



1987

Judicial Conservatism v. A Principled Judicial Activism: Foreword to the "Symposium on Law and Philosophy"

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FOREWORD: JUDICIAL CONSERVATISM V. A PRINCIPLED JUDICIAL ACTIVISM

RANDY E. BARNETT*

I. JURISPRUDENCE AT THE RAMPARTS

We are in the midst of one of the more exciting periods in this century for jurisprudence. In the wake of the Reagan administration's numerous judicial appointments, it is the rare observer of the American legal scene who has not thought seriously about the proper role of the judge in enforcing the law. Editorialists, columnists, and academicians are all debating in one form or another the classic jurisprudential question: "What is law?" While such questions have never completely dropped from sight, we are now in a period of constructive intellectual turmoil much like those surrounding the Nuremberg trials and the civil rights movement. Such periods are usually characterized by, and perhaps caused by, a perception among an influential elite that there is a lot at stake.

One of the most significant developments in the current debate has been a schism between conservative and classical liberal intellectuals on the issue of the proper role of the judiciary. Some of these intellectuals have hewed to a stance known as "judicial conservatism." Others have urged a more activist judicial role, a view that I have previously called "judicial pragmativism"¹ and that has recently been referred to as a "principled judicial activism."² This controversy among con-

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1. See Barnett, *Judicial Pragmativism: A Definition*, in *ECONOMIC LIBERTIES AND THE JUDICIARY* (J. Dorn & H. Manne eds. forthcoming). An earlier version appeared at 4 *CATO J.* 853 (1984).

2. See S. MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* 43 (1986) ("[T]here is a need for a constitutional vision with a robust conception of judicially enforceable rights grounded in the text of the Constitution, in sound moral thinking, and in our political tradition. A *principled judicial activism* would overcome the incoherence of the modern Court's double standard.") (emphasis added). See also Dorn, *Economic Liberties and the Judiciary*, 4 *CATO J.* 661, 661 (1985) (describing the "resurgence of interest in constitutional economics and the role of the judiciary in protecting property rights and economic liberties."); Aranson, *Judicial Control of the Political Branches: Public Purpose and Public Law*, 4 *CATO J.* 719, 781 (1985) ("[T]he notion that the Court has embraced, that the legislature is omnipotent in its redistributionist activities, . . . should now become a

servatives and classical liberals surfaced in a 1984 debate between Justice Antonin Scalia and Professor Richard Epstein,³ and it is likely to continue for some time.⁴

While the papers in this symposium do not directly address the issue of a principled judicial activism, the analysis they present has important implications for the substance of that position. In this Foreword, I will attempt to describe the methodology of a principled judicial activism in a manner intended to respond to the legitimate concerns of judicial conservatives. I shall then sketch some important substantive issues that deserve future consideration and discuss the relevance of the symposium papers to this jurisprudential controversy.

II. WHAT IS A JUDGE TO DO?

A. *The Judicial Conservative Answer*

Both judicial conservatives and their critics are attempting to answer the age-old question: When faced with conflicting claimants as parties to a lawsuit, what is a judge to do? Today's judicial conservatives⁵ advise that judges should "follow the law" and that judges should not "make law." In the tradition of legal positivism, they tend to identify "the law" as the command of the sovereign, where the sovereign is "the people" who exert their majority will through their representatives in state legislatures and in the Congress. To judicial conservatives, judges are the "lieutenants" of the legislature who re-

candidate for serious judicial rethinking."); Pilon, *Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty*, 4 CATO J. 813, 832 (1985) (judges and scholars must go "behind the Constitution to the rigorous, analytical theory of rights that alone can legitimately inform its broad texture, that alone can justify our resort to force, which is what government, in the end, is all about."). These three papers will be reprinted in *ECONOMIC LIBERTIES AND THE JUDICIARY*, *supra* note 1.

3. Scalia, *Economic Affairs as Human Affairs*, 4 CATO J. 703, 707 (1985) (Conservatives "must decide whether they really believe, as they have been saying, that the courts are doing too much, or whether they are actually nursing only the less principled grievance that the courts have not been doing what *they* want."); Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 CATO J. 711, 718 (1985) ("[S]ome movement in the direction of judicial activism is clearly indicated.").

4. The controversy continued in a recent debate among Professor Macedo, Professor Epstein, and Bruce Fein of the American Enterprise Institute sponsored by the Cato Institute.

5. Caveat: It is probably impossible to summarize briefly the views of judicial conservatives without caricaturing them. Nonetheless, some summary effort is needed to place a principled judicial activism in its proper perspective. For a more comprehensive view of the brand of "judicial conservatism" I describe, see S. MACEDO, *supra* note 2.

ceive their marching orders in the form of statutes. They view the Constitution as a special qualification of this relationship by which judges are also subservient to the sovereign will of a past generation who imposed constraints on the future exercise of legislative power.⁶

In short, judicial conservatives believe that judicial authority extends only to judicial enforcement of the law enacted by the requisite majority of duly elected representatives, whether that law is a statute or the Constitution. They argue that because any such enactment represents the authoritative voice of the people, it should be "strictly construed" according to the "original intent" of its framers.⁷ Any deviation from the original intent lacks authority and is to be condemned as judicial fiat or "lawmaking."⁸

Many judicial conservatives are peculiarly ambivalent about the role that justice should play in judicial decisions. This ambivalence likely arises from the political conservatism of many judicial conservatives. Political conservatives favor "doing justice" by punishing, even killing, criminals convicted of crimes, call and for increasing the severity of sanctions currently imposed by statute. Judicial conservatives do not, however, explain when justice permits judges to rightfully depart from the commands of the legislature, or if it ever does. This tension creates the impression that "justice," like law itself, is determined solely by reference to majority preferences. It is this ambivalence that gives rise to the charge that judicial conservatism amounts to majoritarianism only weakly fettered by constitutional constraints that are themselves grounded in majoritarianism.⁹

This is the crux of today's judicial conservatism: Judicial conservatives quite reasonably fear the "tyranny of the judiciary." For them, legitimacy stems from popular or majority will.

6. See, e.g., Address by W. Rehnquist, The Edna Nelson Lecture at the University of Missouri (Mar. 7, 1980) (on file at the *Harvard Journal of Law & Public Policy*). I discuss the close connection between legal positivism and judicial conservatism and the anachronous reading of the Constitution that has resulted from this connection in Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have: The Case of Associational Freedom*, 10 HARV. J.L. & PUB. POL'Y 101 (1987).

7. For recent summaries and critiques of an "original intent" position, see Lyons, *Constitutional Interpretation and Original Meaning*, 4 SOC. PHIL. & POL'Y 75 (1986); R. DWORKIN, *LAW'S EMPIRE* 313-37, 359-63 (1986).

8. Perhaps the best example of this approach is R. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* (1984).

9. See S. MACEDO, *supra* note 2, at 33-41.

Therefore, they want to tightly bind judges to past expressions of majority will by a methodology of "strict construction" and "original intent." Consequently, adherence to a philosophy of judicial conservatism can create great dissonance for political conservatives and classical liberals who are sensitive to the acute problems of individual liberty in a welfare state, particularly in the economic realm.

B. *Principled Judicial Activism*

If principled judicial activism were defined simply as judicial activism in the service of some purpose, one could hardly distinguish it from conventional judicial activism.¹⁰ This is probably one reason why conservatives are so suspicious of the idea. To its current proponents, however, a principled judicial activism means something considerably more specific. It calls for judicial development of substantive principles by which legislation and constitutional provisions are to be evaluated. Significantly, a principled judicial activism is based on a jurisprudential view that preceded the legal positivism of modern judicial conservatives.

According to principled judicial activists, judges must indeed "follow the law," but the law extends beyond legislative enactments to embrace substantive rules and standards used by judges in evaluating legislation. Every judicial command entails the use of force against one party to a lawsuit or the other, a use of force that must be justified.¹¹ Judges are therefore inescapably responsible for developing, justifying, and applying substantive rules and standards for normatively evaluating human conduct—including the conduct of legislators acting collectively.

In all legal challenges to legislation, judges must choose between imposing the legislative will on an individual and enforcing the individual's claim that the legislation in question has violated his or her rights. Under the principle of equality of

10. Elsewhere I applied the term "judicial pragmativism" to any argument for judicial renewal guided by moral principle. I then identified types of judicial pragmativism: equal-wealth pragmativism, efficiency pragmativism, and rights pragmativism. See Barnett, *supra* note 1. While the term "principled judicial activism" could be as broadly construed as judicial pragmativism, the particular variant discussed here corresponds to the view I called rights pragmativism.

11. See generally Lyons, *supra* note 7, at 78-80 (stressing the importance of moral justification in legal analysis).

persons, no person may violate the rights of another, and this must include legislators acting collectively (and judges too). Legislative action is but a subset of human action that “the law” functions to evaluate and regulate. In deciding an individual’s claim of right, the judiciary must evaluate both the legislation and the individual’s action. The judiciary therefore cannot avoid responsibility for developing substantive standards by which it chooses between the legislation and the individual’s claim of right.

The position that judges must always defer to legislative fiat is itself a claim of political morality. Such a claim requires justification. While the best justification of a judicial decision might depend on the existence of a statute enacted by a popularly elected legislature, the very substantive rules and standards developed to support such a preference might also on occasion undermine the legitimacy of an act of legislative will. In other words, principled judicial activists answer the fundamental question “What is a judge to do?” by instructing the judiciary that its assessments of legal disputes *may* be justified by the popular sentiment expressed in legislation and in the Constitution. This, however, is neither the only possible justification nor an irrebuttable one.

A principled judicial activism immediately raises important questions, the last three of which are methodological: By what right are judicial standards imposed on legislative acts? In what manner are substantive standards to be developed? What deference does a judge owe to legislation? Who has the last word on a controversy over such matters?

III. BY WHAT RIGHT MAY JUDGES EVALUATE LEGISLATIVE ACTS?

For today’s judicial conservatives, the question of judicial right to evaluate legislative acts may be the most important question of all. All legislators are elected. All federal and many state court judges are appointed, not elected; those judges who are elected are not elected to “legislate.” Judicial conservatives ask: By what right does a judge thwart the expressed will of a popularly elected legislature?

Notice first of all that this question is based on an important and usually implicit and undefended assumption—that the will of the majority adequately justifies forcibly imposing rules on a

nonconsenting minority. One is tempted to ask the following questions in return: By what right does a majority impose its will on a nonconsenting minority? *A fortiori*, by what right does a simple majority of elected legislators, who themselves represent the consent of only a simple majority of the electorate (consisting, most likely, of a mere plurality of the citizenry), impose its will on the other members of society and their descendants? Or to put the question even more pointedly: By what right does a legislature consisting of a *minority* of the citizenry impose its will on anyone but itself?

Of course, such question swapping does not itself provide any answers, but it does place judicial conservatives and proponents of a principled judicial activism on a more even rhetorical footing. A "level playing field" is the current expression. Neither school can blithely assume its view of judicial authority; each must explain and justify its views, and neither effort at justification will be easy. Moreover, each attempt at justification will have to come to grips with issues of "the good" and "the right." Even a "might makes right" approach must resort to some concept of right.

What then might authorize a judge to thwart the act of a legislature? Suppose the legislative process that produced a statute was shown to be defective in some important way. If so, this legislative pronouncement might be viewed as lacking its normal majoritarian authoritative force. As this "procedural due process" basis of judicial authority also gains textual support from the "Due Process" Clauses of the Fifth and Fourteenth Amendments, most judicial conservatives are willing to go this far.¹²

This basis of judicial review, however, is exhausted when a statute is procedurally legitimate. Such a statute would have whatever authority majoritarian pronouncements are thought to possess.¹³ When a statute is procedurally sound, is there any possible authority for a judge to stand in the way? Here, today's principled judicial activist would part company from the judi-

12. See, e.g., W. Rehnquist, *supra* note 6, at 18 ("For popular sovereignty or majority rule to have substance as well as form, it must have an institutional infrastructure which permits public political opposition and frank and spirited criticisms of the policies followed by the government then in power.").

13. *But see* Pilon, *supra* note 2, at 822-27 (questioning the fundamental legitimacy of political power).

cial conservative and answer that the "rights of the individual" might still support judicial review.

Surely, however, this is a wholly inadequate response. For has not moral, if not legal, positivism established beyond question that the only rights individuals can be said to have are those rights given to them by the sovereign? Is not any discussion of natural rights "nonsense" (and any discussion of imprescriptible natural rights "nonsense upon stilts")?¹⁴ Do not substantive rights claims unavoidably assume the existence of a "brooding omnipresence in the sky?"¹⁵ Are not claims of right "mere assertions" that do not substitute for reasoned policy analysis?¹⁶

In light of the similar questions that judicial conservatives must answer, however, this traditional litany loses much of its impact, for anyone engaging in intellectual discourse who believes in the rightfulness of majority rule must justify that belief. If he refuses to do so, he abandons intellectual discourse itself and requires no further response. Justifying the rights of groups is certainly no easier than justifying the rights of individuals. Indeed, it has traditionally proved much more difficult.

Moreover, the absence of irrefutable proof of either individual or group rights is no cause for a nihilist or relativist conclusion on the subject.¹⁷ While hard proofs are not forthcoming,¹⁸ each of us, including judges, must still act in their absence. This means that we each must somehow choose among alternative courses of conduct. To act rationally is not to refrain from

14. This epithet was used by Jeremy Bentham. Bentham, *Anarchical Fallacies*, in *HUMAN RIGHTS* 28, 32 (A. Meldon ed. 1970).

15. This epithet was used by Justice Oliver W. Holmes, Jr. in *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

16. This epithet was used by most of my law professors. I have found it printed in J. KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* 103 (1983) ("The problem with such 'rights' is that they are merely assertions. They do not carry arguments with them.") This view misses the vital methodological distinction between a rights analysis and one based on public policy. See Barnett, *Public Decisions and Private Rights* (Book Review), *CRIM. JUST. ETHICS*, Summer/Fall 1984, at 50.

17. For a useful discussion of moral scepticism, see R. DWORKIN, *supra* note 7, at 78-85.

18. Our discussion will be adequate if it achieves clarity within the limits of the subject matter. For precision cannot be expected in all subjects alike, any more than it can be expected in all manufactured articles. Problems of what is noble and just . . . present so much variety and irregularity that some people believe that they exist only by convention and not by nature . . . [A] well-schooled man is one who searches for that degree of precision in each kind of study which the nature of the subject at hand admits
ARISTOTLE, *NICHOMACHEAN ETHICS* 5 (M. Ostwald trans. 1962).

all action until perfect knowledge of its correctness is obtained; it is to act on the basis of the best reasons available to us. So the proper inquiry in this, as in all intellectual discourse, is to ask what choice is supported not by perfect reasons, but by the best reasons.¹⁹

To sum up the analysis to this point: Judges must decide between conflicting claims of right. That is their job. Therefore, they and we cannot avoid deciding if and when they should follow the commands of the "sovereign," and if and when they should instead enforce a conflicting claim of right by an individual. In contrast with judicial conservatism, a principled judicial activism is clear on the point that individual rights are potentially distinct from the rights of a sovereign. Moreover, this view finds textual support in the Constitution of the United States.

Following closely on the heels of the natural rights-based Declaration of Independence, the Constitution explicitly supports a natural rights view.²⁰ In addition to employing such normative terms as "due process of law," "just compensation," the "obligation of contract," "privileges or immunities," and "life, liberty, or property," the Constitution contains the following declaration: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage *others* retained by the people."²¹

Thus, even if they are "personally" hostile to natural rights theories, judicial conservatives who subscribe to a doctrine of "original intent" are obliged by the Constitution to assume *arguendo* that such rights exist. And if such rights are assumed to exist, then it is reasonable (though not, of course, uncontroversial) to conclude that the Article III power of the courts ex-

19. Of course, I do not address here the meta-ethical issue of what constitutes the "best" reasons. The evaluative problem here, however, is not all that different from the question, discussed by philosophers of science, of what constitutes a "good" scientific argument. In either field we are not frozen in our tracks until philosophers settle the question. We must act and evaluate both without ironclad principles and without criteria for evaluating the principles at our disposal. Yet there are both wise and foolish ways to proceed. Much of this meta-evaluative knowledge is reposed in our evolved and ever-evolving traditions and tacitly reposed in us as a result. See M. POLANYI, *THE STUDY OF MAN* 11-39 (1959) (discussing the importance of tacit knowledge and contrasting it with explicit knowledge).

20. See H. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* (1981); 1 *THE FOUNDERS' CONSTITUTION* 424-27 (P. Kurland & R. Lerner eds. 1987).

21. U.S. CONST. amend. IX (emphasis added). I will discuss the meaning and importance of the Ninth Amendment at greater length in the foreword to a forthcoming republication of B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (1955).

tending "to all Cases, in Law and Equity, arising under this Constitution. . . ." ²² gives courts the authority to include them among their criteria of decisionmaking.

Elsewhere I have tried to defend the reasonableness of an individual rights position, ²³ and I shall not repeat or summarize that analysis here. It would be helpful, however, to address certain methodological concerns. For when it is proposed that judges may enforce some set of pre-constitutional rights, certain questions immediately arise: By what method are such evaluative decisions to be made? Do we leave it up to individual judges to decide cases entirely on their own? More specifically, is any single judge free to override the explicit mandate of a popular assembly?

Many who would otherwise be attracted to an individual rights approach may be led to embrace judicial conservatism and reject a principled judicial activism because of these methodological or process-oriented concerns, rather than because of any deep philosophical scepticism. In contrast, the objections that modern political liberals and socialists might make to today's principled judicial activism may be more substantive in nature.

IV. THE METHODOLOGY OF A PRINCIPLED JUDICIAL ACTIVISM

A. *How Are Substantive Standards of Evaluation Developed?*

In a search for reasons that justify a judicial decision to permit the use of force against an individual (or to refuse to permit its use), we seek a kind of knowledge: the subset of moral knowledge that concerns the nature and scope of individual rights. One potential source of this or any moral knowledge is popular opinion. Popular opinion is the source of knowledge relied on almost exclusively by democratic theory, that is, a theory favoring rule by majority electoral institutions.

While much of this democratic theory has been effectively undercut by the writings of the "public choice" school, ²⁴ this

22. U.S. CONST. art. III, § 2. See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

23. See Barnett, *supra* note 16; Barnett, *Pursuing Justice in a Free Society: Part One—Power v. Liberty*, CRIM. JUST. ETHICS, Summer/Fall, 1985, at 50; Barnett, *Foreword: Why We Need Legal Philosophy*, 8 HARV. J.L. & PUB. POL'Y 1 (1985). I discuss substantive aspects of individual rights in the articles cited *infra* note 43.

24. See, e.g., J. BUCHANAN, *THE LIMITS OF LIBERTY* (1975).

need not worry us now, because any imaginable legal system will be thoroughly saturated by popular opinion. Like it or not, knowledge of popular opinion naturally and unavoidably pervades our legal system. To paraphrase Dylan, judges and lawyers do not usually need a pollster to know which way the popular wind is blowing. The democratic objection of judicial conservatives to judicial "discretion" is not that judges do not know what popular opinion dictates. It is that, unlike elected representatives, they cannot be held accountable to it.

While not without considerable value as a source of moral intuition, popular opinion is nonetheless highly unreliable and largely question-begging as a source of moral knowledge of individual rights. Easy cases of rights violations are usually consistent with popular opinion. That is why they are easy. Most hard cases involve situations where there is either no consensus of popular opinion on the question or where the consensus of popular opinion is against the person asserting a claim of right. When popular opinion is unclear or against a claim of right, the judiciary must critically assess the claim's validity. A resort to popular opinion for this assessment is circular.

Consequently, in these hard cases, if not most adjudicated cases, what judges need are sources of moral knowledge that are at least somewhat distinct from popular opinion. In the Anglo-American legal system, the two most important sources of moral knowledge are and have always been *tradition* and *reason*. The American legal system (and its English antecedent) consists of far more than judges deciding cases in government courts. This system is comprised of manifold institutions and practices that have woven an extremely intricate pattern of law from these two strands of knowledge.²⁵

1. Sources of Legal Tradition

The two most historically important sources of legal tradition are the doctrine of precedent and doctrinal legal scholars. Legal precedent is the product of countless decisions of judges in countless numbers of cases. Although there is usually some authority on both sides of any issue, the trend—the so-called

25. One writer who is much belittled by conservatives for his political liberalism, but who has long stressed the constraints inherent to a process of judicial decisionmaking that produces a "proper decision," is Ronald Dworkin. See Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060 (1975); R. DWORIN, *supra* note 7.

“majority rule” or “minority rule”—is usually revealing. The doctrine of precedent does more than encourage us to treat like cases alike, though from a moral perspective this is one important justification for the practice.²⁶ It also constitutes an ongoing referendum of judicial judgment, a referendum that includes the published wisdom (and folly) of all judges past and present. When a judge reads opinions, he or she learns not only the reasons given for prior decisions, but also the other judges’ view of the factual situations that surrounded the decisions.

The doctrine of precedent provides a judge who is deciding a case here and now with a great deal of assistance and a good deal of restraint. In a legal system that accepts a doctrine of precedent, parties may obtain appellate review of a judge’s interpretation of precedent or a judge’s refusal to adhere to precedent. In our common law system, the doctrine of precedent binds intermediate appellate courts as well as trial courts, and prior decisions are treated deferentially by state supreme courts and the Supreme Court of the United States.

In contrast with published judicial opinions, doctrinal legal scholars provide a more systematic view of a body of decisions.²⁷ In their massive treatises, such writers as James Kent,²⁸ Samuel Williston,²⁹ and John Henry Wigmore³⁰ extracted general rules and principles from the holdings of cases and communicated these to lawyers and judges. While doctrinal legal scholars still exist—in the field of contract law, E. Alan Farnsworth comes to mind³¹—the present intellectual climate has not been conducive to their production.³² The resulting gap in

26. See R. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 60-73 (1961) (discussing four justifications for the doctrine of precedent: certainty, reliance, equality, and efficiency).

27. See E. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 217-23 (1953) (discussing the legal role played by treatise writers and other “legal experts”).

28. J. KENT, *COMMENTARIES ON AMERICAN LAW* (De Capo ed. 1971) (New York 1827).

29. See S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* (1920).

30. See J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* (1904).

31. See E. FARNSWORTH, *CONTRACTS* (1982).

32. See Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 674-79 (1981) (discussing the intellectual trends responsible for the decline of doctrinal scholarship in treatise form); cf. Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy* (Book Review), 97 HARV. L. REV. 1223 (1984) (discussing recent trends in jurisprudence that gave renewed credence to doctrinal legal scholarship). Because theoretical legal scholarship is so greatly rewarded today among the faculties of the “elite” law schools, young academics at these institutions may not have adequate incentive to commit themselves to the life-long te-

sources of doctrinal legal knowledge has been filled largely by the *Restatements of the Law* volumes produced by the American Law Institute (A.L.I.) and the West Reporter System, with its anonymous headnote authors and categorizers.

Of course, doctrinal legal scholars have always applied their own analyses to the data they reported, as did such famous judicial opinion writers as Justices Holmes and Cardozo, and Judge Hand. Our legal tradition has never been inert. Judges and doctrinal scholars shape the legal tradition as they report on it. Normal social life provides an animating force by generating an endless stream of disputes requiring resolution. As soon as a rule or principle is devised and announced, circumstances will cause clients and lawyers to conspire to test it at its margins. If it is found wanting by future judges and doctrinal legal scholars, a rule will be modified or rejected.

Judges and doctrinal scholars vote on what the law is with their pens, and the consensus that emerges from this process defines the appropriate boundaries of argumentation. This ongoing injection of knowledge into tradition accounts in part for the evolution of tradition.³³ An unquestioned legal history contains and conveys to us only limited moral information.³⁴

2. Sources of Reason

Reason is certainly injected into the legal system by doctrinal legal scholars who reshape as they systematize bodies of law. In recent times, however, a singularly important role has been played by legal scholars using theoretical techniques that stand apart from pure doctrinal analysis.³⁵ Rather than report or sys-

dium of treatise writing and the constant updating that doctrinal legal scholarship requires. As a result, the traditional leadership status of faculty at elite law schools in this form of scholarship may be eroding, and primary responsibility for doctrinal legal scholarship may be shifting to professors at the so-called "regional" law schools. One wonders what the long-term effects of such a trend will be for institutional prestige.

33. One jurisprudential writer who has stressed the relationship between tradition and the evolution of knowledge is F.A. Hayek. *See, e.g.*, F. HAYEK, 1 *LAW, LEGISLATION AND LIBERTY* (1973).

34. One concern that arises from a heavy reliance on the West Reporter System is that by merely reporting the data and making no effort to reconcile it, we are degrading our legal traditions and thereby undermining the value of precedent as a repository of moral knowledge. If a historian tried to record everything that happened without exercising any critical insight about what was important, what would be the value of the result except as data for other more critical analysts? Without doctrinal scholars injecting knowledge into precedent, we may be forced to rely unduly on the reason of legal theory.

35. One of the few American writers who has described the law-shaping role played

tematize, these theorists try to distance themselves from legal practice so that they can critically analyze the decisions of judges and legislators. They seek to learn if these decisions can be rationally explained and justified. At least four groups play an important role in the process of theoretical legal analysis: theoretical legal scholars, lawyers acting as advocates, judicial clerks, and law journal editors.

Most theorizing is done by full-time law school professors, who may or may not also be doctrinal legal scholars. While it is a great advantage to analyze law both theoretically and doctrinally, many persons are more adept at seeing the forest than they are in examining the trees (and vice versa). These days, the forum of choice for legal theory is the elite law review and the occasional book. For each legal subject, there is a community of theorists who spend most of their time engaging one another in a written and verbal conversation concerning the justification and rationalization of legal doctrine and practice.

Legal theorists borrow from philosophers just as they borrow from the doctrinal legal scholars, economists, and others to obtain the stuff from which a flash of theoretical insight might emerge. Once conceived, their ideas are shaped by colleagues' comments, law school workshops, the processes of publication, and ensuing post-publication discourse. The very few ideas that reach the consciousness of the legal community and survive can remold and even revolutionize doctrinal thinking on a given subject.

Lawyer-advocates, judicial clerks, and law review editors usually lack the time, patience, or sometimes the skill to engage in deep legal theory, but they play a vital role in the theoretical process nonetheless. They transmit the reason of the theorist from the ivory tower to the real world of cases and controversies. These intermediary groups read the writings of the theoretical legal scholars. As law review editors they select the papers that are published and help the theorists refine their ideas. Lawyers and judicial clerks attempt to harness these theories in the service of their clients and their judges.

For their ideas to be heard, legal theorists must somehow make their analyses appealing to these intermediary groups. Theories that pass this threshold must still "work" in the legal

by legal scholars is George Fletcher. See Fletcher, *Two Modes of Legal Thought*, 90 *YALE L.J.* 970 (1981).

system. To have any impact on legal tradition, they must withstand the rigors of practice and be accepted by judges. Only if they become a part of the legal tradition will they be handed down to future generations, who in turn will stand ready to improve upon the received wisdom.

B. *The Electorate of Law: Judicial Discretion Revisited*

The preceding analysis only begins to capture the social epistemology of how judges escape from popular opinion and their own preferences, and obtain the moral knowledge they need to decide cases in a principled and morally justified manner, to decide when to side with the individual against the legislature. Even this brief and greatly simplified picture, however, hardly reveals a world of individual judges drawing on blank slates. There is a far more intricate balloting going on here than is possible in any legislature (or in the A.L.I.). Unlike the legislative process, this is a balloting that can take into account far more than today's popular opinion (although this is not entirely excluded).

The "electorate of law" includes judges, scholars, lawyers, clerks, law students, and philosophers, living and dead. Their votes are weighted according to the respect each has earned from peers and from succeeding generations and from the status of the institutions from which they speak. As a result of the collective decision of the faculty of my law school to hire me to teach contract law (and later to grant me tenure), my decision to write, and a journal's decision to publish what I have written, I have a vote; but my vote is not as heavily weighted as, for example, Grant Gilmore's, Lon Fuller's, or many others. They may be gone, but they are not forgotten; the votes they cast while alive have survived them.

There is no guarantee that the outcome of this intricate balloting process will be correct, that the process will inevitably produce genuine progress. While all the law that survives may by definition be "fit," all that survives may not be right. The moral knowledge conveyed by this mechanism, however, makes real progress possible. For better or worse, one judge's ability to influence the electoral tide is clearly marginal: His or her opinion must be accepted by others before it becomes "the law."

A judge's opinion will, however, decide the docketed case. If he or she is wrong about the law, for the sake of the parties we cannot rely solely on the electorate of law to correct the error. We need a more direct mechanism to protect innocent parties: appellate review. While appellate review also contributes importantly to the development of moral knowledge, it is virtually the only mechanism to correct individual adjudicative errors. It constrains judges from straying too far from the current legal consensus at the expense of litigants.

Nevertheless, it is always tempting to point to local practice where judicial conduct is often dominated by aberrant and unreviewed exercises of discretion. Many practicing lawyers who care deeply about the integrity of the institution of law can become demoralized by this sort of experience, which can sometimes seem all pervasive. Nonetheless, while aberrant (and corrupt) judges certainly decide the outcomes of many cases, they cannot "make law" that will effectively bind parties in other cases unless their decisions survive the socio-legal filtration mechanisms described here. Judges are accountable to the electorate of law.

A principled judicial activism, then, is hardly the world of unfettered judicial tyranny painted by some judicial conservatives and feared by many more. The judicially-driven common law system develops substantive standards that are as much a product of collective wisdom as the statutory output of Congress, perhaps more. With the many real constraints a common law system places on judges, it is perhaps astounding that any evolution of law actually occurs, that creative judicial "lawmaking" (beyond individual cases) exists at all. Maybe this is why the progress of the common law has sometimes seemed to be so painfully slow.

C. *Judicial Deference in an Era of Legislative Inflation*

The precise stance a judge is entitled to take towards legislation depends in no small measure on the practice of legislation in a given society. Ours is a legal world that bears the heavy mark of both the codification and "progressive" movements of the Nineteenth Century. There was a time when statutes were far more extraordinary than they are today. At that time, statutes were used to establish much needed conventions, such as those specifying the formal requirements of certain kinds of

rights transfers. Three important examples are the Statute of Frauds,³⁶ the Statute of Wills,³⁷ and statutes of limitations. These statutes were very "strictly construed" by judges, which in this context meant that there was lots of room for judges to craft exceptions. These statutes were also striking for their longevity. The Statute of Frauds of 1677 is remarkably similar to state statutes of frauds today.³⁸

An important impetus behind the codification movement and the progressive movement was a desire to "rationalize," systematize, and, most of all, to speed the evolution of law. As a result we now have a never-ending deluge of ever-changing expressions of legislative will. The "Blankety-Blank Act of 1986" yields the "Blankety-Blank Reform Act of 1987" as well as ad hoc statutory amendments, volumes of manufactured "legislative histories," and reams of administrative regulations that are needed to explain the act. In sum, we have witnessed a veritable legislative inflation and the consequent diminution of value that the inflation of any commodity inevitably entails.

Moreover, modern public choice analysis has restored to intellectual respectability the constitutional framer's fervent preoccupation with problems of political faction. As a result, it has greatly undermined the "public interest" myth that for so long pervaded judicial and academic treatments of legislative acts. Public choice analysis also explains the vagueness of today's statutes. The statutes are deliberately rendered vague to enable politicians to support particular legislation that pleases certain constituencies without alienating others. This deliberate vagueness shifts the battle over a statute's meaning away from the legislature into the administrative process and the courts. In these circumstances, judges must either strike down a statute or give it some meaning.

More than any time since the "progressive era," the rhetoric of legislative supremacy based on an alleged public interest now appears to be so much whistling past the graveyard. Genuine authority must be earned. In such an inflationary environment, the deference judges owe to legislative enactments must be greatly reduced. In short, legislative activism gives rise to a need for a principled judicial activism.

36. An Act for Prevention of Frauds and Perjuries, 29 Car. 2, ch. 3 (1677).

37. 32 Hen. 8, ch. 1 (1540).

38. *See, e.g.*, U.C.C. §§ 1-206, 2-201 (1972).

D. *Who Has the Last Word on What the Law Is?*

The system of appellate review, of course, defines the last word on the outcome of any given lawsuit. Within any conceivable legal system administered by human beings, there is no real "last word" on the law itself. In contrast with the legislative process, however, the Anglo-American common law system has been far better able to produce *lasting* words.³⁹

V. SUBSTANTIVE SPECULATIONS

These methodological concerns do not exhaust the questions raised by a principled judicial activism. The most important of those remaining to be discussed is the substance of the standards that judges should use to evaluate both individual acts and the acts of legislative groups. In this section I will confine myself to identifying the direction being urged by today's proponents of a principled judicial activism.

We are accustomed to differentiating between private law and public law.⁴⁰ Those who question this distinction would convert all private law analysis into a public law analysis.⁴¹ In contrast, today's principled judicial activism assesses the appropriate content of public law by building on a base of private law rights rationally gleaned from the traditional common law processes described above.⁴² While I will not further defend this conception here,⁴³ at its heart lies the Lockean concepts of "private property," that is, self-ownership and private ownership of external resources, and "freedom of contract," that is, free exchanges of justly acquired entitlements.

This "traditional" legacy of private law rights has been subjected to the withering "rational" attack of generations of legal and philosophical intellectuals. While it has withstood this on-

39. See Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1980).

40. See Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267 (1986).

41. See, e.g., Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351-52 (1982) (discussing the alleged collapse of the distinction between public law and private law).

42. The most ambitious effort to date is R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

43. I discuss some substantive aspects of individual rights elsewhere. See Barnett, *Pursuing Justice*, *supra* note 23; Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y 179 (1986); Barnett, *The Justice of Restitution*, 25 AM. J. JURIS. 117 (1980); Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977).

slaughter surprisingly well, the private law of contract, property, and tort has not been unchanged by it. Some changes have been for the better, others reflect an undesirable injection of competing and inconsistent philosophies. (Some discordant strains were, of course, always present.) Only in the past two decades has the tide of this "rational" challenge begun to be stemmed by the analysis of legal theorists who are sympathetic to the principles underlying our common law heritage.

VI. CONCLUSION: THE TRUE SOURCE OF CONSTITUTIONAL AUTHORITY

When I limited my discussion of the sources of moral knowledge to tradition and reason, some may have wondered why I omitted the Constitution from the list. I did so because, ultimately, in my view, a constitution only has authority to the extent that it comports with our best moral knowledge. A constitution has authority if the framework it establishes generally fits our best conception of individual rights. If this fit is established, a judge must enforce the constitutional scheme that was actually enacted, not a different one that might be more appealing to him or her personally.

Recently, Professor Epstein has argued powerfully, if not altogether persuasively,⁴⁴ that the Constitution of the United States passes this threshold test of fit.⁴⁵ Assuming that it does, judges must look to the Constitution for two kinds of guidance. The first is guidance in interpreting the "background" private rights of individuals.⁴⁶ Earlier I quoted certain textual passages that support in a general fashion the natural background rights view of property and contract that are revealed by the common law process. These rights are not created by the Constitution. These passages merely add textual support to the view that the

44. See Hummel, *Epstein's Takings Doctrine and the Public Goods Problem* (Book Review), 65 TEX. L. REV. —, — (forthcoming) ("Either Epstein's minimal State is necessary and therefore unattainable, or it is attainable and therefore unnecessary.").

45. See R. EPSTEIN, *supra* note 42; Epstein, *Taxation in a Lockean World*, 4 SOC. PHIL. & POL'Y 49 (1986).

46. I discuss the distinction between "background" and "institutional" rights in a Constitutional context in Barnett, *supra* note 6, at 108. The distinction was advanced by Ronald Dworkin in *Hard Cases*, *supra* note 25, at 1078-82. This article became chapter 4 of R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). However, in *LAW'S EMPIRE* (1986), Professor Dworkin's most recent and comprehensive statement of his position, it appears to play little role, if any.

Constitution was not the source of all our rights but was instead created to protect these pre-existing rights.

The second aspect of constitutional guidance is the “institutional” rights a constitution does in fact create.⁴⁷ To protect the individual from the governmental structure it establishes, the Constitution grants individuals certain enumerated rights against the government, for example, the right to be free from unreasonable searches and seizures. Whether or not such institutional rights are also background rights is normally irrelevant. A judge is empowered by the Constitution to enforce these institutional limitations on governmental powers unless they clash with background rights.⁴⁸

In a regime of principled judicial activism, then, the substance of the law is determined by the ideas that prevail in the inescapable intellectual struggle that produces all socially accepted knowledge. There is no such thing as a final victory, and there is no avoiding the turbulence of moral and theoretical discourse by retreating to the shelter of judicial deference to legislative will. In the end, one can run but one cannot hide. If the threats to substantive individual rights posed by legislative acts are not confronted in the classroom and the courtroom, they will most surely be confronted in the bedroom and the boardroom. When this happens, the law will have failed us because we have failed it.

VII. THE IHS SYMPOSIUM ON LAW AND PHILOSOPHY

The debate between judicial conservatives and those favoring a principled judicial activism reflects a longstanding jurisprudential debate. For many years, Professor Lon L. Fuller pressed this point in the face of widespread intellectual dis-

47. Some such distinction between background and institutional rights was not unknown to the Founders. See M. GOODMAN, *THE NINTH AMENDMENT* 46 (1981) (“‘Natural rights are those which appertain to man in the right of his existence—civil rights are those which appertain to man in right of his being a member of society.’” (quoting John Dickerson)).

48. The priority of background over institutional rights can affect the interpretation of institutional rights and remedies. For example, in a system of restitution, the remedy of excluding reliable evidence of guilt obtained in violation of the institutional right to be free from unreasonable searches would deprive victims of rights violations of their background right to reparations from the offender. This would argue in favor of a compensatory remedy for violations of such institutional rights. See Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 *EMORY L.J.* 937 (1983) (compensation will better deter police misconduct than the exclusionary rule).

interest. He persisted in reminding us that jurisprudence belonged at the ramparts.⁴⁹ He clearly saw the stark jurisprudential choice we face:

I have insisted that law be viewed as a purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it, and fated, because of this dependence, to fall always somewhat short of a full attainment of its goals. In opposition to this view it is insisted that law must be treated as a manifested fact of social authority or power, to be studied for what it is and does, and not for what it is trying to do or become.⁵⁰

It is, then, altogether fitting that this Symposium on Law and Philosophy contains the first three recipients of Lon L. Fuller Prizes in Jurisprudence, a prize that will be awarded annually by the Institute for Humane Studies at George Mason University. Moreover, each of the contributions has important implications for a principled judicial activism.

In his paper, *The Perils of Positivism or Lon Fuller's Lesson on Looking at Law: Neither Science nor Mystery—Merely Method*, Professor Robert Moffatt explores Professor Fuller's influential critique of legal positivism and tries to put Professor Fuller's account of natural law in perspective. A principled judicial activism unavoidably relies on the existence of a moral knowledge that is both accessible to a judge and subject to rational evaluation by legal processes. Professor Moffatt's important point is that Professor Fuller tried to hold a middle ground between scientific verification and mystery. Only if some such middle ground can be held will a principled judicial activism—or any rational criticism of law—succeed. In his comment, Daniel Wueste explores the relationship between Lon Fuller's legal philosophy and the positivist and natural law traditions, arguing that Professor Fuller's emphasis on legal processes rather than on individual legal views provides a valuable perspective on the problem of the separability of law and morals.

Professor John T. Sanders critically assesses the merits of the Lockean Proviso in *Justice and the Initial Acquisition of Property*. In light of the Lockean origins of our legal tradition and the re-

49. See, e.g., L. FULLER, *The Needs of American Legal Philosophy*, in THE PRINCIPLES OF SOCIAL ORDER 249, 249-50 (K. Winston, ed. 1981) (“[T]he object of legal philosophy is to give effective and meaningful direction to the work of lawyers, judges, legislators, and law teachers.”).

50. L. FULLER, THE MORALITY OF LAW 145 (rev. ed. 1969).

cent powerful Neo-Lockean theoretical defenses of that tradition, it becomes important to take seriously Locke's own expressed reservations on the private acquisition of wealth. Professor Sanders gives a lucid account of the Proviso and its conceptual difficulties. He also discusses the strengths and weaknesses of a Lockean labor-mixing criterion of property acquisition. In his comment, Geoffrey Miller offers a different account of the Lockean Proviso. Professor Miller justifies his very interesting and unconventional efficiency interpretation of the Proviso by a textual examination of Locke's underlying motives for devising it.

In *A Justification of Social Wealth Maximization As a Rights-Based Ethical Theory*, Professor Lloyd Cohen defends the principle of wealth-maximization as an ethical norm to demonstrate the close connection between moral principles and legal analysis. A principled judicial activism must depend upon the moral validity of its animating principles. While a Lockean principle of natural rights has been the dominant theme of principled judicial activists, others, such as Judge Richard Posner, have advocated the principle of social wealth maximization.⁵¹ Of course, its advocates must justify positing wealth maximization as a moral basis for legal decisions. Professor Cohen's paper is an effort in this direction. In his comment, Professor Thomas Morawetz takes strong issue with Professor Cohen and, while doing so, also makes some important methodological observations.

In addition to these three IHS Fuller Prize-winning papers we present two papers by IHS Leonard P. Cassidy Fellows in Law and Philosophy. Daniel Klein, in *Tie-ins and the Market Provision of Collective Goods*, and David Schmitz, in *Contracts and Public Goods*, both critically examine the "public goods problem." Today, public goods analysis is perhaps the leading intellectual justification for government interference in a free market. That this is of particular importance to principled judicial activism is exemplified by the heavy reliance Richard Epstein has placed on "free-rider" problems to legitimate government efforts to force certain exchanges.⁵²

51. See, e.g., Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

52. See R. EPSTEIN, *supra* note 42, at 331-34, 337-38; Epstein, *Taxation*, *supra* note 45, at 51-54; but cf. Hummel, *supra* note 44, at — (responding to Epstein's public goods argument).

Commentator David Friedman agrees with much of both Mr. Klein's and Mr. Schmidtz's theses, but questions whether their analyses support the scope of their stated conclusions. He also adds a crucial public choice insight to the discussion: that in assessing the efficacy of permitting the government to force certain exchanges, the costs of the market's failure to provide an optimal amount of public goods must always be compared with the costs of the "government failure" that is likely to arise in trying to provide them. He suggests that a "public good problem" might not be a problem worth resorting to government to solve.

Acknowledgements

This symposium issue owes its existence to the hard work of the many fine people at the Institute for Humane Studies at George Mason University and the *Harvard Journal of Law & Public Policy*. I am enormously grateful to Walter Grinder of IHS for all his generous assistance and good advice. Finally, without the capital, all this labor would have been for naught. We all owe a great debt indeed to the Veritas Fund, Inc. for once again providing the financial support that made the Lon L. Fuller Prizes in Jurisprudence, Leonard P. Cassidy Summer Research Fellowships in Law and Philosophy, and this symposium issue possible.