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# Self-Interest and the Constitution

Richard A. Epstein

## I. Self-Interest, Violence and Competition

The choice of a constitution rests in large measure upon our conception of human nature. The relation between human nature and human government was well understood by the political writers who influenced the framers of our own Constitution, but it is often lost sight of today. What I hope to do in this brief essay is to resurrect a lost tradition and to show why we as a nation have gone astray because we have failed to keep a close tab on certain critical fundamentals of political theory.

To the question, What is the driving force of human nature with which constitutions must contend?, I give one answer and one answer only: The Hobbesian answer of self-interest. All people are not equally driven, but when it comes to the use of power, those who have excessive amounts of self-interest are apt to be the most influential—and most dangerous. Hence it is to curb them, not to accommodate benign altruists, that government should be designed. Of course, we must not oversimplify, for it is surely true that, even among the self-interested, all individuals have different natural talents and endowments. Thus we should not expect that self-interest will manifest itself in the same way in all people. Some people gain more from cooperation, others gain more from competition—hence the organization of firms and the existence of competition (or collusion) between them. But self-interest can express itself in ways other than competition. Sometimes it works through the use of force and violence or the use of deceit. Politics is not immune from these variations that characterize private behavior. If anything, politics brings out the extremes—of both good and evil. Accordingly we should expect coalitions, competition, confiscation, and violence to be part of the political process as it is of private affairs. And it is just that array of behaviors and outcomes that we have observed over time.

There is unfortunately no set of institutions which can escape the ravages of misdirected self-interest. The problem then is to design a set of institutions which at some real, admitted, positive cost curbs the worst of its excesses. In order to design that system of governance, it is not enough

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simply to condemn self-interest. Such condemnation cuts too broadly, for then there is nothing left to praise. It is necessary therefore to distinguish among the different manifestations of self-interest.

One way to clarify the issue is to examine the correspondence between, or the divergence of, the private and the social interest. Competition and violence give very different pictures. Voluntary bargains tend to benefit both parties to trade and by increasing the store of wealth tend (with a few minor exceptions, e.g., monopolies) to have positive external effects on the public at large as well. The greater the wealth in the aggregate, the greater the opportunities for third parties to trade with the contracting parties. When one looks at a full array of transactions, therefore, any outsider's particular loss in one case is overridden by the potential for gain from free trade in a myriad of other transactions. I might wish to stop a voluntary trade between A and B because I hope to sell to A. But if I were forced to decide whether I wish to stop all voluntary sales across the board in order to stop this one, my answer would clearly be "no." With the strategic options blocked, I will not forfeit the many opportunities for buying and selling that the system of markets affords to me, along with all others. As a general matter, discrete competitive losses are offset by systematic gains from which everyone—the short-term loser included—benefits. What I want is a special exemption from the general rules. I should not get it.

Violence produces very different social effects than does competition, because one individual's gain is necessarily another's loss. Violence yields no mutual benefits. Further, the third-party effect of violence is to spread fear throughout the general population. There is no reason to think that the total level of wealth or happiness in society will remain constant when incursions on liberty and property are routinely tolerated. Vast resources will be spent on attack and defense, so that the total level of wealth (the social pie) will shrink through the process of coerced redistribution. The negative social consequences of violence stand in sharp opposition to the positive consequences of competition.

There is then a functional explanation for the durability of the basic distinction between force and persuasion both in constitutional law and political theory. One obvious way to think of a constitution follows. A constitution should vest in "The Sovereign" the task of controlling violence and of facilitating voluntary transactions. Our general success in this task should not blind us to its importance.

## II. Three Limitations on Sovereignty

It is one thing to specify what behavior is legal and what is not. It is quite another to make sure that the rules are observed in practice. For enforcement we turn to the sovereign. But who is the sovereign? Here any neat theory of governance tends to break down in practice, just as all systems do when one searches for a prime mover. It is hard to identify the sovereign. We cannot rely upon the market, that is, voluntary transactions, to police and protect the market. Someone will break from the post, set up shop as a sovereign, and claim and exert a monopoly on force. The risk is that the sovereign's

self-interest will render him faithless to his duty to protect the legal order. He will have the position and face the temptation to extract all he can from the citizens in order to improve his own personal condition. For example, rent-seeking in politics is simply a statement that the sovereign, i.e., those fallible people with sovereign power, will allow the citizen a little something so long as he continues to make the sovereign better off. Thus the sovereign, the supposed solution to the problem of political union, himself becomes the problem. And the issue of constitutionalism is just this: how to constrain the misconduct of the sovereign while allowing him the necessary power to keep peace and good order.

Our answer to this problem is limited government. If our task is to limit the power of self-interested individuals, it seems clear that a certain *redundancy* is good for the health of the system. Some barriers may bend or break, and the presence of some back-up protection should merely improve the operation of the system as a whole. The key trick is to make sure that no single individual, or small faction, obtains or maintains the legal monopoly on force for himself or themselves. Of course, it costs a good deal of money and statecraft to abandon the Hobbesian state wherein everybody is at the mercy of the sovereign; but we can try. Here are three possible limitations on sovereignty: federalism, separation of powers, and entrenched individual rights.

#### A. Federalism

First, we should try to maintain competition between the separate governments, as a check to the threat of monopoly. The system of federalism, which was familiar to the founders because of their colonial experience, represents a profound response to the problem of governance. The individual states are in competition with each other for residents, businesses, and tax dollars. That competition will limit their capacity for the ruinous forms of expropriation that might otherwise take place, at least if the rights of exit and entry across the states are fully preserved in the governing document. This competitive model generally works without direct judicial regulation of the substantive legislation of the various states. But by the same token, it works only if state powers cannot be supplemented by a vast federal power that covers the same domain of economic issues.

The regrettable jurisprudence under the modern commerce clause cases thus becomes critical in this connection because it shows how Justice Hughes (in *The Wagner Act cases*)<sup>1</sup> and Justice Jackson (in the agricultural production quota cases)<sup>2</sup> had so little understanding of the relationship between government monopoly and private competition that they give the federal government the trump over local production and employment decisions. By so doing, they weakened the power of private citizens and increased

1. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

2. *Wickard v. Filburn*, 317 U.S. 111 (1942).

the opportunities for interest-group politics. The power to exit from any given state loses much of its effectiveness when Congress can regulate private market behavior on a national scale. The groups that are bound in state A can no longer escape their restriction by a move to state B, since the federal solution is undercut by a national cartel enforced at the national level. Federalism as a counterweight to the monopoly sovereign is undercut by the massive expansion of federal power under the commerce clause.<sup>3</sup>

### *B. Separation of Powers*

The second restraint on sovereignty is the division of power across separate branches at every level of government, each division acting as a check on the powers of the others. This system of restraints was built into the original Constitution, and in large measure it has held. The most controversial element is the judicial, but the case for judicial review is that, while the courts do have the power to trump legislation, they lack (or should lack) other powers: they have no power of appointment, no power to levy taxes and impose regulations, no power to declare war. Thus no sovereign monopoly is conferred upon the judges, even under the banner of judicial activism.

Administrative agencies, which were not a part of the Constitution's original plan, raise a more controversial issue. My view is that they are flatly unconstitutional—there is no article IIIA—and for good reason. Keeping the cost of running government low is not an unalloyed blessing when there is a persistent risk of government misconduct. Forcing all powers into three distinct branches reduces the total size of the federal government and forces those in power to make hard choices about what should be done. The rigid division of power operates therefore as another indirect limit on the size of government and hence upon its total power. The modern regulatory state is quite unthinkable without independent administrative agencies, and that is the way it should be.

### *C. Entrenched Rights*

The last part of the overall system is the direct protection of individual rights. In part this principle is necessary because the exit rights from the states (or for that matter the nation) are simply not powerful enough to overcome all forms of governmental abuse. Local expropriation in land use contexts continues to be rampant; and the formal school segregation in the Old South (and to a lesser extent elsewhere) indicates that local governments do exercise some substantial element of monopoly power, which can be turned in unprincipled fashion against some determinate group of citizens for the benefit of the rest. If the key peril is the inability of democratic political institutions to preserve the rights of minorities, then the problem of entrenched legal rights against both state and federal government is rightly regarded as critical to our entire scheme of government.

3. I shall treat these problems in greater detail in *The Proper Scope of the Commerce Clause* in a forthcoming issue of the *Virginia Law Review*.

Accordingly, I strongly support limitations upon government power in all areas of life. In addition, I think that the modern distinction between preferred freedoms and ordinary rights is wholly misguided, not because the former receive too much protection but because the latter receive far too little. It is not sufficient to say that the rich can protect themselves by legislation. We are not trying to protect them as such. The concern is social. There is little good to factional struggles that pit industry against industry, rich against rich, or poor against poor. But whatever the configuration of these struggles, the source of concern is social, not private, losses. The defense of private property that I have tried to mount is not a disguised defense of special privilege.<sup>4</sup> I should strike down any legislation that tries to restrict entry to preserve the province of the well-to-do. As Adam Smith demonstrated so long ago, a belief in property and markets is not a belief in mercantilism, high tariffs, and other barriers to trade.

Our basic purpose is to keep the Sovereign, that Leviathan, to manageable proportions. That task is not an easy one because a constitution requires that one make judgments in the abstract, with confidence that they will hold good in the particular cases that arise in the future. That has proved a recurrent difficulty with all substantive guarantees, but not a hopeless one. The ambiguity and error at the margins, be it with property or speech, are well worth tolerating to preserve the core. Over the years we have been able to fashion principles of freedom of speech that control its use as an adjunct to force and fraud, while allowing it the broadest possible sway in other areas. That same generality is applicable in principle to the constitutional protection of contract and property, notwithstanding their shabby treatment at the hands of the Supreme Court.

Recall the observations I made at the beginning of this paper about the effect of ordinary contracts. If they are correct, then we know that voluntary commercial transactions increase the wealth of the contracting parties and generate systematic positive externalities. The use of violence has exactly the opposite social effect. The argument in no way turns on the particulars of the case, such as the type of private contract or the motivation for violence. We have therefore the requisite generality to support a constitutional principle. We can protect contract whether we work with labor or capital markets, whether we deal with restrictions on entry imposed by the minimum-wage laws, with restrictions on entry that prevent banks from selling securities, or with rent-control laws. As a matter of first principle, they are all unconstitutional. The details of each case do not alter the general analysis. They only indicate the way in which fundamentally wrongheaded legislation takes its toll in social loss, whether measured in terms of utility or wealth. Decisions such as *Lochner v. New York*<sup>5</sup> were correct because New York's maximum-hour legislation was vintage special-interest legislation:

4. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass., 1985).

5. 198 U.S. 45 (1905).

successful attempts by certain unions to impose disproportionate burdens upon rival firms that employed different modes of production and hence had different requirements for their work force.<sup>6</sup>

The principles of substantive due process, or of takings, *do* deserve constitutional status precisely because they have a generality, power, and permanence that are immune to future shifts in technology or tastes. While there is surely a need to leave to the legislature the decision whether to declare war on some foreign nations, there is no similar reason to suspend judgment when the question is whether one should regulate wages and prices of ordinary labor and commodities.<sup>7</sup> Since that question can be answered in the negative once and for all, there is no reason to leave it open so that legislatures can get it wrong when they succumb to the powerful pressures and blandishments of special-interest groups. There is a powerful normative theory which explains why the protection of liberty and property are good for all ages, and it is that theory which makes it inadvisable to draw the artificial distinction between the protection of speech and the protection of property which is now embedded in the modern law.

### III. Is Constitutionalism Possible?

The above program is an ambitious one. One might ask therefore, Can all this be done by any constitution? By our Constitution? One's answer in large part depends upon the view one takes of language, of its capacity to guide and inform. If one assumes that all doctrines are mushy, intellectually open, politically adaptable, and morally contestable, then any effort to formulate a constitution is in vain. Sooner or later, and probably sooner, any serious effort at constitutional elaboration will necessarily fall of its own weight. Yet it seems clear that some provisions of our Constitution, most notably those on separation of powers and freedom of speech and religion, have survived the pounding to which generations of cases have exposed them precisely because linguistic skepticism has never dominated judicial approaches to textual interpretation.

6. The bakers employed by *Lochner* worked longer hours because they both prepared the bread in the evening and removed it from the ovens in the morning, sleeping in between. The larger rival union firms used two shifts of labor and did without sleeping workers. It is worth noting three features of the legislation. First, the maximum-hour legislation invalidated in *Lochner* disrupted *Lochner's* way of doing business but had no impact on his protected rivals. Second, the maximum-hour legislation was part of a larger package of "reform" legislation that heavily regulated the sleeping conditions of workers, with obviously disparate effects. Third, not all types of bakers were covered. The forces that procured the legislation were able to tailor it so that it did not provoke legislative opposition from other industries with whom these union bakers were not in competition. See generally, Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 732-34 (1984).

7. There is only the question of whether the regulation can take place if the compensation is provided to the losers. That compensation will typically not be forthcoming because the regulation is a negative sum game. But the possibility of improving overall social welfare is what distinguishes at a constitutional level the use of antitrust laws to control horizontal monopolies from the minimum-wage rules. For a more extended treatment of these issues, see Epstein, *supra* note 4, esp. at 274-82.

I will go further. I think that very few of the wrong steps that have been taken in our constitutional history can be made respectable by celebrating the open-textured nature of constitutional language. In ordinary usage, manufacture does precede commerce; it is not part of it. In ordinary language, there is no watertight distinction between a tax and a taking. In ordinary language, the creation of legislative and executive power does not authorize the use of administrative agencies. I do not want to minimize the interpretive difficulties that arise under the Constitution even when interpreted with an eye to its basic structure and theory. But the difficulties of interpretation cannot explain the current malaise of modern American constitutional law. The remorseless and enormous expansion in government power can only be explained by the systematic repudiation of the basic principles of limited government which informed the original constitutional structure. It is a different political philosophy that lies at the root of the many decisions that have extended the scope of federal (and state) power over individual affairs. The Constitution was drafted by individuals who tried to find a Lockean response to the Hobbesian problem. It has been interpreted by courts and academics who too often forget that big government is often the problem, not the solution.

#### **Epilogue: Comments on Remarks of Other Participants**

I want to comment very briefly on the presentations of the four other panel members.<sup>8</sup> First, a general observation: the words “self-interest” and “greed” simply disappeared from the discourse after I spoke. The question is, What happened to them and why?

With respect to Gerry Lopez’s talk, I share his sense that a “grand constitution” does not require everyone’s allegiance to a common set of core values. His own political uneasiness is wholly consistent with my own view of government. One advantage of having a minimal, rather than a large state, is that it allows people of differing beliefs and traditions to live together in relative political tranquility, without having to make collective choices about the proper signs and symbols of culture. It is only the large, modern state that threatens the private beliefs of political and ethnic groups. To someone like me, whose grandparents were all immigrants, open immigration and freedom of movement are critical not only to prosperity but also to survival. It is big government and its transfer programs that have tended to close off these opportunities, if only because we cannot afford to provide for outsiders the essential social services we provide for ourselves.

Second and more generally, there are two ways to handle the problem of factions. First, if you know that everybody is supping at the collective trough, you can try to join the crowd, which is what Lopez in essence proposes. But my basic instinct is that this strategy is a social and intellectual

8. These comments are not after-thoughts, but were given as part of the plenary session, in which each of the participants had the opportunity to comment on the remarks of the others.



mistake. What you really want to do is to strengthen legal prohibitions and institutions so that today's fat cats will be prevented from continuing their elegant meals. That strategy suggests the need for stronger government restraints on government power rather than greater participation for everyone. It seems to me that everyone gains when you restrict private access to public goods, while everyone loses if that access is made unlimited.

Hanna Pitkin discusses the question of what a constitution means, and I quite agree with her that the nature of the discourse is going to be heavily influenced by our understanding of the underlying nature of man. But I have two points of caution. First, she cannot talk about this problem at a high level of abstraction unless she makes some decision about the proper form of government. Second, when you try to figure out the nature of man in thinking about constitutional government, you should emphasize those elements of human behavior that are most universal and constant. Again, self-interest fits the bill. It is very dangerous to speak constantly about realizing "our" collective responsibilities and rights while ignoring the risks of self-interest. The reason, public-choice theory tells us, is the fallacy of composition: too often the choice of the group is mistakenly thought to be a simple summation of the choice of its members. When all of us get together it may turn out that only some of us will win. Taking the language of "we and us" too far compounds the excesses of popular democracy. What is needed is a system that tries to get the best out of public life while limiting these political excesses. The tripartite structure that we have evolved over the years—if we had kept to it more systematically than we have done—would have done a better job in this regard than our relentless expansion of government power into economic affairs.

Larry Tribe's presentation reveals a very radical disjunction in the ways he and I do intellectual work generally. I regard his talk as a perfect illustration of Christmas Past. It is an effort to think about the world as a series of discrete, unconnected contradictions. He denigrates any effort at holistic or comprehensive approaches, without offering any alternative in its place. Yet in the end the hedgehog will indeed beat the fox, for people with coherent, unitary conceptions must dominate intellectually others who are content to live with contradictions in their basic position.

But wait. Professor Tribe is only prepared to pay the price of contradiction at the abstract level, when he is talking about the glorification of political life in all its richness and fullness. Once he is faced with a concrete case that lies between two inconsistent traditions, sooner or later one of them must yield. Tribe must therefore have some kind of theoretical framework to tell him what will be abandoned and what will survive. If, for example, we consider a case such as *Bowers v. Hardwick*,<sup>9</sup> he can talk about all the perturbations of the first and fourth amendments. (Tribe's exclusion of the fifth amendment on private property I take as an inadvertent slip.) But on

9. 106 Sup. Ct. 2841 (1986).

the other hand, someone can talk, as did the Supreme Court in that case, about our ancient tradition, the implicit scope of the police power, and the inherent power of the government to deal with matters of morals. Without a unified theory that allows you to incorporate the written text (which protects liberty) with its implied exceptions (the police power), any judicial outcome turns out to be respectable on any issue of public importance. Tribe therefore could disagree with the Court, but he could not object to its decision on principled grounds.

I would rather avoid the skeptical position and argue instead that Holmes was wholly incorrect when he argued in *Lochner v. New York*<sup>10</sup> that our constitution is so pluralistic that virtually anything goes if the legislature or “dominant opinion” approves of it. There is little gain in isolating the contradictions in a rival theory if you cannot produce a coherent theory of your own.

With respect to Bill Van Alstyne, I both agree and disagree with his presentation. Surely I am a “hard-wired” constitutional fellow, because I think that clear language has the capacity to resolve critical cases. I also think he is right to say that constitutionalism as we understand it cannot exist without judicial review, since legislatures and executive bodies will always find some reason to validate the laws that they desire on political grounds. But more than hard wiring is at issue. It is absolutely critical to have the right hard wires. Unfortunately, you can have the wrong hard wires in your constitution. Clarity is extremely important in constitutional interpretation and judgment. But, again, in the end clarity is an aid to establishing a basic social structure, not a replacement for the substantive work that has to be done. The way in which our view of human nature is linked to our view of social institutions remains the key question to constitutionalism in its grandest sense.

10. 198 U.S. 45 (1905).