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Recommended Citation

Richard A. Epstein, "Beyond Judicial Activism and Restraint," 1 *Georgetown Journal of Law and Public Policy* 85 (2002).

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Beyond Judicial Activism and Restraint

RICHARD A. EPSTEIN*

The third question that the editors of the *Georgetown Journal of Law & Public Policy* have posed to their contributors asks whether conservative intellectuals (broadly conceived, I hope, to include libertarians as well as social conservatives) are hoisted by their own petard by embracing judicial activism for their own pet causes after denouncing its use by more liberal justices and scholars for a different set of causes. In order to unpack this multi-part question, it is important to set the appropriate frame of debate. One possible response is to assume that “liberal” activism is wrong, so that conservative activism becomes no better. Both sides engage in selective forms of judicial intervention. A second line of argument assumes that liberal judicial activism is on some points correct. Under this view, conservatives (especially the more libertarian among them) regard any asserted contradiction as more apparent than real. They think that the only question is whether any given interpretation, be it broad or narrow, is consistent with the text and structure of the Constitution. All things considered, I believe that the second approach has more traction than the first. We learn little from recrimination across the legal divide. We learn much more by seeking a sound approach to judicial interpretation generally, letting the chips fall where they may.

In dealing with constitutional interpretation, it is important to avoid the tyranny of presumptions, which as an abstract matter are often used to define the judicial role. All too often these discussions of judicial activism begin with global accounts of the limitations and the strengths of the judicial role relative to those of its main competitor in law-making, the legislature. It is often said against the judiciary that it cannot take and assimilate evidence by experts and ordinary citizens, and that it is ill-equipped to pass on the strengths and weaknesses of our social institutions. Owing to these limitations, it should not attempt to second-guess results that are supported by both popular sentiment and specialized knowledge. In response, it is said that legislatures (and the administrative agencies that they create) are often so rent with faction that much of what passes for popular sentiment and specialized knowledge is little more than pretext for indefensible political longings. The resulting class legislation merely shifts wealth and opportunity from one side of the ledger to another by political might and intrigue and bears little if any relationship to the advancement of the general welfare.¹ Any critique of the judicial role that ignores either

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1. For discussion of this general theme, see, e.g., HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWER JURISPRUDENCE* 20 (1993) (noting the importance of this theme in the nineteenth century police power jurisprudence that preceded *Lochner v. New York*, 198 U.S. 45 (1905)).

of these competing concerns is so blinded as to offer little or no guidance as to how judges ought to behave. We have had legislation that does well by these dual measures, and we have had legislation that has done miserably by the same standards. The question we have to answer is *how* to distinguish between them without doing violence to the constitutional text or the judicial role.

Whether interpreting a contract, a statute, or a constitution, my own view of textual interpretation does not vary much. In each case I start with the presumption that language is a tool of incredible sophistication which, when properly used, conveys information with matchless efficiency. In ordinary life, when we pay far less attention to words than we do in formal legal documents, people communicate with great rapidity and accuracy. We could not build, let alone fly, airplanes unless the precision of scientific language carried over in large measure to the business of our daily lives. I do not think that we lose that power of communication when we choose to set down in specific language our thoughts about social rules and practices. Rather, our challenge is to take ordinary language and to use it in a way that not only articulates a decision in the here and now, but also to frame general rules that apply to circumstances, some of which are foreseen and understood and some of which are not. We face therefore the familiar choice between language that is specific in the domain that it covers, so as to eliminate uncertainty in its application, but unable to keep pace with changes in events, or language that is general in application, but uncertain in its application to particular cases.

The simple truth of the matter is that neither strategy dominates the other across the board. In some situations we choose bright-line rules, such as one that requires a President to be thirty-five years of age on taking office. In other cases, we choose broader language that is closely tied to our political and intellectual heritage. The Due Process Clauses of the Constitution, for example, speak of the protection of "life, liberty and property,"² which seems to echo the Lockean injunction that the purpose of the state is to protect all individuals in their "lives, liberties and estates."³ The first principle of good statutory interpretation is to identify which clauses have adopted which approach, and then to apply the canons suitable to the ambitions of the provision. It would strike me as odd in the extreme, for example, to insist that one could find all sorts of exceptions and qualifications to the requirement that the President be thirty-five years of age. There are a large number of individuals who are eligible to hold that office, so it would be peculiar to find an implied waiver of that provision for, say, the son of a former President or current army general. We may hold the (now obsolete) view of my generation of graying Berkeley activists who "never trust anyone over thirty," but that objection is most decidedly one of policy,

2. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

3. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 66 (C.B. Macpherson ed., Hackett Publishing 1980) (1690).

which recognizes the clarity of the 35-year minimum age limit on the one hand even as it denounces its wisdom on the other.

Other provisions of the Constitution, however, do not admit that rifle-like precision. Once a command becomes general in nature, it then becomes much more important to have rules of interpretation that recognize the built-in dangers of over- and under-extension that influence its correct interpretation. In order to see how this parallelism works, it is useful to take two broad commands of the Constitution that, in my view, should be read in tandem. One of these, the First Amendment guarantee of freedom of speech, provides, "Congress shall make no law abridging the freedom of speech."⁴ The Fifth Amendment admonishes, ". . . nor shall private property be taken for public use, without just compensation."⁵ Both of these clauses cry out for some degree of interpretation consistent with the twin imperatives set out above. They are designed to make sure that Congress does not go off the rails in the regulation of either speech or property; yet they must be read to allow legislation that may abridge some speech or may take some property value in exchange for a greater common good. How might these dual tasks be undertaken?

In the First Amendment, for example, what force should be given to the term "abridged"? In its natural sense, the word seems to mean "limited." Could one make a serious argument to the effect that it is unconstitutional to limit speech but clearly constitutional to deny it altogether? After all, the Fifteenth Amendment tells us that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color or previous condition of servitude."⁶ And the Nineteenth Amendment uses the "denied or abridged" language with respect to sex.⁷ It would be clearly preposterous to argue that the abundance of caution found in the Fifteenth and Nineteenth Amendments should be read back into the First Amendment to say that limitations on speech are impermissible but total evisceration of speech rights is acceptable. That interpretation makes no sense because it licenses massive government evasions of the basic constitutional prohibition while sanctioning lesser violations. It invites the government to magnify the scope of its wrong to escape constitutional scrutiny. The whole point of the use of a general word like "abridge" is that it does not limit the scope of the constitutional protection by targeting one form of government action to the exclusion of another.

So how ought the Speech Clause to be read? First, we should not care what particular device Congress uses to strike at the freedom of speech. Legislation that creates civil liability, or forfeiture, or fines, or incarceration, or taxation, or regulation can all in principle abridge the freedom of speech so that none can be

4. U.S. CONST. amend. I.

5. U.S. CONST. amend. V.

6. U.S. CONST. amend. XV, § 1.

7. U.S. CONST. amend. XIX.

simply ruled beyond the Amendment's reach. Likewise, there is a genuine question of whether speech includes only speaking or whether it covers writing, drawing, painting, acting, or even (nude) dancing.⁸ On these matters we should again take the same position. All of these forms of expression are so similar to the core protection that it hardly makes sense that the Congress must allow everyone to speak his piece from behind a podium but not from a stage. And no one would want to argue, I hope, that the free speech protections contemplated by the Framers do not cover information that is transferred by telephone or the Internet because those technologies were unknown in 1791.

These conclusions seem to me to be defensible by looking at a combination of text and structure. I see no reason to think that judicial activism is a precondition for reaching these results. I would regard it as a clear dereliction of judicial duty to invoke some supposed shortfall of institutional competence to thwart this application of constitutional principles. The knowledge that we can glean from the text is sufficient, at least in the cases presented, to avoid casting our interpretive lot with either judicial activism or judicial restraint.

But what about the similar protection of private property under the Fifth Amendment? The same attitude of interpretation applies; we must begin with the basic question of coverage. What constitutes a "taking" of private property? It is easy to understand that the removal of property from the possession of the individual into the hands of the state is a taking. But what of the concern that government will resort to close substitutes? Certainly, this risk is as real with the Fifth Amendment as it is with the First Amendment. Suppose a high federal official ordered government troops to blow up a private home and then compensated the property owner for the value of the land, less the cost of removing the rubble. Does anyone doubt that this should be treated as though the land were taken first and "improved" by the government thereafter? The sequence of events cannot under any sensible view determine the scope of the state obligation. Blow-up-then-take, or take-then-blow-up must both yield the same result.

I see no obvious constraint on this line of argument; it is difficult to see how some actions directed toward the owner's possession, use, and disposition of property fall within the scope of the Takings Clause, while others fall outside of it. The same animating principle that applies to the First Amendment applies here. The scope of constitutional protection would be paltry indeed if close substitutes to *prima facie* textual constitutional violations escaped scrutiny. To further illustrate, suppose that the government did not blow up the property, but only told its owner he was not allowed to use it as he wished but may hold it only as a nature preserve. Or suppose that the property owner is not allowed to enter the property, but some private third party is, as occurs under rent control statutes with holdover tenants. Can one really argue that the property is not taken when the owner is excluded even if the government does not enter? Even if the

8. See *California v. LaRue*, 409 U.S. 109, 118 (1972).

government does not enter, is not property taken when the government guarantees that some third person cannot be displaced when his property interest has expired? Here, as with the First Amendment, reason and analogy are needed to guard against legislative evasion, wholly without any appeal to judicial activism.

Once we start down this path, there is no principled limit to how far we go. Any effort by the government to regulate, restrict, or tax the occupation, use, or disposition of private property is equivalent to a taking of some fraction thereof. The private law of property recognizes limited interests such as easements, covenants, profits, leases, and life estates. Most forms of so-called land use regulation are really state efforts to obtain one of these partial interests in real property without compensation. Clearly, no landowner can compel his neighbor, as a matter of right, to abstain from building on his own land (or near to the common boundary, or above a certain height) without cause or contract. Why then can the landowner enlist the state to gain that advantage for him without having to pay a cent for the privilege? Encouraging the massing of state power for private factional advantage in this matter will be the source of great political mischief. The requirement of just compensation for these takings prevents the dangerous slide down to the base aggrandizement of public power, for it restores the parity between public and private initiatives. Just as with the First Amendment, it is hard to imagine any taxation or regulation that is so privileged as to escape scrutiny under the Takings Clause, without ever mounting the horse of judicial activism.

A common response to this conundrum is an argument that rights are not absolute. Justice Holmes has reminded us more than we care to hear that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”⁹ It seems clear that some concern with public safety and order preclude a misrepresentation of fact that may incur suffering and personal injury. Once again, as with the basic coverage of the First Amendment, this one seed gives rise to a luxurious doctrinal thicket. The private law that protects the freedom of action generally is not absolute in substance. There are all sorts of justifications for the limitation of what would otherwise count as a *prima facie* right, and that is true under the Constitution as well. The very use of the word “freedom” before speech carries with it the unmistakable conclusion that what is protected under the First Amendment is a conception of the freedom of speech, not some view that all speech must be free of adverse legal consequence.

So from there it is off to the races. Next it becomes necessary to decide when speech amounts to an incitement to riot. (After all, one person can be held responsible in tort law for authorizing or encouraging another individual to harm a hapless stranger.) From there it is a short walk to begin thinking about other conspiracies and combinations, be they for insurrection, for smuggling, or

9. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

for cartelization. There is not a word in the Constitution that speaks to the role of the police power in the face of individual protection of rights, but no believer in the Constitution can defend the view that the proper scope of the police power is disembodied from the Constitution. It is a meticulous effort to figure out when concerns with defamation, with privacy, with fraud, with solicitation, with advertising, with public nuisances, justify the limitation of free speech. The structure of the Constitution requires us to consider issues for which there is no explicit textual guidance, but for which our society has imperative need. It is no accident that the major nineteenth-century treatises on constitutional law contained references to the use and limitations of police power in the title.¹⁰ But the need for limitations on basic constitutional rights does not follow from a theory of judicial restraint any more than the broad reading of the basic coverage provisions followed from a belief in judicial activism. It is text, structure, and function that point to broad constructions on both fronts.

The same argument again applies with respect to the Takings Clause. There is no reason to think that the First Amendment does not protect against the creation of a public nuisance but that the Takings Clause requires compensation for those who commit a public nuisance, such as polluting public waters. This opens the door to even more questions. For example, the concern with force and fraud give rise to comprehensive justifications for everything from the regulation of fireworks to the control of toxic medicines. William Novak has written eloquently in *The People's Welfare*¹¹ on the range of regulation that was routinely sustained in the so-called golden age of laissez-faire. He speaks in successive chapters of the regulation of fire, the well-ordered market, public spaces, disorderly houses, demon rum, noxious trades, and medical police. Robert W. Gordon's jacket blurb celebrates Novak's book because it "blasts to pieces the surprisingly hardly myth of laissez-faire, the libertarian fantasy that until the twentieth century the American state left private property owners and entrepreneurs alone."¹²

Fortunately, Novak's book does nothing of the kind. Far from blasting laissez-faire, it supports the more reasoned conclusion that nineteenth century judges (including those in *Lochner*) worked very hard within the confines of the police power to figure out which activities should have been regulated and which not. It is only the parody of libertarian theory that holds that no form of regulation is appropriate. Think about each of Novak's categories mentioned above, and the force of the basic point becomes clear. Fire of course was a common danger on the one hand and a common law tort on the other. It would be odd to hold that the state could hold someone responsible for starting a fire in

10. See GILLMAN, *supra* note 1. See also ERNST FREUND, *THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904); CHRISTOPHER GUSTAVUS TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES: CONSIDERED FROM BOTH A CIVIL AND A CRIMINAL STANDPOINT* (1886).

11. WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA* (1996).

12. *Id.* Back cover.

tort but could not regulate to see that this same fire did not start or spread. Economic regulation is not outside the scope of the police power either. It seems sensible to allow the state to condemn land for use as a railroad. It may well make sense for the state to require all noxious firms to work within a given locale to control the risks of contagion.¹³ And as Justice Peckham, author of *Lochner*, recognized, antitrust laws fall within the police power to the extent that they are intended to limit the consequences of private monopolies and cartels.¹⁴

Many cases point to exactly the opposite of what Gordon contends. Given the historical scope of the police power, the hard question is why modern writers revel in its decline when it seemed to represent an honest and intelligent effort to draw the line between public-regarding and class-regulating legislation. Earlier cases did recognize the ability of the state to regulate, even though they *rightly* rejected the effort of the state to impose “labor statutes,” which were in fact class regulation designed to limit the ability of nonunion workers to compete with union workers.¹⁵ The reasonable view of the police power in the pre-1937 cases was in fact narrower than the “Open Sesame!” view of that power in the modern cases. In modern cases, anything that looks like a “compelling state interest” passes muster, even if the regulations in question prop up monopolies and stifle competition.¹⁶

We now come to the final critical point. Today we have police power regulation under both the First and the Fifth Amendments. Yet why do we have a narrow account of the police power for the First Amendment and unbridled police power under the Fifth Amendment? To expand, under the First Amendment we really do care whether regulation of force and fraud are directed solely at their proper objects, and whether the state is using reasonable means to achieve that object. In contrast, under the Fifth Amendment none of these restrictions apply, and use and economic regulation are freely used for the most indefensible of partisan purposes under the latter Amendment.

The point here is that once we go back to basic theory, we do not have to worry about an arid dispute between judicial activism and judicial restraint. We simply have to make sure that we do not give expansive interpretations only to clauses of the constitution that we as judges and scholars “like” while consigning those provisions that we do not like to some constitutional netherworld. The real vice is inconsistent and opportunistic interpretation that lurches from one extreme to another. The debate would be far better advanced if we junked labels and debated principles of constitutional interpretation solely on their merits.

13. Concerns over quarantining noxious trades were far more prevalent in the nineteenth century than they are today. See HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW: 1836-1937* at 118-20 (1991) (reexamining the famous Slaughter-House Cases).

14. See *Lochner v. New York*, 198 U.S. 45, 66-67 (1905).

15. This was the gist of the Peckham position in *Lochner*. See *id.*

16. See, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934) (allowing price regulation for competitive industry).

