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## **LEGISLATIVE OVERSIGHT OF A BILL OF RIGHTS: A WAY TO RECTIFY JUDICIAL ACTIVISM**

**DUANE L. OSTLER\***

The term “judicial activism” has become a common part of modern American political speech, though it remains ambiguous and can often mean many different things.<sup>1</sup> It most commonly applies to judicial decisions that exceed judicial authority on issues that otherwise would be decided by the legislature and is most frequently invoked when some aspect of the bill of rights is litigated.

Political leaders in both parties have condemned judicial activism, particularly where it threatens their party’s ideology. For example, in 1968 Richard Nixon stated, “I want men on the Supreme Court who are strict constructionists, men that interpret the law and don’t try to make the law.”<sup>2</sup> In 1986 Ronald Reagan said that America has “had too many examples in recent years of courts and judges legislating.”<sup>3</sup> Yet Democratic leaders can feel just as much concern for judicial activism as their Republican counterparts. Barack Obama expressed fear in 2012 that a conservative Supreme Court might disagree with the new healthcare law:

I’d just remind conservative commentators that, for years, what we have heard is, the biggest problem on the bench was judicial activism . . . that an unelected group of people would somehow overturn a duly constituted and passed law. Well . . . I’m pretty confident that this court will recognize that and not take that step.<sup>4</sup>

This Article asserts that judicial activism does not have to be inevitable and can be overcome by way of structural change to the Constitution.

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1. See Keenan D. Kmiec, Comment, *The Origin and Current Meanings of ‘Judicial Activism,’* 92 CALIF. L. REV. 1441 (2004).

2. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 112 (2009).

3. Jack Nelson et al., *Interview Text: Reagan’s Thoughts on Arms Talks, ‘Star Wars’*, L.A. TIMES, June 24, 1986, at 18, available at [http://articles.latimes.com/1986-06-24/news/mn-20963\\_1\\_arms-control](http://articles.latimes.com/1986-06-24/news/mn-20963_1_arms-control).

4. Jeff Mason, *Obama Takes a Shot at Supreme Court Over Healthcare*, REUTERS (Apr. 2, 2012, 6:45 PM), <http://www.reuters.com/article/2012/04/02/us-obama-healthcare-idUSBRE8310WP20120402>.

Indeed, some of the founding fathers had just such a perspective. They preferred legislative oversight of rights issues, rather than risking judicial activism by leaving such matters to the judiciary.

#### MADISON'S VIEWS ON THE BEST WAY TO PROTECT RIGHTS

Despite having proposed the Federal Bill of Rights in 1789, James Madison had grave misgivings about constitutionalizing a bill of rights.<sup>5</sup> He proposed the Bill of Rights mainly to stop the call for a second constitutional convention, rather than out of concern for actually protecting rights.<sup>6</sup>

However, Madison firmly believed there *was* a way to protect individual rights from state abuses, without having a bill of rights. This method was so vital to his thinking that he proposed it at the start of the Constitutional Convention in 1787. The sixth resolution of his Virginia Plan gave the National Legislature the power "to negative all laws passed by the several States contravening in the opinion of the National Legislature the articles of Union."<sup>7</sup> This was no afterthought, written to satisfy those clamouring for a bill of rights or threatening a second constitutional convention. Rights protection would be provided by the federal Congress vetoing state rights violations.

For Madison, the legislative veto was needed as a rights protection because "[e]xperience had evinced a constant tendency in the states to . . . [among other things] oppress the weaker party within their jurisdictions."<sup>8</sup> Madison's proposal for the legislative veto was initially approved by a majority of the delegates to the constitutional convention.<sup>9</sup> It was only later that it was dropped, over the objections of many.<sup>10</sup> Other delegates who supported the legislative veto included George Read, John

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5. "[E]xperience proves the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every state." 5 THE WRITINGS OF JAMES MADISON 271, 272 (Gaillard Hunt ed., 1900).

6. Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 362–63 (1998); LEONARD LEVY, ORIGINS OF THE BILL OF RIGHTS 39 (1999).

7. 3 HUNT, *supra* note 5, at 19.

8. *Id.* at 121. Madison's comments also show that the legislative veto could be useful for more than just protecting rights.

9. *Id.* at 55. This occurred on May 31, 1787.

10. *Id.* at 127. This occurred on June 8, 1787. The vote was seven states to three against the legislative veto, with one state (Delaware) divided. On Aug. 16, 1787, Charles Pinkney moved to reinsert the legislative veto into the Constitution. The vote was closer this time, six states to five against the veto. 4 HUNT, *supra* note 5, at 286–88.

Dickinson,<sup>11</sup> Charles Pinkney, Jacob Broome, James Wilson, James McClurg, and John Landgon.<sup>12</sup>

One may wonder why these founders distrusted state legislatures, yet were willing to trust the Federal Congress with a veto. The reason involved factions, which Madison considered the greatest threat to individual rights. As he explained in *The Federalist No. 10*, factions could easily control smaller state governments, but it was less likely they would control the legislature of a large government, drawing its membership from all of the states. “The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States.”<sup>13</sup> This is because of the greater sociocultural and political diversity found where there is a “greater number of citizens and extent of territory.”<sup>14</sup> Hence, the very size of a large republic would be a useful tool for controlling the factions that arose within it.

It is noteworthy that the legislative veto required review of a law *before* it took effect, not afterward in the courts. Madison wanted a mechanism whereby violations of rights could be prevented before they happened. It should be remembered that this was 1787, long before the incorporation doctrine of the Fourteenth Amendment allowed the Federal Bill of Rights to be enforced in all the states, and long before the ‘commerce power’ allowed Congress to impose legislation on the states.

However, some members of the constitutional convention did not like the legislative veto. One objected that the larger number of representatives from the large states might use it to bully the small states.<sup>15</sup> Many also wondered how the national legislature could review all state laws.<sup>16</sup> Ultimately, the convention changed the legislative veto significantly. They specified limits to state power within the Constitution in Article 1, Section 10. If the states defied these limits, the federal judiciary could declare their acts unconstitutional, or, failing that, Congress would take action by passing a federal law.<sup>17</sup> The prohibitions listed in Article 1, Section 10

11. 3 HUNT, *supra* note 5, at 127.

12. 4 HUNT, *supra* note 5, at 286–88.

13. THE FEDERALIST NO. 10, at 64 (James Madison) (Jacob E Cooke ed., 1961).

14. *Id.* at 63.

15. 3 HUNT, *supra* note 5, at 125–26.

16. 4 HUNT, *supra* note 5, at 287–88.

17. *Id.* at 449.

were considered almost like a bill of rights.<sup>18</sup> Madison's legislative veto was replaced with a judicial veto, and the potential for judicial activism was born.

After the convention, Madison lamented to Jefferson over the replacement of the legislative veto with the inferior judicial veto:

[A] constitutional negative on the laws of the states seems equally necessary to secure individuals against encroachments on their rights . . . . A reform therefore which does not make provision for private rights, must be materially defective. The restraints [in Article 10, Section 1] are not sufficient. Supposing them to be effectual as far as they go, they are short of the mark.<sup>19</sup>

Madison believed the convention had missed the best way to protect rights by rejecting the legislative veto. A judicial veto power, although better than nothing, was problematic:

It may be said that the Judicial authority, under our new system will keep the states within their proper limits, and supply the place of a negative on their laws. The answer is, that it is more convenient to prevent the passage of a law than to declare it void after it is passed.<sup>20</sup>

Hence, Madison raised the very policy-making issue that is seen in judicial activism today. Judicial involvement only comes *after* a violation has occurred. Someone must be hurt before asking the courts for a remedy. Courts are aware that their decisions will be binding in the future in similar cases, and that their decisions create policy many feel is a task better left to the legislature. Madison disliked such a structure. For him, it was obvious that the best branch of government to protect individual rights was the federal legislature.

In 1799, Madison commented pointedly about the dangers of judicial activism in his response to the 'Alien and Sedition Acts' enacted during the Adams administration. These acts allowed the president to deport "dangerous" aliens and criminalized certain criticisms of the government.<sup>21</sup> Because the authority to enact such acts was hard to find in

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18. Referring to Article 1, Section 10, John Marshall said, "the constitution of the United States contains what may be deemed a bill of rights for the people of each state." *Fletcher v. Peck*, 10 U.S. 87, 138 (1810).

19. 5 HUNT, *supra* note 5, at 27.

20. *Id.* at 26.

21. See generally JOHN CHESTER MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS (1951).

the Constitution, some justified them by arguing that the Constitution impliedly incorporated British common law. Madison strongly disagreed, asserting that the Supreme Court should not interpret the common law as support for a constitutional right (which is exactly what the Supreme Court later did in *Roe v. Wade*).<sup>22</sup> Madison stated:

[W]hether the common law be admitted as of legal or of constitutional obligation, it would confer on the judicial department a discretion little short of a legislative power . . . [they would] decide what parts of the common law would, and what would not, be properly applicable to the circumstances of the United States. A discretion of this sort has always been lamented as incongruous and dangerous . . . [T]he power of the judges over the law would, in fact, erect them into legislators.<sup>23</sup>

A clearer warning against judicial activism could hardly be found.

Jefferson also objected to judicial activism. In 1819 he expressed concern over the decisions of “unelected” judges who would view the constitution as “a mere thing of wax . . . which they may twist and shape into any form they please.”<sup>24</sup> Other founders had similar concerns. Luther Martin, a delegate to the constitutional convention, noted in 1787 that “[a] knowledge of mankind, and of legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the legislature.”<sup>25</sup>

#### A THREE STEP MODEL TO RESTORE LEGISLATIVE OVERSIGHT OF RIGHTS

The preference of Madison and other founders for a legislative veto rather than a bill of rights shows their belief that the legislature, rather than the judiciary, is the entity best equipped to deal with rights questions. The legislative veto was intended to be entrenched in the Constitution, and thus not easily ignored. A similar structural solution, embedded into the Constitution itself, appears necessary today to fix the judicial activism of the Supreme Court. A constitutional amendment along the lines of the legislative veto is called for. While Madison in his day primarily feared state violations of rights, the concern today is with judicial activism in matters that should be left to the legislature. Accordingly, the legislative veto should be directed toward Supreme Court rights decisions.

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22. 410 U.S. 113 (1973).

23. 6 HUNT, *supra* note 5, at 380–81.

24. 10 THE WRITINGS OF THOMAS JEFFERSON 141 (Paul Leicester Ford ed., 1899).

25. 4 HUNT, *supra* note 5, at 26.

However, this veto power should not extend to procedural rights pertaining to the criminally accused. Such rights include the right to habeas corpus, to a jury trial, to call witnesses, and to not be compelled to testify against oneself. It is best to leave the resolution of these types of procedural criminal protections with the judiciary. If the legislature were to control these procedural criminal rights, their actions could amount to an unconstitutional “bill of attainder,”<sup>26</sup> under which the legislature may act judicially to criminally punish a person or group that it believes deserves punishment, without the protection of due process of law. In short, the judiciary is best at overseeing procedural protections for criminally accused *persons*, while the legislature is best at resolving disputed *policy* issues.

Hence, the amendment would apply to all rights except the procedural rights of the criminally accused. Many of these non-criminal rights involve policy issues that are highly contested today. This includes, among others, the so-called right of sexual privacy, the right to die, the right to free speech, and the right to assemble.<sup>27</sup> The amendment would create a three-step procedure to be followed with respect to such non-criminal rights. If anyone felt that such rights were violated, step one of the model would apply. Under this step, if suit under these rights was filed, the court would refer the issue directly to the state or federal legislature that was accused of committing the violation. Alternatively, the claimant could lodge his complaint directly with the legislature. A six month waiting period (similar to the 180 day waiting period in Title VII cases<sup>28</sup>) would follow, during which the legislature could potentially fix the problem. It should be noted that the legislature’s action would need to be general in nature and not specifically directed at the claimant’s particular case, as if the legislature were a court dealing only with his claim. If the legislature took

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26. U.S. CONST. art. X, § 1.

27. The non-criminal rights where the new amendment may apply are as follows: free exercise of religion (U.S. CONST. amend. I); free speech (U.S. CONST. amend. I); free press (U.S. CONST. amend. I); freedom to assemble (U.S. CONST. amend. I); petition to government for redress of grievances (U.S. CONST. amend. I); bearing arms (U.S. CONST. amend. II); quartering of soldiers (U.S. CONST. amend. III); due process, other than procedural protections of the criminally accused (U.S. CONST. amend. V); takings (U.S. CONST. amend. V); privacy—abortion, marriage and other alleged sexual rights (U.S. CONST. amend. XIV); equal protection (U.S. CONST. amend. XIV); voting (U.S. CONST. amends. XV, XIX, XXIV, XXVI); access to courts/agencies (implied—*NAACP v. Button*, 371 U.S. 415 (1963)); right to travel (implied—*Shapiro v. Thompson*, 394 U.S. 618 (1969)); right to educate one’s children (implied—*Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)); right to refuse medical treatment (implied—*Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990)).

28. See 42 U.S.C. § 2000e-5(f)(1) (2006).

action and changed the law, it would apply its changes retroactively and thereby bring relief to the claimant and others like him.

At the end of six months, if the legislature had not acted, or if the claimant still felt aggrieved in spite of the legislature's action, step two of the model would apply. Under this step, the courts would resume jurisdiction of the matter in cases where the claimant had initially filed suit, or the claimant would bring a new action in the courts. The courts would then rule on the matter in their normal way, thereby safeguarding rights if the legislature was unwilling (for political or other reasons) to act, or had acted in a way that was still perceived as violating rights.

However, that would still not end the matter. The most important part of this new constitutional amendment would be step three, giving solely to the Federal Congress (not the state legislatures), by a simple majority vote, the power to veto the Supreme Court's ruling *on the non-criminal rights issue*, but not any other issue of the case. Importantly, Congress would not be able to engage in any judicial-type review or discussion of the matter, but would simply vote on whether to veto the non-criminal rights portion of the court decision, in order to terminate its *stare decisis* effect. Unlike the prior six month opportunity for the legislature to 'fix' the problem in step one, this vote would not apply retroactively. Essentially, Congress would be declaring that, whatever resolution was achieved by the claimant in the court case, all similarly situated persons in the future would *not* be able to rely on the non-criminal rights portion of the Court's decision in their future cases. Indeed, by voting to veto, Congress would be creating a new and different *stare decisis* effect, which would be exactly the opposite of the Supreme Court ruling.

Because this congressional veto power would be entrenched by way of a constitutional amendment, the Supreme Court would have to abide by the veto of its decision by Congress. There would be no possibility of further judicial review of that particular case after Congress enacted its veto. And that is precisely how it should be in issues of policy that are best left to the people, through their representatives, to decide. In effect, this procedure would leave highly political issues in the hands of elected politicians, not unelected judges.

## CONCLUSION

The American experience at a time when it had no Bill of Rights highlights a method that can be used to overcome the judicial activism that stigmatizes the Supreme Court today. The surest way to achieve the needed change is by structural alteration of the Constitution itself, by way

of a new amendment. The amendment would provide for a three-step process as described in this Article, which would alter the relationship between the legislature and the judiciary with respect to non-criminal rights. Under this new model, both the legislature and the judiciary would retain some contribution to the protection of rights. But the legislature would have the final word concerning non-criminal rights, if it felt strongly enough about the issue. In making this change, America can show the world that judicial activism is not unavoidable, and that it can be controlled.