

THE SCOPE OF GOVERNMENT IN A FREE SOCIETY

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The purpose of this article is to delineate the legitimate functions of government in a free society. This exercise differs from determining the “optimal” size of government, which economists have estimated at 15 to 30 percent of gross domestic product. James Madison, the chief architect of the U.S. Constitution, was not primarily looking for an engine of economic growth; he was seeking an institutional design to limit the powers of government and protect individual rights. People would then be free to pursue their happiness and, in the process, create wealth.

Eighteenth century liberals had no theory and no formal models to calculate the optimal size of government. They started from first principles and sought to discover the legitimate functions of government. Their emphasis was on liberty—not democracy; they sought to prevent injustice, not to use government power to obtain some vague concept of social justice. Classical liberals viewed economic development as an expansion of the range of choices open to individuals, not simply as growth in real GDP per capita (there were no GDP statistics). They understood that getting the rules right and allowing markets to expand would increase personal and

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economic freedom, thereby increasing the wealth of nations (Bauer 1957: 113; Dorn 2002).

There is no more important question than the scope of government in a free society. The legitimate functions of government help define the range of choices open to individuals and, hence, the boundaries between the individual and the state. Limiting the powers of government to the protection of persons and property—broadly understood in the Lockean sense as “lives, liberties, and estates”—provides a clear sense of justice and promotes a spontaneous market order, enhancing both personal and economic liberties. An overreaching government does the opposite.

An Overview

The Framers of the U.S. Constitution took it as “self-evident that all men are created equal” and have “unalienable rights”—including the rights to “life, liberty, and the pursuit of happiness.” Those rights, as expressed in the Declaration of Independence, were incorporated in the broad rubric of property—understood as “everything to which a man may attach a value and have a right; and *which leaves to everyone else the like advantage*” (Madison 1792, in Hunt 1906: 101).

Madison held that the legitimate and primary function of a just government is “to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses” (Madison 1792, in Hunt 1906: 102). Thus, in the Madisonian vision of government and society, there is no separation between good government, personal liberty, private property, and justice.

“It is sufficiently obvious,” Madison ([1829a] 1865: 51) argued, “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.” Madison’s constitutional republic was to be one of limited powers under a rule of law, rather than an intrusive state aimed at redistributing income and wealth via the democratic process.

The basis of the U.S. experiment in designing a system of government to “secure the blessings of liberty” was the principle of consent. Within a regime protecting individual rights to life, liberty, and property, people would be free to pursue their own happiness without interfering with the equal rights of others.

The existence of slavery, however, violated the very heart and soul of the normative principles underlying the Constitution and expressed in the Declaration of Independence. It took the Civil War and constitutional amendments to finally move the country closer to the ideals expressed in the Constitution as a “charter of freedom.”

The principle of freedom or nonintervention means that individuals have the right to pursue their preferred choices provided they do not interfere with the equal rights of others. Private property—beginning with self-ownership—is synonymous with personal liberty and freedom of contract (consent). Justice requires that government and law, which operate through power/coercion, be limited to the prevention of *injustice*—that is, to the defense of one’s person and property, viewed as natural rights that exist prior to government. This model of good government is the “simple system of natural liberty” that Adam Smith and the Scottish Enlightenment thinkers so admired, both for its moral consistency and for its practicality in allowing people to pursue their own interests while bringing about social and economic harmony.

The demise of the U.S. “constitution of liberty,” to use F. A. Hayek’s term (Hayek 1960), began during the Progressive Era toward the end of the 19th century and accelerated with the Great Society programs in the mid-1960s. Most recently, in the wake of the 2008 financial crisis, the rapid growth in the size and scope of government has further expanded the redistributive/welfare state and eroded the Framers’ Constitution of liberty. At the beginning of the 20th century, total U.S. government spending was about 10 percent of GDP, and most of that was at the state and local levels. Entitlements were seen as unconstitutional and inconsistent with an American culture of independence and moral rectitude. Today, welfare spending is an important component of government budgets, total government spending is about 36 percent of GDP, and federal spending is about 24 percent.

The real size and scope of the federal government, however, is vastly understated if one merely looks at present obligations and ignores future promises. The unfunded liabilities in Medicare and Social Security are now more than \$100 trillion in present value terms and far exceed the explicit federal debt of roughly \$15 trillion. Moreover, the high costs of regulation, the heavy excess burden of high marginal tax rates, the waste inherent in rent-seeking, and the damage to our moral fiber from the rise of the welfare state and the

“too big to fail” mentality have eroded property rights, responsibility, and freedom.

In this article, the links between law, liberty, and justice will be explored. In particular, the distinction between what Adam Smith called “perfect justice” and “imperfect justice” will be elaborated on. It will be seen that only the former can be extended to all persons without violating anyone’s natural rights to life, liberty, and property. If the government transforms itself from preventing injustice to promoting some concept of “social justice” via redistribution, then perfect justice is turned on its head and the doors are opened for all types of state activism. In such a system, equality of result will trump equal treatment under a just rule of law—and coercion will crush consent.

The vast expansion of government in the United States has eroded the moral foundations of a system of justice based on property rights and responsibility, leading to the problem of moral hazard. By underpricing risk and credit, the government has impeded the market process, misallocated resources, and undermined the scope for voluntary exchanges. The growth of government is crowding out private entrepreneurs, turning market liberalism into market socialism, and eroding the ethos of liberty and responsibility.

Law, Liberty, and Justice

The purpose of the law of the Constitution, as stated in the Preamble was to “establish Justice, insure domestic tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty.” To do so, the Framers strictly limited the powers of the federal government, enumerating them in Article 1, Section 8. In particular, there is no evidence that the Framers envisioned the General Welfare Clause as a blanket provision for expanding the size and scope of government.

In understanding the limited scope of the General Welfare Clause, one need only refer to what Madison ([1831a] 1865: 171–72) wrote some three decades after the ratification of the Constitution:

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.

The Framers created a compound republic and a judiciary to safeguard the Constitution of liberty. A Bill of Rights was added as insurance—not because the Framers thought that all rights had to be enumerated to be protected. As A. V. Dicey ([1885] 1982: 72) noted in his classic treatise on the *Law of the Constitution*, the U.S. system of government “makes the judges the guardians of the Constitution.” All three branches swear allegiance to the Constitution but the judiciary is the “final arbiter” (see Siegan 1985).

The whole constitutional enterprise, of course, is based on the “consent of the governed.” Thus, the powers of the federal government are delegated and are “few and defined,” as Madison wrote in *Federalist* No. 46. In his Farewell Address in 1796, President George Washington reiterated the principles of freedom and limited government, noting that the American constitutional republic was to be “a government of as much vigor as is consistent with the perfect security of liberty. . . . to maintain all in the secure and tranquil enjoyment of the rights of person and property.”

If laws are just, liberty and property are secure. The most certain test of justice is negative—that is, justice occurs when injustice (the violation of natural rights to life, liberty, and property) is prevented. The emphasis here is on what Hayek (1967) called “just rules of conduct,” not on the fairness of outcomes. No one has stated the negative concept of justice better than the 19th century French classical liberal Frederic Bastiat ([1850] 1964: 65):

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.

In short, the purpose of a just government is not to do good with other people’s money, but to prevent injustice by protecting property and securing liberty.

The negative concept of justice goes back to Adam Smith’s distinction between perfect and imperfect rights. In his lecture “Of Jurisprudence,” Smith ([1762] 1982: 9) argued that “perfect rights”

refer to “those which we have a title to demand and if refused to compel another to perform,” while “imperfect rights” pertain to “those which correspond to those duties which ought to be performed to us by others but which we have not title to compel them to perform.” Perfect rights are consistent with the principle of freedom and with justice because they are impartial and safeguard property. They can be extended to everyone without violating anyone’s natural rights. Imperfect rights are rights only in a “metaphorical sense.” They favor special interest groups at the expense of the general welfare, refer to distributive not commutative justice, and violate property rights.

An individual may be said to have a moral duty to help others—and *ought* to do so—but one cannot be said to have a *legal* obligation to help others. Virtue depends on *voluntary* action, not on coercion (Pilon 1979a: 1194).

It is clear from the following passage that Madison (1792, in Hunt 1906: 102–3) would regard the modern redistributive state as unjust and inconsistent with a liberal social order:

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. . . . That is not a just government, nor is property secure under it, 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. . . . A just security to property is not afforded by that government under which unequal taxes oppress one species of property and reward another species; where arbitrary taxes invade the domestic sanctuaries of the rich, and excessive taxes grind the faces of the poor; where the keenness and competitions of want are deemed an insufficient spur to labor, and taxes are again applied by an unfeeling policy, as another spur.

In sum, law, liberty, and justice are inseparable. Law is the use of force to protect our natural rights to life, liberty, and property; liberty is the freedom to act within the law; and justice is the safeguarding of property broadly conceived.

The Case for Limited Government

The Framers based their case for limited government on both moral and practical grounds. Madison ([1829b] 1865: 22) consistently argued that “in a just and free Government . . . the rights both of property and of persons ought to be effectively guarded.” He also recognized that doing so would “encourage industry by securing the enjoyment of its fruits.” In his speech in the First Congress on April 9, 1789, Madison emphasized that “commercial shackles are generally unjust, oppressive, and impolitic.” Moreover, he held that “all are benefited by exchange, and the less this exchange is cramped by Government, the greater are the proportions of benefit to each” (Madison 1789, in Padover 1953: 269–70).

Madison understood the need for rules as opposed to discretion, and held that markets have built-in incentives for people to act responsibly. He was a pioneer in constitutional political economy in recognizing that rules based on free-market principles would be a superior way to achieve economic harmony than by trusting enforcement to legislators (Dorn 1991). Consequently, he thought that a commodity standard based on the convertibility principle would be a superior way to regulate the value of money than by giving Congress the discretion to print paper currency, even if in theory its value could be stabilized by limiting its supply. As he noted, “What is to ensure the inflexible adherence of the Legislative Ensurers to their own principles and purposes?” (Madison 1831b, in Padover 1953: 292).

The Framers wanted to establish a common market for the common good. The principle of spontaneous order developed by Adam Smith and other Enlightenment thinkers cautioned against government interference with private free markets. The word “macroeconomics” would have been meaningless, as would fine-tuning through monetary and fiscal policies. Like Smith, Madison (1789, in Padover 1953: 269) thought that “if industry and labor are left to take their own course, they will generally be directed to those objects which are the most productive.” In particular, Madison recognized the knowledge problem that Hayek (1945) later elucidated. According to Madison, if government adhered to the principle of free trade, resources would be allocated “in a more certain and direct manner than the wisdom of the most enlightened Legislature could point out.”

At the time of the American Revolution, economics was better known as “political economy” and generally was viewed as a branch of moral philosophy. It was well understood that individuals were not angels and needed rules and “right reason” to guide them. Order would then emerge naturally from the institutions of limited government, private property, and free trade. Civil society, not the welfare state, was to be of central importance in day-to-day living.

The Rise of Government and the Decline of Morality

When government oversteps the constitutional limits that protect persons and property in order to pursue what Hayek (1976) called the “mirage of social justice,” virtue is replaced by compulsion, democracy overrides limited government, and the spontaneous order of the market is impaired.

Modern U.S. liberals (so-called progressives) see the role of government to “do good” (with other people’s money) rather than to “do no harm.” Instead of asking whether the *rules* are just, they ask whether the *outcomes* are fair. This change from a focus on justice as protection of property to justice as the redistribution of property to satisfy special interests has undermined the Constitution as a charter of freedom.

The principle of equal freedom under the law of the Constitution has been violated and replaced by what Bastiat called “legal plunder”—that is, the use of the law not to protect natural rights but to favor one group over another. The result of replacing the law of liberty with legal plunder is exactly as Bastiat ([1850] 1964: 238–39) predicted:

If you make the law the palladium of the freedom and 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. . . . If on the contrary, you make of the law an instrument of plunder for the benefit of particular individuals or classes, . . . there will be tumult at the door of the legislative chamber; there will be an implacable struggle within it, intellectual confusion, [and] the end of all morality. . . . Government will be held responsible for everyone’s existence and will bend under the weight of such a responsibility.

The competition for favors (rent-seeking) results in legal plunder, with numerous laws enacted that redistribute income and wealth via the tax and transfer system, the regulatory state, and protectionism. Deficits and debt, once considered immoral, now weigh down the U.S. government and burden future taxpayers. Meanwhile, the U.S. central bank issues pure fiat money, which Madison warned against, to help finance that debt.

Making government responsible for economic growth and for the welfare of special interest groups—instead of providing for the “general welfare” by adhering to the principle of freedom/nonintervention—has led to the rise of government and the decline of morality (Dorn 2010).¹ As the size and scope of government has expanded, individuals have become more dependent on government for education, healthcare, retirement pensions, and a myriad of subsidies in the form of corporate welfare, including protectionist measures that reduce the range of choices open to consumers.

For Thomas Jefferson ([1801] 1989: 15–16), the “sum of good government” is to “restrain men from injuring one another,” to “leave them . . . free to regulate their own pursuits of industry and improvement,” and to “not take from the mouth of labor the bread it has earned.” That concept of government was widely shared during the 19th century.

In 1837, John O’Sullivan, editor of the *United States Magazine and Democratic Review* wrote:

The best government is that which governs least. . . . [Government] 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 other respects, the voluntary principle, the principle of freedom . . . affords the true golden rule. . . . This is the fundamental principle of the philosophy of democracy, to furnish a system of the administration of justice, and then to leave all the business and interests of society to themselves, to free competition and association—in a word, to the *voluntary principle* [in Vernier 1987: 12–13, emphasis in original].

¹See Pilon (1979b: 1340–41) on the basic right to noninterference, which characterizes a free society, and its inconsistency with modern “welfare rights” or what Smith called “imperfect rights.”

The demise of the Framers' Constitution by legislative and judicial activism has clouded the vision of limited government as one bounded by rules of just conduct and allowed democracy as crude majoritarianism to erode the voluntary principle. The perfect fundamental rights to be secured by the Constitution have been supplanted by the imperfect welfare rights that conflict with freedom and private property. In the process, moral hazard has become a major problem as costs and risks have been socialized.

Those in the "Occupy Wall Street" movement rightly object to government (taxpayer) bailouts of incompetent entrepreneurs, but they also call for redistribution and greater equality of outcomes. The idea that liberty comes first and democracy second (Pilon 1992/93), and that limited government and equal rights under the law of the Constitution generate a harmonious social and economic order (Dorn 1990), has been lost.

The lack of understanding of the constitutional limits on the size and scope of government power, and the failure to distinguish between perfect and imperfect rights, has led to the notion that there is "a legitimate demand that fiscal policy should promote some sort of social justice" (Bordo and James 2011: 5). But how can that demand be "legitimate" if it conflicts with the very notion of justice enshrined in the constitutional principle of freedom?

Bordo and James (2011: 5) argue that the sustainability of free markets "depends on perceptions of the legitimacy and fairness of the social order"—without providing any clear definition of those terms. They merely state that the government "must offer a safety net, when other—better—mechanisms that should produce social cohesion and solidarity (such as greater levels of entrepreneurship . . .) for some reason are not effective." They conclude by saying that "failure to do so can produce bad and destabilizing consequences, and dramatic market failures."

Bordo and James certainly are not advocates of big government, and they are correct to note that people's views of the "legitimacy and fairness of the social order" matter in shaping the economic order. Yet, it is also useful to recognize government failure. The lack of private property rights within government means there are no owners who bear the consequences of failure or capture the rewards of success. Government officials have little incentive to be resourceful. Most politicians seek to expand, not reduce, the size of government—and use every crisis to do so.

If a government program fails, there will be a demand for more, not less, spending.

It was not “market failures” that the Framers were concerned about. Their primary concern was to limit the *power* of government and let civil society flourish. They understood that the legitimate function of government is to protect property rights (i.e., personal freedom), not to “promote some sort of social justice” via redistribution of income and wealth.

The overextension of government in the United States—from a government of limited powers to one of positive welfare rights or entitlements—has corrupted the law of the Constitution, turned the concept of commutative justice on its head, and weakened the bonds of civil society. By asking too much of government, people have become disillusioned and distrustful of political promises that cannot possibly be kept. The rise of government power has dulled personal responsibility, diminished natural benevolence, and narrowed private choices.

Conclusion

This article has expounded fundamental principles that underpin the law of the Constitution. A government based on the consent of the people and designed to protect their natural rights to life, liberty, and property is just. Moreover, with the limitation of government power, individuals will be free to choose, and markets will emerge to coordinate human action and create wealth.

When the constitutional constraints on government power are eroded, market liberalism will give way to market socialism, and the spontaneous market order will suffer. The rise of government will eventually lead to a decline in morality as private property rights and freedom of contract are violated.

The 2012 elections will be a referendum on the size and scope of government. If people fail to understand that much of the Great Recession was due to government failure, not market failure, they will be led down the path of greater legislative activism. Instead of binding government to the law of the Constitution, the siren song of social justice will entice people to demand more government spending and more “stimulus.”

The idea that policymakers, with the help of economists, can design a complex system like the market, fine-tune the economy, and use

discretionary monetary and fiscal policy to achieve a real GDP growth target is a “fatal conceit,” to use Hayek’s term. In fact, much of what the federal government does is inconsistent with constitutional principles and disrupts the spontaneous market order. Rent-seeking and legal plunder dominate the Washington landscape. Discretion, not rules of just conduct, is the defining characteristic of today’s policies—designed to promote special interests, not the common good.

The challenge will be to restore limited government and increase individual responsibility under a rule of law. Creating new rights out of thin air—rights that cannot be universally extended and that violate private property rights—erode the Constitution of liberty. Having gone so far down the path of market socialism (or crony capitalism), it will not be easy to change course.

Returning to first principles will help one recognize the importance of just rules in generating social and economic harmony. The moral and practical arguments for limited government and for individual freedom and responsibility need to be squarely contrasted with the disharmony and uncertainty that result from government activism and the attempt to do good with other people’s money.

The limits of monetary and Keynesian-type fiscal policies need to be recognized. Rules, rather than discretion, provide a stable framework for individual choices affecting future values. Narrowing the scope of government and expanding the scope of markets, is a surer way toward peace and prosperity than expanding the power of government.

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