THE FISCAL POWERS AND THE 1930s: ENTRENCHMENT

JOHN HARRISON*

Most constitutional theory is normative and looks to the past. Theorists usually adopt the viewpoint of a contemporary actor, typically a judge on a court with final decisional authority, and ask about the relevance of past events to the judge's decision.[1] For example, in one standard form of the argument over originalism, the question is whether the judge today should treat as conclusive an application of the constitutional text that generally was accepted at the time of adoption.[2] Deeper questions arise when one looks beyond the context of judicial decision, abandons the standard suppositions concerning judicial authority, and asks why people today should care about events that took place long before any of us were born.

Although expressions of opinion on the foregoing issues are in no danger of running out, there is a surprising shortage of thinking about how constitutions work, rather than how they ought to work. Theory that discusses what makes some constitutional arrangements effective and others ineffective is relatively scarce. This Essay uses as its test instrument a forward-looking perspective that considers not how we are bound by the past, but rather how we may bind the future. An attempt to answer that question should provide some insight into the actual operations of constitutions in general and the American constitutional system in particular. In order not to stray too far from the topic of this symposium, I will bring this perspective to bear on the most important change in the practice of American government

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* Professor of Law and Class of 1966 Research Professor, University of Virginia. Thanks are due to the other participants in and organizers of the conference at which this paper was presented.

1. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

2. *See, e.g.*, Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 398-99 (1995).

that took place during the 1930s: the dramatic expansion of federal spending. That thunder still reverberates through our constitutional politics.[3]

To some extent, any change in legal rules binds the future in any system where the rules are followed as such and formally changing them is costly. Constitutional rules are often said to be entrenched, however, in the sense that it is more difficult to change them than to alter ordinary laws, because the process of constitutional amendment is more difficult than the process of statutory change.[4] The options available to would-be constitution-makers thus depend on the available mechanisms of entrenchment.

One aspect of this question occupies much of Bruce Ackerman's second volume of *We the People*.[5] Ackerman provides a detailed account of the Roosevelt Administration's decision to support the Court-packing plan rather than an Article V amendment, and discusses the eventual use of transformative Supreme Court appointments instead of an amendment.[6] Ackerman is much concerned with the fact that although both court-packing and nonpacking transformative appointments are instruments of constitutional change, it is not so clear that they are instruments of constitutional entrenchment.[7] For example, suppose that Reagan and Bush had created a majority of Justices who believed that *Wickard v. Filburn*[8] and *United States v. Darby*[9] and maybe even *NLRB v. Jones & Laughlin Steel Corp.*[10] were decided wrongly under the Constitution as it stood in 1933. Would this majority have been required to overrule those cases on the grounds that no subsequent amendment vindicated expanded federal regulatory power? Ackerman says no because he believes that something more than a shift in judicial personnel

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3. *See, e.g.*, S.J. Res. 5, 106th Cong. (1999) (proposing a constitutional amendment requiring a balanced budget without "the use of Social Security surpluses to achieve compliance").

4. *See* Larry Alexander, *Introduction* to CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 2 (Larry Alexander ed., 1998).

5. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 268-344 (1998).

6. *See id.* at 316-33, 351-53.

7. *See id.* at 403-09.

8. 317 U.S. 111 (1942).

9. 312 U.S. 100 (1941).

10. 301 U.S. 1 (1937).

took place under Roosevelt, but he confesses that the case is harder to make than it would be had the more familiar technique of Article V entrenchment been employed.[11]

Although Ackerman is worried about the entrenching effects of the constitutional changes that took place during the Roosevelt Administration, especially as compared to the effects of changes that were considered but not adopted, the New Dealers do not seem to have been so concerned.[12] Their immediate problem involved freeing themselves from the chains of the past, and they seem to have given little thought to imposing chains on the future.[13] Maybe they would have been against doing so, believing with Thomas Jefferson that the earth belongs to the living and that each generation should be able to make its own destiny.[14] Maybe they would have thought entrenchment unnecessary because the country had finally emerged into modernity and no one would ever want to turn back.

On the other hand, if the New Dealers had thought about it, maybe they would have wanted to protect against the possibility of another Justice McReynolds, who, after all, was appointed by a liberal President, just as Justice Brennan was appointed by a conservative. In seeking entrenchment, the Democrats would have been following the Reconstruction Republicans, a group who clearly regarded the Fourteenth Amendment as a guard against future backsliding. Section 1 was designed not only to underwrite the Civil Rights Act of 1866, but also to prevent its repeal by a future Democratic Congress.[15] More to the point, Section 2 was designed to prevent the election of such a Congress.[16]

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11. *See* 2 ACKERMAN, *supra* note 5, at 314-17, 362-66.

12. *See id.* at 403-09.

13. *See id.* at 347-48.

14. *See* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 392 (Julian P. Boyd ed., 1958) ("I set out on this ground, which I suppose to be self evident, *'that the earth belongs in usufruct to the living'*: that the dead have neither powers nor rights over it.").

15. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 958 (1995) (stating that "Section 1 of the Fourteenth Amendment . . . was to provide a firm constitutional basis for the 1866 Act and to ensure that future Congresses would not be able to repeal it").

16. *See* EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 49-50 (1990).

As the observation about Reconstruction suggests, entrenchment in order to preserve current political advantage is only one reason for adopting a higher-order legal rule, and perhaps not the most desirable. Entrenching maneuvers are doubtful as a matter of political morality because they represent attempts by people in the present to control people in the future. Somewhat less troublesome are entrenchments that attempt to make binding deals that secure political agreement. The classic American example of that kind of constitutional rule is equal state suffrage in the Senate, the "great compromise" that was thought necessary to secure participation by the smaller states in the new Union.[17] That deal is placed into the deepest trench the Constitution has, a limitation on the amendment power itself. Least troublesome of all, but still problematic, is the use of constitutional rules as self-binding mechanisms through which people in their lucid moments seek to limit their options at times of greater stress.[18]

For present purposes, however, this Essay assumes that the Roosevelt Administration would have sought to change constitutional norms in order both to fill in the old trench and dig a new one. Though the Roosevelt Administration was mainly concerned with the problem of federal regulatory power, I will take the federal government's spending power as my basis for speculation; the spending power is at least as much the foundation of the modern state as the federal government's regulatory power.[19] Certainly the availability of that power was a main plank of the New Deal because it underlay federal unemployment compensation and old-age pensions.[20]

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17. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 57, 69-70 (1996).

18. For a discussion on constitutional self-binding, see Jon Elster, *Intertemporal Choice and Political Thought*, *in* CHOICE OVER TIME 35, 35-45 (George Loewenstein & Jon Elster eds., 1992).

19. For example, nondefense federal outlays were 8.1% of the gross domestic product in 1940 and 16.5% in 1998. *See* OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT OF THE U.S., HISTORICAL TABLES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2000, at 103, 109 (1999).

20. *See, e.g.*, Helvering v. Davis, 301 U.S. 619 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937). The New Deal and what has come after also rests on the federal government's other fiscal power, the power of taxation. That question was largely settled, however, by the Sixteenth Amendment, proposed during the presidency of that notable constitutional revolutionary, William Howard Taft.

Suppose, then, that President Roosevelt and his coadjutors had wanted to establish firmly the principle on which Congress acted when it passed the Social Security Act[21] and which the Supreme Court endorsed in dictum in *United States v. Butler*:[22] that Congress may spend tax revenue so as to advance the national interest in general.[23] How might they have gone about doing that?

The most direct approach would be an Article V amendment. That is a little trickier than it first appears. To begin with, an amendment will become part of the entire Constitution. A new power will be slotted into the already existing structure of government and will interact with provisions that limit powers by overriding the results that otherwise would flow from the grant of power.

The interaction between powers and affirmative limitations on powers creates two questions. First, the drafters of a power-granting amendment must decide to what extent they want to free the new power from existing limitations. In the easiest case the answer is not at all, which is to say that the only limitation being undone is one that results from the principle of enumeration itself. Even accomplishing this can be difficult because the general principle is that when two legal enactments are equally authoritative, last in time prevails. Any time a power is added to the Constitution it is possible to argue that it is free from preexisting affirmative limitations.

This possibility arises largely because the First Congress rejected Madison's proposal concerning the drafting of constitutional amendments.[24] Madison recommended that amendments alter the text, as Congress does when it amends its statutes.[25] Had that approach been adopted, a new power that was to be subject to all previous limitations would simply be added to the appropriate list of powers, usually Article I, Section 8. Conversely, if a preexisting power was to be freed of a limitation that applied specifically to that power, that limitation could simply

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21. Ch. 531, 49 Stat. 620 (1935).
22. 297 U.S. 1 (1936).
23. *See id.* at 65.
24. *See* Edward Hartnett, *A "Uniform and Entire" Constitution; Or, What if Madison Had Won?*, 15 CONST. COMMENTARY 251, 252-53 (1998).
25. *See id.*

be removed. Also, a new power that was to override all preexisting limitations, if one wanted such a thing, would be reflected by a clause making explicit that the new power was not subject to any of the Constitution's restrictions on legislative authority.

The First Congress rejected Madison's suggestion.[26] As a result, this difficulty has been with us ever since. The standard approach seems to be simply to ignore Madison's failure, leaving it implicit that, for example, Congress may not enforce Section 1 of the Fourteenth Amendment with bills of attainder. Although such a limitation on Congress may seem obvious, problems can arise in this context. The Sixteenth Amendment, for example, states that Congress may tax incomes "from whatever source derived . . . without regard to any census or enumeration."[27] The Sixteenth Amendment plainly exempts direct taxes from the apportionment requirement, but it is unclear whether the above phrase lifts other restrictions. When the amendment was proposed, Charles Evans Hughes, Governor of New York, feared that it did affect other limitations and recommended that the New York legislature reject the amendment because it would empower Congress to tax income from state and municipal bonds.[28]

A drafter who wanted belts and suspenders for the affirmative limitations could draft so as to address this problem when giving a new power. For example, Madison's approach could be approximated by referring to a particular clause. One could write: The power conferred on Congress by Article I, Section 8, paragraph 1 of this Constitution shall include the power to spend the funds raised by taxation to provide for the common defense and promote the general welfare. The Eleventh Amendment, which refers to the judicial power of the United States, works somewhat like this.[29]

This assumes that the New Dealers simply would have wanted to add to the list of powers, leaving the affirmative restric-

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26. *See id.* at 258.

27. U.S. CONST. amend. XVI.

28. *See* Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 50 (1999).

29. *See* U.S. CONST. amend. XI. In Eleventh Amendment fashion, drafters wanting to ensure the validity of expenditures already undertaken could provide that the power should be construed to include expenditure.

tions intact. The New Dealers knew there could be a problem with that because they disapproved of many of the Court's interpretations of the affirmative restrictions.[30] The forward-looking standpoint adopted here suggests a variation on this problem: What could the drafters do to entrench their decision to grant Congress additional spending power against possible future expansions of some affirmative limitation? What could they do, for example, to forestall the possibility that some neo-McReynolds in the 1960s would discover that the Ninth Amendment entitles the people to a national government that spends no more than fifteen percent of gross domestic product?

The answer seems to be: not much, short of changing the mechanism of constitutional enforcement, a kind of tinkering also considered by Roosevelt and company.[31] Some qualification of judicial review, such as vesting Congress with the power to overrule the Supreme Court by an appropriate supermajority, would advance this objective.[32] In the 1930s, such amendments were considered seriously and they presented some intriguing design questions.[33] The leading option seems to have been to give Congress the power to overrule the Court by a supermajority vote, perhaps after an election by the House had intervened.[34]

The primary technical problem with such a regime is that it gives Congress a blunter tool than the Court's. The simplest context for a legislative override is one in which the Court has decided that some identifiable provision is facially invalid. In that case, congressional override is fairly straightforward; however, legal doctrine can be more subtle than that. To the extent that constitutional liberties of action are protected by effects tests, for example, legal rules are neither constitutional nor unconstitutional on their face. The Court's decision that an act

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30. *See, e.g.*, Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Senate Comm. on the Judiciary, 75th Cong. 37, 43 (1937) (statement of Robert H. Jackson, Assistant Attorney General of the U.S.).

31. *See* 2 ACKERMAN, *supra* note 5, at 320-50.

32. The utilization of supermajority rules to change the scheme of constitutional enforcement is a widely debated topic even today. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365 (1999).

33. *See* 2 Ackerman, *supra* note 5, at 321-42.

34. *See id.* at 348-49.

of Congress was impermissible under one set of facts does not imply that it is impermissible under another. The question thus arises whether, if Congress voted to override such a decision, the new rule would be that the provision was permissible under all circumstances, or just those at issue in the case. Consider also the situation in which the Court decides that an act of Congress is unconstitutional for one reason and therefore need not reach other possible grounds of unconstitutionality: Would an override vote affect only the ground the Court reached, or would it simply insulate the provision at issue from all constitutional challenges? It is difficult to imagine the latter result, if only because it once again would permit enforcement through bills of attainder.

Another approach to entrenchment would be to constitutionalize the restrictions on standing that insulated properly designed spending programs from most judicial review in the 1930s. Under *Frothingham v. Mellon*,[35] unconstitutional spending did not constitute the kind of private injury that gave rise to a case or controversy.[36] As Barry Cushman has explained, *Butler* came before the courts as the result of almost willfully incompetent drafting; had Congress been more circumspect or the President less insistent, the Agricultural Adjustment Act could have been shielded by the taxpayer standing rule of *Frothingham*.[37]

Constitutionalizing *Frothingham* presents its own drafting problem. It probably would not do to provide that no court should decide a case calling into question the validity of a federal spending program, because one might wish to preserve the courts' ability to review claims that conditions on spending were unconstitutional, a form of review the Court seems to have conducted in *Butler* itself.[38] Rather, the objective would be to keep the courts from holding that the very existence of the spending program was impermissible.

An equally ineffective approach would be to say that the Constitution does not create any right to be free from a federal expenditure, because the validity question can arise in a defensive

35. 262 U.S. 447 (1923).

36. *See id.* at 480.

37. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 102 (1998).

38. *See* United States v. Butler, 297 U.S. 1, 64-78 (1936).

posture, albeit a somewhat odd one. The federal government could seek to avoid an obligation under a spending program by arguing that the obligation never arose because the program was invalid from the outset.[39] Perhaps that eventuality is too remote to be worth considering, in which case it probably would suffice to state that the Constitution creates no individual entitlement not to have money spent from the Treasury.[40]

Neither a general limitation on judicial review nor an attempt to write *Frothingham* into the Constitution would insulate the new spending power from the conscience of legislators who thought an exercise of it inconsistent with some affirmative limitation. That problem is of little practical importance, however. Yes, a future legislator might think some spending program desirable; nevertheless, he may find it inconsistent with an unforeseen aspect of a currently existing constitutional limitation. One cannot guard against every possibility, however.

The preceding problem concerned the interaction between powers and limitations. Another problem results from interactions among powers. In a system of enumeration, the presence of one power can imply a limitation on another when, without the limitation, the latter power would make the former unnecessary.

In the spending context, the argument would be that the presence of limited regulatory powers implies some limits on the use of spending to influence behavior. That argument prevailed in *Butler* when the Court noted that Congress could not do indirectly through inducements what it could not do directly through regulatory penalties.[41] It is quite possible that Democrats in the 1930s would have been perfectly content with this result once the regulatory powers had been expanded or given their proper expansive construction. If the hypothetical New Deal drafters of a spending power amendment wanted to make that result ex-

39. If this seems excessively strange, imagine a southern state seeking to repudiate debt incurred in order to compensate slave owners for emancipation. In doing so, the state would be able to rely on Section 4 of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 4.

40. Such a clause would have prevented the Court from reaching the conclusion that it did in *Flast v. Cohen*. *See* Flast v. Cohen, 392 U.S. 83 (1968) (limiting judicial power to a role consistent with the separation of powers doctrine). How the Roosevelt Administration would have felt about that is an interesting question.

41. *See Butler*, 297 U.S. at 74.

plicit, they could provide that spending could not be used to give inducements to take action that Congress could not require. It also would have been relatively easy to add that the spending power could be used to provide inducements for private action, notwithstanding whether such action could be required or forbidden by the exercise of another congressional power.

A spending power amendment may be unusual in that so much attention must be given to constitutional context as opposed to the text of the amendment itself; however, the latter requires some thought too. Of course, the particular language employed in an amendment depends on what the authors are trying to accomplish, and here it depends on whether the New Dealers would have wanted any restrictions built into the spending power. For purposes of discussion, I assume that the New Dealers would have proposed what they regarded as a clarifying amendment, which would have clearly established a power to spend tax revenues for the common good of the country.

The first drafting step would thus be to make clear that the spending power extended beyond the other enumerated powers. It is quite possible that simply adding it to the list of enumerated powers would do that because later interpreters would assume that each power was there for a reason. If greater clarity were sought, it would not be difficult to say that Congress, in addition to the spending powers conferred elsewhere, should have power to spend, subject to the appropriate modification.

The appropriate modification remains elusive. "Common defense and general welfare" would not be a good idea because of the danger that it might be given a Madisonian reading, under which it is equivalent to "pursuant to the other enumerated powers."[42] If that option is put aside, some of the classic problems of constitutional interpretation arise, only as faced by the drafter rather than the interpreter.

Requirements that legislation be general are designed to limit the costs associated with interest group politics, through which influential subparts of the citizenry enrich themselves at the expense of taxpayers at large.[43] Implementing that principle,

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42. *See* David E. Engdahl, *The Spending Powers*, 44 DUKE L.J. 1, 19-20 (1994).

43. *See generally* Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L.

however, is sufficiently tricky as to make one wonder whether trying to do so is worthwhile. Most of the seemingly obvious formulations of the general welfare principle encounter the phenomenon that is so familiar from the other end of the interpretive telescope: Their application depends so strongly on the identity of the person given interpretive authority that the formulations amount largely to delegations of power to the interpreters. Substantive provisions of that sort are structural provisions in disguise. Whether a provision that directly invokes the substantive policy involved is a good idea thus depends on one's views about the allocation of authority between Congress and the courts, assuming that some form of judicial enforcement is expected. If the amendment were combined with a guard against judicial enforcement, or if it were anticipated that the rule of *Frothingham* would continue in effect, then it is unlikely that an explicit requirement that spending be for the general good would make much difference. That is not because Congress would not be moved in conscience by such a provision, but because it is quite unlikely that any government officer, whether Senator, Representative, or judge, would think that a desirable program was not in the national interest.

As the Constitution suggests, the next step is to search for more concrete proxies for the ultimate goal. The main proxy for generality in the Constitution as it stood in 1787 seems to have been geography. For example, direct taxes had to be apportioned among the states in a way that prevented redistribution;[44] nondirect taxes had to be uniform throughout the United States;[45] bankruptcy and naturalization laws had to be uniform;[46] and preferences among ports were impermissible.[47]

REV. 471, 504-07 (1988) (describing strategies "for controlling interest group activity").

44. *See* U.S. CONST. art. I, § 9, cl. 4 (stating that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken"), *amended by* U.S. CONST. amend. XVI (allowing such a tax on incomes); *see also* Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2340 (1997) (describing the apportionment requirement).

45. *See* U.S. CONST. art. I, § 8, cl. 1 (stating that "all Duties, Imposts and Excises shall be uniform throughout the United States"); *see also* Jensen, *supra* note 44, at 2340.

46. *See* U.S. CONST. art. I, § 8, cl. 4 (stating that Congress shall have power "[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States").

47. *See id.* art. I, § 9, cl. 6 (stating that "[n]o Preference shall be given by any

It seems unlikely, though, that the New Dealers would have sought similar requirements. Apportionment largely paralyzed the power to levy direct taxes;[48] a requirement of apportionment or even uniformity in spending, even if a good idea, probably would be administratively unworkable. Moreover, the Constitution already contains a powerful inducement to spread spending evenly across the country: Congress is elected.

A supermajority requirement is useful when there is concern that one interest group might exploit others. At times, various groups that have felt threatened have sought such protection. In the Federal Convention, the southern states initially demanded a supermajority requirement for navigation acts, statutes that could have given New England shippers a protected market in transporting southern goods.[49] Ultimately other features of the system satisfied the staple exporters.[50] Once again, however, it seems unlikely that the Roosevelt Administration would have wanted to impose further procedural obstacles to congressional action and, in particular, to give potentially reactionary minorities a new veto power.

Other methods of entrenchment do not purport to change the constitutional text. The most obvious relies on the force of precedent. One way to bind future constitutional interpreters to a particular view is simply to act on it, thereby establishing practice. Such practice can consist of both judicial opinions and congressional enactments. When Congress enacts legislation, it influences the decisions of later interpreters who take seriously what it has done.

Whether later interpreters will take either kind of precedent seriously depends on their own norms regarding the relevance of

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Regulation of Commerce or Revenue to the Ports of one State over those of another").

48. Probably the clearest demonstration of the inhibiting effect of the requirement that direct taxes be apportioned among the states is the fact that Congress responded to *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 637 (1895) (holding that taxes on income from property are direct and must be apportioned), not by passing an apportioned income tax, but by proposing the Sixteenth Amendment.

49. *See* Brett W. King, *The Use of Supermajority Provisions in the Constitution: The Framers, the Federalist Papers and the Reinforcement of a Fundamental Principle*, 8 SETON HALL CONST. L.J. 363, 387 (1998) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 169, 183, 445-56 (Max Farrand ed., 1937)).

50. *See id.* at 412.

earlier practice. Such norms vary. Different judges at different times have found constitutional precedent to be of more or less weight. For example, Chief Justice Taney once expressed a willingness to reconsider constitutional questions.[51] As for congressional precedent, its importance also is a subject of debate. According to one canon, the actions of early Congresses are given substantial weight because of their temporal proximity to the framing of the Constitution, whereas the views of later Congresses are no more likely to be correct than our own views.

In order to rely on precedent as a method of entrenchment, one would have to entrench rules of precedent, other than through an Article V amendment, or believe that one could forecast confidently what those rules would be in the future. It is difficult to understand how to do the former, or why one would believe the latter.

Nevertheless, entrenchment without any formal amendment is quite possible. In the 1930s, Congress and the Court did just that by adopting a broad reading of the spending power.[52] To entrench an interpretation of a power means to ensure that in the future, if the legislature decides to act on that interpretation, the judiciary will not stand in its way at the behest of losers in the ordinary political arena. It means to take steps that will make less likely the formation of a blocking minority that can operate through the courts.[53]

On a larger scale, the Supreme Court's decisional tendencies reflect the political views, including views as to proper jurisprudence and doctrine, of the President, the Senate, and of the legal elites who staff the higher federal judiciary. The latter group is the main source of the Court's countermajoritarian tendencies.[54] One way to prevent the formation of a blocking minority would be to do something that would marshal widespread support for

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51. *See* The Passenger Cases, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting).

52. *See supra* text accompanying note 3.

53. Because the constitutional principle at issue involves a legislative power, a blocking coalition that can operate through the legislative process is legitimate and not to be guarded against.

54. *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 543-51 (1997) (asking whether courts can "[b]e [t]rusted to [l]imit [t]hemselves to [a]nti-[e]ntrenchment [r]eview").

the power at stake, so that the President and the Senate would want to find Justices who have no trouble supporting the pro-power interpretation.

Government programs are more likely to last when they create their own constituency, especially if that constituency is the vast bulk of the country. In particular, such a program is likely to preserve the constitutional doctrine on which it rests, because whatever remaining minority opposes it will have a very difficult time getting the courts to agree. Public spending involves the most notorious example of a program that created an immense constituency. Social Security is the third rail of American politics: Touch it and you die. Another accurate image is to say that it is protected from constitutional challenge by a very, very deep trench. Broad and deep political support is the best guarantee of persistence. That is the foundation upon which the Constitution rests.