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ARE ENUMERATED CONSTITUTIONAL RIGHTS THE ONLY RIGHTS WE HAVE? THE CASE OF ASSOCIATIONAL FREEDOM

RANDY E. BARNETT*

Much of contemporary constitutional thought assumes that the only rights individuals have are either those that they are given by the legislature or those that are explicitly specified in the Constitution of the United States (or in a state constitution). Such a view of rights is based on the jurisprudential philosophy known as legal positivism, a view that has dominated academic discussions about legal rights for at least fifty years and that has begun to wane only in the last fifteen years.¹ In this Paper, I will try to explain how adherence to this legal positivism taints and distorts constitutional discussions in general and discussions of associational freedom in particular.

I. LEGAL POSITIVISM AND CONSTITUTIONAL RIGHTS

Legal positivism specifies that the only legal rights one has are those that are recognized by the sovereign legal authority. According to legal positivism, while one may appropriately claim that a sovereign legal authority *ought* to recognize a right, unless and until such a right is in fact recognized, one cannot say that an individual *has* such a right.² In other words, legal positivism represents the proposition that "first comes government, then come individual rights."

This jurisprudential position influences constitutional analysis in the following manner. If the exclusive source of law is the sovereign and if, as in the United States, the sovereign is thought to be the popularly elected legislature, then, unless the

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1. See Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy* (Book Review), 97 HARV. L. REV. 1223 (1984) (tracing the recent decline of legal positivism and the rise of normative rights-based legal philosophy).

2. A good introductory discussion of legal positivism can be found in J. MURPHY & J. COLEMAN, *THE PHILOSOPHY OF LAW* 22-38 (1984).

legislature grants a right to an individual, that right does not exist. Admittedly, in the United States, this "legislative supremacy" is qualified by a constitutional framework that places judicially enforced limits on what legislatures may permissibly do; but the Constitution itself can be seen as nothing more than the enactment of the sovereign body known as the Constitutional Convention (as ratified by the states).

Viewed from a positivist perspective, then, judges are the "lieutenants" of the sovereign. Judges, in the United States, are authorized to recognize only such rights as are generated by a popularly elected legislature or by a written constitution, for these two institutions are the exclusive sources of all rights. A judge may never restrict the acts of a duly elected legislature unless such a restriction is specifically authorized by the Constitution. A judge is authorized to enforce only those strictures that are actually written in the Constitution (and those that may fairly be implied). Let us call this "government first—rights second" account of the relationship between individual rights and the Constitution the "Austinian" approach to the Constitution, after John Austin, the father of legal positivism.³

II. NATURAL RIGHTS AND THE "HISTORICAL CONSTITUTION"

The Austinian approach to the Constitution is so well established that the older view of law and rights, which may be contrasted with the legal positivist view of the Constitution, might today be inconceivable to some. Before the development of positivism, however, scholars *began*, rather than concluded, their political and legal analysis with the proposition that individuals had rights, often referred to as natural rights. John Locke was one of these thinkers. Thomas Paine was another.

The theory asserted that in a "state of nature," that is, in a society where there is no government, "all men may be restrained from invading other's rights, and from doing hurt to one another, and the law of Nature be observed, which willeth the peace and preservation of all mankind . . ." ⁴ Putting Locke's point in more modern terms—Robert Nozick's terms to be precise—we might say that according to a Lockean polit-

3. See Urmson, *John Austin*, in 1 *ENCYCLOPEDIA OF PHILOSOPHY* 209 (P. Edwards ed. 1967).

4. J. LOCKE, *An Essay Concerning Civil Government* § 7, in *TWO TREATISES ON GOVERNMENT* 316 (Mentor ed. 1960) (London 1690).

ical and moral analysis: "Individuals have rights, and there are things no person or group may do to them (without violating their rights)."⁵

Where does government and law come in? Locke argues:

[C]ivil government is the proper remedy for the inconveniences of the state of Nature, which must certainly be great where men may be judges in their own case, since it is to be imagined that he who was so unjust as to do his brother an injury will scarcely be so just as to condemn himself for it.⁶

In short, government is created because it is *convenient*. It solves some difficult practical problems of enforcing one's natural rights. Government is not seen as the source of rights, but rather the legal protection of pre-existing rights is seen as the reason why a government is created. Accordingly, not just any government will do, for as Locke observed:

[I]f government is to be the remedy of those evils which necessarily follow from men being judges in their own cases, and the state of Nature is not to be endured, I desire to know what kind of government that is, and how much better it is than the state of Nature⁷

In other words, if government is a cure for some malady involving the legal protection of individual rights, it must be a cure that is better than the disease. The standard for assessing the performance of government is its efficacy in enforcing the pre-existing rights of individuals. Government is created to provide substantive due process of law and must be assessed by this standard. According to this view, then, individual rights come first and government, with all its various "branches" and federal-state "separations," comes second as a means of securing these fundamental rights.

To some, this view of law and rights and government may appear to be nothing more than ancient philosophy. Fascinating though such intellectual history might be, what could it possibly have to do with contemporary constitutional jurisprudence, much less with freedom of association?

The connection lies in the fact that the authors of our Constitution were very much influenced by the Lockean philosophy of "rights first—government second." The Founders saw that the

5. R. NOZICK, *ANARCHY, STATE AND UTOPIA* ix (1974).

6. J. LOCKE, *supra* note 4, § 13, at 316.

7. *Id.*

creation of government requires constitutional limits on the power of government. The constitutional limitations they imposed on the three branches of the government—including the legislative branch—were imposed to protect the natural rights of all persons who comprise the society. At least that was the intent of the Framers.⁸

Judge Bork has recently and wisely admonished us that “judges have no mandate to govern in the name of contractarian or utilitarian or what-have-you philosophy rather than according to the historical Constitution.”⁹ The proper connection between natural rights and constitutional analysis is that the “historical Constitution” that judges are called upon to interpret may be seen most accurately as a product of Lockean philosophy. Even if a contemporary analyst did not believe in natural rights, for the Constitution to be given its historically proper construction, such rights must be hypothesized and *assumed* to exist.

From the point of view of “original intent,” viewing the Constitution and the legislature as the sole sources of individual rights is actually quite anachronistic. Interpreting the Constitution from a legal positivist or Austinian perspective of “government first—rights second” is to treat the Eighteenth-Century Constitution as a product of *Nineteenth-Century* philosophy. John Austin did not deliver his path-breaking lectures in jurisprudence until 1826,¹⁰ and they were first published in 1832,¹¹ some forty years after the Constitution of the United States was adopted.

III. THE DECLINE OF NATURAL RIGHTS AND THE “HISTORICAL CONSTITUTION” AND THE RISE OF THE WELFARE STATE

Until the mid-1970s, the Austinian Constitution and the “government first—rights second” view dominated constitutional thought. What accounts for the almost complete eclipse of the “rights first—government second” philosophy of John Locke and the historical Constitution? This question defies a

8. See, e.g., J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* (1981) (concisely describing the views of the proponents and opponents of the Constitution).

9. R. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* 7 (1984).

10. See Urmson, *supra* note 3, at 209.

11. *Id.*

simple explanation, but at least three factors contributed importantly to the decline of the Lockean approach.

The first blow to the Lockean world-view was the acceptance of Austinian legal positivism by American legal intellectuals as part of the empiricist movement that swept all branches of academia in the Nineteenth Century. Empiricism has been defined as "the theory that experience rather than reason is the source of knowledge."¹² According to this view, if you cannot see it, feel it, or measure it, it is not real. The most palpable aspect of law is enforcement. To an empiricist, all talk about natural law is "nonsense" and talk about natural rights is "nonsense on stilts," to use Jeremy Bentham's colorful phrase.¹³

No one exemplifies this approach to legal analysis better than Oliver Wendell Holmes, Jr. His famous statement that "the life of the law has not been logic: it has been experience"¹⁴ captures perfectly his empiricist orientation. Consequently, Justice Holmes lampooned notions of substantive due process based on pre-existing individual rights as positing "a brooding omnipresence in the sky."¹⁵ In *Lochner v. New York*¹⁶ he dismissed the Court's Lockean reasoning with a phrase that became the rallying cry for Twentieth Century constitutional law: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."¹⁷

Even for Holmes—the master of judicial catch phrases—this putdown was brilliant. By making it appear to be a product of Herbert Spencer's popular, liberal Nineteenth Century work, Justice Holmes deprived the Court's analysis of its actual historical legitimacy. Reasoning that was firmly based on the Lockean philosophy that preceded and produced the American Revolution and Constitution was recast and dismissed as a wholly extraneous and "ideological" gloss on the document. In the guise of philosophical neutrality, Justice Holmes successfully paved the way for a more "modern" constitutional analy-

12. Hamlyn, *Empiricism*, in 2 *ENCYCLOPEDIA OF PHILOSOPHY* 499 (P. Edwards ed. 1967).

13. J. BENTHAM, *Anarchical Fallacies*, in *HUMAN RIGHTS* 32 (A. Meldon ed. 1970) ("Natural rights is simple nonsense; natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts. But this rhetorical nonsense ends in the old strain of mischievous nonsense . . . So much for terrorist language.").

14. O.W. HOLMES, *THE COMMON LAW* 1 (1881).

15. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

16. 198 U.S. 45 (1905).

17. *Id.* at 75 (Holmes, J., dissenting).

sis based on the essentially utilitarian¹⁸ Nineteenth Century Austinian legal philosophy favored by him and others.

The second blow to the Lockean "historical Constitution" was the Great Depression. A general perception existed that this tragic event was a product of the failure of classical liberal principles or, at the very least, that to deal efficiently with this catastrophe required a scuttling of liberal principles. As the Japanese detention cases illustrate,¹⁹ we cannot underestimate the effect that general fear and perceptions of exigency may have on constitutional jurisprudence.

Finally, the Lockean rights of private property and freedom of contract had been inconsistently protected by the Court. This made the constitutional basis of these rights appear less intellectually compelling and easier to reverse.²⁰ In truth, when individual rights are taken seriously, problems of application are probably unavoidable for reasons which go well beyond the scope of this presentation, but history has shown that the Austinian alternative is not superior.

Beginning in the 1970s, when the doctrine of substantive due process was rehabilitated by such writers as Gerald Gunther²¹ and Lawrence Tribe,²² the positions of those on the left and those on the right had reversed. Modern liberals now use substantive due process and the language of "entitlement" to protect certain basic personal (as opposed to economic) liberties and to defend the welfare and regulatory state from the powerful intellectual (and popular) assault that classical liberals and conservatives have developed in recent years.²³ Ironically, many of those on the right who reject much of the so-called "progressivism" of the New Deal now accept the legal positivist Austinian constitutional theory that was used to bring the welfare and regulatory state into existence.²⁴

18. John Austin was a close associate of both Jeremy Bentham and James Mill. The University of London, where he was made the first Professor of Jurisprudence, was founded by the Benthamites in 1826. See Urmson, *supra* note 3, at 209.

19. See *e.g.*, *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (upholding the internment of citizens of Japanese descent).

20. This view of the "internal erosion" of substantive due process is described in L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 442-46 (1978).

21. See G. GUNTHER, *CONSTITUTIONAL LAW* 570-646 (10th ed. 1975).

22. See L. TRIBE, *supra* note 20, at 1137-46.

23. I briefly chronicle this shift in Barnett, *supra* note 1, at 1225-36.

24. This ironic and largely unrecognized development has been recently documented in S. MACEDO, *THE NEW RIGHT v. THE CONSTITUTION* (1986). Professor Macedo persuasively argues that, for all their talk of morality, many judicial conserva-

IV. FREEDOM OF ASSOCIATION

We must now examine how the Lockean-Austinian debate applies to freedom of association. The freedom to associate with persons of one's choice, which also includes the freedom to refuse to associate, is a basic component of the freedom to order one's own life that natural rights protect. If one takes a strictly Austinian or positivist view of the Constitution, however, how are such freedoms to be protected from legislative encroachment? The answer is that a court must either find some enumerated Constitutional right (or at least a "penumbra" of or "emanation" from an enumerated right) or forever hold its peace.

But what enumerated right protects the freedom of association? In three well-known cases, *NAACP v. Button*,²⁵ *Buckley v. Valeo*,²⁶ and *Brown v. Socialist Workers '74 Campaign Committee*,²⁷ the Supreme Court held that the legislative restrictions on association in question threatened the enumerated First Amendment right of free speech, but the recent case of *Roberts v. United States Jaycees*²⁸ could not be similarly resolved. In that case, the National Jaycees, a purely nongovernmental association, had excluded women from its membership. Finding that the Jaycees engaged in little, if any, constitutionally protected speech (a trait that the Jaycees would share with many private associations), the Court concluded that application of a Minnesota statute against sex discrimination did not jeopardize the enumerated constitutional right of free speech and therefore was constitutionally permissible. A similar stature has been held to apply to the Boy Scouts²⁹ and to the Boys Clubs.³⁰

tives are moral "subjectivists." Believing that moral claims have no objective or rational basis, but are instead merely subjective and essentially arbitrary "preferences," they resort to sheer majoritarianism (exerted through legislatures) to determine right. In this way Professor Macedo is able to account for some judicial conservatives' seemingly contradictory stance of "strictly construing" individual *rights* according to Eighteenth Century opinion, while broadly construing the extent of governmental *powers* by standards we have grown accustomed to only in the last four decades of the Twentieth Century. As Macedo notes, however, sheer majoritarianism is sharply at odds with both the structure of the American Constitution and the beliefs and intentions of its Framers.

25. 371 U.S. 415 (1963).

26. 424 U.S. 1 (1982).

27. 459 U.S. 87 (1982).

28. 104 S. Ct. 3244 (1984).

29. See *Curran v. Mount Diablo Council of the Boy Scouts*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *appeal dismissed*, 104 S. Ct. 3574 (1984).

30. See *Isbister v. Boys' Club of Santa Cruz*, 40 Cal. 3d 72, 707 P.2d 212, 219 Cal.

Assuming they could have imagined these cases, is there any doubt that the Founders would likely have abhorred such governmental interference with a private association? Yet advocates of "strict constructivism" or "judicial restraint" or "what-have-you philosophy" (to again borrow Judge Bork's felicitous phrase³¹), would be forced to urge the Supreme Court of the United States to supinely countenance this kind of legislative usurpation of associational freedom. There is, however, an alternative.

V. TWO KINDS OF JUDICIALLY ENFORCEABLE RIGHTS

A Lockean approach to the Constitution considers two types of rights as capable of overriding legislation. The first is the *institutional* rights that the constitutional framework explicitly provides to protect the individual from the government it established. The second type of right is the *background* rights that each person has by virtue of being a human being living in society with others.³² Government is thought to be necessary to protect both types of rights.

One way to understand this distinction is to imagine that the Constitution is a script for governmental "players" who must play the roles of the "characters" it provides. While some updating of the play may occasionally be needed so that its original meaning is preserved for contemporary audiences, no player can simply make up his own lines. According to this analogy, the constitutional allocation and limitation of powers defines the relationship of the various "branches" and "levels" of government in the way a script defines the relationship of stage players to each other.

Continuing the analogy, what happens if an actor strikes out at a member of the audience? The rights of the people in the audience are two-fold. Against each other and against the players, they have background "private law" rights that judges have been developing for centuries as part of the Anglo-American

Rptr. 150 (1984) (relying on *Roberts*).

31. See R. BORK, *supra* note 9, and accompanying text.

32. Cf. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 101-05 (1977) (conceptually distinguishing between background and institutional rights). Such a distinction is widely employed, though not always explicitly recognized. For example, opponents of abortion typically favor an alleged (background) right of the fetus to life over an alleged constitutional (institutional) right of the mother to privacy. And they would be unswayed in their assertion of these rights by majoritarian legislation endorsing the legality of abortion.

common law. Against the players alone they may have *additional* enumerated "public law" or institutional rights, such as a right to be free from unreasonable searches and seizures, provided by the Constitution.³³

Do we have a right to "freedom of association" and, if so, is it an institutional right, a background right, or both? It is not too difficult to find an institutional right of associational freedom based in the First Amendment's explicit guaranty of free speech, as the Court held in the *Button*, *Buckley*, and *Brown* decisions mentioned earlier. While this institutional right probably does fall short of protecting the associational freedom of the Jaycees (or the Boy Scouts or the Boys' Clubs), at least if the Court's characterization of the Jaycees's activities is accurate, a Lockean analysis would not end here.

A Lockean approach proceeds to identify more fundamental background rights that do not evaporate upon the creation of a government or the expression of majority will. Locke called these rights "property rights;" that is, rights to acquire, use, and transfer ownership of resources in the world. Such rights are a principal means by which life, liberty, and the pursuit of happiness are facilitated in a social context.³⁴ Such rights include not only the right to external resources but also the right to one's person.³⁵

It is, then, plausible to claim that the application of the statute in *Roberts* violates the background property rights of the individuals comprising the National Jaycees. Just as you need not associate with someone who knocks on your door and desires to enter, persons who form associations such as the National Jaycees, the Boy Scouts, or the Boys' Clubs by expending their own rightfully and privately acquired resources on these non-governmental activities need not admit into these activities persons with whom they do not wish to associate. While we may not have a background right of associational freedom per se,

33. I discuss the variable content of the private law-public law distinction in Barnett, *Foreword: Four Senses of Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267 (1986).

34. I explain this view of rights in Barnett, *Pursuing Justice in a Free Society: Part One—Power v. Liberty*, CRIM. JUST. ETHICS, Summer/Fall 1985, at 50.

35. See J. LOCKE, *supra* note 4, § 27, at 328 ("every man has a 'property' in his own 'person'").

associational freedom is an important aspect of the background property rights we do have.³⁶

The only obstacle remaining in the path of judicial intervention on behalf of the Jaycees is to justify federal judicial interference with a state legislative act. The Fourteenth Amendment permits such an intervention when a state deprives a citizen of "life, liberty, or property, without due process of law" or when it abridges "the privileges and immunities of citizens of the United States."³⁷ To strike down a legislative infringement of Lockean background property rights, a court need not incorporate the Bill of Rights into the Fourteenth Amendment or find "eminations" and "penumbras." A proper substantive theory of "due process of law" and "privileges and immunities" would support federal protection of the property rights of the Jaycees.³⁸ After all, the Fourteenth Amendment did not enact Mr. Jeremy Bentham's *Anarchical Fallacies*.

VI. PROPERTY RIGHTS AND THE CONSTITUTIONAL TEXT

At this point, many readers may be thinking: Wait a minute! Call it "legal positivism," or the "Austinian Constitution," or "government first—rights second," or whatever you like. I still want to know what gives an unelected federal judge with lifetime tenure the right to thwart the will of a popularly elected legislature in the absence of an expressed constitutional authorization. Fortunately, to answer this question, we need not rely solely on John Locke or even on Robert Nozick. The answer is contained within the Constitution itself: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."³⁹ Notice that the Ninth Amendment speaks of *other* rights which are "*retained* by the people." I submit that such a phrase would be completely inexplicable to the Nineteenth Century "government first—rights second" philosophy of John Austin, Jeremy Bentham, or Justice Holmes. This statement would

36. By granting review in Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213, *appeal granted*, 55 U.S.L.W. 3306 (U.S. Sept. 30, 1986) (86-421), a case that relied on Roberts v. United States Jaycees, 104 S. Ct. 3233 (1984) in rejecting Rotary International's constitutional claims, the Supreme Court will have the opportunity to reconsider its position.

37. U.S. CONST. amend. XIV, § 1.

38. See also, *infra* note 44.

39. U.S. CONST. amend. IX.

have been viewed by them as “nonsense on stilts,” yet the Framers thought it important enough to include in the Constitution.⁴⁰

Some of the Framers and members of the ratifying conventions realized that simply enumerating the powers of the federal government would not be enough to prevent the federal scheme of government from violating the individual rights it was created to protect.⁴¹ They believed that future generations might construe the rights of individuals too narrowly.⁴² They therefore inserted, among other clauses, an amendment referring to “the rights retained by the people” as a way of authorizing the enforcement of a Lockean vision of “rights first—government second.”⁴³ If this interpretation of the Ninth Amendment is correct, associational freedom can be viewed as an important aspect of the fundamental background rights that it protects.⁴⁴ If this interpretation is incorrect, then what else can this explicit passage in the historical Constitution mean? It is very hard to believe that the Framers intended to insert in their Constitution an amendment that meant nothing at all.⁴⁵ Surely it is disingenuous to claim to be interested in the Framers’ original intent and then to read this amendment out of the Constitution simply because it does not harmonize with the received view of contemporary utilitarian and analytic phi-

40. I do not wish to imply that this is the only textual support for background property rights in the Constitution. For a considerably richer account of the text and its relationship to private property see R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND EMINENT DOMAIN* (1985); and S. MACEDO, *supra* note 24. This language is, however, virtually inexplicable by any theory that rejects entirely any sort of natural rights position. Far from being an obscure phrase buried within the document, it constitutes an entire amendment.

41. See J. STORING, *supra* note 8, at 64-70; B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT 6-9* (1955).

42. J. STORING, *supra* note 8, at 68-70.

43. B. PATTERSON, *supra* note 41, at 10-26.

44. Further, the legal protection afforded by the Ninth Amendment applies to the States as well as the federal government without recourse to the Fourteenth Amendment. See *id.* at 36-43.

45. In case anyone should think that I am criticizing a straw man here, I offer the following anecdote. At the “Symposium on the First Amendment” held at Stanford Law School in March 1986 where this Paper was delivered, Seventh Circuit Court of Appeals Judge (and former University of Chicago law professor) Frank Easterbrook took a positivist and narrow view of associational freedom in his paper. See Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POL’Y (1987) (arguing that, absent a theory similar to substantive due process, the free speech clause of the First Amendment would not protect associational activities like those of the National Jaycees). During the question session that followed the delivery of our papers, Judge Easterbrook was asked what he thought the Ninth Amendment meant. His initial response was: “Nothing!”

losophy. The longstanding effort to render this explicit passage meaningless confirms the foresight of those Framers who were not content to let the future of liberty rest entirely on the enumeration of governmental powers.⁴⁶

VII. CONCLUSION: JUDICIAL ACTIVISM AND JUDICIAL AUTHORITY

Many of those who abhor the thought of judges enforcing rights that have not been legislatively determined and who characterize such a practice as "judicial activism" or "judicial supremacy" are correctly concerned with the issue of judicial authority. The question posed earlier: "What gives unelected (or even elected) judges the right to determine individual rights?" is a central question of jurisprudence. Similarly, however, one must ask what gives the majority of the members of a legislature, each of whom was elected by a simple majority of the voters in a single election, the *exclusive* right to determine individual rights? It is illegitimate for a judicial conservative to ask one question without attempting to answer the other.

The answer to both questions suggested by a natural rights analysis is that judges (and legislatures) have genuine authority only to the extent their decisions are consonant with the background and institutional rights that individuals have. Constitutions obtain their authority in no other manner. The American Constitution is authoritative (if it is⁴⁷), not because it was written by the right group of now deceased thinkers and activists, but because this particular group of thinkers and activists got it generally right. After all, even Bentham's *Anarchical Fallacies* was an attack on the merits of, not the pedigree of, *The Declaration of the Rights of Man and of the Citizen*,⁴⁸ which had been adopted by the French Constituent Assembly on August 27, 1789.⁴⁹ Bentham did not argue that the document lacked authority because it was improperly enacted. Rather, he maintained that the French framers got it wrong.

46. The proper meaning and use of the Ninth Amendment is a topic that merits further discussion.

47. This aspect of our received wisdom was challenged in L. SPOONER, *NO TREASON: THE CONSTITUTION OF NO AUTHORITY* (1869).

48. The original title of his essay was *Anarchical Fallacies; being an Examination of the Declaration of Rights issued during the French Revolution*. See Monroe, *Jeremy Bentham*, in 1 *ENCYCLOPEDIA OF PHILOSOPHY* 284 (P. Edwards ed. 1967).

49. See J. SCHAPIRO, *LIBERALISM: ITS MEANING AND HISTORY* 128 (1958).

This gives rise to the knotty problem of determining what the so-called individual rights are, a question that I have dealt with elsewhere,⁵⁰ as have others.⁵¹ Absent a complete abandonment of rational moral discourse, however, no competing theory can avoid this problem either. For example, by what reason beyond sheer power does the majority of the citizenry gain the right to coerce a dissenting minority? If the proposed basis of legislative authority is "utilitarian," how and by whom is this utility to be conceived and computed? If legislative authority is alleged to be based on "harmony with biblical scripture," then a host of similar interpretive questions are still raised.

Any moral position short of "might makes right" must grapple with such issues, and the "might makes right" view, which amounts to the view that there is no right,⁵² gives rise to its own special difficulties. There is simply no escaping the hard questions. All we can do is the best we can to reason our way to answers. Indeed we are obliged to do no less.

Many conservatives today shy away from all talk of entitlements.⁵³ By doing so they are yielding the moral high ground to those who oppose many of our most basic and traditional rights. Of course, an open debate about fundamental rights creates a risk that misconceived rights will be enforced, and this has certainly occurred. The dangers of permitting "rights talk" by judges, however, is greatly exaggerated. Judges have been developing a system of private legal rights for centuries. It is called the "common law." And where judges have recently

50. See Barnett, *supra* note 34; Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Barnett, *Contract Remedies and Inalienable Rights*, SOC. PHIL. & POL'Y, Autumn 1986, at 179; Barnett, *Why We Need Legal Philosophy*, 8 HARV. J.L. & PUB. POL'Y 1 (1985); Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977); Barnett, *The Justice of Restitution*, 25 AM. J. JURIS. 117 (1980); Barnett, *Public Decisions and Private Rights* (Book Review), CRIM. JUST. ETHICS, Summer/Fall, 1984, at 50.

51. See e.g., R. EPSTEIN, *supra* note 40; R. NOZICK, *supra* note 5; H. VEATCH, HUMAN RIGHTS: FACT OR FANCY? (1986).

52. For a discussion of constitutional analysts who appear to hold such a view, see S. MACEDO, *supra* note 24.

53. See e.g., Scalia, *Economic Affairs as Human Affairs*, 4 CATO J. 703, 707 (1985) ("conservatives who have been criticizing the courts in recent years . . . must decide whether they really believe . . . 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."). For a response defending a principled activism, see Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 CATO J. 711, 712 (1985) ("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.").

gone wrong in the area of constitutional rights, they have done so largely for two reasons.

First, some of the fault for judicial activism lies squarely at the door of Congress and the political system. Many of the "rights" judges have "created" have been based on vaguely worded acts of Congress that were passed in response to a supposed public "will" to "do something" about a real or imagined social problem,⁵⁴ with the effect being that the burden for determining the actual content of the legislation is shifted to others. Sometimes this means that regulatory agencies create the rules. Often legislative language gives judges little choice but to define rights *ab initio* as best they can.⁵⁵

Second, much of the fault for creating objectionable rights lies with the intellectual community, which has persistently ignored or ridiculed the distinction between "positive" and "negative" rights.⁵⁶ There is certainly far less danger of the kind of abuse conservatives decry when courts strike down legislation as beyond what government may rightfully do *to* an individual, than when a judge can create a governmental obligation to do something *for* an individual. While such a distinction may not in practice always be clear, it is at least as workable as many other legal distinctions courts routinely employ. It is the will, not the way, to protect negative rights and eschew positive rights that is lacking.

In the final analysis, the abandonment of all discussion of individual rights in the name of philosophical neutrality (or subjectivism or skepticism) is tantamount to unilateral intellectual disarmament in favor of those who would deny the rights which secure and define our precious liberty. It virtually assures that these economic and personal rights will be violated, if not

54. Consider, for example, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (halting construction of a multi-million dollar dam to prevent the destruction of the snail darter fish).

55. In *Tennessee Valley Authority*, the statute in question required all agencies and departments of the federal government to take "such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species." The Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (codified as amended at 16 U.S.C. § 1539 (1982)). It should surprise no one that many judges will try to interpret such language when it is cited by a party as authority and will occasionally create absurd "rights." Does not the real fault lie with the members of Congress who for purely political purposes authored or voted for legislation containing such meaningless empowering language?

56. See H. VEATCH, *supra* note 50, at 177-97 (discussing the nature and basis for such a distinction).

under the rubric of “rights,” then under the rubric of majority or community “will.” Moreover, such a posture is not only doomed to failure, it is contrary to the original intent of the Framers of the historical Constitution.