

REFLECTIONS ON FREEDOM, FAIRNESS, AND THE CONSTITUTION

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Introduction

Freedom (with accountability) is the key to both prosperity and to any reasonable and realistic conception of fairness. Only with entrepreneurial freedom will the innovation required to increase prosperity occur. And only through freedom and prosperity can fairness—in the sense of benefits accruing to those with low incomes, as well as fair treatment under the law—be maintained. Both freedom and prosperity are incompatible with extensive regulatory or tax/transfer powers in the hands of government. This paper argues that freedom, fairness, and prosperity are unalterably linked and require strong constitutional constraints on government.

A powerful case can be made for small, secure, but constrained and competing governments of the sort a federal system suggests. As James Buchanan's work indicates, in today's world Hobbesian anarchy is not likely to yield freedom, economic growth and prosperity, or fairness. In this world, I believe we do need government.

Restraints on government, however, are the key to freedom and fairness. Few would dispute the need for restraints to maintain freedom, but the restraints on government are necessary for fairness as well. Why? Individuals are not equally endowed with effectiveness in market earnings, nor in the market for political influence. There will be elites in any system, and those who are not members of the elite are far better off when the influence of elites is diffused, as in a free society with constrained government—with freedom of entry and exit, operating under the rule of willing consent. Thus a government with the power to prevent arbitrary abuse of some people by others, but with sharply limited power to coerce others directly and

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in detail, is likely to provide maximum freedom, and hence maximum prosperity and fairness as well.

Arguably, limits on government can persist over time only when protected at the constitutional level. Several papers in this volume, and especially Buchanan's, show the need for procedural and constitutional restrictions to restrain the power of central government. Even the competition among states for citizens and capital (and thus a tax base) inherent in a federal system, important though it is, cannot by itself constrain the powers of the central government. The latter, if unrestrained in this regard, can help state governments to collude in efforts to redistribute wealth and favor to the politically powerful, using federal regulations and federal taxes.

In this view too pessimistic? Can we not depend on politicians of high principle to eschew political advantage in seeking out the public good? No, because without constitutional constraints, competition among politicians and candidates for political support in a representative democracy almost guarantees the growth of programs redistributing wealth and advantage from the politically unorganized to the politically organized and influential. This result does not depend on the actions of venal or unprincipled politicians. Instead, we need to recognize that those politicians who are unwilling to work effectively to help organized special interests, via logrolling and political entrepreneurship of all sorts, tend to be outcompeted by those who are more willing and more able to do so.

Fairness and the Failure of Redistributive Policies

Although economists often profess not to know what fairness means, we can all agree that a system *perceived* as unfair lacks the legitimacy critically needed by any regime in a representative democracy. The perception of fairness in the system is a prerequisite to the survival of our free society, and the way in which income is distributed can greatly affect the perception of fairness.

Suppose we accept the Rawlsian criterion for fairness: a change is fair if it helps the worst-off among us. How *are* those at the bottom of the income ladder helped most? Through economic growth! That is the only program that has consistently helped people to escape the blight, all-too-common in world history, of exceedingly low (by current American standards) standards of living.

How Unconstrained Tax and Transfer Programs Lead to the Reduction of Freedom

In contrast to economic growth, the larger burdens on producers and the benefits to recipients of tax-transfer programs will lead unin-

tentionally, but inexorably, to the reduction of individual freedoms and the perpetuation of unfairness. Consider the income tax. As rates rise, evasion becomes more attractive. Taxpayers feel morally justified in trying to escape the growing burden, and it increasingly pays them to find sophisticated tax dodges. As a consequence, either cheaters prosper relative to honest taxpayers, or the Internal Revenue Service must be given broader powers to surveil, to police business practices and individual behavior, and to force compliance.

On the spending side, even well-funded programs must be targeted so that most can be kept from sharing the spoils, or their participation at least limited, in order to concentrate benefits primarily on those who have “earned” them—the intended beneficiaries who have successfully expended political resources to obtain the program benefits. This effort to exclude also requires increased governmental monitoring and enforcement powers. Acreage limitations on farm programs might have to be established and policed, for example, to prevent new entrants from capturing the fruits of large farm subsidies. Otherwise the program will be horrendously expensive.

Financially attractive government programs draw new participants unless and until the cost of entry for potential newcomers offsets the program advantages. People always try to utilize their land, labor, and capital in activities that offer greater rates of private return—returns they can keep and spend themselves. They will refocus their efforts and reinvest their capital as they move their resources toward higher paying ventures. Such movement of resources will stop only when the private rate of return is the same in each endeavor.

The Political Unattractiveness of Programs to Aid the Politically Ineffective

Political realities militate against expanding government programs that promote Rawlsian fairness, especially programs intended primarily to alleviate poverty. When tax-transfer programs grow, the reactions of both taxpayers and recipients tend to offset the stated intentions of the program. In addition, programs for redistribution toward the poor have few strong and consistently effective political allies. James Gwartney and I (1986) explained how these factors combine to make the dream of political redistribution unattainable, and provided evidence from the U.S. experience in support of our theory. The blunt fact is that it is nearly impossible to politically redistribute income systematically toward the poor (or any other category of people), aside from conferring windfall gains on them.

Why, then, do programs for redistribution persist beyond the stage at which the successful special interest lobbyists have received their windfall gains? As Gordon Tullock (1975, 1986) has shown, the transitional gains trap explains why there is a strong built-in demand to continue transfer programs that have already provided windfall gains. To eliminate the program is to harm those who have already adjusted to the program or who are currently enjoying its benefits. Those individuals who would be hurt are a concentrated, often vocal lobby against program cutbacks.

Both economic logic, including public choice theory in particular, and the empirical evidence from around the world and over time, indicate that governments' intentions, or stated intentions, to redistribute income from rich to poor simply do not come to fruition in practice. Given the need for political effectiveness to achieve that stated goal, we should not expect success. Given the responses over time of people to any such tax-transfer program, we should expect the lack of political incentive to be reinforced by the lack of effective political and economic tools to achieve the result in any case. Greater governmental control over incomes does not, in fact, systematically increase measured income equality: strong incentives are typically missing and even the best of intentions would not be enough. The strength of the forces tending to equate the rates of return in each economic activity is very great indeed.

When we politicize income distribution, or any other matter of concern, those with political power will reap the windfall gains—and in the real world, the rich are nearly always and almost everywhere more politically powerful than the poor, in addition to being economically more effective. Recognizing these realities, we should not be surprised at the fact that today only one of every six dollars redistributed by the federal government is part of an income-tested program. In most programs, as judged by their stated distribution criteria (as opposed to the rhetoric of supporting lobbyists) there is not even the pretense of systematically helping those of smallest means.

Pushing Back Poverty: The Role of Economic Growth

Poor people do best with growth and prosperity, as do others, when opportunities are created for everyone. Both Adam Smith and Karl Marx agreed that prosperity is achieved by voluntary exchange in free markets. Is "fairness" an important policy criterion? Is helping those who are least advantaged important to fairness? The *best* way

to increase the smallest slice of a national pie is to make the pie bigger (see Gwartney and Stroup 1986). Growth truly is the way to make all of society better off. For this reason it is important that most economic decisions not be in the hands of government officials empowered with substantial discretion. The ability of such individuals (or committees or agencies) to show favoritism, to help “worthy” groups creates a nearly irresistible pressure on participants to make politically advantageous decisions, not efficient ones or ones that favor powerless individuals and groups. In order to foster growth, the role of government is best limited to preserving predictability of the law and to seeing that individuals are not victimized by powerful minorities, especially the elite. Income distribution is an important determinant of how much wealth is available to the society as a whole. How much goes to those who produce additional wealth, and how much to those concentrating more on simply manipulating the strong arm of government, for example, will strongly influence how much income is produced. The activities best rewarded are those most likely as a result to increase the most. Thus income growth and fairness are closely connected.

Economic growth requires free entry and free experimentation to encourage innovation. Yet innovative ideas are usually judged, early on, to be “crazy” for the perfectly good reason that most are. Yet the few that turn out to be good ones are critical—they do in fact lead to growth. But when decisions are governmental, only those ideas accepted as valid by the majority are properly provided with society’s resources. In contrast, when private individuals and groups of investors wish to commit their own funds and efforts, only they need to be believers. The private sector, for this reason, is more likely to make erroneous investments. But since their own wealth is at stake, private investors also have a strong incentive to promptly acknowledge, and to terminate the many ventures which turn out, in hindsight, to have been mistaken. That means that collective or majority control is unnecessary and indeed undesirable.

The presence of individual and small group freedom and accountability encourages entrepreneurial search and experimentation. So long as accountability is present, so that innovators cannot commit the resources of others without the owners’ consent, government regulation and financing are the *antithesis* of the needed conditions for growth. But because each special interest group believes it deserves special treatment and demands it from the politicians in exchange for political support, we must have constraints on the power of government to determine which innovations will be tried, and which will be halted. In particular we must have constitutional constraints

on what government can do in the capital market as well as the output market. Otherwise “pie slicing” via redistributionist political activity will come to dominate “pie enlarging” or adding to productivity, in the activities of individuals. If we allow government the power to distribute favors, the competitive political marketplace will provide persistent advantage to politicians who find ways to reward these special interests, and the bureaucracies which try to serve them.

The Morality of Pie-Enlarging and Pie-Slicing Activities

Most would probably agree that the primary purpose of government, and the reason we endow it with a monopoly on legitimized force, is to enhance the lives of the citizenry as a group—to make society’s pie larger, so to speak. The promotion of redistribution exercises (reallocating everything from education priorities to money) at the expense of economic growth not only reduces the wealth and income to be enjoyed by the society, but also strains the fabric of society by pitting faction against faction, as the Founding Fathers put it. Again both efficiency and equity demand less, rather than more, government control of the economy. Governmental powers themselves must be tightly controlled.

Consider for example what happened when deregulation (brought on more by Ted Kennedy than by Ronald Reagan) reduced the power of government to control airline routes and prices: it *hurt* airline pilots, some of whom were earning \$120,000 per year, bringing the starting salary in their occupation down to a mere \$42,500 per year. But it *helped* retirees, and blue collar and pink collar workers, who now can afford to visit relatives, see Florida, and travel to the Grand Canyon, on bargain air fares. More travel is done at lower prices. More wealth is created because more mutually beneficial exchange takes place: exchange at terms which had been forbidden under regulation. The previous regime of strong regulation had been helping well-organized (and highly paid) individuals at the expense of unorganized consumers who wanted the bargain fares, and workers who wanted airline jobs but could not get them when prices and wages were artificially high. Again, it is important to recognize that the actual outcome of regulating airline fares and routes had been to force the airline industry to serve the politically effective elites at the expense of the less politically effective common citizen. The people of the nation had given up freedom of contract between buyers and sellers (low cost carriers were not allowed to offer lower prices), presumably in exchange for a better deal for those least able

to help themselves economically. Yet those least able to help themselves in the economic arena were typically least well-off in the political marketplace also.

Preserving Freedom and Prosperity

A free society and an effective constitution are not a natural condition for society, if history is any guide. Their existence requires a strong and supportive constituency that continually demands freedom and constitutional government. Our Constitution, as with any component of government, must have a strong constituency to be effective over time. Yet “good government” is quite clearly a public good: each citizen may wish to live in such a system, but each has the incentive to be a free rider in maintaining it. Why pay for your ride, if those who refuse to pay can ride for nothing? This unwillingness to pay the costs of obtaining high-quality information causes most citizens to cast their ballots, if indeed they cast any ballot at all, in a relatively ignorant state. This factor, of course, makes it all the easier for well-organized special interests to have disproportionate influence in a representative democracy.

Maintaining the Constitutional Order

For those of us who are teachers, it is important to inform the coming generation of leaders and voters about how unusual our freedoms are in the world today and in history. Robert Higgs (1987) points out the erosion of Constitutional protection, and makes a convincing argument that we may not have a lot more time to avoid an increasingly authoritarian, probably fascist operation of government. How can that drift be avoided? How can we best try to see that Hayek’s “road to serfdom” (1944) does not become a toboggan slide? The moral climate is critical.

Although each voter as an individual has little impact, what voters as a group demand, they probably will get. Only if the populace demands that the economy operate on the basis of individual responsibility, and is willing to adjust the generally superior, but sometimes difficult individual outcomes through private charity and other means, will we have the freedom and the economic growth needed to help the worst-off among us. An economically strong nation has of course another built-in advantage. It can more easily (with a smaller standing army) fend off potential foreign threats. Economic strength is in fact a substitute for currently organized military strength. It was, after all, the strength of the American economy that to a large degree helped

defeat the Axis powers in World War II despite the weakness of American forces at the beginning of the war.

It is also worthwhile to note that when an economy is strong because mutually beneficial trade is fostered, competition is turned into cooperation. When this happens, all can gain—and normally do. That is why the social fabric of a free and prosperous society is strong relative to that of a dog-eat-dog world where an unconstrained government takes from the politically weak to protect and give to the politically strong. A free and prosperous society can itself be strong internationally, without the fervor, fanaticism, and hatred of other nations that is sometimes used to extract higher performance from people in an authoritarian society. The strength of cooperative behavior in a free and growing economy can substitute for the fanaticism sometimes used to raise military effectiveness. Mutually beneficial trade is, I hope we can all agree, morally superior to fanaticism.

I personally hope that the Bicentennial of the Constitution, and the study it is causing, will help us all realize the importance of pulling together to back a strong Constitution. It is important to remember that good government is in fact what economists call a “public good”; it has no “built-in” effective constituency. Only a public educated to the dangers of unconstrained government can be expected to demand the necessary constraints. Without constitutional constraints freedom will disappear, and with it will go both prosperity and fairness.

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THE PUBLIC TRUST DOCTRINE

Richard A. Epstein

Private and Public Property

From the outset political and legal theory have long been divided on the question of whether various forms of natural resources are in the original position held in common ownership or, alternatively, are subject to private ownership by individual acts of appropriation. Locke, for example, tries to work both sides of the street. He first appeals to Biblical authority to demonstrate that God gave mankind the earth to be held in common: "God, as King David says, Psalm cxv.16, 'has given the earth to the children of men,' given it to mankind in common." (Locke 1690, ch. 5, ¶25). Thereafter he argues that individuals "fix" their property in that portion of the common good with which they mix their labor, even when they act without the consent of others.

Locke's argument rested in part on a theistic foundation. Once that is removed, however, accounting for property rights is far more difficult, for there is no obvious starting point for the analysis, as mankind in general cannot be regarded as joint donees who take by transfer, rather than by acquisition. Locke's argument does not tell us how to think about property when there are no rights, and no grantor, in the state of nature. No longer is the inquiry, how does one get private rights out of public ones, or indeed how to get public rights out of private ones. No longer is there any necessary presumption that all property rights should be either private or public. A mix of rights, some public and some private, is surely conceivable, even if their relative proportions are unclear. Historically, both the common law and Roman traditions were able to accommodate both forms of property, with the navigable waters being perhaps the most nota-

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