WALL STREET JOURNAL

Correcting the Record on Judicial Activism

July 9, 2018

Daniel Henninger's otherwise excellent Thursday column came up short this week ("Trump Blows Away a Penumbra," July 5). His hope that President Trump's new Supreme Court pick will end "judicial overreach" is understandable, but the far larger problem, as always, is legislative and executive overreach, for which the court is the constitutional remedy.

To be sure, the Warren and BurgerCo urts often did overreach. But since those days, the debate among conservatives and libertarians has slowly shifted from judicial "restraint" to "engagement," aimed at checking lawless political activism (see my 1991 Wall Street Journal op-ed "Rethinking Judicial Restraint").

To see why, look simply at *Griswold v. Connecticut*, the 1965 decision Mr. Henninger sites as the source of judicial overreaching. True, the court's resort to "penumbras" and "privacy" to explain why Connecticut's statute prohibiting the sale and use of contraceptives was unconstitutional strained credulity. A classic case of right result, wrong reasons, the court should have noted first that the state enacted that law under its basic police power—its power, mainly, to protect the rights of its citizens. The court should then have asked simply: Whose rights is this law protecting? Connecticut would have come up empty-handed. This was a pure "morals" statute, promoted by some, against the liberty of others.

Notice, there's no need here to speak of "privacy" or to discover rights. The burden is on the state to justify its act, failing which there's a right, by implication, to sell and use contraceptives. Nor does the holding in *Roe v. Wade* follow, because there the police power may very well be protecting the rights of unborn children. That is a decision properly left to states.

But beyond the constitutional infirmities with Mr. Henninger's argument is a practical problem. What Senate moderate would vote for a nominee who believes that states have the kind of unbridled power that was at issue in *Griswold*—or in many decisions since, especially economic liberty cases where courts today are increasingly checking unconstitutional power? Proper judging means principled engagement, not judicial deference.

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