JUDGING WITHOUT JUSTICE: THE STERILE DEBATE OVER JUDICIAL ACTIVISM

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When a citizen claims that a congressional act or state statute violates his or her rights, what is a judge to do? In recent years we have witnessed a tumultuous debate about this issue between judicial "conservatives" and "liberals."[1] In Part I of this article, I shall describe each of these two positions and explain why both are constitutionally suspect. In Part II, I shall suggest that both of these positions stem from a skepticism about the existence of rights antecedent to government. I shall contend that, whether or not such a skeptical posture is philosophically warranted, it sterilizes a Constitution that was written by persons who believed in the existence of such rights. In Part III, I distinguish the "external" from the "internal" functions that individual rights should perform in constitutional analysis. Finally, in Part IV, I address the concerns of some that letting judges pursue justice will inevitably result in the "tyranny of the judiciary."

THE CURRENT DEBATE BETWEEN JUDICIAL LIBERALS AND CONSERVATIVES

Judicial liberals, who have dominated both the courts and academic discussions for decades, view the Constitution as a "living" document whose broad provisions warrant the judicial adoption of enlightened social policy to keep up with changing times. Since the 1930s, this has meant that federal and state courts have legitimated a virtually unfettered legislative power to remake the law governing economic relations, while strictly scrutinizing legislation that impinges on certain favored non-economic rights.

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Today's judicial conservatives resist the idea of judges substantively scrutinizing congressional and state legislative acts. They view political legitimacy as stemming entirely from majority will—a will, they say, that unelected federal judges, especially, have thwarted with impunity. Popularity elected legislatures are "accountable." Lifetime appointed judges are not. Judges are authorized only to "apply" the law, not to "make" it, by which judicial conservatives mean that judges must follow legislative orders—including the commands contained in the popularly ratified Constitution.

Which of these judicial philosophies is most appealing often depends upon what a person most fears. Judicial liberalism appeals to those who support a general expansion of governmental power for noble ends, but who fear that state legislatures will prove only too responsive to a majority's wrongheaded desire to trample the (non-economic) freedoms of the minority. Liberals would employ a rather freewheeling judicial activism by federal judges to counter the discretion of state legislatures.

Judicial conservatism, on the other hand, appeals to those who are afraid that an unaccountable "activist" judiciary will conspire to impose its own wrongheaded vision of social policy. To constrain this exercise of judicial power, they would confine federal judges to enforcing the rule-like provisions of the Constitution[2] and, where the Constitution is more general, they would confine judicial enforcement to those specific applications that were contemplated or intended by the constitutional framers.

While the fears of each camp are warranted and deserving of serious attention, I think both of these judicial philosophies are constitutionally flawed. The first is to override the original constitutional scheme of limited, enumerated federal powers as stipulated in the Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[3]

Despite this constitutional injunction, judicial liberals view the powers of Congress to regulate economic activity as virtually unbounded. Since the 1930s this view has dominated Supreme Court opinions. This view has been facilitated by, among other devices, an expansive interpretation of the "commerce clause"[4] and the "necessary and proper clause"[5] to grant Congress the power to regulate economic activity without any constitutional restraint.[6]

Judicial liberal's second constitutional mistake is to advocate a hierarchy of rights or liberties. Legislative acts impinging on certain "personal" (non-economic) liberties are accorded judicial scrutiny; economic liberties receive no effective protection. The distinction between economic and non-economic liberties, however, receives no support from a Constitution that ensures the "equal protection of

the laws"[7] and that explicitly protects the "obligation of contract,"[8] the undifferentiated "privileges or immunities"[9] of citizens, and the "life, liberty, or property"[10] of all persons. Moreover, the Constitution provides that "private property may not be taken for public use, without just compensation."[11]

Although some modern judicial (and political) liberals clearly wish it had been otherwise, the Constitution of the United States expressly acknowledges property rights and the obligation of contract. Indeed, the Supreme Court has never explicitly refused to review economic legislation. Instead, it purports to determine whether there existed a "rational basis" for economic legislation—a standard of review that, as applied by the courts, one hundred percent of economic regulations can pass.

Judicial conservatives embrace the liberals' broad post-New Deal reading of congressional powers but compound this mistake in two ways. First, they limit judicial review of legislative acts to an application of the narrowest possible reading of only those rights that are clearly specified in the Constitution. Second, they adopt an expansive, antebellum view of state legislative discretion. Consequently, judicial conservatives fiercely resist judicial protection of *both* non-economic and economic rights.

This vision of expansive legislative powers, constrained only by enumerated rights, turns the actual constitutional text upside down. At the federal level, the Constitution explicitly establishes a structure of limited enumerated governmental powers and expansive individual rights. When Congress exceeds its enumerated powers by acting in ways not shown to be truly "*necessary* and *proper*" to these enumerated powers, such acts are *ultra vires* and should not be recognized by courts as law. Therefore the substance of congressional acts must be evaluated by judges to see whether they are in fact within an enumerated power. Those acts which survive this scrutiny must be further evaluated and stricken if they violate individual rights—for example, by taking property for public use without paying just compensation or by violating a right of free speech.

Judicial conservatism also distorts the issue of federal judicial scrutiny of state statutes by ignoring fundamental structural changes that occurred long after the framing of the original Constitution. True, the original text left state legislatures free to act in ways that Congress could not, but this structure was found to be grossly deficient.[12] Most significantly, it permitted state laws enforcing human slavery. The Thirteenth Amendment outlawed slavery,[13] but did not prevent other legislative abuses that were widespread after the civil war-abuses that often took the form of economic regulation.[14] The Fourteenth[15] and Fifteenth[16] Amendments, however, fundamentally altered the original constitutional structure. They expressly authorized Congress and the courts to protect from state infringement the economic and non-economic rights to "life, liberty, or property" of all persons, as well as the "privileges or immunities" of all citizens and the right to vote.[17]

If a written constitution means anything, it means that even constitutional rights that are unfashionable according to current political thinking merit genuine judicial protection until the

Constitution is amended. Judges who turn a blind eye to enumerated powers and constitutionally protected economic liberties dangerously undermine their own authority. As people come to believe that the Supreme Court makes up its own constitution as it goes along in order to fulfill a political agenda, the legitimacy of judicial review is eroded and the Constitution is debased.

STERILIZING THE CONSTITUTION

An underlying philosophical skepticism pervades both judicial liberalism and conservatism. Judicial conservatives consistently pose a false choice between an objectively determinate meaning of rule-like constitutional provisions on the one hand and the imposition of judges "subjective preferences" on the other.[18]

Many judicial conservatives allow for no middle ground because they share the view of Jeremy Bentham that "there are no such things as natural rights—no such things as rights anterior to the establishment of government...."[19] Once this skeptical premise is accepted, judicial decisionmaking that does not rest squarely on a legislative command can be nothing but illicit, subjective lawmaking.

For their part, judicial liberals have long disparaged any assertion of unenumerated substantive rights against state power as positing, in the words of Justice Holmes, "a brooding omnipresence in the sky."[20] While many judicial liberals were led to this view by the prevailing pragmatism and utilitarianism of modern thought, there was a political motive as well. For a time, the judicial protection of rights antecedent to government operated as a serious constraint on the growth of the modern regulatory-welfare state. With these institutions in place, however, judicial liberal fealty to rights skepticism has recently abated, permitting them to favor the judicial protection of "fundamental" (non-economic) rights. Moreover, many have sought to harness the rhetoric of "entitlements" to resist the eroding popularity of expansive redistributionist measures.[21]

Although intellectuals of every ideological stripe have shared a skeptical view of rights for a very long time, grave problems arise when the Constitution is interpreted in this light. The original Constitution, the Bill of Rights, and the Fourteenth Amendment were not written by Benthamites. They were written by persons who accepted the reality of Lockean natural rights.[22] This philosophy was formally enacted in the Ninth Amendment:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage *others retained* by the people.[23]

The Ninth Amendment has long been dismissed as a "mere" rule of construction by liberals and conservatives alike. Even if this was true, however, its importance to today's debate over judicial activism is undiminished. One reason the Ninth Amendment was included in the Constitution was precisely to avoid the cramped construction of individual rights that judicial liberals in the recent past insisted—

and that conservatives continue to insist—was the framers' "original intent." As James Madison's original draft of what became the Ninth Amendment makes clear:

> The exceptions *here or elsewhere* in the Constitution, made in favor of *particular rights*, shall not be construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution, but either as *actual limitations of such powers*, or as inserted merely for greater caution.[24]

In sum, enumerated constitutional rights were meant to supplement the scheme of enumerated powers in two ways: by further limiting these powers or by acting as a redundant safeguard against their illicit expansion. They were not intended to foreclose the existence and equal protection of other rights retained by the people.

The framers rightly believed that, while democracy is a useful constraint on the tyranny of the executive branch, it is insufficient to protect the individual from the tyranny of the legislature. For this reason, they wrote a Constitution limiting the Federal government to enumerated powers, and containing not one, but several passages recognizing the existence of economic and non-economic rights that even majoritarian institutions should not violate. As Madison argues as in Congress he introduced his version of the Bill of Rights:

> [T]he legislative [branch]...is the most powerful, and most likely to be abused, because it is under the least control. Hence, so far as a declaration of rights can tend to prevent the exercise of undue power, it cannot be doubted, that such declaration is proper.[25]

Notwithstanding this elaborate effort, one by one, most of explicit power-limiting provisions and rights-protecting passages have been steadily rendered functionless by the Supreme Court. Once interpreted away, these protective strictures never seem to resurface. Judges must salvage these long-neglected provisions of the text, or the American experiment with constitutional limits on governmental power will have failed.[26]

THE INTERNAL AND EXTERNAL FUNCTIONS OF UNENUMERATED RIGHTS

The limitation of government to its enumerated powers and the vigorous protection of enumerated rights would go a long way towards ensuring liberty and prosperity, but this is not enough. In addition, the unenumerated individual rights protected by the Constitution also must be taken seriously. Such rights are neither mystical creatures, nor unfathomable mysteries. Rather, they establish a vital baseline of individual freedom from external interference with voluntary economic and non-economic activities. Unenumerated rights or

"privileges" and "immunities" from government constraints create a constitutional presumption in favor of liberty and against legislative constraints on liberty.

In constitutional analysis, individual rights have both an internal and an external function. Externally, rights provide a means of critically evaluating a political scheme. The American revolutionaries, for example, used a rights analysis to criticize the acts of Parliament and to justify acts of rebellion against the Crown. The role played by individual rights *within* an assumedly justified constitutional scheme, however, is distinct from using individual rights to critically evaluate the legitimacy of the constitutional scheme itself. In this mode, a rights analysis has an internal role to play.

In establishing the Constitution, the framers contemplated an internal role for individual rights—that is, they contemplated the protection of individual rights within the Constitutional scheme. Such an internal mode of rights analysis takes the legitimacy of the Constitutional structure as given, but requires an interpretation of this structure that renders it as consistent with an individual rights analysis as possible. Of course, it would have been possible to devise a constitution that did not contemplate the protection of unenumerated rights. Justifying such a constitution by an external rights analysis might, however, prove difficult as internal and external rights diverge. The constitutional protection of "internal" rights, therefore, can enhance the external legitimacy of the constitutional scheme as a whole.

However, it is important to note that even within a scheme that protects unenumerated rights, an internal analysis of rights could markedly diverge at points from an external rights analysis of the Constitutional structure as a whole. Internally, rights claims have a presumptive character that permits them to be overcome by sufficiently weighty Constitutional strictures. So, for example, although the Constitution continues to protect property rights, it also explicitly permits the collection of an income tax[27] and the regulation of foreign trade.[28] A constitutional scheme that permits such powers may be criticized by an external rights analysis, but internally, the taxing power and commerce powers must be permitted, albeit in a manner that is as consistent with individual rights as possible.

Although the Constitutional presumption favoring individual liberty sometimes may be overcome by sufficiently weighty constitutional strictures, this presumption is of great practical importance. It requires that any claim by some—including those calling themselves a legislature—to control forcibly the actions of others *must be justified.*[29] Rights "theory" is the systematic study of what constitutes a sound moral justification for the use of force by one against another.[30] If express constitutional warrant for this kind of inquiry is required, the Constitution of the United States provides it.

For this inquiry to be meaningful, however, the legislature cannot be the judge in its own case. We need an impartial third party to adjudicate claims by individuals that persons designated a legislature have exceeded their constitutional authority and violated individual rights. In short, we need substantive "judicial review" of legislative action.

As Madison argued on the floor of Congress,

> If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will naturally be led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.[31]

Accordingly, the federal courts are empowered by Article III to decide "all Cases, in law and Equity, arising under this Constitution,"[32] just as common law judges have for centuries determined the content of individual rights.[33]

COMBATING JUDICIAL OVERREACHING

Judicial conservatives fear that judicial review of the substance of legislative acts will lead (or has already led) to a "tyranny of the judiciary." Substantive judicial review, they argue, enables judges to substitute their own "subjective policy preferences" for those of the legislature. Even if the rights skepticism of judicial conservatives is in error, the danger of judicial overreaching is quite genuine.

Yet the means favored by judicial conservatives for preventing judicial tyranny exacts too steep a price. By opposing substantive scrutiny, judicial conservatives would combat the risk of judicial overreaching by all but ensuring legislative overreaching. Instead, the Constitution contemplates that judicial overreaching be minimized by utilizing three important formal constraints on the powers of judges engaged in reviewing legislation.

First, constitutional rights only operate against the government. They do not generate rights claims against private parties.[34] Second, judges have no authority to exercise executive functions or to spend state or federal tax moneys (except to order the payment of damage awards). In exercising substantive review, judges, in Jefferson's words, must be "kept strictly to their own department...."[35] Finally, the Constitution contemplates the protection of "negative" not "positive" rights.[36] Constitutional rights protect individual actions that are "privileged" and "immune" from governmental interference. While these rights may justify equal access to "public" property and processes, they do not justify claims to wealth transfers.

In short, according to these formal limitations, proper substantive review only authorizes judges to say no. Judges may only strike down legislative acts, not pass them. Judicial negation is not legislation.[37]

Moreover, the Constitution provides three important structural safeguards of judicial performance. First, both the President and the Senate may scrutinize the "judicial philosophy" of all judicial appointments[38]; second, federal judges may be impeached by the Senate[39]; and, third, where the text itself is wrong, it may and should be amended.[40] Any lack of "public will" to use these constitutionally authorized constraints on judicial power suggests that the problem with the judiciary today is not that it has thwarted the majority's will, but that it has succumbed to it. While the danger of judicial overreaching is quite real, with these formal and structural constraints, the judiciary is indeed the "least dangerous branch."

CONCLUSION

The debate about judicial philosophies often camouflages a more fundamental debate about political philosophies. The authors of the Constitution, the Bill of Rights, and the Fourteenth Amendment tried to design a constitutional structure and constraints that would facilitate their political views. It is no accident therefore, that this structure pinches the feet of those who do not accept the framers' political vision. Some try to evade this structure by expanding or contracting the role of the judiciary.

Still, although political vision is all that can ever justify a constitution, the debate over the appropriate role of the courts is itself important. We remain at peace with one another by confining our political disputes to constitutionally permissible channels. Those on the right or left who manipulate the constitutional text to support their political vision invite grave social conflict by undermining the legitimacy of these channels. They convert the Constitution into a mere fig leaf for wholly extra-constitutional debate. We must end this dangerous game by restoring both the textual constraints on governmental power and the vision of justice based on individual rights that the Constitution presupposes to their rightful places in constitutional adjudication.

1. In this essay, I will refer to *judicial* liberals and conservatives. Such persons may, but need not also be *political* liberals and conservatives.

2. For example, the provision that stipulates that a person must be thirty-five years old to be President. See Article II, Sec. 1.

3. U.S. Constitution, Amend. X.

4. U.S. Constitution, Art. I, Sec. 8 ("The Congress shall have Power...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...").

5. U.S. Constitution, Art. I, Sec. 8 ("The Congress shall have Power...To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers...").

6. See Richard A. Epstein, "The Proper Scope of the Commerce Power," *Virginia Law Review* 73 (1897): 1387-1455.

7. U.S. Constitution, Amend. XIV ("No State shall...deny to any person within its jurisdiction the equal protection of the laws").

8. U.S. Constitution, Art. I, Sec. 10 ("No State shall...pass any...Law impairing the Obligation of Contracts...."). See Richard A. Epstein, "Towards a Revitalization of the Contracts Clause," *University of Chicago Law Review* 51 (1984): 703-751.

9. U.S. Constitution, Amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States....") See Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, NC: Duke University Press, 1986).

10. U.S. Constitution, Amend. V ("No persons shall be...deprived of life, liberty, or property, without due process of law...."); U.S. Constitution, Amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law...."). For a discussion of the "substantive" conception of "due process of law" that preceded the adoption of the Fourteenth Amendment, see Michael Les Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism, *Law and History Review* 3 (1985): 293-331.

11. U.S. Constitution, Amend. V. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985). I summarize Epstein's thesis in Randy E. Barnett, Book Review, *Ethics* 97 (1987): 669-672. For a useful criticism of this thesis, see Jeffrey Rogers Hummel, "Epstein's Takings Doctrine and the Public-Goods Problem" (book review), *Texas Law Review* 65 (1987): 1233-1242.

12. State legislative power was not originally unbounded, however. Significantly, Article I. Sec. 10 stipulated that "No State shall...make any Thing but gold and silver Coin a Tender in Payment of debts; pass any...ex post factor Law, or Law impairing the Obligation of Contracts...." By the time the Fourteenth Amendment was passed, these strictures had already been denied any meaningful function in constraining state legislatures.

13. U.S. Constitution, Amend. XIII ("Neither slavery nor involuntary Servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction").

14. See e.g. Jennifer Roback, "The Political Economy of Segregation: The Case of Segregated Streetcars," *Journal of Economic History* 46 (1986): 893-917.

15. See supra notes 7 and 9.

16. U.S. Constitution, Amend. XV ("The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude").

17. Note that while the Fifteenth Amendment prohibits the denial or abridgement of the right to vote "on account of *race, color, or previous condition of servitude*," the protections of the Fourteenth Amendment are not limited to legislative abuses on this basis.

18. See Stephen Macedo, *The New Right v. The Constitution* (Washington, DC: Cato Institute, 1986), pp. 33-41.

19. Jeremy Bentham, "Anarchical Fallacies," in A. Meldon, ed., *Human Rights*, (Belmont, CA: Wadsworth, 1970), p. 31.

20. Southern Pacific Co. v. Jensen, 224 U.S. 205, 222 (1917) (Holmes, J., dissenting).

21. I chronicle the growing rejection of rights skepticism and the related philosophy of legal positivism in Randy E. Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy* (book review), *Harvard Law Review* 97 (1984): 1223-1236.

22. See Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," *Harvard Law Review* 42 (1928): 149-185, 369-409; Thomas C. Grey, "The Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought,"

Stanford Law Review 30 (1978): 843-893; Suzanne Sherry, "The Founders Unwritten Constitution," *University of Chicago Law Review* 54 (1987): 1127-1177.

23. U.S. Constitution, Amend. IX (emphases added). I discuss the Ninth Amendment at length in Randy E. Barnett, "James Madison's Ninth Amendment," in *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (R. Barnett, ed. forthcoming). See also, "Symposium on Interpreting the Ninth Amendment," *Chicago-Kent Law Review* (forthcoming).

24. *Annals of Congress*, vol. 1 (Washington, DC: J. Gales & W. Seaton, ed. 1834), p. 452 (emphasis added).

25. Madison, supra note 24, at 454.

26. Two recent cases interpreting the "takings clause" of the Fifth Amendment show that rehabilitating right-protecting provisions is possible, even after years of neglect. See First Evangelical Lutheran Church of Glendale v. Los Angeles County, 480 U.S. ___, 107 S.Ct. 2378 (1987); Nollan v. California Coastal Commission, 483 U.S. ___, 107 S.Ct. 3141 (1987).

27. U.S. Constitution, Amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.")

28. U.S. Constitution, Art. I, Sec. 8 ("The Congress shall have Power...To regulate Commerce with foreign Nations...").

29. On the need for moral justification of legal coercion, see Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press), p. 110; David Lyons, "Constitutional Interpretation and Original Meaning," *Social Philosophy and Policy* 4 (1986): 78-80; Dale A. Nance, "Legal Theory and the Pivotal Role of the Concept of Coercion," *University of Colorado Law Review* 57 (1985): 1-43.

30. For one approach, see Randy E. Barnett, "Pursuing Justice in a Free Society: Part One—Power v. Liberty," *Criminal Justice Ethics* 4:2 (Summer/Fall 1985): 40-72; *id.* Foreword: "Why We Need Legal Philosophy," *Harvard Journal of Law and Public Policy* 8 (1985): 6-15; *id.* "*A Consent Theory of Contract, Columbia Law Review* 86 (1986): 291-300.

31. Madison, supra note 24, at 457.

32. U.S. Constitution, Art. III, Sec. 2.

33. I discuss substantive judicial review at greater length in Randy E. Barnett, Foreword: "Judicial Conservatism v. A Principled Judicial Activism," *Harvard Journal of Law and Public Policy* 10 (1987): 273-291.

34. This is known in constitutional parlance as the "public-private" distinction. I explain this and other usages of the distinction in Randy E. Barnett, Foreword: "Four Senses of the Public Law-Private Law Distinction," *Harvard Journal of Law and Public Policy* 9 (1986): 267-273.

35. Letter of Thomas Jefferson to James Madison (March 15, 1789), reprinted in Bernard Schwartz, *The Bill of Rights: A Documentary History*, vol. 1 (New York: Chelsea House, 1971), p. 620. This passage was part of Jefferson's argument that Madison had to date underestimated the effectiveness of judicial review to combat legislative abuses:

> In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.

Some credit Jefferson's influence for Madison's later explicit endorsement of judicial review in his speech in the House of Representatives. See Bernard Schwartz, *The Great Rights of Mankind* (Oxford: Oxford University Press, 1977), p. 118.

36. See David P. Currie, "Positive and Negative Constitutional Rights," *University of Chicago Law Review* 53 (1986): 864-890.

37. Analogously the Senate may reject, but may not choose a Supreme Court Justice and the President may veto, but not initiate and pass legislation. We consider neither

of these functions to be "lawmaking." Still I must emphasize that these are only analogies. Judges do not have a "veto" power over legislation that they, like the President, may exercise simply because they disagree with the wisdom of legislation. Rather, they may strike down legislation only if it is unconstitutional. The point is that when they do so, they are not engaged in *lawmaking*—except to the extent that their act influences future judicial decisions