And if the voter is in despair, or near it, follow the advice of the man in the gold breastplate under the old stone cross, as reported by William Butler Yeats, and

Stay at home and drink your beer
And let your neighbor vote.

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Conservatives and the Constitution.

REACTIONARY ACTIVISM

ON JANUARY 22, by a vote of 2-to-1, the Federal Circuit Court in Washington, D.C., ruled that the law authorizing "independent counsels" (or special prosecutors) to deal with executive branch misbehavior is unconstitutional. The law was challenged by lawyers for former Reagan assistant attorney general Theodore Olson, who is under investigation for allegedly conspiring to misinform Congress. The position that special prosecutors are unconstitutional is shared by the Reagan administration, along with former officials currently under investigation, such as Michael Deaver and Oliver North.

The battle over special prosecutors, in fact, is part of an emerging trend among right-wing legal strategists that makes a mockery of claims that the right in general and the Reagan administration in particular believe deeply in "judicial restraint," a chord oft-struck during the Bork-Ginsburg-Kennedy confirmation proceedings. Increasingly, conservative jurisprudence appears to be moving away from restraint and toward conjuring constitutional law doctrines that would authorize judges to overturn federal and state regulatory and social welfare laws established by the Progressives, the New Deal, and the Great Society.

In two particular areas, New Right academics, Reagan administration officials, and judges have begun to move the law in directions that seem calculated to promote this goal of economic conservatism. First, they have shown interest in constraining the power of legislatures, including Congress, and establishing the dominance of the executive branch. Second, they have begun to argue that individual *property* rights should receive greater constitutional protection.

D.C. Circuit Judge Laurence Silberman's broad-scale attack on the independent counsel statute raises the first of these banners, executive branch dominance. Essentially, Silberman holds that special prosecutors violate the constitutional principle of "separation of powers" on two grounds: because a court, rather than the president, appoints the independent counsel; and because the president can only fire the counsel "for cause"—such as serious wrongdoing.

Until January 22 these arguments had uniformly been rejected by the federal courts, for reasons that any consistent devotee of judicial restraint ought to find compelling. The Constitution itself says that while certain principal officers can be appointed only by the president (with the advice and consent of the Senate), "The Congress may by law vest the Appointment of such inferior Officers, as they think proper . . . in the Courts of Law." It has been established since the late 19th century that courts are permitted under this provision to appoint officials who, like independent counsels, are located outside the judicial branch, to perform executive-type functions.

The first canon of construing any legal document—and a basic tenet of "strict constructionist" constitutional jurisprudence—is respect for the "plain meaning" of words. But Silberman had no trouble brushing the principle aside: "Although we certainly sympathize with the notion of seeking the meaning of constitutional provisions first in textual language, we do not think this issue can possibly be resolved by invocation of the plain meaning rule."

Silberman is equally brisk with a second strict constructionist icon—deference to the "original intent" of the Framers. During the late 18th century and for more than a century thereafter, federal prosecutions were frequently handled by court-appointed private lawyers—similar to the modern independent counsel concept—or by justices of the peace who were otherwise members of the judiciary. It seems unlikely that the Framers intended to forbid a practice that was widespread in their own time (a favorite conservative debaters' point when the subject is, say, prayer in school).

One conservative theme echoed in Silberman's opinion is that the executive branch should enjoy an absolute monopoly over all activities that can be classified as "law enforcement." The courts and, more especially, Congress may not interfere with the Executive's discharge of that function—however inadequate or even corrupt it may be in a given case. But the whole point of the special prosecutor law—a law, like all laws, passed by the democratically elected Congress and signed by the democratically elected president—is that an administration cannot reasonably be expected to investigate and prosecute itself, a point borne out by the historical record, certainly including the record of the current regime at Justice.

Silberman's reference to law enforcement as a "core executive" function has broader implications as well. It hints of a resurgence of executive privilege as a judicially enforced barrier against meaningful congressional oversight in other areas such as foreign affairs. Conservatives made precisely such claims for absolute presidential foreign policy power during last summer's debate over the Boland amendment, another law democratically enacted and signed, which forbade aid to the Nicaraguan *contras*.

Silberman's second line of attack on the independent counsel law has more far-reaching implications. This is his rejection of any limits on the president's power to fire a

prosecutor, once appointed. Silberman's reasoning potentially could invalidate more than a dozen independent regulatory agencies, including the Interstate Commerce Commission (which has operated since 1887), the Federal Communications Commission, the Securities and Exchange Commission, and the Federal Reserve Board. (Indeed, Olson himself, the subject of the Silberman opinion, is involved as a private attorney in a suit challenging the authority of the Federal Trade Commission on precisely this ground.)

Until recently, the idea that the "separation of powers" theory might justify the Supreme Court in forcing so massive a transformation of government was confined to academic scholars. But such ideas have been gaining legitimacy on the right. In a 1985 speech, Attorney General Edwin Meese asserted: "Federal agencies performing executive functions are themselves properly agents of the executive. They are not 'quasi' this or 'independent' that. . . . Power granted by Congress should be properly understood as power granted to the Executive." Justice Antonin Scalia wrote two years ago, when he was still on the D.C. Circuit Court of Appeals: "It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely 'independent' regulatory agencies."

AN EVEN MORE radical attack on liberal regulatory and social welfare programs has been advanced by leading right-wing academics and appears to have found champions in Scalia and Chief Justice William Rehnquist. This ambitious agenda, involving the exhumation of long dead pre-New Deal constitutional theories, was displayed at an October 1987 Federalist Society conference at George Mason University entitled "Constitutional Protections of Economic Activity: How They Promote Individual Freedom." The symposium was funded, perhaps ironically, by a grant from the National Endowment for the Humanities. It featured a keynote address by University of Chicago Professor Richard Epstein, a former colleague there of Scalia. Epstein argued that social welfare programs, and taxes that pay for them, "take" property from some citizens and give it to others without the constitutionally mandated "just compensation." This position, as Epstein cheerily acknowledges, "invalidates much of the 20th-century legislation," including "modern zoning, landmark preservation, and rent-control statutes, . . . collective bargaining, and minimum-wage laws."

Two Supreme Court decisions during the last term seemed to be moving the courts in Epstein's direction. An opinion by Rehnquist dealt with what happens when a government regulation (such as zoning) reduces the value of property so much that it becomes a "taking," and thus requires "just compensation" under the Constitution. The old rule had been that the government was liable for compensation only prospectively. Thus it could gracefully abandon the invalid regulation, but the public treasury would suffer no loss. Rehnquist held that property owners could recover for *past* harm from the regulation, thus creating an inherent and sometimes vast risk of monetary liability any time the government attempts to regulate land use.

In the second case, Scalia held that the state of California had to compensate beachfront property owners for requiring them to provide public access to the beach as a condition of getting a building permit. Previously, a regulation that impaired property values was not considered a "taking" if it met the easy test of being "rationally related" to any plausible government interest or purpose. Scalia wrote that such a regulation must "substantially advance" the state purpose, and that the beach access rule did not. This ruling, obviously, is an invitation for judges to involve themselves in minute details of government policymaking—exactly the kind of "activism" conservatives claim to deplore.

Whatever the ultimate destination of this new Scalia-Rehnquist property rights initiative, their decisions are plainly calculated to invite challenge to as yet undefined classes of regulation and legislation. As Justice John Paul Stevens observed in dissent, they are likely to spark a "litigation explosion" and impose "an unprecedented chilling effect . . . on public officials charged with the responsibility for drafting and implementing regulations designed to protect the environment and the public welfare."

These Supreme Court decisions refining the law of "taking," or even Supreme Court invalidation of the independent counsel statute, might not lead the Court all the way down the road it seems to be started on. But there are powerful political interests urging it forward. The Republicans have controlled the presidency for 16 of the past 20 years, while controlling the Senate for only six of those years and the House of Representatives for none. This gives them a strong practical interest in enhancing executive power at the expense of the legislature. On a theoretical plane, the legal right has long drawn sustenance from Nobel economist James M. Buchanan's "public choice" theory, which holds that democratic legislatures chronically overspend and undermine growth-maximizing profit incentives. In Richard Epstein's typically quotable words, "public choice" theory can be traced to the Founding Fathers: "The greatest abuse known to the Framers was the ceaseless imagination of legislative factions to devise new schemes for the costly and unproductive transfer of wealth and power from one's opponents to one's friends."

THE CONSTITUTIONALITY of the independent counsel law may be the first major issue that Anthony Kennedy faces on the Supreme Court. But in considering other judicial nominees for the remainder of Reagan's term, and beyond that if necessary, the Democratic Senate would do well to consider not only the preservation of civil rights and civil liberties precedents, but the potential for a new conservative activism.

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