ECONOMIC LIBERTIES AND THE JUDICIARY

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FOREWORD

THE JUDICIARY AND THE CONSTITUTION

Alex Kozinski

We are in the midst of a very important phenomenon in jurisprudence: the emergence of a new school of thought. For the first time in a generation, legal scholars are mounting a serious challenge to the jurisprudential approach that has dominated American legal thinking since the New Deal. The articles in this volume are at the forefront of this challenge, providing a reassessment of attitudes that have long dominated constitutional law. In response, disciples of the current doctrine have been forced to defend positions that for years were accepted on faith. And defend they have, frequently revealing a good deal about the premises underlying their thinking.

What many consider to be the most important response to the challenge is Justice William Brennan's speech titled "The Constitution of the United States: Contemporary Ratification," given at Georgetown University in 1985.[1] Justice Brennan's views of how the Constitution should be interpreted are at the center of a very important debate over the role judges should play in constitutional adjudication. What is perhaps most fascinating about Justice Brennan's speech is the rationale he gives for his noninterpretivist approach to the Constitution. It provides important evidence as to the linkage between the erosion of economic liberties and departure from other constitutional values. If Justice Brennan's speech actually reflects the prevailing jurisprudence—and there is every reason to believe it does—this renders the essays in this volume timely indeed.

On reading Justice Brennan's speech, one is surprised to find a single idea repeated again and again. This is the concept defined by

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[1]William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification." Speech at Georgetown University, Washington, D.C., 12 October 1985, p. 8.

the term "dignity." In various configurations, such as "human dignity," "fundamental dignity," or just plain "dignity," the expression appears no fewer than 35 times. According to Justice Brennan, "The Constitution is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law," and "a sparkling vision of the supremacy of the human dignity of every individual."[2]

Although the term "dignity" appears nowhere in the Constitution, Justice Brennan uses it to justify sweeping departures from the constitutional text. The way Justice Brennan derives the concept of human dignity and the way he applies it in interpreting the Constitution provide an illustration of how we have come so far from the text of the document in so short a time.

Justice Brennan notes that things have changed since the Constitution was drafted. At that time, freedom and dignity "found meaningful protection in the institution of real property." In those distant days, "property relationships formed the heart of litigation and of legal practice, and lawyers and judges tended to think stable property relationships the highest aim of the law."[3]

But those days are forever gone Justice Brennan assures us:

> To a growing extent economic existence now depends on less certain relationships with government—licenses, employment, contracts, subsidies, unemployment benefits, tax exemptions, welfare and the like. . . . Government participation in the economic existence of individuals is pervasive and deep. Administrative matters and other dealings with government are at the epicenter of the exploding law. We turn to government and to the law for controls which would never have been expected or tolerated before this century.

Justice Brennan recognizes the danger of allowing unbridled expansion of governmental power. He notes that "[t]he possibilities for collision between government activity and individual rights will increase as the power and authority of government itself expands, and this growth, in turn, heightens the need for constant vigilance at the collision points."[4]

For someone like me, who is firmly committed to the concept of individual freedom and highly suspicious of government power, it is difficult to disagree with Justice Brennan's conclusion, given his premises. If government is going to have free rein to meddle into

[2]Ibid., p. 9.
[3]Ibid.
[4]Ibid.

every aspect of our existence, I, too, favor strict controls on the way it does this.

But Justice Brennan and I part company on a very basic assumption. In his view, government control over people's lives is unavoidable: "The modern activist state is a concomitant of the complexity of modern society; it is inevitably with us."[5]

It is this aspect of Justice Brennan's analysis that is the cause for the greatest alarm, but it also provides the opportunity for the most thorough reassessment of jurisprudential attitudes toward economic regulation. Rather than accepting "the modern activist state" as a given and quibbling over how much "human dignity" we can squeeze out of the remaining portions of the Constitution, we might question whether we have not taken a wrong turn somewhere and yielded to the state too much power over our lives.

Justice Brennan is quite accurate in noting that ownership of property is an aspect of human dignity and autonomy, although he inexplicably limits the concept to real property. There can be no serious suggestion, however, that rights in real property have a different status under the Constitution than rights in personal or intellectual property. Moreover, one can dismiss as silly the anthropomorphic notion, popular among college students and law professors until recently, that property rights should be subordinated to human rights, as if property can have rights. As Wesley J. Liebeler cogently notes in his essay, the concept of property rights need not be limited to possession of tangible items, but rather can be viewed more expansively as extending generally to relationships among people. As such, the concept is applicable to control over land, goodwill, and, under some circumstances, even to communications.

For the last 50 years or so, however, courts have tended to treat certain rights differently from others. Those rights that have been classified as fundamental or human rights have been given preferred treatment. Among them are rights to speech, religion, travel, and privacy, and a variety of rights pertaining to arrest, conviction, and punishment.

Other rights, even where specifically articulated in the Constitution, have been disfavored. Government has been given a free hand to create, destroy, and adjust individual rights in the economic sphere. For example, a law forbidding Penn Central from constructing an office building over Grand Central Terminal was upheld against a taking claim,[6] and land use regulations that diminish property value

[5]Ibid., p. 10.

[6]Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

by 75 percent,[7] 90 percent,[8] and even 95 percent[9] have been found not to amount to takings under the Fifth Amendment. Ellen Frankel Paul points out in her essay that the public use restraint on taking private property by eminent domain has all but vanished under recent Supreme Court interpretation. Simon Rottenberg provides further examples of how property rights have been given short shrift in the courts in his discussion of judicial interference with contractually agreed upon creditor remedies.

While summarily upholding laws that drastically curtail property rights, the courts give laws infringing personal rights close and painstaking scrutiny. The right to display obscene words on your jacket[10] or shout them at police officers[11] is constitutionally protected. A jailer who cuts a prisoner's hair too short before release commits a constitutional offense,[12] and male prisoners have a constitutional right not to be supervised by female prison guards when taking showers.[13]

Someone unfamiliar with the text of the Constitution reading some of these decisions would naturally assume that the Constitution is replete with references to such things as what obscene words one can display and the amenities one must provide prisoners. But one would be certain that the Constitution has little or nothing to say about property. Similarly, if one knew nothing about the Founding Fathers, one would guess that they had a deep suspicion of government when it came to personal rights but were entirely sanguine about majority rule in matters of economics.

The text of the Constitution and the historical record conclusively refute these notions. The Constitution, as amended by the Bill of Rights, shows much solicitude toward the individual. It certainly safeguards his right to speak, pray, and be secure from unwarranted government intrusion into his home. But it shows at least equal concern for the individual's right to the fruits of his endeavors: the Fifth Amendment prohibits the taking of property without due process or just compensation; even with just compensation, property may only be taken for a public purpose. Article I, section 10 forbids the states from interfering with contracts. The Third Amendment prohibits quartering of soldiers in private homes during peacetime.

[7]Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
[8]Hadacheck v. Sebastian, 239 U.S. 394 (1915).
[9]Giuliano v. Town of Edgartown, 531 F. Supp. 1076 (D. Mass. 1982).
[10]Cohen v. California, 403 U.S. 15 (1971).
[11]Lewis v. New Orleans, 408 U.S. 913 (1972); Brown v. Oklahoma, 408 U.S. 914 (1972).
[12]Carter v. Noble, 526 F.2d 677 (5th Cir. 1976).
[13]Hudson v. Goodlander, 494 F. Supp. 890 (D.C. Md. 1980).

Bernard Siegan, in his essay, points out that "economic liberties [were] firmly rooted in the due process clause of the Fourteenth Amendment," for the purpose of protecting property rights from unrestrained state regulations.

Moreover, the entire document reflects deep concern about the excesses of governmental power and the unbridled will of the majority. The federal government is limited to functioning in certain specified areas, and its actions are constrained by internal checks and balances. The power of the states is limited by the supremacy clause; the Ninth Amendment declares that enumeration of certain rights shall not be construed to deny or disparage others retained by the people.

Nor can it be seriously disputed that the Founding Fathers were men to whom property was important and who were intensely aware of the need to safeguard property rights from majoritarian abuse. As Richard Epstein points out in his recent work on takings, the Framers were deeply influenced by natural rights thinkers such as Locke and Montesquieu. They were well aware that government, as the holder of a monopoly on the lawful use of force, can be used to siphon off the property of some for the benefit of others.[14]

The suspicion of unchecked governmental power, and the excesses to which it could lead, created a heavy presumption against laws that restricted individual rights, whether they involved liberty or property. While the courts were not always consistent, Siegan has demonstrated that for the first century and a half after ratification there was considerable judicial oversight of legislative enactments that impaired property interests.[15]

These early judicial decisions were based on principles that were antimajoritarian and antidemocratic, much as the Constitution itself. They were based also on the idea that the interests of society are best served by protecting the rights of the individual. As Justice George Sutherland stated in *Adkins v. Children's Hospital*, in the waning days of the substantive due process era, "[t]o sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members."[16]

[14]Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1985), ch. 2.

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

[16]Adkins v. Children's Hospital, 261 U.S. 525, 561 (1922), overruled in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

I would be the last to denigrate the importance of freedom of speech and religion, the right to participate fully in the political process, or the right to be free from arbitrary arrest, conviction, and punishment. But it is not clear to me that these rights are any more important than rights pertaining to property. I can certainly conceive of rational people who, if pressed to a choice, would be willing to give up the right to wear a jacket with obscene words on it in order to retain the right to construct a building or run a railroad.

Economic rights are not only a crucial component of individual liberty, but an important check on governmental power. In *Capitalism and Freedom*, Milton Friedman notes as follows:

> [E]conomic arrangements are important because of their effect on the concentration or dispersion of power. The kind of economic organization that provides economic freedom directly, namely competitive capitalism, also promotes political freedom because it separates economic power from political power and in this way enables the one to offset the other.
>
> Historical evidence speaks with a single voice on the relation between political freedom and a free market. I know of no example in time or place of a society that has been marked by a large measure of political freedom, and that has not also used something comparable to a free market to organize the bulk of economic activity.[21]

To simply accept, as Justice Brennan does, that "government participation in the economic existence of individuals is pervasive and deep," and likely to get deeper still, can only lead to an erosion of constitutional values and endanger the system that served us well for most of our existence as a nation.

Just as individual rights are not divisible, so too the Constitution must be viewed as an integral whole. When a portion of it is ignored or abused, this tends to throw the entire system out of balance, with significant repercussions.

The danger signals are clear. The most important is the one so candidly articulated by Justice Brennan—the perceived need to create new constitutional rights to make up for those we lose when government intrudes into every aspect of our lives. This gives judges a roving commission continuously to rewrite the Constitution in the guise of upholding human dignity, further destabilizing the constitutional process.

There are other danger signals as well. Since the 1930s there has been a proliferation of regulatory agencies at both the state and federal levels. It sometimes seems like the only free competition left

[21]Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), p. 9.

To be sure, this view was not universally shared. And the degree of scrutiny over economic regulation has varied from time to time according to the issues presented and the composition of the Supreme Court. Yet, until this century there was a commonly shared belief that individual rights were cut from a single cloth and that whatever power government had to limit those rights applied more or less equally to all. I find significant, for example, Justice Brennan's observation that as late as 1922 the only portion of the Bill of Rights that had been held applicable to the states was the Fifth Amendment's guarantee of just compensation for official takings.[17]

This century brought a different view, leading to the deconstitutionalization of economic rights. The reason Justice Brennan gives for this is that "the modern activist state is a concomitant of the complexity of modern society."[18] The idea seems to be that things have gotten so complicated that "common law property relationships" are no longer adequate to govern the intricacies of modern life. I can see at least three problems with this view.

First, property rights, that is, the legal relationships between people pertaining to the use and enjoyment of property, become more important as resources grow scarcer and society more complex. Metes and bounds may suffice to separate adjoining farms, but city lots are measured in feet and inches; land is leased by the decade, computer time by the micro-second. Complexity calls for more certainty and precision in defining legal relationships, not less.

Second, the substitute for precisely defined property rights is an increase in the scope and power of government. As Justice Brennan recognizes, this increases "[t]he possibilities for collision between government activity and individual rights." This, in turn, "requires a much-modified view of the proper relationship of individual and state."[19] In other words, we must rewrite the Constitution to give the government wider discretion, and then rewrite it again to give people a renewed sense of dignity. The spiral is endless.

Finally, individual rights simply are not divisible or fungible. As F. A. Hayek says, "The importance of freedom . . . does not depend on the elevated character of the activities it makes possible. Freedom of action, even in humble things, is as important as freedom of thought."[20]

[17]Brennan, "The Constitution," p. 11.

[18]Ibid., p. 10.

[19]Ibid.

[20]F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), p. 35.

in our economy is between government agencies as to which can grab the most power. James Miller, Robert Tollison, and Henry Manne, in their essays, articulate some of the costs of this trend: decreased regulatory efficiency, market disruptions due to lack of predictability and the loss of civil liberties.

Another sign of distress is the massive increase in litigation, what Justice Brennan calls "the exploding law."[22] An alarming proportion of our productive resources is now devoted to fighting each other and our government. It is also no accident, I think, that significant peacetime budget deficits first began appearing in the mid-1930s, about the time that judicial control over government intrusions into the economy began to disappear. Epstein points out that our Constitution reflects a general distrust of the political process. It may be that entrusting elected officials with unrestrained authority to shuttle economic resources between different individuals, regions and interest groups is a power that is not capable of containment. Much as the Framers feared, the temptation to serve the interests of faction, at the expense of the whole, may simply be too great. Perhaps, as Roger Pilon notes in his essay, by being "[u]nable to discern that due process of law is ineluctably substantive and that all the rights we have are there to be drawn from the Constitution, [the courts] have turned over to the legislature—the domain of interest and will—what was properly theirs to perform in the domain of reason."

These are difficult questions, and the answers are neither simple nor immediately apparent. My friend and esteemed colleague, Justice Brennan, has lived longer and seen far more constitutional adjudication than I have. He may be right in both his premises and his conclusions. But it is our duty not to accept without question what may be serious and irreversible changes in our system of checks and balances. It is important to challenge the assumptions of the modern activist state before we abandon ourselves and our lives to it. The New Deal, and the case law that supports it, is itself an experiment of relatively recent origin. The time has come to assess where we stand and, if necessary, to change direction, slowly and cautiously, but without fear.

The importance of a volume such as this, with its ground-breaking essays, is that it provides a forum for raising these ideas and creating what Justice Antonin Scalia calls "a constitutional ethos of economic liberty." It is difficult to imagine a work better suited to this important purpose or published in a timelier fashion.

[22]Brennan, "The Constitution," p. 9.