers to be absent from their places of employment for four hours between the opening and closing of election polls:

Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.... [T]he state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided.<sup>40</sup>

In a series of articles notable as much for their careful study of history as for their insightful constitutional analysis, Professor Parmet argues that this reluctance to expand the concept of a police power to include widespread and chronic threats to public health, especially where workers were involved, served to deconstitutionalize public health law. The phrase *salus populi supreme lex* was dropped from judicial lexicon, and the Supreme Court "abandoned the quest for the boundaries between the public and private spheres of authority."<sup>41</sup> No one lamented this subtle shift at the time, in large measure because state and federal legislatures were given ample running room by the courts to enact all manner of public health programs, from wage and hour laws to occupational safety laws to environmental regulations.

Professor Parmet concludes that, while it may be difficult to document the tangible effects of deconstitutionalization, the cumulative effect of these decisions is to take the focus off government's legitimate and affirmative

responsibility to preserve civil society by protecting public health. The states' decisions to spend a great deal of money and control large swaths of industrial activity are rationalized instead on the basis that they are supported by the majority of the voters and should be scrutinized by the courts only where institutional rights are clearly jeopardized or newly energized principles of federalism are compromised. This commentary could as easily be applied to environmental law. Anchoring the constitutionality of environmental statutes on the Commerce Clause deflects consideration of what government should be expected to do for the people in an affirmative sense. As in the public health context, judicial and legislative debates over the wisdom of environmental policy revolve around the merits and downsides of the individual policy in economic terms rather than the principle that communities should expect government to preserve essential natural resources without which a healthy life is impossible.

Like every scholar firmly grounded in the implications for future events of her historically based theories, Professor Parmet notes the shocking implications of the tragedies that began on September 11, 2001, for public health constitutional doctrines.<sup>42</sup> She suggests that these events should have made clear to every observer that the federal government has a crucial role to play in protecting public health from bioterrorism and such emerging threats as pandemics. In this new and fearful era, all three branches of government have an unavoidable stake in removing the barriers between state and federal responsibilities to protect public health. Similarly, the advent of climate change demands a more flexible interpretation of constitutional intent than the Supreme Court has yet realized.

### ***B. The Federal Police Power***

One of the most bizarre and troubling by-products of the September 11, 2001, attacks was the mailing of anthrax to the offices of Senator Thomas Daschle (D-ND) and the NBC News anchor Tom Brokaw.<sup>43</sup> The Federal Bureau of Investigation later discovered that this act of terrorism was almost certainly conducted by a mentally ill American who worked as a senior researcher in a military laboratory at Fort Detrick in Frederick, Maryland.<sup>44</sup> The incident cast in sharp relief the extraordinarily high expectations that Americans harbor toward the national government's ability to protect people from such threats. Had the anthrax spread, the federal

government would have organized a coordinated response. Federal officials would have depended heavily on local hospitals, police departments, and emergency medical personnel, but they would have been the ones held accountable for curtailing the spread of the dreadful disease. Indeed, most people – especially the federal officials rushing to sit in the hot seat of such crises (former Pennsylvania Governor Tom Ridge, the newly appointed chief of homeland security for then president George W. Bush, dominated the airwaves in the wake of the crisis) – would have considered anyone who questioned this preeminent role unpatriotic.

Despite this clear manifestation of national consensus on the federal government's obligation to exercise what the law has always described as police powers, conventional theory is that only the states have this authority. As the anthrax episode illustrates, the global challenges of the twenty-first century make this stubbornly constricted reading of the Constitution very much against our national interests. No participant in the national policy debate would ever challenge the proposition that the federal government must play the dominant role in preventing and responding to global threats. And, of course, the federal government has erected an elaborate bureaucratic infrastructure to exercise its police powers (see, e.g., the National Institutes of Health, the Department of Health and Human Services, and the Centers for Disease Control and Prevention).

Similarly, the next generation of public health and environmental laws will be compelled to deal with global threats. The national government has long dominated domestic regulation through a cooperative federalism system that defines the terms and conditions of environmental protection through federal statutes but allows states to volunteer for the responsibility of implementing those rules. Among the strongest principles embodied in that system is that federal standards set the floor – as opposed to the ceiling – of protection and that states can go further if they deem additional protections to be necessary. One statute, the Clean Air Act, even goes so far as to allow California to impose more stringent rules on motor vehicles sold in interstate commerce because the state has acute air-quality problems. But this principle is beginning to unravel in the climate-change context, with many large fossil fuel producers and users demanding preemption of state authority to curb greenhouse gases.<sup>45</sup> Ironically, the most prominent argument these parties make is that the federal government has superior ability to combat this global crisis, which threatens both public health and natural

resources.<sup>46</sup> Although I do not agree with the next step of this argument – that states should be excluded from governmental efforts to control climate change<sup>47</sup> – its proponents, among the largest companies in the world, clearly have acknowledged that much more than the free flow of interstate commerce is at stake. Instead, federal control is viewed as crucial in ensuring that the nation makes progress on this global threat.

### *C. Taxing and Spending*

Pouring the hopes for the future of environmental law into the as-yet-unused chalice of the General Welfare Clause is likely to result in overflow, or at the very least a tight fit, unless one specific doctrinal problem is addressed. The Supreme Court held in *United States v. Butler* that the power to provide for the general welfare is directly tied to congressional taxing and spending authority.<sup>48</sup> The 1936 case involved agricultural subsidies designed to control crop prices. The Supreme Court struck down the program because it addressed “agricultural production,” a “purely local” industry that only the states were empowered to address.<sup>49</sup> This aspect of the case is no longer good law given the dramatic expansion of federal Commerce Clause authority discussed earlier.<sup>50</sup> More significantly, however, the Court also held that the national government’s power to provide for the general welfare is conditioned on its simultaneous exercise of the power to tax to and spend, and this rule remains good law.<sup>51</sup> Most significantly, the Court stated that the “the power of Congress to authorize expenditures is not limited by the direct grants of legislative power found in the Constitution.”<sup>52</sup> Accordingly, if Congress is willing to put its money where its mouth is, whether or not it has the power to legislate under the Commerce Clause, it is free to create programs that promote its perception of what is needed to provide for the general welfare.

The federal government spends considerable sums each year to manage federal lands, deploying park rangers and firefighting teams, maintaining the national parks, securing the borders from private-sector incursions, building roads, supervising the preservation of wildlife, and so on. These substantial financial commitments are probably sufficient to satisfy the *Butler* test as applied to the core requirements of the Legacy Act, which would mandate planning to ensure the long-term sustainability of natural resources located on federally owned lands. However, as discussed at the

outset, the Legacy Act would also require that proposed action be abandoned or modified if analysis showed that it would threaten long-term sustainability of federally owned natural resources. The power to block such actions should reasonably extend to actions that take place on privately owned land if they would have comparable effects. Opponents of the Act could argue that, unless the federal government subsidized the costs of these consequences, the new law should be read as purely regulatory with respect to private conduct and therefore not involving the exercise of taxing or spending authority. Any number of other legislative formulations that seek to protect future generations could raise comparable questions.

Article I, section 8, concludes that Congress has the power

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The courts have given Congress wide latitude in designing taxes and spending (e.g., state grants-in-aid) to include prescriptions that affect behavior of either the taxpayer or the recipient of federal largesse.<sup>53</sup> How far they would defer in cases where spending is accompanied by regulation that affects the conduct of private parties is obviously an issue that must be resolved if and when we make the shift in constitutional doctrine. Supporters of the Legacy Act and similar next-generation proposals would urge the most generous leeway, pointing out the very large sums the federal government is spending – and the even larger sums it would be required to spend – if these prohibited actions continued.

Putting the arguments together, then, the strong advantages of grounding the protection of public health and natural resources in the concept of the government's affirmative responsibilities to safeguard the quality of life in a civil society would best be served by recognition of a federal police power anchored on the General Welfare Clause. There remains the question of whether this power, or authority, can traverse the long distance to becoming a judicial enforceable right. For the foreseeable future, as explained in the next section, I think it cannot. The proposition that the Constitution grants Congress authority to provide for the general welfare of the people is not based on any notion that the people, or nature for that



matter, have a judicially enforceable right to such protection. If the people are not satisfied with how Congress carries out this mission, their remedy is at the ballot box, not in the courts.

## V. The Affirmative Constitution

### A. *Negative versus Affirmative Rights*

Midway through the Reagan administration, long-simmering tensions among constitutional experts erupted into public view. The conflict, which is ongoing, pits conservatives who view the Constitution as primarily important for the “negative” rights it affords individuals against liberals who read “affirmative” rights into the text.<sup>54</sup> A full exposition of this extensive debate is beyond the scope of this chapter. Nevertheless, locating my admittedly ambitious theory on the progressive end of this evolving constitutional scholarship should help readers evaluate it further.

The debate began in 1985 when then attorney general Edwin Meese gave a speech to the American Bar Association articulating the theory of originalism, an approach to interpreting the Constitution that views it as an immutable, transcendent law that is not subject to evolving, arguably inconsistent interpretations.<sup>55</sup> Unless a proponent of a constitutional theory can provide substantial evidence that the framers of the document intended for it to be read the way they think we should read it today, the theory is rejected. Judges should not substitute their personal biases or policy choices for a careful study of what the Constitution’s framers had in mind.

Conservative commentators on the bench and in academia have embraced the doctrine, and it has become a central tenet for at least four Supreme Court justices (Alito, Roberts, Scalia, and Thomas), as well as countless judges in the lower courts. Originalism has prompted conservatives – and liberals seeking to persuade conservative judges and policy makers – to search through the documents contemporary to the Constitution, especially the *Federalist Papers*, as well as history books to support claims that the framers in their wisdom intended the result they advocate. Professor Parmet’s careful exposition of the framers’ awareness of Massachusetts vaccination laws, discussed earlier, is an example of this kind of analysis.<sup>56</sup>

Supreme Court Justice William Brennan responded to General Meese in a speech at Georgetown University a few months later:

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in static meaning it might have had in a world that is dead and gone but in the adaptability of its great principles to cope with current problems and current needs.<sup>57</sup>

His views have been reiterated by progressive or liberal academics and judges, perhaps most notably by Justice Stephen Breyer in his 2005 book *Active Liberty: Interpreting Our Democratic Constitution*.<sup>58</sup> Under this alternative view, the Constitution establishes a framework for the most successful system of government in human history, but its statement of generalized principles must be interpreted in a flexible way to resolve challenges that the framers could not have anticipated. The most important guidance for judges is their informed consideration of the shifting values shared by the American public, along with the consistent commitment to the protection of minority rights that motivated the framers to establish a constitutional republic rather than a direct democracy.

Not surprisingly, because these discussions have revolved around judicial interpretations of the First, Second, Fourth, Fifth, and Fourteenth amendments, they have focused on government's obligations to avoid interfering with individual autonomy (or negative rights), as opposed to its responsibility to provide benefits for the people (or affirmative rights). For example, challenges to the exercise of state police powers are often brought by individuals placed under quarantine or compelled to undergo vaccination.<sup>59</sup> Judicial efforts to balance the needs of the community against the Bill of Rights did not substantially diminish the notion that the states had substantial discretion to do what was necessary to protect the general public.<sup>60</sup> A smattering of scholars have argued for the recognition of affirmative rights to fundamental needs like health care but have encountered heavy resistance from the academic establishment and the courts.<sup>61</sup>

The landmark case is *DeShaney v. Winnebago County Department of Social Services*,<sup>62</sup> which concerned the tragic story of four-year-old Joshua

DeShaney, who was so severely beaten by his father that he became profoundly retarded. The lawsuit was brought by his mother, who asserted that county authorities had twice returned Joshua to the custody of his father despite their awareness that Joshua was victim of repeated, severe physical abuse in his father's house. These actions violated Joshua's rights under the Fourteenth Amendment and entitled him to recovery under 42 U.S.C. § 1983, the civil rights statute granting a cause of action against government officials who act outside the scope of their authority. Lower courts had rejected these claims. However, the Third Circuit held in a similar case that, once a state or local government learns of abuse and undertakes to protect a child from such danger, it forms a special relationship that imposes an "affirmative constitutional duty" to provide adequate protection.<sup>63</sup> Six state attorneys general, the National Association of Counties, and the National School Boards Association filed amicus briefs in the *DeShaney* case, warning of the floodgates that would open if the Court put a foot wrong by suggesting that the states assumed an obligation to keep people like Joshua safe whenever the social service systems produced decisions about their lives. The Supreme Court granted certiorari to address this conflict in the circuits.

Acknowledging that the facts of the case elicited "natural sympathy," the majority noted that "before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father."<sup>64</sup> Because the county had no "constitutional duty" to protect Joshua, its failure to do so, "although calamitous in hindsight," is not a violation of the Due Process Clause.<sup>65</sup> Justice Brennan, writing in dissent for Justices Marshall and Blackmun, significantly did not challenge the majority's view that "the Due Process Clause as construed by our prior cases creates no right to basic government services."<sup>66</sup> But, he added, Joshua's case did not present that question. Rather, Joshua suffered grave injury after the county had already taken action on more than one occasion to place the small child under the control of his father, thereby subjecting him to the possibility of abuse. If their actions were arbitrary, then Joshua and his mother should recover, and the case should be remanded to the trial court for examination of that issue. Given the extreme circumstances of the case, and the enormous pressure that state and local governments can exert on courts by warning of the unforeseen consequences of creating

affirmative rights, it is difficult to imagine that a majority of the Court would reverse this position any time soon.

Conditioning the argument for recognition of a federal police power on the acknowledgment that the Constitution grants Congress authority to take action but does not confer on individual citizens a judicially enforceable right to such protections has the great advantage of neutralizing a central assertion of the originalists. It would be a bad thing if unelected federal judges undertook the difficult job of deciding when and how to deploy the government's limited resources to combat such extensive threats. But I advocate that these changes be undertaken by Congress and the executive branch, not the judiciary. As Professor Robin West has argued persuasively in other contexts, the legal academy's preoccupation with the role of judges in making law too often obscures the responsibilities of the other branches to implement the affirmative authority the Constitution grants to Congress.<sup>67</sup>

### ***B. The Aspirational Constitution***

If judges are not the sole source of constitutional interpretation and should not control – literally or by implication – how other branches read the Constitution's affirmative grants of authority, how should Congress interpret its responsibilities under the General Welfare Clause? Professor West has argued that the Constitution creates positive obligations to pass laws that will protect citizens against environmental threats.<sup>68</sup> She points to the writings of Thomas Hobbes, John Locke, Thomas Paine, and more recently, John Rawls in defining the nature and scope of those responsibilities. She accepts the *DeShaney* holding as definitive at the same time that she dismisses it as irrelevant to Congress's quest to define its affirmative role. Professor West further argues that the American people believe in the idea that Congress has affirmative duties and are far more concerned about its failure to carry out those duties than they are about the government's interference with the individual rights that so preoccupy constitutional scholars:

The worry increasingly voiced by American citizens, particularly in Katrina's wake, is that our domestic politics and the state that is its product have become too *wan*, not too voracious, even as our foreign policies have become monstrously outsized. Our shrunken state, incapable

of either preparing for or mounting an adequate response to a hurricane, incapable of repairing deteriorating bridges or crumbling schools, incapable of responding to public health crises or to a dangerously warming climate, seems, to many of our co-citizens, to be in breach of the most basic, fundamental duties central to a sensible construal of virtually any social compact. Thus, where lawyers look at our government and see the “empire of force” of which Weil spoke, in violation of any number of constitutional norms, many of our co-citizens see, at best, sloth – an empire that is failing or willfully refusing to live up to its most basic obligations.<sup>69</sup>

Time will tell whether a Democratic Congress and the Obama administration will respond to these deep-seated perceptions of government inadequacies or whether they will shrink from these challenges in the face of strident charges that protections will cost too much and drown our children in debt. We may think we cannot afford to deal with climate change and sustainability, but our children almost certainly will not be able to afford to confront these problems if we fail.

## Conclusion

Despite their implicit commitment to precedent and a stable interpretation of the Constitution, General Meese and other originalists would be compelled to acknowledge that the Supreme Court has made some stunning, 180-degree turns in its history. In 1896, *Plessy v. Ferguson* upheld the separate-but-equal doctrine in the context of railway travel,<sup>70</sup> only to rectify this disgrace fifty-eight years later in *Brown v. Board of Education*.<sup>71</sup> Yet the Constitution that existed in 1896 was the same as the Constitution that existed in 1954. What had changed were the hearts, minds, and perceived social imperatives of the justices appointed to safeguard it. At this moment on Earth, with the planet’s future literally hanging in the balance, it may be time for a similar constitutional moment.

If we stick with Commerce Clause analysis, giving economists free rein to forecast future markets in commodities like clean air and clean water, we can justify incremental but significant changes. The problem with these projections is that the economic value of natural resources left in trust for future generations diminishes to zero over time. Consequently, traditional economic analysis militates against preserving environmental quality for

future generations. Supporters of proposals to protect natural resources will seldom win a numbers game unless they limit their preservation goals to a severely constrained short term.

If, in contrast, we read the Constitution as embodying additional values beyond preservation of the marketplace, the horizon of change may well be extended beyond where we already see. The National Environmental Legacy Act and similar breakthrough laws, all of which are necessary to avert the worst consequences of climate change, could be based on the principle of preserving the general welfare that was embraced by the framers and that remains central to Americans' understanding of the rule of law today. Had the justices serving on the Supreme Court in the postindustrialization era been less timid, or less focused on shielding the marketplace from government interference, they might well have considered whether the Constitution's text provided additional authority to protect public health, safety, and the environment.

## NOTES

1. U.S. CONST., art. IV, § 3.
2. J. Clarence Davies, *Oversight of Next Generation Nanotechnology* 24 (April 2009), available at <http://www.nanotechproject.org/process/assets/files/7316/pen-18.pdf>.
3. U.S. CONST., art. I, § 8. The Constitution further states in art. I, § 8, that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States."
4. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE s.v. "commerce" (Philip Babcock Gove & Merriam-Webster Editorial Staff eds., 1993).
5. For a description of these developments, see ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 254-75 (3d ed. 2006).
6. See, e.g., Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433 (2008); Douglas A. Kysar, *Discounting... On Stilts*, 74 U. CHI. L. REV. 119 (2007); RENA I. STEINZOR, *MOTHER EARTH AND UNCLE SAM: HOW POLLUTION AND HOLLOW GOVERNMENT HURT OUR KIDS* (Univ. Texas Press 2007); Frank Ackerman, *The Unbearable Lightness of Regulatory Costs*, 33 FORDHAM URB. L.J. 1071 (2006); David M. Driesen, *Is Cost-Benefit Neutral?* 77 COLO. L. REV. 335 (2006), and *Distributing the Costs of Environmental, Health, and Safety Protections: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1 (2005); Robert R.M. Verchick, *The Case against Cost-Benefit Analysis*, 32 ECOLOGY L.Q. 101 (2005); FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (New Press 2004); Catherine A. O'Neill, *Mercury, Risk, and Justice*, 34 ENVTL. L. REP. 11,070 (2004); THOMAS O.

- McGARITY, SIDNEY A. SHAPIRO & DAVID BOLLIER, *SOPHISTICATED SABOTAGE* (ENVTL. L. INST. 2004); Amy Sinden, *Cass Sunstein's Cost-Benefit Lite: Economics for Liberals*, 29 COLUM. J. ENVTL. L. 191 (2004); Thomas O. McGarity, *Professor Sunstein's Fuzzy Math*, 90 GEO. L.J. 2341 (2002); Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981 (1998) and *The Rights of Statistical People*, 24 HARV. ENVTL. L. REV. 189 (2000).
7. U.S. CONST., art. I, § 8.
  8. For an excellent discussion of these developments in the context of environmental protection, see Robert V. Percival, "Greening" the Constitution: Harmonizing Environmental and Constitutional Values, 32 ENVTL. L. 809 (2002).
  9. See, e.g., *Wickard v. Fillburn*, 317 U.S. 111, 127-28 (1942).
  10. *New York v. United States*, 505 U.S. 144 (1992).
  11. *United States v. Lopez*, 514 U.S. 549 (1995).
  12. *Id.* at 561-62.
  13. *Id.* at 615-31 (Breyer, J., dissenting).
  14. I cheerfully made these arguments myself in Rena I. Steinzor, *Unfunded Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?* 81 MINN. L. REV. 97, 154-65 (1996).
  15. *Morrison v. United States*, 529 U.S. 598, 700-01 (2000).
  16. *Id.* at 613.
  17. *Percival*, *supra* note 9, at 837.
  18. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001). The Fourth Circuit has gone as far as to declare that Commerce Clause authority does not extend to isolated wetlands. *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).
  19. *Id.* at 171-73.
  20. *Id.* at 174.
  21. *Id.* at 193 (emphasis in original).
  22. *Rapanos v. United States*, 547 U.S. 715 (2006).
  23. Linda Roeder, *Clean Water Act: Jurisdiction over Wetlands, Infrastructure, Stormwater Runoff Top Agenda This Year*, 40 ENVTL. REP. 24 (2009).
  24. 529 U.S. at 700-01 (2000).
  25. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).
  26. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).
  27. U.S. EPA, SUMMARY REPORT TO THE PRESIDENT: THE PRESIDENTIAL REGULATORY REFORM INITIATIVE BY THE ENVIRONMENTAL PROTECTION AGENCY, reprinted in 1995 DAILY ENV'T REP. (BNA) 121 (June 23, 1995) ("We have learned that by focusing on results, not on how results are achieved, we can tap the creativity of Americans to devise cleaner, cheaper, smarter ways of protecting the environment.")
  28. For an admittedly extreme but not atypical example, consider former congressman Tom DeLay's comparison of the EPA to the Gestapo. Bruce Burkhard, "Year in Review Congress vs. Environment: Environmental Laws Suffer under GOP-Controlled Congress," *Cable News Network*, Dec. 29, 1995, available at

- [http://www.cnn.com/EARTH/9512/congress\\_enviro/](http://www.cnn.com/EARTH/9512/congress_enviro/). An audio recording of Congressman DeLay's comments is available through the online version of the article.
29. For a compelling explanation of the history of public health law, see Wendy E. Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 AM. J. LEGAL HIST. 476 (1996) [hereinafter *Rise and Fall*] (focusing on the full sweep of historical developments from colonial times through the New Deal to the present) and Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L.Q. 267 (1992-93) [hereinafter *Health Care and the Constitution*] (considering especially the framers' expectations about the role of the government with respect to public health during colonial times).
  30. *Slaughter-House Cases*, 83 U.S. 36 (1872).
  31. U.S. CONST., amend. XIV.
  32. *Slaughter-House Cases*, 83 U.S. at 61.
  33. *Id.*
  34. See *Rise and Fall*, at 493-501.
  35. *Lochner v. New York*, 198 U.S. 45 (1905).
  36. *Id.* at 70-71.
  37. *Id.* at 57.
  38. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
  39. *Id.* at 392.
  40. *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 423 (1952).
  41. *Rise and Fall*, at 502.
  42. Wendy E. Parmet, *After September 11: Rethinking Public Health Federalism*, J.L., MED. & ETHICS, 201-11 (2002).
  43. David Johnston & Alison Mitchell, *A Nation Challenged: The Widening Inquiry; Anthrax Mailed to Senate Is Found to Be Potent Form; Case Tied to Illness at NBC*, N.Y. TIMES at A1 (Oct. 17, 2001).
  44. Scott Shane & Eric Lichtblau, *Scientist's Suicide Linked to Anthrax Inquiry*, N.Y. TIMES at A1 (Aug. 2, 2008).
  45. See, e.g., *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 392 (D. Vt. 2007). In the case, the auto industry argued that California's efforts to pass state laws dealing with this global problem should be preempted by the federal government's exclusive constitutional authority to conduct the nation's foreign affairs.
  46. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007) (the Clean Air Act covers greenhouse gas emissions and the EPA must make a decision as to whether such emissions constitute a sufficient endangerment to require regulation under the statute).
  47. See, e.g., Center for Progressive Reform, William Andreen, Robert Glicksman, Nina Mendelson, Rena Steinzor & Shana Jones, *Cooperative Federalism and Climate Change: Why Federal, State, and Local Governments Must Continue to Partner* (2008), available at <http://www.progressivereform.org/articles/federalismClimateChange.pdf>.



48. *United States v. Butler*, 297 U.S. 1 (1936).
49. *Id.* at 63–64.
50. CHEMERINSKY, *supra* note 5, at 274.
51. *Id.*
52. *Butler*, 297 U.S. at 64–65.
53. See, generally, CHEMERINSKY, *supra* note 5, at 275–81.
54. For an incisive summary of this literature, see Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1989–90). See also Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241 (1993–94).
55. Speech by Attorney General Edwin Meese III before the American Bar Association, Washington, D.C., July 9, 1985, available at <http://www.fed-soc.org/resources/id.49/default.asp>.
56. *Health Care and the Constitution*.
57. Justice William J. Brennan Jr., speech to the Text and Teaching Symposium, Georgetown University, Washington, D.C., Oct. 12, 1985, available at <http://www.fed-soc.org/resources/id.50/default.asp>.
58. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).
59. See, e.g., *Jacobson v. Massachusetts*, 195 U.S. 11 (1905) (upholding mandatory vaccination law).
60. *Id.*
61. For commentary on both sides of the issue, see Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 12 U. PA. L. REV. 962 (1973); Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001).
62. *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989).
63. *Id.* at 194. The Third Circuit case was *Estate of Baily by Oare v. County of York*, 768 F.2d 503 (1985).
64. *DeShaney*, 489 U.S. at 202–03.
65. *Id.* at 201.
66. *Id.* at 203–04.
67. Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221 (2006).
68. *Id.*
69. Robin West, *Ennobling Politics*, in *LAW AND DEMOCRACY IN THE EMPIRE OF FORCE* (H. Jefferson Powell & James Boyd White eds., Univ. of Mich. Press 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1172204](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1172204).
70. *Plessy v. Ferguson*, 163 U.S. 537 (1896).
71. *Brown v. Bd. of Educ., Topeka, Kan.*, 347 U.S. 483 (1954).