BAD POLICY, BAD LAW, AND THE CONSTITUTION: A STIGLERIAN VIEW

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> The opinion that any monarch receiveth his power by covenant, that is to say, on condition, proceedeth from want of understanding this easy truth: that covenants being but words, and breath, have no force to oblige, contain, constrain, or protect any man, but what it has from the public sword.
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> —Thomas Hobbes

Introduction

In a succinct demonstration of contempt for the notion that the Constitution has economic content, Supreme Court Justice Scalia stated that "a law can be both economic folly and constitutional."[1] The ghost of James Madison might have made a timely appearance and, if he had been prone to sarcasm, asked, "What do you think the Constitution is for—to protect the people from economic wisdom?" In any case, a majority of the Supreme Court agreed with Justice Scalia, and the particular decision was consistent with at least 50 years of precedent. Economic liberties have not been protected by the Supreme Court for some time. As for James Madison, a man can spin in his grave for only so long.

Justice Scalia is correct in one sense in assigning the word folly—implying error—to certain legislative action, but incorrect in another sense of the word. Similarly, in determining the proper scope for constitutional constraints on the legislature, the courts can also make two distinct types of error. So-called judicial activists favor one type

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[1]CTS Corp. v. Dynamics Corp., 107 S. Ct. 1637, 1653 (1987) (Scalia, J., concurring).

of error, judicial conservatives the other. It would seem that both do harm to the concept of constitutionally constrained government.

The study of constitutional protection of economic liberty or the lack thereof has received vigorous renewed attention from several scholars.[2] Applying George Stigler's view of regulation, I will examine how the legal issues relate to public policy. There is a compelling symmetry between the concepts of policy errors and judicial errors. When analyzing economic liberties and the Constitution, we should be careful not to overestimate the independence of the judiciary from political manipulation.

Two Types of Mistakes

In analyzing public policy, economists have two jobs. One is to understand and demonstrate which policy is most efficient, and the other is to understand and demonstrate why their policy recommendations are systematically ignored. As Stigler (1982: 8) presented this dilemma:

> Clever economists have displayed an obtuseness in this matter that is difficult to believe. They will say, not year after year but generation after generation, "Parliament, do you not realize that free trade would increase the national income?" As if the Parliament did not know this![3]

As with trade restrictions, the same may be said of agricultural subsidies, price controls, and convoluted tax codes. Such policies are economically inefficient, but they are politically efficient. They are crafted by clever people with the intent of subsidizing well-represented groups and taxing poorly-represented groups. A law usually accomplishes what was intended.

Another way to look at this is to recognize that economically inefficient policies involve two kinds of errors. The first kind of error we can call the simple mistake: the action that would not have been taken if more information about its consequences had been known. This is what most people think of when they use the term mistake.

[2]These books make fascinating reading for economists. See Bork (1990), Gwartney and Wagner (1988), Paul and Dickman (1988), Siegan (1987), Dorn and Manne (1987), Higgs (1987), Macedo (1986), Epstein (1985a), and Siegan (1980). Jan Tumlir (1985) discusses some of the same issues as they relate to protectionism and William Niskanen (1990) provides a helpful overview. In particular, Bork (1990), Epstein (1985a), and Siegan (1980) are excellent introductions to the subject. The reader may judge for himself whether the works of Epstein and Siegan stand up to Bork's criticism.

[3]There are those who will argue that the Parliament really does not know this, but that preaching to them is pointless anyway since they strongly prefer ignorance. The next three paragraphs follow the discussion in Stigler (1983).

Mistakes of this type are not repeated and from these mistakes people learn. (Hence the economists' aphorism: there are no *ex ante* mistakes, only *ex post* mistakes.) Using this definition we see the sense in which it is peculiar to refer to agricultural subsidies or trade barriers as mistakes. Had such policies been mistakes, they would not have persisted over the decades in every western democracy.

Such policies are mistakes, however, in another sense of the word. This other sense of the word mistake is more encompassing. It implicitly compares the system that generates such policies with a theoretically better one: namely, a system that would not allow such policies to come into existence. Such policies are mistakes, not in the sense that legislatures will learn not to make them, but in the sense that legislatures should not have the power to implement them.

Stigler has suggested that these mistaken policies be referred to as "inappropriate," since "no generally accepted goal of society is achieved . . . the beneficiaries of such laws are achieving their goal, but the society as a whole is not achieving its goals" (1983: 19). Inappropriate policies are the mistakes that are repeated year after year. Once again, the alternative to this mistake is not a more competent legislature—the legislature is already too clever—but a more constrained legislature.

Justice Scalia, in his discussion of folly mentioned earlier, was referring to a purposeful corporate anti-takeover law passed by a state legislature: a law specifically designed to prevent the transfer of property, in order to protect incumbent management at shareholder expense. The lower court held the law to be in violation of the interstate commerce clause, a laudable device for constraining destructive legislation attempted by state legislatures.[4] Folly had little to do with it.

Economists refer to the distinction between the study of what does happen and the study of what should happen as positive versus normative analysis. When an economist analyzes, for example, rent control, he may examine the political economy of the policy, trying to explain why some cities have it and some do not. Alternatively, an economist may study how rent control affects the incentives of people who might otherwise have added to the stock of housing. In either case, he is likely to be well aware that the policy, now in its eighth decade since the Supreme Court legalized it, will not disappear if a copy of his insightful discussion is mailed to the New York City Housing Authority.[5]

[4]Dynamics Corp. v. CTS Corp., 794 F.2d 250 (7th Cir. 1986).

[5]See Epstein (1985a: 176–77) on Supreme Court decisions affecting rent control.

Economists are also beginning to consider carefully the full costs to society of inappropriate policies. These rent-seeking activities do not destroy only small welfare loss triangles—the losses due to inefficient allocation of resources. Some or all of the rents that can potentially be transferred might also be compelled into the process of seeking or avoiding regulation. A government that has the power to selectively favor groups (with agricultural marketing orders or entry restrictions for automobile dealers, for examples), and has the power to selectively expropriate market surplus (windfall profits taxes or rent control, for examples), can destroy wealth without imposing any particular policies at all. The government can induce groups and industries to use resources to avoid regulation, as well as to be favored by regulation. The threat of regulation can destroy resources and distort economic incentives.[6]

Two Types of Judicial Error

We can present another dichotomy of mistakes, related to the distinctions drawn so far, in analyzing the judiciary.[7] So-called judicial activists find groups to be deserving of rights that are not provided for in the Constitution and that would not exist unless the government actively supplies them. Such rights might include welfare payments or housing of a certain quality. These findings confuse an opportunity with an outcome. Put another way, these findings confuse a right to be unhindered by the state with a right to be subsidized by the state. Judicial activists, it is said, have expanded the government's role inappropriately, simply by judicial fiat.

Judicial conservatives or passivists, on the other hand, recognize that in most instances the law does not, and the judiciary should not, require the legislature to act. But, at least in terms of civil rights—neither group protects economic liberties—judicial conservatives are less likely than judicial activists to find that the law constrains the legislature from acting. That is, judicial conservatives seem to give maximum discretion to the legislature, by requiring it to do less and by allowing it to do more.

[6]See Magee, et al. (1989), McChesney (1987), and Wenders (1987) for recent discussions on the potential costs of rent seeking and rent-transferring activity. Stephen Magee, et al. use the apt term "black-hole tariffs" to describe the limitless wastefulness of rent-transferring activity. William Dougan (1991) offers an amusing and informative survey of this literature.

[7]Here, I will simplify the characterizations of so-called judicial activists and judicial conservatives. See Dorn and Manne (1987) for general discussions. My classification of judicial errors is, of course, not original. See Barnett (1987: 205–18), Siegan (1987), Anderson and Hill (1986), Scalia (1985), and Epstein (1985b).

But the legislature can decide not to act without the judiciary's prompting. If the proper bounds of government encroachment upon civil or economic rights are determined more by the legislature or the executive, the judiciary serves a reduced constitutional purpose—except that it does less active harm. Those concerned about individual liberties might find the conservative approach as frightening, or more frightening, than the activist approach. The government's freedom from constraint comes at the expense of individual liberty.[8]

An appealing solution to these diverse approaches is for the courts to find that the government is not required to subsidize particular outcomes—by conferring upon those outcomes the status of rights—nor is the government allowed to contravene rights unless a specific duty or exemption is granted to the government under the Constitution. Bernard Siegan (1987: 81) states the position succinctly, "Failure to implement existing rights is no less an error than enforcing non-existent rights."[9]

Thus, in deciding on the appropriate role of the government, the judiciary can make two mistakes as well. It can require the legislature to act when it should not have required the action. We can call this an active mistake. On the other hand, it can allow the legislature to act when it should have constrained the action. We can call this a passive mistake. Judicial conservatives tend to make passive mistakes; they allow inappropriate policies. Judicial activists tend to make active mistakes, they require the inappropriate policy—although with regards to economic liberties they tend to make passive mistakes as well. The republic would be better served if each group recognized the error of its ways.

Economic Liberties

As noted above, the sanctioning of inappropriate economic policies by the judiciary has received renewed attention from legal scholars. They argue that a coherent interpretation of the Constitution should have protected such basic liberties as the freedom to sell a product or service at the price of one's own choosing, or the freedom to enter into otherwise legitimate businesses. They demonstrate, in the Madison-Hayek-Friedman tradition, the artificial and dangerous distinction now drawn by the courts between civil and economic liberties. Their simple thesis is one that will warm the hearts and

[8]For further elaboration of these themes, see Bork (1990), Macedo (1987: 111–36), Pilon (1987: 183–204), Macedo (1986), and Anderson and Hill (1986). Robert Bork argues that the greater threat to liberty comes from judicial activism.

[9]This position is sometimes referred to as principled judicial activism.

stimulate the minds of many economists. It is that one of the purposes of the Constitution, and its creation of the judiciary, was to establish a form of government that eliminated the inappropriate policy. They argue that the system, to put it in modern jargon, was designed to disallow rent seeking.

But the protection of economic liberties did not survive. As these authors demonstrate, the Supreme Court began to abandon this role in the 1920s and 1930s, and it is showing no sign yet of reversing its direction (cf. Siegan 1980: chap. 6). The government is free to restrict property and contract rights without fear of judicial oversight. Property and contract rights have thus degenerated.

We are left with Stigler's challenge to explain why the judiciary changed its policy. As before, we should not rely on a "mistake" explanation of judicial behavior.[10] The concepts discussed here are, in theory at least, neither subtle nor complicated. The Court's action, persisting as it has, should be seen as purposeful. One way to begin is to ask to what extent did the Court actually change its policy. Since the Supreme Court could so easily revise its view of economic rights, those rights were tenuous to begin with. It may be more accurate to say that the Supreme Court provides a legal framework for regulatory confiscation and redistribution when political forces call for it.[11]

And such a result should not be unexpected. After all, in the long run, how independent is the judiciary? We have seen recently that the Senate carefully screens nominees to the Supreme Court. It is not likely to be in the President's interest to nominate candidates who will be rejected. Yet 27 out of 137 (about 20 percent) of those nominated to be either Associate Justices or Chief Justices of the Supreme Court have failed to win congressional approval.[12] The legislative and executive branches have also tried to manipulate the Court by changing the number of judges comprising it. Where there is wide scope for interpreting the Constitution, why should we suppose that judges approved by the Senate would make decisions inimical to the legislature's interest?

[10]As Stigler (1982: 8) put it, "To explain something by saying that it is a mistake . . . is on the same level as explaining it by intervention of invisible spirits."

[11]Landes and Posner (1975) develop this idea and offer a cogent analysis of the judiciary's role in the political process. They conclude that "in our view the courts do not enforce the moral laws or ideals of neutrality, justice, or fairness; they enforce the 'deals' made by effective interest groups with earlier legislatures" (1975: 894). The authors cited in footnote 2 offer many descriptions and insights regarding the political manipulation of the Supreme Court.

[12] See *World Almanach and Book of Facts* (1991: 89), and *Wall Street Journal*, 26 October 1987: A 23.

Recent Supreme Court nomination hearings have shown there to be a close match between political parties and judicial types. Since judges are selected and approved through a political process, it should be no surprise that the predilections of successful judges will resemble those of the political parties. Judges tend to be either activists or conservatives because politicians tend to be either Democrats or Republicans. We get the choices of judges we do because we have the choices of politicians we have. That is not a comforting thought.

Conclusion

As with civil liberties, basic economic liberties could be protected, if at all, only by an independent judiciary. Attempts to enjoin such liberties are rational, calculated, and determined methods of enhancing the positions of special interests. The legislature is incapable of constraining itself from such redistribution; indeed it is designed for such redistribution. As Jan Tumlir (1985: 16) described the process:

> The result of the loosening of legislative constraints can best be described as a refeudalization of the economy. The notion that groups have rights is medieval. In a democracy, groups may have political influence, even a degree of economic power, but only persons have rights. In the redistributive state, government has become what it was in the middle ages—an inscrutable power above the people, to be lobbied, petitioned, and propitiated for the favors it can dispense.

In the United States, basic economic rights were considered to be protected by judicial oversight at one time. That may have been the case largely because the effective political demand for such regulation did not exist prior to the 1920s. To resurrect economic liberties and place them under constitutional protection is an honorable goal. Whether or not it is a realistic goal remains to be seen.

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