The Judicial Duty to Scrutinize Legislation

Randy E. Barnett
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I. INTRODUCTION

The Declaration of Independence famously declared, “[w]e hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.”1 It then affirmed “[t]hat to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.”2 This last sentence has proven to be problematic.

If “consent of the governed” means the consent of a majority of “We the people,” then the “consent of the governed” can be used to violate the unalienable rights for which “Governments are instituted among Men.”3 The situation is still worse if the consent of a majority of a small body of men and women called “legislators” and “representatives” is taken to be the same as the consent of the people themselves.4 The problem with the prevailing “collective” conception of popular sovereignty is that it invites this majoritarian interpretation of the “consent of the governed.”5 How else is the “will” of “We the people” to be identified?

In my book, Restoring the Lost Constitution, I addressed this tension by identifying what I called “The Fiction of ‘We the People.’”6 By this I mean it is fiction to claim that laws passed pursuant to the Constitution are binding in conscience on the individual because “We the People” have consented to be so bound. The basic problem with this claim is the fundamental proposition that no one can by her own consent bind someone else. For example, two people cannot by their consent oblige a

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

2 Id.

3 RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 14 (2d ed. 2014); see THE DECLARATION OF INDEPENDENCE, supra note 1, at para. 2 (stating that “Governments are instituted among Men”).

4 See BARNETT, supra note 3, at 14–15 (explaining the issues with equating voting to consent).

5 See id. at 14–31 (identifying the problems with the collective consent of “We the People”).

6 Id. at 11.
third person to part with her money or her bodily integrity. For a person to be bound by consent, she must be the one who consents.

Yet we are told that because some subset of a group of people residing in North America a couple hundred years ago can be said to have consented to be bound by a government formed by the Constitution of the United States, then this consent bound dissenters back in 1789 and each successive generation, including ours. In my book, I explain why each of the arguments that are commonly offered on behalf of this claim fails upon close examination. For this reason, it is fair to read my book as rejecting what may be called either “popular sovereignty” or the “consent of the governed” as the basis for the legitimacy of the Constitution.

Instead, I contend that a constitution to which everyone does not consent could still be legitimate if it establishes procedures that make it more likely than not that the laws being imposed on nonconsenting persons are proper and necessary insofar as, first, these laws do not improperly violate the rights of these nonconsenting persons and, second, these laws are necessary to protect the rights of others. If both of these conditions are met, laws produced by such a system can bind in conscience so that there may exist a prima facie duty of obedience notwithstanding the absence of actual consent.

However, since the first edition of the book appeared ten years ago, I have become aware of another more individualist conception of popular sovereignty that existed at the time of the founding but which is generally neglected. This conception does not rest on the collective consent of a body of people—which in practice means consent by a majority of those who are allowed to vote—but is instead based on the individual sovereignty of each person. This individualist conception of popular sovereignty was most strikingly presented in the first great constitutional case: *Chisholm v. Georgia* decided by the Supreme Court in 1793, just four years after the enactment of the Constitution.

II. INDIVIDUAL POPULAR SOVEREIGNTY

In *Chisholm*, the Supreme Court, by a vote of four to one, rejected Georgia’s assertion of sovereign immunity as a defense against a suit in federal court for breach of contract brought against it by an individual.

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7 See id. at 14–25 (discrediting arguments that support the “consent of the governed”).
8 Id. at 44–45.
9 2 U.S. (2 Dall.) 419 (1793).
citizen of another state. Instead, the Court concluded that if the concept of “sovereignty” is even applicable—the term is nowhere used in the Constitution—sovereignty rests with the people rather than with state governments. This decision is inconsistent with both the modern claims that democratically elected legislatures exercise the sovereign will of the people and that states are entitled to the same immunity as was enjoyed by the King of England. The Justices in Chisholm affirmed that, in America, the states are not kings, and their legislatures are not the supreme successors to the Crown.

To reach this holding, the Court interpreted the meaning of Article III, Section 2, which specifies that “[t]he judicial power [of the United States] shall extend to . . . Controversies . . . between a State and Citizens of another State.” This section seems to authorize a suit for breach of contract against Georgia (“a state”) brought by a citizen of South Carolina (“another state”). But Georgia contended that this text was qualified by the extra-textual doctrine of sovereign immunity; despite Article III’s apparent plain meaning, no suit could be brought against it by a citizen of another state without its consent.

Because each Justice delivered his own opinion “seriatim,” there was no opinion of the Court. Justice James Wilson, a member of the Committee of Detail that produced the first draft of the Constitution, began his opinion by stressing that the Constitution nowhere uses the term “sovereignty.” He stated: “To the Constitution of the United States the term Sovereign, is totally unknown.” There was only one place in the Constitution “where it could have been used with propriety,” he observed, referring to the Preamble. “But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves ‘Sovereign’ people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.”

12 U.S. CONST. art. III, § 2; see Chisholm, 2 U.S. (2 Dall.) at 466 (opinion of Wilson, J.) (interpreting the language of Article III, Section 2).
13 See Chisholm, 2 U.S. (2 Dall.) at 476 (opinion of Jay, C.J.) (providing Georgia’s contention that Article III, Section 2 only applies to cases involving a state as a plaintiff).
14 Id. at 454 (opinion of Wilson, J.); Evan Tsun Lee & Josephine Mason Ellis, The Standing Doctrine’s Dirty Little Secret, 107 NW. U. L. REV. 169, 233 n.342 (2012).
15 Chisholm, 2 U.S. (2 Dall.) at 454 (opinion of Wilson, J.).
16 Id.
17 Id.
Wilson then identified three possible alternative meanings of the term “sovereign.” First, “the term sovereign, has for its correlative, subject. In this sense, the term can receive no application; for it has no object in the Constitution of the United States. Under that Constitution there are citizens, but no subjects.”18 Indeed, Wilson noted that the “term, subject, occurs . . . once in the instrument; but to mark the contrast strongly, the epithet ‘foreign’ is prefixed.”19

Wilson rejected the concept of “subject” as inapplicable to states because he knew “the Government of that State to be republican; and my short definition of such a Government is,—one constructed on this principle, that the Supreme Power resides in the body of the people.”20 Furthermore:

the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the “People of the United States,” did not surrender the Supreme or sovereign Power to that State; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is NOT a sovereign State.21

In other words, according to Justice Wilson, to the extent one wishes to use the word “sovereignty” at all, sovereignty lies in the people themselves, not in any government formed by the people.

Wilson then considered a second sense of sovereignty relating to the feudal power of English kings:

Into England this system was introduced by the conqueror: and to this era we may, probably, refer the English maxim, that the King or sovereign is the fountain of Justice. . . . With regard to him, there was no superior power; and, consequently, on feudal principles, no right of jurisdiction.22

Wilson characterized this as “only a branch of a much more extensive principle, on which a plan of systematic despotism has been lately formed in England, and prosecuted with unwearied assiduity and care.”23

18 Id. at 456.
19 Id. (footnote omitted).
20 Id. at 457.
21 Id.
22 Chisholm, 2 U.S. (2 Dall) at 458 (opinion of Wilson, J.).
23 Id.
Wilson rejected this feudal notion of sovereignty as inconsistent with “another principle, very different in its nature and operations [that] forms . . . the basis of sound and genuine jurisprudence.” This is the principle that “laws derived from the pure source of equality and justice must be founded on the Consent of those, whose obedience they require. The sovereign, when traced to his source, must be found in the man.” In other words, obedience must rest on the consent of the only “sovereign” from which justice and equality rest: the individual person who is asked to obey the law. Wilson believed that the only reason “a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the Courts of Justice, which are formed and author[iz]ed by those laws.”

Just as individuals are subject to the jurisdiction of courts, so too are state governments, which are merely the very same people who have banded together to form a government. Therefore, states are no less bound by the law than are the ultimate sovereign individuals that established them. “If one free man, an original sovereign, may bind himself to the jurisdiction of the court, “why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired.”

For Wilson the situation posed by the case was simple: “A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, wilfully refuses to discharge it.” If the dishonest merchant “is amenable to a Court of Justice,” then “[u]pon general principles of right” shall the dishonest state “when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a Sovereign State? Surely not.”

That Justice Wilson was the author of this opinion is significant. James Wilson was as crucial a member of the Constitutional Convention as any other, including James Madison with whom Wilson worked closely during the convention debates. Unlike Madison, Wilson served

24 Id.
25 Id.
26 Id. at 456.
27 Id. (emphasis added).
28 Id.
29 Id.
on the Committee of Detail that drafted the text of the Constitution.31 His defense of the Constitution in the Pennsylvania ratification convention was lengthy and influential, and that state’s early ratification set the stage for the Constitution’s eventual adoption in other key states.32 Wilson was also among the most theoretically sophisticated of the Founders, as demonstrated by the lectures on law he delivered from 1790 to 1792 in Philadelphia as the first law professor of the University of Pennsylvania (then the College of Philadelphia).33

Justice Wilson was not alone in locating sovereignty in the individual person. In his opinion in Chisholm, Chief Justice John Jay—who, with Madison and Hamilton, had authored some of the early Federalist Papers—referred tellingly to “the joint and equal sovereigns of this country.”34 Jay affirmed the “great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own Courts to have their controversies determined.”35 Denying individuals a right to sue a state, while allowing them to sue municipalities, “would not correspond with the equal rights we claim; with the equality we profess to admire and maintain, and with that popular sovereignty in which every citizen partakes.”36

Neither Wilson nor Jay’s individualist conception of popular sovereignty conforms with the modern notion of popular sovereignty as a purely “collective” concept. Professor Elizabeth Price Foley captures the individualist concept of popular sovereignty by calling it “residual individual sovereignty.”37 Their opinions in Chisholm present the radical yet fundamental idea that if anyone is sovereign, it is “We the People” as individuals, in contrast with the modern view that locates popular sovereignty in Congress or state legislatures, which supposedly

L. REV. 1707, 1714 (2012) (listing James Madison and James Wilson as the two main visionaries during the Constitutional Convention.

31 Id. at 1720. This wording was later revised by a separate Committee of Style and Arrangement. Id. at 1721.

32 Ratifying a week after Delaware, Pennsylvania was just the second state—and the first large one—to ratify the Constitution. See PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 97–124 (2010) (discussing the Pennsylvania convention and Wilson’s role).


34 Chisholm, 2 U.S. (2 Dall.) at 477 (opinion of Jay, C.J.); Aaron Zelinsky, Misunderstanding the Anti-Federalist Papers: The Dangers of Availability, 63 ALA. L. REV. 1067, 1071 (2012).

35 Chisholm, 2 U.S. (2 Dall.) at 479 (opinion of Jay, C.J.) (emphasis added).

36 Id. at 472–73 (emphases added).

37 ELIZABETH PRICE FOLEY, LIBERTY FOR ALL: RECLAIMING INDIVIDUAL PRIVACY IN A NEW ERA OF PUBLIC MORALITY 42 (2006) (“[O]ne of the foundational principles of American law—at both the state and federal level—is residual individual sovereignty. . . .”).
represent the “will of the people,” or in a majority of the citizenry, rather than residing sovereignty in the citizenry as a whole.

The Court’s decision in *Chisholm* was eventually reversed by the adoption of the Eleventh Amendment that reads: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” A robust judicial and academic debate has arisen as to whether the Eleventh Amendment represents a repudiation of the Court’s incorrect interpretation of the Constitution, or a change in the meaning of the Constitution that the Court had correctly interpreted as inconsistent with the sovereign immunity of states. For what it is worth, after the ratification of the Eleventh Amendment, Chief Justice Marshall seemed to endorse the view that the Court had previously been correct in its reading of Article III. He stated: “The Constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual States.... This feature is no longer found in the Constitution; but it aids in the construction of those clauses with which it was originally associated.”

I am not claiming that Wilson’s and Jay’s conception of individual popular sovereignty was the only conception of popular sovereignty present at the founding. Nor am I claiming anything about the original meaning of the Constitution. Instead, I offer it to make sense of an approach to the “consent of the governed” that also existed at the time of the founding—an approach that further supports the natural rights approach of constitutional legitimacy that I defend in my book. If it is the people as individuals who are sovereign, and the people as individuals retain their preexisting rights, as is affirmed in the text of the Constitution by the Ninth Amendment, then we are faced with the issue of what the people could have consented to. Put another way, to the

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38 U.S. CONST. amend. XI.
39 See Barnett, supra note 10, at 1741–55 (describing the debate and denying that the Eleventh Amendment represented the repudiation of the reasoning of *Chisholm* rather than the result).
40 See infra text accompanying note 41 (quoting Chief Justice Marshall’s view on Article III).
41 Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810) (emphasis added).
42 See Barnett, supra note 3, at 84–85 (discussing natural rights and the duty to obey the law).
43 See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 Tex. L. Rev. 1, 2 (2006) (“The purpose of the Ninth Amendment was to ensure that all individual natural rights had the same statute and force after some of them were enumerated as they had before . . . .”); see also Randy E. Barnett, *Kurt Lash’s Majoritarian Difficulty: A Response to A Textual-Historical Theory of the Ninth Amendment*, 60 Stan. L. Rev. 937, 938 (2008)
extent we care about the consent of the governed, we need to ask what each person could be said to have consented to in the absence of each person’s express consent.

III. PRESUMED CONSENT

How then do we reconcile the individual conception of popular sovereignty based on each and every person’s consent with the fact that such unanimous consent to governance is never expressly solicited and would be impossible to obtain? An answer to this question can be found at the time of the founding and long before that, similar to how the individual conception of popular sovereignty has been generally overlooked. If we start with the proposition that it is the people as individuals who are sovereign and that they retain their preexisting rights unless they are expressly delegated to their agents, then in the absence of such express consent we must ask to what each person could be presumed to have consented.

In his book, The Unconstitutionality of Slavery, Lysander Spooner contended that, since the consent of the governed “exists only in theory,” the people cannot be presumed to have given up their preexisting rights.44 “Justice is evidently the only principle that everybody can be presumed to agree to, in the formation of government.”45 But Spooner was far from the first to make this argument, which crops up in some interesting places.

John Locke, in his Second Treatise, observed that “Men when they enter into Society, give up the Equality, Liberty, and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislative, as the good of the Society shall require.”46 He then considered the scope of the legislative or police power that is given up, employing an analysis very similar to Spooner’s:

[Y]et it being only with an intention in every one the better to preserve himself his Liberty and Property; (For no rational Creature can be supposed to change his condition with an intention to be worse) the power of

(rejecting a “collectivist” interpretation of the “rights retained by the people” to which the Ninth Amendment refers).

44 LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY, in THE COLLECTED WORKS OF LYSANDER SPOONER 153 (1971) (“Our constitutions purport to be established by ‘the people,’ and, in theory, ‘all the people’ consent to such government as the constitutions authorize. But this consent of ‘the people’ exists only in theory. It has no existence in fact.”).

45 Id. at 143.

Like Spooner, Locke asked, in the absence of any explicit consent, what a “rational Creature can be supposed” to have consented to when leaving the state of nature to enter civil society. And the individual can only be supposed to have consented to the common good, which consists of the protection of each person’s life, liberty, and property.

This idea of “supposed” or “presumed” consent appears again in Attorney General Edmund Randolph’s opinion on the constitutionality of a national bank. In addressing whether the power to incorporate a national bank is among the implied powers of Congress, Randolph observes that a legislature governed by a written constitution without an express “demarcation of powers, may, perhaps, be presumed to be left at large, as to all authority which is communicable by the people,” provided that such authority “does not affect any of those paramount rights, which a free people cannot be supposed to confide even to their representatives.” Once again, given the sovereignty of the people as individuals, the people cannot “be presumed” or “supposed” to have confided in their legislature any power to violate their fundamental rights.

Perhaps the most striking use of this notion of the presumed or supposed consent of the governed appears in the 1798 Supreme Court case of *Calder v. Bull*.

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47 Id. (emphases added and omitted). The “three defects” to which Locke refers are the absence of standing laws, the want of an effective power to protect one’s rights, and the lack of an independent and impartial magistrate to adjudicate disputes. Id. at 351. These three defects are ameliorated by the legislative, executive, and judicial functions of government. Id.


49 Id. (emphasis added).

50 Id.

constitution limit. Generally overlooked is the fact that, like Locke, Randolph, and Spooner, Chase too employs the notion of supposed consent.

Justice Chase begins by providing examples of laws that violate these “great first principles,” such as a law “that punished a citizen for an innocent action . . . ; a law that destroys, or impairs, the lawful private contracts of citizens[,] a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B.” He then contends that the enactment of such laws is beyond the legislative power because “[i]t is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.”

When discussing presumed or supposed consent, the issue is the relevant default rule. For Chase in Calder, the legislature only has those powers that are expressly delegated, together with those implied powers that are not fundamentally unjust, such as punishing a person for acts that were legal when performed. This choice of default rules comes into play when the legislature is exercising implied powers rather than those that were expressly delegated. Like Locke, Chase asked whether, in the absence of a clear statement in a written constitution, a free and rational person would have consented to that?

Just seven years after Calder, in the case of United States v. Fisher, Chief Justice John Marshall adopted a similar clear statement rule with respect to presumed legislative intent: “Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.”

To be sure, natural justice or natural rights lurk in the background of all these considerations of “presumed consent” but only as a way of interpreting the scope of legislative power in the absence of an express consent. When combined with the concept of individual popular sovereignty, all these invocations of “presumed,” “supposed,” or “theoretical” consent cast the issue of popular sovereignty and the

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52 Id. at 388 (emphasis omitted); cf. id. at 398–99 (opinion of Iredell, J.) (construing the legislature’s power more broadly).
53 Id. at 388 (opinion of Chase, J.) (emphasis omitted).
54 Id. (emphasis added).
55 Id. at 387–88.
“consent of the governed” in a new light that supports the approach to constitutional legitimacy I present in *Restoring the Lost Constitution.*

We can separate the steps of this argument as follows. First, sovereignty rests not in the government, but in the people themselves considered as individuals. Second, to be legitimate, the government must receive the consent of all these sovereign individuals. Third, in the absence of an express consent by each person, however, the only consent that can be attributed to everyone is consent only to such powers that do not violate their retained fundamental rights. Fourth, the effective protection of these rights retained by the people is what assures that the government is actually conforming to the consent that it claims to be the source of its just powers. Finally, only if such protection is effective, does its commands bind the individual in conscience.

### IV. JUDICIAL ENGAGEMENT AND THE DUE PROCESS OF LAW

Having discussed individual popular sovereignty and presumed consent, let me now turn to the final step in my analysis: judicial engagement and the due process of law. Let us begin by recalling the quote from John Locke above: “The power of the Society, or Legislative constituted by them, can never be suppos’d to extend farther than the common good; but is obliged to secure every one’s Property by providing against those three defects . . . that made the State of Nature so unsafe and un easie.”

One of these three defects was the absence of an impartial magistrate:

In the State of Nature there wants a known and indifferent judge, with Authority to determine all differences according to the established Law. For every one in that state being both Judge and Executioner of the Law of Nature, Men being partial to themselves, Passion and Revenge is very apt to carry them too far, and with too much heat, in their own Cases . . . .

No one who views popular sovereignty as residing in the individual would confuse the people themselves from their representatives in the legislature, who are but men and women who may use their power to

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57 *See* BARNETT, *supra* note 3, at 52 (concluding that without consent, constitutional legitimacy is only present when there are sufficient procedures to assure that enacted laws are just).

58 *Locke, supra* note 46, at 353 (emphasis added and omitted).

59 *Id.* at 351 (emphasis omitted).
improperly restrict the liberties of the people. As Madison explained in Federalist No. 10:

No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men, are unfit to be both judges and parties, at the same time; yet, what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens; and what are the different classes of legislators, but advocates and parties to the causes which they determine?60

According to Locke, the answer to this defect in the state of nature is the creation of an independent neutral judiciary.61 Or, as Madison put it in his speech proposing what became the Bill of Rights: “independent tribunals of justice . . . will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.”62

Among these express guarantees is the Fifth Amendment that says “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”63 This due process of law includes an assessment by the independent judiciary that a particular statute was indeed a law within the powers that people may be presumed to have delegated to their agents.

To get a sense of how this approach used to work in practice, we need not refer to the Supreme Court’s due process analysis in the controversial case of Lochner v. New York.64 Instead, we need look no farther back in history than the hallowed 1938 case of United States v. Carolene Products Co. in which Justice Stone reaffirmed “that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute

61 LOCKE, supra note 46, at 353.
63 U.S. CONST. amend V.
64 198 U.S. 45 (1905).
depriving the suitor of life, liberty or property had a rational basis.” He then elaborated that:

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

Of course, in Carolene Products, the Court found that Congress did have a factually rational basis for prohibiting the interstate trade in filled milk. Filled milk is made by skimming the butter fat from whole milk and then combining the resulting “skimmed milk” with vegetable oil so it tastes like whole milk. Congress heard testimony about the scientifically-proven health benefits of milk fat in our diet. But some thirty-four years later in 1972, in a little-known development, the Filled Milk Act was actually held unconstitutional as applied to the Milnot Company—the successor to the Carolene Products Company—by Federal District Court Judge Robert Morgan, who wrote that “while Congress may select a particular evil and regulate it to the exclusion of other possible evils in the same industry, any distinction drawn must at least be rational.”

Judge Morgan wrote that “[a]ssuming that the factual basis for the Filled Milk Act now does require review, the court is not at liberty to shut its eyes to a possible constitutional infirmity out of deference to Congress, when the validity of the law depends upon the truth of what is declared.” Denying that it may sit “as a ‘super legislature,’ weighing the wisdom, need, or general appropriateness of legislative policy,” the court recognized that it “must consider the possible violation of due process of law in existing declared policy.” Judge Morgan then paraphrased the passages from the text (not the footnote) of Carolene Products I highlighted above: “regulatory legislation affecting ordinary

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65 304 U.S. 144, 152 (1938).
66 Id. at 153 (citation omitted).
67 Id. at 153–54.
68 Id. at 149 n.2.
69 Id. at 148. I refer to Carolene Products as the “Milk Fat Case.”
70 Milnot Co. v. Richardson, 350 F. Supp. 221, 224 (S.D. Ill. 1972) (emphasis added).
71 Id.
72 Id.
commercial transactions is not to be pronounced unconstitutional unless, in light of the known facts, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators” and that “the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.”

Applying this standard to the undisputed facts in the record, the court found that:

it appears crystal clear that certain imitation milk and dairy products are so similar to Milnot in composition, appearance, and use that different treatment as to interstate shipment caused by application of the Filled Milk Act to Milnot violates the due process of law to which Milnot Company is constitutionally entitled.

Whatever previous “dairy market conditions and dangers of confusion [had] led to the passage and judicial upholding of the Filled Milk Act many years ago,” the court found that these “have long since ceased to exist.”

Although he accepted the proposition that the “equal protection of the laws does not require identical treatment among those similarly situated,” Judge Morgan nevertheless found that “it does require that arbitrary or capricious distinctions not be made.” For this proposition he cited Wickard v. Filburn. The fact that “at least six other food products now moving in interstate commerce have almost identical appearance and consistency to milk (or evaporated milk) and to each other, both in the package and when poured,” yielded a “conclusion that

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73 Id. (citing Carolene Products, 304 U.S. at 152; Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924)).
74 Id.
75 Id. In footnote one, Judge Moran then observed:

It is not insignificant in this regard that some eleven states which passed filled milk acts have since discarded them—five by repeal and six by court action. By far, the majority of states now permit wholesome and properly labeled filled milk products. It is worth noting, also, that when the Federal Filled Milk Act was passed by Congress and upheld by the Supreme Court, the presently accepted dangers of “cholesterol” in animal fat were almost unknown.

Id. at 224 n.1.
76 Id. at 225 (citing Wickard v. Filburn, 317 U.S. 111, 129 (1942)).
77 Id.
an act which produces such incongruous results regarding interstate shipment alone is devoid of rationality.” Judge Moran continued:

The possibility of confusion, or passing off, in the marketplace, which justified the statute in 1944, can no longer be used rationally as a constitutional prop to prevent interstate shipment of Milnot. There is at least as much danger in this regard with imitation milk as with filled milk, and actually no longer any such real danger with either.

For all these reasons, the court found that “[p]revention of confusion in the market, however valid in 1944, [was] no longer a valid basis to sustain the Filled Milk Act, and thus to prevent only the interstate shipment of Milnot (or any other product of milk which is exactly like it).” Therefore, the court concluded “as a matter of law, that the Filled Milk Act, as applied to prohibit interstate shipment of Milnot, deprives the plaintiff of due process of law and provides no rational means for the achievement of any announced objective of the Act.”

In short, the Milnot Company was allowed to bring evidence into court to show the irrationality of the Filled Milk Act—evidence which the court would then evaluate as an independent tribunal of justice. Judge Morgan then ordered that the company was free to market Milnot “in interstate and foreign commerce, free from any prosecution or other interference from defendant for violation of the Filled Milk Act.” The government declined to appeal to the circuit court.

Although Judge Morgan’s opinion was true to the Court’s decision in Carolene Products, which it cited, it failed to cite the more recent 1955 decision of Williamson v. Lee Optical of Oklahoma, in which Justice Douglass’s majority opinion reversed the lower court’s considered judgment that a law banning opticians from providing certain eye glass services in competition with ophthalmologists and optometrists was irrationally discriminatory. Instead of a realistic judicial examination of the facts, as the Supreme Court in Carolene Products had previously insisted was required to satisfy due process, Justice Douglass’s opinion

78 Id.
79 Id.
80 Id.
81 Id.
82 Id.
accepted any hypothetical or imagined basis a legislature might have had for restricting liberty.  

Like Judge Morgan’s opinion in Milnot, the lengthy lower court opinion in *Lee Optical of Oklahoma v. Williamson* provides an example of a realistic judicial inquiry into the rationality of a restriction on liberty. Although the three-judge panel court applied a presumption of constitutionality, it allowed the Lee Optical Company to show that it was irrational and arbitrary to prohibit opticians from providing some of the same services as ophthalmologists and optometrists. For example, if you broke your glasses and went to an ophthalmologist, he would hand them to his technician to use a Lensometer to read off the prescription—exactly what an optician does. Such a lens replacement service simply did not require the training of a medical doctor.

In *Restoring the Lost Constitution*, I proposed reversing the presumption of constitutionality in favor of a presumption of liberty that would place the burden on the government to justify its restriction of liberty. However, these opinions show that who bears the formal burden of proof is less important than the recognition that laws must be realistically assessed for rationality, even if the legislature is given the benefit of the doubt. After all, the lower courts in the *Williamson* and *Milnot* cases dutifully applied a presumption of constitutionality placing the burden on the affected companies to establish the irrationality of the law. What was important was that the individual citizen, or here a company, was allowed to meet this burden.

Nevertheless, the individual conception of popular sovereignty identified here supports a presumption in favor of the people. Not only does the Ninth Amendment imply that the “rights . . . retained by the people” not be “den[ied] or disparag[e]d,” but the Tenth Amendment reserves “to the people” all powers not delegated to the federal or state

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84 See id. at 490 (suggesting possible conclusions on which the legislature could have relied that would create a legitimate basis to uphold the restriction).
86 Compare id. at 132 (“It is recognized, without citation of authority, that all legislative enactments are accompanied by a presumption of constitutionality . . . .”), with id. at 139 (finding no real difference between ready-to-wear spectacles and prescription glasses; therefore, finding a statute unreasonable that regulated one but not the other).
87 See id. at 137 (stating that an office clerk operates the Lensometer and not the physician).
89 BARNETT, supra note 3, at 253–54, 260.
90 See supra text accompanying notes 73, 86 (discussing how the *Williamson* and *Milnot* courts applied a presumption of constitutionality).
governments. Both these textual affirmations of popular sovereignty suggest that it is “the people” as individuals, not their agents, who deserve the benefit of the doubt. If the government really has a legitimate justification for restricting the liberties of the people, it ought to be able to sustain the burden of defending its justification to a neutral tribunal without any judicial thumb placed on the scale in its favor.

Before concluding, let me summarize the analysis I have presented here:

1. Because the people are sovereign, in the absence of their express consent, there must be assurance that laws restricting their liberties are within the power of a legislature to enact.
2. Laws that irrationally or arbitrarily restrict the rights retained by the people are not within the legislative power because no rational person can be supposed to have consented to their liberty being arbitrarily restricted.
3. Legislators cannot be the judges in their own case when a citizen claims that a law restricting his or her liberty is irrational, arbitrary, or discriminatory.
4. The due process of law affords each person the opportunity to contest the rationality of a restriction of his or her liberty before an independent tribunal of justice.
5. This conception of due process differs from modern “substantive due process” doctrine that gives heightened protection—perhaps even strict scrutiny—to a select few rights that judges deem to be fundamental. Instead, any restriction of liberty is unconstitutional if it is shown to be irrational, arbitrary, or discriminatory.
6. In our constitutional system, judges have a duty to scrutinize legislation to ensure that it is within the proper power of the legislature to enact.

V. CONCLUSION

The conception of individual popular sovereignty advocated by James Wilson and John Jay in Chisholm v. Georgia, resolves the tension

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91 U.S. CONST. amend. IX; U.S. CONST. amend. X.
92 See CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION’S PROMISE OF LIMITED GOVERNMENT 2 (2013) (indicating that the government needs a valid reason to restrict people’s freedom and that the judiciary should not favor the government’s position).
93 See generally PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008) (describing the origin and development of the judicial duty—as opposed to a judicial “power”—to invalidate or nullify unconstitutional statutes).
between “the consent of the governed” and the natural and inalienable rights of each person. According to the collectivist conception of popular sovereignty, by necessity, the will of the majority of the people, or even a majority of a group of legislators can “consent” to restricting everyone’s liberties. In contrast, under an individualist conception of popular sovereignty, the “consent of the governed” requires the consent of each and every person. Because, however, such consent can only be presumed, every restriction on one’s life, liberty, or property must be assessed by an independent tribunal of justice to ensure these restrictions are really aimed at serving what Locke called “the common good.”

In this way, the Declaration’s affirmation that “to secure these rights, Governments are instituted among Men” can be reconciled with its claim that these “just powers” are “deriv[ed] . . . from the consent of the governed.”94 If we are realistic about this consent, then a government lacking the express consent of each person is illegitimate unless “the due process of law” includes effective assurances that it does not exercise powers that violate the rights retained by the people. Such assurances require judicial engagement to identify when the restrictions on the liberties of the individual are irrational, arbitrary, or discriminatory. For this reason, judges have a constitutional duty to scrutinize legislation.

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94 The Declaration of Independence, supra note 1, at para. 2.