The Constitutional Protection of Private Property

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Can private property be protected within the framework of democratic governance? More specifically in the context of this volume, how likely is it that rights to resources and to environmental amenities can be made stable and relatively immune from government encroachment? Both theory and history present us with ambiguous responses. A nice summary of long-standing arguments that democratic governance is not sufficient for the task in the long run is presented by Alexander Tytler, an 18th century Scot historian:

A democracy cannot exist as a permanent form of government. It can only exist until the majority of voters discover that they can vote themselves largesse out of the public treasury. From that moment on, the majority always votes for the candidate who promises them the most benefits from the public treasury, with the result that democracy always collapses over a loose fiscal policy, always to be followed by a dictatorship and then a monarchy. (As quoted in Niskanen, 1978, p. 159.)

As Dan Usher (1992) explains with different language though to similar effect as Tytler, democratic governance based on voting does not mesh easily with private property. The contemporary literature on public choice, surveyed nicely in Mueller (1989) and Mitchell and Simmons (1994), seems largely, though not wholly, to reinforce the thrust of the type of thinking represented by Tytler.

In sharp contrast, Francis Fukuyama, in his well-received The End of History and the Last Man, argues that liberal democracy stands at the end of history, and so is to be followed by nothing else, simply because there is no alternative. Among other things, Fukuyama argues, only capitalism can deliver the goods and only democracy can satisfy man’s need for recognition.
Fukuyama’s claim about history will have to await the passing of time. His analytical argument, however, founders on its failure to make reasonable and meaningful distinctions, and resembles an effort to tell us that a forest contains “trees and animals,” without being any more specific or substantive. Any effort to derive some general relationship between property and democracy must confront the dependence of the substantive character of that relationship upon a variety of particular institutional details concerning types of property and forms of democracy. Without information regarding these details, it is impossible to identify any necessary relationship between property and democracy. Democracy may serve to secure liberty and property, but it may also serve to undermine them. Which happens depends on the particular details of the constitutive framework within which human relationships are governed.

In this paper I seek to explain why this is so, and to examine some of the particular institutional and constitutional principles and details that are necessary if democracy is to serve as a means for securing property and liberty. I start by exploring some important preliminaries concerning the relationship between normative and positive aspects of the problem of securing good governance, invoking analogies from classical moral education in the process. In short, good governance involves first of all a normative choice among contending principles to govern human relationships, with those principles in turn reinforced by a congruent institutional structure that provides compatible incentives to support those principles. From this point of departure, I point out that the relation between property and democracy cannot be explored at the level of abstract categories, because the meaningfulness of any such analytical exercise depends on some important substantive details concerning particular forms of property and democracy.

In particular regard to Fukuyama’s claim, it is not liberal democracy, grounded in private
property, but social democracy, grounded in common property managed by government, that is currently ascendant. Within contemporary socially democratic regimes, which have typically been misspecified as “mixed economies,” there exists a clash between two systems of property and two systems of pricing. One is a system of market pricing organized under the rules of private property. The other is a system of political pricing organized under the rules of common property. The system of political pricing, moreover, is parasitical upon the system of market pricing, in the sense that common property and political pricing require the presence of private property and market pricing for their existence. This parasitical character of the political price system provides, perhaps, a kind of natural limit to the reach of social democracy. Whether it is possible to achieve an even stronger limit on the reach of government through constitutional design is considered in the closing sections.

1. The Didactic Relevance of Classical Moral Education

The ancient Greeks recognized that virtue was a matter of right knowledge reduced to habit through good practice. Conscious choice repeated often enough becomes habitual and unconscious. Right conduct is cultivated through the ability of right practice to create good habits. Conversely, wrong practice will cultivate bad habits and produce wrong conduct. This classical formulation has didactic value for thinking about the relationship between property and democracy.

To be sure, this classical concern was with the moral education of individuals. Nonetheless, the structure of the classical argument has relevance for the relationship between property and democracy. The ability of a system of democratic governance to secure property
and liberty depends upon the habits of governance that are cultivated through democratic practice. In a setting of collective rather than individual choice, however, there is an additional step in this process, one that involves mediation among the participating individuals. Whether governance turns out for good or bad will depend importantly on those mediating relationships. Good habits still result from good practice, only the goodness or badness of the practice is a matter of collective and not individual choice. Desirable normative conduct is reduced to unconscious choice if the incentive features contained within a set of institutional arrangements reinforce that conduct. But if institutional arrangements do not reinforce such conduct through their weight of incentive, the desired normative conduct will diminish, just as the classics recognized that virtue would diminish without its practice. What is necessary, then, is both knowledge about what constitutes good governance and the reduction of that knowledge to habit through good practice, with that practice mediated by an institutional framework that supports good practice over bad.

In *Federalist* No. 1, Alexander Hamilton asked “whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.” Whether reflection and choice can triumph over accident and force is a matter of what might be called social agriculture. Agriculture attempts to improve upon what Mother Nature offers, by imposing reflection and choice upon what otherwise would be the products of fate. There are both normative and positive elements to social agriculture. Normatively, there must be some standard of desirability. Among other things, it must be possible to distinguish between desirable and undesirable forms of plant life. Vegetables may be put into the category of desired plant life
while weeds are not, though even here the growth of knowledge may reveal useful properties of what were previously thought to be undesirable weeds.

All of the normative wishes in the world are useless, however, without some idea of how to achieve those wishes. People may prefer squash to ragweed, and squash in their stomachs to squash devoured by bugs. Without knowledge of how to restrain the bugs and weeds, however, the yield of squash for human consumption will be left to fate and fortune. It is the same for governance, as Hamilton noted in *Federalist* No. 1. We may recognize that people prefer to go through their lives free from fear of being preyed upon by others, whether in the form of local bandits or thugs, or in the form of invasions by foreign hordes. We may likewise recognize that people prefer to see their children grow up in prosperous, free, and peaceful environments, and not be plagued by poverty, enslavement, or war. Mere recognition of these preferences, however, does nothing to satisfy them. Mother nature may give us islands of peace and periods of prosperity, but to move beyond her offerings and limitations requires more than wishful thinking. It requires the application of intelligence concerning the social equivalents of the principles of soil chemistry and plant genetics, so as to allow the flowers and vegetables to flourish while restraining the weeds and bugs.

Good governance involves both normative and positive dimensions. There must be a normative vision of what good governance entails. In this respect, I presume that good governance entails human relationships based upon reciprocity and equality, and not based upon domination and supplication, even if perhaps moderated through some dose of noblesse oblige. For that normative vision to be reduced to institutionalized habit, however, the constitutional framework that mediates among participating individuals must channel collective practice in a
manner that reinforces through its incentive-compatibility those normative foundations. The normative vision just stated takes seriously and substantively the affirmation in the Declaration of Independence that governments derive their just powers from the consent of the governed, but this vision can be reinforced or undermined, depending upon actual practice. Should that constitutional framework channel collective practice in a contrary direction, those normative foundations will erode through bad practice supported by bad institutionalized habits.

2. Property Forms and the Types of Democracy

While a rich vocabulary has developed to characterize the different forms of property relationships, for my analytical purposes it suffices to distinguish between private and common property as polar types. Property may be held individually or privately and be freely alienable, or it may be held in common and be inalienable. The problem of democratic governance differs, depending on the presumed property setting. To each form of property there corresponds a different type of democracy: private property is instantiated politically as liberal democracy; common property is instantiated politically as social democracy.

Liberal democracy reflects the normative orientation that people and their rights are prior to government, and that governments exist to secure those prior individual rights. This normative orientation is also consistent with the historical record that property rights arose prior to nation states, as noted by Vernon Smith in this volume (pp. xx - xx). Government is a reflection of people’s use of their rights. It most clearly is not a source of rights, because it is limited by those prior rights and the consent of the governed (e.g., McIwain 1947). Liberal democracy entails the presumption that people can do as they choose without requiring state
permission, provided only that they do not abridge the similar rights of other people in the process.

Social democracy represents the normative orientation that government should be the source of rights. Property is held in common, and government regulates access to the commons. What people may do individually resides ultimately within the domain of government. There can be no principled limit on the reach of government, because government is the source of rights. The only limit on the reach of government is the pragmatic one of the amount of political support that can be mustered. Under social democracy, collective judgments trump individual rights. To be sure, people will have spheres of autonomy under social democracy simply because, pragmatically speaking, governments cannot be involved in everything. Those spheres, however, are always subject to change as the dictates of political expediency change.

With respect to the environment, much of the present debate assumes the common property framework. Collective judgments about environmental issues are presumed to trump individual rights. If individual rights to resources exist, it is only because the government has chosen to tolerate such rights. With private property, an owner of land may choose whether to drain and fill some marshland or to leave it alone. If other people object to draining and filling, they can always make an offer for the land, and if their bid is accepted they can leave it as a marsh. With common property where the legislature is the arena where rights are determined and revised, the legislature may choose to remove from individual owners the right to drain and fill. Within a system of liberal democracy this would represent a clear taking of a component of property by government. Within a system of social democracy, however, there can be no taking because the legislature may grant and rescind rights as it chooses.
Whether they are made explicitly or left to the fortunes of history, we inescapably face a stream of constitutive choices concerning these two different principles by which human relationships are constituted and economic activities governed. We can face these choices directly with reflection and choice, or we can let them face us through accident and force. But face them we will in either case. A liberal democracy entails a commitment to the principles of property and contract as organizing principles that are suitable for a self-organized society whose individual members have their own purposes, and where the state itself has no purpose that does not derive from the consent of the governed. This constitutional commitment limits the activities of government to those that support rather than subvert the fundamental principles of property and contract that undergird a liberal order.

Without such a commitment, it is easy for accident and force to propel a change in constitutional regime without any conscious decision to this effect. The United States was founded on private property and liberal democracy, but much of the 20th century has been witness to a continuing transformation into common property and social democracy. In his masterful little 1932 book *Congress as Santa Claus*, the legal historian Charles Warren illustrated this type of change with respect to the constraints on federal legislation that are imposed by the Constitution’s general welfare clause. Originally, the general welfare clause was a limitation on the ability of Congress to appropriate money, because appropriations could be only for the general benefit of all, as distinct from the particular benefit of some. Warren documented the transformation of this limitation over a century and a half into its opposite, whereby the general welfare clause ceased to be a limit on government because the general welfare came to mean whatever a Congressional majority asserted it to mean. A government
whose actions were limited by principles of private property was transformed into an unlimited
government that managed the commons that had been created out of private property. A
principle of limited government, liberal democracy, gave way to a principle of unlimited
government, social democracy.

The treatment of endangered species provides a good environmental illustration of this
transformation, as portrayed nicely by Terry Anderson in this volume (pp. xx - xx). Endangered
species will be protected within a framework of private property, with the extent of protection
offered depending on the relationship between the value of the species and the cost of protection.
As a species becomes less plentiful, its value rises and the incentives to offer protection through
private protection strengthen. This is illustrated nicely for wildlife in South Africa, in the paper
by Anderson. A framework of private property is exceedingly flexible in accommodating a wide
menu of approaches to the protection of endangered species. No doubt the simplest form is a
direct real estate transaction, where people who want to protect a species buy the land on which a
habitat resides. But private property can also accommodate numerous other, more complex
arrangements. When the protection of endangered species is brought into the domain of
collective choice, private property is transformed into common. When this happens, an owner of
land can no longer do what he chooses to his land, for rather what he can do is subject to
legislative approval and restriction.

The transformation from liberal democracy to social democracy takes place gradually, not
by a single choice but as the product of numerous choices over the years. Suppose you found
yourself playing football, and were pleased to do so. At various intervals over the ensuing years,
changes were made in the rules of play. Would those changes in the rules maintain the integrity
of the game or would they subvert it? One year’s change might have made the ball rounder and heavier. Another year’s change might have eliminated shoulder pads, while in yet another year the helmet was replaced by a soft cap. Still later the sizes of the teams were expanded and the time of a game lengthened by 20 minutes. With the further passing of time, the method of scoring was changed, though not in a way that seemed grossly to affect the aggregate score registered in games. Getting the ball into the end zone now counted only five points, while successful kicks could count either two or three points. Yet other changes in the rules led to an increase in the amount of lateraling and kicking, as well as to a change in the formations used at the line of scrimmage. Would you still describe yourself as playing football? Or might you recognize that you were now playing the quite different game of rugby instead?

3. Social Democracy as Tectonic Clash between Pricing Systems

Is it accurate to describe our present economy as a market economy? Was this description accurate a century ago? Do we still have the same economic system as we had a century ago, though with modified rules? Or do we have a different type of economic system, in which case if we had a market economy then we can’t have one now? Just as some rules generate the pattern of interaction we call football while other rules generate the different pattern we call rugby, so would differences in social rules governing human interaction generate different forms of economic organization. A system of market pricing rests upon the principles or institutions of private property, freedom of contract, and personal liability (Eucken 1952). These principles comprise the framework of rules that constitute a market economy. Within the rules of a market economy, choices regarding the allocation of resources reflect a consensus.
among market participants. Is Tulsa, Oklahoma a suitable place to create a seaport? Within a regime of market pricing, the participants themselves reach an agreement as to the answer for such a question. There is no need for any resort to conflict and domination to reach a resolution over whether the conversion of Tulsa into a seaport would represent a more highly valued use of resources than any other use of those resources. People who think it would be a good idea to turn Tulsa into a seaport can compete openly with those who think the required resources would be more valuable in other uses. Those who are unwilling to bid sufficiently to assemble the required resources are, within the framework of rules provided by private property, freedom of contract, and personal liability, agreeing with those who secure command of resources, that the projects of the successful bidders are the most valuable anticipated uses of those resources.

Tulsa is a seaport today, and has been for around a generation now. The resources required to convert Tulsa into a seaport were not, however, assembled through a system of market pricing. Those resources were instead assembled through a different price system, a political price system whose constitutive rules are not the principles of property, contract, and liability. Whether economists speak of regulation or taxation, they typically construe the state as acting within the market economy to modify the terms of market exchange. Regardless of the extent to which the state might modify market prices, resources are allocated through a system of market pricing in any case. Hence, there is but a single, unitary price system that governs the allocation of resources in society. Actually, there exist two distinct price systems in contemporary mixed economies. One is a system of market pricing, the other is a system of political pricing. Each has its own mode and principle of operation. Moreover, the political price system cannot exist on its own, but can only exist parasitically upon the market price
The market price system is equivalent to an all comers track meet, whereas the political
price system is equivalent to an invitation-only track meet. The parasitical character of political
pricing means that, in this analogy, invitation-only meets are possible only because all comers
meets exist. The economic organization of milk, as the economic organization of agriculture
generally, to pick but one among many possible illustrations, is most surely not governed by a
system of open competition and market pricing. It is governed by a system of closed competition
and political pricing. To be sure, there is a logic of economic relationships that is independent of
the substantive forms those relationships might take. This logic is as applicable to contemporary
mixed economies, regardless of the particular mix of collective and private participation in
resource allocation, as it is to a pure market economy. The economic logic of markets can be
used to analyze the market for milk when milk is produced under the closed market arrangements
created by the contemporary system of marketing orders in the United States. It can likewise be
used to analyze the production of milk under conditions of open competition.

The logic of pricing and allocation, however, is distinct from the historical or institutional
conditions under which pricing and allocation occur. Only if milk were produced under open
competition would it be substantively correct to say that the production of milk was organized
through a system of market pricing. When production takes place under marketing orders,
resources are allocated through a system of political pricing. Market pricing and political pricing
are two distinct, though connected, sets of rules that guide the allocation of resources, and the
boundary between the two systems of pricing forms a combat zone in society, as Webber and
Wildavsky (1986) explain, particularly in their distinction between individualist-market and
egalitarian-sectarian regimes. Politics, in other words, does not take place on a smooth, continuous surface, but on a tectonic landscape.4

In place of alienable and several ownership, a political price system invokes common ownership and management by committee. With private property the permission of no particular resource owner is required. Resources must be assembled with the agreements of owners, but there is no particular owner whose agreement is necessary. With common or state property, the permission of particular people is required, as with a zoning board or an Environmental Protection Agency. In place of contract, a political price system invokes duress and coercion. Command over resources can be secured through force and intimidation, and not just through agreement. In place of personal liability, a political price system invokes common liability. Losses that result because enterprises do not operate as initially anticipated or projected are not borne by the sponsors of those enterprises but are spread throughout the polity.

Governmental decisions concerning resource allocation, unlike those of organizations that participate within the market economy, are not constrained by the consensual requirements that a market economy imposes. Where market pricing reflects contractual relationships, political pricing reflects rapacious relationships. Government is thus able to generate a system of pricing that is different from what would emerge through market pricing. Indeed, it is the creation of such alternative prices that surely provides the reason why people seek to use government in the first place. If it were not for its ability to replace market prices with political prices, there would be no support for a system of political pricing. What is social reform, after all, but a change in prices?

Political pricing represents a different approach to making choices concerning resource
allocation. It is an alternative price system whose operation is constituted by different rules than those that constrain the operation of a market price system. How different depends, perhaps, on constitutional and institutional matters. The Wicksellian approach or tradition in public finance seeks to have political pricing correspond to the same consensual principle that undergirds market pricing.\(^5\) Other institutional formats diverge in various ways from the consensual principle.

I have no argument against the use of economic reasoning to examine the operation of markets under various governmental constraints. An economic logic is as capable of illuminating how it happened that Tulsa’s becoming a seaport was an outcome of a system of political pricing, as it is of explaining why it would not have arisen within a system of market pricing. It is a mistake, however, to go from a general logic of pricing and allocation to characterize actual pricing and allocation as occurring under a system of market pricing, regardless of the rules governing human relationships and choices concerning resource allocation. Our knowledge of pricing and allocation is inadequate so long as we fail to recognize that we inhabitants of contemporary social democracies live in the presence of two distinct, though connected, regimes of pricing and allocation.

4. Parasitical Political Pricing as a Natural Limit on Government?

To note that market prices are self-generating and self-sustaining is not to assert that orderly and peaceful anarchy is a viable historical option. Rather it is to assert only that if people were to limit their activities to those governed by the principles of property and contract, an organized network of economic relationships will arise and these relationships will sustain
themselves. We have authentic and coherent knowledge about the self-organizing features of a market economy. If people were to conduct themselves according to the principles that constitute a system of market pricing, an orderly and sustainable network of economic relationships would arise.

No such claim can be made about a collective economy. In the absence of private property, freedom of contract, and personal liability, market pricing will not arise. Resource allocation would require planning and allocation without markets. This is impossible, as recognized even by those faint-hearted proponents of communism who advocated the oxymoronic fiction of market socialism. It is conceivable that there could exist a market economy without a polity and political prices; it is inconceivable that there could exist a collective economy without a market and market prices. Political prices are neither self-generating nor self-sustaining. The presence of a market economy and market pricing is necessary for a collective economy and political pricing to arise. Those enterprises that are organized through the state-regulated commons and its system of political pricing exist parasitically upon those enterprises that are organized through private property and genuine market pricing. A collective economy organized within a framework of common property can exist only in the presence of a host market economy that is organized within a framework of private property.

The constituency for political pricing and enterprises arises from the ability of those enterprises to provide advantageous pricing for at least some set of people. On the product side of the market, political prices must be lower than market prices for at least some buyers. On the factor side, political prices must be higher than market prices for at least some suppliers. The
constituency for political pricing arises from these price advantages. There are two possible sources of price advantage for public enterprises. One is efficiency, as portrayed in the various models and claims of market failure. A public enterprise that was more efficient than the private substitutes would be able to secure price advantages for everyone. While efficiency cannot be ruled out analytically, its range of empirical applicability does seem tightly limited. The other source of price advantage is price discrimination. An inefficient public enterprise can still secure price advantages for some, so long as it can impose discriminatory pricing on everyone else.

It is common to model a firm as producing a single product and selling it at a uniform price. Aside from those exceptional cases where a public enterprise has superior efficiency, collective enterprises cannot sell at a uniform price. For if they were constrained to a single price, they could not generally compete with market-based enterprises. To be sure, it is sometimes claimed that political enterprises do not have to earn returns for equity holders, and thus have a lower cost of capital that can be passed along through lower prices. This claim is mistaken. Governments can generally borrow more cheaply than private enterprises not because they involve less risk and, hence, a lower cost of capital, but because they can shift risk from bondholders to taxpayers. Hence, what appears to be a lower cost of capital is really a by-product of there being two prices at the factor supply level: one is a price to bondholders and the other is a tacit or implicit price to taxpayers. This latter component of cost is left out of the claim that the nonprofit status of government gives it a cost advantage over private firms. A political enterprise may offer prices to some buyers that are lower than what market enterprises offer, but only because they also charge higher prices to other buyers--and have the ability to force consumption at those higher prices. If a market enterprise sells at a single price, the creation of a
political enterprise will thus involve at least two prices, one below the market price and one above the market price. The higher price is necessary to make the lower price possible.

The organization of water supply provides numerous illustrations of the conflict between common and private property as frameworks for governing the organization of economic activity. Irrigation, for instance, can be organized through either private property or common property, as illustrated by several of the essays in Anderson, ed. (1983). Suppose irrigation were organized collectively through common property, with a Bureau of Reclamation as the manager. The support for the collective irrigation enterprise will depend on the ability of the enterprise to offer lower water prices to its supporters. The collective enterprise cannot do this while charging a common price to all consumers. If it were to charge a common price, that price would be higher than what private enterprises could offer and the collective enterprise could not compete against enterprises organized within a framework of private property. The collective irrigation enterprise can establish a competitive position only if it charges lower prices to a group of sufficient size to secure the necessary political support. To accomplish this requires some form of price discrimination, with the higher prices charged to some people providing the means for awarding price reductions to supporters.

The central problem in maintaining a system of price discrimination, of course, resides in preventing the emergence of a secondary market in water. Should those who are offered low prices sell water to those who would otherwise be charged high prices, the discrimination scheme would disintegrate. Price discrimination requires the prevention of a secondary market, which in turn requires that transfers among buyers of rights to water be prohibited. A further obstacle to the maintenance of price discrimination to support a collective irrigation enterprise resides in the
threat of alternative, privately organized sources of supply. The collective enterprise cannot exist as one competitor among many, at least so long as its revenues are derived from consumer payments. Some territorial monopoly in conjunction with prohibitions on transferability among customers are central imperatives for irrigation enterprises organized under common property.

Taxation offers yet another source of price discrimination that further strengthens the survival power of the collective enterprise. For one thing, the receipt of budgetary appropriations is a method of reducing the prices to customers by imposing charges on those who are not customers. Actually, there are two ways that taxation lowers the price to customers by imposing charges on those who are not customers. One operates directly through the appropriations process. The other operates through the cost of capital as the operation of the market for capital is repressed. Under private property the cost of capital to an irrigation enterprise would reflect investor expectations in an openly competitive market where enterprises have to compete for investors. With the collective enterprise, however, taxpayers become forced investors whose liability, moreover, is not limited by their investment. The collective irrigation enterprises organized within a Bureau of Reclamation do not compete for willing investors and do not have any direct cost of capital.

As the extent of collective enterprises organized within common property expands relative to the private enterprises organized under private property, an increasing number of market prices are suffocated or impaired, and are replaced by political prices that are administrative and not grounded in preferences and technology. Although there is considerable controversy over the details of explanation, economists are agreed that a valuable feature of market pricing is the assistance it gives to economic calculation. Market prices serve as
navigational aids to economic calculation. While prices are not sufficient information for effective economic conduct, they are necessary and powerful. They are navigational aids that improve the efficiency with which people get where they want to go, even if they cannot prevent people from wrecking or getting lost. Whatever the network of navigational aids that comprise a market economy might look like, the injection of political pricing disables some of those aids. Sometimes it does so completely, as equivalent to destroying a buoy. At other times it does so only partially, as in giving the buoy a loose and variable anchorage. In any case, a political price cannot compete directly against a market price, so the injection of political pricing into the economy must involve the degradation if not the destruction of market pricing in those areas most closely related to the price domain of the public enterprise.

Through the destruction or degradation of market prices, the growth of the political price system reduces the quality of the navigational aids that inhabit the economy. Contrary to Littlechild (1978), however, I offer no argument for any “fallacy” of the mixed economy. Rather what I offer is a line of argument suggesting that political pricing becomes more damaging as its scope expands. Even in a world of full market pricing, economic wreckage would arise, and in many ways. There would be all kinds of ways in which enterprises and projects will have been undertaken that do not turn out as planned. In some cases the actual outcome will have been less satisfactory than what was planned or anticipated, and the promoter, as well as those who relied on him will suffer various kinds of capital losses. The opposite outcome is possible as well, of course, in which case the promoter finds himself with too small an enterprise. In any case there will exist unanticipated capital gains and losses in a purely market economy because the navigational aids that market prices represent can never be fully sufficient instruments for
judgment and choice. The absolute value of capital gains and losses is an indicator of the extent to which plans have not been fulfilled.

As political pricing grows and market pricing weakens, the volume of economic wreckage will surely increase. Political prices attach themselves to particular market prices, extinguishing the market prices in the process. Due to the connectedness among market prices, there is little problem for political prices to substitute for market prices when their numbers are small. But as political prices proliferate and an increasing number of market prices have been extinguished, the informational value of market prices declines and economic calculation becomes increasingly difficult and mistaken. The economic wreckage that might be attributed to the degradation of the calculational aids represented by market prices are unlikely to be distributed uniformly throughout the economy. Their distribution would probably reflect the pattern of injection of political pricing into the economy. Economic wreckage would increase in those places where political prices had more fully degraded market prices. Environmental issues provide some prime examples of this economic wreckage because for numerous environmental amenities political prices have largely replaced market prices.

This has a number of potential empirical implications, or so it would seem. For one thing, the growth of political pricing would increase the volume of unanticipated capital gains and losses in the economy, relative to various economic aggregates. Growth in an economy characterized by a robust political price system would be distributed differently than growth in an economy dominated by market pricing. Provided only that political prices are not distributed uniformly throughout the economy, the variability of growth rates across the economy would expand along with the expansion in political pricing. More rapid growth would occur in those
areas where the navigational aids offered by market prices had been less degraded by political pricing.

On the other hand, in those areas were political pricing was relatively strong and the reliability of navigational aids relatively weak, economic wreckage would loom larger. This greater riskiness would be accompanied by larger costs of capital to market participants who sail those waters, and the stock market betas of such enterprises should be larger due to the expansion of political pricing. Conversely, enterprises operating in areas where political pricing was relatively slight would have lower costs of capital and lower betas.\(^9\)

It is obvious that there is some limit to the extent to which the political price system can operate in a society, due simply to the parasitic nature of political pricing. Without a system of market pricing, political pricing cannot exist. This purely formal point sheds no insight into just where short of 100 percent that limit might reside. Whether it is possible to advance some numerical limit is dubious, because the limit could well depend on the particular location at which political pricing replaced or degraded market prices. In any case, contemporary social democracies do not possess a single system of market pricing whose operation is in various ways shaped and constrained through government. Rather they possess dual pricing systems, with political pricing bearing a parasitic relationship to market pricing. The economic organization of agriculture and broadcasting, for instance, take place within a different system of property and pricing than does the economic organization of magazines and newspapers, just as surely as rugby and football entail different systems of rules for governing human relationships.

5. Ordnungstheorie and the Movement beyond Natural Limits
What I have characterized as the natural limit on the extent of common property and political pricing corresponds to the accident and force articulated by Hamilton in *Federalist No. 1*. It remains to be seen whether it is possible to limit further the reach of social democracy through constitutional craftsmanship. The Germanic tradition of *Ordnungstheorie*, articulated nicely in Walter Eucken (1952), provides a nice vehicle for exploring the problem of limiting the reach of social democracy beyond that contained in the parasitical relationships between common and private property. Eucken invoked a fundamental distinction between the framework within which economic processes unfold and the specific operation of those processes. This formulation distinguishes two types of policy measures: those that shape the economic order and those that represent particular adjustments within the framework of that economic order.

The choice of frameworks is constitutional in character. This is a choice among different regimes and principles for governing human relationships. This is a choice that either we can make expressly or we can make by default, but make it we will in any case. Along one path lies the economic organization of a society where people relate to one another through reciprocity and equality, as provided by a framework of contract and private property. Along the other path lies the economic organization of a society where people relate to one another as grantors and supplicants, as provided by a framework of domination and common property. This alternative is the inexorable imperative of common property and social democracy, for those who are invited to complete occupy a privileged position, and those who issue the invitations are grantors who can always count on having supplicants at their doorsteps.

It is easy, however, for piecemeal policy measures to generate incentives that ever more continually undermine the market economy, replacing liberty and responsibility with servility and
dependence in the process. As a source of orientation for the conduct of economic policy for a liberal democracy, there is much merit to a requirement that state policy measures be congruent with the central operating features of a market economy, which entails the principles of property, contract, and liability. The point of such a constitutional orientation would be to give scope for government policy, only to do so in a way that such policy would tend to support the basic principles of a market economy, which are the principles of liberty, autonomy, and responsibility. The opposite principle is one that leads to differential ranks of overseers and underlings, to those who dispense noblesse oblige and those who are the recipients of that oblige.

The injection of nontransferability into water supply policy, for instance, would clearly be a non-conformable policy measure. States could still participate in the organization of water supply projects, but their modes of operation could not violate the principles of property and contract. Hence, states could not prevent the emergence of a secondary market for water. As an alternative illustration, a state could still be involved directly in the preservation of wetlands. Contracts with land owners to preserve marshes would conform to the principles of a market economy, whereas the direct imposition of prohibitions against draining marshes would violate the principle of conformability. A requirement that policy measures pass a test of market conformability is one that would seek to allow government to act consistently with the principles of private property while restraining it from transforming private property into common.

The distinction between conformable and non-conformable measures, if treated as a constitutional requirement for economic policy, might well serve as a kind of constitutional compass. Starting from a normative affirmation of the central principles of a liberal society, such a compass would declare that a wide range of policy measures are open to the state, subject
to the limitation that the particular content of those measures cannot violate the principles of private property, freedom of contract, and personal liability. In this manner, such a limitation on the possible domain of policy measures would perhaps restrict some of the problems of time inconsistency and path dependency that might otherwise operate to produce a degeneration of liberal democracy through liberal democratic processes. To be sure, questions of interpretation concerning the requirement that policy measures conform to the principles of property, contract, and liability would arise, and I would have to be confronted. Those interpretative questions would surely be no more difficult than those that surround First or Fifth Amendment interpretation these days.

At the same time, the problem of the elasticity of interpretation raises knotty issues. I would never want to depreciate the value of such scholarly efforts as those of Siegan (1980) and Epstein (1985), who show clearly how the Supreme Court has ceased its protection of private property in this century. At the same time, however, I think the task of restoring constitutional protection for property and liberty involves more than judicial criticism, if for no other reason than what is surely the reasonable presumption that the potential elasticity of interpretation surely varies directly with the amount of the stakes involved in any act of interpretation. While I do not think that any circle can be squared through sufficient interpretative creativity, I do think that there are a good number that can.

*Hawaii Housing Authority v. Midkiff* (104 S.Ct. 2321 (1984)) is a good illustration of the opportunities for interpretative creativity. Hawaii passed a statute that required landowners to sell their property to tenants. While the 9th Circuit ruled unanimously against Hawaii, the Supreme Court reversed the 9th Circuit, again unanimously. The reasons given made dubious
references to an oligopolistic land market in Hawaii. Yet it would have been possible to craft a line of reasoning that actually had constitutional resonance. Article 4, Section 4 holds the federal government responsible for guaranteeing that the states maintain republican forms of government. There is a great deal of American republican tradition that holds that landownership rather than tenancy promotes the republican virtues. It would thus seem possible to craft a constitutionally resonant line of argument in support of Hawaii. While there are surely limits to the interpretative imagination, any approach to constitutional enforcement that seeks to protect private property must ultimately involve more than judicial procedures and interpretations.

6. Madison’s Principle of Dual Security

Madison articulated an important principle of constitutional enforcement in *Federalist* No. 51, when he argued how governments would control both themselves and each other through the compound republic the constitution would establish:

In the compound republic of America, the power surrendered by the people is first divided between distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. *The different governments will control each other,* at the same time that each will be controlled by itself (italics supplied).11

Among other things, there is a significant judicial asymmetry regarding the ability of the different governments to control each other, as noted in Niskanen (1978). Claims that a state legislature oversteps its bounds can be heard before federal forums. This is consistent with the proposition that no man should be a judge in his own cause. However, similar claims about the
federal legislature can be heard only by federal officials. This places the federal government as a judge in its own cause. Madison’s principle of dual security would seem to require that claims about federal constitutionality should be heard in state-convened forums, in one fashion or another, for otherwise the federal government is standing as a judge in its own cause.

This insulated position of the federal government was strengthened by the 16th and 17th Amendments. The former allowed Congress to levy taxes without regard to apportionment among the states, while the latter did away with the ability of states to select senators. Together, they elevated the federal government to a relatively monopolistic position within our federal system of government. Unlike the federal government, individual states exist in a relatively competitive environment where they must attract residents in an open economy. It is reasonable to treat states as if they operate under some Wicksellian principle of approximate unanimity. It is now different for the federal government. The 16th and 17th Amendments expanded the ability of the federal government both to place states in a prisoners’ dilemma setting with respect to their acquiescence in federal programs and to participate in the organization of coalitions of interest groups the cut across state lines.

The prisoners’ dilemma setting is well illustrated by federal grant programs, which are commonly used as a vehicle by which the federal government expands its reach, in environmental as well as in other areas. A state does not have to participate in a federal grant program. If it does not, however, its residents will pay the same federal taxes in any case. Individual states are placed in the position of paying and participating or paying and not participating. That nonparticipation will simply leave larger revenues to be spent among the states that do participate. All states may well prefer that none participate and that federal taxes be lowered
instead. But they are never given this choice. A very different situation would be created if the federal government had to sell such programs to the states. A state that chose not to participate would at the same time be choosing lower federal tax payments for its residents.

In the private law of contract there is a concept of duress. What is the equivalence of duress in public law? It would surely represent collective action that was contrary to the will of a participant in that action. At present the “consent of the governed” articulated in the Declaration of Independence is treated only formally and not substantively. Hence it is said that we consent to governmental actions because we don’t kill ourselves or emigrate or agitate for insurrection. What if the consent of the governed was taken to be a substantive promise? A consideration of this question is well beyond the scope of this question. Madison’s principle of dual security suggests we look in two places for an answer. One is to the division and fragmentation of authority within a unit of government. The other is to the ability of different levels of government to check each other, as envisioned in the principle of a competitive federalism.

We are witnessing a growing call supported by increased litigation for taking seriously and accurately the Fifth Amendment’s strictures against the taking of private property. We are also witnessing a growing interest in bringing the 9th and 10th Amendments back into play as methods of protecting private property. I have no quarrel with any of these efforts. I do, however, think that the success of those efforts also requires more substantial institutional reformation along the lines of creating a federal system of government that is openly competitive, which in turn would take seriously Madison’s recognition in Federalist No. 51 that the protection of private property against government requires that each level of government be able to police the other.¹²
The environmental issues discussed in this volume are but an example of a much larger issue, namely, how can government be constrained within a modern democracy? Good governance requires both a clear normative map and constitutive arrangements that reinforce congruent practice. Augustine, in his City of God, tells the story of a pirate who was captured and brought before Alexander the Great. When Alexander castigated the pirate, the pirate responded: “I do my fighting on a tiny ship, and I am called a pirate. You do yours with a large fleet, and you are called a commander.” Augustine, in noting that the pirate’s response to Alexander was wholly accurate, asked: “In the absence of justice, what is sovereignty but organized brigandage?” Justice may exist when human relationships are governed by reciprocity and exchange, but it can never exist when they are governed by domination and supplication, and yet domination and supplication are natural outcomes of common property and social democracy.
Endnotes

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References


1. Less sweeping in scope but to the same effect is Donald Wittman’s (1995) claim that democracy is economically efficient, in sharp contrast to the predominant thrust of the contemporary literature on public choice.


3. For a clear recognition of this dual system of pricing, and of the parasitical character of political pricing, see Maffeo Pantaleoni (1911). For amplification, see Wagner (forthcoming).


5. Wicksell’s (1896) formulation is described in terms of the contemporary literature on public choice in Wagner (1988).

6. See, for instance, the papers collected in Hayek, ed. (1935). In a related vein, Roberts (1971) shows that the Soviet Union did not replace market allocation with collective planning, but rather created a form of political price system that sought some anchorage in some semblance of market pricing.

7. Even Lott’s (1990) model of predatory pricing by public enterprises derives some of its features by virtue of the public enterprise’s being able to operate without regard to returns to stockholders-taxpayers, and hence to operate with a second source of financing outside that raised directly from prices.

8. For valuable treatises, see Hirshleifer, DeHaven, and Milliman (1960) and Ostrom 1953.

9. To be sure, the presence of political pricing is not the only reason for betas to vary among enterprises. I am not advancing any semblance of a theory of beta here, but am trying only to illustrate some of the implications of political pricing and economic calculation.

10. In this vein, see, for instance, Leipold (1990), Streit (1992), and Vanberg (1988).

11. For a crisp articulation of Madison and the federalist vision, see Vincent Ostrom (1987).