

THE LIBERAL STATE VERSUS INDIVIDUAL RIGHTS

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ATTEMPTS TO REVITALIZE philosophical doctrines by placing them on a new footing merit attention at least because they may expose elements that have hitherto gone unnoticed or been given insufficient weight. This is, for example, a major strength of John Rawls's *Theory of Justice*, which casts a great deal of light on the notion of an "original position," or prepolitical state out of which some sort of social compact is supposed to arise, and on the sorts of agreements that can be imputed to "reasonable" people. Bruce A. Ackerman's attempt to revitalize liberalism, in *Social Justice in the Liberal State* (New Haven and London: Yale University Press, 1980), exhibits the same strength, with one significant difference: whereas Rawls's attempt to revitalize contractarianism is most illuminating insofar as it succeeds, Ackerman's attempt to revitalize liberalism is most illuminating precisely where it fails. We will accordingly concentrate on the failure of Ackerman's central arguments to address adequately issues that traditionally have been problematic for liberalism. Although Ackerman offers innovative discussions of several public policy issues, they are not central to his attempt to ground liberalism, and we will not discuss them here.

IDEAL THEORY AND SECOND-BEST THEORY

Traditionally, liberalism has been a response to the problem of the legitimacy of power. But Ackerman rejects the view of many liberals that "the only significant power in society comes out of the smoking typewriter of a government bureaucrat" and proposes to subject "the powers of 'private' citizens" to scrutiny as well (p. 19). All individuals, in order to sustain their lives, must control their bodies and at least a part of the world around them. But in a world of scarce resources, this gives rise to conflicts of power and to questions of legitimacy. Why should you, rather than I, exercise control over a particular share of the scarce resources that both of us need? One response, Ackerman notes, is simply to suppress the

questioner. But Ackerman proposes to take the question of legitimacy seriously, to ask what our world would look like if every question of legitimacy were met with an honest attempt at an answer. Indeed, he takes this stance as definitive of liberalism.

Ackerman's answer to this question is developed in three stages (corresponding to the first three parts of the book). In the first ("A New World") he begins with a thought experiment: a group of colonists aboard a spaceship has decided to settle a planet that, while it is wealthy, does not have sufficient resources to satisfy all the demands of all the colonists; for simplicity, all property consists of "manna," a homogeneous asset. The colonists must confront the problem of distributive justice: How should *the manna* be distributed among the colonists? (It should be noted that Ackerman's thought experiment poses the problem of justice in a peculiar way: there is no "problem of production"; for all the manna is a preexisting, collectively owned asset that is to be distributed according to rules collectively agreed upon.) Ackerman proposes to answer this question first in the context of *ideal theory*, which is constrained by two assumptions. First, the settlers have a perfect technology of justice; that is, "there never is any practical difficulty (including cost) in implementing the substantive conclusions" at which the settlers arrive (p. 21). Second, there is no danger of corruption or abuse of power; those charged with implementing the distributional scheme the settlers adopt will do just this and nothing else. Within these constraints, the settlers must decide how to distribute the available manna.

The second stage of Ackerman's argument ("Justice over Time") is also developed in the context of ideal theory. But here he confronts the problem of intergenerational justice. He introduces into his argument the complexities arising from the fact that children are continually being born into society and making their own demands on scarce resources.

The final stage of the argument ("From Ideal to Reality") is developed in the context of *second-best theory*, which is characterized by the absence of a perfect technology of justice. At this stage, Ackerman confronts the fact that the best we can hope to do is approximate the preferred distributional scheme and that even this entails costs and trade-offs.

METHODOLOGICAL LIBERALISM

The core of Ackerman's attempt to revitalize liberalism is the method by which he proposes to resolve conflicts over legitimacy.

This is the method of liberal dialogue. "Rather than linking liberalism to ideas of natural right or imaginary contract, *we must learn to think of liberalism as a way of talking about power, a form of political culture*" (p. 6, emphasis in original). The problem of the original distribution of resources, and all subsequent challenges to the distributional scheme as a whole or to any particular person's holdings, are to be resolved by a dialogue between all parties to the dispute. That is, individuals must be prepared to respond to challenges to the legitimacy of their power; individuals who cannot successfully meet these challenges must (should) be prepared to relinquish their power.

This "dialogic" approach to the resolution of conflicts over individual rights and distributive justice is allegedly unprecedented. Dialogue has, of course, played an important role in contractarian political theory; it is a device that many contractarians use to convince us that people in a prepolitical state would agree to some particular social compact or other. But the *compact*, once it is made, forms the basis for the resolution of all subsequent conflicts over legitimacy. In contrast to this, Ackerman substantially inflates the role of dialogue. Challenges to legitimacy cannot be met simply by referring to some prior agreement. Rather, each challenge would be an occasion for reopening the debate about what principles are to govern society or how these principles are to be applied. Moreover, in contrast to the natural rights tradition, in which rights provide independent, objective criteria for evaluating social practices, Ackerman offers a *constructivist* account of rights: "an ongoing social practice—the dialogue engendered by the question of legitimacy—" is "itself the constituting matrix for any claim of right" (p. 6).

Ackerman's view is further distinguished from traditional political theories by the constraints he places on liberal dialogue, which are captured by three principles set forth in chapter 1. Two of these—Rationality and Consistency—are, putatively, purely formal principles. The Principle of Rationality requires that a powerholder not simply suppress someone who questions his legitimacy but, rather, give reasons why he is more entitled to the resources he controls than is the questioner. The Principle of Consistency requires that the reasons advanced by a powerholder on different occasions be consistent with one another. These principles are alleged to be purely formal: they do not place any restrictions on the kinds of reasons that can be given to justify power; hence, *any* distributions of resources can be defended in a manner that is consistent with these principles. But Ackerman never explains why the burden

of giving reasons must be borne by the power-*holder* rather than the claimant. In view of the way he assigns the burden of proof, it is questionable whether the Principle of Rationality, as he deploys it, is *purely* formal. For his assignment of the burden of proof to a specific party implies a *material* component in the principle.

Substantive restrictions on liberal dialogue are captured by the Principle of Neutrality. According to this principle, nothing will count as a reason if it requires a power-holder to assert (1) that his conception of the good is superior to others' conceptions or (2) that, regardless what his conception of the good is, he is intrinsically superior to one or more of his fellow citizens (p. 11). This principle, Ackerman claims, captures the liberal's opposition to paternalism; it effectively precludes any individual or group from imposing its values on the other members of society. Thus, it imposes substantive restrictions on the kinds of claims that can be made in defense of any distribution of resources.

The three principles—Rationality, Consistency, and Neutrality—are intended to explicate Ackerman's insight that the essence of liberalism is dialogic. They also allegedly represent the case of traditional liberalism, and a political system that would emerge from dialogue within these constraints could justifiably be called a "liberal state" (p. 20). Ackerman seems to presume without argument that the principles would not result in a state that was inimical to the liberal tradition.

But it is interesting to note that Ackerman's analysis falls into immediate difficulties in dealing with a central problem for liberal theory: the rights of potential citizens. He begins with a clear-cut constructivist criterion: "Since, in a liberal state, the policy is constituted by the process of a dialogic interchange, an individual who lacks dialogic competence fails to satisfy the necessary conditions for membership" (pp. 74-75). This permits him to assume a "pro-choice" view on abortion: the fetus is a mere potential citizen and thus not a citizen of a liberal state (p. 127). This would seem to imply that infanticide is permissible as well, since, as he concedes, "a day-old infant is no more a citizen than a nine-month fetus." Ackerman recognizes this as a problem but responds to it with rather lame arguments (see p. 129). Since his constructivism assigns rights only to actual participants of the dialogue, he is vulnerable to other objections: Some members of society could decide to breed selectively a group of genetic defectives who were obliging slaves but lacked the capacity for liberal dialogue, in the manner described in Huxley's *Brave New World*. Or they could deliberately deprive normal human beings of the education required to partake

in dialogue, a standard practice in slave-owning societies. How do these victims differ from aborted fetuses? Ackerman's response defies comprehension:

Quite simply, if the aborted fetus exists at all (subsequently) it exists as a purely spiritual being—with whom we could not conceivably talk in a way that is cognizable within a liberal Assembly. The victim, however, stands before us in the everyday way; indeed, he has many of our wants and anxieties. Yet whenever he grabs something, he is oblivious to our questioning. He turns blankly away from us as we invite him to reason together. . . . While such a relationship cannot be avoided in dealing with the animal, vegetable, and mineral kingdoms, it cannot be the affirmative aim of education in a community whose very being is constituted by the common effort to discipline power through the rule of Neutral dialogue. [p. 146]

If by "common effort" he means to *include* the victims, he contradicts himself (since, *ex hypothesi*, they are not capable of dialogue); if not, his conclusion simply does not follow.

TACIT ETHICAL ASSUMPTIONS

Ackerman would, it seems, prescribe that *all* disputes over legitimacy be resolved through dialogue constrained by three principles: Rationality, Consistency, and Neutrality. The most important is Neutrality, since it is allegedly the only principle that places substantive constraints on liberal dialogue. Neutrality does play a central role in the sample dialogues Ackerman constructs. But at certain crucial junctures, Ackerman's arguments rely on additional ethical assumptions that are never argued for or even clearly articulated. These tacit ethical assumptions enter the arguments of both ideal theory and second-best theory. Without them, Ackerman's arguments would often yield quite different results. One tacit assumption—that the burden of proof always rests with the holder of power (in Ackerman's extended sense of "power")—has already been alluded to. But there are two others that play a crucial role in his argument.

Tacit Maximization Assumption

The first of these assumptions is a maximization principle with close affinities to the utilitarianism that Ackerman repeatedly castigates. This assumption is necessitated by Ackerman's constructivist view of rights ("the substance of individual rights is constructed through a social dialogue," p. 347). Allegedly, Neutrality

is the only substantive constraint on liberal dialogue; participants do not enter the dialogue endowed with a set of natural rights that can be used to block certain kinds of challenges to legitimacy and rule out some distributional schemes. Rather, all rights are determined by liberal dialogue. Thus, Ackerman must confront two very serious problems. At the level of ideal theory, he must confront the problem of citizenship: Who will be allowed to participate in the dialogue? At the level of second-best theory, he must confront the problem of conflict between individual interests and the public welfare: To what extent may the individual be required to sacrifice his or her own ends for the welfare of society?

Ackerman's response to the first question is to argue that disputes over citizenship must also be resolved in accordance with Neutrality. Citizenship is at the core of liberalism, he claims, "involving as it does the right to have one's rights determined through a Neutral conversation" (p. 93). To allow this prior right to be determined by a method that did not meet the constraints of Neutrality would simply trivialize liberalism. For example, Nazis could avoid the charge of violating Consistency in claiming both "Aryans are better than Jews" and "All citizens are created equal" (cf. p. 7), if they could arbitrarily exclude Jews from citizenship. In the real world, Ackerman argues, the liberal account of citizenship translates into an immigration policy under which newcomers must be admitted to the community, either by simply being granted citizenship or by being allowed to replace someone who is already a citizen, unless it can be shown that this would cause a disruption of the *liberal* community—for example, by reducing the proportion of citizens who are committed to and experienced in liberal dialogue below some threshold. In short, the only reason to exclude immigrants is to protect the liberal dialogue itself (pp. 94-95).

But notice what has happened here. Ackerman has introduced a kind of *maximizing principle*: Follow policies that will protect "the operation of liberal institutions" and, thereby, "the ongoing process of liberal conversation." If, as he claims, citizenship is "conceptually prior to all other power struggles," this maximizing principle will have the effect of making all individual rights instrumental. For the rights that an individual will have are contingent on whether or not he or she attains the status of a citizen, and when the latter is made contingent on whether or not it is consistent with preserving liberal dialogue, then individual rights may be sacrificed to the "higher" goal of preserving the liberal state. But it is far from obvious that Ackerman's three principles entail that the liberal state is such an end in itself; rather, this seems to be an addi-

tional tacit assumption.

At the level of second-best theory, another maximizing principle functions to resolve disputes over inequality. Ackerman argues that the liberal dialogue yields a presumption in favor of equal distribution of society's resources and equal sacrifice by all to fund social programs that meliorate inequality. Equal distribution, Ackerman is quick to point out, does not entail simply giving everyone an equal share of society's resources; rather, those who suffer certain handicaps—for example, birth defects—must be compensated so that they are not at a disadvantage relative to other members of society. To the extent that this and other programs are undertaken by the state, there is also a presumption in favor of requiring everyone to contribute an equal share. This presumption can be overridden *only* if it can be shown that giving special advantages to some will induce them to be so productive that *everyone* will be better off than they would be under a scheme of equal sacrifice. Ackerman calls this kind of argument, which resembles Rawls's difference principle, an appeal to general advantage (pp. 239-40, 257-61).

This argument is important because of the twin problems of scarce resources and imperfect technologies of justice. Even in a community in which all members are committed to liberal dialogue, there will be some legitimate claims that cannot be met, either because resources are too scarce or because there is not the technology to remedy the handicaps of some citizens. If giving special advantages to some members of society would meliorate this situation, we are justified in doing so. Once again, individual rights are instrumentally justified, since individuals are granted those rights whose exercise will promote the general advantage. But in this case the justification depends upon a gratuitous maximizing principle. For the principle that individuals may be treated unequally provided that each person is better off than he or she would be otherwise does not follow in any obvious way from the Neutrality principle that each person is at least as good as any other. Nor does Ackerman provide a persuasive argument that his appeal to the general advantage is a legitimate part of the liberal tradition.

The Egalitarian Assumption

A glaring *non sequitur* recurs throughout the book in nearly every application that Ackerman makes of the Neutrality principle, starting with the first dialogue on pp. 15-16:

Q: I want X.

A: So do I! And if I have my way, I'll use force to stop you from taking X.

Q: What gives you the right to do this? Do you think you're better than I am?

A: Not at all. But I think I'm just as good.

Q: And how is that a reason for your use of power?

A: Because you *already* have an X that's at least as good as mine is. If you take this X as well, you'd be better off than I am. And that's not right. Since I'm at least as good as you are, I should have power over an X that is at least as good as yours is.

Q: But haven't you just violated Neutrality?

A: Not at all. Neutrality forbids me from saying that I'm any better than you are; it doesn't prevent me from saying that I'm at least as good.

Etcetera, etcetera.

In order to derive the inference made by A—"Since I'm at least as good as you are, I should have power over an X that is at least as good as yours is"—one needs not only the Neutrality principle, which does imply that Q is at least as good as A, but also a principle of justice such as the following: A has a claim to more of X than Q does only if A is a better, that is, *more deserving*, person than Q. But for Ackerman to assume that all entitlements must be grounded in desert is to beg a fundamental question against theorists, like Robert Nozick, who contend that entitlement is a more fundamental concept than desert: one deserves, for example, the product of one's labor only if one produced it with natural assets and nonhuman resources to which one was entitled. That Ackerman does beg a basic question becomes obvious as soon as one plays the following dialogue, which is intended to parallel Ackerman's dialogue:

Q: I want your left kidney.

A: I want to keep it. And I'll use force to stop you from taking my kidney.

Q: What gives you the right to do this? Do you think you are any better than I am?

A: Not at all. But I think I'm just as good.

Q: Ah, hah! You have just violated Neutrality. My only kidney is about to fail, and you have two perfectly good ones. If you keep your kidney and prevent me from taking it, you'll be better off than I am. And that's not right. Since I'm at least as good as you are, I should have power over a kidney that is at least as good as a kidney you have power over.

Etcetera, etcetera.

Although Ackerman would seem obliged to accept the inference made by Q in this dialogue, since it employs the same logic as the previous dialogue, it is not obvious that A must consent to become a source of spare parts for Q. Cannot A object without inconsistency, "Even if you are at least as good as I am and have two failing kidneys, you have no claim to mine"? If Q were to ask if A were more deserving than Q is, A could respond: "That's irrelevant. It's *my* kidney!" Q can succeed only if A concedes an *egalitarian* principle: "If we are all equally good from the standpoint of liberal dialogue, we have an equal claim to everything." But it is not at all obvious that A is abjuring allegiance to the liberal tradition in rejecting this egalitarian precept and insisting upon his or her right to keep both kidneys. It is very likely that Ackerman would himself not want to go as far as kidney egalitarianism. But no good reason has been provided for driving a wedge between rights to person and rights to property and asserting egalitarianism in nonhuman assets. Ackerman tacitly assumes the latter egalitarian principle, but it is not at all obvious that A would be illiberal in rejecting it. A could still have a theory of social justice, namely, by supplementing the Neutrality principle with a theory of entitlement. Such a theory might set forth the principles according to which individuals could acquire entitlements (starting with the entitlement to their own persons) and transfer them and principles according to which individuals should be compensated or punished when entitlements were infringed upon. Insofar as a social system conformed to the principle of Neutrality, individuals would receive "equal protection" in the enforcement of these principles. But Q and A might be entitled to quite different, unequal human assets and property. Since Ackerman has not ruled out such a nonegalitarian interpretation of Neutrality, his arguments against Nozick beg the question.

Ackerman's egalitarianism colors his discussion of a variety of issues throughout the book, in conjunction with both ideal theory and second-best theory. For example, in the chapter "Free Exchange," Ackerman defends a liberal theory of economic and other social relationships founded on the egalitarian principle that each citizen has a "prima facie right to an *equal* share of material reality" and an allegedly "individualistic property system" (p. 171). He adds that liberalism "is grounded in each citizen's ideal right to use his transactional power as he sees fit so long as he does not engage in any act of censorship or monopolization." A few pages later, however, Ackerman repudiates as "myopic" Nozick's defense of Wilt Chamberlain's use of his natural talents to ac-

cumulate great wealth through voluntary transfers. All exchanges require the exchange of something produced with one's own genetic endowment through relatively costly negotiations in a transactional network. Nozick's argument, he concedes, might have some validity in a world in which we were equipped with costless transmitters and shields that enabled us to negotiate with whomever and only whomever we chose to; alas, this is not our world. If one's abilities give one "genetic dominance" over other citizens or if one's "messages" have a "privileged place in the transactional network," then one is not unqualifiedly entitled to what one receives (p. 185).

How can this be reconciled with Ackerman's earlier assertion of the "citizen's ideal right to use his transactional power as he sees fit so long as he does not engage in any act of censorship or monopolization?" The apparent answer is that Wilt Chamberlain is a monopolist. This may sound implausible, but Ackerman uses the term "monopoly" in a peculiar way. To be sure, he proceeds from a familiar description of monopoly: "Quite simply, you are guilty of the charge of monopolization if you make *any* effort to sabotage my shield so that you can impose a special sanction on me for dealing with one of your competitors" (p. 178). This suggests that monopoly involves the initiation of coercive force to prevent others' entry into markets. But Ackerman soon reveals his egalitarian bias, for we learn that if our situation places us in an advantaged situation for negotiating with others, then we are monopolizing. Because Chamberlain is taller, faster, and innately possesses many of the skills required for basketball, he possesses "genetic dominance" over his fellow citizens. This unfair advantage gives him "power" over others that is like a monopolistic sanction preventing others from competing fairly for wealth and fame. Ackerman uses these notions of monopoly and unfair competition to argue for government regulation: "To the extent that government regulation of individualistic property rights permits the reduction of negotiation costs, these measures can be readily justified in dialogic terms" (p. 188). Thus, Ackerman's systematic confusion of entitlement and desert leads to a systematic confusion of monopoly in the sense of using coercive force to prevent others from trading and "monopoly" in the sense of being better positioned than others to carry out exchanges.

Similar confusions crop up in the chapter "Exploitation," which begins his discussion of second-best theory. This theory addresses the situation in which individuals differ widely in the amount of wealth, quality of genes, or level of education they have, and in

which there is no costless way to rectify these inequalities—that is, no perfect technology of justice. The solution offered by second-best analysis is that “each citizen should bear an equal share of the costs” of social imperfection. One group of citizens is relatively more advantaged than another if it has more wealth, better education, and so on. When one group is more advantaged in a number of different ways, Ackerman describes this as “the exploitation of one group by another” (p. 242). He advocates a welfare state in which legislators would arrive at a budget (above a minimally acceptable baseline defined by the judiciary) to remedy all the clear cases of exploitation generated by the prevailing social structure (“racism, sexism, genetic handicap, and initial inequality of wealth,” p. 251).

Ackerman is quite explicit about what he takes to be the major difference between his view and that of libertarians and other proponents of a minimal state: “The statesman who is most likely to choose an intrinsically exploitative budget is precisely the advocate of *laissez faire*. While proposals for ‘minimal’ government differ in detail, I take their essence to be a refusal to permit the state to question the overall distribution of power in society” (p. 253). The gist of Ackerman’s argument is that, if the libertarian opposes the use of the state to redistribute wealth to the genetically handicapped, for example, the libertarian is defending an unjust power relationship. For the genetically handicapped are “just as good as” the genetically advantaged and thereby equally entitled to whatever the genetically advantaged have produced. If the genetically advantaged won’t share with them, they are using their “power” to perpetuate the “exploitation” of the genetically handicapped. Unless one concedes the egalitarian (assumed) premise on which this argument turns, it is not in the least convincing.

THE BETRAYAL OF THE LIBERAL TRADITION

We have argued that in many cases the results sought by Ackerman can be obtained only if one concedes tacit ethical assumptions such as maximization and egalitarian principles that stand in no clear logical relationship to the three principles of liberal dialogue enunciated at the beginning of the book. A far more serious difficulty for Ackerman’s project is that the introduction of these assumptions threatens to subvert the liberal tradition that he is striving to champion. Ackerman represents his extended defense as a “triumph of individualism,” in contrast to utilitarianism, which “fails to take individualism seriously enough” (pp. 347, 342). But

in the course of Ackerman's "constructivist" defense of rights, one finds that his individualism has died a death of a thousand qualifications.

Ackerman's analysis also fails to solve the central problem of liberal theory with which Mill wrestled: how to define a sphere of individual freedom consistent with public responsibility. He remarks that "the liberal ideal is a social order in which *free* people act within a *just* power structure" (p. 376). Ackerman criticizes "conservative *laissez faire*" for prizing freedom over justice and utilitarianism for not taking individualism seriously enough. He confesses: "Privileged people, like myself, must confront the fact that we have no right to use all the power at our command to further our own personal ends in life." Yet he advocates an egalitarianism so sweeping in ideal theory and a theory of rights so constructivist and tentative that—from a libertarian perspective—there remains scarcely any sphere of individual freedom at all. In Ackerman's second-best theory we are all exploiters and are entitled only to what "privileges" can be justified—this fiscal year—to promote the general advantage. Next year these may be included in our "equal sacrifice."

In fairness to Ackerman, this does not seem to be his intention. For he states that "it is the very point of Neutrality to permit each citizen to defend his rights *without* requiring him to convince his fellows that his personal good serves the common good" (p. 372). But if this is its point, it is certainly never attained. He attempts to distinguish a legitimate sphere of free exchange (legitimate as long as one is not a monopolist like Wilt Chamberlain) by distinguishing between intragenerational transfers and inheritance. (Both transfers are legitimate on Nozick's principle of transfer.) But intragenerational exchanges are vulnerable to egalitarian objections of the same sort as those that he uses against inheritance. Inheritance of large gifts creates "transactional advantages" for the recipients; but, argues Ackerman, free exchanges are implied by each citizen's right to pursue the good (p. 212). This is less a distinction than a contradiction. Intragenerational exchanges—for example, exchanging accumulated manna with one architect rather than another for a preferred house design—also make one person more advantaged than another. The right of the consumer to pursue the goods that he prefers simply contradicts the right of the unsuccessful vendor to be at least as well off as the successful vendor.

At the outset, we remarked that Ackerman's book was most instructive for what its failures reveal. First, they reveal the inadequacy of a "dialogic" or "constructivist" methodology to deal

with problems that can only be resolved by a general theory of human rights. Second, they reveal the impossibility of reconciling the liberal ideal with the presumption of egalitarianism and a maximization principle that places a higher premium on the liberal *state* than on individual rights. Ackerman's failures reveal, in sum, that the liberal ideal—which he *correctly* describes as “a social order in which *free* people act within a *just* power structure”—can become coherent and defensible only when it is again rooted in the classical liberal tradition that twentieth-century liberals have abandoned.

*This critical note resulted, in large part, from several discussions of Ackerman in a reading group that also involved Thomas Attig, Louis Katzner, Hyung Kim, and Eleanor Roemer. Often after ideas had taken shape through argument and counterargument, it was difficult for us to distinguish our contributions from those of our colleagues. We are especially indebted to Louis Katzner for detailed and incisive criticisms of an early draft. Although he has not entirely convinced us of the errors of our ways, we have with his help eliminated unclarities and infelicities.