

JUDICIAL REVIEW: RECKONING ON TWO KINDS OF ERROR

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Antonin Scalia has explained why he believes courts should refrain from intervening to protect what are generally described as economic liberties—chiefly, the right to own and use property and the right to dispose of both property and labor by contract. In so doing, he has recounted at length all the errors and confusions that beset courts when they try to vindicate these basic economic rights by constitutional means.

There are powerful reasons why judges may do badly in this endeavor. They are isolated, and they tend to be drawn from political or social elites. Their competence on economic matters is often limited. When they pass on complex legislation, they often misunderstand its purpose and effect. By any standard, the error rate of their decisions has been high. I cannot challenge his conclusions simply by saying that he underestimates the sterling performance of his colleagues on the bench. If the only issue were judicial competence, Scalia's conclusion would swiftly follow: Since courts cannot master economic matters, they should adopt a form of judicial *laissez faire* that keeps judges' hands off the economic system.

As stated, Scalia's plea for judicial restraint is not a defense of legal anarchy. Instead, it accepts government control over economic affairs, but guarantees that this control will be exercised by the legislative and executive branches of government (as well as the administrative agencies they have created). By necessity, only political checks are available to ensure that national policy does not stray too far from the social consensus.

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Scalia's position represents the mainstream of American constitutional theory today. My purpose is to take issue with the conventional wisdom. I hope to persuade Scalia to take upon himself, and to pursue energetically, the tasks that our Constitution assigns to him and to other federal judges. Note that in urging this course I speak as an academic who would impose on sitting judges duties more extensive than they are often willing to assume.

In my view, Scalia has addressed only one side of a two-sided problem. He has pointed out the weaknesses of judicial action. But he has not paid sufficient attention to the errors and dangers in unchanneled legislative behavior. The only way to reach a balanced, informed judgment on the intrinsic desirability of judicial control of economic liberties is to consider the *relative* shortcomings of the two institutions—judicial and legislative—that compete for the crown of final authority. The constitutionality of legislation restricting economic liberties cannot be decided solely by appealing to an initial presumption in favor of judicial restraint. Instead, the imperfections of the judicial system must be matched with the imperfections of the political branches of government.

What are the problems with legislation? When we put someone in charge of the collective purse or the police force, we in effect give him a spigot that allows him to tap into other people's property, money, and liberty. The legislator that casts a vote on an appropriations bill is spending not only his own wealth, but everyone else's. When the power of coalition, the power of factions, the power of artifice and strategy come into play, it often turns out that legislatures reach results that (in the long as well as the short run) are far from the social optimum.

To take the limiting case, suppose a group of people have a profound and anxious debate, and then decide, by a bare majority, that the prevailing distribution of wealth is wrong. So the 51 percent decide to condemn, without payment, all the property of the 49 percent. Strict majoritarian principles would allow them to get away with that. But Scalia and others would say, "It cannot be done because the eminent domain clause in our Constitution provides that when government takes private property for public use, it must pay." The winners in a legislative battle may not confiscate the property of the losers.

Now, note the slippery slope. We have identified a form of legislative failure, along with a constitutional provision that seems to respond to that kind of failure. The first step down the slope is the announcement that a particular piece of legislation, even if it reflects the consensus of the population at large, is not going to work. And

once we take that step, where in principle do we stop? Suppose we change the dynamics of coalition building, so that it takes 80 percent of the population to confiscate the wealth of the other 20 percent. Does this broader consensus mean that the program is acceptable and can proceed? Or are the perils of faction not indeed, in many ways, even greater in the second case than they were before, since the minority is now more isolated and less able to defend itself in the legislative forum?

Once one starts down the slippery slope, one cannot stop, at least without a theory. Intellectually, we must conclude that much of the impetus behind legislative behavior is to induce forced exchanges—to take from some people more than they get in exchange, in order to provide benefits to those who happen to control the political levers. To some extent this is unavoidable, since we need a system of collective controls in order to operate the police, the courts, the national defense, and so on. And opportunities for abuse in government operations are inseparable from that collective need.

The theory of constitutionalism, as I understand it, tries to find a way to minimize the sum of the abuses that stem from legislative greed on the one hand, and judicial incompetence on the other. There is, by and large, no third alternative to this sorry state of affairs. What I fear is wrong with Scalia's statement of the argument is this: By focusing exclusively on the defects he finds in the judicial part of the process, he tends to ignore the powerful defects that pervade the legislative part of the process. Our Constitution reflects a general distrust toward the political process of government—a high degree of risk aversion. That is why it wisely spreads the powers of government among different institutions through a system of checks and balances. To provide no (or at least no effective) check on the legislature's power to regulate economic liberties is to concentrate power in ways that are inconsistent with the need to diversify risk. To allow courts to strike down legislation, but never to pass it, helps to control political abuse without undermining the distinctive features of the separate branches of government. Once we realize that all human institutions (being peopled by people) are prey to error, the only thing we can hope to do is to minimize those errors so that the productive activities of society can go forward as little hampered as possible.

Thus far I have been discussing general political theory: How is it that one would want to organize a constitution? But we do not have to talk about constitutions in the round and in the abstract. We have an actual constitution, and since it is a written one, we can check to

see how it handles the particular problem of protecting economic liberties.

To listen to my colleague—and to the many other advocates of judicial restraint—one would almost think that the Constitution contained only the following kinds of provisions: those organizing a judiciary, a legislature, and an executive; and those providing for separation of powers, checks and balances, and so on. All those devices—efforts to divide and conquer the governing power—are efforts to limit the abuses of factions. But they are not the only provisions our Constitution contains. It also contains many broad and powerful clauses designed to limit the jurisdiction of both federal and state governments. The commerce clause, at least in its original conception, comes to mind. Other clauses are designed to limit what the states and the federal government can do within the scope of their admitted powers. These include the eminent domain clause (which always bound the federal government and since the Civil War amendments has bound the states as well), the contracts clause, the privileges and immunities clause found both in the original Constitution and the Fourteenth Amendment, the equal protection clause, and due process.

These provisions are not curlicues on the margins of the document; they are not without force or consequence. They are provisions designed to preserve definite boundaries between public and private ordering. Take the question of minimum wages. The principle of freedom of contract—that parties should be free to set wage terms as they see fit—is, given the contracts clause, on a collision course with that sort of legislative regulation of the economy. So it is with the eminent domain question discussed above. Many of the particular provisions of the Constitution are designed to deal with the very kinds of questions that political theory indicates to be sources of our enormous uneasiness and distrust of the legislative process.

The next question is, how have these constitutional provisions been interpreted in actual practice? A key element is the “rational basis” test, which holds that so long as there is some “plausible” or “conceivable” justification for the challenged legislation, it is invulnerable to constitutional attack. Under the guise of this test, judges have decided that the last thing they will do is look hard and analytically at any political institution, at any legislative action, that regulates economic affairs. It turns out that Scalia’s position, already stated even more forcefully by the Supreme Court itself, completely abandons the idea that serious intellectual discussion can yield right and wrong answers on matters of political organization and constitutional interpretation. Courts simply give up before they try, and

embrace an appalling sort of ethical noncognitivism. Anything legislatures do is as good as anything else they might have done; we cannot decide what is right or wrong, so it is up to Congress and the states to determine the limitations of their own power—which, of course, totally subverts the original constitutional arrangement of limited government.

Part of the explanation for the judiciary's poor performance now becomes clear. When courts do not try, they cannot succeed. When they use transparent arguments to justify dubious legislation, they cannot raise the level of debate. When courts (following the lead of the Supreme Court) hold that the state has the right to say X, when they know X is wrong, they fritter away their own political authority on an indefensible cause.

But can matters ever be this clear? In some instances it has seemed that no conceivable interpretation of the constitutional text could generate or justify the results that the Supreme Court has been prepared to reach. Take its decision in *Hawaiian Housing Authority v. Midkiff* (1984). There is a good reason why the constitutional clause restricting the seizure of property by eminent domain contains a provision specifying that the seizure must be for public use. The last thing one needs a government for is to arrange a set of coerced transfers between A and B when voluntary markets can arrange the same transfers without the abuses of faction. For the most part, this means that when we want the government to take property, we want it to do so in order to generate a public good, some nonexclusive benefit, that a private market cannot generate. Legislation (like that challenged in *Midkiff*) that simply takes land and transfers it from landlords to tenants, or the reverse, constitutes the paradigmatic transaction that the eminent domain clause was designed to prohibit. So when the Court sustained the Hawaiian statute, it declared the central wrong to be perfectly legal. The justices stood the Constitution on its head. They said, in effect, that although the eminent domain clause must have been put there for some purpose, we cannot figure out what that purpose might be, so we might as well read it out of the document and act as if it had never existed.

The courts have shown the same pattern of behavior in other cases. For example, it seems clear today that they will no longer construe the police power to protect private contracts of any sort—even when those contracts complied with all applicable rules at the time of their formation. What does a clause that prohibits impairing the obligation of contracts mean? Today, it turns out (with only minor exaggeration) that a legislature can simply decide to nullify contractual provisions on the grounds that this legally imposed breach of contract makes

one of the contracting parties better off than it was before. If that is the only test, then every contract is vulnerable to judicial nullification.

This judicial deference in the protection of economic rights has enormous costs. The moment courts allow all private rights to become unstable and subject to collective (legislative) determination, all of the general productive activities of society will have to take on a new form. People will no longer be able to plan private arrangements secure in the knowledge of their social protection. Instead, they will take the same attitude toward domestic investment that they take toward foreign investment. Assuming that their enterprise will be confiscated within a certain number of years, domestic investors will make only those investments with a high rate of return and short payout period, so that when they see confiscation coming, they will be able to run. To be sure, the probability of expropriation is greater in many foreign contracts than it is in the United States. But given our record of price controls and selective industry regulation, it is clear that the once great protections we enjoyed have been compromised, and for no desirable social goal.

I submit that this is not what we want legislatures to do. It is wrongheaded to argue that, because an auditor cannot hope to correct every abuse in the Defense Department's procurement policies, he should therefore refuse to go after the \$5,000 coffee pot—or that because a judge cannot hope to correct every infringement of economic liberties, he should therefore refuse to go after large-lot zoning restrictions. There are many blatantly inappropriate statutes that cry out for a quick and easy kill. Striking them down puts no particular strain on the judiciary. To invalidate a statute, a judge need not make complex factual determinations or continually supervise large branches of the federal government. He need not take over school boards, try to run prisons or mental hospitals, or demand that Congress appropriate funds. He need only say that, in certain circumstances, the government cannot do something—period—while in other circumstances, it can, but must pay those people on whom it imposes a disproportionate burden.

Government exists, after all, because the market's ability to organize forced exchanges is limited. We need to collect taxes, to impose regulations, to assign rights and liabilities through a centralized process, but only for limited public purposes. Our guiding principle should derive from our Lockean tradition—a tradition that speaks about justice and natural rights, a tradition that understands the importance of the autonomy of the person, and respects it in religion, in speech, and in ordinary day-to-day affairs. When government wishes to encroach on those rights in order to discharge its collective

functions, it must give all the individuals on whom it imposes its obligations a fair equivalent in exchange. It may be that it is not always possible to measure that equivalence. Possibly we cannot achieve the goal of full compensation and simultaneously provide the collective goods. I am prepared to debate at great length where the proper margins are with respect to the application of this general principle. What I am not prepared to say is that we can organize our society on the belief that the question I just posed is not worth asking. Consequently, when the government announces that it has provided a comparable benefit, courts should not take its word on faith, when everything in the record points indubitably to the opposite conclusion.

When one compares the original Constitution with the present state of judicial interpretation, the real issue becomes not how to protect the status quo, but what kinds of incremental adjustments should be made in order to shift the balance back toward the original design. On this question, we can say two things. First, at the very least, we do not want to remove what feeble protection still remains for economic liberties. Any further judicial abdication in this area will only invite further legislative intrigue and more irresponsible legislation. Yet recent Supreme Court decisions have tended to invite just that. Second, since courts are bound to some extent by a larger social reality, we cannot pretend that the New Deal never happened. Rather, we must strive to regain sight of the proper objectives of constitutional government and the proper distribution of powers between the legislatures and the courts, so as to come up with the kinds of incremental adjustments that might help us to restore the proper constitutional balance.

Judicial restraint is fine when it keeps courts from intervening in areas where they have no business intervening. But the world always has two kinds of errors: the error of commission (type I) and the error of omission (type II). In the context of our discussion, type I error refers to the probability of judicial intervention to protect economic rights when such intervention is not justified by constitutional provisions. And type II error refers to the probability of forgoing judicial intervention to protect economic liberties when such intervention is justified. This second type of error—the failure to intervene when there is strong textual authority and constitutional theory—cannot be ignored.

What Scalia has, in effect, argued for is to minimize type I error. We run our system by being most afraid of intervention where it is not appropriate. My view is that we should minimize both types of error. One only has to read the opinions of the Supreme Court on economic liberties and property rights to realize that these opinions

are intellectually incoherent and that some movement in the direction of judicial activism is clearly indicated. The only sensible disagreement is over the nature, the intensity, and the duration of the shift.

At this point, the division of power within the legal system is not in an advantageous equilibrium. If the judiciary continues on the path of self-restraint with respect to economic liberties, we will continue to suffer social and institutional losses that could have been reduced by the prudent judicial control that would result from taking the constitutional protections of economic liberties at their face value.