

# THE ROLE OF INSTITUTIONAL FACTORS IN PROTECTING INDIVIDUAL LIBERTIES

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Questions about the efficacy of the Bill of Rights cry out for serious comparative legal scholarship. Robert Ellickson and Frank Easterbrook suggest that one might approach these questions by looking at different state constitutions.<sup>1</sup> One might also look more seriously at the different constitutional regimes around the world, and try to draw some judgments about what impact, if any, different types of constitutional arrangements have on individual rights. We have heard expressions of skepticism about this approach,<sup>2</sup> but there has been very little serious comparative scholarship by constitutional law scholars in this country. The scholarly tradition in America has been extremely myopic, obsessively concerned with Supreme Court cases and the history of our own constitutional development; very little attention has been given to constitutional developments elsewhere to determine the actual effect of institutional differences.

I readily acknowledge the difficulty of doing comparative work in this area. There are serious definitional problems, such as compiling the list of liberties or rights to use as a bench mark, deciding whether the scope of rights is more important than the security with which the rights are maintained, and determining the importance of how rights are protected. With respect to the latter question, do we think exclusively in terms of judicial protection through litigation, or do we entertain the possibility that rights can be maintained in other ways? To make any headway in answering questions like the one before the panel, it would be useful to identify some institutional factors that vary across cultures and that could be studied to see to what extent they make a difference.

To my mind, three factors are likely to make the most differ-

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1. See Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y 17, 31-32 (1992); Frank H. Easterbrook, *Bills of Rights and Regression to the Mean*, 15 HARV. J.L. & PUB. POL'Y 71, 78-79 (1992).

2. See Herman Schwartz, *The Bill of Rights in America and Central East Europe*, 15 HARV. J.L. & PUB. POL'Y 93, 94 (1992).

ence to the robustness of individual liberties. The first is the extent and health of a system of private property rights. Richard Epstein argues convincingly about the importance of a decentralized economic system as a basis for the protection of other types of civil liberties, including First and Fourth Amendment rights.<sup>3</sup> The diffusion of economic power tends to diffuse political power, and individual liberty flourishes where there is no monolithic political power to suppress it. Thus, if we did undertake my hypothetical comparative study, I predict that we would find a strong, positive correlation between regimes with widespread ownership of private property, and those that protect civil liberties as we think of them in this country.

The second institutional factor of some importance is a government divided either vertically by federalism or horizontally by separation of powers, or both. If government is divided vertically, and significant decisionmaking power is relegated to local governmental entities, then people can vote with their feet—if they do not like the repressive measures adopted in one jurisdiction they can transfer to another. At the horizontal level, a divided government is important because the three branches of government must come to a consensus before the liberties of the citizenry can be repressed.<sup>4</sup> In effect, a horizontally-divided government allows the people to have second (and third) thoughts about particularly repressive measures before those measures are implemented.<sup>5</sup>

Consider the following example. England does not have a system of separation of powers at the national level.<sup>6</sup> When the Gulf War broke out, England quickly instituted a policy of detaining Iraqi nationals and other people suspected of terrorist proclivities.<sup>7</sup> In this country, we would have had to enact legislation, adopt regulations, and survive judicial review before we could implement such a policy.<sup>8</sup> By the time the process was

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3. See Richard A. Epstein, *The Indivisibility of Liberty Under the Bill of Rights*, 15 HARV. J.L. & PUB. POL'Y 35, 36-38 (1992).

4. See JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 117 (1980).

5. See PAUL P. CRAIG, *PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA* 13-14 (1990).

6. See *id.* at 17.

7. See *War in the Gulf: Diplomats*, N.Y. TIMES, Jan. 25, 1991, at A11.

8. *But see* *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding a post-Pearl Harbor military order excluding all persons of Japanese ancestry, both citizens and non-citizens, from certain areas of the West Coast). This decision, however, is regarded

completed, the war would be over. A system of divided government can thus provide protection for liberty interests.<sup>9</sup>

The third factor is an independent judiciary enforcing a bill of rights. Here, I would disagree with Judge Easterbrook.<sup>10</sup> Bills of rights by themselves perhaps are not terribly significant, but enforcement of the Bill of Rights by an independent judiciary does make a difference. This enforcement is another variety, along with horizontally-divided government generally, of a supermajoritarian rule that has the effect of protecting unpopular minorities. In the long run, I agree that cultural and social norms will prevail. If ninety percent of Americans believe that suspected drug dealers should be lynched on the spot, we will eventually have an interpretation of the Constitution that allows suspected drug dealers to be lynched on the spot.<sup>11</sup> The Constitution is written in broad and elastic terms and subject to various interpretations. If judges do not respond to the popular will, they can eventually be replaced by judges willing to reinterpret the language, or their jurisdiction can be taken away,<sup>12</sup> or the executive can refuse to enforce their judgments.<sup>13</sup> But, in the short run, an independent judiciary enforcing the Bill of Rights acts as a further road block to majoritarian impulses toward repression. In that sense, the judiciary provides a further measure of protection of individual liberties beyond that provided by a divided government or some cultural norm of mutual toleration and respect.<sup>14</sup>

These three institutional factors that work to protect rights

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as one of the worst betrayals of constitutional rights in the history of the Supreme Court.

9. See THE FEDERALIST No. 47, at 301-03 (James Madison) (Clinton Rossiter ed., 1961).

10. See Easterbrook, *supra* note 1, at 72.

11. See BRUCE ACKERMAN, WE THE PEOPLE 266-94 (1991).

12. See, e.g., Lynch v. United States, 292 U.S. 571, 581-82 (1934) (stating that consent to sue the United States may be withdrawn at any time); Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869) (acknowledging that Congress has the authority to curtail the Supreme Court's appellate jurisdiction in habeas corpus cases).

13. President Andrew Jackson's reaction to the Supreme Court's opinion in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), in which the Court held that grants to Indians of rights in reservations within state boundaries were valid, is a noteworthy example. President Jackson is rumored to have commented: "John Marshall has rendered his decision, now let him enforce it." See GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS 235 (Univ. of Okla. 1972) (1932). Presidents Jefferson and Lincoln also asserted a power to disregard or act inconsistently with judicial decisions. See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 909-11 (1989-90).

14. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-26, at 187-88, § 5-7, at 313-16 (2d ed. 1988).

do not exist independently; they have important interactive effects as well. A complete understanding of how any constitutional system protects rights requires some appreciation of this interaction.

Prominent here is the idea of fail-safe mechanisms. It is better to have both a system of divided government and a bill of rights enforced by the judiciary, rather than only one of these institutions, because sometimes one of these mechanisms will fail and the other one will be needed to provide protection.<sup>15</sup> For example, one of the rights mentioned in the Bill of Rights is the right to bear arms as stated in the Second Amendment.<sup>16</sup> The Second Amendment prefaces this right with a reason why it is needed—to maintain a well-regulated militia. It does not, however, suggest that the right is limited to the implementation of that reason alone. The judiciary in this country has done little to enforce the Second Amendment,<sup>17</sup> perhaps because intellectual elites, such as the American Civil Liberties Union, do not really think it is a right.<sup>18</sup> Or perhaps a judiciary that lives by the pen is not terribly supportive of those who would live by the sword.

Nevertheless, and notwithstanding the complete judicial default in enforcing the Second Amendment, we have rather widespread ownership of firearms and other weapons in this country.<sup>19</sup> This fact is in part a result of our federal structure. People in Wyoming have different views about gun control than people in New York City or Chicago, and to the extent that policymaking develops on the local level, we have different

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15. *See id.*

16. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

17. *See Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) ("These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties."); *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding that there is no Second Amendment protection of the right to keep and bear arms unless possession "has some reasonable relationship to the preservation or efficiency of a well regulated militia"); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) (upholding city ban on all hand guns as consistent with due process and holding that the Second Amendment does not apply to the States). For a defense of the view that the Second Amendment was intended to secure an individual right of gun ownership, see Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

18. *See Nadine Strossen, What Constitutes Full Protection of Fundamental Freedoms?*, 15 HARV. J.L. & PUB. POL'Y 44, 49 (1992).

19. *See Tom Morganthau, The War at Home: How to Battle Crime*, NEWSWEEK, Mar. 25, 1991, at 35.

policy regimes in different areas of the United States. In addition, our divided government at the national level has allowed people with strong views on this point to exert much more influence than they would have in a unitary parliamentary regime.<sup>20</sup>

On the other hand, the Bill of Rights, enforced by the judiciary, frequently steps in where our divided government fails. The flag burning episode is a classic example. A huge wave of public sentiment in favor of repressing flag burners crashed easily over the barriers of the presentment and bicameral requirements,<sup>21</sup> but was stopped by a five-to-four vote in the Supreme Court.<sup>22</sup> By the time the Court had twice declared that flag burning was protected by the First Amendment, public passions had either cooled or had been diverted to other questions. It seems that we are now relatively secure in our right to burn the American flag for the foreseeable future.

Having multiple institutional protections for liberty is also important because of gaps that inevitably occur in any one system standing alone. To the extent that the Bill of Rights is incomplete, structural protections may offer a complementary measure of support. For example, people who think homosexuals have a right to be free from official acts of disfavor or discrimination are not going to get much solace from the Bill of Rights in the foreseeable future. The Supreme Court has decided that sexual preferences are not a fundamental right protected by the Constitution.<sup>23</sup> Around the country, however, many local communities have adopted human rights ordinances that include sexual preference.<sup>24</sup> Thus, our federal system of government has generated a measure of protection that a bill-of-rights regime alone does not provide.

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20. See Einer R. Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 668, 722 n.270 (1991) ("[C]apture can occur whenever small intensely interested groups are pitted against large mildly interested groups. [This] explains the success of the National Rifle Association despite large majorities favoring gun control.").

21. See U.S. CONST. art. I, § 7, cl. 2; *INS v. Chadha*, 462 U.S. 919 (1983).

22. See *Texas v. Johnson*, 491 U.S. 397 (1989); *Eichman v. United States*, 110 S.Ct. 2404 (1990).

23. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

24. See, e.g., *Gay Law Students Ass'n v. Pacific Tele. & Tele. Co.*, 595 P.2d 592 (Cal. 1979) (holding arbitrary exclusion of qualified individuals from employment opportunities by a public utility violates the state constitutional rights of the victims); *Collins v. Secretary of the Commonwealth*, 556 N.E.2d 348 (Mass. 1990) (upholding Massachusetts law making it unlawful to discriminate on the basis of sexual orientation); *In re Anonymous*, 435 N.Y.S.2d 527 (N.Y. Fam. Ct. 1981) (holding sexual orientation not a valid basis to deny right to adopt an adult).

On the other hand, aliens are an example of a group to whom the Bill of Rights has made a difference, contrary to what Judge Easterbrook suggests.<sup>25</sup> Because of their lack of enfranchisement, aliens probably could not expect much protection from state and local governments. But the Supreme Court intervened in the name of the Equal Protection Clause<sup>26</sup> to provide a significant measure of protection for aliens against discriminatory state laws.<sup>27</sup>

Another point to note about the relationship of these institutional factors is that there are certain "synergistic" effects among them. For example, a system of divided government is more likely to have a judiciary that opposes the will of the political branches than is a unitary or parliamentary regime. If the control of the judiciary is divided between an executive branch that appoints judges and a legislative branch that appropriates funds for the judiciary and controls their jurisdiction, then the judiciary will be more confident about asserting itself than it will be in a regime where the control is in a single hand that can bring swift retribution. Also, the Bill of Rights is more likely to find private champions with the resources and confidence to go to court in a system that is based on a robust private property system than if the government controls most of the resources. On the other hand, certain features of the Bill of Rights, most prominently the Takings Clause,<sup>28</sup> help to foster a regime of private property.<sup>29</sup> There are also interactive effects among various individual rights. For example, the Fourth Amendment<sup>30</sup> protects those who want to bear arms, even if the Second Amendment is not enforced by the judiciary.

Finally, we must acknowledge the feedback loop effect that operates between a judicially-enforced Bill of Rights and a general cultural appreciation of liberty. If the judiciary does a poor job of enforcing rights, one might have a negative feedback

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25. See Easterbrook, *supra* note 1, at 82.

26. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

27. See, e.g., *Sugarman v. Dougall*, 413 U.S. 634 (1973) (holding that a state may not bar aliens from holding positions in the state civil service); *Graham v. Richardson*, 403 U.S. 365 (1971) (holding that states cannot deny welfare benefits to aliens).

28. U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation.").

29. See Epstein, *supra* note 3, at 36.

30. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

loop in the form of spreading disrespect for the idea of individual liberty. By and large, however, the Supreme Court has done a good job of protecting liberties and has lent the great prestige of the law to the cause of freedom. As a consequence, we have a much greater tradition of toleration and mutual respect in this country than would otherwise have been the case.

