
A Constitutional Amendment to Constrain Rent-Granting and Rent-Extraction

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Political economists have given the problem of rent-seeking a prominent position in their analyses since Gordon Tullock (1967) brought it to attention by highlighting the tendency for the efforts of seeking it to compete away the rents sought, and Anne Krueger (1974) gave the concept its common name. This has naturally led to many proposals to mitigate the problem; however, they tend only to attack the problem indirectly. They promote changes in rent-seekers' strategy while leaving the essential nature of the game unchanged.

In the first section of this article, I review the concepts of rent-seeking and rent-extraction. In the second section, I discuss the improbability of eliminating rent-seeking through normal politics, then argue for the theoretical and historical legitimacy of using Constitutional-level rules to limit the granting of economic privilege to limit rent-granting and rent-extraction. In the third section, I suggest text for an amendment to the United States Constitution to limit rent-granting by government and consider how such an amendment might be applied in various policy contexts. I also address the challenge of creating substantive constraints that may be eroded by procedural legal interpretations.

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Rent-Seeking and Rent-Extraction

Rents are created by grants of special economic privileges, which are undesirable for several reasons. In terms of economic efficiency, although rents themselves are only transfers, rent-seeking produces dead-weight economic loss as the rents are dissipated through the effort spent seeking them, as well as in the resources that must be spent to preserve them, and those used to fight the political battle against such privileges, both before and after they are granted (appropriately understood as “directly unproductive economic activity”). They reduce consumer surplus by reallocating resources away from uses beneficial to consumers, such as research and development or entrepreneurial investment, and toward producers (Cowen and Tabarrok 1999). And their effects often fall most harshly on the poor, particularly minorities, who often lack the political capacity to defend their interests (Bernstein 2001; Rothstein 2018). And from the perspective of “clean” politics as an ideal, they create opportunity for politicians to engage in rent extraction, seeking payoffs for themselves, ranging from campaign contributions through more obviously corrupt types of payoffs, in exchange for granting or preserving these privileges (Paul and Wilhite 1990).

Given political limitations on directly coercive rent-extraction by politicians, one means of extraction is responsiveness to the rent-seeking of economic actors on the demand side of politics. A government’s favorable response to rent-seeking encourages more of it, which means that granting rents further incentivizes directly unproductive activity. In addition, the special economic privileges are not themselves economically productive. Therefore, an explanation for rent-granting based in the public good theory of government requires the assumption that those who exercise the state’s sovereign authority are either irrational or ignorant. Each is possible, but the rent-extraction model, in which those who govern are understood as self-interested actors extracting rents from the rent-seekers themselves, enables us to understand them as rational and aware of the effect of their choices. That is, allowing favored economic actors to capture rents through the creation of economic privileges is rational strategic behavior on the part of politicians. As Murray Rothbard pointed out, “one method of securing [political] support is through the creation of vested economic interests” (2009, 19). Sam Peltzman notes that favorable regulations can result in “campaign contributions, contributions of time to get-out-the-vote, occasional bribes, or well-paid jobs in the political afterlife” (1989, 7). And Fred McChesney (1997) showed that these extractions are not one-time events, but that by threatening to retract the economic privileges, political actors can continue to extract rents from a past grant, a strategy that may be particularly attractive to those who come into office after the original deal has been made (23). Due to the endowment effect (Thaler 1980), the threat to eliminate existing rents may grieve the renters more than the prospect of not gaining rents, possibly inducing greater returns for the political actor. In McChesney’s analysis we can clearly see the justification for Charles Tilly’s (1985) description of the state as a “quintessential protection racket.”

Publicly, few in a democracy are so crass as to admit such personal motives. Taking a page from Vincent Ostrom ([1988] 1999a), we can note that sometimes the real purposes of these grants of privileges are obscured by legitimating rhetoric, in this case by talk about the public good. For example, subsidies for sports stadiums are claimed to spur economic development, tariffs are purported to protect American jobs, and occupational licensing is offered as critical consumer protection. Even regulation that constrains firms' profit-making activities can create rents because compliance costs are more easily borne by larger firms than smaller competitors (Stigler 1971). With some regulatory rules, the self-interest of rent-seekers and extractors is particularly easy to obscure by talk about consumer safety. As Bruce Yandle points out: "A carefully constructed regulation can accomplish all kinds of anticompetitive goals ... while giving the citizenry the impression that the only goal is to serve the public interest" (1983, 13).

Constraining Rent-Granting and Extraction Constitutionally

We cannot expect to use the normal political process to eliminate these special economic privileges, because they are themselves a product of that process, resulting from political bargaining between the supply side of politics (the political actors who have authority to grant such privileges) and the demand side (the economic actors who seek the privileges). It is not simply endemic to politics but foundational to the normal political process, being one of the means by which politicians try to maintain their opportunities to continue participating in the political game. Although on particular occasions certain privileges may be eliminated, there is no incentive on anyone's side to eliminate economic privileges in general. If a large number of privileges were targeted simultaneously, legislative log-rolling would ensure that none were actually limited, as each legislator would vote to preserve others' rent-extraction opportunities in exchange for those others' votes to preserve their own. This dynamic is overcome only rarely, as in the Base Realignment and Closure process for closing military installations, where the rules prohibit log-rolling. But the notoriety of this process's success indicates how unusual it is, and the persistent failure of Congress to use it as a model indicates how little chance there is of broader application of that rule-set to other sets of policies.

Additionally, as Anne Krueger (1974) noted, any rent-granting intervention in the market system causes people to perceive the system as not functioning well, which produces calls for more intervention with the ostensible goal of correcting the problem. This creates more opportunities for rent-seeking under cover of correcting market imperfections, but then creates more imperfections that produce calls for more intervention that create more opportunities for rent-seeking, in a ratchet effect, or what Krueger calls a "vicious circle." The logic of this demonstrates the difficulty of using normal politics to break out of a political cycle.

The political difficulty is exacerbated by the sheer number of loci for the granting of special privileges in a country such as the United States, with not only the federal government but fifty state governments and over thirty-nine thousand general purpose municipalities, counties, and townships having regulatory authority. Finally, there is a temporal issue, in that what is done through normal politics can also be readily undone, and once a rent opportunity is eliminated, there is a continuing incentive on both the supply and demand side of politics to recreate it.

Further, any statutory attempt to limit the demand-side activity of lobbying is constitutionally dubious, as it would likely conflict with the First Amendment rights of speech, press, and petition. Even if such a statute would pass muster, it would have either minimal or troublesome effects. It would be odd, for example, to argue that the First Amendment would allow prohibitions on lobbying government for regulations for public safety. But many economic privileges are advocated for under that cover. And if, as we would hope, the courts interpreted the boundaries of antilobbying law narrowly, such safety or public good rhetoric would be generally successful in defending privilege. The alternative is for the courts to interpret any such law broadly, with unpredictable but likely negative effects on freedom of speech. One can argue that “national economic welfare interest” can justify some limitations on lobbying government for the purpose of seeking rents (Hasen 2012), but the idea that a particular problem is so important that the First Amendment must give way has tended to set bad precedent. This approach recalls the anti-free speech rulings of the Supreme Court in the early twentieth century, which gave us the *fighting words doctrine* with its heckler’s veto and the analogy of antidraft advocacy as being akin to “falsely shouting fire in a crowded theater and causing a panic,” principles that even though never explicitly overruled are no longer generally considered good law. As James Madison wrote in *Federalist*, no. 10, to destroy liberty to eliminate the effects of faction is a cure worse than the disease.

Collectively, these problems make the statutory elimination of rent opportunities a giant game of political whack-a-mole. Therefore, we must turn to constitutional politics and consider how we might devise constitutional language to constrain the granting of privileges. At this level, much of the problem can be solved in one statement. If the constitutional text is broad enough, it can invalidate all existing special privileges, enjoin all governmental sources from creating such privileges, and do so permanently.

Turning to the constitutional level also is appropriate in terms of political theory. The purpose of constitutions, after all, is both to empower government and, in so doing, to define the limits of that power. At this level, the focus is on “why human beings have recourse to political institutions and what options are available” (Ostrom [1982] 1999b, 151). The constitutional level appropriately places the constraint on the exercise of government power rather than limiting individual citizens’ pursuit of their own interests. It follows that the appropriate level of reform for those seeking to reduce cronyism and promote a liberal political system is not the policy level, or

normal politics, but the constitutional level (Buchanan 1987), and the goal should be to structure a political system that allows allocation of values through voluntary exchange and “eliminate[s]” or “at least very substantially reduce[s]” political allocation (Buchanan 1993, 1). In short, we should focus on the supply side of the rent problem rather than on the demand side.

Constitutional proposals to constrain the supply side of the rent game are not new but have only targeted the problem at the margins. Among the ideas that have been promoted are “a balanced budget rule, term limits on elected representatives, tax and expenditure limitations, and compensation for partial regulatory takings” (Sutter 2002). Notably, none of these strikes directly at the heart of the issue. They merely provide certain constraints in playing the game, akin to a change in the rules of any sport. It is surprising that nobody seems to have proposed a more direct and powerful attack on the game itself, which is to eliminate governments’ authority to grant the economic privileges that create rents.

Constitutionally constraining the granting of economic privileges is not outside the American constitutional tradition. Indeed, one of the fundamental purposes of the Constitution was to constrain rent-seeking by prohibiting state laws regulating interstate commerce. These laws primarily served to create privileges for in-state firms by protecting them from out-of-state market competition, as seen notably in the 1824 case of *Gibbons v. Ogden*, which concerned a state attempt to grant monopoly ferry service between New York and New Jersey. As Justice Anthony Kennedy explained in the more recent case of *Granholm v. Heald*, challenging restrictions on out-of-state liquor distributors, “States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses.”

The New Hampshire convention of 1788 for ratifying the then-proposed U.S. Constitution proposed to go even farther, urging that the following amendment be added to the Constitution: “That Congress erect no company of merchants, with exclusive advantages of commerce” (Department of State 1894, 142). Although the proposal was unfortunately unsuccessful, it highlighted both their fears that the new federal government would create economic privileges and their belief that the Constitution was a suitable method for prohibiting grants of economic privilege. It is not surprising that a people for whom a royal monopoly was one of the grievances leading to rebellion should think about preventing their new government from having authority to reenact such an offense. How broadly such an amendment might have been construed by federal courts over the past two centuries is unknowable, but the essential desire to prevent economic privilege is clear.

The ideas are also present in the history of American constitutional interpretation. In 1873, Justice Stephen Field, dissenting in the *Slaughterhouse* cases, distinguished between a simple exercise of the police power to regulate for safety and health and regulations that granted economic privileges: “It is contended in justification for the act in question that it was adopted in the interest of

the city, to promote its cleanliness and protect its health, and was the legitimate exercise of what is termed the police power of the State. . . . But under the pretence of prescribing a police regulation, the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment” (87).

Later, the Supreme Court’s *Lochner* era jurisprudence was not simply about liberty of contract, as it is often simplistically described, but interpreted the Fourteenth Amendment’s requirement for equal protection of law as prohibiting regulations that granted economic privileges to discrete groups. As Bernstein (2001; 2005) has pointed out, the dispute over labor regulation in *Lochner* was between large bakeries staffed largely by Anglo-Irish and German bakers, who were sometimes unionized and rarely worked more than ten hours a day or sixty hours a week, and smaller bakeries, disproportionately staffed by ethnic minorities working longer hours. The upshot of *Lochner* was to strike down a law favoring larger established bakeries and unionized bakers at the expense of the smaller bakeries challenging them in the marketplace. Unfortunately, later Supreme Court decisions reinterpreted the Constitution to read the due process clause of the Fourteenth Amendment merely procedurally rather than substantively insofar as it affects economic regulation, although substantive due process continues to be the norm for states’ attempts at regulating civil liberties.

There is also relevant constitutional precedent at the state level. In 1870, in *People v. Salem*, the Michigan Supreme Court ruled against taxation for the purpose of supporting a private corporation, in this case a railroad. The Court’s opinion identified “a broad and manifest distinction . . . between public works and private enterprises; between the public conveniences which it is the business of government to provide and those which private interest and competition will supply whenever the demand is sufficient” (484–85). This distinction held in Michigan law until 1941. Then, in *Miller v. Michigan State Apple Commission*, the Court allowed a tax on apple producers in order to fund the Michigan State Apple Commission to promote industry interests (Wright 2018).

In summary, whereas the decision of whether to directly allocate material values, including whether to grant economic privileges and to whom, is a policy-level question, the decision whether to allow the state the prerogative to grant those privileges is a constitutional-level question and has been recognized as such from the earliest days of the United States.

Proposed Text and Consideration of Its Application

I present here the text of a proposed constitutional amendment to ban the granting of special economic privileges, and explain its expected application in different contexts. A note of humility is required here. If this idea were to be taken up, debated,

and passed by the House and Senate, undoubtedly it would not retain this exact wording. Given that inevitably it would be changed, I offer it here as a starting point for discussion, inviting suggestions for improving it, rather than suggesting any such amendment must have precisely this form. And even if an amendment of this precise wording were to be added to the Constitution, it is impossible to predict exactly how future Supreme Court justices would interpret it in practice, particularly in the hard cases. The analysis here is suggestive of how courts *ought* to interpret a constitutional text that has as its intent the prohibition of grants of economic privilege.

The Amendment

Section 1. No unit of federal or state governance, nor any subsidiary political authority, shall make any law or regulation that privileges any business, firm, industry, or economic competitor, existing or prospective, over any other, or that serves to create a purposeful barrier to entry to any industry or occupation, or that limits competition between potential competitors within any industry through any form of cartelization, or that provides to any business, firm, industry, or economic competitor any form of subsidy, including tariffs or quotas on imports or preferential tax treatment other than for not-for-profit entities.

Section 2. Any existing such laws or regulations will become inoperative three years after the date of ratification of this amendment.

Section 3. This provision shall not be construed to deny any authority granted to Congress under Article 1, section 8, provided that such regulations do not conflict with this provision, and provided that no intellectual property rights may last more than twenty years beyond the life of the creator, or a maximum of fifty years, whichever limit is first met.

Nor shall this provision be construed to deny the authority of states and their subsidiary political authorities to regulate for the health, safety, and welfare of the people, provided such regulations do not conflict with this provision.

Section 4. Any person harmed by any such law or regulation, even if such harm is diffuse and individually insubstantial, shall have standing to challenge that law or regulation in the federal courts.

Brief Commentary

This proposed text is not meant to be an ideal but to be realistically achievable. There are, of course, arguments for eliminating intellectual property rights altogether, but that is—even if desirable—a more radical goal, and the primary purpose here is to restrain the apparently perpetual increase in the length of copyright protections. A more radical approach would entirely eliminate the state's police powers

to regulate for health and safety, leaving such regulation entirely to market forces, but the text as proposed is far-reaching enough, and to go farther would further diminish the already low probability of successful enactment. We can expect that it would actually take considerably longer than three years for the amendment to become fully effective as various firms and industries fought through the legal system to protect their privileges. Assurance of standing for individuals to challenge economic privileges, particularly in cases of concentrated benefits and widely dispersed costs, is crucial to ensure the effectiveness of the amendment. In the absence of such a statement, the courts' standard for demonstrating harm to gain standing could, in many cases, be too high to allow challenges to privileges, particularly in the case of indirect subsidies. We can presume that affected firms will sometimes see prospective gains sufficient to justify litigation, and for individuals of lesser means, public interest organizations may take up their cases just as they currently do for many issues. As a final note, this amendment does not prohibit welfare programs for the needy, as they do not fall into the classification of "business, firm, industry, or economic competitor."

Note also that this amendment cannot eliminate every possible source of rent. Government can rarely act without creating rents. Particularly in the area of national security, government must engage in purchases of land and procurement of equipment and services. This amendment will not touch these particular sources of rents. Rather the goal is primarily to address what Justice Field saw as "arbitrary interferences" against economic liberty (Zuckert 2011), although, substantively, the amendment goes beyond that and constrains even some nonarbitrary distinctions that would prevent voluntary exchange, as will be seen below in the discussion of occupational licensing. The goal is to achieve substantial gains on the margin even if absolute victory is impossible.

It might be asked whether the federal Constitution can properly regulate the states. It already does, via the Fourteenth Amendment, which has been used to incorporate most of the Bill of Rights to apply against the states. During the *Lochner* era, the Fourteenth Amendment was also used for the purpose of reviewing the legitimacy of state regulations. In that respect, this amendment is not innovative.

Intended Application

No one can claim with certainty how any prospective amendment will be applied if adopted. The Fourteenth Amendment is a case in point. The Supreme Court both stripped its privileges and immunities clause of any substantive meaning and for half a century claimed that de jure segregation did not violate the amendment's equal protection clause. Likewise, the framers of the original Bill of Rights could not have anticipated that freedom of speech would come to cover erotic dancing, nor that the Eighth Amendment would come to limit the Fifth Amendment by prohibiting the execution of juveniles and the mentally ill. However, in recognition of government's

interest in letting government govern, and a judicial tendency to emphasize the Constitution's authorizing power rather than its constraining power, a realistic expectation is that the Court would not interpret this amendment in its full force. But those proposing amendments not only can but ought to provide guidance as to its intended application, and so I do that here.

Easy Cases

We can begin the discussion of application with some easy cases. One category is laws that allow businesses to limit competition by vetoing the approval of similar businesses. For example, in Louisville, an ordinance allowed food trucks to operate within 150 feet of a restaurant only if they got written permission from that restaurant. There is no plausible premise here of a safety regulation—although possibly a wholesale ban on food trucks might be based on such—only explicit protection for the brick-and-mortar restaurants (Howell 2017). Similarly, many states have certificate of need laws for providing particular medical services or buying certain items of medical equipment that other local providers already own. Because these create explicit barriers to entry into a market, preserving monopolistic or cartelistic privileges for existing service providers, certificate of need laws would not survive scrutiny under this amendment.

A similarly easy case would be the proposal made by the administration of President Joe Biden in 2020 to offer subsidies for electric vehicles, with larger subsidies for union-made vehicles. This proposal should doubly fail under this amendment. First, it explicitly provides a subsidy, and, second, it privileges certain manufacturers over others, and privileges union workers over nonunionized workers. A court might rule in favor of the basic subsidy on the grounds that it is the consumer being subsidized rather than the manufacturer, but ideally courts would recognize that such subsidy ultimately is a government support for the firm, and thus in violation of the purpose of the amendment.

Another easy case would be tax breaks or other subsidies for relocating businesses. These are inarguably special economic privileges that grant rents to businesses. Subsidies for privately owned sports stadiums should also be easy targets for such an amendment; however, the de facto subsidies to teams created by public financing of publicly owned stadiums would be tougher to challenge. Therefore, one unintended but possible side effect of this amendment might be an increase in publicly owned and a decrease in privately owned professional sports stadiums and arenas.

Rents can also be sought and granted in international trade policy (Hillman 2015). The George W. Bush steel tariffs and the Barack Obama tariffs on tires would also have been easily overruled. These initiatives were openly intended to protect domestic industries against competition and so reduced consumer surplus. On the other hand, an import prohibition when the Food and Drug Administration found toothpaste from

China that had poisonous diethylene glycol as an ingredient would be a legitimate regulation for consumer safety (FDA 2020). National security concerns prohibiting exports of a very limited variety of products would likely override this amendment in the Supreme Court's jurisprudential perspective, particularly as that prohibition would not have the purpose of harming the relevant firm(s) vis-à-vis any others.

Another regulation that should certainly fall is the practice of limiting taxi medallions and prohibiting ride-sharing services such as Uber. A local regulatory authority could legitimately require regular inspections of all taxi and ride-share vehicles on the grounds of public safety and at a cost that does not effectively discriminate against poorer drivers or smaller companies. But the limitation on the number of ride-service vehicles is purely a matter of creating rents for existing taxicab companies.

Easy cases can also go the other way, where regulations easily survive constitutional scrutiny. Say, for example, a city has sidewalks of different widths in different neighborhoods, and restaurants like to set up outdoor seating on the sidewalk. The city might allow it for sidewalks of a certain width and prohibit it for sidewalks that are too narrow for public safety reasons. Without getting into the unpredictable question of whether courts would apply a version of a rational basis test or some heightened scrutiny, we can assume that as long as the restriction is equally applied, it is likely to survive.

Harder Cases

Some cases are less predictable, but commentary here can serve as a part of the legislative history suggesting how they ought to be interpreted. One example is that of environmental protection laws. Although within the regulatory authority of both the state and federal governments and in some cases, such as clean air and water, appropriately premised on public safety, such laws can create opportunities for rent-seeking. For example, a clean air law that imposes higher costs on new sources of pollution than on old ones, such as by grandfathering in existing sources, should fall, as this is a means by which existing polluters can avoid competition, particularly, for example, energy producers. More difficult is the equal imposition of expensive regulations, which may be more affordable for large industry participants than for small ones. These regulations, although justifiable on their face, can create de facto rents and so may actively be lobbied for by larger players. These cases can play out in international trade as well. Environmental protection rules, such as dolphin-safe tuna or rain-forest protection rules, can protect and create rents for domestic producers by limiting imports from producers in other countries. These issues are difficult because the stories that are used to justify them are not stories of rent-protection (Hillman 2015).

In such cases, courts should exercise a heightened scrutiny, rather than be deferential to regulators, to see whether the real purpose is different from the facial purpose, asking who supported the challenged option and whether equally

effective but less costly options are available. To conclude the example of clean air, pollution markets should surely pass scrutiny because here, each market participant receives equal treatment in a Coasean bargaining situation. Although small players may not be able to compete effectively to purchase pollution permits, they can effectively sell their own permits at the market price, enabling them to exit their industry with market compensation rather than being driven out regulatorily with no compensation.

Another challenging case is that of occupational licensing permits. To some extent, these are similar to taxicab licensing, but they often have a greater claim to a public safety rationale. The amendment prohibits “purposeful barriers to entry” but also preserves the police power to regulate for health and safety. As a first pass, this amendment would prohibit all federal occupational licensure, as the federal government lacks that police power (it not having been delegated by the states through Article I, section 8 of the Constitution). On the state level, application would depend on the analysis used by the courts. The appropriate approach would be to use the approach followed by Justice Fields in his *Slaughterhouse* dissent, with little deference to regulating authorities and a serious effort to determine whether public safety is truly at stake.

Here it would help if judges generally had better economic education and recognized that markets normally sort out practitioners efficiently and safely. In the case of licensing of lawyers, for example, George C. Leef (1997) looked at Arizona, which lacks an “unauthorized practice of law” statute, and found that nonlawyer legal practitioners limited themselves to areas of their actual competence and passed more complex issues on to fully qualified attorneys. Two anecdotes help make the case for limiting occupational licensing in medicine as well. First, when I once went to the hospital due to a scalp laceration, the nurse quite competently glued shut the wound in my forehead, but the required brief visit from the doctor to check her work was entirely unnecessary but costly. Second, one of my former students has told me of a woman in his city’s minority neighborhoods who does unlicensed orthodontics out of her home. She apparently worked for many years in an orthodontist’s office and learned on the job. Her work is satisfactory enough and priced at only hundreds instead of thousands of dollars, so customers willingly flock to her and advertise her by word of mouth. She, of course, does not claim to be a licensed orthodontist and is not defrauding anyone.

Of course, we wouldn’t want to let just anyone do brain surgery on people. But underlying that conceit is the assumption that unqualified people *will* be doing brain surgery, that somehow patients will either choose to let them or will be fooled into thinking they’re qualified. But we have laws against fraud that can take care of cases where people claim credentials they don’t have, and unqualified practitioners can be sued for harms caused. What marginal value occupational licensing provides for consumers is unclear, but the marginal value of the consequent cartelization for practitioners is obvious. Under this amendment, regulators would ideally have to demonstrate that harm to consumers *has* occurred—or is *very likely and*

substantial—harm that is greater than the harm to consumers of higher costs through occupational licensing.

Another hard case is that of Pigouvian subsidies to overcome market failures. When there is a positive externality from some activity, economic theory tells us that the good that has the externality will be underproduced, and a subsidy can lead to the socially desired amount of production. In practice, identifying the correct amount of the subsidy is exceptionally difficult if not impossible (Simmons 2011, 256). It is as or more plausible that the subsidy will be too large and the benefit overproduced than that it will be the correct amount. This is especially so because the affected firm(s) have an incentive to seek a subsidy greater than justified simply to correct the market failure. Therefore, such subsidies are probably best avoided. However, there is an economic theory justifying them, which likely will be persuasive to judges. These are likely to be addressed on a case-by-case basis with judges attempting to discern whether the subsidy is justified on Pigouvian terms or whether it is too large to be so justified. Although we cannot expect the results to match reality, the outcome we can expect is that a good number of claimed Pigouvian subsidies survive judicial scrutiny.

A Note of Caution—Continuing Debate and Marginal Gains

The amendment presented here is a substantive effort to limit the granting of special economic privileges and the rents that flow from them. As noted above, there is no way to guarantee how Supreme Court justices would interpret this amendment. Words on paper cannot wholly constrain those who are the final interpreters of those words. As Richard Wagner (1987) noted, interpretation is inescapable, and as Peter Aronson suggested, “It is difficult to overstate the central place of uncertainty in constitutional construction” (1987, 354). The substantive nature of it is an attempt to create as strong a constraint on judicial interpretation as is reasonably possible. The amendment does, however, have an inner tension between preserving states’ police power to regulate for health and safety—a necessary condition if the amendment is to have even the faintest prospect of passage—and the prohibition on granting economic privileges. There is also an inevitable political tension between claims of national security and economic privileges attendant to supplying the military and such political decisions as constraining trade with countries deemed hostile or deserving of sanctions. The Court is left as the final arbiter of these lines, as it is for all such constitutional line-drawing, not final because it is infallible, but “infallible” only because it is final (Jackson 1953).

This raises the question of whether the text will not simply be read out of existence by justices more favorable to those interests than to the interest of ending economic privileges. We have seen liberty of contract appear and disappear as a key constitutional concept, the privileges and immunities clause of the Fourteenth Amendment was immediately nullified by the Court, and the public use constraint of the Fifth Amendment’s takings clause degraded to the much less constraining public

purpose. On the other hand, the mid and late twentieth century saw a strengthening of freedoms of speech and religion, and the late twentieth and early twenty-first century saw a more rigorous application of the Eighth Amendment's prohibition on cruel and unusual punishment. Admittedly, however, this set of strengthened freedoms does not include economic liberties, at least not yet.

Wagner has argued that in the end, a "constitution largely will be what the legislature wants it to be" (1987, 327). Substantive constraints thereby degrade into merely procedural limitations. However, the more explicit the substantive statement, the more challenge, at least, that it creates for justices who would seek to get around it, and the more solid foundation it creates for justices who would seek to strongly enforce it. In a world of marginal gains, this may be the best we can hope for, and even procedural constraints are superior to no constraints whatsoever. The alternative to attempting to change the rules of the game, to give prospective like-minded justices better rules to apply, is to nihilistically throw our hands up in despair and make no attempt to better the situation.

A contrary perspective is that such an amendment might put too much power in the hands of unelected and unaccountable judges. If Wagner is right, this will not be a problem. But in any case it should not be a problem, because the amendment does not call for any substantive *positive* actions. It is a negative approach, calling for restraint by legislators and executives and neutrality among potentially affected parties. It offers judges no grounds for demanding that government take positive actions, only that it refrain from favoritism.

Conclusion

Cases could be discussed endlessly, but that should give a taste for the intended application of the amendment. The result would be a freer economy, reduced rents to the politically connected, and reduced rent-extraction by politicians. The amendment would not perfectly reduce all rent granting, but as Bismarck said, politics is the art of the attainable. James Buchanan asked, "how could the constitutional framework be reformed so that players who advance generalized interests are rewarded rather than punished. . . . The distributional elements in the inclusive political game must be eliminated or at least very substantially reduced" (1993, 1). And indirectly, Eugene Volokh answered, saying, "When you mean to check government authority, you do this by imposing specific commands, even if sometimes they don't match your purposes perfectly, rather than by letting the government decide how it thinks the purposes can best be served" (1998, 806–7). The amendment proposed here does not perfectly meet the purpose of eliminating rents created through grants of special economic privileges, but it would at least substantially reduce them. Without authority to grant special privileges, legislators will lose a crucial tool in extracting rents. Firms will likely invest less in lobbying for that which they cannot as reasonably expect to receive, or if once received, keep when challenged in the courts. Legislators will be less likely to signal their openness to creating rent opportunities, and if they do, their signals

will be appropriately discounted by potential rent-seekers, which should be reflected in declining campaign contributions. And on the back end, with these privileges eliminated, legislators could not extract rents via threats to eliminate them.

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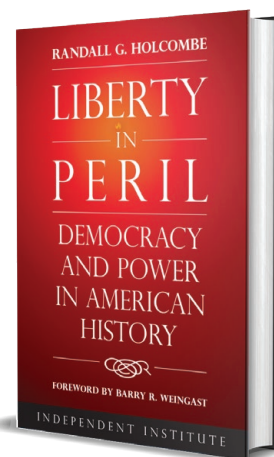
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