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Public Values and Private Virtue

by

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Professor Novak's article¹ is a much-needed breath of fresh air, because of both its historical approach and its rejection of a paradigm of pure individualism. Professor Novak eloquently reminds us that constitutional theorists of all political stripes are today both more presentist and more individualist than their predecessors. His paper is a gentle suggestion that we might do well to moderate these modern tendencies.

Professor Novak's thorough historical examination persuasively debunks the myth of the early nineteenth century as the constitutional parent of the twentieth. Indeed, his paper shows us that comparing the length of a line and the weight of a rock is perhaps a more apt description of comparisons between the constitutional jurisprudence of the two centuries than it is of attempts to balance private rights and public values.

Successful as it is, however, Professor Novak's article is only the first step. Moreover, like many attempts to correct prevalent misconceptions, its strength is also its weakness: In his desire to reintroduce the missing concepts of historical knowledge and common or community interests, Professor Novak unintentionally goes too far and undervalues both individualism and presentism.

I share Professor Novak's appreciation for historical knowledge. I find it almost inconceivable that any scholar interested in the future of constitutional law should be uninterested in its past: How are we to decide where we should be going unless we know where we have been?

Indeed, I would go further and suggest that we ought to indulge in at least a mild presumption that past constitutional traditions are worth preserving. In general, a prudent regard for tradition—a reluc-

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1. William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061 (1994).

tance to embrace change for its own sake—is a positive value. As James Boyd White suggests, we “should meditate long before exercising [critical judgment] against the texts that have behind them the authority of our tradition.”² A failure to accord proper respect to the past is the height of self-indulgent presumptuousness because it assumes that we stand at the pinnacle of human progress.

Nevertheless, too great a fascination with the past carries an opposite danger. If the late twentieth century is not the pinnacle of progress, neither were the eighteenth and nineteenth centuries. We must sift through our constitutional inheritance critically, lest we succumb to the complacency of believing that “where we have been is where we want to be.”³ Constitutional interpretation can, and must, simultaneously acknowledge our debt to the past and deny that the past should control the present. In other words, we must be both willing and reluctant to alter the status quo, avoiding both an unthinking adherence to tradition and an overeagerness for change. Professor Novak’s paper reminds us that our traditions have value, and I would add only that we must be careful of exaggerating that value.

In addition to reminding us of the value of history, Professor Novak uses that history to show us that our heritage is not one of unrelenting individualism. He persuasively demonstrates that our fascination with individual rights as distinct from community values is a modern phenomenon. Although he does not put it quite the same way, his article has much in common with the neo-republican movement in constitutional scholarship. Professor Novak’s emphasis on law and regulation as a means to “the promotion of public happiness in the good society,” containing “aspirational, cultural, historical [and] moral imperatives,”⁴ echoes the neo-republican call for a revival of civic virtue.⁵ In both accounts, individuals are part of, and accountable to, their communities, and the highest form of human flourishing is

2. James Boyd White, *Is Cultural Criticism Possible?*, 84 MICH. L. REV. 1373, 1382 (1986); see also Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

3. Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 204 (1993).

4. Novak, *supra* note 1, at 1082, 1083.

5. See, e.g., Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

participation in the life of the community. Individual rights are not so much devalued as incomprehensible: The rights of the individual simply cannot be separated from the rights of the citizen, and hence of the polity.

To some extent, I subscribe to this portrait of the views of earlier generations. The expectation of civic virtue, and pervasive community definition and description of aspirations and values, were commonplace in the late eighteenth and early nineteenth centuries; the modern antinomy of individual and community was much less pronounced.

But Professor Novak neglects, or perhaps even rejects, an equally important strand of our constitutional heritage—natural rights. At least until the Civil War (and perhaps beyond), many American politicians and jurists assumed the existence of a broad pantheon of unwritten and inalienable individual rights.⁶ One political theory animating both the Declaration of Independence and the Revolution was a theory of natural, inalienable political rights.⁷ After independence, state and federal judges enforced those unwritten rights in state after state and case after case. In measuring the validity of statutes, judges referred not only to the written constitutions but also to such things as “natural justice,”⁸ “common right and reason,”⁹ “the dictates of the moral sense,”¹⁰ “the maxims of eternal justice,”¹¹ “the rights of the

6. See generally DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 219-21, 258-71 (1990); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171 (1992) [hereinafter Sherry, *Natural Law*]; Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987) [hereinafter Sherry, *Founders' Unwritten Constitution*]; John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993).

7. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 180-84 (1967); FARBER & SHERRY, *supra* note 6, at 9-11; FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 57-59 (1985); JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 87-95 (1986).

8. See, e.g., *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815); *Bradshaw v. Rodgers*, 20 Johns. 103, 106 (N.Y. Sup. Ct. 1822) (“natural right and justice”), *rev'd on other grounds*, 20 Johns. 735 (N.Y. 1823); *Elliott's Ex'rs v. Lyell*, 7 Va. (3 Call) 268, 283, 285 (1802); see also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) (“vital principles” and “general principles of law and reason”); *Holden v. James*, 11 Mass. 396, 403 (1814) (determining that a legislative resolution superseding statutes of limitation for a particular claim was contrary to “natural justice”).

9. See, e.g., *Ham v. McClaws*, 1 S.C.L. (1 Bay) 93, 98 (1789); see also *Robinson v. Barfield*, 6 N.C. (2 Mur.) 391, 422 (1818) (“principles of reason, justice and moral rectitude”).

10. *Ware v. Hyton*, 3 U.S. (3 Dall.) 199, 255 (1796); see also *Turpin v. Lockett*, 10 Va. (6 Call) 113, 150 (1804) (“the dictation of moral justice”).

subject,"¹² and "natural rights."¹³ In many cases, judges used unwritten rights to strike down statutes that violated no provision of the written constitution.¹⁴

Thus eighteenth- and nineteenth-century Americans had perhaps an even more robust perception of rights than we do today, including both written and unwritten rights. Yet, as Professor Novak suggests, these earlier generations had no trouble reconciling that reverence for individual rights with pervasive regulation in the interests of the community (or, in more republican terms, with civic virtue). Why is it that we, unlike our predecessors, see rights and virtue as competing and perhaps incommensurable?

Part of the answer is simply a question of emphasis. Nineteenth-century legal positivism left us with more confidence in written rights than in unwritten aspirations. We have gradually intensified our reliance on rights until, in Mary Ann Glendon's words, rights have become "less about human dignity and freedom than about insistent, unending desires."¹⁵ If individual rights loom so large in our political and constitutional landscape, it is difficult to find room to accommodate public values.

But I think there is also a more disturbing explanation for our inability to replicate the easy accommodation of our forefathers. They knew—and we are in danger of forgetting—that rights do not exist in isolation, but rather as concomitants of responsibility. Professor Novak's quotation from Justice Lemuel Shaw, in *Commonwealth v. Alger*,¹⁶ illustrates how intertwined were the rights and responsibilities of citizenship: "[E]very holder of property . . . holds it under the implied liability that his use of it may be so regulated, that it shall not be . . . injurious to the rights of the community."¹⁷ This notion of individ-

11. *Terrett*, 13 U.S. at 50; see also *Dunn v. City Council*, 16 S.C.L. (Harp.) 189, 199 (1824) ("immutable principles of justice").

12. See, e.g., *Foster v. Essex Bank*, 16 Mass. 245, 270 (1819).

13. See, e.g., *In re Albany St.*, 11 Wend. 149, 151 (N.Y. Sup. Ct. 1834); *Page v. Pendleton* (Va. Ch. Ct. 1793), reprinted in GEORGE WYTHE, DECISIONS OF CASES IN VIRGINIA BY THE HIGH COURT OF CHANCERY 211, 216 n.(e) (B.B. Minor ed., 1852). For complete documentation and analysis of the judicial, non-textual references, see Sherry, *Founders' Unwritten Constitution*, supra note 6, at 1134-46, 1167-76; Sherry, *Natural Law*, supra note 6.

14. See generally Sherry, *Founders' Unwritten Constitution*, supra note 6; Sherry, *Natural Law*, supra note 6; Yoo, supra note 6.

15. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 171 (1991).

16. 62 Mass. (7 Cush.) 53 (1851).

17. Novak, supra note 1, at 1070 (quoting *Alger*, 62 Mass. (7 Cush.) at 84-85).

ual responsibility toward the community was part and parcel of the founders' faith in natural rights. Even John Locke, often assumed to be the progenitor of modern American rights-oriented liberalism, suggested that the natural right to property was limited by the needs of the community. According to Locke, a man can only acquire property if "there is enough, and as good left in common for others."¹⁸

The link between rights and responsibilities persisted through Reconstruction. During arguments over the Fourteenth and Fifteenth Amendments, the question of women's suffrage was raised and soundly defeated. At least one of the arguments against it was exemplified by the comments of Senator Frederick Frelinghuysen of New Jersey: "[T]he women of America are not called upon to serve the government as the men of America are. They do not bear the bayonet, and have not that reason why they should be entitled to the ballot"¹⁹ For the Reconstruction generation, as for the eighteenth-century founders, rights and responsibilities were intertwined (the right to vote, for example, was linked with the duty to defend).

So the founding generation, and succeeding generations for at least a hundred years, had little trouble reconciling private rights and public values, largely because private rights necessarily implied private responsibilities, and thus were naturally bounded by community needs.

We have lost that element of individual responsibility. Individuals are no longer seen as responsible for their own shortcomings. We are all victims of circumstance, and therefore not accountable for our irresponsible, illegal, or immoral behavior. As victims, we are owed reparations—which come in various forms, including some claimed rights—but owe nothing in return.

I have time to give only a few examples of the triumph of isolated and absolute rights over responsible citizenship. First, many young Americans, when asked what the American flag stands for, respond with some version of "the right to do what we want."²⁰ Second, legal scholarship, which should be more balanced, similarly privileges rights over responsibility: A recent article in the *Yale Law Journal* laments welfare reforms designed to discourage unwed teenage parenthood as wrongly penalizing those who do not "conform to majoritarian mid-

18. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 306 (Peter Laslett ed., 2d ed. 1967) (6th ed. 1764).

19. CONG. GLOBE, 39th Cong., 2d Sess. 66 (1866).

20. GLENDON, *supra* note 15, at 8 (quoting a television talk show host).

dle-class values,"²¹ and an article in the *Wisconsin Law Review* argues that a woman whose job is to encourage teenagers to avoid pregnancy in favor of more constructive life choices has the right to keep her job even if she chooses to have an illegitimate child.²² Lastly (although there are many more examples), the ACLU has opposed allowing public housing authorities to exclude or evict tenants who commit crimes.²³

What these examples suggest—and they are quite typical—is that too many of us now claim an inalienable right to act irresponsibly. Such claims present a twofold danger: They undermine traditional notions of the responsibilities of citizenship, and they invite a backlash against even the responsible exercise of individual rights. It would be tragic if the loss of our virtue also cost us our liberties.

21. Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 720-21 (1992).

22. Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 550-76.

23. See, e.g., Thomas Bell, *Bill to Hasten Drug Evictions Clears One Hurdle*, WASH. POST, Mar. 22, 1990, at J1; Jorge Casuso, *Housing Officials Taking Tough New Tack on Drugs*, CHI. TRIB., July 30, 1989, § 4, at 1; Mack Reed, *Jackson, in Wilmington, Blasts Eviction Policy for Drug Arrests*, PHILA. INQUIRER, May 3, 1989, at 7-B.