

What If This Is As Good As It Gets?

RICHARD A. EPSTEIN

PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD
PERSEUS BOOKS

Daniel D. Polsby

THIS, I'M AFRAID, IS as good as it gets. A central problem of libertarian theory is how to reconcile liberty – freedom from coercion – with some workable notion of public good. For many libertarians, in fact, the problem is so pestering that they decline to face it at all: taxes are theft; public works a scam; only the barest minima of collective life – keeping up a posse for shooting Communists and enforcing contracts – can possibly be justified; and everything else, from the Hoover Dam to the mosquito abatement district to compulsory vaccinations, is illegitimate, damnable, and not for a moment to be countenanced. Libertarians, among whose number I bashfully count myself, thus pretty often find themselves in the singular condition of seeming to wish for a world in which they wouldn't dream of trying to live or raise a family. More smallpox rather than less? Few paved roads and no public spaces? No community other than the purely elective kind, like

membership in a health club?

Most of Richard Epstein's distinguished career has been given over to blazing a path out of this dark wood by trying to make common sense of the possibility of collective action in a laissez-faire world. Now he has produced an entire volume devoted entirely to effectuating a rapprochement between libertarian impulses on the one hand, and on the other a recognition that collective projects of many different kinds enrich human life. Amplifying and extending the arguments set forth three years ago in *Simple Rules for a Complex World*, *Principles for a Free Society* is a fine book, irreverent, learned, earnest – and in fact *Principles* is everything that a book should be, yet it never does slay the dragon that was the putative purpose of the quest. While Epstein effectively defends laissez-faire and the principles of natural law from any number of weak or confused refutations that have been thrown at it, he supplies us with no means for sorting

Daniel Polsby is Kirkland and Ellis Professor of Law, Northwestern University.

out the bona fides of a proposed public good – the central problem, after all, of public budgeting. Unless one has a grip on the public goods question, it becomes impossible for a consequentialist libertarian to define or defend a limit for the exercise of state power. One begins to suspect that no philosophical détente between libertarian ideals and collective action is going to be possible.

Epstein argues (and indeed his book illustrates) that a defense of *laissez-faire* can be at once principled and sophisticated. A concern for liberty is not an invitation for human beings to try to shirk their social nature or to pretend that human happiness is served if political authorities may never impose burdens on individuals without particularized, specific consent. Forced exchanges are sometimes legitimate. Property, contract and freedom from paternalistic impositions are not best thought of as hard and fast rules, but simply as tropisms that tug in the direction of the institutions and behaviors that best secure human happiness. By making this much strategic concession to the arguments of street-smart pragmatism, argues Epstein, most of the more outré caricatures of *laissez-faire* become untenable, and then fair fights about public policy in the modern world can be carried out on the level playing field that Epstein believes to be very favorable to libertarian argument.

The doctrinaire libertarian from whom Epstein is trying to distinguish himself has great difficulty explaining taxation, eminent domain, and other such coercive impositions by the state. Correlatively, understanding the prisoners' dilemmas well enough to acknowledge the propriety of compulsory revenue-gathering to pay for collective goods, that doctrinaire libertarian will usually have a very restricted set, maybe even a null set, of things he avows actually are public goods. No doubt coercions by government can seem useful at times, he thinks, but that doesn't make them right. If one believes that taxa-

tion is theft – which surely it is if it's being collected for private rather than public benefit – there is every reason to disdain the serpent-windings of utilitarianism in connection with any discussion of taxation. It is hard for some people to accept that whether or not one has a moral duty to refrain from thieving depends upon whether or not, all things considered, thieving brought more utility into the world rather than less. If one once begins to believe that, then the Kaldor-Hicks criterion of efficiency would become the little shadow of the Good. That mental state is one of the earliest and most deadly symptoms of Potomac Fever, whose onset no libertarian sensibility can survive. Best stay away from the slippery slopes, or canyon walls, of utilitarian justifications, lest one lose one's virtue.

Epstein has no such conceptions of virtue and labors under no illusions that it would be possible or desirable to live in a world without very many public goods. And, he insists, consequentialist arguments for taxation or regulation should not be avoided but embraced because they are, more often than not, friendly to libertarian principles. Utilitarian and deontological justifications for *laissez-faire* tend in the real world to converge. This is the heart of Epstein's argument.

And there is a certain proverbial resonance to this claim. *Laissez-faire* both feeds material abundance and reinforces virtues like keeping promises, taking responsibility, being careful and above all being reasonable. A virtuous man, because he is known as virtuous, more readily elicits cooperation from his neighbors, which leads to wealth, while antilibertarian regulatory impositions place a tax on virtue, louse up people's capacity to contract and engage in meaningful planning, and thus inhibit the creation of wealth or actually destroy it. Yet the power of such consequentialist argumentation here depends entirely on the absence of some alternative world view that

accounts for the facts in a way that yields policy implications opposite to those Epstein (or, for that matter, I) would accept. Epstein is sanguine about the scarcity of such alternative accounts, inexplicably so since he hears them all the time. As a result, he is far too optimistic about the potential for consequentialist argumentation to convince the rationally ignorant or the actively skeptical of the virtues of laissez-faire. Indeed, it is not all that clear that the Epstein sort of person and the true-blue children of the administrative welfare state can actually inhabit the same polity without the side having the upper hand practicing despotism upon the other.

Let's say you have a housing shortage on your hands. Libertarians understand why: something, probably a municipal land use agency, has acted to prevent the supply of housing from keeping pace with demand. They strayed from virtue and were rewarded with a plague; 'tis ever thus. Nine times out of ten – more often than that – this will be a satisfactory explanation for any persistent housing shortage. Yet the land use agency will continue on its merry way, not infrequently with broad-based public support. Why can't people learn?

Elected representatives in the Capitol of New Dealia (a state in which the principles of laissez-faire are scorned) will have their own, very different, theory of how the housing market failed. "Radix malorum est cupiditas," they will reason with unselfconscious irony. "The housing shortage is simply a species of hoarding, caused by profiteers holding product off the market so as to allow them to jack up the prices they can wring from tenants. We'll alleviate the shortage by taking the profit out of this profiteering. Rent control! Give it to 'em good and hard, and the housing shortage will disappear." Naturally the housing shortage will get worse. Libertarians will not be surprised; they will say "I told you so: lowering the rate of return on housing

discourages investment and will make the shortage worse."

Sadly, the New Dealians won't learn that lesson at all. The rent stabilization community – it is sure to call itself that – will have an "I told you so" of its own. "I told you that the local rentiers could not be stopped with the Milquetoast half-measures adopted by our gutless legislature," it will say. Stung by the suggestion of indifference to human pain, the general assembly will pass still more and more stringent laws increasing the harshness of the business environment and the size of the bureaucracy administering it. Matters will thus get yet worse. Blame will be placed. Reforms will be reformed. And so on and so on, without any necessary terminus. The fact that there are chronic housing shortages where one theory prevails and no housing shortages at all where the other holds sway may sooner or later transpire into the consciousness of those whose lives are immiserated by bad economic theory. But the process may take more like generations and centuries rather than months and years. Nor will reform likely go in a straight line, as socialistic politicians, playing on the parochial interests of locals, arbitrage the difference between the public interest and the voters' interest by reviving controls whenever they can. At every step of the way, the possibility of permanent reform will be dogged by the fact that laissez-faire is not just a set of predictions about the likelihood that government will be a reliable supplier of public goods. An entire world view slips in behind it, whose austere vistas are quite foreign to our brothers and sisters, the children of the New Deal. They do not see the damage that their market infringements do, partly because they are rationally ignorant and partly because of the availability of a welcome set of justifications for remaining rationally ignorant – alternative explanations for the damage. Americans have grown quite

comfortable with the notion that social justice may sometimes require a little systematic redaction of the verdicts of economic markets in order to clothe the naked, feed the hungry, shelter the homeless, erect a museum of trolley cars in the seventeenth congressional district, and create other collective goods that it would be unthinkable to omit in the administration of a modern state. They wouldn't have things any other way.

How do we know people feel this way? It is a revealed preference: that is how they vote. To be sure, they may be – probably are – simply behaving rationally only in light of the prisoners' dilemma in which they find themselves courtesy of the electoral institutions of representative democracy. One might then feel entitled to say: no, this is not the vox populi after all, but a defect in the ground rules that govern how political preference is expressed. But that is a weak criticism. It invites one to compare a flawed real system with a flawless imaginary one. No political system can perfectly translate a people's will (supposing a fact not in evidence) into an electoral outcome. And though some systems are more imperfect than others, surely American idiomatic democracy is not a contemptible specimen as these things go. In our democracy, in any welfare state, so long as everybody else is out there rounding up trolley museums and other trophies for the home folks, one is a sucker, not a saint, for refusing to scramble oneself. In contrast to the moral norms of natural law, in the administrative welfare state, deploying good character and self-denial in the neighborhood of public monies goes for naught. Practicing Federalist virtue in this instance does not make property more secure. It is not as though, if the member of Congress from the seventeenth district were to refrain from accepting coerced pelf – tax revenues – for any purpose other than an honest-to-God public good, the rightful owners would have their property returned. That won't happen; the sheep, once shorn, will stay

shorn. The choice is seldom or never “trolley museum” or “no trolley museum,” but whether one has the trolley museum in one's own district, or must stand by as it is erected in West Virginia where the Appropriations Committee chairman lives. In this realm it is a basic test of a member's political competence, no matter what principles he might profess, whether he can bring home federally paid-for trolley museums and other white meat. If he continues to rail against this system but accepts its largess, he sounds a hypocrite; if he refuses the largess while others are accepting it, he acts the fool. Either way, he's not cut out to sit in the Congress. Loyalty to good morals would move him into the political margin, feeding a cycle of ideological to political isolation. The Drafter of “Thou Shalt Not Steal” could not possibly have had democratic welfare states in mind.

Most any libertarian would say of the foregoing housing shortage, “Well, sorry about that and the people sleeping in washing machine crates under the viaducts, but one cannot justifiably use force to confiscate valuable things, like spare apartments or the monies to build them, from a person who has acquired them lawfully.” They may think that because they believe that once you start coercing people to surrender (“share”) their property, the incentives to acquire and keep up property change, perhaps enough to do some authentic long-term damage to markets in which real goods are produced, thus damaging the material and moral welfare of the community and its members (that is what Epstein would think) – or they may simply believe that stealing is wrong and leave it at that. Either way, they shall get no respect from the progeny of the administrative welfare state and those of that kindred who write the newspapers, script the television, compose the anthems, inscribe the pediments. To the contemporary sensibility, numbed as it is by the sheer scale of public action, someone who

acquiesces in people sleeping in washing machine crates (even if for a greater good) will seem not to really care, when you get right down to it, that someone is washing-machine-crate-poor. Speak aloud an earnest desire not to steal, in other words, and the ears of a social democrat, trained to think of the very idea of scarcity as a right wing plot to undermine government and common decency, will hear the tergiversations of a miser. The constitutional moments of our lives have brought public morals to such a pass.

Epstein began seriously to address the problem of collective action a number of years ago in *Takings*, and it is still central to his work – and still, unfortunately, fairly refractory to explication. The problem is deceptively simple but its ramifications profound. Public goods don't come with labels on them. People differ about what they are. They differ so radically that they may regard it as scarcely credible that other people are seriously putting forward some program or budget claim under the pretense that it is a public good rather than an out-and-out heist from the Treasury. There is, in fact, no way to be sure of one's opponent's sincerity and no particular reason, other than politeness, to assume it. But statesmen don't have to be sincere, only effective, and there seems to be nothing more refined than some version of the "giggles" test (can one state the case without giggling?) to test for whether a proposed outlay is a genuine or counterfeit public good. Yet a life in politics generally equips one more than adequately not to giggle no matter what the subject is: there were solemn encomia at Marshal Petain's funeral. The challenge for political institutions is, at the limit, to make it possible for people to pursue common projects under the lurking conviction that their colleagues are no better than a bunch of swindlers. When there is a great deal of booty on the table and the institutions in question manage to last for any length of time (both of which are true in the

United States), one has an improbable, in fact a nearly miraculous, happenstance, that nigh validates worshipping the ancestors who put it together and made it work. Yet over the long pull, this system is destined to failure unless the participants in the process can keep more or less on the same page regarding what is and what is not a public good. It is not good enough simply to say: let us shake hands on a process and then let that decide what the public goods are and what they aren't. If the constituents of democracy are far enough apart in their habits of mind about where lines should be drawn between public and private, mine and yours, liability rules and property rules (and so on), their indefinite collaboration becomes impossible and hence democracy meaningless. Epstein believes that there is a way out by, in effect, repositioning the public goods question as an inquiry into whether there has been "some clear showing that the individuals subjected to state power all benefit on net from the program that has taken or regulated their property." (p. 320). Maybe libertarian savants could find their way to consensus solutions to such problems, but it would be quite a trick to bring the world along. How does one approach putting a price on the factors in that equation? In particular, how can one place a value on government power that is handcuffed with nothing more intimidating than a vague equation? It is not so far-fetched to suggest that men could bid their lives, their property and their sacred honor to be quits with such a beast. This valuation issue is the main reason why Montesquieu did not expect democracy to succeed as a governmental form except at a small and local scale. What he doubted, but what Epstein seems to believe, is that "common sense," or Right Reason or some other naturalistic tradition of apprehending and criticizing the world, can adequately serve as a cofferdam for preserving a distinction between substantive and procedural notions of public

good. More conventional libertarian thinkers do not share that optimism, which is probably why their thinking often seems to shade from a criticism of idiomatic democratic governance into an embrace of anarchism – that is, the belief that organized coercion to create public good is (for one of many possible reasons) simply a bad thing.

Considering the weight that he places on common sense, one might have expected a plenary defense of the proposition that notions of social rightness that are drawn from traditional rather than political sources are entitled to some legal standing as a counterweight to the goofiness that regularly emerges from government – at least one that assumes to commandeer upwards of a third of the measured earnings of its people. Communitarians have effectively won the argument that allows the state to require motorcyclists to wear a helmet because it is, in fact, the case that a self-respecting community will not simply walk away from a fallen rider who lingers in a persistently vegetative condition. Because the community will not walk away, it follows that the actor cannot assume entire responsibility for riding helmetless. If somehow he could contrive to do so it would create a massive moral externality: it would propagate the norm that a helpless, luckless man, volunteer though he may have been, must be left to die because he made a stupid choice and now cannot pay for his care. But this proof of truncated personal responsibility proves too much. Why should helmets be required for motorcyclists only? If everyone riding in cars wore them, surely many more lives would be saved – and think of the people killed falling down stairs: why not helmets all the time, for everybody? And Kevlar vests? And for that matter, why should we allow there to be motorcycles? And for that matter, why, in a country with three million square miles of mostly empty land, should we allow there to be staircases, bane of the young and the old and the

differently-abled? Does anyone really believe that the state is or ought to be free to legislate such outcomes without effective limit? Or is one stuck with the standard communitarian answer to this line of reasoning – demurrer: abortions and sodomy to one side, it is up to the political community to define what constitutes a risk and to decide what (if anything) constitutes a reasonable rejoinder thereto. If all is politics, there is no coherent mission here for Right Reason or a natural law of governmental limitation to accomplish. By implication the fundamental question of constitutionalism (“can there be boundaries to the exercise of power?”) is thus answered, if not with Hobbes’ harsh answer, then at least by asserting that nothing is feasible beyond structure and procedure – as though structure and procedure did not imply the existence if not the details of an underlying theory of rights, moral personality and human good.

These good gray communitarian talking points, though, have lost much of their power in the light of public choice theory. If constitutionalism is to be all procedure and structure, then Hobbes was right and constitutionalism fails. Human nature is human nature, and people, whoever they are and in whatever station, will tend to carve what they can for themselves. Democracy misfires, not simply because human reason and foresight is limited, but also because the structures and procedures of collective decision making possess inherent liabilities to failure. There are tragedies of the commons; prisoners’ dilemmas; path-dependencies in cases where precedent matters; and above all there is rational ignorance – the chance that most people won’t care, at any given time, what a highly organized group of hijackers (a “faction”) are able to accomplish before a court, an administrative agency or a legislature. One who is conscious of these limitations of collective action, at any rate, will not necessarily bring a deferential frame of mind to considering such

products of democracy – such exercises in unbridled cultural spitefulness – as criminalizing trafficking in ordinary toilets; mandating the installation of killer airbags in cars; sending pot smokers to prison or cigarette smokers scuttling not only out of doors, but yards away from building entrances; forbidding possession of rifles with pistol grips; strictly forbidding the resection of mattress tags; holding up the marketing of fat-free potato chips for eight years because of concerns that, like canned corn, they might cause loose stools; sending people to prison for draining swamps on their own property – or any of a million other neoplasms in the vast metastasis that “collective goods” have become in the modern welfare state. Such criticisms of democratic decisions are, in effect, the criticisms of common sense, drawn from ordinary life as lived by ordinary people who mind their own business and possess only a minimal and easily appeased will to power. (Libertarians, though they seem not to know it, need conservatives in order to know what, precisely, they’re entitled to laugh at.)

Every year several trillion dollars worth of public goods are created in the United States. Surely we ought to be able to know one when we see one. The economist’s working definition of a public good dwells on two characteristics: nonrivalrous consumption (consumption of the good by one person does not diminish its supply for others), and non-excludability (non-paying users of the good cannot be successfully excluded from receiving its benefits). Economists say, both as tautology and as prediction, that one does not get enough (“an efficient amount”) of a public good unless its production is subsidized, because people who would otherwise be happy to pay fair value for the goods they receive will often enough take them for free if they can get them for free. Anything that qualifies as a public good is in principle entitled to queue up for a public subsidy of some sort, so it is critical to know just what does and does not fit the

description. Here is where the argument turns grim for anyone who wants to assert inherent limits on what the state may do. The reality is that there is an infinite supply of communal projects which can plausibly lay claim to government support. Any given state of the world, it seems, can be redescribed to fit the public goods template. Hence public goods creation collapses as a workable boundary to sovereign power. Let the legislature meet and allocate the budget: whatever pops out at the other end of the process possesses all the credentials necessary – in fact, all the credentials there can possibly be – to be treated as a public good. On this view of politics there really is nothing to discuss except that some people have this opinion, and other people have that opinion. The radical skepticism of Holmes rather than the virtue of Madison thus becomes the governing spirit of our laws. The seductions of this move are powerful.

Everyone should agree that the common law of contract (indeed, the common law generally) is a public good, a source of immense though diffuse value to every single member of the public indifferently, over and above the private goods that may be created by any particular contract one might make. (Ask what the difference would be between the auction value of all the goods and real estate in the United States (1) with the existing legal system in place, and (2) with the current legal system of the Democratic Republic of Congo.) Everyone is better off living in a world where a person can bind himself to a promise of future performance even if he could somehow contrive never actually to do so himself, personally. The infrastructure is there: the courts, the lawyers, the law, the predictability and stability that these bring. A person can use this infrastructure if he ever wants or needs to use it – in fact, willy nilly, he uses it already though he thinks he’s abstaining because his entire world is structured and civilized by it. His friends and neighbors are out there contracting away

with one another, making themselves richer and happier and more refined; and, being wealthier, they call forth more and ever more amenity and beauty and elegance into the world, beautiful lawns and gardens, beautiful cars and boulevards, Starbucks and scones instead of Mom's Eats. Even an imaginarily consummate couch potato will be better off if his couch is parked in Marin County rather than Burkina Faso. It is right and proper that people pay their taxes to support the legal institutions that make this possible, from which all benefit and no one can be excluded, and no worthwhile libertarian objection to this compulsion can rightfully be lodged. Welcome to the slippery slope.

National defense is commonly mentioned high up in the hierarchy of public goods (non-rivalrous consumption – everybody benefits indifferently; non-excludability – no way to leave slackers at risk from enemy H-bombs while one is protected oneself); but for the sake of the present argument there are better examples. For example, mohair. It seems that there never is enough mohair around when one wants it, resulting in high prices and spot shortages; and life without enough mohair, one finds, is poor, solitary, nasty, brutish and short. What accounts for the mohair shortage? A market failure of some sort, no doubt, but no matter why, the solution is straightforward and obvious. What is wanted is mohair subsidies. Of course mohair has a private goods aspect both on the production and consumption ends – the mohair sweater one loves to wear cannot be worn by everyone; one can exclude non-owners. But the defense budget has private goods aspects as well, and as we lawyers know, so does the common law. Despite this private goods side, though, like common law, like the defense budget, mohair has a public goods aspect. Even if one has no mohair sweater and covets none, it will be there, for oneself if one ever changes one's mind (options are valuable), and for others

whose beauty and happiness is increased by it and hence the beauty and happiness of the world – and so on – to say nothing of the value of keeping mohair ranching a viable lifestyle, preventing mohair ranchers from joining the reserve army of the unemployed (which helps all workers), and helping to level the playing field vis-a-vis fast-breeding Angora rabbits.

Speaking of level playing fields, one out of six American workers labors directly or indirectly in the automobile industry, from which a trillion dollars or so in national income flows. Japan, Germany and other former Axis powers all pay their auto manufacturers buxom subsidies to sell product in the emerging market of El Bananador, thereby effectively precluding Octopus Motors of Detroit, U.S.A. from selling product on the level playing field that moral decency and fair play require. If the common law is a public good, then decency and fair play – a common moral framework in which the common law and common life are inescapably embedded – must certainly be public goods as well. Few people would doubt this proposition at all if we were, let's say, talking about building a public shelter to decently house stray animals or paying policemen public salaries to shoo indecent nudists away from the shopping malls. But actually, when you think about it, decency in industrial competition is far more central to civilization than the sentimentality or prudery we so often call "decency"; and if that higher decency requires that we pony up a few billions' subsidy for the third richest corporation in the world, well, principles are principles, and where would we be without them?

It is a fair question, at this point, for the reader to ask: who in his right mind would seriously pretend that a public goods mantle can be draped around mohair subsidies or marketing allowances for big business? Ahem. Write your congressman. And for that matter, perhaps you should complain to your founding fathers, in direct descent from whom we have

our present world. They would probably say, if we could confront their shades, that they did not foresee the New Deal; they had no idea the state would assume to claim so extravagant a share of people's lives. They were thinking of a government whose relative size in people's lives would be equivalent to, let's say, the modern pet food industry, not a life's partner with supervisory jurisdiction over every orifice of one's body – and wallet. Yet it was something that might have been foreseen – surely it was not unprecedented, else it is hard to see how the Pyramids of Giza or the Great Wall of China could have been built.

If *laissez-faire* allows for the impingements of liberty that necessarily follow from the institution of contract (I take your money and am bound by my promise to mow your lawn tomorrow), there is no obvious reason why it should not also allow for social contract (we mutually promise to abide by the decisions thrown off by the institutions we have established). The connection between “contract” and “social contract” is far more than audio-genic. One can hardly have an enforceable contract without some sort of coercive official apparatus lurking in the background. The escape from this bind, if there is one (and it is far from obvious that there is), is constitutional – a theory of natural rights. The social contract is not a machine that would go of itself – all process and structure – but a respecter of human nature and a believer in the necessity of limited government to human happiness. Theories of right, though, are notoriously solvent in the acid bath of democracy. Without such a theory in hand, Epstein is fooling himself to think that “The principles of a free society are within our grasp if only we would reach out to grasp them.” That “if only” is waiting for a

more complete and persuasive account of how and in what circumstances people can live together, willingly submit themselves to compulsory collective institutions, and not be understood to have signed in blank a social contract that declines on principle to make any distinction between democracy and despotism. It may simply not be possible to have democracy on a very large scale (as Montesquieu thought), or indefinitely (as the late Mancur Olson argued) – and come to think of it, it may not be possible at all. It is vain to expect people to transcend human nature. The fate of representative democracy, of any large and reasonably complex system of government, is heat-death: eventual degeneration into a sort of kleptocracy – modified, as far as may be, by good manners. Why should anyone with modest experience of the world believe otherwise? It is one thing to keep one's Federalist virtue intact if tariffs are one's main source of income and coercion is not thought of as the default mode of human cooperation. But in a world of multi-trillion dollar public budgets there is a tragedy of the commons waiting to unfold; virtue becomes a meaningless relic of a discarded political science, and the only thing one should be exhorted to reach out to grasp is other people's money, because that's what they're doing to you. Epstein believes it is possible to plea bargain – to strike a compromise between the principles of *laissez-faire* and those of modern government, but the converse seems more nearly the case. To accept the premises of the administrative welfare state is as much as to pass the event horizon of the libertarian universe. Nothing, however energetic – not even light, not even Epstein's lucid prose – can escape that black hole. 