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Five more years of intern seminar series

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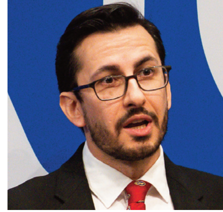

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Three Constitutional Issues Libertarians Should Make their Own

BY ILYA SOMIN

Libertarian legal scholars, activists, and public interest lawyers have made valuable contributions on a range of important constitutional issues, including property rights, school choice, Second Amendment rights, free speech, religious liberties, and more. But we have largely ignored three significant constitutional issues, thereby passing up valuable opportunities to expand liberty: zoning, constitutional constraints on immigration restrictions, and racial profiling in law enforcement.

Over the past several decades, libertarians have helped make important advances on several areas of constitutional law. Legal scholars Richard Epstein and Randy Barnett made pathbreaking contributions to our understanding of constitutional property rights and structural limits on federal power, respectively. Groups like the Institute for Justice and the Pacific Legal Foundation have won important cases enhancing protection for property rights, constraining religious and racial discrimination in public education, and much else. In recent years, my colleagues at the Cato Institute have done much to advance the ball on curbing qualified immunity: the judge-made doctrine that insulates police and other government officials who violate citizens' rights from liability for their actions. Cato has also long been active on issues involving property rights, limits on federal powers, free speech, and civil liberties. For a relatively small movement, this is an impressive record.

But there is, nonetheless, room for improvement. Libertarians have largely neglected three major constitutional issues that they would do well to focus on much more. All three combine strong constitutional arguments

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Vanessa Brown Calder, Cato's director of opportunity and family policy studies, speaks at a briefing on Capitol Hill about *Empowering the New American Worker*, a Cato book that offers free-market economic reforms to help working Americans.

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with enormous real-world consequences for liberty and human happiness.

ZONING

Exclusionary zoning is probably the greatest American property rights issue of our time. In many parts of the country, restrictions on the construction of new housing severely constrain property rights and cut off millions of people from housing and job opportunities. For example, the common practice of zoning for single-family housing blocks the construction of multifamily housing, which in turn prices most working and middle-class people out of the areas in question. Other types of zoning rules forbid the construction of a variety of housing options in large swaths of our most dynamic metropolitan areas, particularly on the East and West Coasts.

Economists and housing policy experts across the political spectrum largely agree that exclusionary zoning prevents huge numbers of people from moving to areas where they could be more productive, and have better educational and other opportunities. The effects are so enormous that economists estimate that U.S. gross domestic product would be some 36 percent higher if the level of zoning in several of the most restrictive metro areas was reduced to the national average.

Exclusionary zoning disproportionately victimizes the poor and minority groups. But all of us have much to gain from the increased economic growth and innovation that would result from empowering more people to "move to opportunity." Property owners could benefit from loosening constraints on their ability to use their land as they see fit.

It is often argued that zoning restrictions at least benefit current NIMBY (not in my backyard) homeowners, who can thereby prop up their home values and keep out people they dislike. But even many current homeowners have much to gain from the economic growth that reform would create, and from reducing housing prices for their children.

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Libertarians have not neglected zoning. Libertarian-leaning scholars, such as Harvard economist Edward Glaeser and the late legal scholar Bernard Siegan, have authored pioneering works on this issue. But libertarian legal scholars and litigators have mostly overlooked the constitutional dimensions of the issue, despite their successful focus on a wide range of other constitutional property rights questions.

One possible reason for this neglect may be the weight of long-standing precedent. Since the Supreme Court's 1926 decision in *Village of Euclid v. Ambler Realty Co.*, which upheld zoning against constitutional challenges, and later rulings building on it, conventional wisdom has been that there is no strong legal case against the practice.

But *Euclid* was a terribly flawed decision. Among other things, the majority ignored the fact that the property rights protected by the takings clause of the Fifth Amendment (which requires the government to pay "just compensation" when it takes private property) include a right to use the property as the owner sees fit, not merely the right to prevent others from physically occupying the land or seizing formal ownership. That is in accordance with Founding-era understandings of natural property rights and much 19th century jurisprudence. If the government severely restricts use rights, ownership becomes little more than a hollow shell.

The right to use could traditionally be limited by the "police power"—the government's authority to protect public health and safety. But much exclusionary zoning goes far beyond anything that can be justified on that basis.

In recent years, the Supreme Court has shown a willingness to strengthen constitutional protections under the takings clause, in the process repudiating or modifying long-standing precedent. A well-developed litigation effort could lead the Court to narrow or overrule *Euclid*, as well. Libertarian organizations with extensive experience in property rights issues are well positioned to undertake such a campaign.

Libertarians would also do well to investigate the extent to which litigation can strengthen state constitutional protection against zoning. On some issues, state constitutions protect property rights far more than the Supreme Court's current interpretation of the federal Constitution. In addition, many state constitutions are far more easily amended than the federal one. In states such as California (which has some of the most severe zoning problems in the nation), libertarians should consider investing in campaigns to enact restrictions on zoning by constitutional amendment.

Here, as elsewhere, constitutional reform is most likely to succeed through a combination of litigation and political advocacy. That is the lesson of past successful constitutional movements—such as the civil rights movement, the gay rights movement, and the gun rights movement—and past successful efforts to strengthen protection for property rights. Research by academics and policy analysts also played a significant role in moving the ball on these issues, including by influencing the development of legal doctrine. In recent years, there have been successful moves toward zoning reform in California, Oregon, and elsewhere. Libertarians can help build on this trend.

IMMIGRATION RESTRICTIONS

Like exclusionary zoning, immigration restrictions massively restrict liberty and degrade human welfare. By barring entry to hundreds of thousands of people who seek freedom and opportunity in the United States, the federal government massively restricts the liberty of would-be immigrants and American citizens alike.

The impact on potential immigrants is enormous. Many of those excluded are effectively confined to lifelong poverty and oppression under authoritarian, socialist, or radical Islamist regimes. In theory, they can join the "line" and wait to enter legally. But for most, that line is either decades-long or nonexistent. And for the most part, these exclusions are based on arbitrary circumstances of parentage and place of birth, of a kind libertarians and others in the liberal political tradition consistently reject in other contexts. Persons born in the United States or those who have a U.S.-citizen parent can live and work in the United States. Otherwise, they can only do so if they get special permission from the government, which is usually denied.

Less widely appreciated, even by many libertarians, is the massive negative effect of immigration restrictions on the liberty of current American citizens. Immigration restrictions bar millions of Americans from engaging in economic and social transactions with potential immigrants. It closes off Americans from hiring immigrant workers, getting jobs at businesses founded by immigrants (who establish such enterprises at higher rates than native-born citizens), renting property to immigrants, and benefiting from scientific and economic innovations to which immigrants also contribute at higher rates than natives. No other current U.S. government policy restricts liberty more than immigration exclusion does—and that's true even if we focus solely on the liberty of native-born citizens, especially economic freedoms.

Immigration restrictions also have massive negative effects on economic growth and human welfare. Economists estimate that free migration throughout the world would double global domestic product. That's an enormous chunk of lost wealth for immigrants and native-born citizens alike.

> "Libertarian economists and political philosophers have played a leading role in highlighting the harm and injustice caused by immigration restrictions."

Libertarian economists and political philosophers have played a leading role in highlighting the harm and injustice caused by immigration restrictions. Economist Bryan Caplan, Georgetown political philosopher Jason Brennan, and Cato Institute scholars Alex Nowrasteh and David Bier are among the libertarians who have made major contributions in this area. But libertarians—including most libertarian lawyers and legal scholars (myself included, for much of my career)—have largely ignored the constitutional dimensions of the problem.

It's far from clear that the original meaning of the Constitution even gives the federal government a general power to restrict immigration in the first place. Nothing in the text specifically grants Congress or the president such authority, and leading Founding Fathers—including James Madison—argued that no such power existed. It took more than a century for the Supreme Court to rule—in the 1889 *Chinese Exclusion Case*—that the federal government does in fact have this unenumerated power. And that decision is based on highly dubious reasoning and tinged with racism.

Whatever the merits of its reasoning, the Supreme Court is unlikely to overturn the *Chinese Exclusion Case* anytime soon. But libertarians would do well to take aim at extensions of that ruling that have largely immunized immigration restrictions from constitutional constraints that apply to virtually every type of government policy. For example, courts often uphold immigration restrictions that discriminate on the basis of speech, religion, race, ethnicity, and other characteristics that are presumptively forbidden in other areas of law. Immigration detention and deportation proceed with far weaker due process protections than other severe deprivations of liberty. Due process is so lacking in the system that Immigration and Customs Enforcement and other agencies have detained and sometimes even deported thousands of American citizens before they figured out their error. Such detention with little or no due process would not be tolerated elsewhere.

Similar double standards have resulted in the travesty of toddlers "representing" themselves in deportation proceedings, even though the right to counsel applies in other situations where serious restrictions on liberty are at stake. You don't have to be a constitutional law maven to see that such practices make a mockery of the "due process of law" guaranteed by the Fifth Amendment.

In *Trump v. Hawaii* (2018), a narrow 5–4 Supreme Court majority unfortunately bolstered constitutional double standards in immigration law, by upholding then president Donald Trump's travel ban targeting residents of five Muslim-majority nations, despite overwhelming evidence that the policy was motivated by anti-religious bigotry of a kind that would lead to invalidation of government policies in any other field. Similarly, immigration restrictions are almost the only field of government policy where federal officials openly endorse racial discrimination by law enforcement, in the form of racial profiling.

The exemption of immigration restrictions from many normal constitutional constraints on government power has no basis in the text or original meaning of the Constitution. A few constitutional rights are explicitly confined to U.S. citizens. But the vast majority are phrased as general constraints on government power, and protect citizens and noncitizens alike. Judges readily accept this fact outside the area of immigration restrictions. Thus, no one denies that the government must provide due process protections to noncitizens charged with crimes. In current practice, a noncitizen who decides to contest a traffic ticket is often legally entitled to stronger procedural protections than one facing detention and deportation, who is left to the tender mercies of an oppressive government.

Eliminating such double standards would not end immigration restrictions. The government would merely be forbidden to base them on suspect classifications, such as race, ethnicity, and religion, and would be required to apply stronger due process protections. But this change would curtail many of the worst abuses of the current migration regime, and perhaps set the stage for further progress. Even incremental improvement could make the difference between freedom and oppression for many thousands of people.

Achieving even this much will not be easy. The present conservative majority on the Supreme Court is often hostile to constitutional rights claims in the immigration context. But they have never been presented with a systematic effort to highlight the ways in which constitutional double standards on immigration are inimical to those justices' own commitments to originalism and textualism. Libertarian litigators well versed in these methodologies from experience elsewhere are potentially in a good position to raise these issues. Moreover, the composition of the Court can shift over time, opening up new opportunities. There is also room for incremental progress in lower courts, as the Supreme Court only considers a small fraction of cases.

"Curbing racial profiling should be a priority for all who believe government should be colorblind."

As with zoning reform, success in the immigration field will likely require a combination of litigation and political advocacy. Libertarians can contribute on both ends of this equation, if more of us become motivated to do so.

RACIAL PROFILING

Racial profiling occurs when law enforcement officers treat members of one racial group worse than they would be treated in the same situation if they belonged to another group. If a police officer stops, searches, or arrests a black person when a white person in the same situation would be left alone, that's a case of racial profiling.

Not all cases of abusive police behavior qualify. Some involve "equal opportunity" police brutality. Still, racial profiling is a widespread problem. A 2019 Pew Research Center poll found that 59 percent of black men and 31 percent of black women say they have been unfairly stopped by police because of their race. Their perceptions are backed by numerous studies—including many that control for other variables—showing that police often treat blacks and (to a lesser degree) Hispanics more harshly than similarly situated whites. Sen. Tim Scott (R-SC) has movingly recounted multiple incidents in which he was racially profiled by Capitol Police.

Most cases of racial profiling do not result in anyone being killed, injured, or even arrested. Usually, police unfairly stop, question, or otherwise harass a minority-group member. They then let that person go, perhaps with a traffic ticket. But that fact does not render racial profiling insignificant. It is painful and degrading if the people who are supposed to "protect and serve" you treat you as a second-class citizen—based on the color of your skin. Most individual cases of profiling have little effect; however, the cumulative impact of hundreds of thousands of such minor injustices is still severe.

Racial profiling also poisons relationships between the police and minority communities. If you (with good reason) believe that cops routinely discriminate against your racial or ethnic group, you are less likely to cooperate with them, report crimes, or otherwise help them. That creates obvious difficulties for both the police and civilians, and makes law enforcement less effective.

Curbing racial profiling should be a priority for all who believe government should be colorblind. If we libertarians truly believe that it is wrong for government to discriminate on the basis of race, we cannot ignore that principle when it comes to those officials who carry guns and have the power to kill, injure, and arrest people. Otherwise, we are blatantly inconsistent, and critics will rightly suspect that we oppose discrimination only when whites are among the victims, as in the case of racial preferences in education.

In addition to being unjust, racial profiling is also unconstitutional. The original meaning of the equal protection clause of the Fourteenth Amendment was centrally focused on unequal *enforcement* of laws by state and local governments, including the police. That happens when authorities enforce laws against some racial or ethnic groups differently from others, treating some more harshly on the basis of group identity. Racial profiling is a paradigmatic example of exactly that problem.

In part because the practice is so widespread, curbing racial profiling is a difficult task. Some important progress on this front can be made by pursuing traditional libertarian objectives, such as ending the war on drugs

and abolishing qualified immunity. The former would eliminate many of the police–civilian interactions most prone to racial profiling, whereas the latter would subject police to greater accountability for rights violations of all kinds, whether racially motivated or not.

But libertarians would also do well to consider more direct approaches to curbing profiling. It may be difficult to find an effective litigation strategy for doing so. But we should consider a variety of options. Here, as elsewhere, litigation can be combined with political action, such as legislative qualified immunity reform and steps to curb the power of police unions, which often protect abusive rogue officers.

With rare exceptions, libertarians—including libertarian legal thinkers—have devoted little time and effort to the problem of racial profiling. Greater engagement could enable us to make distinctive contributions to its solution. It would also help with the long-standing issue of improving libertarian outreach to racial minorities.

CONCLUSION

Libertarians have achieved much on a variety of constitutional issues. But we have largely neglected three that cry out for our attention. It is, perhaps, no accident that two of them (immigration and racial profiling) tend to pit us against the political right. The third—zoning—cuts across ideological lines. The "fusionist" alliance between libertarians and conservatives has deteriorated in recent years, but remains stronger in the constitutional law field than elsewhere.

Libertarians should embrace useful collaboration with conservatives; however, we must also protect liberty across the board, regardless of whether the danger emanates from the left or the right. Constitutional law cannot address all such threats; even where useful, it must often be combined with other strategies. But we should not neglect its potential on these three extraordinarily important issues. ■

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