Equality, Justice, and Freedom: A Constitutional Perspective

James A. Dorn

The publication of Thomas Piketty's best-selling book *Capital in the Twenty-First Century* (2014) has raised awareness of the rising inequality of income and wealth. The author argues that such inequality threatens democratic values and should be reversed by imposing steeply progressive income and wealth taxes on the rich and near-rich. His policies, if implemented, would create more equal outcomes but undermine the principles of freedom and justice that are the essence of the U.S. Constitution.

The notion of equality is central to any discussion of the legitimacy of markets and government. This article investigates alternative meanings of equality, especially as the term applies to economic and political equality, derives the implications of each for the legitimacy of markets and government, and considers the role of the state in the maintenance of a free society. It will be seen that the legitimacy of the U.S. system of government is based on limiting the power of government to the protection of persons and property.

The roots of legitimacy for America's constitutional republic and for capitalism can be traced to what Corwin (1955) called "the 'higher law' background" of the Constitution. In the Framers' Constitution, majority preferences are bounded by constitutional principles—that is, higher-law principles or what Sir Edward Coke referred to as

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James A. Dorn is a Senior Fellow at the Cato Institute. This article is adapted from Dorn (1990).

"common right and reason" (Corwin 1955: 44). The constitutional perspective sees natural rights to life, liberty, and property as being self-evident and prior to the institution of government.[1] In a rights-based approach to constitutional legitimacy, liberty trumps democracy. That view is in sharp contrast to Piketty's contention that "capitalism and markets should be the slave of democracy" (quoted in Schuessler 2014).

The constitutional perspective on equality—namely, equal rights and freedom under a rule of law—has been eroded as the redistributive state has grown. Equality has come to mean equal outcomes and "equal opportunity," in the sense of equal starting positions, rather than equal rights under a just rule of law. The trend toward what Anderson and Hill (1980) have called the "transfer society" has been encouraged by a complacent judiciary that has split the constitutional rights fabric in half, creating an artificial distinction between economic and noneconomic rights, with only the latter being afforded the status of fundamental rights (Dorn 1986). As Mayer (2011: 8) notes, "It is the creation of this double standard, under which economic liberty and property rights are devalued compared with more favored liberty rights, that improper judicial activism . . . can truly be found."

The loss of the constitutional perspective has given rise to what James M. Buchanan (1977: 296) has called "constitutional anarchy." More than a century earlier, Frederic Bastiat ([1850] 1964: 238–39) warned:

> If you make of the law the palladium of the freedom and the property rights of all citizens, and if it is nothing but the organization of their individual rights to legitimate self-defense, you will establish on a just foundation a rational, simple, economical government, understood by all, loved by all,

[1]The epistemological problems surrounding John Locke's natural rights theory have been exaggerated, according to Epstein (1985: 11–12), at least as they relate to constitutional theory. Likewise, Pilon (1981: 7) notes that although the Framers lacked modern epistemological tools, they "got it right, right as a matter of ethics." The important point is that the Framers did accept the conclusions of Locke's political philosophy even though his reasoning may have been flawed in part. Carl Becker (1958: 72) argues: "It was Locke's conclusion [regarding the inviolability of property] that seemed to the colonists sheer common sense, needing no argument at all."

> useful to all, supported by all, entrusted with a perfectly definite and very limited responsibility, and endowed with an unshakable solidarity.
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> If, on the contrary, you make of the law an instrument of plunder for the benefit of particular individuals or classes, first everyone will try to make the law; then everyone will try to make it for his own profit. There will be tumult at the door of the legislative chamber; there will be an implacable struggle within it, intellectual confusion, the end of all morality, violence among the proponents of special interests, fierce electoral struggles, accusations, recriminations, jealousies, and inextinguishable hatreds; . . . government will be held responsible for everyone's existence and will bend under the weight of such a responsibility.

Those conflicting views of law and justice have as much relevance today as they did in Bastiat's time. Understanding their ramifications is essential for the maintenance of a free society.

In the modern redistributive state, equality of rights has been crowded out by equality of outcome; equal opportunity has been turned on its head; and limited government has given way to legislative activism. Cronyism and rent seeking have become the dominant features of democratic states as special interests seek to use the power of government for their own benefit. Consequently, the constitutional perspective—with its emphasis on ordered liberty, equal rights, and a just rule of law—has been seriously eroded.[2] Accordingly, the security of private property and freedom of contract have been jeopardized with a consequent rise in the uncertainty surrounding rights to property, liberty, and contract.

Equality of Rights and the Constitution of Liberty

From a constitutional perspective, equality means first and foremost the equality of rights under a just rule of law, with the basic right of every individual being the right to noninterference (Pilon

[2]The institution of slavery cast a big shadow on the Framers' Constitution, though the Civil War amendments helped to rectify that injustice. The "constitutional perspective" is one that recognizes fundamental rights and the importance of just rules that guide long-run behavior so that individual actions can be coordinated and result in economic and social harmony. That is why well-defined property rights are so important.

1979b, 1979c, 1981, 1983). That fundamental right stands at the center of what F. A. Hayek (1960) called the "constitution of liberty."

The basic principles inherent in the natural rights doctrine were stated in the Declaration of Independence and were used to justify the American Revolution. Their content is well-known: "All men are created equal . . . with certain unalienable Rights"; "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed"; and "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it." The Constitution stands on those higher-law principles and is best viewed as a charter for limited government and individual freedom, not a blueprint for majority rule (see, e.g., Barnett 2004, Neily 2013).

The higher-law standing behind the written Constitution is what Cicero called "true law"—namely, "right reason, harmonious with nature, diffused among all, constant, eternal; a law which calls to duty by its commands and restrains from evil by its prohibitions" (Corwin 1955: 10). It encompasses the principles inherent in "the rule of law" regarded as "a meta-legal doctrine or a political ideal" (Hayek 1960: 206). Chief among those principles are the supremacy of private or common law, equality of the law, and priority of individual rights (Dicey [1915] 1982: 120–21). Those principles form a common web because equality, justice, and freedom are all central to the higher-law background of the Framers' Constitution.

At the heart of the English common or private law, and implicit in the U.S. Constitution, is what Hume ([1739–40] 1978: 526) called the "three fundamental laws of nature—that of the stability of possession, of its transference by consent, and of the performance of promises." Adam Smith ([1759] 1976: 163) referred to them as the "laws of justice," and F. A. Hayek (1982, vol. 2: 40) termed them the "rules of just conduct." Equality under the law requires equal treatment or due process and, at a more fundamental level, equal rights. Thus, the rule of law places substance above process.

James Madison, the chief architect of the Constitution and Bill of Rights, accepted John Locke's natural rights' position that "the *State of Nature* has a Law of Nature to govern it, which obliges every one. And Reason, which is that Law, teaches all Mankind . . . that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions" (Locke 1965: 311). He also accepted Locke's dictum that "The great and *chief end* . . . of Mens uniting into

Commonwealths, and putting themselves under Government, *is the Preservation of their Property,*" by which Locke meant their "Lives, Liberties, and Estates" (p. 395).

Madison, following in the Lockean natural rights tradition, placed property and equality of rights at the core of his constitutional system, a system in which both economic and noneconomic liberties were to be afforded equal protection under the law of the Constitution and enforced by a vigilant judiciary.[3] As Madison (1865: 51) wrote:

> It is sufficiently obvious, that persons and property are the two great subjects on which Governments are to act; and that the rights of persons, and the rights of property, are the objects, for the protection of which Government was instituted. These rights cannot well be separated. The personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right.

In his famous essay "Property," which appeared in the *National Gazette* on March 29, 1793, Madison argued that "in its larger and juster meaning," property "embraces every thing to which a man may attach a value and have a right, and *which leaves to every one else the like advantage*." An individual thus has a property right in "his opinions and the free communication of them, . . . in the safety and liberty of his person, . . . [and] in the free use of his faculties and free choice of the objects on which to employ them." Justice requires that government safeguard "property of every sort." Consequently, Madison stated: "that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*" (Hunt 1906: 101–2).

The idea that to be legitimate law must be impartially administered and protect property broadly conceived was self-evident to the Framers. Although those abstract principles were not fully realized in practice, they set a framework for future constitutional change, as evidenced by the Thirteenth and Fourteenth Amendments.

In establishing a constitutional republic, Madison's main concern was to limit the power of government and protect persons and

[3]For an in-depth account of the higher-law background of the Constitution and its influence on Madison, as well as his view of the judiciary, see Dorn (1988).

property. Writing to Thomas Jefferson in 1788, Madison noted: "In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its Constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents" (Padover 1953: 254).

By limiting the powers of government and reaffirming the rights of individuals, the Constitution and Bill of Rights set the basis for a free society—that is, a social and economic order characterized by equal rights and equal freedom. As Pilon (1983: 175) argues,

> The free society is a society of equal rights: stated most broadly, the right to be left alone in one's person and property, the right to pursue one's ends provided the equal rights of others are respected in the process, all of which is more precisely defined by reference to the property foundations of those rights and the basic proscription against taking that property. And the free society is also a society of equal freedom, at least insofar as that term connotes the freedom from interference that is described by our equal rights.

In the Madisonian, natural-rights view of the constitutional contract, there are no welfare rights entailing positive obligations on the part of the state to take private property from A, in the name of "social justice," and redistribute it to B without A's consent. The right to noninterference carries only the negative obligation to refrain from interfering with the equal rights of others to their property and freedom. As such, under the constitution of liberty, there is a consistent set of rights, all of which flow from the basic right to noninterference. In that "world of consistent rights, everyone can enjoy whichever of his rights he chooses to enjoy at the same time and in the same respect that everyone else does, and the negative obligations correlative to these rights can be satisfied by everyone at the same time and in the same respect that he enjoys his own rights by noninterference" (Pilon 1979c: 1340–41).

The Madisonian system of government, being one of equal freedom and justice, is in sharp contrast to the modern redistributive

state with its emphasis on forced transfers. As Bastiat ([1850] 1964: 65) stated:

> When law and force confine a man within the bounds of justice, they do not impose anything on him but a mere negation. They impose on him only the obligation to refrain from injuring others. They do not infringe on his personality or his liberty or his property. They merely safeguard the personality, the liberty, and the property of others. They stand on the defensive; they defend the equal rights of all. They fulfill a mission whose harmlessness is evident, whose utility is palpable, and whose legitimacy is uncontested.

When equality is viewed from a constitutional perspective, the emphasis is on equal rights and equal freedom, which are essential for legitimate constitutional choice—that is, a just constitutional order. In this respect, Madison (in Hunt 1906: 102) remarked:

> That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest. . . . Nor is property secure . . . where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word, but are the means of acquiring property strictly so called.

Underlying the legitimacy of the Framers' Constitution, therefore, is what John O'Sullivan, editor of the *United States Magazine and Democratic Review*, referred to as the "voluntary principle." In 1837, he wrote: "The best government is that which governs least." Thus, legislation "should be confined to the administration of justice, for the protection of the natural equal rights of the citizen, and the preservation of the social order. In all respects, the voluntary principle, the principle of freedom . . . affords the true golden rule" (Vernier 1987: 12). From a constitutional perspective, then, equality refers to the equal rights of individuals to be free from interferences affecting their lives, liberties, and estates.

Buchanan and Tullock, in their classic *Calculus of Consent* (1962: 250), argue that when choosing the rules of the game (the

constitution) "full consensus . . . among all members of the social group seems . . . to be the only conceivable test of the 'rightness' of the choices made."[4] Indeed, it is the *voluntary* nature of any choice that justifies it under the process-driven model, but one must also ask if anyone's rights have been violated in the process. Hence, in determining the legitimacy of governments, "process will not carry the day; substance must" (Pilon 1985: 826). That is why the rights-driven model of constitutional legitimacy is a necessary complement to the unanimity rule. By accepting property, liberty, and contract as self-evident natural rights, the Framers' sought a system of government that would secure those rights.

In sum, individual rights to life, liberty, and property are justified by "right reason" not by majoritarianism, and the function of a just government is to protect both economic and noneconomic rights under the rubric of the property right. In this sense, Pilon (1985: 829) emphasizes that the "substantive element [in due process] is justified not because it reflects the will of the majority, not because it has been determined by some democratic process, but because it is derived from principles of reason."

Insofar as the judiciary safeguards those principles embodied in the higher-law background of the Constitution, individuals will be able to pursue their own interests provided they respect the equal rights of others. By limiting the range of political choice in the post-constitutional setting, the Framers wisely provided for a structure and function of government compatible with free markets and a political setting in which individual rights come first and majoritarianism second.

[4]Rutledge Vining, who influenced Buchanan and Tullock at the University of Virginia, recognized this aspect when he wrote:

> To be free to act as one chooses and at the same time to recognize the freedom of others to do likewise can only mean that all participate equally in setting the constraints upon individual action. For no one is free unless all abide by the rules of conduct which all can be brought to accept as approximate constraints upon individual action. . . . To require of each individual that he takes no action which impairs the freedom of any other individual is to accept the moral principle that no individual should treat another simply as a means to an end. Each individual chooses the rules and principles for the guidance of his conduct, but he does so under the general principle that no rule of action will be adopted which could not be universally adopted by all individuals [Vining 1956: 18–19].

Equality of Outcome and the Redistributive State

A change in the meaning of equality—from equality of rights to equality of outcome—transforms the function of government from one of protection to one of redistribution. As such, there is a shift away from the Framers' minimal state to the modern welfare state. In this shift, the concept of justice also undergoes a transformation, losing its classical connotation of equal freedom and taking on the connotation of "social justice," which is to be achieved by forced transfers and socioeconomic regulation. Thus, instead of a substantive theory of rights and justice consistent with a free-market process and a social compact theory of the state, the acceptance of equality of outcome as the basis for legitimacy leads to a purely consequentialist model of markets and government and to an end-state concept of justice.[5]

When viewed from the outcome-driven model of equality, the concepts of economic equality and political equality also take on new meanings. Economic equality, instead of meaning open competition and the protection of individual rights to private property and freedom of contract, is now defined in terms of distributive justice. The focal point thus shifts from rules to results and from freedom to coercion as the state attempts to impose some predetermined pattern of income and wealth distribution on the free-market process. The constitutional perspective is thereby distorted as judicial and legislative eyes turn toward what Hayek (1982, vol. 2) has called the "mirage of social justice." Similarly, political equality, when viewed outside the Framers' system of limited government, becomes more focused on the democratic process than on effectively constraining the powers of government and safeguarding individual freedom. The danger is that without effective constraints on majoritarian impulses to redistribute income and wealth, democracy will trump liberty—thus, politicizing economic life and slowing economic growth.

The demise of substantive protection of economic rights in the United States since the late 1930s has eroded the economic constitution and expanded the size and scope of government.[6] The Supreme

[5]On the difference between the process concept of justice and the end-state concept, see Nozick (1974: 153–60).

[6]In 1988, William Niskanen, then chairman of the Cato Institute, observed: "The erosion of the economic constitution and the pervasive growth of government are among the more important characteristics of our times" (Niskanen 1988: xiii). See also Dorn and Manne (1987), Epstein (1985), and Siegan (1980, 1984).

Court's reliance on the "rational basis" test has effectively eliminated judicial review in the field of economic liberties, leaving the door open to all sorts of legislative mischief. Commenting on this development, Epstein (1984: 28) wrote:

> Under present law, if any conceivable set of facts could establish a rational nexus between the means chosen and any legislative end of government, then the rational-basis test upholds the statute. In theory, the class of legitimate ends is both capacious and undefined, while the means used need have only a remote connection to the ends chosen. In practice, every statute meets the constitutional standard, no matter how powerful the arguments arrayed against it.

In sum, the movement from a rights-based view of equality toward an outcome-based view has turned the Framers' Constitution on its head. The safeguarding of persons and property, which Madison held as the primary function of a just government, has given way to the promotion of social justice via the redistributive state. Rent seeking has risen as the judiciary has abandoned substantive due process with respect to economic liberties.[7] The notions of economic and political equality have taken on new meanings that are inconsistent with the "voluntary principle." The linkage between moral and political legitimacy, therefore, has been severed (see Pilon 1982).

The Chameleon of Equal Opportunity

Equality is often interpreted as "equal opportunity," but that usage sometimes refers to equal rights and other times to equal starting conditions.[8] In the former sense, equal opportunity simply means equal freedom under what Bastiat ([1850] 1964: 94) called the "law of justice"—that is, the law of liberty or higher law underlying the

[7]Jan Tumlir (1985: 14) understood that "if we are to explain the rise of rent seeking to a dominant form of democratic politics, we must focus on the change in constitutional interpretation."

[8]See Pilon (1982: 37–39) and Friedman and Friedman (1980: chap. 5). Both Pilon and the Friedmans recognize that equality of opportunity—in the sense of equal freedom—is fully consistent with the Framers' Constitution. However, when viewed as equality of material starting conditions, equality of opportunity is at odds with the free society envisioned by the Framers.

Framers' Constitution. As such, equality of opportunity is perfectly consistent with the constitutional perspective on equality.

The chameleon nature of equal opportunity, however, becomes apparent when viewed in the second sense—namely, as equality of one's starting position or endowment. For here, the minimal state sheds its protective function to return as Leviathan, ready to redistribute property according to the preferences of organized interests or the will of the majority. In the process, the original and legitimate meaning of equal opportunity is lost sight of.

Just as equality of rights and equality of outcome are inconsistent usages, so too are the twin usages of equal opportunity just noted. Extending equal opportunity to everyone violates no one's rights when used in the sense of equal freedom. All individuals can jointly have rights to life, liberty, and property—in the sense that all are free to choose among competing alternatives in a world of scarcity. One person's right to noninterference in the use of his property does not preclude others from having the same right to their property. Whether the property right in question is the right to freedom of contract or freedom of speech, those rights are fundamental natural rights belonging to each individual on an equal basis. Thus, in the absence of any positive welfare rights, the set of rights stemming from the basic right to noninterference (which entails only negative obligations) is a world of consistent and equal rights, "a world in which we can at all times enjoy whichever exemplifications of our right to noninterference we choose to enjoy, subject only to the restrictions we incur as a result of our own actions" (Pilon 1979a: 148).

Having an equal right to noninterference or liberty, however, is not the same as having an equal power to exercise that right.[9] Under the First Amendment, all individuals have the right to free speech, but the exercise of that right will be affected by relative endowments and, thus, by the scarcity of resources. The same is true in the exercise of economic liberties such as the right to use and dispose of private property and the right to negotiate contracts so long as third-party rights are not violated.

[9]For a useful discussion of this distinction and the implications of the failure to perceive the difference between having general rights and exercising those rights, see Pilon (1979b: 1189–91).

The failure to understand the difference between having a right and exercising it has led to the fallacy of thinking that the state can legislate a right to equal opportunity—in the sense of equal starting conditions—without violating the right to noninterference. Yet, the incentive is for politicians to legislate free lunches, even though in a world of scarcity it is impossible to equalize material conditions without taking from those who produce income and wealth and redistributing it to those who do not. Thus, while it is possible for all individuals to have the right to private property and freedom of contract, it is patently absurd to think that all individuals can exercise that right without violating the very freedom the initial right conveys.

In sum, extending the right of equal opportunity—in the sense of equal freedom and equal justice under a rule of law—to everyone as a natural right entails no opportunity cost in terms of forgoing other legitimate rights and liberties.[10] As such, equal opportunity in this limited sense is a legitimate part of the constitutional perspective of equality. However, once equal opportunity is enlarged to mean equal endowments, the state necessarily moves from protecting property rights to redistributing them.

Constitutional Principle or Constitutional Anarchy?

A principled approach to equality requires an understanding of the higher-law background of the Constitution, wherein the Constitution is viewed as a charter of freedom. Insofar as equality of rights is replaced by equality of outcome or equality of opportunity in terms of equal starting conditions, the Framers' Constitution will fall prey to the redistributive state. The choice between a constitutional ethos of liberty and an ethos of social justice, therefore, is a choice between constitutional principle and what Buchanan (1977: 296) has called "constitutional anarchy."

A Constitutional Perspective of Equality and Order

In taking a constitutional perspective of equality and order, the focus is on the underlying rules necessary for coordinating individual interests so as to resolve conflicts in a socially and economically harmonious way with a minimum of government interference in the

[10]See Meckling and Jensen (1980) on the difference between what they call "scarce rights" and "non-scarce rights."

private domain. A constitutional perspective, therefore, encompasses both the problem of moral legitimacy and the problem of efficiency—that is, it deals with the ethical problem of determining the legitimacy of the rules underlying markets and government as well as the practical problem of determining how well the chosen rules operate to bring about a spontaneous social and economic order. It is only within a system of limited government safeguarding private property and freedom of contract that those two aspects of the constitutional perspective reinforce each other as justifications for a free society.

When addressing the question of how rule changes affect individual incentives and behavior, the constitutional perspective accepts the public choice view that individuals are self-interested in all aspects of their behavior involving scarce resources. The upshot of the self-interest postulate is not that individuals cannot be public spirited, but rather that each individual seeks to undertake those actions he expects will render him a net benefit—whether operating in the private or public sector. An individual's utility function can contain many different economic goods subjectively perceived, including charity. But the tradeoffs among those goods will depend on the relative prices confronting the individual and, therefore, on the property rights structure. Thus, the constitutional perspective is also a property rights perspective of individual action as it affects social and economic order. Changes in the property rights structure—the rewards an individual can capture for various actions and the costs he must bear—will affect his choices. The lower the relative price of any action, the greater will be the incentive to take it (other things being equal). This law of rational choice is as applicable to individuals within government as it is to those in the private sector.[11]

A constitution, viewed as a set of rules empowering government and constraining individual action, is an important determinant of the penalty-reward system and, hence, of individual action. A constitution affording broad protection to economic and noneconomic liberties, understood in the natural rights tradition, will ensure justice in terms of equal protection under the law. It also will yield an economic and social order in which individuals are responsible for their

[11]On the public choice perspective, see Buchanan (1983) and Gwartney and Wagner (1988: chaps. 1–2). On the property rights perspective, see Alchian (1965a, 1965b), McKean (1972), and Furubotn and Pejovich (1972).

actions and have an incentive to utilize information that will bring about mutually beneficial exchanges, enhancing both private and social wealth. In pursuing their self-interest, therefore, individuals will tend to bring about a spontaneous economic order in which resources are directed in line with consumer sovereignty. This "principle of spontaneous order," which Buchanan (1979: chap. 4) has called "the central principle of economics," is operative, however, if and only if there is a constitution of liberty—that is, one protecting property (broadly conceived) and the right to noninterference.[12]

An effective enforcement mechanism is essential if the Framers' constitutional principles are to be more than mere symbols of the higher-law background within which the Constitution was framed. It is in this regard that Madison saw the judiciary as the final arbiter and guardian of the Constitution. He considered a strong federal judiciary to be an essential element in protecting individual rights and for establishing a sound constitutional order based on the classical concept of commutative justice. In the First Congress, he argued for a judiciary that would act as "an impenetrable bulwark against every assumption of power in the Legislative or Executive" (Gales 1834, *Annals*, vol. 1: 439). Similarly, Madison (1865: 296–97) emphasized that "the Federal judiciary is the only defensive armor of the Federal government, or rather, for the Constitution and laws of the United States. Strip it of that armour, and the door is wide open for nullification, anarchy, and convulsion." Although the U.S. Supreme Court has largely fulfilled its protective function with respect to First Amendment rights, it has failed to provide equal protection for economic liberties, thereby leaving the door open for nullification of the economic constitution by the political branches.[13]

[12]According to Hayek (1967: 162), "Under the enforcement of universal rules of just conduct, protecting a recognizable private domain of individuals, a spontaneous order of human activities of much greater complexity will form itself than could ever be produced by deliberate arrangements, and in consequence the coercive activities of government should be limited to the enforcement of such rules." See also Hayek (1960: 160; 1982, vol. 1: 36–37) for a discussion of the principle of spontaneous order and its relation to a constitution safeguarding individual liberty, and Hayek (1945) on the importance of a decentralized system of markets and prices for utilizing the vast amount of knowledge available only to individuals on the spot.

[13]For a discussion of Madison's view of the judiciary, the Court's role in a federalist system, and the abandonment of substantive protection of economic liberties since the late 1930s, see Dorn (1988: 76–83).

In sum, a constitutional perspective of equality reveals that within a system of rules safeguarding property (in its larger Madisonian sense), freedom will flourish, and self-interest will operate to promote a spontaneous economic and social order. As Adam Smith ([1776] 1937: 651) pointed out more than two centuries ago, within a "system of natural liberty . . . every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his own way, and to bring both his industry and capital into competition with those of any other man, or order of men." It is in this spirit that Madison wrote:

> If industry and labor are left to take their own course, they will generally be directed to those objects which are the most productive, and this in a more certain and direct manner than the wisdom of the most enlightened Legislature could point out. . . . All are benefited by exchange, and the less this exchange is cramped by Government, the greater are the proportions of benefit to each [in Padover 1953: 269–70].

Insofar as the rules of just conduct are not enforced by a vigilant judiciary, the political branches will negate the Framers' constitutional principles. Majoritarianism and special interests will then undermine individual rights and give rise to a redistributive state.

Social Justice and Legal Plunder

The principle of spontaneous order and the importance of rules of just conduct in bringing about social and economic order are often disregarded. Instead of seeing the connection between constitutional order and socioeconomic order, policymakers tend to think in terms of placing better people in command of static institutions. Rather than changing the rules of the game in order to change incentives and behavior in line with constitutional principles and the free-market process, policymakers tend to ignore the constitutional perspective and focus on short-run solutions. Emphasis is usually on better government and the "public interest" rather than on upholding the Framers' Constitution. It is often heard that self-interest applies only in the economic regime, not in the political regime. That presumption, however, has been seriously challenged by

public choice theory and the reality of government failure. According to Buchanan (1983: 10–11),

> The constitutional perspective . . . emerges naturally from the politics-as-exchange paradigm or research program. To improve politics, it is necessary to improve or reform the rules, the framework within which the game of politics is played. There is no suggestion that improvement lies in the selection of morally superior agents, who will use their powers in some "public interest."

Calls for radical measures to achieve greater equality of income and wealth by Piketty and others, if realized, would vastly increase the power of government, violate private property rights, dampen market incentives, and increase rent seeking. In contrast, under a just rule of law and limited government, markets would be insulated from redistributive government programs, and rent seeking would be replaced by profit seeking and wealth creation.

Using the force of law to violate property rights is what Bastiat ([1850] 1964: 60] called "legal plunder." It is ruinous to civil society as freedom and responsibility are destroyed by the state. According to Bastiat, "it is quite impossible . . . to conceive of fraternity [charity] as *legally* enforced, without liberty being *legally* destroyed, and justice being *legally* trampled underfoot" (p. 64).

A judiciary that is active in striking down legislation that violates rights to private property and freedom of contract would change expectations and limit rent seeking. The economic and political regimes would then cooperate to produce economic and social harmony. However, it has been the Court's failure in this respect—and the success of legislative activists—that have eroded the economic constitution and allowed the emergence of the welfare state.

Restoring the Constitutional Perspective

In 1792, Madison stated what he thought to be the central principle on which good government should rest—namely, "the inviolability of property" broadly interpreted in the Lockean sense. In his opinion, "If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights" (in Hunt 1906: 103). Much progress was made in achieving a greater security of property

rights up through the early part of the 20th century. However, with the rise of the modern welfare/regulatory state, economic liberties have come under increasing attack (Dorn and Manne 1987, Levy and Mellor 2008, Mayer 2011, Pilon 2013).

The demise of the constitutional perspective has been fueled by a Supreme Court that has largely abandoned its duty of protecting economic rights, especially private property and freedom of contract. As Siegan (1985: 289) has written: "The most important civil rights for the framers of the original Constitution, the Bill of Rights, and the Fourteenth Amendment were those of life, liberty, and property. Contemporary Supreme Court policy largely ignores this understanding with respect to the last item of this trilogy."

The Case for Principled Judicial Activism

To restore the Framers' constitutional perspective, the judiciary needs to return to first principles and adopt what Macedo (1986) calls "principled judicial activism"—that is, activism aimed at enforcing the principles of equal freedom and justice inherent in the higher law of the Constitution. By acting as the final arbiter and guardian of the Framers' Constitution of liberty, the judiciary would reestablish itself as a bulwark against the political branches and help restore what Antonin Scalia (1985: 709) calls "a constitutional ethos of economic liberty."

Although Scalia has advocated such an ethos, he has not been a defender of Macedo's principled judicial activism. He believes a favorable change in the public's sentiment toward economic liberty must *precede* any change in the Court's policy toward reestablishing substantive protection of traditional economic rights. In his words, "the allegiance comes first and the preservation afterwards" (Scalia 1985: 709). That may be true as a matter of practice but not principle. Once the Constitution is in place, preservation of the Framers' *principles* comes first and public *sentiment* regarding the inviolability of property second. It is the judiciary's responsibility to give economic liberties the same protection as noneconomic rights.

Restoring the Constitution of Freedom

Buchanan (1977: 297–98) has argued that the time may be ripe for "genuine constitutional revolution" designed to restore the "constitution of freedom." Such a revolution, however, requires taking a

"constitutional attitude," by which he means "an appreciation and understanding of the difference between choosing basic rules and acting within those rules." Buchanan's public choice perspective has led him to focus on "constitutional choice"—that is, "to analyze alternative constitutional regimes or sets of rules and to discuss the predicted workings of alternative constitutional arrangements" (Buchanan 1983: 11).

Today, many critics of the existing social and economic order operate in an institutional vacuum, ignoring the potential for abuse under majority rule and harboring the illusion that a mere changing of the guard—without any effective change in constitutional rules and enforcement—will improve the operating characteristics of democratic government. This is not to deny that people make a difference. Rather, it is to warn that without changes at the constitutional level—in the effective set of rules constraining individual behavior—there is little reason to believe that any significant changes in either public or private behavior will occur. Property rights matter. As McKean (1972: 186) pointed out,

> In appraising special tools to increase efficiency, one should examine what happens to property rights and appropriability in order to form realistic expectations about the effects. Also, in trying to invent improved devices or institutional changes, or in launching new programs, we should keep the impacts on rights and opportunity sets in the forefront of our minds, and not just assume that good intentions pave the road to economic efficiency.

The Framers' adherence to the Lockean notion of justice, with its emphasis on the protective rather than the redistributive state, corresponds with the importance they attached to the priority of individual rights over democratic values. It also corresponds with the Framers' constitutional perspective whereby equality is viewed in terms of equal *rights* rather than equal *outcomes*. Social or distributive justice is nowhere mentioned in the Constitution, and its implementation by forced transfers cannot be sanctioned as a legitimate function of the state when viewed from the higher-law background of the Constitution. Indeed, as Hayek (1982, vol. 2: 96) has argued: "In a society of free men whose members are allowed to use their own knowledge for their own purposes the term 'social justice' is

wholly devoid of meaning or content." That is because "while an equality of rights under a limited government is possible and an essential condition of individual freedom, a claim for equality of material position can be met only by a government with totalitarian powers" (p. 83).

Trying to impose some predetermined outcome on a free-market order can only undermine freedom and, hence, the moral fabric of the Framers' Constitution. Thus, the Framers rejected the quest for distributive justice as a legitimate function of a free and just government, leaving that goal largely to voluntary charity and the private domain. Indeed, when asked about the meaning of the general welfare clause, Madison (1865: 171–72) wrote:

> With respect to the words "general welfare," I have always regarded them as qualified by the detail of powers connected with them. To take them in a literal and unlimited sense would be a metamorphosis of the Constitution into a character which there is a host of proofs was not contemplated by its creators. . . . [T]he words, in the alternative of meaning nothing or meaning everything, had the former meaning taken for granted.

Despite the clash between equal rights and equal outcomes, and the inconsistency of the welfare state with the Framers' voluntary principle and private property, modern liberals continue to claim the moral high ground for the redistributive state. In doing so, however, they reverse the order of importance the Framers placed on individual rights by giving priority to democratic values. As such, the priority of the higher law of the Constitution has given way to moral relativism if not skepticism and legal positivism. By inverting rights and values, proponents of the redistributive state have lost the moral high ground they claim to occupy. They ignore the fact that "there are many things that we value, and many things in which we have an interest, but these are not ours by right unless we hold title in them free and clear" (Pilon 1981: 9).

The restoration of a constitutional perspective, therefore, requires a restoration of the fundamental right to property and the principle of freedom/noninterference. Like Adam Smith, the Framers generally accepted the idea that "beneficence is always free, it cannot be extorted by force" (Smith [1759] 1976: 155). True beneficence is

outside the scope of legislation and cannot be compelled by law without destroying the voluntary choice that is the essence of moral action. As Brunner (1983: 354) notes,

> A society with a minimal and widely decentralized political structure offers the only opportunity for genuine moral decisions and concerns of justice. The imposition of such "decisions" and concerns with the aid of coercive police powers destroys the meaning of moral behavior. A "moral society" places the responsibility for moral decisions with individuals and their conscience and not with the police powers of the state's apparatus.[14]

In discussing the nature of moral choices and "genuine virtue," Pilon (1979b: 1194) observes:

> When individuals engage in Good Samaritan behavior they can easily say they are doing what they *ought* to do, as decent members of civilized society, quite apart from what they are strictly *obligated* to do (or have a right not to do). Here there is no difficulty because no issue of force arises—and indeed, only because they are *not* forced to perform these acts can genuine virtue arise.

Perfect and Imperfect Rights

In like manner, Adam Smith in his lecture "Of Jurisprudence" ([1762] 1982: 9) distinguished between "perfect rights" and "imperfect rights," with the former referring to "those which we have a title to demand and if refused to compel another to perform," and the latter referring to "those which correspond to those duties which ought to be performed to us by others but which we have no title to compel them to perform."

[14]Brunner (1983) derives the implications of alternative models of man and justice for the role of government. Like Bastiat, he distinguishes between the so-called Scottish model, in which man is self-interested and justice is in the form of equality under the law (and is commutative), and what he refers to as the "sociological model," which corresponds with the modern liberal's view of man and justice. The Scottish model yields a night-watchman/protective state while the sociological model yields a redistributive state. See also Sowell (1987).

According to Smith (p. 9),

> A beggar is the object of our charity and may be said to have a right to demand it; but when we use right in this way it is not in a proper but a metaphorical sense. The common way in which we understand the word right, is the same as what we have called a perfect right, and it is that which relates to commutative justice. Imperfect rights, again, refer to distributive justice. The former are rights which we are to consider, the latter not belonging properly to jurisprudence, but rather to a system of morals as they do not fall under the jurisdiction of the laws.

The distinction between perfect and imperfect rights is as pertinent today as it was in Smith's day. In particular, the imperfect nature of welfare rights as moral rights needs to be widely recognized if the moral pretense of activists operating under the banner of social justice—such as Piketty—is to be exposed and the rights-based approach to equality and justice restored (Dorn 2014a, 2014b, 2014c).

Freedom, Equality, and the Law

The failure to understand the connection between freedom and equality, and thus the tendency to substitute equality of outcome for equality of rights, serves to strengthen the hand of the state and produce constitutional anarchy as special interests come to dominate both the political and market processes. As Friedman and Friedman (1980: 139) note:

> A society that puts equality—in the sense of equality of outcome—ahead of freedom will end up with neither equality nor freedom. The use of force to achieve equality will destroy freedom, and the force, introduced for good purposes, will end up in the hand of people who use it to promote their own interests. On the other hand, a society that puts freedom first will, as a happy by-product, end up with both greater freedom and greater equality.

Regaining a constitutional perspective requires both an understanding of the higher-law background of the U.S. Constitution and an appreciation of the interconnectedness of stable government by

law, spontaneous market order, and economic progress. People should not forget that the Constitution was intended "to protect private markets from political pressures" (Epstein 1984: 28). The practice of judicial restraint in the review of economic legislation, however, has led to the politicization of economic activity and the consequent rise of rent seeking. In Epstein's view, this result was predictable because "the judicial surrender to legislative faction diverts resources from the production of wealth to the transfer of wealth" and "promotes political division that threatens the economic foundations of a stable, free and democratic society." For Epstein, "the connection between politics and markets, so understood by the Founding Fathers, has been all but forgotten today." A proper understanding of the connection between political action and economic choice, in other words, is a necessary ingredient for returning to the Framers' constitutional order.

Conclusion

A return to principle and reason, and therefore to a constitutional ethos of liberty, will not be easy. The existence and growth of the welfare state has immunized a large segment of the media and general public against thinking in terms of rules, equality of rights, commutative justice, and spontaneous market order. Individual cases of poverty and unemployment are typically generalized to crisis proportions in a matter of minutes on the nightly news. Long-run consequences of policies on social and economic stability are bypassed for immediate consequences, and so on. The public is led to believe that the Constitution is primarily a majoritarian document rather than a charter of rights and freedoms—and that it is a legitimate function of government to redistribute income and wealth via taxes and transfers, as well as by outright takings and regulation. In such an environment, it is not surprising that Piketty has attained rock star status, or that William Bradford Reynolds, while assistant attorney general for civil rights, remarked that he "never thought of private property rights as civil rights" (Crovitz 1986).

Reestablishing a constitutional perspective of equality will require a strong educational effort—one that returns to the roots of America's classical liberal heritage. If constitutional anarchy is to give way to ordered liberty, the judiciary will have to once again act as a bulwark against any usurpation of economic as well as noneconomic

liberties. Upholding the constitutional principles of the Framers and recognizing the primacy of individual rights over majoritarian values would help point the compass of liberty in the right direction. With a principled judicial activism, the public would better understand the importance of stable constitutional rules for long-run social and economic harmony, and an effective foundation would be established for restoring the constitutional perspective of equality.

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