THE BOND BETWEEN LEFT AND RIGHT LIBERTARIANS

Burt Neuborne*

I am delighted to moderate today’s panel on constitutional methodology for two reasons. The first is both personal and institutional. Richard and I have been disagreeing about constitutional law for almost a half-century. I still remember a paper that Fritz Schwarz and I presented at the University of Chicago Law School in the 1980’s recounting the tortuous negotiations leading to the settlement of a complex challenge to New York City’s financial support of religiously affiliated foster care agencies. The settlement required City-funded religious foster care agencies to accept children in need on a first-come, first-served basis, without regard to religious affiliation. In return, I dropped an Establishment Clause challenge to the government funding. Richard was so upset at what he perceived as the economically destructive consequences of the settlement, which he predicted would dry up private contributions from the faithful that had allowed the religiously denominated agencies to operate as well-funded islands of excellence, that the
Dean made him stand outside until the presentation was over.\textsuperscript{1} I did not take offense. I was delighted and impressed that a brilliant colleague would take ideas so seriously. When our good fortune at NYU made it possible to persuade Richard to take up residence here full time, I looked forward to sparring with him. I have not been disappointed. In his stay at NYU, Richard has enriched our already vibrant intellectual life, and has galvanized innumerable earnest discussions and events. I have learned that if you wait for him to breathe, you can get your answer in. So, on a personal and institutional note, I am happy to participate in an event honoring Richard’s challenging new book.

My second reason is that I sense a kindred spirit at work in Richard’s challenging new book.\textsuperscript{2} Not that we agree on much substantively, although, to our mutual surprise, we disagree less vigorously than when we were young. Maybe that is just getting old. But, despite our continuing disagreements, I understand and appreciate the craft of a remarkably able constitutional lawyer hard at work constructing a legal framework for the defense of cherished values. Richard seeks to reinvigorate an Arcadian libertarian tradition in which private individuals and entities interact economically and socially with one another with minimal governmental intrusion. He finds such a world both morally desirable and economically efficient. Since he is too sophisticated to argue against all government regulation of economic markets or social interactions, Richard acknowledges a necessarily vaguely-defined degree of government

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\textsuperscript{2} RICHARD EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2013).
regulatory power aimed at preserving free markets, and then embarks on an elegant *tour-de-force* of constitutional doctrine and history designed to minimize its scope.

I know that game. It is what I did for years at the ACLU as a left-libertarian in seeking to shield my preferred values—freedom of conscience, free speech, and equality. I conceded that an ill-defined dollop of government power was a necessary evil, especially in protecting values of equality, and then set about finding ways to keep that government power at bay. I took the road most traveled by, invoking the Constitution as a limit on majoritarian excess. So does Richard. We both invoke John Marshall’s syllogism machine in defense of our core values. My preferred route has been to invoke a degree of heightened judicial scrutiny, forcing the government to bear a heavy burden of regulatory justification before impinging on what are essentially Kantian values. In my experience, the really heavy lifting in heightened judicial scrutiny takes place at the level of the fact-based minor premise. By requiring a highly persuasive factual showing of the necessity for regulation, the law permits government regulation only when it is genuinely

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3 I served on the ACLU legal staff for eleven years, serving as National Legal Director during the Presidency of Ronald Reagan.

4 Over the years, I have come to realize that the major differences between a center-left libertarian, like me, and a center-right libertarian like Richard, turn on our respective willingness to tolerate government power designed to advance equality. Except for equality issues, both left and right libertarians are closer to each other than they are to the statist in the middle.

5 I’ve attempted to describe the process of constitutional review as the construction of a judicial syllogism, with the major premise consisting of a command drawn from the Constitution’s maddeningly ambiguous text, and the minor premise consisting of facts—both adjudicative and constitutional—“found” by the reviewing judges. See Burt Neuborne, *Serving the Syllogism Machine: Reflections on Whether Brandenburg Is Now (or Ever Was) Good Law*, 44 Tex. Tech. L. Rev. 1 (2011).

6 I have usually invoked the celebrated footnote 4 of *Carolene Products* as the guide for when a degree of heightened judicial scrutiny is appropriate. See generally United States v. Carolene Products, 304 U.S. 144, 152, n.4 (1938).
needed, and deflects factual error in favor of unregulated enjoyment of the value. Moreover, it vests the final word on whether adequate factual justification is demonstrated in a skeptical, unelected judge. It is like a judge reviewing a jury verdict in a criminal case under the guilt beyond a reasonable doubt standard.\(^7\) The issue is whether, based on the evidence before it, a reasonable jury could have found guilt beyond a reasonable doubt. Such a high burden of justification deflects factual error in doubtful cases in favor of liberty. That is just what a constitutional judge does when she invokes strict scrutiny—only the majoritarian body being reviewed is the legislature, not the jury. When the legislature cannot produce sufficient evidence demonstrating an almost certain need for regulation, the legislative verdict is set aside, deflecting error in favor of enjoyment of the value in question.\(^8\)

Richard takes issue with the disappearance of heightened judicial scrutiny from the economic realm. In its place, since the New Deal, the modern Court uses a permissive “rational basis” standard that is even weaker than the “more likely than not” standard used in ordinary civil cases. Its closest analogue may be Fourth Amendment “probable cause.” Jury verdicts under the “more likely than not” standard, and search warrants under the “probable cause” standard, are far more difficult to overturn than “guilt beyond a reasonable doubt” cases precisely because they demand a much lower threshold of certainty. As Carolene Products illustrates, that is what has happened to judicial review of economic regulations—the very low standard of factual justification required to justify legislative action renders it almost impossible to overturn a legislative verdict in favor of regulation. Richard’s ambitious project seeks to

\(^7\) See In re Winship, 397 U.S. 358 (1970) (deriving guilt beyond a reasonable doubt standard in criminal cases from the due process clause).

\(^8\) See Neuborne, Sizing the Syllogism Machine, supra note 5, at 41-58, for my attempt to describe the syllogism machine in action.
pump air back into judicial review of legislative decisions to regulate economic interactions. His remarkable case-reading skills are deployed throughout the book to persuade judges to go back to an earlier, pre-New Deal time when government was forced to prove a genuine need for economic regulation, not just a plausible desire to do so; and where factual error was deflected against regulation. As a technical matter, Richard’s project seeks two things—(1) a robust judicial conception of what counts as constitutionally protected property or contract; and (2) the application of some form of heightened scrutiny carrying a high burden of factual justification that will function as an error deflection mechanism, confining regulation of property or contract to settings where the state can prove a genuine necessity for regulation. In short, he seeks the judicial re-estabishment of the Arcadian liberal state.

In the end, Richard’s book poses the troublesome question of why Kantian values of personal autonomy and equality should command more judicial protection than enjoyment of property. We have been debating that question since Holmes’ crack about Herbert Spencer’s Social Statics. Richard’s book is a worthy and important addition to the debate.

Just wait until he breathes before you attempt to answer.

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