Viewpoint

Robert H. Bork

On Constitutional Economics

PROPOSING AMENDMENTS to the Constitution is much in vogue these days. The proposals for change vary greatly, but advocates usually advance one of two lines of argument to explain why the legislative process is defective and why the subject should be assigned to the judicial process instead. The first is simply that policy outcomes would be improved by doing so. That may or may not be true. Certainly we have, to our great benefit, constitutionalized, and thus removed from majority control, a number of policy areas. On the other hand, almost no one supposes that it would be wise to continue the process of shifting policy choices from legislatures to courts indefinitely.

That brings us to the second reason, which is very sophisticated and is rarely heard outside a rather small, largely academic, group. This approach seeks ultimate principles by which we may determine which subjects are best controlled by judges and which by elected representatives. It is a highly abstract enterprise and one is likely to hear arguments about whether the basis for constitutionalism is utilitarian, contractarian, consensualist, or something else. The object, of course, is nothing less than to discover the ultimate principles of government, a noble enterprise but one which promises no quick success and from which I propose to excuse myself.

Those who practice law, unlike those who profess its more philosophical reaches, do not ordinarily have to face the question of the ultimate justification for the regulation of human behavior by law. As a professor, I wrestled with the problem for years in my seminar on constitutional theory. It seemed to me that the legal mind, used to finding general principles to explain a series of particular cases, could reason from the particular provisions of the Bill of Rights to a general theory of the legitimate spheres, respectively, of individual freedom and governmental coercion.

The endeavor led me to deduce from the Bill of Rights a series of very libertarian positions. Indeed, that outcome is virtually guaranteed by the starting point. If you start from instances of guaranteed personal autonomy, the generalizing principle will turn out to be one of autonomy, if not anarchy. Had I started instead from instances of the constitutional powers of government, the principle might have been almost pure majoritarianism. Neither principle, of course, is adequate to the complex governance of our society. In any event, because of where I started and came out, the students loved it. Alexander Bickel, who taught the course with me, hated it. His position was that no overarching theory of freedom and coercion is possible, and I came to think that he was right.

Being a lawyer is hard enough, but at least a lawyer, in his professional work, has the luxury of not dealing with ultimate justifications. He need only try to make things work legitimately and well within the limits of his calling and the context of this particular society. The lawyer deals with principles of limited range that continue to evolve. If they reflect some unknown ultimate or transcendent principle, they are not themselves ultimate but shifting, partial, and incomplete, though nonetheless valuable, indeed indispensable, for that. Working with them, their collisions and compromises,

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has proved to be difficult enough. Experience has taught me to prefer this working lawyer's perspective to arguments about constitutionalism pitched at a very high level of abstraction.

Part of what a working lawyer knows is that any principle or idea, however admirable in the abstract, undergoes changes as it is applied through courts. The changes may be so great that it would have been better not to embody the idea in law at all. I want to deal here with the difficulties that attend the embodiment of economic principles in law, particularly in law that must speak in the generalities appropriate to the Constitution.

THE SUBJECT IS certainly timely. Not only are courts urged to extend existing constitutional provisions to guarantee greater freedom in the marketplace but there are very serious proposals to control national fiscal policy through new provisions. Thirty-two of the required thirty-four states have now called for a convention to propose amendments concerning this subject. This being an unknown area of constitutional procedure, the validity of these applications may be open to question, but there is no question about the seriousness of the movement. It is against this background that I will discuss the problems of economics as a subject for the Constitution.

To begin with, the idea of constitutional economics seems to me entirely a legitimate one. We are all familiar with the argument that economic policy is a matter of prudence and pluralist politics which simply does not belong in the fundamental law of our nation. In my view, that is wrong. It is well to distinguish between two kinds of constitutional economics —the protection of the economic liberties of individuals from state interference and restraints placed upon government monetary and fiscal policy.

As to the first, it has long since been known that there is no principled philosophic difference between individual economic freedoms and individual freedoms of other sorts. Since we protect one set of individual freedoms, it is difficult to say why the other should be without protection. Indeed, the Constitution contains a variety of clauses that were intended to, did, and to some extent still do, protect such freedoms. Since the framers of the Constitution thought that such matters deserved to be included, that in itself is a reason of considerable persuasive power for us to think that, as a matter of principle, such guarantees may still have a place.

Nor is there any case in principle against inclusion in the Constitution of a provision controlling fiscal or monetary matters. The public may reasonably feel that we must somehow stop the seemingly inexorable rise in the share of the public's wealth claimed by the federal government, and so far, nothing short of a constitutional amendment has really worked. It may be that only a constitutional check can cope with the well-known pathology of representative government in the social democratic style, in which intense constituencies press for particular programs that add up to spending levels that nobody really wants.

It is widely recognized that, in the near term, such increasing aggregates are a threat to economic vitality. Over the longer term, inefficiency, inflation, and fights over the division of a shrinking pie may be capable of taking us to a worse and far less free society than any we now would find tolerable—one governed by unaccountable bureaucracies, if not by rulers even less benign. Any systematic malfunctioning of government serious enough to threaten both prosperity and freedom may properly be addressed by the Constitution.

But if there is no objection to the general idea of constitutional economics—no objection to it, that is, as a matter of somewhat abstract principle—there are a number of problems with the implementation of the idea. Problems in implementation are not to be regarded as minor matters that some lawyer adept at conveyancing can deal with. There is a temptation among the philosophers of this subject to walk away from such mundane considerations, muttering that they don't do windows. But lawyers and judges do windows. They know from experience that not all policies can be made into effective law. There is a tendency to think that constitutional rules execute themselves and that they accomplish precisely what was intended, but that is not by any means always the case. Law, to use the terminology many economists have employed, is one gigantic transaction cost. The cost comes in many forms and must be taken into account when we are deciding whether to amend the Constitution and how.

Even as we are learning more about economics, and in particular about the defects of economic policy made through a pluralist political process, so, too, are we learning more about law as a mechanism of social and political control.

There was a time when it was casually assumed that law was capable of dealing with and transforming virtually any social or political reality. Perhaps that belief was engendered by the startling success of the Supreme Court's rulings, beginning with *Brown* v. *Board of Education* in 1954, that official segregation of the races is unconstitutional. William Graham Sumner's dictum that "law ways can't change folkways" seemed to many decisively disproved. But not all of society's ills have proven so amenable to legal cures. We all know of extensive regulatory programs that have added enormous costs without securing any discernible benefits or that have created graver problems than they solved. We should have learned by now that any expectation that law is omnipotent is not merely naive in its theoretical underpinnings but often disastrous in practice. It has brought us what many Americans perceive as not merely an overregulated but a clumsily regulated society. We have learned that law is frequently not a scalpel but a blunt instrument. Legal rules have side effects, and these sometimes come close to outweighing the good that rules do.

I should pause to make it abundantly clear that I do not for a moment doubt that this nation is far better off, freer and more prosperous, because of the Constitution of the United States. I should also make it clear that I am not an anti-constitutionalist in the sense that I oppose amending the Constitution further as the need arises. But I assume most people would agree that the presumption is against amendment so that the need for it must be clearly demonstrated. There is much wisdom in those two constitutional philosophers, one English and one American, who said, respectively, "Unless it is necessary to change, it is necessary not to change," and "If it ain't broke, don't fix it."

BUT LET US SUPPOSE a need for a constitutional provision has been clearly shown, or at least a need has been clearly shown on the assumption that the provision will do precisely what it is intended to do. It is the assumption that is likely to get us into trouble. Many, though not by any means all, constitutional provisions have to be enforced by judges. Constitutional economics would rest, I take it, on judge-enforced amendments to the Constitution.

Milton Friedman argues that a spending limit provision in the Constitution would pose no problem for the courts—that all we have to do is look at the First Amendment to see that courts can handle complex and difficult subjects in ways that preserve our freedoms. Rejecting this argument poses some difficulty for me—not only because of its author. I went to the University of Chicago and so was raised virtually from childhood—you remember the Hutchins plan—to believe that Milton was always right. In this case, however, I do not believe his analogy holds. The First Amendment is almost entirely judge-made law. It has worked well, but I doubt that anybody wants judge-made economics. Moreover, even provisions that work well on the whole might profit from more careful drafting.

The guarantees of freedom of speech and of the press are perhaps the most important guarantees of liberty to be found in the Constitution. We are far better off with them than we would be without them, but there are costs. Those guarantees have been interpreted to permit the destruction of persons' reputations, the spread of pornography, the advocacy of violence and even genocide, and much more of like nature. Communities have lost a good deal of their power democratically to control their own moral environment. Many people count these as substantial costs. Whether they are inseparable from the benefits of the amendments is not the point; the point is that judges have thought they were, and so a constitutional provision has come to have a meaning that may not have been fully apparent to those who framed and ratified it. If the very generally worded First Amendment has on balance produced good social policy, as I think it clearly has, that may be because the subjects of speech and press are ones that judges understand fairly well. They are also subjects that lend themselves to relatively simple rules. It may be doubted that an equally generally worded economic amendment would produce policy as beneficial.

This is not said in criticism of judges. My days of criticizing judges are over. It is simply

a fact that judges are human and that appellate tribunals are committees. The interpretation of words on paper in unanticipated factual circumstances is always a chancy thing. Remember that Chief Justice Charles Evans Hughes said that the Constitution is what the judges say it is. That was not cynicism, but merely a common-sense observation about the application of law. It does, however, raise the question whether we want the economic policy of the United States to be what the judges say it is.

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That is a real problem with respect to any constitutional provision that attempts to secure the economic liberties of individuals against hostile legislation. Legislation directed at market freedom can take so many forms that a constitutional provision guaranteeing economic freedom might have to be generally worded and subject to interpretation of wide latitude. Indeed, that is the lesson of our history. As Professor Bernard Siegan has shown, we already have clauses that could be used to protect economic freedom—and were so used. They are, however, so open-textured, so general, that judges were free to impose their own economic policies—and they did.

In some of the literature on constitutional economics, there is favorable comment about the Supreme Court's decision in *Lochner* v. *New York* (1905), which struck down a working-hours regulation for bakers. The trouble with *Lochner* was that Justice Rufus Peckham's opinion was unable to provide any reasoning to explain why this particular regulation of markets was an undue infringement of liberty while others were not. The case is correctly perceived as essentially a lawless judicial decision. If judges step into this area, that must be expected. The Constitution provides minimal guidance and it is difficult to imagine an amendment that would be able to provide much more.

IT MAY BE RESPONDED that judges do the same thing today in other fields and their decisions often survive. If that is true, it is not a vindication of *Lochner* but a condemnation of those other decisions. But I wish to make another point. The fate of the *Lochner* decision and many others like it, which defended not only economic liberty but other values such as federalism, illustrates the weakness of constitutional guarantees that are not widely supported, and supported in particular by the constitution-making apparatus of our society. When the mood of the country swung against free markets, the Supreme Court was able to check anti-market legislation only very partially and only very briefly. Franklin Roosevelt's Court-packing campaign was merely the most dramatic episode in a long swing of the courts away from protection of economic freedoms. More important was Roosevelt's series of appointments of new justices, men who read the Constitution the way Holmes did in his *Lochner* dissent. The lesson to be learned is that broad, interpretable constitutional provisions cannot long stand against determined political forces that have gained the ascendancy. Hence, it is difficult to imagine that a constitutional amendment guaranteeing individual economic freedom could remain effective unless it had very strong political and intellectual support. Even then, as I have said, it is difficult to imagine a clause so worded as to guard adequately against judicial subjectivism in its application.

This danger lessens somewhat, though it does not entirely disappear, as a clause becomes more specific. Perhaps a clause intended to control the fiscal policy of the United States could be drawn with enough specificity to prevent subjective interpretation. There are, however, several problems with proposals for fiscal policy amendments that must be considered.

The first, of course, is effectiveness. Even assuming no problems of enforcement or of distortion in the enforcement process, government has ways of commandeering society's wealth and redistributing it that do not depend upon taxation, borrowing, or inflation. The most prominent, of course, is regulation. Government need not spend a dime on a program if

it can find groups in the private sector who can be made to spend their own funds. Much of the heavy expenditure of funds required by the Clean Air Act, for example, does not appear in any governmental budget and requires neither taxes nor governmental borrowing or spending. Industry is simply required to pay to clean up emissions. That technique could be used for many other programs. Social Security benefits could be handled largely in this way, ending governmental deficits but not the share of wealth appropriated by government for its purposes. So far as I know, no one has suggested a workable way around this difficulty. Perhaps the difficulty is not as great as this may suggest. And, of course, a balanced-budget or spending-limitation amendment might still be worth adopting even if it would not be wholly effective.

Also troubling is the problem of enforcing such a constitutional provision. In the early stages of discussion, a lot of people, including most economists, apparently thought this was no problem: if Congress exceeded the constitutional limits on spending, someone would sue. That much is true. The result, however, would likely be hundreds, if not thousands, of lawsuits around the country, many of them on inconsistent theories and providing inconsistent results. By the time the Supreme Court straightened the whole matter out, the budget in question would be at least four years out of date and lawsuits involving the next three fiscal years would be slowly climbing toward the Supreme Court. It is quite possible that it would be necessary to narrow the class of possible plaintiffs significantly and to create a special, and final, court to handle this litigation.

UNLESS ATTENTION is paid to the institutional problems involved, a constitutional amendment would become in practice a nullity—either that, or the budgetary process would pass into the hands of the courts, an outcome desired by no one. When I said earlier that law is a transaction cost, I was not merely being flippant. We all know that there are the direct costs of law enforcement and that these can be large. Many recognize that there are also the costs of undesirable but unavoidable side-effects of policy enforcement. But too few understand the costs of a policy's alteration in the very process of its application. Constitutional provisions pass through the hands of judges, and any venture in constitutional economics would almost certainly be transformed to some extent in that process.

Since economists are in the forefront of those advocating constitutional economics, it may be thought ironic that so little attention has apparently been paid to the institutional problems involved, including the incentive structure that judges face and how that structure may influence their interpretations of law. Having identified the incentive structure confronting legislators as the source of the problem, it is odd that economists should advocate moving the policy into the courts without a similar inquiry. The defects of the legislative process do not of themselves render the judicial process perfect or even preferable.

If the economists' utility-maximizing hypothesis is accepted as an accurate predictor of behavior, then we need to know what it is that judges maximize. They cannot affect their money incomes, like practicing lawyers, and they cannot choose their subjects or opt for leisure, like professors. What is it that they can and do maximize? Does their incentive structure deflect them from doing what we want of them? And what mechanisms of control do we have to obtain performance that maximizes the chances of getting what the framers of a constitutional provision wanted? Until we have some inkling of an answer to at least the last of those questions, constitutionalism will accomplish less than it should, and the thought of placing new areas in the control of judges will continue to make some people apprehensive about vaguely worded constitutional amendments.

I do not mean to say that our Constitution should never be amended. What I do mean is that an exclusively philosophic or economic approach to market-freedom or fiscal-policy amendments is likely to produce provisions that either are largely unworkable or have unintended consequences. Some sophistication about the way provisions are litigated and the way they are applied by courts can reduce these problems. This may seem a mundane observation, but it is, I think, a vital one to bear in mind. The wisdom of our economic policy is important, but so too is the integrity of our legal institutions—and in the area of constitutional economics the two are inseparable. ■