INDEPENDENT JUDGES AND INDEPENDENT JUSTICE

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I
INTRODUCTION

Professor Currie's article[1] discusses historical attempts to limit judicial independence. I consider the converse: how judges have exercised their independence. This essay provides a brief historical overview of judges using their independence to implement their own view of justice, often contrary to both popular sentiment and legislative will.

II
THE ENGLISH BACKGROUND

American judges come from a long tradition of judicial independence, even when the formal British regime curtailed that independence. For example, English judges had no independence before 1701—and not much after that date. There was no practice of judicial review; judges did not strike down legislative enactments. The classic description of legislative omnipotence was that "[a]n act of parliament can do no wrong, although it may do several things that look pretty odd."[2]

Nevertheless, even against this background of judicial dependence, there were examples of judges refusing to bend to parliamentary will. In 1649, Parliament impeached, convicted, and executed Charles I. Although there were no precedents and no procedures for such an action—and history has subsequently judged it as lawless—Parliament tried to make the proceedings conform to at least the forms of justice. They sought out the highest judges in England to preside over the trial: the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer. All three refused, and Parliament eventually chose an obscure local jurist, who no doubt contributed to the proceeding's historical disrepute.[3]

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1. *See* David P. Currie, *Separating Judicial Power*, 61 LAW & CONTEMP. PROBS. 7 (Summer 1998).

2. City of London v. Wood, 12 Mod. Rep. 669, 678 (K.B. 1701).

3. For a brief but informative review of the impeachment of Charles I, see Louis J. Sirico, Jr., *The Trial of Charles I: A Sesquitricentennial Reflection*, 16 CONST. COMMENTARY (forthcoming 1999).

Sir Edward Coke, the father of American judicial review, provides another example of English judicial independence. He wrote that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."[4] Americans, for whom Parliament was a source of frustration, much preferred Coke's view to Blackstone's parliamentary supremacy.

III

A BRIEF OVERVIEW OF AMERICAN JUDICIAL INDEPENDENCE

Americans thus had models for both appropriate judicial independence and legislative (and executive) tyranny; when they declared independence, they were determined to have independent judges. As the individual states enacted constitutions during the 1770s and 1780s, each provided for varying levels of judicial independence, while also enacting various devices for curbing runaway judges. All American judges, however, had more independence than their colonial predecessors.

The new state judges immediately began exercising their independence. Even before the United States Constitution was drafted, state judges engaged in judicial review by invalidating legislation and overturning convictions. They did so, moreover, not only on the basis of a conflict with a written constitution, but also on the basis of natural law. Between 1780 and 1787, at least five courts in five different states protected unwritten rights—property rights and the right to trial by jury—from legislative abrogation, despite the absence of any applicable constitutional provision.[5]

As the nation matured, the new federal courts joined state courts in using unwritten natural law to invalidate statutes. Courts also began justifying and explaining their actions more carefully; when judges did so, they used the language of natural rights. Court opinions spoke of such limits on legislation as "natural rights," "inalienable rights," "inherent rights," "fundamental principles of civilized society," and the "immutable principles of justice."[6] They also broadened the definition of unwritten rights, protecting not only property rights and the right to jury trial, but also the right of representation and rights against retroactive laws or laws granting special privileges.

The federal courts invoked natural or unwritten rights until about 1820. State courts continued to do so for a much longer period, well into the 1830s and sometimes later. A few representative examples give the flavor of the judicial use of natural law in the late eighteenth and early nineteenth centuries.

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4. Dr. Bonham's Case, 8 Co. Rep. 113b, 118a, 77 Eng. Rep. 646, 652 (1610). For an interesting discussion of what this statement meant to Americans, see John V. Orth, *Did Sir Edward Coke Mean What He Said?*, 16 CONST. COMMENTARY (forthcoming 1999).

5. For a detailed discussion of the five cases, see Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1134-42 (1987).

6. Cases using these and other formulations are discussed in *id.*; Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171 (1992); Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001 (1988).

A South Carolina court held in 1794 that "trial by jury is a common law right; not the creature of the constitution, but originating in time immemorial; it is the inheritance of every individual citizen, the title to which commenced long before the political existence of this society."[7]

Judge Spencer Roane of Virginia agreed that some rights predated the constitution. Judge Roane, of course, is most famous for his dispute with John Marshall about the power of Congress to establish a national bank.[8] But in 1809, in the course of upholding a retroactive law because it did not work any injustice, Roane indicated that he would strike down an unjust law even if the constitution did not specifically prohibit the law. At oral argument in the case of *Currie's Administrator v. Mutual Assurance Society*,[9] counsel had argued for strict limits on the power of judicial review: "No doubt every government ought to keep in mind the great principles of justice and moral right, but no authority is expressly given to the judiciary by the Constitution of Virginia, to declare a law void as being morally wrong."[10] Roane vehemently disagreed, writing:

> It was argued by a respectable member of the bar, that the legislature had a right to pass any law, however just, or unjust, reasonable, or unreasonable. This is a position which even the courtly Judge Blackstone was scarcely hardy enough to contend for, under the doctrine of the boasted omnipotence of parliament. What is this, but to lay prostrate, at the footstool of the legislature, all our rights of person and property, and abandon those great objects, for the protection of which, alone, all free governments have been instituted?[11]

One could not ask for a clearer endorsement of both broad judicial review and the principle that unjust or unreasonable legislation should not be enforced by judges.

New York was another state in which judges turned to natural law in the absence of constitutional limits on the legislature. In 1816, Chancellor James Kent ordered the state to pay compensation for a taking of private property, even though the New York constitution did not require it and the federal Constitution did not apply to the states. Kent reasoned that depriving an owner of property without compensation was "unjust, and contrary to the first principles of government."[12] Almost two decades later, another New York court emphasized that the taking of private property for a private rather than a public purpose—even if compensation was paid—was "in violation of natural right, and if it is not in violation of the letter of the constitution, it is of its spirit, and cannot be supported."[13]

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7. Zylstra v. Corp. of Charleston, 1 S.C.L. (1 Bay) 382, 395 (1794).
8. *See* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969).
9. 14 Va. (4 Hen. & M.) 315 (1809).
10. *Id.* at 341.
11. *Id.* at 346-47.
12. Gardner v. Village of Newburgh, 2 Johns Ch. 162, 168 (N.Y. Ch. 1816).
13. *In re* Albany Street, 11 Wend. 149, 151 (N.Y. Sup. Ct. 1834).

The United States Supreme Court also relied on natural law rhetoric during this period. Opinions from Justice Chase's in *Calder v. Bull*[14] to Justice Story's in *Terrett v. Taylor*,[15] for example, are full of references to such ideals as the "vital principles in our free republican governments," "the great first principles of the social compact," "the maxims of eternal justice," and the "principles of natural justice."[16]

From the 1780s until at least the 1830s, then, judges exercised their independence to invalidate laws that conflicted with natural justice. From the 1830s to the eve of the Civil War, judges in Northern states used judicial independence to strike a blow against slavery. In a country that was half slave and half free, courts necessarily faced the issue arising when slaves were taken into a free state: Did the slave thereby become free? Courts in Massachusetts, Connecticut, and New York held that such persons did become free, even if the owners were in the state only temporarily.[17] Indeed, in *Lemmon v. People*,[18] the New York Supreme Court freed a slave who was in the state only to change ships on the passage from Virginia to Texas; such a stopover was necessary because there was no direct sea passage between the two slave states. In these and similar cases, the courts reasoned that because slavery was contrary to natural law, it could only exist where authorized by positive law.[19] Ironically, these judges behaved more courageously than the life-tenured judges of the United States Supreme Court: When the same question came before that Court, the Justices not only ducked it but reached several other questions that made matters worse.[20]

State judges again strode into the fray after the Civil War. In 1868, two months before the Fourteenth Amendment was ratified, the Iowa Supreme Court invalidated racially segregated schools as a violation of both the Iowa constitution and the "spirit of our laws."[21] In 1881, the Kansas Supreme Court followed suit, striking down segregated schools in that state.[22] Tragically, the Kansas Supreme Court changed its mind two decades later[23]—the Topeka Board of Education, of course, was the lead defendant in *Brown v. Board of Education*.[24]

In the 1950s and 1960s, federal court judges used their own judicial independence to ignore popular opposition and implement justice. Courageous

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14. 3 U.S. (3 Dall.) 386, 387-88 (1798).

15. 13 U.S. (9 Cranch) 43, 50-52 (1815).

16. For other Supreme Court cases using natural law language, see Sherry, *supra* note 5.

17. *See, e.g.*, Lemmon v. People, 20 N.Y. 562 (1860); Jackson v. Bulloch, 12 Conn. 38 (1837); Commonwealth v. Aves, 35 Mass. (18 Pick.) 193 (1836).

18. 20 N.Y. 562 (1860).

19. For a thorough discussion of these cases and their English precedents, see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981).

20. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

21. Clark v. Board of Dirs., 24 Iowa 266, 276 (1868).

22. Board of Educ. v. Tinnon, 26 Kan. 1 (1881).

23. Reynolds v. Board of Educ., 72 P. 274 (Kan. 1903).

24. 347 U.S. 483 (1954).

federal judges such as Frank Johnson and Skelly Wright, John Minor Wisdom and Elbert Tuttle, and Richard Rives and John Godbold integrated an obstinate and defiant South in the years after *Brown*. These judges used the independence bestowed by Article III to compel integration against both popular and governmental resistance, even taking over state institutions when necessary.[25]

IV

CONCLUSION

What can we learn from these widely disparate examples of independent judges, stretching over almost two centuries? First, despite the unpopularity of their decisions, and despite the attacks on the judiciary catalogued by Professor Currie, these judges by and large suffered no official repercussions. There were calls for impeachment, but no judges were removed. There were calls to limit jurisdiction, but jurisdiction remained unchanged.

The more important lesson, however, is to remember that all of the judges I have mentioned—from those who refused to sit in judgment on Charles I to the federal judges who enforced the Equal Protection Clause in the mid-twentieth century—have been vindicated by history. We now applaud their rulings, however controversial they were at the time they were rendered. And we condemn some judges who lacked the courage to exercise their independence. We do not praise the majority in *Plessy v. Ferguson*,[26] which upheld segregation in 1896, or the majority in *Korematsu v. United States*,[27] which affirmed the internment of Japanese-Americans in 1944. We admire instead the Justices who dissented in each of those cases.

So when we try to achieve a balance between independence and accountability, we should be careful not to be blinded by present passions. What we might today think is excessive judicial activism and insufficient accountability might in a hundred years be viewed as a shining example of judicial courage.

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25. For a gripping account of these judges and their accomplishments, see JACK BASS, UNLIKELY HEROES (1981).

26. 163 U.S. 537 (1896).

27. 323 U.S. 214 (1944).