

THE NECESSITY FOR CONSTRAINED DELIBERATION

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The revitalization of democracy requires some fundamental structural changes in order to avoid the nightmarish scenarios that Charles Fried outlined,¹ scenarios that might in fact, in the current political climate and constitutional regime, be enacted into law. Currently, there are serious problems with American democracy, including low participation in electoral politics and low voting rates. Indeed, these offer powerful evidence of the high levels of public cynicism about how this nation conducts itself in its collective affairs. What does this level of apparent political malaise reveal?

The answer stems from two very simple facts: first, we demand too much from our democratic institutions; and second, we fail to direct and organize political deliberation by constraining the permissible outcomes that we are able to achieve through these democratic processes. In other words, the major structural weakness of American democracy today is that it has become a pure political majoritarian machine, unconstrained and unmoored by any discernible constitutional principle.² I believe that the only way in which we can revitalize and improve our level of discourse and deliberation is to change fundamentally the constitutional ground rules in which our political institutions operate.

One common prescription for improving democracy dwells

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1. See Charles Fried, "Revitalizing Democracy": *Some Caveats*, 24 HARV. J.L. & PUB. POL'Y 155 (2000).

2. My idea of a government seeks to afford lots of protection for limited partners. Everybody seems to want to be a general partner—not me. I want to be a limited partner in a government run with weak general partners, and my right of non-participation, to some extent, is contingent upon their duty of non-participation, or at least limited participation, in the affairs of state.

on our need for more thoughtful deliberation about the common good. Yet every time I hear the clarion call for more deliberative democracy, I put my hand on my wallet. So, in this moment of disinterested reflection, I ask myself why I assume this defensive posture. The unfortunate answer is that a political democracy, as we now have it, contains no substantive limitations that define the outer boundaries of proper political deliberation.

Charles Fried talked about the brute fact that today "We the People" are entitled to regulate, for example, whether you smoke or whether you carry guns.³ Additionally, it is certainly commonplace that democracy can now regulate the size of your hallway leading to your bathroom so as to make sure that it will be able to accommodate a wheelchair,⁴ and when you may visit a medical specialist under the so-called Patient's Bill of Rights.⁵

The last example is especially telling because it illustrates a basic transformation in political orientation. The real (1791) Bill of Rights was directed to limit the ability of political institutions to trench on private rights. The new Bill of Rights empowers the government to coerce one person to act in ways that may benefit another. This rhetorical switch allows more governmental intrusions into what used to be private space and private transactions.

To avoid this current slippage, we should think less about democracy and more about republicanism.⁶ To make my meaning clear, I treat republicanism in a narrow, somewhat formalistic way, by which I mean *res publica*.⁷ A sound

3. See Fried, *supra* note 1, at 156. See generally RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 6-7 (1995) (documenting the upsurge of regulatory activity beginning in the late 1960s and continuing "unabated to the present").

4. See, e.g., 42 U.S.C. § 12183 (requiring public accommodations and commercial facilities to provide ready access for individuals with disabilities).

5. See, e.g., S. 1344, 106th Cong. (1999); H.R. 2990, 106th Cong. (1999).

6. See Richard A. Epstein, *The Republican Civic Tradition: Modern Republicanism—Or the Flight From Substance*, 97 YALE L.J. 1633, 1634-37 (1988) (describing the evolution of republicanism) [hereinafter Epstein, *Modern Republicanism*]; Richard A. Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 GEO. WASH. L. REV. 149, 162-68 (1987) (discussing generally constitutional republicanism).

7. As I have noted elsewhere, "'republican' is a compound word derived from the two Latin words, 'res' and 'publica', which loosely translated means 'affairs pertaining to the public at large.' This linguistic rendition gives a useful clue as to the proper task of a sound republican political philosophy." Epstein, *Modern*

constitution must make sure that public deliberation is directed towards public matters, just as the Latin suggests. It therefore becomes incumbent on us to develop a theory whereby public matters are not expanded insensibly to include whatever topic the public happens to fancy or worry about at any given time.

The point of departure for this analysis turns on the instructive concurrence between economics and politics, namely, in the technical economic definition of public goods: things that cannot be provided to one unless they are simultaneously provided to all. No matter how I examine the problem, I cannot understand how the minimum price charged for the sale of a quart of milk (which was found to be "affected with the public interest" in *Nebbia v. New York*⁸), or the size of my hallway in my house, or my choice of job, counts as a public good under any plausible rendition of that definition. By hewing to that economic definition in politics, we may find a way, probably the only constitutional way, to sweep the table clean so that doubters are not able to argue that it is only rank political bias or opportunism that keeps these matters out of the political domain.

The second point of concern with democracy is with the types of outcomes that it produces. In my view, Democracy is designed to overcome the various collective action⁹ and holdout¹⁰ problems that arise in providing public goods. The good social contract theorist hopes that political deliberations will yield what are commonly called win-win situations,¹¹ so that everybody who participates in democracy comes out satisfied with what political deliberation has produced.¹²

Unfortunately, the odds of achieving win-win outcomes have been sharply reduced by the rapid decline in the constitutional

Republicanism, *supra* note 6, at 1648-49.

8. 291 U.S. 502, 530 (1934).

9. See RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 44-46 (1998) (describing the collective action problem).

10. See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 36-37 (1993) (describing the holdout problem).

11. See EPSTEIN, *supra* note 9, at 122-31 (explaining the "benefit principle" of modern social contract theory).

12. Additionally, we should be hostile to the situations in which we have win-lose contests, which dissipate resources and, in the end, leave everybody worse off than before. We should try to add whatever judicial filter we can to democratic institutions in the hope of increasing the odds of nurturing win-win legislation, as opposed to win-lose legislation.

protection of economic liberties and private property from state regulation. So long as these guarantees remain weak and ineffectual, we lack the necessary formal constraint on the outcomes of the political process and hence on the dysfunctional nature of much political deliberation. A uniform position of judicial restraint opens us up to democratic political abuses that are so vast that one has to retreat from them.¹³ Under the current system the astute politician asks: "What is the minimum political coalition that I have to put together in order to be able to steal from my fellow man?" After that, it takes little imagination to dress up the idea with some high-sounding rationale that will withstand constitutional scrutiny under a malnourished rational basis test. The weak protections for property and economic liberties translate into feeble incentives for sound legislative behavior.¹⁴ Ironically, this withdrawal of protection on economic matters has very odd consequences for the one set of constitutional constraints we still care about: political speech and communication under the First Amendment. Yet when property rights are weak, the robust political market makes it easier to organize corrupt political coalitions whose object is wealth transfer rather than overall social improvements.¹⁵ Today, political communication need not bring everyone inside the charmed circle; rather it only facilitates communication with political allies. In one sense, the object is to form the *minimum* winning coalition before your rivals can form theirs, knowing the losers will not have a chance to recoup their losses in the judicial forum.

A previous panel on voting rights spoke at great length

13. Cf. Richard A. Epstein, *The Cartelization of Commerce*, 22 HARV. J.L. & PUB. POL'Y 209, 214-15 (1998) (recognizing that the Justices do a good job achieving their goal of preserving competition by taking an active role in enforcing the dormant Commerce Clause).

14. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 116-19 (1992) (describing the decline of economic liberties).

15. As I have noted elsewhere:

Unregulated political markets tend to work in very different ways from a free market. It is now possible for some political coalition to block the voluntary exchange between private parties. Special interest legislation, on this account, is any form of legislation that tends to take us further from the competitive solution. With politics, it is far more difficult to exhaust all the potential gain from trade because there are so many parties whose interests must be satisfied before agreement is reached.

Epstein, *Modern Republicanism*, *supra* note 6, at 1640.

about the legislative fissures associated with reapportionment and with various voting requirements.¹⁶ These pressures on voting rules reveal two serious weaknesses in our current democratic structure. The first is that it allows politicians to discuss too many things, so that it distracts them from focusing on those matters that *do* require public deliberation. Every minute that is spent talking about the Family and Medical Leave Act,¹⁷ for example, is a minute that cannot be spent speaking about matters of life and death, peace and war, and national defense, which on any view fall within the political realm. When we speak about the side issues, we have no constraints on the types of outcomes that can be conjured up by fevered legislative majorities who think that it is their duty to determine, for example, what patients can see which medical specialists and when.

The revitalization of democracy as a source of popular respect will come only with a massive redefinition and shrinkage of its permissible ends. To reach that goal will require, at a minimum, that many judges (and legislators) who have treated *Lochner v. New York*¹⁸ with suspicion or contempt rethink their positions to see why its principles could assist in promoting sound democratic institutions and deliberation.¹⁹ We should try to create a political environment that is receptive to general social improvements. And if unregulated democracy

16. See Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103 (2000); Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J.L. & PUB. POL'Y 119 (2000); Melissa L. Saunders, *The Dirty Little Secrets of Shaw*, 24 HARV. J.L. & PUB. POL'Y 141 (2000).

17. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-54 (1994). I have noted elsewhere why this Act is especially troubling:

As a matter of first principle, I cannot think of any legislation less meritorious than these laws, no matter the cubby hole in which they are placed. There is no social justification for disrupting private contractual arrangements over the question of which circumstances generate leave, with or without pay, and which do not. It may be good that people are given leave without pay after the birth of a new child or to take care of a seriously ill family member Yet, no matter how the issue is classified, there is no reason why any decision over leave should not be made consensually by the parties instead of coercively by the state.

Richard A. Epstein, *Externalities Everywhere? Morals and the Police Power*, 21 HARV. J.L. & PUB. POL'Y 61, 64 (1997).

18. 198 U.S. 45 (1905).

19. See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (advocating the rethinking of *Lochner*).

often strays from that mission, then it ought to be modified and controlled to the extent that sound constitutional institutions can do it.

The basic point that must be defended time and time again is that any political democracy should set a high threshold of justification before it interferes with the operation of competitive markets. A sensible form of government directs its attention to the externalities created by aggression, nuisance,²⁰ and fraud,²¹ and seeks to correct any misallocations associated with monopoly practices.²² It then ought to call it a day.

20. *See* EPSTEIN, *supra* note 3, at 276-77.

21. *See id.* at 81-82.

22. *See id.* at 123-27.