

THE PROPER ROLE OF “JUDICIAL ACTIVISM”

THE HONORABLE CLINT BOLICK*

The last time I was invited to speak at the Federalist Society National Student Symposium,¹ never in my wildest dreams did I imagine that the next time I spoke at the Symposium would be as a Justice of the Arizona Supreme Court. Yet, here I am, as a judge. And once again, I am going to extol the virtues of an activist judiciary—here at the Federalist Society, of all places. How on earth could I make such a provocative, if not downright shocking, argument? “Judicial activism” is the universal pejorative. It is one thing on which both the right and left, red and blue, agree—that judicial activism is horrible.² But think about this for a moment: Every single person in this room is an activist. We are here because we are activists. After all, the opposite of activism is passivity, and perish the day that any of us are accused of passivity.

The devil, of course, is in the definition. I define judicial activism as any instance in which the courts strike down a law that violates individual rights or transgresses the constitutional boundaries of the other branches of government. In that regard, the problem with judicial activism is not that there is far too much, but that there has been far too little. This is due to the explosive growth of government power at every level.³

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1. Clint C. Bolick, *Jump-Starting K-12 Education Reform*, 40 HARV. J.L. & PUB. POL'Y 17 (2017).

2. See Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002) (“Everyone scorns judicial ‘activism’ [I]f ‘restraint’ is good, then ‘activism’ must be bad. When liberals are ascendant on the Supreme Court, conservatives praise restraint and denounce activism. . . . When conservatives are ascendant on the Court, liberals praise restraint—by which they mean following all those activist liberal decisions from the previous cycle!—and denounce ‘conservative judicial activism.’”).

3. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233–50 (1994) (tracking the growth of the administrative state); Stephen Moore, *The Growth of Government in America*, FOUND. FOR ECON. EDUC. (Apr. 1, 1993), <https://fee.org/articles/the-growth-of-government-in-america/>

From our nation's founding, it took 169 years—until 1958, two decades after the New Deal had been enshrined in federal law—for the U.S. Code to reach 11,000 pages.⁴ It took only 42 years—to the year 2000—for the number of those pages to quadruple.⁵ One quarter of the time, yet four times the amount of federal laws. And of course, those laws have grown substantially since then.⁶

So it stands to reason that if we have four, or five, or six times as many laws as we did in 1958, we ought to see four, or five, or six times as many judicial decisions striking laws down as unconstitutional, unless we have fewer unconstitutional laws today than we had in 1958. That is quite unlikely. To the contrary, every student of the Constitution and of the various branches of government knows that, once upon a time, the President and the Congress debated endlessly over whether they had the constitutional authority to do what it was that they wanted to do.⁷ In fact, that is why we have a Fourteenth Amendment—because Congress was persuaded that the civil rights laws that it wanted to pass were beyond the scope of its constitutional authority.⁸

When was the last time you saw an elected political official agonize over whether he or she possessed the power to enact a law? It was only a few years ago that President Bush signed into law the McCain-Feingold Act, recognizing that “the bill does have flaws” and expressing “reservations about the constitutionality” but stating that he “expect[ed] that the courts

[<http://perma.cc/S44-4784>] (“The United States has been gradually transformed from a nation with almost no government presence in the marketplace to one in which the government is now the predominant actor in the domestic economy.”).

4. Compare 1–50 U.S.C. (1934), with 1–50 U.S.C. (1958).

5. Compare 1–50 U.S.C. (1958), with 1–50 U.S.C. (2000).

6. Compare 1–50 U.S.C. (2000), with 1–50 U.S.C. (2012).

7. See Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1103–09 (2013) (explaining that historical practice has framed the discussion of presidential powers vis-à-vis Congress); Samuel Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed “Human Life” Legislation*, 68 VA. L. REV. 333, 394–96 (1982) (providing a terse summary of congressional authorization vis-à-vis presidential powers).

8. See generally John P. Frank & Robert F. Munro, *The Original Understanding of “Equal Protection of the Laws,”* 50 COLUM. L. REV. 131 (1950) (providing a rich history of the Fourteenth Amendment that sheds light on its original meaning).

[would] resolve these legitimate legal questions as appropriate under the law."⁹

Today, much of our law is made not by officials who are democratically accountable to the people, but by unelected bureaucrats who are not.¹⁰ The growth of the U.S. Code pales in comparison to the growth of the Federal Register, the compilation of agency-made law.¹¹ And what has been the judiciary's response? The *Chevron*¹² Doctrine—which, if we had an Academy Awards for judicial abdication, would be strolling down the red carpet right now.¹³

From what source does the judicial power and duty to strike down unconstitutional laws derive? It derives from the genius of our constitutional republic.¹⁴ As Hamilton argued in Federalist No. 78, "[n]o legislative act . . . contrary to the Constitution, can be valid," and "the courts were designed to . . . keep the [legislature] within the limits assigned to their authority."¹⁵ To

9. Press Release, President George W. Bush, President Signs Campaign Finance Reform Act (Mar. 27, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/03/20020327.html> [<http://perma.cc/AE6L-M6ZV>].

10. See Ronald D. Rotunda, *King v. Burwell and the Rise of the Administrative State*, 23 U. MIAMI BUS. L. REV. 267, 281–82 (2015) ("Unelected administrators, hidden from public view, decide significant and controversial issues such as 'net neutrality,' or the future of the Internet. Regulators (and the President who appoints them) can use complex regulations that are written in jargon to reward political friends and burden political enemies.").

11. See SUSAN E. DUDLEY & JERRY BRITO, REGULATION: A PRIMER 5–6 (2d ed. 2012) (discussing the growth of agency-made law). This is illustrated through the sheer number of pages that have been added to the Federal Register, which "has grown from under 25,000 pages to over 165,000 pages over the last 50 years." *Id.* at 5.

12. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

13. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151–52 (10th Cir. 2016) (Gorsuch, J., concurring) (Rather "than completing the task expressly assigned to us, rather than 'interpret[ing] . . . statutory provisions,' declaring what the law is, and overturning inconsistent agency action, *Chevron* step two tells us we must allow an executive agency to resolve the meaning of any ambiguous statutory provision. In this way, *Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty" (alteration in original) (quoting 5 U.S.C. § 706 (2012))).

14. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–78 (1803) (holding that the Constitution was designed to assign "to different departments, their respective powers," and that it granted the judiciary the power to strike down laws that violate the Constitution of the United States).

15. THE FEDERALIST NO. 78, at 379 (Alexander Hamilton) (Terence Ball ed., 2003).

be sure, Hamilton also presciently warned that the judiciary itself could become dangerous if it ever exercised executive or legislative powers.¹⁶

It ought not be an option for a court to “fix” a seemingly unconstitutional statute. Justice Scalia was famous for saying that, if the legislature produces garbage and the Court is asked to interpret it, the Justices’ constitutional obligation is to return garbage.¹⁷ “Garbage in, garbage out.”¹⁸ Of course, if there are two competing ways to interpret a statute, the judge should interpret the statute in the way that makes the statute constitutional rather than the way that would make it unconstitutional. That proposition is not only compelled by the separation of powers, but is a core rule of statutory interpretation.¹⁹ However, the problem arises when a judge is inclined to rewrite a statute that, as written, cannot be interpreted in such a way as to make it constitutional.

The Arizona Supreme Court recently adjudicated a case involving a question of statutory interpretation related to a parental-rights provision.²⁰ Arizona has a statute that says that, if a parent fails to appear at the hearing for termination of parental rights, that person waives his parental rights.²¹ The issue before the court was whether the parent’s absence is determined at the beginning or the end of the hearing.²² In addressing this question, my colleagues on the Arizona Supreme Court

16. *Id.* at 378, 381 (internal citation omitted) (“[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers. . . . [I]f [judges] should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”).

17. See *Q&A with Justice Antonin Scalia*, C-SPAN (July 19, 2012), <https://www.c-span.org/video/?307035-1/justice-antonin-scalia-1936-2016> [<http://perma.cc/DHY2-UMZZ>].

18. *Id.* at 00:16:54 to 00:16:57.

19. Derek P. Langhauser, *Executive Regulations and Agency Interpretations: Binding Law or Mere Guidance? Developments in Federal Judicial Review*, 29 I.C. & U.L. 1, 13 (2002) (“The basis of *Chevron* was a constitutional presumption central to the separation of powers.”).

20. See *Marianne N. v. Dep’t of Child Safety*, 401 P.3d 1002 (Ariz. 2017).

21. ARIZ. R.P. JUV. CT. 64(C).

22. *Marianne N.*, 401 P.3d at 1006–07.

used a variety of statutory construction tools.²³ But frankly, I am sure the legislature did not even think about this question when it wrote the statute. Unsurprisingly, the justices' statutory construction tools resulted in interpretive conflicts.²⁴ For instance, two other justices and I read the statute's language and determined that there was only one constitutional way to interpret the statute: A parent only waives his rights if he is absent for a severance or termination hearing.²⁵ For if a parent could waive his parental rights by missing the beginning of the hearing, such as by arriving only two seconds late, that would unquestionably constitute a violation of due process.²⁶ And I do not think that is a controversial way to interpret a statute. That said, four of our colleagues chose Option C, which was to effectively rewrite the statute to make it constitutional.²⁷ The other two justices and I were very critical of this approach, so we found ourselves in dissent.²⁸

Whereas I view the above legal debate as relating to a doctrine of statutory interpretation, Mr. Whelan sees a presumption of constitutionality in favor of the statutory language. Such a presumption enables a situation in which an individual who possesses a right under the Constitution walks into the courtroom, and the government walks into the courtroom, and the scales of justice tilt in favor of the government.²⁹ Instead of simply interpreting the individual's right against the government power on equal terms, a presumption of the statute's con-

23. See generally *id.* (approaching the question by analyzing, for example, the Arizona Constitution, legislative intent, and the statute's plain language).

24. See generally *id.*

25. See *id.* at 1010 (Eckerstrom, J., dissenting) ("Based on its plain language, § 8-863(C) expressly allows default only if the parent fails to attend the severance hearing.").

26. See *id.* at 1008–09.

27. See generally *id.* at 1004–08.

28. *Id.* at 1008–13 (Eckerstrom, J., joined by Bolick, J., and Gould, J., dissenting).

29. See Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898, 913 (2005) ("[T]he rational basis test permits—perhaps encourages—government lawyers and witnesses to misrepresent facts and distort reality; it destroys the principal of judicial neutrality by conscripting judges to act as advocates for the government; it turns a blind eye to corruption; it saddles plaintiffs with a logically impossible burden of proof; and it is often deliberately misapplied in order to achieve a preferred result.").

stitutionality forces the individual to prove what is, in some instances, a metaphysical impossibility.³⁰

Another reason judges should never rewrite statutes is for the sake of individual inquiry. If a person wants find and obey the law, she ought to be able to look at a statute and know what it means; she should not have to turn to a judicial decision to see how judges have rewritten words that in fact do not appear in the statute. That is certainly true also when judges invalidate a provision. They do not really remove laws from the books, but declare laws void and hold that they cannot be enforced.³¹

No matter how activist a judge is in policing constitutional boundaries, that judge should never yield to the temptation to exercise legislative or executive powers, lest that judge violate those very same boundaries. But judicial abdication is just as grave as judicial lawlessness, for it eviscerates individual liberties and allows government to grow far beyond its intended powers.³²

With respect to the other branches of government, how is the judicial power properly bound? It is bound by the constitutional oath that all judges take, and hence, by the words and to the meaning of the Constitution.³³ That means that judges should enforce every provision of the Constitution—the Fourth and Fifth Amendments, just as the First and Second Amendments. There are no ink blots in the Constitution, whether the Ninth

30. *Id.*

31. See THE FEDERALIST NO. 78, at 379 (Alexander Hamilton) (Terence Ball, ed., 2003) (“Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.”).

32. Professor Randy Barnett has written, very persuasively, that proper interpretation introduces not a presumption of constitutionality, but a presumption of liberty into the Constitution. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 253 (2004) (contrasting the presumption of constitutionality with the presumption of liberty and then offering an in-depth explanation of the presumption of liberty).

33. 28 U.S.C. § 453 (2012) (“I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.”).

Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.

An example of unbridled judicial abdication is the judiciary's flawed interpretation of the Fourteenth Amendment. The Fourteenth Amendment marked a radical restructuring of part of our system. In fact, one of the dissenting justices in the *Slaughter-House Cases*³⁴ aptly referred to it as a "new Magna Carta"; it was an understanding that the states, despite the assumption that they would be the more reliable guardians of liberty, in many instances were not.³⁵ And so the intent of the Fourteenth Amendment was to place a floor beneath the rights that are guaranteed by the federal Constitution.³⁶

A judicial abomination like the *Slaughter-House Cases* is not an act of judicial moderation, but a virtual repeal of one of the most important and meaningful provisions of our Constitution.³⁷ By reading the Privileges or Immunities Clause out of the Constitution, the Supreme Court removed the principal basis for the protection of economic liberties in our Constitution.³⁸

34. 83 U.S. (16 Wall.) 36.

35. *Id.* at 56 (Swayne, J., dissenting).

36. *See id.* at 37 (Field, J., dissenting) ("The amendment was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the National government."); *id.* at 54 (Bradley, J., dissenting) ("[F]ormerly the States were not prohibited from infringing any of the fundamental privileges and immunities of citizens of the United States . . . since the adoption of the fourteenth amendment. In my judgment, it was the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of the citizen."); *id.* at 59 (Swayne, J., dissenting) ("By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against the wrong and oppression by the States. That want was intended to be supplied by this amendment.").

37. *Id.* at 24 (holding that the Privileges or Immunities Clause of the Fourteenth Amendment protects only the privileges and immunities of citizens of the United States, not those of the citizens of the several states); *see also* *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010) ("[T]he Privileges or Immunities Clause protects only those rights 'which owe their existence to the Federal government, its National character, its Constitution, or its laws.' . . . [O]ther fundamental rights—rights that predated the creation of the Federal Government and that 'the State governments were created to establish and secure'—were not protected by the Clause" (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 76–79).).

38. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 78–79 ("Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for

That gave rise to the somewhat oxymoronic notion of substantive due process, and created a hopelessly muddled jurisprudential regime.³⁹

In some sense, the *Slaughter-House Cases* did restore to the states a much greater measure of sovereignty or autonomy than would have been the case if the court had struck down the challenged laws and given a more robust interpretation to the Privileges or Immunities Clause.⁴⁰ But at the same time, it opened up a regime of tyranny that was precisely what the Fourteenth Amendment was designed to prevent.⁴¹ So unless one is an advocate of state power as an end in itself, the decision is not one to cheer.

However, one thing that the *Slaughter-House Cases* also did not do is require the states to adopt its interpretation of “privileges or immunities.”⁴² Quite the contrary, the Court said if the citizens wanted to protect their privileges or immunities that are not expressly protected under federal law, they had to go to the states.⁴³ So how did the state courts respond? “Our Privi-

security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.”)

39. See *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) (referring to substantive due process as an “oxymoron”).

40. See Brief for the Goldwater Institute et al. as Amici Curiae Supporting Petitioners at 26, 28–29, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521) (opining that, given its proper interpretation, “[t]he undeniable truth is that the Fourteenth Amendment significantly altered the original constitutional balance of power between the federal and state governments, at least as it pertains to protecting rightful liberty from state action”).

41. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (“[W]e think the enforced separation of the races, as applied to the internal commerce of the state [does not] abridge[] the privileges or immunities of the colored man . . .”).

42. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 77 (“Nor did it profess to control the power of the State governments over the rights of its own citizens. Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.”).

43. See *id.* (“But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government.”).

leges and Immunities Clause does not mean anything either," they replied.⁴⁴

Principled judicial activism means enforcing rather than amending constitutional language. "Public Use" does not mean "Public Benefit."⁴⁵ "Cruel and Unusual Punishment" does not mean "Cruel or Unusual Punishment."⁴⁶ Principled judicial activism means avoiding the muddle of hopelessly subjective, value-laden, judicially created tests, like the three-part system of assigning different protections to different types of rights under the Equal Protection Clause.⁴⁷ Just think of how much easier a law school constitutional law exam would be if students could just apply one standard.

Instead, we have multiple standards, including the particularly problematic "Rational Basis" test for economic liberties under the Constitution—a test that calls itself Rational Basis, but requires neither a rationale nor a basis.⁴⁸ Constitutional

44. See, e.g., *Cory v. Carter*, 48 Ind. 327, 341 (1874) (upholding segregation in schools by following the rationale of the *Slaughter-House Cases* vis-à-vis its Privileges or Immunities Clause); *Bd. of Educ. v. Tinnon*, 26 Kan. 1, 16–17 (1881) (finding no statutory basis from the Kansas legislature for school segregation, but noting that "[f]or the purposes of this case we shall assume that the legislature has the power to authorize the board of education of any city or the officers of any school district to establish separate schools for the education of white and colored children, and to exclude the colored children from the white schools, notwithstanding the fourteenth amendment to the constitution of the United States; and there are decisions in some of the states which sustain such authority"); *State ex rel. Russell v. Beattie*, 16 Mo. App. 131, 134–38 (1884), *overruled in part by City of St. Louis v. Russell*, 22 S.W. 470 (Mo. 1893) (following the *Slaughter-House Cases* precedent to grant wide latitude to the Missouri legislature to regulate livery stables).

45. *Kelo v. City of New London*, 545 U.S. 469, 508 (2005) (Thomas, J., dissenting) ("The most natural reading of the [Public Use] Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever.").

46. See generally Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119 (2004) (discussing the trouble with the often-indiscriminate uses of "cruel and unusual" and "cruel or unusual").

47. See *High Tech Gays v. Def. Indus. Sec. Clearance Off.*, 895 F.2d 563, 571 (9th Cir. 1990) ("It is well established that there are three standards we may apply in reviewing the plaintiffs' equal protection challenge to the DoD Security Clearance Regulations: strict scrutiny, heightened scrutiny, and rational basis review" (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985)).

48. See Neily, *supra* note 31, at 913 ("[T]he rational basis test permits—perhaps encourages—government lawyers and witnesses to misrepresent facts and distort reality; it destroys the principal of judicial neutrality by conscripting judges to act

challenges subject to Rational Basis Review are almost impossible to win.⁴⁹ The Rational Basis test creates a presumption of constitutionality, where the judge puts his weight on the scale.⁵⁰ Where does this come from? It does not come from the language of the Constitution.⁵¹ In fact, it is contrary to the spirit of the Constitution, which is by and large a delegation of specifically enumerated powers to the national government, not a declaration of rights.⁵² Here, I adhere to thoughts that have

as advocates for the government; it turns a blind eye to corruption; it saddles plaintiffs with a logically impossible burden of proof; and it is often deliberately misapplied in order to achieve a preferred result.”).

49. See Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79–81 (1997) (“[J]udicial scrutiny under rational basis review is typically so deferential as to amount to a virtual rubber stamp.”).

50. See Neily, *supra* note 31, at 907–08 (“It is a bedrock principle of common law that parties to court proceedings are entitled to a neutral adjudicator who is free from bias and even the appearance of bias. . . . But like so many of our most cherished legal traditions, that one goes right out the window in rational basis cases, where judges are not only permitted but *required* to assist the government in defending challenged regulations by dreaming up possible justifications of their own. In any other setting, the idea that judges may actually align themselves with one party and actively work to help that side prevail in litigation would be intolerable.”).

51. See U.S. CONST. amends. V, XIV; see also *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2326–27 (2016) (Thomas, J., dissenting) (“The majority’s furtive reconfiguration of the standard of scrutiny applicable to abortion restrictions also points to a deeper problem. The undue-burden standard is just one variant of the Court’s tiers-of-scrutiny approach to constitutional adjudication. And the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right—be it ‘rational basis,’ intermediate, strict, or something else—is increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat. Though the tiers of scrutiny have become a ubiquitous feature of constitutional law, they are of recent vintage.”); *United States v. Virginia*, 518 U.S. 515, 570 (1996) (Scalia, J., dissenting) (“To reject the Court’s disposition today, however, it is not necessary to accept my view that the Court’s made-up tests cannot displace longstanding national traditions as the primary determinant of what the Constitution means.”).

52. See *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (“This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.”).

been well developed by Georgetown's esteemed Professor Randy Barnett.⁵³

The current rational basis test came from *FCC v. Beach Communications*,⁵⁴ in which the Court held that any conceivable rational basis will suffice—even one not presented by the government in defense and even one that was not the actual factor motivating the legislature.⁵⁵ In essence, the Court said, "If you don't come up with a rational basis, Solicitor General, we will come up with it. And if we can conceive of a rational basis, then the statute is constitutional."⁵⁶ That is a far cry from a more robust Rational Basis test, which would ask two questions: "Is indeed there a legitimate government power?" And in this case, "Are the means rationally related to accomplish the legitimate objective?"

A quick example will illustrate the issue with the Rational Basis test. The Tenth Circuit has held that economic protectionism is a legitimate government purpose.⁵⁷ But if one goes to the common law, he will find that it is not.⁵⁸ Is an economic regulation rationally connected in a genuine way to a legitimate gov-

53. See generally Randy E. Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have?: The Case of Associational Freedom*, 10 HARV. J.L. & PUB. POL'Y 101 (1987); Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI. KENT L. REV. 37 (1988); Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y (1991); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1989).

54. 508 U.S. 307 (1993).

55. *Id.* at 315 ("Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of legislative facts explaining the distinction [on the record, has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data" (internal citations omitted).).

56. See *supra* note 31 and accompanying text.

57. *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) ("[F]avoring one intrastate industry over another is a legitimate state interest. . . . [W]e hold that, absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.").

58. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 101-02 (1872) (Field, J., dissenting) ("All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void at common law in the great *Case of Monopolies*, decided during the reign of Queen Elizabeth.").

ernment purpose? This was the rule of law that was articulated by the dissenters in the *Slaughter-House Cases*.⁵⁹ Yet, under the current regime, most courts would likely uphold nearly any economic regulation.

A possible exception is a challenge under a state constitution, in which case state courts are at liberty to give greater meaning to the protections of economic liberty—just as the Texas Supreme Court did in *Patel*.⁶⁰ That case illustrates that state courts may enforce constitutional rights even if their federal counterparts do not.

For instance, the Arizona Supreme Court had a case involving the warrantless use of GPS devices on vehicles, which the court struck down under the Fourth Amendment by a four to three vote.⁶¹ One of the federal precedents that we had to apply was a case from 1967 called *Katz v. United States*,⁶² defining what a “reasonable expectation of privacy” is under the Fourth Amendment.⁶³ The justices were admonished, among other things, to ask and answer whether a particular privacy was one that society was prepared to recognize as reasonable.⁶⁴ How on earth does a judge know what society is prepared to recognize as reasonable? If asked to do that again, perhaps I should call

59. See generally *id.* at 83–130 (illustrating Justices Field’s, Justice Bradley’s, and Justice Swain’s dissenting views).

60. *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015); see also *id.* at 95 (Willett, J., concurring) (“Like the Court, I favor a less hard-hearted and more liberty-minded view for Texas, one that sees the judiciary as James Madison did when he introduced the Bill of Rights, as an ‘impenetrable bulwark’ against imperious government. The Texas Constitution enshrines structural principles meant to advance individual freedom; they are not there for mere show. Our Framers opted for constitutional—that is, *limited*—government, meaning majorities don’t possess an untrammelled right to trammel. The State would have us wield a rubber stamp rather than a gavel, but a written constitution is mere meringue if courts rotely exalt majoritarianism over constitutionalism, and thus forsake what Chief Justice Marshall called their ‘painful duty’—‘to say, that such an act was not the law of the land’” ((internal citations omitted)).

61. *State v. Jean*, 407 P.3d 524, 527 (Ariz. 2018).

62. 389 U.S. 347 (1967).

63. *Id.* at 360–61 (Harlan, J., concurring).

64. *Jean*, 407 P.3d at 547 n.5 (Bolick, J., concurring in part and dissenting in part) (“[W]e are admonished to determine whether a particular expectation of privacy is ‘one that society is prepared to recognize as “reasonable”’” (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring))).

for a show of hands at the next Federalist Society event I attend; that will be my litmus test.

Principled judicial activism means a perspective on stare decisis not as an end in itself, but as a means to perpetuate the rule of law. Our job as judges is not to align the Constitution to our precedents; it is to align our precedents to the Constitution. Principled judicial activism means avoiding artificial, court-made obstacles to the vindication of individual rights, such as taxpayer standing and a presumption of constitutionality.⁶⁵ Furthermore, principled judicial activism means recognizing state constitutions as the primary safeguards for freedom in our federalist system, not as an afterthought.⁶⁶

We have seen the incredible power of ideas over the last few decades in American jurisprudence, compared to the era in which people like Richard Epstein and Mike McConnell and

65. See Randy E. Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273, 276, 290 (1987) ("Others have urged a more activist judicial role, a view that I have previously called judicial pragmatism and that has recently been referred to as a principled judicial activism.").

66. Justice Brennan, in his dissenting opinion in *Michigan v. Mosley*, urged state courts to look to state constitutions for protections of individual liberties. 423 U.S. 96, 120 (1975) (Brennan, J., dissenting) ("In light of today's erosion of *Miranda* standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution."). Justice Stevens echoed Justice Brennan's sentiments in cases subsequent to *Mosley*. See, e.g., *Massachusetts v. Upton*, 466 U.S. 727, 738-39 (1984) (Stevens, J., concurring) ("It must be remembered that for the first century of this Nation's history, the Bill of Rights of the Constitution of the United States was solely a protection for the individual in relation to federal authorities. State Constitutions protected the liberties of the people of the several States from abuse by state authorities. The Bill of Rights is now largely applicable to state authorities and is the ultimate guardian of individual rights. The States in our federal system, however, remain the primary guardian of the liberty of the people."). States courts have at an increasing rate accepted Justice Brennan and Justice Stevens' invitation to focus on state constitutions to protect individual liberties. See, e.g., *Baker v. State*, 744 A.2d 864, 870 (Vt. 1999) ("While the federal [Fourteenth] [A]mendment may thus supplement the protections afforded by the Common Benefits Clause, it does not supplant it as the first and primary safeguard of the rights and liberties of all Vermonters" (citations omitted)); *State v. Badger*, 450 A.2d 336, 347 (Vt. 1982) (stating that the state court was free to "provide more generous protection to rights under the Vermont Constitution than afforded by the federal charter").

Randy Barnett were just beginning to work.⁶⁷ So many of their ideas, considered radical at the time, have become mainstream.⁶⁸ Over the past 30 years, the United States Supreme Court has revitalized many freedoms and enhanced forgotten parts of the Constitution. This revitalization has included a renewed focus on federalism,⁶⁹ constraints on Congress's ability to use the commerce power to restrict political speech,⁷⁰ the protection of private property rights,⁷¹ and an increased clarity and greater rights related to the individual's right to keep and bear arms.⁷² These are the types of beneficial, principled judi-

67. Michael W. McConnell, STAN. L. SCH., <https://law.stanford.edu/directory/michael-w-mcconnell/> [<http://perma.cc/Z8QV-KE2K>] (last visited Sept. 22, 2018) (linking to a list of Michael McConnell's publications); Randy E. Barnett, GEO. L., <https://www.law.georgetown.edu/faculty/randy-e-barnett/> [<http://perma.cc/2B3H-GLP6>] (last visited Sept. 22, 2018) (including a list of Randy Barnett's publications); Richard Epstein, N.Y.U. L., <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.publications&personid=26355> [<http://perma.cc/ME77-HDP7>] (last visited Sept. 22, 2018) (including a list of Richard Epstein's publications).

68. See, e.g., Sheryl Gay Stolberg & Charlie Savage, *Vindication for Challenger of Health Care Law*, N.Y. TIMES (March 26, 2012), <https://www.nytimes.com/2012/03/27/us/randy-barnetts-pet-cause-end-of-health-law-hits-supreme-court.html> [<https://nyti.ms/2MQLMlv>]; Sam Williamson, *The Miscasting of Michael McConnell: The Curse of Excellence*, FINDLAW (July 3, 2001), <https://supreme.findlaw.com/legal-commentary/the-miscasting-of-michael-mcconnell.html> [<http://perma.cc/N7TR-AN3C>].

69. See Richard C. Reuben, *Court Bolsters 10th Amendment*, A.B.A. J., Apr. 1995, at 78, 78 (1995) ("While today's renewed focus on federalism is being driven by political events, much of the legal groundwork already has been plowed by the U.S. Supreme Court.").

70. See *Citizens United v. FEC.*, 558 U.S. 310, 365 (2010) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of non-profit or for-profit corporations.").

71. See Ilya Somin, *It's Time To End the Poor Relation Status Of Constitutional Property Rights*, WASH. TIMES (July 29, 2015), <https://www.washingtontimes.com/news/2015/jul/29/celebrate-liberty-month-its-time-to-end-the-poor-r/> [<http://perma.cc/8WPV-UDWN>] ("In recent years, the Court's record on property rights has improved. In several decisions, it has gradually strengthened protection against uncompensated takings. It has also cracked down on practices under which landowners are sometimes forced to go through costly, byzantine administrative procedures before they can even raise a takings claim. Most recently, in its June decision in *Horne v. Department of Agriculture*, an 8-1 majority held that a taking has occurred when the government seizes large quantities of raisins from producers, in order to artificially inflate the market price of that commodity.").

72. See *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (holding that a ban on registering handguns and keeping guns in the home disassembled or non-

cial activism to which I alluded. They demonstrate that it always possible to return the Constitution to its text.

If I may just impart one imperative to each of you—in your future scholarship, in your civic engagement, in your philanthropy, in your litigation, and for the many of you who are unidentified as yet as future judges, in your opinions—please keep this momentum going. The threats to our freedoms are omnipresent and omnivorous. For better or worse, our judges are often the thin black-robed line between freedom and tyranny. As homage to the patron saint of my precious adopted state of Arizona, and of the modern conservative movement, I will close by adapting the famous words of Barry Goldwater: "Activism in defense of liberty is no vice. Abdication in pursuit of justice is no virtue."⁷³

functional with a trigger-lock requirement, violates the Second Amendment and therefore is unconstitutional).

73. Senator Barry Goldwater, 1964 Acceptance Speech (July 16, 1964), <https://www.washingtonpost.com/wp-srv/politics/daily/may98/goldwaterspeech.htm> [<http://perma.cc/GD8P-MVW3>].