ECONOMIC LIBERTY, THE CONSTITUTION, AND THE HIGHER LAW

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INTRODUCTION: THE CONSTITUTIONAL CONTEXT

Our topic for this part of our symposium is "Interpreting the Economic Rights Provisions of the Constitution." Clearly, we would not be here if we thought that all was well with the interpretation of those provisions. Over the years, but especially over the course of the twentieth century, our economic rights have fallen to a kind of second class status, so much so that President Reagan, speaking from the Jefferson Memorial on the eve of last year's celebration of our national independence, thought it fitting to call for an "Economic Bill of Rights," which he later characterized as a "fundamental reform that sees to it that our economic freedom is every bit as protected as our political freedom."[1]

Yet if our concern for the demise of our economic liberty is serious, then our topic, I submit, is too narrowly drawn. Indeed, going still further, we should no more limit our attention to the Constitution as a whole than to its economic rights provisions. For the Constitution is not a free-standing force. It is a document, brought into being in time and amended over time, that compels because of the moral and political theory that stands behind it. Over the years, however, that theory itself has changed, at least in emphasis. If I may characterize that change not with reference to methods of constitutional interpretation — strict versus loose construction, interpretivism versus non-interpretivism — but with reference to the substantive contrast that has recently dominated our bicentennial discussion, I would say that the moral and political theory standing behind the Constitution has evolved from one that emphasized

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This essay is a slightly revised version of remarks delivered at a Federalist Society symposium on "Constitutional Protections of Economic Liberty," held at the George Mason University School of Law on October 16-17, 1987, when the author was Director of the Asylum Policy and Review Unit, U.S. Department of Justice. The views expressed here are those of the author, not necessarily those of the Department of Justice.

1. Remarks by President Reagan to the Citizens of Port Washington, Wisconsin (July 27, 1987).

individual rights and individual liberty to one that, by the earlier parts of this century, at least, was emphasizing democratic rule. More recently, of course, a version of the emphasis on individual rights has reemerged to dominate the theoretical background; but this version has generated in turn a school that places its faith again in democratic rule, such that today it can be said, perhaps, that neither school dominates.

If my characterization of these background forces reaches a fundamental divide, we may reasonably ask which of these opposing emphases, individual rights or democratic rule, has a better claim to being justified. Recasting our topic in light of this more basic question, we may ask whether a democratic majority has a right, constitutional or otherwise, to widely regulate our economic affairs or whether, as in areas such as religion or speech, our constitutional order entails a strong presumption against such regulation, a strong presumption in favor of economic liberty.

I shall argue that a strong presumption in favor of economic liberty can in fact be justified whereas a presumption in favor of democratic regulation cannot. In so arguing I will be suggesting both that there is a closer connection than is often supposed between what Edward Corwin has called the "Higher Law" background of the Constitution and the Constitution itself and that the Constitution compels not from its status as positive law but from its reflection of this higher law.[2] I shall argue, in short, that the foundation of the American order is at bottom moral, not merely political or legal, and that we unjustifiably restrict our understanding of that order if we limit ourselves to positive statements of constitutional will and the interpretive materials that immediately surround those statements, a restriction that can lead only to incomplete analysis and hence to misunderstanding that order.

I. Democratic Rule, Individual Rights, and the Problem of Consent

We begin with the justification for democratic rule, which is grounded, as the Declaration of Independence makes clear, in the idea of consent: "that to secure these Rights, Governments are instituted among Men, deriving their *just* Powers from the *Consent* of the Governed."[3] Plainly, it is not from the good consequences they produce that democratic governments derive their legitimacy: if that were the case, the King might be on equal or even better moral ground than democracies, provided the consequences he produced were equal to or better than those produced by some democratic government. No, it is not from consequences but from consent, not from consequentialist but from non-

2. E. Corwin, The "Higher Law" Background of American Constitutional Law (1955).
3. The Declaration of Independence para. 1 (U.S. 1776) (emphasis added).

consequentialist or deontological considerations that democratic rule is thought to be legitimate. Democratic rule is legitimate not because it is *good* rule but because it is *self* rule.

If consent is the moral bedrock of democratic rule, however, so too is it the achilles heel. To little more than mention the problems, the most basic point of all is that in the competition between democratic rule and individual rights, regarding which of the two "wears the trousers," as the Oxford philosopher J.L. Austin might put it,[4] democratic rule is not itself fundamental. Rather, its justification is derivative and indeed parasitic upon individual rights. The democratic right to rule ourselves, that is, is derived from the individual right to rule ourselves — as individuals. For by a rule of parsimony, the right of people, as individuals, to rule themselves is logically prior to any right of "the people," collectively, to rule themselves. Unless we want to reify the group and make it in some sense logically prior to the individual, of which the group is constituted, then the individual must be our starting point, not simply from considerations of cultural heritage, which are never deeply compelling, but from considerations of intellectual integrity, from a need to beg as few questions as possible. Whatever moral force the argument for democratic rule has, then, it has by virtue of its beginning with the right of the individual to rule himself.

But starting with the individual, with his right to rule himself, to chart his own course through life, free from the interference of others, we confront immediately the problem of making the leap from individual self-rule to collective self-rule.[5] That leap can be justified only under conditions of unanimity, for only then is the individual right of self-rule respected. Majority rule will not work: an act otherwise illegitimate does not suddenly become legitimate once some critical number of the whole want to perform it, not if we take seriously the rights of the individuals who constitute the minority to rule themselves. Nor will appeals to prior unanimous consent to act thereafter by majority rule do the trick, for this move from classical social-contract theory has never been thought to be more than an appeal to myth, which even then never explained how succeeding generations might be bound. Nor, finally, will the argument from "tacit consent" carry the day either — you stayed, therefore you are bound — for resort to this last refuge of consent theory is patently circular. It has the majority saying to the minority, "Come under our rule or leave," which is tantamount to the majority putting the minority to a choice between two of its entitlements, its right to stay where it is and its right not to come under the rule

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4. I use Austin's idiom somewhat more broadly than he. *See* J.L. Austin, Philosophical Papers 140 (1961).

5. *See* R. Wolfe, In Defense of Anarchism (1970).

of the majority — precisely the starting points that need to be respected, not assumed away.

We need not go to such abstract or systematic lengths, however, to appreciate the problems that surround the argument from consent, which underpins in turn the argument for democratic rule. Who among us, for example, can say that he consented to be ruled by more than 3 of the 535 men and women who sit upon Capitol Hill? Indeed, I dare say there are some in *this* room who can boast to having consented to be ruled by not 1 of those 535! Add to this the realization that the art of redistricting has become so refined that in our last election better than ninety-eight percent of House incumbents who ran for reelection had their hold on perpetuity renewed[6] — a datum we need to contrast with the findings of poll after poll on the esteem we hold for our legislative bodies; add yet again the insights from decision theory — that rarely, if ever, do majoritarian processes yield majoritarian preferences[7] — and from public choice theory — that the reality, far from being one of rule by the majority is one of rule by the smallest of minorities, by concentrated special interests;[8] add all of that together and the argument from consent for the legitimacy of democratic rule looks painfully thin. Are we really to believe that our consent has made legitimate the agricultural price supports that determine the price of our food, or the trucking rate regulations that determine the costs of our goods and services? Is it any easier to believe, especially in view of the historical evidence unearthed by Professor Bernard Siegan,[9] that the Court of Mr. Justice Peckham frustrated the will of the good citizens of New York to, as Mr. Justice Holmes put it, "embody their opinions in the law,"[10] on this occasion by regulating the hours that bakers might work — an issue we are invited to believe was fairly burning in the minds of New Yorkers as they cast their ballots in the election of 1894?

No, we must jettison this naive belief that democratic process by itself imbues the results that flow from that process with any substantial measure of legitimacy. In particular, if an individual or a group of individuals would have no independent right to do what some legislative body has done, then that legislative body, just because it is thus characterized, has no such right either. Indeed, where would it get such a right if individuals did not have the right to yield up to it in the first place?[11] As Friedrich Hayek has said, such acts are

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6. *See The House Unrepresentative*, Nat'l Rev., Sept. 11, 1987, at 20.

7. *See* Riker, *Implications From the Disequilibrium of Majority Rule for the Study of Institutions*, 74 Am. Pol. Sci. Rev. 432, 446 (1980).

8. *See, e.g.*, Theory of Public Choice: Political Applications of Economics (J. Buchanan & R. Tollison eds. 1972).

9. B. Siegan, Economic Liberties and the Constitution 113-21 (1980).

10. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

11. *See* R. Nozick, Anarchy, State, and Utopia 6 (1974).

mere legislation, not law, mere acts of will, not acts that conform to or reflect higher law.[12]

II. THE SOLUTION: LIMITED GOVERNMENT AND JUDICIAL OVERSIGHT

The prescription that flows from these reflections should not surprise. Indeed, it is the prescription the Founders handed down: limited government. If we begin with the individual, with his right to be free, as our Declaration of Independence plainly does, and we confront honestly the difficulties of moving from individual self-rule to collective self-rule, yet recognize that in a world of uncertainty some government is not only morally necessary but practically inevitable,[13] then we are justified in creating only a limited government, a government limited to the purpose, set forth in the Declaration of Independence, of securing our rights, a government that restrains the individual as little as is necessary in pursuit of that end.[14] The vision of the Founders, then, was not one of democratic rule ranging widely, limited only by certain enumerated rights, but just the opposite; it was a vision of individual liberty ranging widely, limited only by certain enumerated governmental powers. That gets the presumptions right, on the side of individual liberty. That gets the burden of proof right, upon government action. And that, after all, is what the ninth amendment, in all its generality, is all about when it says that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The earlier judicial "passivists" who created democratic rights that led to expansive government were as wrong, then, as the modern judicial "activists" who create individual rights that call for expansive government.[15] The presumption is against, not in favor of government; in favor of, not against individual liberty.

But if these are the presumptions and burdens that inform the vision that stands behind our constitutional order, we are still left with the practical problem of implementing that vision. In particular, we have to ask first who

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12. *See* F. Hayek, The Constitution of Liberty 155-56 (1960).

13. *See* R. Pilon, A Theory of Rights: Toward Limited Government, ch. 4 (1979) (Ph.D. Dissertation, Univ. of Chicago).

14. *See* Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 585-86 (1972): "In essence, Lockean social-contract theory says this: . . . Government is a servant, necessary but evil, to which its subjects have surrendered only what they must, and that grudgingly . . . [H]is was the accepted theory of government when the [Constitution] was being hammered out."

15. I have discussed these issues more fully in Pilon, *On the Foundations of Justice*, 17 Intercoll. Rev. 3 (1981); Pilon, *Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty*, in Economic Liberties and the Judiciary 183 (J. Dorn & H. Manne eds. 1987); Pilon, *On The Foundations of Economic Liberty*, 38 The Freeman 338 (1988).

shall decide which areas the majority may range over, which is tantamount to deciding which rights we do and do not have. Clearly, to have the majority decide this question is to have the decision made by a party in interest. Moreover, for all the theoretical and practical reasons noted earlier, "the people" never really do make this decision. But more to the point, these questions, as a practical matter, rarely arise as general or global questions but only in the particular — when some individual complains that his liberty has been restricted by some legislative or executive undertaking. On such occasions the decision, in our system, will fall to the judge to make. Inescapably, then, the judiciary will be "active," at least in the sense of finding for one side or the other.

III. THE AUTHORITY OF THE CONSTITUTION

We come then to the more interesting question in the judicial activism/restraint debate: not *whether* the judge shall decide but *how*. To answer by urging the judge to turn to the Constitution is at once correct but too facile. It is too facile because it leaves unanswered the question, "Why should the Constitution compel?" Again, it cannot compel from reasons of consent — save in those exceptional cases of naturalized citizens and oath-takers. For if the problems that attend arguments from consent vitiate the claims to legitimacy of ordinary legislation, then *a fortiori* they vitiate any such claims that might be made on behalf of the Constitution. Who among us, after all, can be said to have consented to be ruled under this document? To appreciate the point, substitute the Soviet Constitution, call it "the supreme law of the land," derive some particular conclusion with logical precision, then argue that that conclusion compels by reason of its derivation from that document in light of the intent of its framer, Leonid Brezhnev in 1977.[16] As you march to the gulag, in strict conformance with constitutional law, you will be forgiven for thinking that the argument for the constitution's binding force is exceedingly hollow.

No, the Constitution, our Constitution, compels not from reasons of consent but from reasons of content — because the document reflects, for the most part, the higher law that itself binds not from interest or will, as manifest by consent, but from principles of reason. Here, precisely, is the nexus between constitutional law and the higher law. Call it moral obligation, call it political obligation, call it legal obligation: it is the point at which legal positivism, insofar as it purports to be more than a declaratory theory, insofar

16. *See* Pilon, *The Systematic Repression of Soviet Jews*, U.S. Dept. of State, Bur. of Publ. Affairs, Current Policy No. 878; *reprinted* as *Human Rights* in 53 Vital Speeches of the Day 71 (1986).

as it purports to be a theory about authority and not simply about power, must come to grips with the grounds that obligate, the grounds that make power legitimate. Deprived of deeply satisfying arguments from consent, the positivist must turn to arguments from reason. But in so doing he is moving to the realm of moral philosophy in the rationalist tradition, and so is already engaged in the higher law.[17]

IV. THE CONSTITUTION AND THE HIGHER LAW

The search for legitimacy will take the judge ineluctably, then, to the higher law. He may draw first from the constitutional language itself, of course, and then from the intentions that further inform that language — intentions that themselves most often reflect the higher law by virtue of their origins in individual liberty. But having done that, the judge may then have to go beyond these reflections of the higher law to the higher law itself, not because the higher law is not already in the Constitution, at least by implication, but because it is there, when not explicitly so, *only* by implication. As the ninth amendment says, not all the rights we have are to be found "in terms" in the document itself — to use an idiom of our current chief justice, but to opposite effect.[18] Does this mean the judge can import his own values? No; not only would that be inconsistent with the idea of constitutional interpretation and the idea that the Constitution already reflects the higher law, but that is not what the higher law is all about. It is about reason and rights, which are confused with values only by those who do not understand the profound difference between the two. Is this distinction between rights and values to be found in the Constitution? No, not "in terms," no more than the admonition that the judge is to reason from canons of logic.

Forgive me for waxing anecdotal here, and pedagogical too, but I am reminded of lectures I have given on the theory of rights and of a point in those lectures when I would turn to the students and ask: "How many rights are there?" Invariably the students would be taken aback by the question, at once so simple and yet so perplexing. After a few responses intended more to clear their embarrassment than to address the question — "There are 39 rights, or

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17. I have developed these themes more fully in Pilon, *On Moral and Legal Justification*, 11 Sw. U.L. Rev. 1327 (1979).

18. "The words 'liberty' and 'property' as used in the Fourteenth Amendment do not *in terms* single out reputation as a candidate for special protection over and above other interests that may be protected by state law." Paul v. Davis, 424 U.S. 693, 701 (1975) (emphasis added) (distribution by local police to area businessmen of a flyer of "active shoplifters" containing photograph and name of plaintiff held not to deprive plaintiff of any liberty or property interests secured by the fourteenth amendment even though shoplifting charges against plaintiff were later dismissed).

211" — one of the students would inevitably say that there are an infinite number of rights, whereupon a second would answer, "No, there is only one right," at which I would respond, "You are both right." And of course they are, for there is only one right, the right of each of us to be free, and yet, owing to the complexity of language and circumstance, there are an infinite number of derivations from this right, all of which must be derived consistently, however. Is any of this in the Constitution? Of course not, not "in terms." Yet all of it is there by implication.

V. RETURNING TO OUR ROOTS

How do we know this? Well, that is where the work begins, the thought, the reflection that goes into the job of judging well. Little of this is taught in our law schools, compelled as they are to teach the vast and arid reaches of the positive "law," the legislation that too often has supplanted law, and with it our rights as well. Nor will any of this change until we demand a stop to the legal juggernaut that surrounds and suffocates us with legislation. But this will not happen until we understand the basic issues — and understand further just where we want to go.

As we reflect upon where it is we want to go we should recall that because our system begins with the individual it stands in polar opposition to those systems that begin with the group; in the modern era, the socialist systems, whether democratic, nationalist, or internationalist. Invariably those systems destroy economic freedom first, but as they do they find it difficult, often impossible, not to destroy personal freedom as well, as witness even the best of them in such areas as education and the arts.

Reflecting upon this, however, should remind us in turn of the insights of the Founders on the essential indivisibility of liberty. Perhaps Locke put it best when he wrote "Lives, Liberties, and Estates, which I call by the general name, *Property*."[19] Our rights are of a piece: they are the titles we hold in our lives, our liberties, and our estates. No distinction arises here between economic and noneconomic rights, much less between fundamental and nonfundamental rights. Those who would import such distinctions into our Constitution are indeed importing their own values. There is all the difference in the world between this and repairing to the higher law for guidance, which is precisely what the Founders did when they set about drafting the Constitution. In deciding where we want to go, therefore, we could do no better than look to where we began.

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19. J. Locke, Second Treatise of Government § 123 (P. Laslett rev. ed. 1965) (emphasis in original); *see also id.* at § 87.