Law Quadrangle (formerly Law Quad Notes)

Volume 26 | Number 2 Article 11

Winter 1982

Elevation of Private Rights to the Constitutional Level

Christina B. Whitman
University of Michigan Law School

Elevation of Private Rights to the Constitutional Level

Professor Christina B. Whitman,
University of Michigan Law School

Summary:

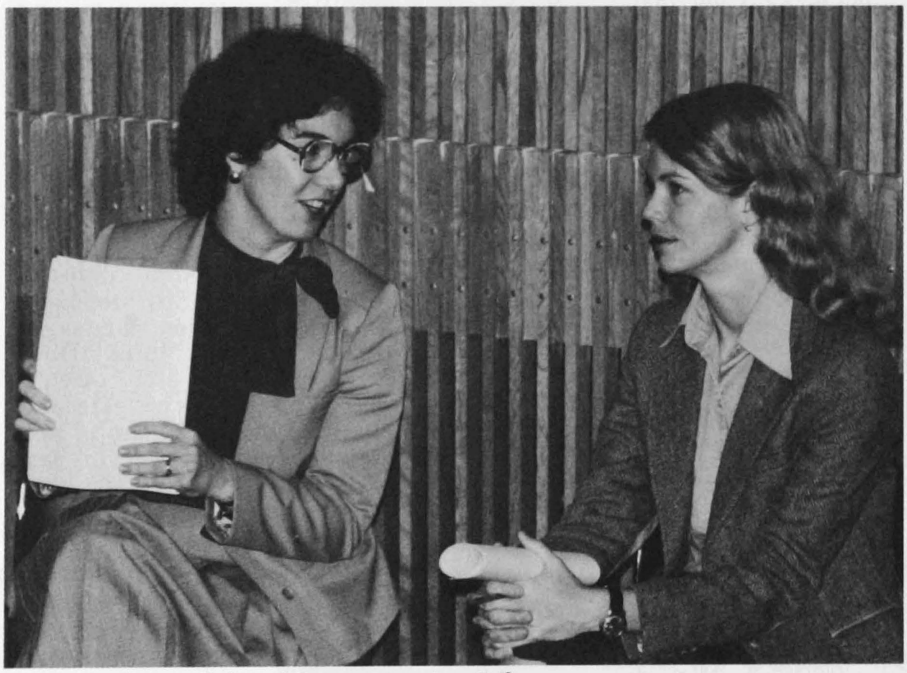
"In the last two decades it has become increasingly common for litigants to characterize as constitutional, rights that would previously have been viewed as properly heard under state tort law if they were to be protected at all." Most recently lower federal courts have been more willing to recognize such constitutional causes of action than the United States Supreme Court, but not long ago the Supreme Court did encourage such claims. In the early 1960s it turned an 1871 civil rights statute into an effective vehicle for litigation of constitutional actions brought against state and local officials. While the actions of the Chicago police in that case did represent an egregious violation of the federal Constitution, they were also the basis for a cause of action under Illinois tort law. In a similar case in 1971, the Supreme Court read the Constitution itself as implying a private right of action for damages against federal officials. Congress has also supported the rights of plaintiffs to bring constitutional claims.

The tendency to see private rights as needing constitutional protection has increased the workload of the federal courts, yet has not meant a reduction in the caseload of the state courts. "It has meant a shift in public and professional attention towards constitutional litigation," which, by creating the expectation that all 'important' claims will be recognized and protected by the federal judiciary, may undermine state authority.

Most constitutional litigation necessarily involves only claims brought against the government or government officials. Constitutional tort actions against private defendants can be brought under some federal statutes, and the trend towards 'constitutionalization' has created pressure for expansion of the 'state action' requirement or for expansive interpretation of those federal statutes that do protect constitutional rights against infringement by private individuals. However, a private right ordinarily becomes the basis for constitutional litigation only when it is infringed by a government actor and where the litigant can point to a constitutional provision to make his case.

This has led the plaintiffs and the courts to struggle to find constitutional bases for claims. What is the source of the impetus to characterize so many rights as worthy of constitutional protection?

This desire to convert private rights into constitutional claims results in part from the increased involvement of government in the lives of American citizens. Constitutional litigation also has a special appeal for public interest litigants who are interested in es-



Christina Whitman (left) and Commentator Lea Brilmayer

tablishing rules of general application and in attracting the attention of the national press.

The impetus to constitutional decision making can also be attributed to the desire to use the courts to resolve questions of morality. While other considerations are material in tort cases, constitutional litigation focuses on the issue of the propriety of the conduct of the defendant, who is typically the government or a government official. A related attraction of constitutional law to litigants is "the relative freedom that judges in constitutional cases have to draw on a range of sources for decision making." While tort judges are more constrained by precedent, judges in constitutional cases have felt freer to look beyond precedent to other historical sources and to their own perception of popular expectations and mores.

One questionable assumption which is often implicit in the arguments of litigants who press for constitutional protection is that all our values should be treated with equal respect. Since there are logical and psychological limits on the range of values that can be treated as essential by a single society, and since even very important values are frequently in conflict, the best approach may well be to reserve for only a few values the ultimate sanction of constitutional protection.

What are the costs of failing to thus limit the range of constitutional recognition? The most significant danger is that the value of constitutional protection will be diminished in those situations where federal intervention is essential and should be available. There are four ways in which expansion of the scope of constitutional protection may actually dilute the ability of our society to guarantee individual liberty: through increasing the workload of the already heavily burdened federal courts; through too hasty and abstract articulation of individual rights; by denigrating the role that the states can play in defending acknowledged rights and in articulating new ones; and by deluding citizens about the connection between individual fulfillment and limitations on government behavior.

The excerpted sections of Professor Whitman's paper give fuller consideration to these dangers inherent in increasing the scope of constitutional litigation.

Excerpt:

The sheer number of constitutional tort cases imposes a grievous administrative burden on the federal courts. This is an extremely serious practical problem, but may not seem, at first glance, to threaten the strength of constitutional protections. However, a crushing weight of cases—whatever their individual merit—ultimately diminishes all rights because the judiciary becomes less capable of responding sympathetically to any single claim. Simply as a matter of self-preservation, individual judges may begin to read complaints grudgingly or to look for narrow resolutions that avoid the most difficult issues.

In order to process the caseload, the federal courts have in the last decade grown dramatically as a bureaucracy; we have far more judges and far more law clerks assigned to each judge than at any time in the past. This too has its costs. The care with which decisions are reached and the degree to which written opinions reflect a consensus view inevitably suffer as a consequence of decreased collegiality. Under time and work pressures judges may be tempted—at least in routine cases, which appear to lack importance, or in abstruse cases, which can be intimidating and time-consuming—to defer to the recommendations of their clerks or to other judges who are perceived to have expertise in a particular area. Opinion writing may be largely delegated to law clerks and increasingly divorced from the process by which the judge reaches a decision. To save time and avoid conflict, appellate judges may hesitate to suggest changes in their colleagues' drafts, joining when they agree with the conclusion but not the rationale. It then becomes difficult to discern a coherent approach in a line of cases or to predict future decisions. Perhaps most significantly, the job of judging may dwindle into an onerous and boring administrative task—one that cannot attract and engage committed, intelligent people.

As the number of claims that receive constitutional sanction increases that in itself may contribute to loss of coherence and predictability. There will be situations in which claims come into conflict, and judges then may adopt quite consciously the role of compromiser, of policymaker. Instead of defining limits on government behavior by articulating a few inviolable principles, the Court has, in the past decade, been increasingly forced to work out solutions that give a little bit to each side. . . .

Debasement of constitutional values, then, can occur when their protection becomes a boring task, and it can occur through dispersal of judicial energy among too many interests. The very concept of "fundamental" rights seems ironic if every important right is to receive constitutional sanction. Owen Fiss has written that "[w]e have lost our confidence in the existence of the values that underlie the litigation of the 1960s, or, for that matter, in the existence of any public values." In part we have lost the certainty of the 1960s simply because the problems with which we are faced seem much more difficult. Affirmative action has not captured the attention of the public with the same fervor as the earlier claim for equal treatment of racial minorities. Abortion has proved to be a much more divisive issue than the right of married persons to use contraceptives. Another reason for our loss of certainty is our failure to remember that only a few particularly important concerns can be given ultimate dedication. As many, often conflicting, values compete for attention, it is hard to retain commitment to any one of them. . . . Constitutional decision making, rather than common-law decision making, may also impair the ability of the judiciary to protect individual rights for the very reasons that make constitutional avenues so attractive to plaintiffs—the conclusive, all-encompassing, and relatively inflexible nature of

constitutional rules. . . . Constitutional conclusions are typically articulated with reference to eternal national values. . . . Justices who sit in the seat of national government to devise rules of nationwide application and significant duration, necessarily think and speak with a degree of abstraction. . . . The Court may generalize from the dramatic situation before it . . . to devise rigid and far-reaching rules that leave inadequate room for change over time or variation in local conditions.

Tort rules, in contrast, are of narrow geographic scope, easy to modify, and typically framed to be responsive to the facts of particular cases. . . . The strength of the common law has been thought to reside in its ability to proceed through the power of judgment exercised on particular cases, accommodating novel situations. Although it works towards universal principles of broader scope through the doctrine of precedent, the common law presumes that relationships among litigants, and the circumstances that give rise to litigation will vary.

The tendency towards abstraction of constitutional litigation has a leveling effect that may actually run counter to the claims of liberty and freedom. . . . There is a tension, often unacknowledged, between a constitutional plaintiff's claim against authority in the name of individual freedom and his request for a national answer, which assumes a universality of values and needs. . . .

The tendency of constitutional litigation to abstraction is only intensified by the increased bureaucratization of the court system caused by expanding caseload. As the judiciary begins to put a high premium on the competent and efficient disposition of large numbers of cases, general rules that dictate results become much more attractive than individual decisions on the merits of each case. A single judge, unless he or she is quite exceptional, will not be able, by sheer memory, to provide the continuity through accumulated experience that has provided the safeguard of equal treatment of similar claims in the past. Instead, clerks will be relied upon to ensure continuity by research—into court files and past cases. Once this burden is transferred to the clerks, there will be an inevitable tendency to simplify and abstract, for young lawyers clerk at the time in their careers when they are most enamored of the rationalizing power of the intellect and most suspicious of decisions based on the reactions of experience to the equities of a particular case. . . .

The expansion of constitutional protection may also be unwise in that the format of constitutional litigation, in contrast to tort disputes, emphasizes the citizen's claims against society with little reference to society's claims upon the citizen. To state a constitutional case the citizen-plaintiff must assert a claim against government authority, typically that government has gone too far and must draw back. In a tort action, the relatively equivalent status of the parties encourages us to consider the reciprocal nature of the problem. Tort litigation makes us aware that the recognition of a right on behalf of the plaintiff necessarily means a constraint or a burden imposed on another citizen or on an institution—the defendant. The infinite expansion of common-law rights is nonsense, for every recognition of a right in one person implies a limitation on the rights of others. Constitutional adjudication is less apt to remind us of our obligations to each other. The problem is not presented as one involving the coordination of the activities of several citizens. Rights are asserted as limitations on government action, not on the conduct of other people.

This is not accurate when the constitutional litigant claims that the government is obliged to protect him from other citizens—from those who discriminate on the basis of race, or from those who pollute, or from those who engage in criminal activities. Similar problems arise when the constitutional right asserted is a welfare claim, perhaps a right to a minimum level of subsistence. It is tempting to see these as simple claims of citizens against authority, but they are not. Like tort law, they ask the courts to coordinate competing activities and to dictate the allocation of resources among citizens. When the relative value of the competing activities is clear—as in cases of racial discrimination—the courts have not been reluctant to impose constitutional resolutions, but they have been understandably hesitant to recognize constitutional claims in most areas in which the claim for government protection is equivalent to a demand to be made upon the resources or activities of other citizens.

The "rights" emphasis of constitutional litigation distracts citizens from the obligations that are otherwise the corollaries of legal protection, and it may conceal the true character of claims addressed to government actors but actually made against the resources available to other citizens. Constitutional litigation encourages us to think of individuals as being most "free" when they successfully assert claims against society, represented by the government. In fact, we live in society, and our responsibilities to each other may be as important to our ultimate freedom as any limitation on government action.

Those who would constitutionalize every private right seem to have a rather exalted view of what political or governmental solutions can do in guaranteeing individual liberty. Restraints on government behavior are important, but all such restraints can do is to remove certain institutional obstacles to individual fulfillment. As important as relief from abuses by government institutions is, a sense of responsibility for one's own life and the existence of alternative institutions that can be a source of strength and fellowship are equally important. For example, the Constitution has been read to protect us from discrimination on the basis of sex and race, but it cannot give us all jobs in a depressed economy. Nor can it protect us from our own lack of confidence or from our inability to take advantage of opportunities. It does not help us to resist the temptations of flattery. It offers no relief from the casual cruelties of friends and strangers. The gift to overcome these obstacles we get not from courts, but from ourselves and from each other.