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Two Traditions of Constitutional Economics

CONSERVATIVES OUGHT to be defending *simultaneously* both economic freedom and virtue. In constitutional terms this means defending both substantive due process and police powers. To put it bluntly, we can have our cake and eat it too with good constitutional conscience. The heart of federalism is precisely this bifurcation between individual freedom on the economic level, and the ability of state and local governments to govern themselves according to chosen ways of life.

I would like to maintain that there are at least two different kinds of "economics" which the founding fathers wished to maintain: first, the classical liberal versions coming from Adam Smith with an emphasis on the market and economic freedom; second, the tradition of household management which promotes virtue. The first is preserved in substantive due process; the second in the doctrine of police powers.

The substantive due process coming out of the post-Civil War jurisprudence extending up to the New Deal is the issue at stake. Was it a flowering of the American constitutional tradition or a deformation? What in fact is the substance of the substantive due process?

The main contenders are three: the modern liberal or civil libertarian view which restricts the preferred freedoms to freedom of expression, which would throw out the police powers except for economic regulations; the consistent libertarian view which would throw out the police powers root and branch; the tension-filled conservative view which would affirm economic freedom in substantive due process terms, but not throw out the police powers of state and local governments.

One of the major responsibilities of conservatives will be to winnow the wheat and throw away the libertarian chaff. There is much to commend in the libertarian interpretations of Siegan, Epstein, and Hayek; there is much to be learned (or should we say relearned) in the positive economics of public choice, law-and-economics, and constitutional economics. Modern economists may require a more technical terminology to keep their white cloaks from being stained so that they can talk value-neutrally about "rent-seeking" rather than the frank, moralistic approach which would use such terms as "corruption" and "selfish vested interests."

But here we must be careful to not reduce the substance of constitutional law to simply another process or procedure, even one so salutary as voluntary exchange. This is the libertarian one-step dance which must be countered by the conservative two-step.

Yes, the founding fathers intended arrangements which fostered private property and freedom of economic enterprise; the mercantilism which the states were establishing under the Articles of Confederation had to be stamped out before we became Banana Republics. All the prohibitions against arbitrary actions of the States in con-

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tractual relationships and monetary institutions were intended to preserve national markets, productivity resulting from the widespread division of labor, and economic freedom.

But no, the founding fathers were neither libertarians nor Lockeans. Private property was subject to salutary regulations by state and local governments and these were enshrined in the police powers. In the current context, control over pornography or blue laws or zoning were not considered illegitimate uses of government power. They were not considered out of court on the grounds of some right to economic freedom. Prudential consideration of their effects, which might even convince me of their inefficacy, is still a prudential consideration which state and local governments must duly weigh.

Blackstone and the Common Law were much more important than Locke here. This was still in a day and age when there were only "neighborhood" effects and not externalities. Let us take a simple case. Do I have the right on my indisputable piece of private property to torture dogs (quietly) on the front lawn? I am creating no physical harm to anyone else. They can avert their eyes. Or, does the community have the right to regulate such use of private property in the name of civility and good neighborhoods? If we choose to regulate, do we have to compensate the owner for the "taking" of his property right?

If the answer to questions one and three is no, and the answer to two is yes, then you are a common-sense conservative—even if you still fear the abuse or over-extension of police powers for selfish gain as in many zoning regulations. If you reverse the answers, then you have the much-cherished consistency of the libertarians.

Common sense was not frozen into a technical terminology which disguised an entire political philosophy. Ironically, the political philosophy that comes out of "externalities" is either radically individualist and private property oriented or radically collectivist: our choices are either the "night watchman" State or the "nanny" State.

The conservatives also have to resist the temptation of waltzing down the aisle with Walter Berns who gives away our lovely daughter to the "new science of politics" while wagging his finger with "I told you so." Mr. Berns, who has been right on so many things, seems bound and determined to characterize the Founding—according to his Straussian perspective—as a Lockean enterprise based on property rights as the sole end of government.

In this land supposedly dedicated to individual rights (the "open society" in Karl Popper's terms, the "great society" in Adam Smith's terms), it is worth noting that in the original unamended Constitution itself the *only* mention of rights is in Article I, Section 8, which gives Congress the power "To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries: . . . " In other words, using economic jargon, the sciences and useful arts were to be promoted not by government expenditures or government agencies but by establishing private property rights in ideas to capture the positive externalities.

In a recent essay, Walter Berns takes note of Article I, Section 8, and then goes on to argue:

> But what better serves to symbolize the open society than a constitutional provision that ties the country to science and its discoveries? The United States was to be a *novus ordo seclorum*, a motto proclaimed on its great seal which, in turn, is displayed on every dollar bill; in its devotion to the modern project, it would be the home, in Shelley's phrase, of *Prometheus Unbound:*
>
> The loathsome mask has fallen, the man remains
> Sceptreless, free, uncircumscribed, but man
> Equal, unclassed, tribeless and nationless.
>
> (Walter Berns, "Re-evaluating the Open Society," *Order, Freedom and the Polity: Critical Essays on the Open Society*, ed. George Carey [Lanham, MD: University Press of

America/Intercollegiate Studies Institute, 1986], 22).

I am inclined to think that something a little stronger than this is required to prove that our nation was dedicated to Promethean ends!

Berns's interpretation of the Constitution is that it was a debate between the advocates of the open society, the Federalists, and the "more or less closed society" advocates, the anti-Federalists. The latter included such men as Samuel Adams, who hoped to build in Boston the "*Christian* Sparta"; he also quotes Mercy Warren, who regretted that a "*Chinese wall*" had not been constructed along the Appalachian ridges to keep the nation within the boundaries of nature and to restrict the influence of commerce, luxury, and the ideas of the world, according to Berns. But again the desire to build a Christian Sparta in *Boston* is fully consistent with the tap roots of American federalism, which permits state and local governments to fashion the ways of life they deem appropriate for their citizenry.

Berns also asserts that out of this debate the anti-Federalists essentially lost the war to the new science of politics and liberty; at best they were able to effect a compromise by which "the states and their simpler societies were retained," but that is all.

I think that, on the contrary, it can be asserted that the anti-Federalists won, and that the Federalists were seriously compromised by the inclusion of the Bill of Rights, as Willmoore Kendall has argued.

Kendall also argued that Richard Weaver's writings supplied the missing link in the *Federalist* on the importance of education for virtue. Although so right on almost everything else, here I think he was mistaken. There is no missing link. The federal government is one of limited, delegated powers and education was too important to be left to it. The responsibility for the proper formation of morals and manners was clearly to be exercised in the homes, churches, and local schools. No argument needed to be made in the *Federalist* because there was no disagreement on this issue.

But Kendall was right to argue that Richard Weaver adds a certain missing link. Before we can reclaim or secure our heritage, we must ground our constitution on the constitution of being. Man has a nature and goods appropriate to that nature. The purpose of education is to foster the goods which nurture body, intellect, and soul.

Process and procedure, even if they are the classical economics version of voluntary exchange, are not sufficient unto themselves. *A fortiori* the institutional economics of Veblen and Ayres, which is the counterpart to Deweyean progressivism, and the basis for the New Deal assault on the Constitution, is no replacement for the substantive nature of man.

The philosophy of progressivism in all its manifestations must be replaced by a philosophy of created natures. Until education gets back to this *substance* all the due process in the world will do no good.