

Parchment versus guns

It is widely thought that just as a market economy is an expression of economic freedom, so is a democratic polity an expression of political freedom. A market economy and a political democracy would thus seem to combine to form a constitution of liberty for a free society. In this respect, the renowned constitutional scholar Charles McIlwain once noted that “constitutional government is by definition limited government” (McIlwain 1947, p. 21). Without some explanation as to how it is possible truly to limit government, however, this common formulation is perhaps more sentimental than realistic. The task of giving that sentiment some grounding in reality is a difficult one that raises some knotty issues regarding the institutional framework of a free society.

The very idea of limited government implies that government is not the source of personal rights, for government itself is limited by the prior and superior rights of the people who form it. People form government, government doesn't form people, a theme that is developed crisply in an economic context in James Buchanan and Gordon Tullock (1962). One use that people make of their rights is to create governments to preserve and protect those rights. Without government, people would be subject to predatory attack, both from each other and from outsiders. Rights are of little value if they cannot be preserved and protected. For government to pursue this protective task, it must be sufficiently powerful to subdue potential predators, both domestic and foreign. Government thus must be the locus of predominant force within a society, for otherwise it could not fulfill its protective role.

The eternal question that won't go away is how, or whether, it is possible to design a government that will use its power to preserve and protect without using that same power as an instrument of predation (Scott Gordon 1999 presents several historical episodes where different societies have taken different approaches to limiting government). It is easy to illustrate the problem of limiting government. If two people acting privately cannot rightfully take the property of a third person, neither should they be able to do so simply because they comprise a political majority. Suppose Primo, Secundo, and Terzo comprise a town. Primo's property contains some marshland which he plans to drain and fill to create a shopping center. Secundo and Terzo each prefer to see the land remain as marshland, even if it means they must go elsewhere to do their shopping.

The institutional framework of the market economy provides an easy way for Secundo and Terzo to secure their desired marshland. All they have to do is to get Primo's permission to keep the land as a marshland rather than turn it into a shopping center. There are many particular ways they could accomplish this. A simple way would be for them to buy the relevant portion of Primo's land. Alternatively, Secundo and Terzo could lease the land from Primo, say for 99 years. They could act on their own behalf in doing this, or they could act in the name of a conservation trust which they established. In any case, the basic principles of property and contract that provide the legal framework for a market economy provide a set of simple rules within which market participants can create quite complex patterns of governance to carry out their desired

transactions (Epstein 1995). Regardless of the particular form that a transaction might take, the market framework provides a consensual method for resolving this divergence of opinion among Primo, Secundo, and Terzo. If Secundo and Terzo place a higher value on using the land as a bird sanctuary than Primo places on building a shopping center, Secundo and Terzo will be able to convince Primo to give up on the shopping center and let the marshland serve as a bird sanctuary instead.

For Secundo and Terzo, the problem with this method of resolving this difference of opinion is that they have to pay full price to get their way. Yet they comprise a majority in the town. So long as political decisions can be made by majority vote and do not require unanimity, Secundo and Terzo can do better for themselves by adopting a motion to treat the construction of a bird sanctuary on Primo's land as a town project. The cost of securing the land would now come from town funds. Public financing of the bird sanctuary thus allows the winning majority to transfer some of the cost onto the losing minority. The extent to which such a transfer occurs depends on the type of tax system the town uses. A very simple tax system would be one that imposes equal cost sharing across residents. In this case, Secundo and Terzo would each pay but one-third of the cost, whereas under the market-based method of creating the bird sanctuary they would each pay one-half the cost.

To be sure, Primo would not voluntarily sell the land to the town under these circumstances because refusing to sell the land would prevent the tax from being imposed. Secundo and Terzo would have to use the name of the town to

invoke eminent domain to get the land. Doing this allows the majority to take Primo's land against his will, and to force him to accept only two-thirds of the compensation the town offers, because his taxes also cover one-third of that compensation.

The Fifth Amendment to the American constitution allows governments to take private property through eminent domain, but also places tight restrictions on the use of this power. One such restriction is that any such taking must be to advance some legitimate public (as distinct from private) purpose. Another restriction is that the owners of property be justly compensated for any such taking. As Richard Epstein (1985) explains, the history of eminent domain over the past century or so has increasingly run in the direction of governments taking property for what are private uses and paying only partial or token compensation in the process.

Despite its clear wording about public use and just compensation, the Fifth Amendment does not seem to be a strong bar against governments taking private property for private use while failing to pay just compensation. The Fifth Amendment, along with any constitutional document, is just a piece of parchment. While parchment paper is stronger than ordinary writing paper, apparently it is not sufficiently strong to deter rapacious governments and interest groups from using government as an instrument of predation.

In Federalist No. 48, James Madison noted that legislatures in Virginia and Pennsylvania had repeatedly violated their state constitutions, acting thereby as an instrument of predation on behalf of some people at the expense of others, in

sharp contrast to acting as an instrument of protection and preservation.

Madison concluded his examination by noting “that a mere demarcation on parchment is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”

The articulation on parchment of a declaration of limited government to protect and preserve is not by itself sufficient to generate protection and preservation as the core activity of government.

There is a tenuous balance between liberalism or capitalism on the one hand and democracy on the other, as the American Founders recognized. A system of economic organization based on private property will require some measure of government activity, if to do nothing else than protect people's rights of person and property. Liberalism is grounded in individual freedom and private property. In this scheme, government itself is simply a reflection of people's use of their rights of person and property, and is not a source of those rights.

Governmental authority is limited to securing individual rights.

Even though there may be general agreement about the proper principles of governmental activity, that agreement often dissolves in the specifics of particular practice. Primo, Secundo, and Terzo might all affirm the principle of limited government, and yet Secundo and Terzo will participate willingly and even eagerly in taking Primo's property when doing so allows them to promote a favored project at lower cost to themselves. To be sure, Secundo and Terzo may have some moral qualms about their use of politics to circumvent the market in building their bird sanctuary. To subdue such qualms, they might invoke such

doctrines as strategic holdouts and free riders as a kind of therapy to ease their minds. This would allow Secundo and Terzo to deceive themselves into believing that Primo really valued the bird sanctuary, only refused to say so because he was holding out to get a higher price.

As Vincent Ostrom (1984) explains with particular cogency, government involves a Faustian bargain: instruments of evil--power over other people--are to be employed because of the good they might do, recognizing that evil will also result. This raises the issue of the terms of that bargain. There are two principle approaches to securing more favorable terms. One approach looks primarily to education and related processes for cultivating virtue and wisdom within a population (Walker 1990). The claim here is that the wiser people are about the dangers of the Faustian bargain, the less eagerly they will embrace it. Parchment will serve as a stronger barrier to predatory uses of government as people become wiser in their understanding about such predatory uses of government.

The other approach looks primarily to a kind of opposition of interests to limit government predation. Metaphorically speaking, this alternative approach looks to guns more than to parchment (Wagner 1987, 1993). The basic principle behind this approach is for governmental action to require some concurrence among different participants with opposed interests. Such concurrence, it should be noted is exactly what market exchange promotes. Within the frameworks of property and contract, Primo, Secundo, and Terzo will all concur in the market-generated outcome concerning the use of Primo's marshland. If that land

becomes a bird sanctuary, this will be because Primo concurs with Secundo's and Terzo's desire to exercise dominion over the marshland. The testimony about Primo's concurrence lies in his willingness to cede control over the land to Secundo and Terzo. If that land becomes a shopping center, this will be because Secundo and Terzo concur with Primo's desire to build a shopping center. The testimony about Secundo's and Terzo's concurrence lies in their unwillingness to make an offer that would be sufficient to convince Primo to cede control over the land.

Both approaches reflect a presumption that self-interest is predominant in all human activity, in government as well as in commerce. The justification for government resides in the need to control the darker side of self-interest. With self-interest being ineradicable, the problem of constitutional control becomes one of how to control the operation of self-interest within government while allowing government the ability to perform those governing tasks that its justification requires. Ultimately, the task would seem to require both parchment and guns, that is, both knowledge pertinent to the task and rightly aligned incentives to act consistently with that knowledge. Knowledge and incentive, moreover, do not act in separable fashion, for knowledge is generated through practice and practice is shaped by incentive, as Richard Wagner (2002) explains. For instance, Charles Warren (1932) describes how the general welfare clause of the American constitution underwent a transformation from a strong limit on the ability of Congress to appropriate money to a situation where Congress could appropriate for whatever it chooses, so long as it pronounces that it has some

good civic reason for doing so. The process Warren describes is clearly one of a continuing spiral involving both belief or knowledge and incentive or interest. One of the central themes of the classical approach to moral education was that morality was simply good conduct that was reduced to habit through practice. The ability successfully to take property through politics instead of relying upon market transactions is to engage in a contrary form of practice. This alternative form of practice, where legislative takings replace market transactions, may, if repeated sufficiently, become sufficiently habitual to promote alternative beliefs as to what comprises just conduct. Knowledge and incentive, parchment and guns, would seem to be nonseparable ingredients of constitutional order in the final analysis. This interaction between knowledge and incentive was clearly recognized in the Germanic branch of constitutional economics that is known as ordnungstheorie, a founding statement of which is Eucken (1950), whose subsequent literature is represented nicely in Stützel, Watrin, Wilgerodt, and Hohmann (1981), and which is given a nice textual presentation in English in Kaspar and Streit (1998).

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