

SCALIA v. EPSTEIN



Antonin Scalia



Richard A. Epstein

*Two Views
on Judicial Activism*

With the appointment of William H. Rehnquist as Chief Justice of the United States and Antonin Scalia as associate justice, there is renewed interest in questions of judicial activism and the role of the courts in protecting personal and economic liberties. To further public discussion of these fundamental questions, the Cato Institute is pleased to present this debate between Judge Scalia and Richard A. Epstein, James Parker Hall Professor of Law at the University of Chicago and editor of the *Journal of Legal Studies*. These papers were originally delivered at the Cato Institute's conference "Economic Liberties and the Judiciary" on October 26, 1984, and appeared in the Winter 1985 issue of the *Cato Journal*.

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ECONOMIC AFFAIRS AS HUMAN AFFAIRS

Antonin Scalia

The title of this article—Economic Affairs as Human Affairs—is derived from a phrase I recall from the earliest days of my political awareness. Dwight Eisenhower used to insist, with demonstrably successful effect, that he was “a conservative in economic affairs, but a liberal in human affairs.” I am sure he meant it to connote nothing more profound than that he represented the best of both Republican and Democratic tradition. But still, that seemed to me a peculiar way to put it—contrasting economic affairs with human affairs as though economics is a science developed for the benefit of dogs or trees; something that has nothing to do with human beings, with their welfare, aspirations, or freedoms.

That, of course, is a pernicious notion, though it represents a turn of mind that characterizes much American political thought. It leads to the conclusion that economic rights and liberties are qualitatively distinct from, and fundamentally inferior to, other noble human values called civil rights, about which we should be more generous. Unless one is a thoroughgoing materialist, there is some appeal to this. Surely the freedom to dispose of one’s property as one pleases, for example, is not as high an aspiration as the freedom to think or write or worship as one’s conscience dictates. On closer analysis, however, it seems to me that the difference between economic freedoms and what are generally called civil rights turns out to be a difference of degree rather than of kind. Few of us, I suspect, would have much difficulty choosing between the right to own property and the right to receive a *Miranda* warning.

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In any case, in the real world a stark dichotomy between economic freedoms and civil rights does not exist. Human liberties of various types are dependent on one another, and it may well be that the most humble of them is indispensable to the others—the firmament, so to speak, upon which the high spires of the most exalted freedoms ultimately rest. I know no society, today or in any era of history, in which high degrees of intellectual and political freedom have flourished side by side with a high degree of state control over the relevant citizen's economic life. The free market, which presupposes relatively broad economic freedom, has historically been the cradle of broad political freedom, and in modern times the demise of economic freedom has been the grave of political freedom as well. The same phenomenon is observable in the small scales of our private lives. As a practical matter, he who controls my economic destiny controls much more of my life as well. Most salaried professionals do not consider themselves "free" to go about wearing sandals and Nehru jackets, or to write letters on any subjects they please to the *New York Times*.

My concern in this essay, however, is not economic liberty in general, but economic liberty and the judiciary. One must approach this topic with the realization that the courts are (in most contexts, at least) hardly disparaging of economic rights and liberties. Although most of the cases you read of in the newspaper may involve busing, or homosexual rights, or the supervision of school districts and mental institutions, the vast bulk of the courts' civil business consists of the vindication of economic rights between private individuals and against the government. Indeed, even the vast bulk of noncriminal "civil rights" cases are really cases involving economic disputes. The legal basis for the plaintiff's claim may be sex discrimination, but what she is really complaining about is that someone did her out of a job. Even the particular court on which I sit, which because of its location probably gets an inordinately large share of civil cases *not* involving economic rights, still finds that the majority of its business consists of enforcing economic rights against the government—the right to conduct business in an unregulated fashion where Congress has authorized no regulation, or the right to receive a fair return upon capital invested in a rate-regulated business. Indeed, some of the economic interests protected by my court are quite rarefied, such as a business's right to remain free of economic competition from a government licensee whose license is defective in a respect having nothing to do with the plaintiff's interests—for example, one radio station's challenge to the license of a competing station on the basis that the latter will produce electronic interference with a third station.

Fundamental or rarefied, the point is that we, the judiciary, do a lot of protecting of economic rights and liberties. The problem that some see is that this protection in the federal courts runs only by and large against the executive branch and not against the Congress. We will ensure that the executive does not impose any constraints upon economic activity which Congress has not authorized; and that where constraints *are* authorized the executive follows statutorily prescribed procedures and that the executive (and, much more rarely, Congress in its prescriptions) follows constitutionally required procedures. But we will never (well, hardly ever) decree that the substance of the congressionally authorized constraint is unlawful. That is to say, we do not provide a *constitutionalized* protection except insofar as matters of process, as opposed to substantive economic rights, are concerned.

There are those who urge reversal of this practice. The main vehicle available—and the only one I address specifically here—is the due process clause of the Fifth and Fourteenth Amendments, which provides that no person shall be deprived of “life, liberty, or property, without due process of law.” Although one might suppose that a reference to “process” places limitations only upon the *manner* in which a thing may be done, and not upon the *doing* of it, since at least the late 1800s the federal courts have in fact interpreted these clauses to prohibit the *substance* of certain governmental action, no matter what fair and legitimate procedures attend that substance. Thus, there has come to develop a judicial vocabulary which refers (seemingly redundantly) to “procedural due process” on the one hand, and (seemingly paradoxically) to “substantive due process” on the other hand. Until the mid-1930s, substantive due process rights were extended not merely to what we would now term “civil rights”—for example, the freedom to teach one’s child a foreign language if one wishes—but also to a broad range of economic rights—for example, the right to work twelve hours a day if one wishes. Since that time, application of the concept has been consistently expanded in the civil rights field (*Roe v. Wade* is the most controversial recent extension) but entirely eliminated in the field of economic rights. Some urge that it should be resuscitated.

I pause to note at this point, lest I either be credited with what is good in the present system or blamed for what is bad, that it is not up to me. (I did not have to make that disclaimer a few years ago, when I was a law professor.) The Supreme Court decisions rejecting substantive due process in the economic field are clear, unequivocal and current, and as an appellate judge I try to do what I’m told. But I will go beyond that disclaimer and say that in my view the position

the Supreme Court has arrived at is good—or at least that the suggestion that it change its position is even worse.

As should be apparent from what I said above, my position is not based on the proposition that economic rights are unimportant. Nor do I necessarily quarrel with the specific nature of the particular economic rights that the most sagacious of the proponents of substantive due process would bring within the protection of the Constitution; were I a legislator, I might well vote for them. Rather, my skepticism arises from misgivings about, first, the effect of such expansion on the behavior of courts in other areas quite separate from economic liberty, and second, the ability of the courts to limit their constitutionalizing to those elements of economic liberty that are sensible. I will say a few words about each.

First, the effect of constitutionalizing substantive economic guarantees on the behavior of the courts in other areas: There is an inevitable connection between judges' ability and willingness to craft substantive due process guarantees in the economic field and their ability and willingness to do it elsewhere. Many believe—and among those many are some of the same people who urge an expansion of economic due process rights—that our system already suffers from relatively recent constitutionalizing, and thus judicializing, of social judgments that ought better be left to the democratic process. The courts, they feel, have come to be regarded as an alternate legislature, whose charge differs from that of the ordinary legislature in the respect that while the latter may enact into law good ideas, the former may enact into law only *unquestionably* good ideas, which, since they *are* so unquestionably good, *must* be part of the Constitution. I would not adopt such an extravagant description of the problem. But I do believe that every era raises its own peculiar threat to constitutional democracy, and that the attitude of mind thus caricatured represents the distinctive threat of our times. And I therefore believe that whatever reinforces rather than challenges that attitude is to that extent undesirable. It seems to me that the reversal of a half-century of judicial restraint in the economic realm comes within that category. In the long run, and perhaps even in the short run, the reinforcement of mistaken and unconstitutional perceptions of the role of the courts in our system far outweighs whatever evils may have accrued from undue judicial abstention in the economic field.

The response to my concern, I suppose, is that the connection I assert between judicial intervention in the economic realm and in other realms can simply not be shown to exist. We have substantive due process aplenty in the field of civil liberties, even while it has been obliterated in the economic field. My rejoinder is simply an

abiding faith that logic will out. Litigants before me often characterize the argument that if the court does *w* (which is desirable) then it must logically do *x*, *y*, and *z* (which are undesirable) as a “parade of horribles”; but in my years at the law I have too often seen the end of the parade come by. There really is an inevitable tug of logical consistency upon human affairs, and especially upon judicial affairs—indeed, that is the only thing that makes the system work. So I must believe that as bad as some feel judicial “activism” has gotten without substantive due process in the economic field, *absent* that memento of judicial humility it might have gotten even worse. And I have little hope that judicial and lawyerly attitudes can be coaxed back to a more restricted view of the courts’ role in a democratic society at the same time that we are charging forward on an entirely new front.

Though it is something of an oversimplification, I do not think it unfair to say that this issue presents the moment of truth for many conservatives who have been criticizing the courts in recent years. They must decide whether they really believe, as they have been saying, that the courts are doing too much, or whether they are actually nursing only the less principled grievance that the courts have not been doing what *they* want.

The second reason for my skepticism is the absence of any reason to believe that the courts would limit their constitutionalizing of economic rights to those rights that are sensible. In this regard some conservatives seem to make the same mistake they so persuasively argue the society makes whenever it unthinkingly calls in government regulation to remedy a “market failure.” It is first necessary to make sure, they have persuaded us, that the cure is not worse than the disease—that the phenomenon of “government failure,” attributable to the fact that the government, like the market, happens to be composed of self-interested human beings, will not leave the last state of the problem worse than the first. It strikes me as peculiar that these same rational free-market proponents will unthinkingly call in the courts as a *deus ex machina* to solve what they perceive as the problems of democratic inadequacy in the field of economic rights. Is there much reason to believe that the courts, if they undertook the task, would do a good job? If economic sophistication is the touchstone, it suffices to observe that these are the folks who developed three-quarters of a century of counterproductive law under the Sherman Act. But perhaps what counts is not economic sophistication, but rather a favoritism—not shared by the political branches of government—toward the institution of property and its protection. I have no doubt that judges once met this qualification. When Madison described them as a “natural aristocracy,” I am sure he had in mind

an aristocracy of property as well as of manners. But with the proliferation and consequent bureaucratization of the courts, the relative modesty of judicial salaries, and above all the development of lawyers (and hence of judges) through a system of generally available university education which, in this country as in others, more often nurtures collectivist than capitalist philosophy, one would be foolish to look for Daddy Warbucks on the bench.

But, the proponents of constitutionalized economic rights will object, we do not propose an open-ended, unlimited charter to the courts to create economic rights, but would tie the content of those rights to the text of the Constitution and, where the text is itself somewhat open-ended (the due process clause, for example), to established (if recently forgotten) constitutional traditions. As a theoretical matter, that could be done—though it is infinitely more difficult today than it was fifty years ago. Because of the courts' long retirement from the field of constitutional economics, and because of judicial and legislative developments in other fields, the social consensus as to what are the limited, "core" economic rights does not exist today as it perhaps once did. But even if it is theoretically possible for the courts to mark out limits to their intervention, it is hard to be confident that they would do so. We may find ourselves burdened with judicially prescribed economic liberties that are worse than the pre-existing economic bondage. What would you think, for example, of a substantive-due-process, constitutionally guaranteed, economic right of every worker to "just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity?" Many think this a precept of natural law; why not of the Constitution? A sort of constitutionally prescribed (and thus judicially determined) minimum wage. Lest it be thought fanciful, I have taken the formulation of this right verbatim from Article 23 of the United Nations' Universal Declaration of Human Rights.

Finally, let me suggest that the call for creating (or, if you prefer, "reestablishing") economic constitutional guarantees mistakes the nature and effect of the constitutionalizing process. To some degree, a constitutional guarantee is like a commercial loan: you can only get it if, at the time, you don't really need it. The most important, enduring, and stable portions of the Constitution represent such a deep social consensus that one suspects that if they were entirely eliminated, very little would change. And the converse is also true. A guarantee may appear in the words of the Constitution, but when the society ceases to possess an abiding belief in it, it has no living effect. Consider the fate of the principle expressed in the Tenth Amendment that the federal government is a government of limited powers. I do

not suggest that constitutionalization has no effect in helping the society to preserve allegiance to its fundamental principles. That is the whole purpose of a constitution. But the allegiance comes first and the preservation afterwards.

Most of the constitutionalizing of civil rights that the courts have effected in recent years has been at the margins of well-established and deeply held social beliefs. Even *Brown v. Board of Education*, as significant a step as it might have seemed, was only an elaboration of the consequences of the nation's deep belief in the equality of all persons before the law. Where the Court has tried to go further than that (the unsuccessful attempt to eliminate the death penalty, to take one of the currently less controversial examples), the results have been precarious. Unless I have been on the bench so long that I no longer have any feel for popular sentiment, I do not detect the sort of national commitment to most of the economic liberties generally discussed that would enable even an activist court to constitutionalize them. That lack of sentiment may be regrettable, but to seek to develop it by enshrining the unaccepted principles in the Constitution is to place the cart before the horse.

If you are interested in economic liberties, then, the first step is to recall the society to that belief in their importance which (I have no doubt) the founders of the republic shared. That may be no simple task, because the roots of the problem extend as deeply into modern theology as into modern social thought. I remember a conversation with Irving Kristol some years ago, in which he expressed gratitude that his half of the Judeo-Christian heritage had never thought it a sin to be rich. In fact my half never thought it so either. Voluntary poverty, like voluntary celibacy, was a counsel of perfection—but it was not thought that either wealth or marriage was inherently evil, or a condition that the just society should seek to stamp out. But that subtle distinction has assuredly been forgotten, and we live in an age in which many Christians are predisposed to believe that John D. Rockefeller, for all his piety (he founded the University of Chicago as a Baptist institution), is likely to be damned and Ché Guevara, for all his nonbelief, is likely to be among the elect. This suggests that the task of creating what I might call a constitutional ethos of economic liberty is no easy one. But it is the first task.

JUDICIAL REVIEW: RECKONING ON TWO KINDS OF ERROR

Richard A. Epstein

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.

Cato Institute

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SCALIA v. EPSTEIN

"My skepticism (about constitutionalizing the protection of economic liberties) arises from misgivings about, first, the effect of such expansion on the behavior of courts in other areas quite separate from economic liberty, and second, the ability of the courts to limit their constitutionalizing to those elements of economic liberty that are sensible."

—Antonin Scalia

"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."

—Richard A. Epstein

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