

## HAYEK ON THE BENCH

*Stephen F. Williams*<sup>†</sup>

One element of my criticism of Professor Epstein's theory is exactly what he said: I do not like the necessary reliance on (as he puts it) knuckle-headed judges. Epstein combats this problem by suggesting that judges need only be able to understand when the point is presented to them in a clear and distinct fashion.<sup>1</sup> In most litigation, however, there will be no one who presents "the point" with the clarity of a Richard Epstein. Richard also limits his optimistic prediction to cases where the judges have no prior political commitment to interfere with a sensible result. Indeed, in *Bargaining With the State*<sup>2</sup> he frequently suggests that the Supreme Court has dropped the ball — so frequently that one may infer that the necessary conditions for judicial application of his approach have rarely existed in the past. Of course, circulation of his book will increase lawyers' and judges' familiarity with his analysis; that is not enough, however, for a reliable judicial application. Many counsel will not grasp them, and even those who do, and whose litigating position would benefit from application of his ideas, will encounter wily opposition, well paid to throw dust in the judges' eyes.

Further, Epstein's discussion at this gathering did not capture the full complexity of his solution. The first source of complexity is the floating baseline. The court must find the optimal solution to whatever problem the legislation addresses in order to maximize social welfare. That is the benchmark for evaluating what the legislature has in fact done.

Second, the court must decide which legislative interventions are relevant for purposes of evaluating those whose net impact is to be evaluated. Does the entire income tax code become an issue when there is a distribution from income tax revenue? To what extent should the court honor any legislative earmarking? This is particularly difficult because of the fungibility of money, which makes earmarking largely cosmetic. These two problems suggest that many judges would founder when trying to apply Epstein's analysis.

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<sup>†</sup> Judge, U.S. Court of Appeals, D.C. Circuit.

<sup>1</sup> See Epstein, *supra* at 466-71.

<sup>2</sup> RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE*, (1993).

Beyond the empirical question of judicial intellectual capacity, there is the more basic one of whether a system of liberty can ever be designed and operated by a rather narrow elite. As a nation we have in part already answered that question. We have embraced the idea of liberty by conscious design. We have Framers whom we revere, such as James Madison, proudly shown on the Federalist Society's banner. The Framers designed a system of liberty which, after over 200 years, we still retain, at least in form.<sup>3</sup> This shows, perhaps, that liberty by design is attainable.

I have two troubles with that conclusion. The first is that, even if we assume success, the design itself may deserve only a small part of the credit. Other factors, such as the preexisting institutions, the manner in which people in 1789 were accustomed to interact with each other and with government, the civic associations whose importance was so celebrated by de Tocqueville, the people's capacity to compromise, and the widespread respect for contract, private property, and entrepreneurial and commercial activity, all go a long way to account for the success that the Constitution has had.

Second, apart from Constitution, the system of liberty seems, today, clearly incomplete. In assessing the forces responsible for this decay, it is unfair to assign a large responsibility to the Supreme Court. I would first credit the erosion in the features I just mentioned.

There is a naive fantasy — widely recognized as naive — that a great man, typically on horseback, will come in and fix our problems. Each newly elected president is the beneficiary of such expectations. No matter how often the expectations are defeated, they are as regularly reborn. There is also a more subtle fallacy, which I will call "the idea on horseback". It is the hope that if we could only get the principle right, then we would be able to create a society of ordered liberty. There is obviously some truth to this proposition (as there is even to the fantasy of the man on horseback). I do not wish to contest the saying of the 1980's: "Ideas have consequences." This is certainly a truism; Marx and Lenin made vital contributions to the creation, and the horror, of the now defunct East bloc. But limited government is in significant part a learned skill. Unless

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<sup>3</sup> For a quick sketch of the changes from the original form, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

a wide range of people in a society have learned how to relate to each other in the productive ways associated with civic associations, contract, and private property, no central committee of brilliant Hayekians can create those relations even if they wear black robes and are dubbed a court.

Hayek himself saw society as evolutionary, with institutions emerging through a competitive process. Unfortunately, Hayek described the process only very vaguely. He did not, as far as I know, address the question of whether there is any assurance that liberty would ultimately win the competition. His careful analysis of socialism's inherent defects suggests, of course, that liberty will be more productive. But this might well be outweighed by the ability of illiberal rulers to divert a larger share of resources to warmaking. That advantage clearly proved inadequate in the Cold War, but the end of communism is not necessarily "The End of History."

In any event, if liberty is to be preserved (and/or restored), my guess is that Hayek was right in his intuition that this will be so largely because of invisible hand processes. Commercial competition from abroad, which makes the costs of value-destroying government programs more visible, or perhaps the technological developments discussed by Charles Murray,<sup>4</sup> may be the critical mechanism. The probability that significant relief will come from the Supreme Court, however it may be constituted and whatever ideas it may be trying to follow, seems vanishingly small.

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<sup>4</sup> See Murray, *supra* at 454.