The Economic Liberties Conference
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Thank you very much, Hank, and thank you, ladies and gentlemen. I'm very pleased to join Hank in welcoming you to this First Annual Department of Justice Conference on the Constitution, Economic Liberties, and the Extended Commercial Republic — which is quite a mouthful.

We're dealing with a subject whose importance this group recognizes, but as a national phenomenon or issue, was better appreciated in the earlier days of our country. The framers of our Constitution regarded the preservation of liberty as the chief object of government. They further understood, as Walter Lippmann expressed it — and every once in a while I find myself surprised to be quoting Walter Lippmann — that the only dependable foundation of personal liberty is the personal economic security of private property.

John Adams cautioned ominously, for example, that the moment the idea is admitted into society that property is not as sacred as the laws of God, anarchy and tyranny commence. And the most eminent representatives of the then young judiciary, Justices Marshall and Story, regarded property with no less reverence.

But today, under what might be called the levelling pressures of contemporary liberalism, the legacy of liberty in regard to property has been somewhat dimmed in the public mind. Bernie Siegan, who will be speaking later, and whom I revere as a former University of San Diego Law School colleague and to whom many of us owe a great deal for stimulating interest in this subject, has chronicled the dangerous impingement of the modern regulatory state upon economic liberty. In his book, he has said, "A free society cannot exist unless government is prohibited from confiscating private property. If government can seize something owned by a private citizen, it can exert enormous power over people."

He goes on to say, "One would be reluctant to speak or write or pray or petition in a manner displeasing to the authorities, lest he lose what he has already earned and possessed." And he quotes Hamilton to the effect that "the power over a man's subsistence amounts to a power over his will."

Although a number of things have changed in our society since the day of the Founders, I would submit to you that these concepts have not changed. As a matter of fact, when Bernie and I have talked on this subject, he's pointed out that economic liberty and the right to private property were so fundamental to the Founding Fathers that it was not given as much attention in some of the writing. It was such an accepted thing that nobody thought that it had to be defended.

Well, Frederick Hayek has talked about this also, saying, "What our generation has forgotten is that the system of private property is the most important guarantee of freedom not only for those who own property, but scarely less for those who do not."

Well, today, fortunately, many encouraging signs exist that the great Western world legacy of private property is in the process of being rediscovered and restored. And one of the things this has contributed to that was the election of Ronald Reagan in 1980, and the importance that he attached to this subject. And I would hope that today's program is another small sign of this reinvigorated interest in economic liberty and private property.

Before our panelists take on their examination today of the Commerce, the Takings and the Contract Clauses, I think it might be appropriate to outline the broad parameters of the discussion, and to try to put our subject in context. The context, of course, is constitutionalism, which is a very appropriate topic in this year that marks the 200th anniversary of our Constitution. We have the longest continuous constitutional government based on such a document in the history of the world.

And, of course, the basic premise of the Constitution is the limitation of government power by enforceable rules of law. In simplest terms, what is at stake really is the rule of law and the Constitution as its implementing vehicle.

Our forefathers founded a republic in which the law would reign supreme and in which no man or group of men, whether they be 535 in number, nine in number, or one in number, would be above the law. In recent years we've witnessed abuses of judicial power. This has raised some questions in the minds of many of the commentators and some of the pundits. At times the spirit and the letter of the Constitution have been supplanted by what some have referred to as the moral enthusiasm of the day.

Well, frankly, it would be easy for some to grow cynical about the place of the judiciary in a republic. In reaction, some have even advocated eliminating any meaningful constitutional function of the courts, while others have said that they would throw their lot with the majoritarian branches of government alone. Some have even advocated stripping the Court of some of its powers as a reaction to a particular decision or series of decisions they dislike.

Well, I personally believe that such reaction would be unwise. I think that we want the Constitution to be an enduring document which prescribes and proscribes the activities of government, and has an enduring value that should not be altered to affect the particular issues of the day. And when mistakes are made under the Constitution, or when things are done by those functions or elements of government under the Constitution that we may disagree with, it's equally important that we take the long view and not try to affect enduring values and enduring instrumentalities to correspond to short range disagreements.

Our Founding Fathers considered this very issue of the long range versus the short range and found that unchecked democracy, the majoritarian will imposed upon enduring principles, to be a threat to liberty. Drawing on their knowledge of the history of ancient republics, political theory and, perhaps more importantly, on their own experiences and practical wisdom, they ordained and established a government that was built on constitutional majorities as opposed to simple majorities.

This is a doctrine — constitutional majorities — that's well worth thinking about. As we all know, this was done through the establishment of institutional arrangements. Power was distributed among distinct departments of the government, and legislative checks and balances were created.

Now, I find it particularly hard sometimes, when the legislative checks and balances are applied, to take the long view, but I would assure you that it's nonetheless necessary. Representatives were chosen to speak and to negotiate on behalf of the people, and factionalism was mitigated by extension of the scope of the republic. And very importantly, against the majoritarian branches, the framers did poise an independent judiciary — the one counter-majoritarian device among the several which were wisely employed.

Now, I don't think I have to repeat to this group that I and many of my colleagues here are not fans of unfettered and arrogant judicial power. And I might say that as I look around the room at the representatives of the judiciary, I find a similar philosophy being represented here. But I think we all recognize that there is an equal danger in raw, unbridled majoritarianism. Both excesses are equally to be feared for either one, when allowed to go unreined, will lead to the end of the rule of law and the loss of liberty, which is what this is all about in our discussions here.

Today, no less than in the Founders' time, an independent judiciary is a very important part of our republic. But as we all would agree, the role of judges is neither to add nor to subtract from the Constitution, neither to read in new duties or rights or powers or limitations, nor, for that matter, to read them out.

The Constitution represents the will of the people in an enduring political sense. It does not, and it should not, merely mirror the wishes of each passing majority in the body politic, even when these have found expression in simple majorities in the Houses of Congress or in the opinions of distinguished justices. The foundation of the Constitution is, in the end, an enduring set of principles that were hammered out after great thought and great debate in the context of the founding document.

It's the intent of the original and the amending constitutional majorities as expressed in the Constitution and its amendments that should guide the Congress, the president, and the court as they endeavor to interpret the Constitution. Our first constitutional majority was obviously formed under the Constitution in 1787. The most recent was assembled at the ratification of the 26th Amendment in 1971. The infrequency of this action where constitutional majorities change the Constitution is important to keep in mind, for as Walter Berns has pointed out, government by a constitutional majority is quite different and distinct from rule by simple majorities. Or to put it another way, majority decision is a fundamental instrument of republican government, but unfettered majority rule would be an abomination to liberty.

Well, today we're asking ourselves what the Constitution and constitutionalism mean to economic liberties. There are, of course, many implications. Let me highlight two major ones. First of all, we should tread very carefully in basing economic liberty on natural law. The proper place and scope of natural law in constitutional interpretation has not yet been settled, even though it's an issue that dates from the birth of the Constitution itself.

That natural law was a part of the conceptual vocabulary of the framers is, I think, beyond dispute, and there's no question that it was very much a backdrop against which the words of the Constitution were written. But exactly what role the framers expected natural law to play in the interpretation of the Constitution is another matter and certainly one that deserves much thought and discussion rather than simple conclusions. Over the years, natural law considerations affecting economic liberty came to be represented through the due process clause, with *Lochner* v. *New York* becoming a sort of high water mark.

But, of course, the invocation of substantive due process on behalf of economic liberty has, to some extent, fallen out of favor. Nonetheless, substantive due process continues to be used freely in behalf of certain civil liberties. What is important, and what this Administration has advocated in its jurisprudence of original intention, is that substantive due process and, likewise, natural law questions of whatever stripe should be decided with scrupulous fidelity to the text of the Constitution as elucidated by the framers.

Naturally, stating that position is the easy part. A great deal of work lies ahead of us completing the historical research necessary to a full conceptual understanding of the Constitution, articulating a coherent canon of understanding and interpretation, and nudging our institutions of government toward a greater constitutional fidelity. We may expect, however, that even the most ardent adherents of the original intent doctrine will disagree on matters from time to time.

My second point — and I believe this to be extremely important — is that honest attempts to interpret the Takings and Contract Clauses of the Constitution should not be disdained as mere "Lochnerizing", as some have characterized them. We must recognize that certain economic rights do exist and are central to the American constitutional order. They are well supported in both the text and the history of the Constitution, and deserve full and fair consideration.

Whatever the momentary contemporary view, judicial deletion of economic rights from the Constitution is a species of activism every bit as deplorable as the unwarranted manufacture of new, so-called civil rights. Today, you'll be focusing primarily on three clauses of the Constitution that are laden with meaning for economic liberty. I mentioned them earlier: the Contracts Clause, the Takings Clause, and the Commerce Clauses. Within each, a revolution in, or perhaps more accurately, a revisiting and restoration of economic liberty is a prospect.

The proper cultivation of these clauses along the lines of original intent could one day abundantly expand the fruits of economic and political liberty. Think, for example, of the uses that have been made of the Commerce Clause for purposes with which many of us would disagree. These are uses which place it into dubious constitutional service as a mode for expanding government regulation of nearly every facet of our lives.

Taking care that the Constitution be faithfully adhered to is an obligation that has to be accepted by all three branches of government, and we in the Administration are stepping up to this task in several ways. One of the ways, of course, is to increase public thought, public discussion, and also intramural discussions such as this conference.

In these days of big government, the 10th Amendment is regarded by many as merely a vestige from another era. There are some of us who take it seriously. The idea of stating the specific constitutional authority for any new piece of federal legislation has become to many no less than a dim memory. But recently, we tried a small step to reimpose discipline on the legislative process by requiring that every presidential signing statement should contain a provision of jurisdiction. This aim is to stop rubber stamping the expansion of government under some kind of supposed constitutional mandate. Just a couple of weeks ago, Assistant Attorney General Charles Cooper, who heads our Office of Legal Counsel, reviewed a proposed bill that sought to establish a national lottery. Well, I assure you that Mr. Cooper takes seriously the concept of enumerated powers and the 10th Amendment. And when he carefully reread the Constitution for the 245th time, and couldn't find any authority supporting a national lottery bill, he called it unconstitutional.

Now, I don't think many of you, at least prior to the last five years, can remember a time when an administration scrapped a bill because it was deemed to be unfounded in the Constitution. Senator Hatch, who takes the Constitution seriously, has proposed that Congress include in every bill a statement citing the specific source of its authority to act on that matter. I would say that some of us feel that if they would similarly have to propose a specific source of

authority to issue a subpoena, a lot of the work of the Justice Department would be considerably lightened.

In any event, although Congress has so far declined to do this, we're hopeful that those on the Hill and on the bench will join us in what we would describe as a little constitutional calisthenics. In many ways, it all comes down to this: we believe that the federalists have the better end of the argument than the anti-federalists over the best way to secure the rights of the people. As Herbert Storing has put it — and we couldn't start one of these conferences without referring to Professor Storing — "The Bill of Rights provides a fitting close to the parentheses around the Constitution that the preamble opens, but the substance is a design of government with powers to act and a structure arranged to make it act wisely and responsibly. It is in that design, not in its preamble or its epilogue, that the security of American civil and political liberty lies."

I would only add that it is in the design of the Constitution that the security of economic liberties lies as well. The Takings Clause, the Contract Clause, and the Commerce Clause are important parts of that design. They deserve our attention, and I'm sure they'll receive it today. I thank you for coming, and I look forward to our discussions together.

Thank you.