SE TexasRecord

Libertarian Judicial Activism Isn't What the Courts Need

Mark Pulliam

January 4, 2017

Were the Founding Fathers anarchists? Did the ideas contained in John Stuart Mill's *On Liberty*, published in 1859, somehow inspire the delegates to the Constitutional Convention in 1787? Does the Constitution contemplate Robert Nozick's minimal state, presaging his 1974 magnum opus *Anarchy, State, and Utopia*?

These may seem like facetious questions, but libertarian legal scholars have devised a novel theory that the Constitution, properly understood, protects a person's "right to do those acts which do not harm others." They contend that this sweeping right to personal liberty is enforceable against the federal government and the states. Moreover, within the three branches of government, it is only *judges* who get to decide whether a particular law is justified constitutionally. Incredibly, libertarian legal scholars are urging President-elect Trump to appoint an adherent of this fanciful theory to replace Justice Antonin Scalia on the U.S. Supreme Court.

I bring this up to introduce an objection made by a libertarian acquaintance to my article, "The Trump Court: SCOTUS Could Stand Some Disruption," which contrasted two competing models of judicial review: "restraint" versus "activism." This acquaintance, a prominent lawyer, questioned the accuracy of the following statement from my post, which he broke into numbered subparts: "[L]ibertarian legal scholars who [1] advocate a more aggressive role for judges in all cases [2] deny the existence of judicial activism and [3] regard any form of restraint as 'abdication.' Many libertarians [4] view *Roe v. Wade* and similar decisions as a vindication of 'unenumerated' individual rights." My acquaintance disputes that any libertarian legal scholar subscribes to even a single one of the four listed viewpoints, let alone all of them.

I'd like to address that challenge.

As someone who regards himself as a classical liberal, I did not intend to pick on—or malign—libertarians in general, with whom I share the goals of limited government, preserving the rule of law, and protection of property rights and economic liberties. I have, in the past, written for libertarian publications such as *Reason* and *The Freeman*, and participated in programs sponsored by the Reason Foundation and the Institute for Humane Studies. However, the

objection raises a specific issue—libertarian constitutional theory—that I consider to be unsound and misguided. Hence my reply.

Libertarians, like atheists and some other groups, exert influence greatly disproportionate to their numbers because they tend to be vocal, intensely focused, tenacious, and dogmatic. Moreover, lavishly funded libertarian organizations such as the Cato Institute and the Institute for Justice tirelessly proselytize their tenets. In matters of constitutional theory, libertarians (notably Cato's Roger Pilon and Georgetown law professor Randy Barnett) have developed an approach that they sometimes refer to as "judicial engagement." They offer this approach as a form of "originalism," but as we shall see later in this post, it more closely resembles the judicial activism pioneered by the Warren Court.

Without getting too deeply into the weeds, the libertarian approach rests on the premise that the Constitution was not so much an arrangement among the individual states (which themselves were separate Lockean social compacts) as it was a very limited delegation to the federal government of individual sovereignty (harkening back to the Declaration of Independence and its reliance on "natural rights"). In this rubric, individuals continue to possess all unalienable rights to which they were endowed in the "state of nature," other than the federal powers *specifically enumerated* in the Constitution. "Natural rights," they claim, are protected by the reference to "liberty" in the due process clause of the Fifth Amendment, and the Ninth and 10th Amendments preserve to the people—as *individuals*, not as states—all rights not specifically surrendered to the federal government.

Libertarians have a facile "solution" to the potentially vexing question of the *states*' police powers, which antedated the drafting and ratification of the Constitution: they contend that the 14th Amendment applied the Fifth Amendment (including the protection of "liberty" in the due process clause) to the states, particularly through the "privileges or immunities" clause, which libertarians believe was erroneously drained of its intended meaning in the incorrectly decided *Slaughter-House Cases* in 1873.

Libertarians maintain, in other words, that the Constitution went off the rails almost 150 years ago, and that—in cabal-like fashion—the Supreme Court has subsequently refused to correct its grievous error. Pardon me for saying so, but in terms of convoluted plot twists, drama, and intrigue, this tale sounds more like an overwrought Dan Brown novel than serious constitutional history.

The rhetorical denouement of this far-fetched jurisprudential exegesis is that the Constitution is brimming with "unenumerated rights" (that is, rights nowhere set forth in the Constitution), leaving us with the aforementioned "right to do those acts which do not harm others," a libertarian credo which—conveniently—echoes Ayn Rand more than it does *The Federalist*. (Tellingly, Barnett's 2004 manifesto, *Restoring the Lost Constitution*, is dedicated in part to anarchist pamphleteer Lysander Spooner, who did not believe in the legitimacy of a written constitution.) And who is responsible for enforcing this state of semi-anarchy? Libertarians aver that the democratically-accountable branches of government (that is, elected officials) are "majoritarian" threats to individual liberty. Hence, all laws should be presumed to be unconstitutional (to vindicate the "presumption of liberty" inherent in natural law), and it is solely up to *judges* (and in federal court, unelected, life-tenured judges) to decide *which* laws can

be justified as necessary and appropriate, based on the government's case-by-case evidentiary showing.

I have described "judicial engagement" as "a judicially managed state of anarchy" in which "judges would have more power than legislators, rendering democratic self-government a feeble charade." Conservative critic Ed Whelan is similarly disdainful, asking "is judicial engagement anything more than camouflage for libertarian judicial activism—an effort to smuggle in the back door what can't be formally established by straightforward and persuasive arguments about original meaning?" Whelan has also said that Barnett's latest book, *Our Republican Constitution*, "looks suspiciously like a fantasy libertarian constitution," and not "the usual stuff of originalism." Ouch.

So much for the overview. Let's turn to the four challenged statements. I can barely scratch the surface of the torrent of words declaimed by the Cato/IJ camp. But here is a representative sample:

Some libertarian scholars advocate a more aggressive role for judges in all cases. Recall that libertarians reject the "presumption of constitutionality" currently enjoyed by most laws; Pilon maintains that "the Constitution, from its inception, established a clear presumption for individual liberty and against collective undertakings." The corollary is that, in Barnett's words, when reviewing laws challenged as an abridgement of "unenumerated" (that is, unwritten) rights, "Judges need to explain why a restriction on liberty is both necessary and proper and then realistically examine the preferred explanation." Under judicial engagement, the government would have the burden of proof to justify all challenged laws. If the judge was not convinced, the law would be struck down. This is obviously a more aggressive role for judges than they currently play, which is the whole point of "judicial engagement."

Throughout his 2013 book, *Terms of Engagement*, Institute for Justice senior attorney Clark Neily derides "rational basis" review as "make-believe judging," "rubber-stamp style judging," and an "empty charade." Judicial engagement, Neily argued, requires "real judging in all cases," with courts using something like the "strict scrutiny" now reserved for "fundamental rights" and "suspect classifications." In a recent *USA Today* op-ed, Neily wrote: "An engaged judge will always require the government to provide a constitutionally proper reason for its actions and evidentiary support for its factual assertions."

Some libertarian scholars deny the existence of judicial activism. In a *National Affairs* article titled "Against Judicial Restraint, Cato's Ilya Shapiro urges a heightened judicial role and dismisses "the vacuous activism/restraint dichotomy." Chapter 7 of Neily's *Terms of Engagement* is titled "The Judicial Activism Bogeyman." Libertarian scholars are fond of citing University of Pennsylvania law professor Kermit Roosevelt's book, *The Myth of Judicial Activism*. In 2011, Neily and an IJ colleague, Dick Carpenter, wrote a report titled, "Government Unchecked: The False Problem of 'Judicial Activism' and the Need for Judicial Engagement."

Some libertarian scholars regard any form of judicial restraint as "abdication." Neily in his book disparages the current standard of review (under the deferential "rational basis" test) as "judicial abdication." Presuming laws to be constitutional, placing the burden of proof on a challenger, and failing to recognize "unenumerated" rights are all cited by Neily as examples of "abdication." Two chapters of Neily's book are titled "Why Do Judges Abdicate?" and "From

Abdication to Engagement." IJ attorney Anthony Sanders has gone so far as to state that anything short of "judicial engagement" constitutes "abdication": "The opposite of judicial engagement—'judicial abdication'—is the real worry."

Many libertarians view *Roe v. Wade* and similar decisions as a vindication of "unenumerated" individual rights. The first three refutations were easy. This one is a little more nuanced, because even libertarians realize that *Roe v. Wade* is the "third rail" for constitutional theorists, at least on the Right.

Accordingly, libertarians such as Neily often deny that recognition of "unenumerated" rights (through the use of "substantive due process" under the Fifth and Fourteenth Amendments) "necessarily entails *Roe*" (as Neily writes in *Terms of Engagement*) but *Roe* was the classic example of judges "finding" rights not actually specified in the Constitution. Constitutional rights, unless credibly derived from constitutional text or history, represent nothing more than the personal predilections of judges. "Natural rights" are an amorphous and potentially unlimited source of jurisprudential legerdemain, capable of extending to any judicial whim or caprice.

Under the theory of "unenumerated" rights, individuals possess a constitutional right to personal autonomy broader than *Roe*—sufficiently capacious to justify every activist decision rendered in the past 50 years, and then some. Abortion rights, unrestricted "sexual privacy" (including engaging in prostitution and incest), same-sex marriage, plural marriage, the right to assisted suicide, recreational drug use, and almost any individual impulse would have to be allowed unless the government was able to convince a judge that the law prohibiting such conduct was justified by a "compelling state interest" that could not be achieved through less restrictive means.

The doctrinal precursor for *Roe* was Justice William O. Douglas's infamous opinion in *Griswold v. Connecticut* (1965), which recognized an unenumerated right of "marital privacy" to overturn a state law restricting the use of contraceptives. Douglas relied on the contrivance of "penumbras, formed by emanations" from the Bill of Rights because the "right" recognized by the Court nowhere appeared in the Constitution. The libertarian theory of "unenumerated" rights is much more open-ended than Douglas's risible artifice in *Griswold*, and would give a blank check to judges wishing to overturn legislative policy preferences. It is revealing that a Cato/IJ compilation of the 12 worst Supreme Court decisions of all time, *The Dirty Dozen* (2008), doesn't include *Roe*. Libertarians play coy about *Roe* but readily acknowledge that the result in *Obergefell v. Hodges* (2015)—constitutional protection for same-sex marriage—would be the same under "judicial engagement."

Judicial engagement is faux originalism. At best, it represents wishful thinking by inventive libertarian scholars. At worst, it would unmoor constitutional law from the text of the Constitution and empower unelected judges to be society's Platonic Guardians. President Trump should avoid jurists in any way sympathetic to this badly misguided theory.