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Two Faces of Liberalism

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Richard Epstein's *Takings: Private Property and the Power of Eminent Domain*[1] purports to speak for the liberal tradition of political theory, and the book does indeed represent a strand of liberalism. Several tenets of the strand of liberalism in *Takings* stand out: the existing distribution of wealth is "natural"; politics should not deal with distributional issues; each person always knows what is in his own interest; voluntary transactions are necessarily in the best interests of the parties; and the existing set of preferences should not be subject to democratic processes. But the tradition for which *Takings* speaks is a narrow and comparatively recent one. Liberal political thought also is embodied in approaches that take a critical and self-conscious approach to the current distribution of property and the current set of preferences.[2] Under such theories, neither property nor preferences are taken as inviolate.

Insofar as it is about property, *Takings* owes its origins to the set of beliefs associated with the *Lochner*[3] era, when an aggressive Supreme Court threatened the regulatory state. The approach of the *Lochner* Court foundered on various grounds. These included, above all, the institutional strain on so aggressive a judiciary—invalidating, time and again, outcomes of the democratic process—and the controversial character of the Court's assumption that the existing distribution of wealth was natural and not a proper subject of politics. *Takings* is vulnerable for the same reasons that led the Supreme Court to reject *Lochner*. These critiques have appeared in discussions of *Takings* in this Conference and elsewhere. In this commentary, I will focus not on Epstein's approach to property, but instead on his belief that government should take private preferences for granted, and his associated view that private consumption choices are the only appropriate basis for government action.

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* Professor of Law, University of Chicago. Some of the ideas set forth in this Comment are elaborated in greater detail in Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986).

1. R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) [hereinafter (p. __)].

2. For a modern statement, see S. HOLMES, BENJAMIN CONSTANT AND THE MAKING OF MODERN LIBERALISM (1984).

3. So-called after Lochner v. New York, 198 U.S. 45 (1905).

I. AN ALTERNATIVE TRADITION

Epstein's views on the liberal tradition are best reflected in his adherence to the agency theory of government. He says, for example, that "[r]epresentative government begins with the premise that the state's rights against its citizens are no greater than the sum of the rights of the individuals whom it benefits in any given transaction. The state qua state has no independent set of entitlements, any more than a corporation has rights qua corporation against any of its shareholders" (p. 331). But this description is highly controversial. It was not, for example, the theory of representation of the framers.[4] For James Madison, national representatives were supposed to deliberate on constituent preferences, not to implement what constituents "want." Moreover, the notion that governments can do only what individual actors might prefer is inconsistent with the preferences of private actors themselves. As we shall see, the concept of "preference" is much more complex than the agency theory of government acknowledges. Citizens do not want to and need not be treated as shareholders.

The approach in *Takings*, treating private preferences as natural and inviolate, attempts to draw on both of the two principal traditions in American political and constitutional thought—welfare and autonomy. But neither tradition supports the premises of *Takings*. In some settings, government decisions that attempt to shape preferences will produce significant increases in welfare. Consider statutes forbidding gambling, or the consumption of addictive substances, or requiring the use of motorcycle helmets and seatbelts. In all of these settings, there should be welfare gains from government action, quite apart from the impact of the conduct in question on third parties.[5]

Moreover, a familiar conception of autonomy, associated with Kant, understands the term to refer to selection rather than mere implementation of preferences. This theme in liberalism understands the notion of freedom to connote a process in which a person chooses his own ends and does not merely attempt to satisfy whatever ends he "has." Under this view, private preferences are, by virtue of their status as such, entitled only to presumptive respect. The republican conception of politics generalizes this understanding, treating governance as a collective process in which citizens select ends through political participation. *Takings* ignores this aspect of the liberal tradi-

4. *See* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

5. *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49, 142-46 (1986).

tion, which played an important role in the constitutional framing.[6] For the framers, freedom consisted in self-governance through politics as well as in the satisfaction of private preferences. The approach in *Takings* disregards this understanding of freedom in the liberal tradition.

II. SOME EXAMPLES

Suppose it is agreed that in some circumstances the citizenry, acting through the government, may make decisions about preferences. There are familiar risks in such a course. Conscious preference-shaping by government may threaten freedom as well as promote it.[7] But there are four contexts in which government action, understood in republican fashion, might diverge from private consumption choices. The point of the discussion that follows is to outline circumstances in which both welfare and freedom may be served by government action that derives from this alternative species of liberalism associated with the republican vision.

A. *Collective Preferences; Voluntary Foreclosure of Consumption Choices*

Societies have collective preferences, and people have "preferences about preferences." People may seek environmental laws even though they do not visit the national parks; they may want government to support public broadcasting even though they do not watch public broadcasting; they may favor welfare programs even though they do not give to the poor. In these and other cases, people may, through government, implement their preferences about preferences. This phenomenon—voluntary foreclosure of consumption choices—is the political analogue of the story of *Ulysses and the Sirens*.[8]

The notion of "preferences about preferences" fits comfortably with the republican conception of politics. The phenomenon reveals that in their capacity as citizens, people make decisions that diverge from those they make as consumers. Voluntary foreclosure of choice is a pure example of conscious selection of preferences. It also is quite different from ordinary paternalism, or from a system in which majorities are seeking to impose their will on minorities simply because they disapprove of the conduct in question. The majority is seeking to

6. *See* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-87 (1972); J. POCOCK, THE MACHIAVELLIAN MOMENT (1975); THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC (R. Horwitz ed. 1979).

7. *See* THE FEDERALIST NO. 10 (J. Madison).

8. *See* J. ELSTER, ULYSSES AND THE SIRENS (2d ed. 1984).

bind itself, and the legal system is the best way to accomplish this task.

The vindication of "preferences about preferences" through politics should not always be approved. Some such preferences are independently objectionable; consider a preference not to marry someone of another race manifesting itself in a miscegenation law. In general, however, the voluntary foreclosure of consumption choices is unobjectionable, and the phenomenon suggests a serious defect in agency theories of government and in models of political behavior that treat political choices as consumption choices.

B. *Preferences and Legal Rules*

Preferences are heavily influenced by context, including one's position in the social order. That position is in turn influenced by legal rules. This phenomenon generates a serious problem for theories that take preferences as exogenous variables. When preferences are traceable to a legal rule or an existing legal regime, the rules and the regime cannot be justified, without circularity, by reference to the preferences. This conclusion has important implications for the assumption, embodied in *Takings* and economic approaches to law generally, that the role of law is to facilitate the satisfaction of private preferences. If the law generates the preferences, that assumption verges on the incoherent. Moreover, defects in the rules that produce preferences may produce preferences that are defective. There may be a good case for collective action to change the existing legal rules. There are several related examples here: the phenomenon of "adaptive preferences"; "endowment effects," which are preferences attributable to ownership or nonownership; and "ideology," amounting to interest-induced beliefs on the part of the well-off and adaptive preferences on the part of those who are badly-off.

The phenomenon of adaptive preferences occurs when preferences are a product of the absence of available opportunities. People may reject an opportunity because they consider it to be unavailable. This is, as Jon Elster has argued, a powerful attack on some forms of utilitarian thought: "For the utilitarian, there would be no welfare loss if the fox were excluded from consumption of grapes, since he thought them sour anyway. But of course the cause of his holding them to be sour was his conviction that he would be excluded from consuming them, and then it is difficult to justify the allocation by invoking his preferences."[9] People may, in short, try to adjust their

9. J. ELSTER, SOUR GRAPES 109 (1983).

preferences to the existing order. Montesquieu, for example, emphasized that one of the most pernicious features of the harem was that the women came to enjoy their fate;[10] and some of the newly freed slaves were ambivalent about their freedom. Rebellion produces cognitive dissonance, and the adjustment to the status quo is an important means of dissonance reduction.

This phenomenon has potentially explosive implications. Above all, it suggests that the fact that people are content with the status quo need not be a dispositive argument against changing it. One of the functions of politics is to expose adaptive preferences as such, and to subject the existing legal regime to critical scrutiny even if people have adapted to it. A system that takes private preferences as exogenous—such as Epstein's—will omit this central function of politics.

Closely related problems occur when there are "endowment effects," or preferences attributable to ownership or nonownership. Sometimes people value things they own more than the same things when they are in the hands of others. This effect has complex roots,[11] but it suggests that it is far too simple to say that because people do not want something, it is not in their interest to give it to them. Some entitlements may have great value once they are conferred on people, even if the same people do not seem eager to have those entitlements in the first place. This problem is related to that of "ideology"—structures of belief and preference that are determined by one's position in the social order.[12] One of the roles of politics may be to reveal ideology as such.

These considerations suggest that preferences are not and should not be treated as exogenous variables. Approaches to the legal system like that in *Takings* do not admit inquiries into processes of preference formation, thus leaving out an important descriptive and evaluative tool.

C. *Endogenous Preferences: Addiction and Others*

Sometimes preferences are endogenous to the very act of consumption. This is the classic argument for regulating addictive substances. Here the problem is that an addict might continue (rationally) to consume notwithstanding the fact that he would have preferred not to have become involved with the object of his addiction in the first place. The case for intervention stems from the fact that

10. Montesquieu, *Letter XXVI: Usbek to Roxana, at the Seraglio at Ispahan*, in PERSIAN AND CHINESE LETTERS 69 (J. Davidson trans. 1901) (1721).

11. For a discussion, see Sunstein, *supra* note *.

12. *See* J. ELSTER, MAKING SENSE OF MARX (1985).

preferences are not static, but can be changed through legal requirements, and changed in such a way as to generate gains in terms of welfare and autonomy. Private preferences suffer from what might be called an intrapersonal collective action problem, in which the short-term costs of engaging in or stopping an activity are overvalued in comparison with the long-term gains. The goal of regulation is to ensure that the preference does not become formed in the first place. An addiction is the most intense and obvious case, but it is an example of a pervasive phenomenon. Consider habits and myopic behavior, both of which may be understood as cases in which the short-term costs of change are (wrongly) seen to dwarf the long-term benefits.

The phenomenon of endogenous preferences helps to explain a wide range of legal rules. The endogenous character of the resistance to seatbelt use might justify legal requirements that people buckle seatbelts in automobiles. It may be that once people are in the habit of buckling their belts, the subjective costs of buckling will decrease dramatically. If so, the fact that people currently fail to buckle need not be dispositive.

Legal rules that combat addictions, habits, and myopia are hard to square with some of the assumptions in *Takings*. But the endogenous character of preferences will sometimes justify legal changes in the face of current practices.

D. *Cognitive Distortions and Low-probability Events*

Sometimes people do not have the information on which to ground a consumption choice. Mill, for example, argued that it was no infringement on autonomy to prevent someone from inadvertently falling off a bridge.[13] The provision of information and, in some cases, the foreclosure of choice based on inadequate information may turn out to be justifiable on both welfare and autonomy grounds.

Of particular importance here is a problem that is only beginning to receive attention in legal theory. The problem involves cognitive distortions that often make people ill-equipped to deal with low-probability events. People sometimes completely discount the probability that a dangerous event will occur when the probability of its occurrence is quite low. Thus, for example, people may treat the risk that a tornado will occur as if its discounted value were zero.

The phenomenon of irrationally discounting low-probability events is part of a more general problem. In sorting out probabilities, people tend to rely on devices that simplify complex problems, devices

13. J.S. MILL, ON LIBERTY (E. Rapaport ed. 1978) (1859).

that can lead to severe errors. When this phenomenon occurs, there is a persuasive prima facie case for government intervention to correct for the cognitive error. Many forms of intervention can be thus understood. Compulsory seatbelt laws, various safety requirements in the workplace, and nonwaivable implied terms in contract and tort law are examples.

E. *Summary*

We have seen that if some of the premises of *Takings* are rejected, it is possible to identify categories of cases in which legal interference with private preferences is defensible on both welfare and autonomy grounds. To say this is not to deny the risk of abuse. If government is free to ignore private preferences, there will be a danger of tyranny. But it is a mistake to conclude, from the prospect of abuse, that legal systems must take preferences as exogenous in all contexts. It is possible to identify with some precision the cases in which private preferences are likely to malfunction, or to be an inappropriate basis for social choice. One might therefore avoid tautologies based on the concept of "revealed preferences" without at the same time allowing intervention on the ground that consumption choices invariably are misguided. A system that takes preferences for granted operates under an unsound conception of freedom, and will produce less in the way of autonomy and welfare than the alternative.

III. CONCLUSION

Insofar as it is political theory, *Takings* is part of a narrow strand of the liberal tradition, one that takes the existing distribution of property and the existing set of preferences as natural, rather than social, and disables government from affecting either. That strand of liberalism flourished during the *Lochner* era. A competing species of liberal thought—reflected in much of modern law—sees the collective selection of preferences as a natural and desirable feature of government. This species of liberalism is, of course, subject to abuse. Those abuses can be controlled, however, thus promoting both welfare and autonomy in ways that are impossible under the approach in *Takings*. I have tried to outline here some of the implications of this conception of politics for legal treatment of private preferences.

Significant dangers lie in an approach that would take property and preferences for granted. That strand of liberalism was properly rejected during the New Deal. I conclude that one of the most important tasks for modern legal theory is not to ignore processes of prefer-

ence formation, but to operate within, and to give content to, this alternative aspect of the liberal tradition.