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LEGISLATIVE ACTIVISM, JUDICIAL ACTIVISM, AND THE DECLINE OF PRIVATE SOVEREIGNTY

Roger Pilon

The Decline of Private Sovereignty

With his *Economic Liberties and the Constitution*,¹ Professor Bernard H. Siegan has thrown the gauntlet down to the judiciary, and to the intellectual and political community that surrounds it, to show why in the case of our economic liberties we have strayed so far from our beginnings. In the beginning, he says, was the Constitution, and it was the word. Its authors, inspired by the higher law, by the natural law and natural rights traditions and by the common law of England, and chastened by their own recent experience with the English Crown, set forth a plan for ordered liberty that protected economic and noneconomic liberties alike. Little more than a decade earlier, during the course of which they secured their independence, these Founders had declared to the world, in a conclusory way at least, their philosophy of government: “[T]hat all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—that to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed. . . .”² It was to set these “self-evident truths” in stone, more or less, that the Founders drew up a written Constitution, designed

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¹Bernard H. Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980).

²Declaration of Independence.

to guide and constrain our institutions of government on into the future.

Over the next century and a half the Constitution did this reasonably well, although the execution of the plan was often less than perfect, to be sure. Whether we point to slavery, to the erosion of riparian rights or strict liability in torts,³ to the "public interest" exception to freedom of contract as formulated in 1876 in *Munn v. Illinois*,⁴ to the passage of the Sherman Act,⁵ or to the *Euclid* zoning decision of 1926,⁶ there were numerous examples of our having strayed from the mark. Nevertheless, for the most part the system worked as it was intended to work. In particular, legislative inroads on private rights in property and liberty were regularly reviewed and almost as regularly rejected by the courts of the land. Thus the tyranny of the majority, which the Founders had learned to fear from their readings of Plato and Aristotle, Lord Coke and Montesquieu, as well as from their own direct experience, never came to pass in any far-reaching form. Whereas the legislature and the executive were the mark of self-government, the court stood as the bulwark of our liberties.

Over the past 50 years, however, the situation has been very different. Professor Siegan points to the decision of the Supreme Court in *Nebbia v. New York*,⁷ handed down in 1934, as signaling "the approaching end of economic due process, which actually terminated three years later"⁸ with the Court's decision in *West Coast Hotel v. Parrish*.⁹ In announcing its decision in *Nebbia*, which upheld the conviction of a store owner who had sold two bottles of milk at a price below that set by a milk control board recently instituted by the New York State legislature, "the majority held that the due process guarantee demands only that the law be not unreasonable or arbitrary and that it have a substantial relation to the object sought to be achieved."¹⁰ Thus did the "rational relation" test emerge, which is tantamount to the most minimal level of judicial review. As Professor Siegan observes, "[b]ecause every economic regulation serves some purpose"—in *Nebbia*, to guarantee a "reasonable return" to

³See Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977).

⁴94 U.S. 113 (1876).

⁵Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) [current version at 15 U.S.C. §§1-7 (1982)].

⁶Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

⁷291 U.S. 502 (1934).

⁸Siegan, *Economic Liberties*, p. 139.

⁹300 U.S. 379 (1937).

¹⁰Siegan, *Economic Liberties*, p. 139.

milk producers and dealers—the rational relation standard essentially presupposes judicial withdrawal.”¹¹ Those who would thereafter exercise their traditional economic liberties would find, he concludes, that the American government consisted of only two, not three, branches. In fact, although the Court has continued to strike down economic regulations that infringed on certain “fundamental” rights, such as expression or privacy, since 1936 not one economic regulation has been invalidated on due process grounds.¹²

With the advent of judicial restraint in the economic area there began, of course, the legislative activism that gave us the New Deal institutions we have all come to know so well. Not that these institutions had not begun slowly to emerge during the Progressive Era, from the thinking of which they drew much of their intellectual support; but now, unrestrained by the need to consider any but the Court’s preferred rights, they grew and prospered, regulating and restraining enterprise as never before, touching every facet of our lives. At all levels of government, legislators, executives, and bureaucrats set out in pursuit of the public interest, driven by the majoritarian pulse—or worse, but more likely, by the interests that would ensure their continuance in office. Policy, not principle, became the *raison d’être* of government, as legislators and executives alike measured their stock by the number of bills they had introduced, the number of benefits they had bestowed.

But the story does not end there, of course, for even before the legislature and executive had gotten their second wind in the form of the Great Society, the Court rediscovered its activist past—not in the area of economic liberty as set forth in the Constitution, to be sure, but in the uncharted sea of social and welfare rights. Armed with an egalitarian sword, the Court began carving out whole areas of entitlement, cutting deeply once again into those economic liberties the legislature had not yet gotten around to skewer. As if pressed by a double phalanx, economic liberties were now under assault on both sides. On one hand the courts would do little to prevent the legislature and executive from reordering property and economic liberty in the name of “social justice.” On the other hand the courts undertook their own program of “social justice,” discovering and inventing rights alike, rights the Founders had never even imagined.

In all of this, of course, the public domain has grown larger as the domain of private sovereignty has declined. This has taken place in

¹¹Ibid., p. 265.

¹²Ibid., pp. 265–66.

two basic ways. First, through countless regulatory schemes at the federal, state, and local levels, direct restrictions have been imposed on rights of property and contract, ranging from zoning regulations to barriers to entry and exit, control of terms, control of product, and on and on—restrictions so myriad that a brief list could not begin to convey their scope. Second, to support these regulatory schemes as well as the growing number of redistributive schemes, substantial increases in the level of taxation have been required. With each increase in the level of transfers from private to public hands, the scope of private sovereignty has necessarily declined. Not that each of us is not entitled, under specified conditions, to some part of this growing public pie. Indeed, the pie has spawned a whole industry aimed at helping us to maximize our piece, whether in the form of agricultural price supports, tax write-offs, research grants, public education, use of public ski resorts, public television—what have you. It would be fatuous, however, to suppose that even those who learn to manipulate the rules enjoy anything like the sovereignty they would enjoy were goods and services not open to public disposition.

The Conservative Response: Deference to the Legislature

Now in light of this history, one might assume that the conservative community that is otherwise inclined toward economic freedom would be of one voice, urging the Court to resurrect the substantive due process that so long enabled it to stand athwart the legislative, majoritarian drive, that enabled it to frustrate interest in the name of right. This is not the case, however. In fact, the subject of judicial review has sharply divided conservatives, as witness the papers presented at a recent Federalist Society symposium on judicial activism.¹³

In general, those conservative critics of the Court who nonetheless eschew substantive due process have been driven by the judicial activism of the past 30 years—and in particular by the Court's decisions on abortion, busing, school prayer, and criminal law—to what often appears to be a deep-seated antipathy to the federal judiciary especially and hence to federal judicial review as such: Thus the score and more of bills in Congress over the past few years aimed at limiting Supreme Court and lower federal court jurisdiction over specified kinds of cases, arguably permitted under Article III, section

¹³"A Symposium on Judicial Activism: Problems and Responses," *Harvard Journal of Law and Public Policy* 7 (1984): 1-108.

2 of the Constitution.¹⁴ Not that these critics would abolish all judicial review; rather, "large categories of cases,"¹⁵ as one put it, would be removed to state courts for review, thus circumventing the Supreme Court's incorporation doctrine under which it applies the provisions of the Bill of Rights to state action through the Fourteenth Amendment. Antipathy aside, therefore, it is their rejection of the incorporation doctrine,¹⁶ together with their belief that the Constitution protects only those rights articulated therein,¹⁷ that leads these critics to the conclusion that the Supreme Court has no authority to decide various of the questions it lately has decided. As one put it:

Virtually any group, therefore, that seeks to limit the power of the Court on any issue for any reason has my support. To limit the Court's power in any regard is to take a most important step toward restoring this country's political and social health.¹⁸

This points, then, to the direction that many of these conservative critics would take. At heart they are small "d" democrats who would place in the hands of the people and their elected representatives—preferably at the state and local level—many of the questions that now are decided by the Supreme Court. Although judicial review at the state level is reserved, judicial restraint is the recommended posture. "If the judges of any state should fail to eschew judicial law-making and the Supreme Court's plainly baseless 'interpretations' of the Constitution," said one, "it would be up to the people of the state to see to their judges."¹⁹ Indeed, judicial review "as understood and

¹⁴See especially the following: Charles E. Rice, "Withdrawing Jurisdiction From Federal Courts," *Harvard Journal of Law and Public Policy* 7 (1984): 13-15; Patrick McGuigan, "Withdrawing Jurisdiction From Federal Courts," *Harvard Journal of Law and Public Policy* 7 (1984): 17-21; Lino A. Graglia, "The Power of Congress to Limit Supreme Court Jurisdiction," *Harvard Journal of Law and Public Policy* 7 (1984): 23-29.

¹⁵McGuigan, "Withdrawing Jurisdiction," p. 18.

¹⁶Rice, "Withdrawing Jurisdiction," pp. 13-14; McGuigan, "Withdrawing Jurisdiction," p. 18. See generally Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Mass.: Harvard University Press, 1977); for a devastating critique, see Edwin Vieira, review of *Government by Judiciary*, by R. Berger, *Law & Liberty* 4 (Fall 1978): 1-6.

¹⁷See, for example, Rex Lee, "Legislative Questions and Judicial Questions," *Harvard Journal of Law and Public Policy* 7 (1984): 38. Compare with Joseph Story (Associate Justice of the Supreme Court, 1812-45), *Commentaries on the Constitution of the United States* (New York: Da Capo Press, 1970), pp. 715-16: "[The Bill of Rights] presumes the existence of a substantial body of rights not specifically enumerated but easily perceived in the broad concept of liberty and so numerous and so obvious as to preclude listing them."

¹⁸Graglia, "The Power of Congress," p. 24.

¹⁹*Ibid.*, p. 28.

practiced today," this critic contends, is "the major obstacle to our maintenance of a system of democratic, decentralized government."²⁰

In truth, however, we need not go beyond the Supreme Court itself to discover the conservative strain that defers to the legislature. Well-known for this view, for example, is the Court's leading conservative, Justice William H. Rehnquist. Thus in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,²¹ a 1976 opinion that struck down a Virginia statute prohibiting pharmacists from advertising the prices of prescription drugs, thereby carving out a degree of First Amendment protection for commercial speech, Justice Rehnquist wrote the lone dissent, denying that the Constitution in any way prohibited the state legislature from regulating such speech. In echo of Justice Holmes's famous dissent in *Lochner v. New York*,²² Mr. Rehnquist averred that "there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions,"²³ a comment presaged some four years earlier when he observed, in *Weber v. Aetna Casualty & Surety Co.*,²⁴ again in dissent, that the freedom of contract doctrine, thought by the Court in the first part of this century to be part of the Fourteenth Amendment's guarantees, had received its "just deserts" in 1937 in *West Coast Hotel v. Parrish*.²⁵

Writing more recently in this vein, the newest court conservative, Justice Sandra Day O'Connor, has indicated her own deference to the legislature in *Hawaii Housing Authority v. Midkiff*,²⁶ a 1984 decision upholding a Hawaii statute that permits the state to condemn private land, not so that it may be converted to public use but so that it may be purchased by the private tenants who occupy it. In

²⁰Ibid., p. 23.

²¹425 U.S. 748 (1976).

²²198 U.S. 45, 75 (1905): "I strongly believe that my agreement or disagreement [with the economic theory on which this decision is based] has nothing to do with the right of a majority to embody their opinions in law. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*."

²³*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting).

²⁴406 U.S. 164 (1972).

²⁵Id. at 179-80. See also Judge Robert H. Bork, "Tradition and Morality in Constitutional Law," *The Francis Boyer Lectures on Public Policy*, American Enterprise Institute, 1984, p. 5: "If one may complain today that the Constitution did not adopt John Stuart Mill's *On Liberty*, it was only a few judicial generations ago, when economic *laissez faire* somehow got into the Constitution, that Justice Holmes wrote in dissent that the Constitution 'does not enact Mr. Herbert Spencer's Social Statics.'"

²⁶81 L.Ed.2d 186 (1984).

overturning the decision of the Ninth Circuit, which had held that "it was the intention of the framers of the Constitution and the Fifth Amendment that this form of majoritarian tyranny should not occur,"²⁷ Justice O'Connor, writing for a unanimous court, commended "judicial restraint," adding that "the Court will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"²⁸ Just what will follow from this sweeping decision remains to be seen; but clearly, the eminent domain powers of states and municipalities have been substantially enlarged.

Stepping back from these conservative arguments, it is easy enough to appreciate their animating force; for the Court has indeed invented rights in recent years—although not as many, perhaps, as the critics suggest. Nevertheless, when the Court legislates rather than decides, when it makes policy rather than finds law, however difficult this pair of distinctions may be to articulate and apply, there is a sense of rule without authority, of self-government usurped, especially when the Court frustrates the clear and substantial will of the majority. Wielding, as it has, a new doctrine of substantive due process, though seldom calling it that, the modern Court has imposed its values on vast areas of our society. These conservatives are understandably reluctant, then, to resurrect the old substantive due process, even if they do think it in some sense legitimate.²⁹ For this would serve only to legitimate much of what the modern Court has done. Better to go the route of political legitimacy, they say, for only thus will the authority of the Court to legislate be undercut.

Having said all of that, however, there remains a deep sense of unease; for ours has never been a pure democracy. Our concern for

²⁷Midkiff v. Tom, 702 F.2d 788, 790 (1983).

²⁸1 L.Ed.2d 197 (1984), citing *United States v. Gettysburg Electric R.Co.* 160 U.S. 668, 680 (1896).

²⁹Many think substantive due process less than legitimate, of course. See, for example, the remarks of William French Smith before the Federal Legal Council, Reston, Va., on 29 October 1981, p. 3: "It is clear that between *Allgeyer v. Louisiana* in 1897 and *Nebbia v. New York* in 1934 the Supreme Court engaged in—and fostered—judicial policy-making under the guise of substantive due process. During this period, the Court weighted the balance in favor of individual interests against the decisions of state and federal legislatures. Using the due process clauses, unelected judges substituted their own policy preferences for the determinations of the public's elected representatives." See also Smith, "Urging Judicial Restraint," *American Bar Association Journal* 68 (1982): 59–61: "In the era that has come to be epitomized by the decision in *Lochner v. New York*, . . . it was conservatives who urged judicial activism under the banner of due process to strike down popular enactments. Judges read their personal predilections into the flexible terms of the Constitution, at the expense of the policy choices of the elected representatives of the people" (p. 60).

the rights of the minority, especially when we find ourselves members of that minority, has always been at the core of our respect for judicial review. Speaking at the Federalist Society symposium mentioned earlier, and to the proposals for withdrawal of certain subjects from Supreme Court jurisdiction, Deputy Solicitor General Paul Bator characterized these arguments as "unconstitutional in spirit," even if they did turn out to be constitutional in fact. As such, he added, they detract "from our valid criticism of the Court."³⁰ Indeed, he continued, the Framers would be "shocked" by some of these suggestions, for they assumed

that a federal government and a federal system needs an institution that has the authority to make uniform authoritative pronouncements of federal law. That assumption is well documented. The Supreme Court did not just invent it.³¹

If judicial review is an essential part of our Constitution, then, if it goes to the core of our system of ordered liberty, the central question before us should be whether there is a principled way through the thicket that surrounds it. Or is it all rather a matter of the shifting sands of constitutional jurisprudence? More precisely, just what are the roots of the authority of the Court? For that matter, what are the roots of the authority of the legislature, or of the sovereign generally?

The Roots of Political Authority

Clearly, an inquiry into the foundations of judicial review takes us ultimately not simply to questions of constitutional theory but to questions of political and moral philosophy as well. Yet how could it be otherwise, for what were the Founders if not moral and political philosophers, drawing upon the thought of the ancients and moderns alike to set in train not simply a legal order but a legal order that reflected an overarching and abiding moral order.³² What, after all, were the self-evident truths of which the Declaration speaks if not the truths of moral reason. That all men are created equal and that they are endowed by their Creator with certain unalienable rights are hardly empirical truths! Moreover, if governments are instituted among men to secure their rights, those rights could scarcely be the

³⁰Paul Bator, "Withdrawing Jurisdiction From Federal Courts," *Harvard Journal of Law and Public Policy* 7 (1984): 31.

³¹*Ibid.*, p. 32.

³²See, for example, Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Ithaca, N.Y.: Cornell University Press, 1955); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass.: Belknap Press, 1967).

product of positive law. Rather, they preexist government; government's function is to recognize and secure them, not to create them.

The principal business of moral philosophy, then, is to discover and set forth the whole truth about our moral rights and obligations, to articulate and justify those universal principles of reason from which our moral rights and obligations are derived, as well as to inquire about those value considerations that add meaning and richness to the stark world of self-referring rights. The principal business of political philosophy, in turn, is to derive from the conclusions of moral philosophy those principles and institutional arrangements that will justly secure our rights in an imperfect world. In the course of this discussion, of course, I will be able to say only a little about these vast subjects before returning to the questions that immediately concern us. Nevertheless, I hope that what I do have to say will help to illuminate those questions.

Individual Rights

There are at least two ways to undertake the discovery of the truths of moral philosophy. The more ambitious approach takes one to the deepest reaches of logic, epistemology, action theory, and ethics in order to derive the basic moral truths, from which the casuistry then proceeds by drawing upon the vast experience of the common law, if not by way of justification, at least by way of illumination.³³ More modestly, one might proceed by a series of minimal presumptions and shifting burdens-of-proof, leading, if not to the greater certitude of the more ambitious approach, at least to the relative certitude that flows from there being no better conclusion in view.³⁴ In either case, however, if we proceed in the classical liberal tradition of methodological individualism (by far the most modest presumption), the basic conclusions we derive are fairly Biblical in their simplicity, however complex may be the arguments necessary to their derivation, on one hand, or to their application on the other. Stated as obligations, correlative to which are rights in others, they are (1) As between generally related individuals—common law strangers—do not take what does not belong to you; (2) As between specially related individuals, keep your agreements; and (3) Failing in either one or

³³For examples of the more ambitious approach, see Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1978); Roger Pilon, "A Theory of Rights: Toward Limited Government," Ph.D. dissertation, University of Chicago, 1979.

³⁴For an example of this approach, see Richard A. Epstein, "Possession As the Root of Title," *Georgia Law Review* 13 (Summer 1979): 1121-43.

two, give back what you have wrongly taken or wrongly withheld.³⁵ What could be simpler? Again, the derivation of these conclusions as well as their application in manifold factual contexts is often exceedingly complex. At its core, however, the theory of human rights is elegantly simple, which is undoubtedly as it should be.

Notice, then, that all of our rights are reducible to property. John Locke, who more than anyone else can be said to have been America's philosopher, was perfectly correct, therefore, when he spoke of "Lives, Liberties, and Estates, which I call by the general Name, *Property*."³⁶ Notice also that all rights, however more particularly described, are derived from this fundamental root—and indeed are merely instances of it.³⁷ Notice finally that with certain rare exceptions, the theory of rights is perfectly consistent, yielding no conflicting rights and hence requiring no "balancing" of rights, whatever that may mean; for as individuals move from being generally related to being specially related, the rights they newly create replace those they have just alienated—thus is consistency preserved.³⁸

The Anarchist's Challenge

Well, what has all of this to do with judicial review? Quite a bit. But we are not ready to proceed there just yet. First we have to address the question of political authority to which our question on judicial review led. We have to discover just what the roots of political authority are, whether it be the authority of the judge, the legislator, or the executive.

³⁵The distinction between general and special relationships stems from H. L. A. Hart, "Are There Any Natural Rights?" *Philosophical Review* 64 (1955): 175–91. I have derived the conclusions set forth above, together with a number of applications, in my doctoral dissertation, "A Theory of Rights," as well as in the following: "On Moral and Legal Justification," *Southwestern University Law Review* 11 (1979): 1327–44; "Ordering Rights Consistently: Or What We Do and Do Not Have Rights To," *Georgia Law Review* 13 (1979): 1171–96; "Corporations and Rights: On Treating Corporate People Justly," *Georgia Law Review* 13 (1979): 1245–1370; "On The Foundations of Justice," *Intercollegiate Review* 17 (1981): 3–14; "Capitalism and Rights: An Essay Toward Fine-Tuning the Moral Foundations of the Free Society," *Journal of Business Ethics* 1 (1982): 29–42; "Property Rights, Takings, and a Free Society," *Harvard Journal of Law and Public Policy* 6 (1983): 165–95.

³⁶John Locke, "The Second Treatise of Government," in *John Locke: Two Treatises of Government*, edited by Peter Laslett, rev. ed. (New York: Mentor, 1965), §123 (original emphasis); see also §87. I have indicated the theoretical foundations of this point in Pilon, "Ordering Rights Consistently," pp. 1178–82.

³⁷Compare with footnote 17 of this paper and the accompanying text.

³⁸See Pilon, "Corporations and Rights," p. 1286.

In addressing this issue, I am going to take what some may think a radical approach, because only so will we get to the heart of the matter. It will not do, for example, to stop at the Constitution, for ours is only one among many such arrangements, each of which must be justified against the moral principles just outlined in order to be ultimately satisfying. When we generalize the question, however, we are taken straightaway to the state-of-nature theory that dominated the moral and political thought of the 17th and 18th centuries, upon which the Founders drew so heavily, and to the ultimate question of political philosophy, the anarchist's challenge: By what right does one man have power over another? If we can answer that question we will have solved the basic problem of political philosophy.

Now it will not do, by way of answer, to point to the good deeds the ruler does, certainly not in the American tradition of individual rights. For as every student of the common law knows, mere receipt of benefit does not entail creation of obligation: Common law strangers are obligated only to leave each other alone, not to affirmatively conform to the will or wishes of others, even when they receive gratuitous benefits from those others. Benefactors, therefore, have no more rights than they would have had they done nothing at all. Indeed, the whole democratic thrust has been directed against beneficent and maleficent rulers alike. Democracy is not a cry for good rule but a cry for self rule.³⁹

The foundations of political obligation are located, then, not in consequences, even good ones, but in process; and process is legitimate when rights are respected—in particular, when power over others arises through consent. As the Declaration of Independence makes clear, governments derive their *just* powers “from the consent of the governed.” That, and only that, is the source of their legitimacy. But how could it be otherwise? If our basic right is one of private sovereignty, of sovereignty over what is ours—our lives, liberties, and estates—then any authority in another over what is ours must have arisen in such a way as to be consistent with our basic moral right. To be legitimate, that is, any such power must have been consented to by those over whom it is exercised, just as with any ordinary contract. Otherwise, the power exercised by that other over what is ours violates our right to be sovereign over our dominion: It is mere power, not authority. Only *we* have the right to alienate our sovereignty, in whole or in part. When others alienate our sovereignty

³⁹See Isaiah Berlin, “Two Concepts of Liberty,” in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), especially pp. 129–31, 162–66.

without our consent, they take what is ours, they alienate our unalienable rights.

Social-Contract Theory

This explicates, of course, the moral foundations of the social-contract theory that dominated classical liberal thought in the 17th and 18th centuries. The power of the sovereign is legitimate only when grounded in the consent of the governed. But here we have to be careful. For it was never enough, on the classical view, that consent be manifest by the conduct of periodic elections among the people. Indeed, by themselves, periodic elections yield no answer at all to the question why the majority that emerges from the process should have power over the minority; for by its very vote the minority indicates it does *not* consent to the issue in question. At common law, parties who cannot come to a meeting of the minds simply walk away. Should it be any different here? Surely the numbers carry no intrinsic moral weight, not if individual rights mean anything at all. Nor does the right of the minority to leave the territory—*its* territory—carry any weight either (the “love it or leave it” argument); for the question here, the basic question, is what right the majority has to put the minority to a choice between two of its entitlements—its right to remain where it is, and its right not to come under the rule of the majority. Clearly, the argument from periodic elections alone merely replicates the original problem, with “majority” and “minority” replacing “ruler” and “subject.”

On the classical view, then, the obligation of the minority to conform to the will of the majority could be justified only by pointing to prior unanimity, to the prior consent of all to be bound thereafter by the results that flowed from the various decision procedures settled upon through that prior unanimous consent. Only when we give our prior consent to be bound by the outcome of an election, that is, can we be said to be obligated to abide by that outcome. Indeed, we need look no further than Article VII of the Constitution to see this point: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution *between the States so ratifying the Same*” [emphasis added]. Clearly, those states that did not ratify the Constitution could not have been bound by it, no matter how small a number they may have been. It is prior unanimous consent, then, that gets the whole game going, that justifies the structure, the decision procedures, and the whole apparatus through which legislators, executives, and judges ultimately derive their authority.

But here, precisely, is the rub. For as a matter of pure historical fact, there never was any such consent. We never did come together in that grand primordial field to yield up our unanimous consent, not to mention some consent capable of binding our heirs. At best, in the American context, our ancestors, or some majority of them, sent their representatives to the various state conventions, where majority rule prevailed again, presumably, to yield unanimity as regards the *states*. But surely that is not the consent that binds those who voted "nay" at some stage in the process, to say nothing of those who played no part at all in the process. Nor will the argument from tacit consent suffice: "You stayed, therefore you are bound." For again, by what right are we put to a choice between leaving or coming under another's rule? The anarchist, in short, has thrown down the gauntlet, and not even the recent and brilliant work of Robert Nozick in his award-winning *Anarchy, State, and Utopia* has succeeded in overcoming the challenge.⁴⁰

None of this is to argue, of course, that no state enjoys even the relative acceptance of its citizens, or that there are not different degrees of consent in different states at different times. Nor is it to argue that there are not immense practical reasons for coming in out of the state of nature, which Locke and others carefully catalogued. I fully expect, in fact, that in any realistic world these arguments would "carry the day," even if we did have a full appreciation of the ultimate inadequacy of social-contract theory. But it is important to recognize that although they would likely carry the day, arguments from relative consent and from prudence, strictly speaking, do not go to the core of the moral issue, a point we most keenly appreciate when we are in the minority on some important question about which the majority is just wrong—morally wrong. At that point the argument from prior consent looks painfully pale.

What the anarchist has done, then, is help us to appreciate the tenuousness of the consent that undergirds political authority—all political authority. He has helped us to see, that is, that there is an air of illegitimacy that ineluctably surrounds *any* public undertaking. For even that quintessential public undertaking, the securing of our

⁴⁰Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974). On anarchism generally, see Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper & Row, 1970). Decision theorists have pointed to quite different problems that surround the theory of democracy, including the observation that majoritarian procedures rarely yield majoritarian preferences. See, for example, Kenneth Arrow, *Social Choice and Individual Values*, 2d ed. (New Haven, Conn.: Yale University Press, 1963); William H. Riker, "Implications From the Disequilibrium of Majority Rule for the Study of Institutions," *American Political Science Review* 74 (1980): 432–46.

rights, is done in violation of the rights of those who would prefer to secure their rights themselves rather than pay the state for the service. We are forcing our association upon such individuals, which by our own standards we have no right to do. If this is true for so basic a service as securing rights, then *a fortiori* it is true for the countless services the modern state provides.

Now I realize that the 20th-century mind, accustomed as it is to viewing the state as a vehicle for doing good, is likely to find these conclusions disquieting, especially since they come not from economics but from ethics. But the anarchist is simply reminding us, albeit in a more searching way, of an insight the Founders keenly appreciated—that the state is a necessary evil, to which powers are to be given only when absolutely necessary.⁴¹ He is urging us, in short, to reflect before we ask the state to do something for us.

From Process to Substance: The Search for Legitimacy

As a theoretical matter, then, when we heed what the anarchist is saying, two important results follow. First, we get the presumptions right. When we recognize the inherent illegitimacy of all political power, that is, a heavy burden is placed upon those who would urge public undertakings to show why those undertakings must be public, why the ends sought, however desirable, must be sought through public institutions. Second, and perhaps more important, we get the focus right. When we recognize our inability to satisfy the unanimous consent condition—when we recognize, that is, the illegitimacy that surrounds the very majoritarian decision process—the moral force of the argument from majority rule is positively undercut; as a result, our focus is shifted away from the process approach to legitimacy and toward the substantive approach. Process will not carry the day; substance must.

These results have two important corollaries. First, when we get the presumptions right, when we place a heavy burden upon those who would pursue ends through government institutions to show why, the presumption amounts to saying that since all government undertakings involve forced associations, government should be doing as little as possible. Second, when we get the focus right—on substance rather than process—we are encouraged to recognize that since government undertakings cannot be justified by considerations

⁴¹See William Stoebuck, "A General Theory of Eminent Domain," *Washington Law Review* 47 (1972): 553–608: "In essence, Lockean social-contract theory says this: . . . Government is a servant, necessary but evil, to which its subjects have surrendered only what they must, and that grudgingly. . . [H]is was the accepted theory of government when the [Constitution] was being hammered out" (pp. 585–86).

of process, by considerations of majority rule, for all government undertakings entail violating the rights of those who would not be associated with them, then whatever is undertaken through government must violate as few *additional* rights as possible. Since the undertaking enjoys no ultimate legitimacy from considerations of process, that is, whatever legitimacy it enjoys must be derived from the fact that no additional rights are violated by its execution. Otherwise the undertaking is twice illegitimate. Thus a policy of securing rights, if executed without violating any additional rights, would be right violating only with respect to those who would prefer to perform this function themselves, those who are thus forced to have the government perform the service for them.⁴²

Substantive Due Process

Now these several considerations can be drawn together, and we can return to the questions we left earlier, through a brief thought experiment as to what possibly could be the meaning of the due process clauses of the Fifth and Fourteenth amendments. The Fourteenth Amendment clause, for example, reads as follows: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The problem, of course, is to determine the meaning of "due process of law," for with due process of law, presumably, a state may deprive a person of life, liberty, or property.

Let us assume initially that the clause has a purely procedural meaning, however difficult that assumption may be to sustain in the mind's eye; and ignore, for purposes of this experiment, all other clauses in the Constitution, however relevant. Presumably, then, if a state, through its duly elected and appointed officials, following duly enacted law, decides to hang a man for no other reason than that it wills to do so, it may hang him, for due process will have been followed. But this cannot be right, you say. Oh but it can! If all we mean by "due process of law" is mere procedure, then a man will be wrongly hanged only when the relevant officials hang him without first having gone through the procedural niceties. Our disquiet derives, of course, first from our inability to fully comprehend what mere procedural conformance would mean in a case such as this—after all, you cannot simply will a man hanged; there must be notice (of what

⁴²Notice how this second corollary qualifies the first. If government undertakes a policy of securing our rights, for example, in connection with which it prohibits most self-help remedies, it cannot then do "as little as possible," as called for in the first corollary. Once it disables its citizens, that is, even if only by degree, government may thereby bind itself to do a great deal by way of executing the responsibility it has taken on.

behavior is illegal), charges, evidence, and so forth—and second, from our sense, implicit in our inability to comprehend “mere procedure,” that “due process of law” cannot mean “mere procedure.” While procedural correctness is a *necessary* condition for due process of law, that is, it is not a *sufficient* condition. In addition, due process of law requires substantive correctness.⁴³

But now suppose our state wants to hang its man, again following all due process, but not simply because it wills to do so but because he parts his hair on the left, or because he is a Jew, or because the state needs to reduce the size of its population, or because the man is genetically unfit. Here, at least, there are substantive considerations; one could even say there is policy. But clearly, not any substance will do. We now have both procedure and substance, both due process and due process of law, if you will, but we have the wrong law. Yet how do we know this? As an historical matter, of course, my examples are not entirely far-fetched.

To try to get to the bottom of how we know this, let us assume now that our state wants to hang its man because he stole a dollar, or because he stole a million dollars, or because he maimed another for life, or because he murdered another. Getting closer? Clearly something is different in this series of examples. Here, unlike with the earlier examples, the man has *done* something, something wrong. By violating the right of another he has alienated a right of his own, meaning that others may treat him in ways that otherwise they may not. How do we know this? Not as a matter of policy, not because some legislature, reflecting the will of the majority, decided that we

⁴³Notice, then, that “procedure” has two aspects, both of which involve substantive moral rights. First, “due process” may refer to the political process—legislative, judicial, or executive—through which the relevant law has been established, which involves the substantive rights discussed earlier. Second, “due process” may refer to the legal process—executive, judicial, or even legislative—through which that law is executed, which also involves substantive rights, notwithstanding that some of these substantive rights are called “procedural rights.”

Notice further that the word “law” in “due process of law” is systematically ambiguous, denoting either the positive law or the higher, moral law. This distinction is crucial; for if, indeed, all we do mean to denote by “law” when we speak of “due process of law” is the positive law, then the state *may* simply will its man hanged—provided the positive law permits this. As long as such “law” satisfies the system’s criteria for being positive law—as opposed to social custom, say, or moral law—it will be law within that system. That law would not conform to the *higher* law, of course, and so would not be *morally* justified. Could the authors of the Fifth and Fourteenth amendments have meant “mere” law when they wrote “due process of law”? (see Siegan, *Economic Liberties*.) Can we? On criteria for establishing the existence of positive law, and on legal positivism generally, see H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

had a right to treat such a person differently than would be the case had he done nothing at all—which suggests that if the legislature had decided otherwise, then we would not have had that right. No, we have this knowledge as a matter of pure reason. These conclusions are contained in and derivable from the theory of rights mentioned earlier. If we are ever to get clear, therefore, about the substantive element in “due process of law,” it is absolutely essential that we get clear about the substantive theory of rights; for this is the theory that tells us what we may or may not do to another, whether as individuals or as public officials.⁴⁴ It is the theory that provides the substantive element in “due process of law.”

“Due process of law,” then, is more than mere process; and it is more than process plus any substance. It is process plus that substance that tells us when we may or may not deprive a person of his life, liberty, or property. As we saw earlier, however, that substantive element is justified not because it reflects the will of the majority, not because it has been determined by some democratic process, but because it is derived from principles of reason. (But see the discussion in the next paragraph.) We have no right to hang a man simply because he is a Jew, even if a substantial majority of the legislature says that we may. We do have a right to treat a person who has stolen a dollar differently than otherwise we may, even if a substantial majority of the legislature says that we may not. These are not matters of will or of policy; they are matters of reason.

Now it is not without reason that I selected that last series of examples, for it serves to draw out an important point, a point that qualifies these conclusions ever so slightly—or better, shows where considerations of value or will enter the picture at last. It is a conclusion of reason that we may treat a man who has done something wrong differently than otherwise we may. And it is a conclusion of reason that the treatment must in some sense equal the wrong. But just what treatment will equal or rectify the wrong is often not a matter of reason. When determining appropriate punishment, then, as well as a good many compensatory remedies, we have to leave the realm of reason, strictly speaking, and move into the realm of value. Here, however, subjectivity enters; reasonable men will disagree about values as they should not about rights if those rights are derived from ultimate principles of reason. Accordingly, when we reach those

⁴⁴Public officials, after all, even if they did derive their powers from the consent of the governed, could not have rights that individuals did not first have to yield up to them. Where would they have gotten such rights? See Nozick, *Anarchy, State, and Utopia*, p.6.

points in the theory of rights where value determinations are necessary—as with remedies, or with questions about where exactly to draw the line between one man’s right to quiet enjoyment of what is his and another man’s right to active use of what is his—then we have genuine questions of policy. Precisely what punishment fits a given crime, therefore, or how much particulate matter a factory shall be permitted to emit are questions of value, not of rights; accordingly, they are questions properly put to all of the people and hence to the legislature, to be decided by the prevailing standards of the time.⁴⁵

As we have seen, then, if a state may hang a man only with due process of law and “due process of law” takes its meaning from the theory of rights—in particular, in the case at hand, from the principle that no man may be hanged unless he has done something to alienate his right against being hanged—then clearly the state has no right to hang a man in order to advance medical science, say, or to make an example of him to those who know nothing of his innocence, or to prevent some great social harm being perpetrated by the mob that mistakenly thinks him guilty. For these grounds for hanging amount to nothing less than *using* him in order to achieve some “social good.” That is precisely what our rights prohibit others from doing—from using us for their own or even for society’s greater good.⁴⁶ Recall that only *we* can legitimately alienate our rights; others have no right to do so, no matter how noble their motives or worthy their ends.

But if these conclusions hold in the case of depriving a man of his life, do they hold any less when we deprive a man of his liberty or property in order to achieve some “social good”? The Fourteenth Amendment makes no distinction at all between “more valuable” and “less valuable” rights. It says simply that no state shall deprive a person of life, liberty, or property without due process of law. If a man has done something to alienate his right in his life, liberty, or property, then by due process of law we may take that over which he no longer holds a right. Absent that condition, however, we have no right to take what rightly belongs to him. We have no right, for example, to take the liberty of a store owner to set his milk prices at

⁴⁵I have discussed some of these issues more fully in “Criminal Remedies: Restitution, Punishment, or Both?” *Ethics* 88 (1978): 348–57, and in “Corporations and Rights,” pp. 1276–77, 1333–39. See also Richard A. Epstein, “Nuisance Law: Corrective Justice and its Utilitarian Constraints,” *Journal of Legal Studies* 8 (1979): 49–102.

⁴⁶This was the fundamental Kantian insight; see, for example, Immanuel Kant, *Groundwork of the Metaphysics of Morals*, translated by H. Paton (New York: Harper & Row, 1964). For an application, see Charles Fried, “Fast and Loose in the Welfare State,” *AEI Regulation* 3 (May/June 1979): pp. 13–16 (proposal to require lawyers to do *pro bono* work as a condition of licensure).

whatever level he chooses, even if taking that liberty *would* accomplish the great social good of guaranteeing a "reasonable return" to milk producers and dealers. Nor do we have a right to redistribute Hawaiian land from owners to their tenants in order to cope with "oligopolistic market structures," even if those tenants do compensate the owners. For in neither case have those from whom we are taking done anything to justify our taking. If indeed we *must* take what does not belong to us—in order to achieve some *compelling* social good—then at a minimum we should pay for what we have taken.⁴⁷ But the power of eminent domain is exercised by necessity, not by right. In recognition of this, at least, we pay. Should it be any different when we take a man's liberty? Why should *he* bear the costs of *our* pursuit of the "social good"? Indeed, is this not the welfare state on its head: not the few drawing from the many but the many taking from the few?

Now it should be noted here that had the *Nebbia* Court overturned the New York statute that prohibited the milk dealer from lowering his prices, it would not have been "making policy" or "imposing its values" on the citizens of New York. Rather, it would have been deciding the case according to the law, the higher law—not some arbitrary or spurious "higher law" that stands in *opposition* to the Fourteenth Amendment, but the rational theory of rights that is the higher law that stands *behind* the Fourteenth Amendment. The Court would have been saying simply that you cannot take a man's liberty when he has done nothing to warrant it. Moreover, far from denying to the citizens of New York their right to govern themselves, the Court would have been saying only that those citizens must exercise their right in such a way as not to violate the rights of some among them.⁴⁸ We are fortunate, in short, that our Constitution—unlike, say, the Soviet Constitution—sets out precisely those rights that reflect the background, higher law, albeit in a general way only. That higher law is one of structure, of framework—of rights that both permit and constrain our pursuit of values, whether as individuals or collectively. But the higher law is not "neutral," any more than any of the truths of reason, strictly speaking, are "neutral." Rather, it is the law of individual freedom, of private sovereignty, and hence of *laissez-faire*

⁴⁷For a development of this principle with respect to the notorious Fifth Amendment "taking issue," see Pilon, "Property Rights, Takings, and a Free Society."

⁴⁸Notice, however, how limited is our "right to govern ourselves (collectively)." If we take individual rights seriously, that is, there is not much room left for the pursuit of "public policy." This is a corollary, of course, of the conclusions developed in the previous section of this paper. Compare with footnote 29 above and the accompanying text, and the text accompanying footnote 45.

capitalism, the pronouncements of Justices Holmes, Rehnquist, and many others to the contrary notwithstanding. Some may value those rights, others may not. But there is all the difference in the world between our rights and our values, between those moral relationships we derive from principles of reason and those attitudes we hold, pro and con, toward the various things of the world. The failure to make this distinction, the failure to distinguish the objectivity of the one from the subjectivity of the other, can only lead, as it has in this century, to the most far-reaching of confusions.

Restoring the Judiciary

Needless to say, a judiciary untrained in these matters and driven by the darkest days of the legal realist movement would understandably, perhaps, have lost its confidence. Unable to discern that due process of law is ineluctably substantive and that all the rights we legitimately have are there to be drawn from the Constitution, they turned over to the legislature—the domain of interest and will—what was properly theirs to perform in the domain of reason. Having thus abandoned reason to will, they grew lethargic in their passivity until at last, witnessing the fun and profit the legislature seemed to be having pursuing the public good, they took up their own pursuit of that good, until today we are fairly awash with the public good.

Well, this will not change until we get back to basics. We will not unshackle the great engine of enterprise until we get the issues straight, until we recognize that the issue, ultimately, is not one of political legitimacy, of which branch of government has more authority to decide—for no branch enjoys the legitimacy that deeply satisfies. Nor is the issue one of values—individual or social, static or evolving. Rather, as it has always been, the issue, in the end, is one of right and wrong—of what it is, in particular, we may do to another by right. And that issue will be finally resolved neither by reading the Constitution literally or even narrowly, whatever those idioms may mean, nor by divining the intent of its authors, however felicitous that intent may have been, but only by going 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.

All of which reminds me of a remark I made to a colleague some years back, that judges should know their philosophy. “Know their philosophy?” my worldly friend replied. “You’re lucky to find one who knows his law!” But how could it be otherwise. Our land today is papered over with law—often inconsistent, often downright

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ridiculous—so much law that no one in a lifetime can master it all. Yet the attempt, or the need, will keep a judge from turning to the things that matter, to the deep and abiding principles of reason and ethics that could help to order it all, that could help to roll it back, that could help to extricate the judiciary from its present intellectual impoverishment. In this, however, the judge needs our help. For let us be candid: at its best, his is a difficult and lonely job. In every system there are points at which the rule of law depends critically upon the rule of men. One such point in our system, a critically important point, is on the occasion of judicial review. We can make this occasion less difficult, less lonely, by creating a climate of opinion that encourages the judge to do what in the end is the only thing he should do—the right thing. We need to encourage the judge, in short, not to do less but to do better.