Chapman Law Review

Volume 16 | Issue 2 Article 4

2013

Libertarianism and Judicial Deference

Ilya Somin

Libertarianism and Judicial Deference

Ilya Somin[*]

INTRODUCTION

Over the last thirty years, libertarian constitutional theory has risen from near-total obscurity to a significant role in debates over constitutional interpretation and judicial review. Libertarian scholars such as Randy Barnett, Richard Epstein, and the late Bernard Siegan have had a major influence on scholarship over a wide range of constitutional issues.[1] Ideas developed by libertarians have also had a substantial impact on court decisions in the fields of federalism, property rights, and gun rights, among others.

Georgetown University law professor Randy Barnett and other libertarian scholars played an important role in developing the arguments behind the recent challenge to the constitutionality of the Obama health care plan individual mandate.[2] The recent revival of "public use" jurisprudence on property rights was in large part stimulated by cases brought by the libertarian Institute for Justice.[3] Libertarians also brought the lawsuit that led to the Supreme Court's recognition of an individual right to bear arms under the Second Amendment, in *District of Columbia v. Heller*,[4] and its application against the states two years later.[5] More generally, libertarian ideas have had a major influence in both the academy and in developing a number of successful public interest law firms that have won notable victories in both courtrooms and the court of public opinion.[6]

---

[*] Professor of Law, George Mason University School of Law. I would like to thank David Bernstein and Josh Blackman for helpful comments and suggestions, and Greg Mottla for valuable research assistance.

1 *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) [hereinafter BARNETT, RESTORING THE LOST CONSTITUTION]; RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

2 *See* Josh Blackman, *Back to the Future of Originalism*, 16 CHAP. L. REV. 325 (2013).

3 See especially *Kelo v. City of New London*, 545 U.S. 469, 500 (2005) (O'Connor, J., dissenting), where four Justices embraced a restrictive interpretation of "public use" long advocated by libertarians.

4 554 U.S. 570 (2008). For an account of the key role of libertarians in bringing this case and developing the arguments behind it, see BRIAN DOHERTY, GUN CONTROL ON TRIAL: INSIDE THE SUPREME COURT BATTLE OVER THE SECOND AMENDMENT (2008).

5 McDonald v. City of Chicago, 130 S. Ct. 3020 (2010). Prominent libertarian lawyer Alan Gura litigated the *McDonald* case and relied on considerable libertarian scholarship on gun rights.

6 *See generally* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT (2008).

These are impressive achievements for a relatively small group of scholars and activists that remains heavily outnumbered by left-liberals in both the academy and the legal profession more generally.[7] But it is still not entirely clear whether libertarianism as such can make a distinctive contribution to constitutional theory. Individual libertarian scholars and activists have developed important and influential ideas about constitutional interpretation. But many of those ideas are not distinctively libertarian. There is no doubt that *libertarians* can make a distinctive contribution to constitutional theory. But whether *libertarianism* can do so is a different question.

In this article, I suggest that libertarian thought can make at least one distinctive contribution to constitutional theory: greater skepticism about doctrines of judicial deference to the supposedly superior expertise of the political branches of government. I do not here seek to prove that libertarian ideas definitively refute the case for such deference. But they are an important contribution to the debate over the subject.

In Part I, I briefly describe the kind of deference my analysis focuses on: cases where judges allow the legislature or the executive to determine the scope of its own authority under some part of the Constitution because of the political branches' superior knowledge of the relevant issues. Although the judges in question recognize that the Constitution limits government power over the issue in question, they defer to legislative or executive interpretations of the scope of those limits. A major rationale for such deference is the superior judgment or expertise of the political branches of government. This argument for deference is seen in many areas, including federalism, property rights, and criminal defendants' rights, among others.

Part II explains why libertarian thought casts doubt on the expertise rationale for judicial deference. That rationale implicitly assumes that the legislature and executive have benevolent motives and superior expertise to which judges should defer. Libertarian thought poses a strong challenge to both assumptions, even if it does not definitively refute them in all possible cases.

Finally, in Part III, I explain why skepticism about judicial deference is a distinctively libertarian contribution to constitutional theory. It is a logical extension of libertarian skepticism about government power and the political process. Much more than originalism—the idea with which libertarian constitutional theory is principally associated—it is a natural extension of libertarian political thought.

Despite the title, this book focuses mostly on libertarians rather than social conservatives. *Cf.* Ilya Somin, *Lessons From the Rise of Legal Conservatism*, 32 HARV. J.L. & PUB. POL'Y 415 (2009) (reviewing Teles' book).

7 In the legal profession overall, libertarians are probably outnumbered by conservatives as well as liberals.

I. JUDICIAL DEFERENCE AND THE CONSTITUTION

There are many situations where courts defer to the legislature or the executive and refuse to strike down their actions as unconstitutional. Here, I focus on one major form of deference: cases where courts recognize that the Constitution limits government power in some way, but largely defer to the legislature or the executive in determining the scope of those limits.

One noteworthy example is the Supreme Court's treatment of the Public Use Clause of the Fifth Amendment, where the Court recognizes that private property may not be condemned for a purely private purpose but also adheres to a "policy of deference to legislative judgments in this field,"[8] thereby essentially allowing the legislature to determine for itself which kinds of condemnations genuinely advance "public purposes," as the Court held is required by the Fifth Amendment.[9]

Similar deference is common in Supreme Court decisions determining the scope of congressional power under the Commerce Clause and Necessary and Proper Clause.[10] The Commerce Clause gives Congress the authority to regulate interstate and foreign commerce, and commerce with the Indian tribes.[11] Modern jurisprudence interprets the Clause as giving Congress the authority to regulate any economic activities that, in the aggregate, "substantially affect" interstate commerce.[12] Even in *Gonzales v. Raich*,[13] the Supreme Court's most expansive interpretation of commerce power, the Court recognizes that there are some limits to congressional authority.[14] But it also allows Congress to determine whether the "economic" activity it seeks to regulate really does substantially affect interstate commerce, so long as Congress has a minimal "rational basis" for its conclusion.[15] Even in the case of noneconomic activity, Congress is allowed to regulate, so long as it has a rational basis for concluding that doing so is necessary to implement a broader "regulatory scheme" aimed at controlling interstate commerce.[16] In analyzing assertions of congressional authority under the Necessary and Proper Clause, the Supreme Court also

---

8 *Kelo*, 545 U.S. at 480.

9 *See also* Berman v. Parker, 348 U.S. 26, 32 (1954) (holding that "[t]he role of the judiciary in determining whether [eminent domain] is being exercised for a public purpose is an extremely narrow one," and if the "legislature has spoken, the public interest has been declared in terms well-nigh conclusive"); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240–41 (1984) (holding that a taking is constitutional under the Public Use Clause if "the exercise of the eminent domain power is rationally related to a conceivable public purpose").

10 U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. I, § 8, cl. 18.

11 U.S. CONST. art. I, § 8, cl. 3.

12 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 558–59 (1995).

13 545 U.S. 1 (2005).

14 *Id.* at 9–10 (seeking to distinguish *Raich* from previous cases striking down laws as beyond Congress' Commerce Clause authority).

15 *Id.* at 22.

16 *Id.* at 19. For a more detailed discussion of these two aspects of *Raich*, see Ilya Somin, Gonzales v. Raich: *Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507 (2006).

defers to Congress' judgment on whether legislation is "necessary" for "carry[ing] into execution" one of Congress' other powers.[17]

Such deference occurs in many other areas of constitutional law and is used as a justification for many judicial decisions.[18] Other notable examples include deference to legislative judgment on the Eighth Amendment and criminal procedure,[19] judicial deference to Congress' decisions on what legislation is needed to implement the Fourteenth Amendment under its Section 5 authority to enact "appropriate" legislation for that purpose,[20] judicial deference on constitutional issues involving foreign affairs,[21] and others.[22] Eric Posner and Adrian Vermeule have argued for broad judicial deference to the executive on issues relating to terrorism and war.[23]

The standard rationale for this kind of judicial deference is the need to give scope for the political branch's superior expertise. As Justice John Paul Stevens' majority opinion in *Kelo* puts it, "the needs of society have varied between different parts of the Nation," thereby justifying "a strong theme of federalism [in the Court's property rights jurisprudence], emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs."[24] That superior expertise may involve both technical knowledge of policy issues and superior understanding of public values and public opinion.[25] In the former category, superior expertise might involve both Congress' understanding of policy in general, and state or local governments' superior knowledge of local conditions.[26]

---

17 *See* United States v. Comstock, 130 S. Ct. 1949, 1956, 1970 (2010) (holding that necessity is satisfied if Congress adopts "a means that is rationally related to the implementation of a constitutionally enumerated power").

18 *See generally* KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM (2006) (arguing that the issue of expertise-based deference justifies a wide range of Supreme Court decisions).

19 Dru Stevenson, *Judicial Deference to Legislatures in Constitutional Analysis*, 90 N.C. L. REV. 2083 (2012); Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1 (2010).

20 *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 652–56 (1966) (concluding that Congress need only have a rational basis for believing that a given law is appropriate under Section 5).

21 *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320–21 (1936) (noting that the president's superior information and expertise on foreign policy justifies judicial deference to congressional delegations of power to him on foreign affairs issues).

22 *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 230–31 (2006) (claiming that "[j]udges should thus defer to legislatures on the interpretation of constitutional texts that are ambiguous, can be read at multiple levels of generality, or embody aspirational norms whose content changes over time with shifting public values").

23 *See* ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS (2007).

24 Kelo v. City of New London, 545 U.S. 469, 482 (1908) (quoting Hairston v. Danville & Western R. Co., 208 U.S. 598, 606–07).

25 For the latter argument, *see, e.g.*, VERMEULE, *supra* note 22, at 225 (arguing that the legislature and the executive are better at discerning societal values than courts); Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 TOURO L. REV. 93, 110–30 (2007).

26 *See* Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEG. F. 53, 53–54, 66–67

It is important to distinguish deference to superior legislative or executive expertise from cases where the courts do not defer, but make their own independent judgment that the Constitution allows another branch of government to make a particular decision. For example, the Court has ruled that the Senate has the sole power to determine the procedures to be used in impeachment trials, even though there is no reason to believe that that institution has greater expertise than the courts on issues of judicial procedure.[27] Even if the courts never defer to legislative or executive expertise at all, they could still uphold many assertions of government power on other grounds, including the text of the Constitution, the original meaning, or a variety of "living Constitution" theories.[28]

Nonetheless, the alleged need to defer to legislative or executive expertise is an important argument that recurs in many contexts. It is one of the major reasons cited to justify judicial deference to the legislature on property rights and federalism issues, among others.[29] For these reasons, it is central to debates over many disputed constitutional questions.

II. THE LIBERTARIAN CRITIQUE OF JUDICIAL DEFERENCE

Libertarian thought creates a basis for a wide-ranging critique of judicial deference to the supposedly superior expertise of the legislature and the executive. The case for judicial deference to legislative and executive expertise rests on two implicit assumptions that are vulnerable to criticism: that the political branches of government are applying their expertise for the purpose of promoting the public interest, and that they really do have greater expertise than the private sector or lower level governments. Libertarian political and economic thought casts serious doubt on both.

These two assumptions may not be relevant to non-expertise based rationales for judicial passivity. For example, one can argue that judges should generally let legislatures do as they wish because the legislature represents the will of political majorities, and majorities have an inherent right to rule, regardless of whether their decisions are informed by superior knowledge. As Robert Bork puts it, "in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities."[30] This and some other justifications for judicial nonintervention do not depend on superior knowledge and expertise on the part of the political branches of government. But the expertise justification for deference is often advanced

---

[hereinafter Somin, *Federalism and Property Rights*] (describing widespread deployment of the latter argument to justify judicial deference to state legislatures on property rights issues).

27 *See* Nixon v. United States, 506 U.S. 224, 229–41 (1993).

28 For a recent defense of the latter, see DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

29 *See* Somin, *Federalism and Property Rights*, *supra* note 26, at 53–54, 66–67 (describing use of deference arguments to justify judicial deference to state legislatures on property rights issues).

30 ROBERT H. BORK, THE TEMPTING OF AMERICA 139 (1990). For my critique of this argument, see ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE (Stanford University Press, forthcoming 2013) [hereinafter SOMIN, DEMOCRACY AND POLITICAL IGNORANCE] (on file with author).

and plays a major role in a number of important constitutional doctrines. The libertarian critique of its assumptions therefore has significant implications for constitutional theory.

A. The Assumption of Benevolence

There is little point in deferring to expertise if that expertise is not being applied in an objective manner intended to promote the public interest. If, for example, government officials are using their superior expertise to expand their own power or to benefit some narrow interest group, there is little justification for judicial deference to their expertise. Indeed, superior expertise in the service of evil ends may be even worse than a government pursuing the same malign purposes with lesser competence. Other things equal, a competent and knowledgeable evildoer is likely to cause more harm than one who is ignorant and ineffective.[31] When such is the case, judges may actually need to be *less* deferential in cases where the government's expertise is unusually great because giving the government free rein is likely to cause unusually great harm.

Even if the government is simply morally neutral, as opposed to actively malevolent, the case for judicial deference is relatively weakened. If the government is morally neutral, then whether its constitutionally suspect actions serve good purposes or not is essentially random. Cases where judicial review ends up curbing beneficial government actions are likely to be offset by those where it prevents harmful ones, and vice versa. In that situation, there is no reason to prefer deference to nondeferential judicial review.

The calculus does not change if we define the relevant moral considerations not in terms of harm and benefit to the public, but in terms of adherence to the Constitution. A government with evil purposes is unlikely to give unbiased consideration to the constitutional issue on which the courts have deferred to it. For example, it is unlikely to use its expertise to objectively consider whether a challenged condemnation really does promote a "public purpose."[32] It will instead pursue its real objective while paying no more than lip service to constitutional issues.

The morally neutral government will be little better on this score. It may not be actively hostile to constitutional constraints on its power. But it is likely to be indifferent to them. Since serious expert consideration of constitutional issues requires affirmative effort, the morally neutral government might simply not bother with it.

The case for judicial deference to legislative expertise is therefore implicitly based on what libertarian public choice scholars call "the

---

31 *Cf.* SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at ch. 2) (explaining how a knowledgeable electorate with evil values might be even worse than an ignorant electorate with the same deplorable goals).

32 For a discussion of this issue see *supra* Part I.

benevolent despot model of politics and government,"[33] which assumes that government is a unitary entity pursuing benevolent objectives. If the government is pursuing evil purposes or is morally neutral, the case for judicial deference to its superior expertise is greatly weakened.

In this, as in other areas of political economy,[34] libertarian scholars can perform a useful service simply by pointing out that a key argument implicitly relies on the benevolent despot assumption. Once the crucial role of the assumption is exposed, we can begin to consider the extent to which it is valid.

Some will likely resist this conclusion on the ground that there is no objective morality on the basis of which we can assess the government's actions. If we embrace moral relativism or believe that judges should do so,[35] perhaps there is no basis for ignoring the government's expertise on the grounds that it might be in the service of evil ends.

Unfortunately, the moral relativist case for judicial deference collapses into contradiction. If there is no objective standard for judging the morality of our actions, then there is no case for deferring to legislative or judicial expertise. After all, there is no way of knowing whether such deference is good, bad, or morally indifferent. Indeed, for moral relativists, there is no case for adherence to any notion of judicial duty. A consistent moral relativist has no basis for censuring a judge who makes decisions based on his own political preferences or even simply flipping a coin.

Libertarian political theory offers several reasons to doubt the validity of the benevolent despot assumption underlying judicial deference to legislative expertise. First and most obviously, government often acts to benefit narrow interest groups at the expense of the general public. Libertarian public choice scholars have been at the forefront of those studying interest group "rent-seeking" and its influence over public policy.[36] Small interest groups can often outmaneuver the general public because a smaller group is easier to organize for political action than a larger one, facing fewer collective action problems.[37]

In addition to lobbying by private sector interest groups, government is also heavily influenced by the self-interest of government bureaucrats

---

33 *See, e.g.*, GEOFFREY BRENNAN & JAMES BUCHANAN, THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY 55 (1985) [hereinafter BRENNAN & BUCHANAN, THE REASON OF RULES] ("[T]he benevolent despot model of politics and government has promoted and sustained monumental confusion in social science, and social philosophy more generally.").

34 *See, e.g.*, GEOFFREY BRENNAN & JAMES BUCHANAN, THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION 7, 14 (1980) (exposing the implications of dropping that assumption in discussions of federalism and tax policy).

35 For defenses of moral relativisms, see generally DAVID B. WONG, MORAL RELATIVITY (1984); DAVID B. WONG, NATURAL MORALITIES: A DEFENSE OF PLURALISTIC RELATIVISM (2006).

36 For a survey of the relevant public choice literature on interest group influence, see DENNIS C. MUELLER, PUBLIC CHOICE III 333–59 (2003).

37 For the classic statement of this problem, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (rev. ed. 1971).

and other officials, who form powerful lobbies of their own.[38] The role of teachers' unions in inhibiting education reform is a notable and remarkably persistent example.[39] Government officials even often pressure private interests to contribute money to their campaigns and programs, threatening them with hostile legislation if they refuse.[40]

Obviously, outside interest group pressure and self-dealing by government officials themselves is to some degree constrained by public opinion. If elected officials cave in to interest groups too much—especially in ways that are visible to the voters—there may be retribution at the ballot box.[41] But that kind of democratic accountability is often undermined by the reality of widespread political ignorance among voters. Often, the public is unaware of interest group activities, or even misperceives them as beneficial.[42] Moreover, to the extent that relatively ignorant public opinion has a major influence on public policy, it diminishes the extent to which that policy is controlled by knowledgeable officials and experts. That, in turn, undermines the assumption of superior knowledge, the second key pillar of judicial deference to expertise.

Few libertarians would argue that government *never* acts out of benevolent motives. But the prevalence of nonbenevolent ones in many situations undercuts the expertise rationale for deference, which assumes that benevolence is present as a general rule, and not just in some particular cases.

B. The Assumption of Superior Knowledge

There can be no expertise justification for judicial deference if the challenged government policies are not in fact based on superior knowledge. There is little doubt that legislatures and executive branch officials often have superior knowledge relative to federal judges. If that were the only relevant comparison, it could justify judicial deference on a wide range of issues.[43] In many cases, however, judicial deference ends up transferring decision-making authority to actors who are less

---

38 *See* MUELLER, *supra* note 36, at 359–85; WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38–39 (1971); WILLIAM C. MITCHELL & RANDY T. SIMMONS, BEYOND POLITICS: MARKETS, WELFARE, AND THE FAILURE OF BUREAUCRACY 58–62, 114–16 (1994).

39 *See* TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA'S PUBLIC SCHOOLS 7–10 (2011) (explaining why union lobbying is possibly the single biggest obstacle to improving education quality).

40 *See generally* FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997).

41 Such "retrospective voting" is often emphasized by scholars who are relatively optimistic about voter competence. *See, e.g.*, MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS (1981). For my critique, see SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at ch. 4).

42 See the discussion of political ignorance in Part II.B.

43 *See, e.g.*, Somin, *Federalism and Property Rights*, *supra* note 26, at 80–86 (explaining why the expertise rationale for judicial deference on property rights issues can also apply to a wide range of other issues).

knowledgeable than those who would decide the issue if the judiciary were to strike down the law in question.

When the judiciary strikes down a law because it violates some constitutionally protected individual right, it allows private individuals to decide for themselves what they wish to do. A decision protecting property rights, for example, enables property owners to decide for themselves what they are going to do with their possessions. A decision protecting freedom of speech allows people to decide for themselves what speech they will engage in.

Often, private sector actors have better knowledge than the government about decisions of theirs that the government seeks to restrict. As Nobel Prize-winning libertarian economist F.A. Hayek famously emphasized, participants in markets and civil society have "local knowledge" that is unavailable to government officials and planners.[44] Such local knowledge includes "knowledge of the particular circumstances of time and place" with respect to which "practically every individual has some advantage over all others" because "he possesses unique information of which beneficial use might be made, but of which use can be made only if the decisions depending on it are left to him or are made with his active cooperation."[45] As a general rule, government regulators are less likely to have such detailed local knowledge, especially when establishing a regulatory rule that will apply to the entire nation or a large state.[46]

Moreover, a great deal of valuable information about potential opportunities and opportunity costs is contained in a market price system.[47] Prices convey information about the relative value of a wide range of goods and services, and their inputs. When government regulation restricts market transactions, it disrupts the price system and often prevents it from transmitting that information to private sector actors.[48]

If judicial protection of individual rights constrains government action and lets private sector actors make decisions for themselves, it can help ensure that those decisions are made by parties who have *greater* knowledge rather than lesser. Far from undermining well-informed decision-making, such judicial review might actually facilitate it.

This conclusion is reinforced by the reality of widespread voter ignorance.[49] Many studies show that public opinion has a significant

---

44 F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

45 *Id.* at 521–22.

46 For a discussion of why this is likely to be true in the case of regulation of property rights, see Somin, *Federalism and Property Rights*, *supra* note 26, at 66–71.

47 Hayek, *supra* note 44, at 521–29 (arguing that too much government restriction can prevent the use of valuable information, as those who control only know a small percentage of the potential opportunities).

48 *See id.* For a more detailed exposition, see THOMAS SOWELL, KNOWLEDGE AND DECISIONS (1980).

49 For a detailed discussion of the relevance of political ignorance to issues of judicial deference

influence on policy.[50] Unfortunately, a great deal of data also shows that the public tends to be highly ignorant about a wide range of policy issues.[51] For example, most Americans have little idea that entitlements such as Medicare, Medicaid, and Social Security are by far the biggest items of domestic spending in the federal budget, despite the ongoing debate over budgetary issues over the last few years.[52]

Such ignorance is actually rational behavior for most voters. If one's only reason to become informed about politics is to influence the outcome of an election, that turns out to be not much reason at all, given the low probability of a vote being decisive.[53] In a presidential election, for example, the odds vary from state to state, averaging out to about 1 in 60 million.[54]

In addition, voters who do acquire some political knowledge—often for reasons unrelated to becoming a "better" voter—have little incentive to rationally evaluate whatever information they learn. Like acquiring information in the first place, evaluating it in a logical and unbiased way requires time and effort. It can also be psychologically painful if the new information ends up undermining cherished partisan or ideological commitments. Given the low probability that their vote will be decisive, voters have little incentive to sacrifice time, effort, and psychological comfort for the sake of evaluating political information more logically. Instead, they tend to evaluate political information in a highly biased way that overvalues anything that reinforces their preexisting views, while ignoring or undervaluing evidence that cuts the other way.[55] Libertarian economist Bryan Caplan calls this pattern "rational irrationality."[56] Because the incentive for rational evaluation of political information is so low, it is

---

to expertise in the context of property rights cases, see Somin, *Federalism and Property Rights*, *supra* note 26, at 71–77.

50 For citations to the relevant literature, see SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at chs. 1–4).

51 *See id.* (manuscript at ch. 1) (presenting extensive evidence). For further discussion and evidence regarding extensive voter ignorance, see also SCOTT L. ALTHAUS, COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS (2003); MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996); RICK SHENKMAN, JUST HOW STUPID ARE WE?: FACING THE TRUTH ABOUT THE AMERICAN VOTER (2008); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1290–1304 (2004); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 413–19 (1998).

52 SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at ch. 1).

53 The idea of rational political ignorance was first introduced by Anthony Downs. *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 238–59 (1957); *see also* SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at ch. 4) (providing a detailed recent discussion).

54 SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at ch. 4).

55 *See generally* BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES (2007) [hereinafter CAPLAN, THE MYTH OF THE RATIONAL VOTER]; *see also* SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at ch. 4) (citing relevant studies).

56 *See* CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 55, at 122–23; Bryan Caplan, *Rational Ignorance versus Rational Irrationality*, 54 KYKLOS 3, 4 (2001).

actually rational behavior for voters to make little or no effort to be logical and unbiased in making political judgments.

The implication for judicial deference to expertise is significant. In cases where legislation is influenced by public opinion, it is also likely to be influenced by political ignorance and irrationality. That does not necessarily mean that the legislation in question is harmful. But it does mean that judges and others should not assume that it is the result of unbiased expert judgment, or even judgment that reflects greater expertise than that possessed by the average judge. After all, most judges are probably far more educated and politically informed than the median voter.[57]

The above critique of the superior knowledge assumption should not be overstated. It does not apply nearly as strongly in cases where judicial invalidation of legislative or executive action protects not individual decision-making, but decisions by other branches or levels of government. Such cases include judicial decisions on issues involving federalism and separation of powers, among others. For example, when the Supreme Court invalidated a congressional statute allowing a single-house "veto" of executive action,[58] the net effect was to give more power to the executive, not to empower private choice. Similarly, if a federal law preempting state or local law is invalidated, then state and local governments will control the ultimate resolution of the issue at hand.

But it is worth noting that some invalidations of federal law indirectly empower private actors if the activity in question is not regulated by state governments, or state regulations are less sweeping than the federal ones. Had the Supreme Court invalidated the federal ban on possession of medical marijuana in *Gonzales v. Raich*,[59] it would have empowered private decision-makers in the many states where medical marijuana is legal.[60]

The knowledge point developed here also does not apply to cases where judicial invalidation of legislative or executive action leads to judicial management of government institutions such as prisons and public schools, rather than empowerment of private decision-makers.[61] Such

---

57 I am not aware of any studies that compare judges' political knowledge to that of the general public. However, knowledge is highly correlated with both education and interest in politics. *See* SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 30 (manuscript at Appendix); DELLI CARPINI & KEETER, *supra* note 51. And it is probably a safe assumption that the average federal judge has a high level of education and much greater interest in politics than the average voter.

58 Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983).

59 545 U.S. 1 (2005).

60 According to a survey conducted by a pro-medical marijuana group, medical marijuana use is legal in 18 states and the District of Columbia. *See 18 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON.ORG (Jan. 7, 2013, 1:42 PM), http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881.

61 *See, e.g.*, Missouri v. Jenkins, 495 U.S. 33 (1990) (partially upholding district court decision that took control of Kansas City school district away from local government and ordered tax increases

judicial intervention may be justified on various grounds, including the need to combat longstanding violations of constitutional principles. But taking advantage of the superior knowledge of private actors is not likely to be one of them.

Similar issues may arise in cases where judicial review forces other government actors to expand their interventions in the economy or civil society. In these situations, judicial intervention might actually exacerbate knowledge problems associated with government decision-making. While such cases are more common in constitutional systems with judicially enforceable "positive" socioeconomic rights,[62] they are quite rare in the U.S. constitutional system, where the national Constitution contains few, if any, such rights.[63] Such issues do arise more often at the state level, where many state constitutions contain positive rights, such as the right to education, which has led some state courts to force the government to increase education spending, often with little or no improvement in student performance.[64]

C. Implications

The libertarian critique of the implicit "benevolent despot" assumption underlying judicial deference is an important contribution to the debate over the subject. Obviously, my summary of that critique in this article is not enough to prove that judicial deference to expertise is always unwarranted. The extent to which actual government decision-making departs from the assumptions of benevolent purpose and superior knowledge may well vary among issue areas. Also, as noted above, the critique of the superior knowledge assumption is much weaker in cases that do not involve judicial protection of individual rights.

Nonetheless, the libertarian critique does raise issues that jurists and legal scholars must carefully consider. Both critics and defenders of judicial deference would do well to take account of them.

---

for purposes of alleviating school segregation); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1999) (describing judicial management of prison systems found to be in violation of the Eighth Amendment). The Supreme Court limited judicial control of Kansas City schools in a follow-up case, Missouri v. Jenkins, 515 U.S. 70, 100–01 (1995).

62 *See, e.g.*, CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 221–38 (2001) (discussing judicial enforcement of positive socioeconomic rights in the case of South Africa).

63 Efforts to interpret the Fourteenth Amendment as mandating positive rights have met with little success in the courts. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973) (rejecting claims that it establishes a positive right to equal education funding).

64 *See* ERIC A. HANUSHEK & ALFRED A. LINDSETH, SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS 145–70 (2009) (surveying the results of judicial intervention in this field, and concluding that it has been largely ineffective).

III. A DISTINCTIVELY LIBERTARIAN CONTRIBUTION TO CONSTITUTIONAL THEORY

In addition to its substantive significance, the libertarian critique of judicial deference is notable as a distinctively libertarian contribution to constitutional theory. While non-libertarians certainly can, and sometimes do, endorse many parts of it, the critique is closely tied to libertarian suspicion of government and the political process. It is no accident that libertarian scholars have taken a leading role in developing public choice theory, the branch of economics devoted to analyzing interest group influence over public policy in a way that does not assume that government actors have benevolent motivations.[65] They have also emphasized the deleterious consequences of rational political ignorance and irrationality.[66]

In recent debates over constitutional theory, libertarian scholars are probably best known for their advocacy of originalism. Libertarians such as Randy Barnett, Gary Lawson, and Michael Rappaport have made major contributions to the literature explicating and defending originalism as a tool of constitutional interpretation.[67]

But there is no necessary inherent connection between libertarianism and originalism. Certainly, the original meaning of the Constitution could mandate extremely non-libertarian results. A socialist state, for example, could have a constitution whose original meaning is completely antithetical to libertarianism.[68] The same goes for a constitution that reflects extreme social conservative or nationalist values. It is not surprising, therefore, that originalism has been advocated by leading conservative and liberal scholars, as well as libertarian ones.[69] Moreover, the idea of a consistent

---

65 *See* BRENNAN & BUCHANAN, THE REASON OF RULES, *supra* note 33, at 55; MUELLER, *supra* note 36, at 333–35; OLSON, *supra* note 37, at 2; MCCHESNEY, *supra* note 40, at 61–62.

66 See especially CAPLAN, THE MYTH OF THE RATIONAL VOTER, *supra* note 57.

67 *See* BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 1, 89–117; Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOYOLA L. REV. 611 (1999); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006) (arguing that the Constitution should be interpreted as understood by the "reasonable American" of 1788, at the time of ratification); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007).

68 The Soviet Constitution is a good real-world example. *See* Ilya Somin, *Ginsburg and Scalia on Foreign Constitutions*, VOLOKH CONSPIRACY (Feb. 8, 2012, 4:56 PM), http://www.volokh.com/2012/02/08/ginsburg-and-scalia-on-foreign-constitutions/ (explaining why "[a] careful reading of the Soviet Constitution . . . leaves little doubt that it was written for a totalitarian communist state").

69 *See* James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1524–26 (2011) (arguing for a liberal version of originalism and describing "original meaning" as the newly dominant view in constitutional theory). For other prominent liberal versions of originalism, see Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 444–49 (2007); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000). For conservative defenses of originalism, see BORK, *supra* note 30, at 144; Steven G. Calabresi, *Introduction*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 1, 12, 35 (Steven G. Calabresi ed., 2007) (arguing that constitutional interpretation should be based on the "the original

moral obligation to obey the original meaning of the Constitution is far from clearly consistent with libertarianism. Libertarians who believe that people are not morally bound to obey the dictates of government unless they freely consented to do so probably must reject the idea that we have any intrinsic duty to obey the Constitution—to which most modern Americans never gave any meaningful consent.[70] Libertarian writer Lysander Spooner emphasized this point in the nineteenth century,[71] and it remains relevant today.

The libertarian case for originalism is necessarily contingent. It could turn out that some other approach will be a more effective way to promote a libertarian society. Obviously, a libertarian could defend originalism on grounds independent of the real-world libertarian effects of originalist decisions. For example, he or she might value adherence to the integrity of legal texts above promoting freedom. But such a defense of originalism, even if valid, would not be a specifically libertarian defense. In my view, libertarians may still have good reason to embrace originalism, partly because the available alternatives are worse, and partly because the supermajoritarian process by which the original meaning was created is one that is likely to produce good laws, on average.[72] But, these are contingent judgments. One can easily imagine constitutions for which they would not hold.

By contrast, the relationship between libertarianism and skepticism about judicial deference is much tighter than that between libertarianism and originalism. While one need not be a thoroughgoing libertarian to accept some or even all of the libertarian critique of deference, it does rest on skepticism about government that is a vital component of libertarian thought. It is surprising, therefore, that libertarian constitutional theorists have devoted relatively little systematic attention to the subject.

CONCLUSION

Libertarian political and economic thought provides some important grounds for skepticism about judicial deference to legislative and executive

---

meaning of the constitutional text"); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1144–45 (2003); Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991 (2008).

70 For a good discussion of libertarian consent theory, see A. John Simmons, *Consent Theory for Libertarians*, 22 SOC. PHIL. & POL'Y 330 (2005); *see also* A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 57–74 (1979) For explanations of why the "tacit consent" created by living in a territory controlled by a government is not sufficient to create an obligation to obey, see id at 75–100; Ilya Somin, *Creation, Consent, and Government Power Over Property Rights*, CATO UNBOUND (Dec. 13, 2010, 8:56 AM), http://www.cato-unbound.org/2010/12/13/ilya-somin/creation-consent-and-government-power-over-property-rights/.

71 *See generally* LYSANDER SPOONER, NO TREASON: THE CONSTITUTION OF NO AUTHORITY (1870).

72 *See* McGinnis & Rappaport, *A Pragmatic Defense of Originalism*, *supra* note 67, at 383; John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1695 (2010).

expertise. These ideas represent a distinctively libertarian contribution to constitutional theory.

In this article, I have not attempted to comprehensively evaluate the libertarian critique of deference. I merely sought to outline that criticism and explain its relevance to debates over deference. The ongoing debate over judicial deference will surely continue. As it does, both sides would do well to take account of relevant libertarian ideas.