CHAPTER 10

The Value of Rights

Like three distinct powers in mechanics, they [Parliament's two houses and the king] jointly impel the machine of government in a direction... which constitutes the true line of the liberty and happiness of the community.

—Blackstone's Commentaries

No man's life, liberty, or property is safe when the legislature is in session.

—Mark Twain

In the preceding quotation, Blackstone refers to the "liberty and happiness of the community." To achieve happiness, democratic constitutions create a framework of competition that fills offices with the candidates most preferred by the majority of voters. To preserve liberty, democratic constitutions divide the powers of government into several branches. Blackstone's homily suggests that a state with the proper division of powers serves the happiness of the community and the liberty of individuals.

The penetrating humor of Mark Twain suggests otherwise. Even a democratic legislature can threaten the individual. To protect against the legislature, some constitutions entrench individual rights, so that a majority in the legislature cannot extinguish them. Entrenchment can protect the life, liberty, and property of citizens even while the legislature is in session.

I will restate this argument in economic terms. The preceding chapters view democracy as a mechanism to satisfy preferences through collective action. From this perspective, allocating constitutional powers creates incentives for officials to supply the public goods that citizens prefer, thus increasing the happiness of the community. Sometimes, however, some citizens prefer restricting the liberty of other citizens. In these circumstances, vulnerable individuals need protection against politics. Entrenching individual rights in the constitution provides some protection against politics.

1 Blackstone 1979, book 1, chapter 2, p. 151. Thanks to David Lieberman for this quote.

2 This quote is attributed to Twain by many people, but I can find no definite reference to when he said it. The same words were used by a judge in a mid-nineteenth-century case (1 Tucker 247, 249 [New York: Sur. 1866]).

3 Joke: In the United States everything is permitted that is not forbidden. In Germany everything is forbidden that is not permitted. In Italy everything is permitted even if it is forbidden.
In a democracy, circumscribing the power of the majority of citizens or impeding their elected representatives requires justification. Rival philosophies disagree over the justification of individual rights. In this chapter and the next, I will use economic analysis to clarify these disputes without choosing among rival philosophies. In this chapter I explain different ways to measure the value of individual rights, which help answer such questions as the following:

Example 1: Laws create many different rights for many different people. How do constitutional rights differ from other legal rights?

Example 2: A consumer sues a credit-rating company to end its practice of disseminating personal information about loan applicants to lenders. The court must balance the value of credit and the individual's right to privacy. How do courts strike the balance? Do they implicitly use cost-benefit analysis?

Example 3: The state finances military defense, which is a public good, and the state subsidizes opera, which is a private good. In what ways do constitutional rights resemble military defense and opera?

INDIVIDUAL RIGHTS IN GENERAL

"Rights" are a multipurpose tool in the box of legal concepts. Some rights are entitlements created by a duty. To illustrate, the promisor's duty to perform on a contract creates the promisee's right to performance. In this case, someone is entitled to a benefit because someone else has a duty to provide it. Instead of a contract, a statute can impose the duty creating the right. To illustrate, legislation that forbids employers from interfering with union organizing by worker gives workers the right to organize into unions.

These rights have legal effect insofar as the individual with the right can obtain a legal remedy for violation of the correlative duty. To illustrate, the victim of breach of contract can sue for damages, and workers can seek an injunction against their employer's interfering with their efforts to organize a union. In general, law creates a right correlating with a duty whenever law gives a remedy for breach of duty to its victim. Giving victims the legal power to remedy their wrongs relieves the state of responsibility for initiating every remedy, thus reducing the information that state officials need to do their jobs. Every developed legal system makes use of victim-initiated remedies, so every developed legal system creates some rights by imposing duties.

Note that someone can have a duty to benefit another person and the beneficiary has no right to the benefit. For example, a policeman may have a duty to protect the citizens, but the citizens may not have a right to be protected by a policeman.

But some entitlements have no remedy. A state official may be obligated to give me an explanation for rejecting my job application, but I may not have a legal remedy against an official who neglects his duty.

There are many refinements of the fundamental legal concepts, which I leave to philosophy. Hobfeld 1964 (1919) provided an early system of such distinctions. Also see Radin 1938; Wright 1963; and Wellman 1985.
When contemporary people speak of "rights," however, they often adopt a lofty tone that implies something more than these work-a-day rights. Modern discussions of the individual and the state often concern special rights such as freedom of speech, press, assembly, and religion, contract, and the right to property and a fair trial. These individual rights are relatively modern inventions conventionally attributed to the eighteenth-century Enlightenment.

A difference in logic partly distinguishes work-a-day rights from individual rights. An autonomous person directs his own life. Many constitutional rights, such as those enumerated in the U.S. Bill of Rights, give the individual a zone of discretion to make life's fundamental choices without domination or manipulation by the state. Individual rights thus provide the legal foundation for a society of autonomous people. Admiration for an autonomous life and a society of individuals provides one motive for embedding individual rights in a constitution.

I refer to individual rights that provide autonomy as liberties. Two aspects of law secure liberty. First, the individual who possesses a liberty is neither obligated nor forbidden to do the act in question. Second, other people are forbidden to interfere with the liberty's exercise. To illustrate, a person who enjoys freedom of speech is not legally obligated to keep silent or to speak, and, if he chooses to speak, he is not legally obligated to say anything in particular. Furthermore, other people are prohibited from interfering with his speech, for example, by silencing him with threats.

By abstracting from these facts, I can formulate a handy definition of liberties. Let \( x \) denote an act such as "speak," "print," "assemble," or "worship." In general, a person has a liberty to \( x \) if he is not obligated or forbidden to \( x \), and others are forbidden to interfere with his \( x' \)ing. A person who is not obligated or forbidden to \( x \) has permission to \( x \). Prohibiting others from interfering with \( x' \)ing protects it. Thus a liberty can be defined as a protected permission.

Now I can explain how individual rights differ from rights in general. Laws impose duties, create powers, distribute benefits, and supply remedies for a variety of purposes. For example, the duty to drive with reasonable care increases safety on the roads. Other purposes of legal duties include health, prosperity, coordination, predictability, compensation, deterrence, fairness, equality, competitiveness, communication, education, and cultural improvement. Different purposes require different logical structures for laws. Individual rights in constitutions have a distinct purpose that requires a distinct logical structure. The purpose of individual rights is to provide the legal basis of autonomy, and their logical structure is protected permissions.

Questions

1. Discuss how the following aphorisms relate to individual autonomy.

   "Liberty is protected permissions."

   "Anarchy is permission without protection."

   "Dictatorship is protection without permission."

7 This definition comes early in the axiomatic development of deontic logic by Wright 1963.
2. In what sense does a bill of rights “legalize freedom”?

3. Suppose the United States had no bill of rights. Would a bill of rights pass in today’s Congress?

**Valuing Rights**

An individual right is one thing and its value is something else. Philosophers worry about what things really are and economists worry about their value. My treatment of individual rights involves a little philosophy and a lot of economics. Having briefly described individual rights, I will devote the rest of this chapter to their value.

If a government violates your constitutional rights, what can you do about it? Sometimes you can sue for money damages, in which case a court must place a price on, say, the right to speak, worship, vote, or a fair trial. Instead of damages, however, the usual court remedy is an injunction prohibiting the injurer from continuing to violate your rights. In these circumstances, increasing the scope of one right may require decreasing the scope of another right. The balancing of one right against another can be described as evaluating the opportunity cost of one right in terms of another right. A court that awards damages or balances competing rights places a value on them. Economics offers several different methods for valuing rights, which can clarify court practices. I will explain these methods in order of increasing complexity.

**Commodities**

Wealth can be ordered by its extent. For example, $200,000 is more than $150,000, and $150,000 is more than $75,000. Similarly, people typically speak as if liberties can be ordered by their extent. For example, contemporary Russia has more freedom of speech than czarist Russia, and czarist Russia had more freedom of speech than Stalin’s Russia.

If a liberty can be ordered by its extent, then standard economic tools can represent its price. In microeconomics, the rate at which an individual will trade one good for another measures their relative value to him. The conventional graph in microeconomics depicts value by the slope of the consumer's

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8 To illustrate, a U.S. law permits suits for money damages, provided that the violation of constitutional rights occurred as a consequence of a policy pursued by the state or local government, not the federal government. See 42 U.S.C. 1983 (1988) for the following:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The “policy” requirement is formulated by the Supreme Court in *Pembaur v City of Cincinnati*, 475 U.S. 469, 483 (1986), which is discussed in Lewis and Blumoff 1992, p. 757.
indifference curve. Thus the vertical axis in figure 10-1 indicates the level of wealth and the horizontal axis indicates the extent of a liberty, such as freedom of speech. Each utility curve represents the rate at which a person will trade wealth and liberty while remaining indifferent. For example, the point $(l_1, w_1)$ lies on the same indifference curve as the point $(l_2, w_2)$, so the person will trade $w_3 - w_2$ in wealth in exchange for an increase in liberty from $l_1$ to $l_2$. Thus $w_3 - w_2$ equals the price the person will pay to increase liberty from $l_2$ to $l_1$. Equivalently, as measured by the individual’s preferences, an increase in wealth from $w_2$ to $w_3$ exactly compensates for a decrease in liberty from $l_2$ to $l_1$. Thus $w_3 - w_2$ equals perfectly compensatory damages for the person’s loss in liberty from $l_2$ to $l_1$.

In general, a demand curve for an individual indicates the price he will pay for the good as its quantity varies. Each of the utility curves in figure 10-1 indicates the price the person will pay for liberty as its extent varies, holding other prices constant. Thus the utility curves are demand curves. (Strictly speaking, they are “utility-compensated demand curves.”)

Presumably the person would be willing to pay more than indicated by curve $U_1$ for liberty if he were able to pay more, and he would be able to pay more if he had more wealth. More wealth could increase utility from $U_1$, say, to $U_2$ in figure 10-1. Compared to $U_1$, the demand curve $U_2$ indicates the price the person would pay for liberty after an increase in wealth and utility. In general, willingness to pay depends on ability to pay.

The “compensated demand curve” indicates the quantity of the good that the person would buy as its price varies, holding constant other prices and utility. The conventional demand curve holds constant other prices and income. Compensated demand curves, which are important for welfare economics, are explained in any mathematical microeconomics textbook, such as Varian 1992.
Having discussed liberty's price, I consider its cost. The definition of a liberty as a protected permission suggests two kinds of costs. First, protecting liberty uses resources, such as expenditures on police and military. Second, increasing liberty can sacrifice other values, so liberty has an opportunity cost. For example, increasing the freedom of owners to develop their property may allow them to construct tall buildings that reduce light for their neighbors.

At first, increasing one liberty does not necessarily interfere with another liberty. Eventually, however, the set of liberties expands until increasing one liberty decreases another. To illustrate, if freedom of speech expands to encompass talking in church, then its exercise interferes with freedom of religion. When one liberty's expansion conflicts with another liberty, the set of liberties has reached the liberty frontier. On the liberty frontier, liberties trade off, and the value of one liberty can be measured by its trade-off with another liberty. In general, the opportunity cost of increasing one liberty equals the value of the resulting decrease in other liberties.\(^\text{10}\)

I have explained that increasing a liberty can cause an increase in the cost of protecting it and a sacrifice of competing liberties. The supply curve \(S\) in figure 10-2 embodies these costs. As depicted in figure 10-2, the supply curve \(S\) slopes up, which implies that the cost of more liberty increases as its extent increases.\(^\text{11}\)

Figure 10-2 also depicts the demand curve \(U_1\) from figure 10-1, which I relabel \(D_1\). As depicted, the demand curve slopes down, which implies that willingness to pay for additional liberty decreases as its extent increases.

Cost-benefit analysis measures value by price and cost. Applying standard cost-benefit analysis to figure 10-2, the optimum occurs where supply \(S\) equals demand \(D_1\), which occurs when liberty's extent equals \(l^*_c\) and liberty's price equals \(p^*_o\). If a court applied this method to decide the extent of a liberty given to citizens by law, the court would find the optimal extent of the liberty by comparing the demand for it by citizens and the cost of increasing its supply.

**Question:** Describe some examples where cost-benefit analysis seems appropriate for individual rights, and describe some examples where it seems inappropriate.

**Public Good**

The preceding section analyzed liberty as a private good. This description, however, is potentially misleading. Each person can have a different amount of the same private good. Democratic constitutions, however, typically guarantee

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\(^{10}\) The liberty frontier resembles the Pareto frontier, where increasing one person's satisfaction decreases that of another.

\(^{11}\) Equivalently, a supply curve indicates the quantity of the good that private producers would supply at a given price, holding constant other prices. In terms of liberty, the supply curve indicates the quantity of liberty that the state can supply at a given cost.
the same liberties for everyone. Treating liberties as private goods conceals the equality constraint.

Given the equality constraint, one person's liberty cannot change without the same change in everyone's liberty. For example, my freedom of speech cannot increase without increasing your freedom of speech. I will adjust figure 10-2 to depict liberty as a good supplied equally to different people. The demand curve $D_1$ in figure 10-2 indicates the price that a particular person will pay for liberty. Presumably the person would be willing to pay more than $D_1$ for liberty if he were able to pay more, and he would be able to pay more if he had more wealth. More wealth could increase utility from $U_1$, say, to $U_2$ in figure 10-1. To reproduce the utility curve $U_2$ in figure 10-3 and relabel it $D_2$.

A modern democracy encompasses many citizens, whose aggregate demand determines the optimal supply of goods. To illustrate the method of aggregation as simply as possible, assume that the nation consists of two people, specifically a poor person with utility $U_1$ and a rich person with utility $U_2$. By assumption each one receives the same amount of liberty. Choose an amount of liberty, say $L^*_p$ in figure 10-3. At $L^*_p$, liberty is worth $p_1$ to the poor person and $p_2$ to the rich person. Consequently, the aggregate value of liberty at $L^*_p$ equals $p_1 + p_2$. Summing vertically in this same way for other quantities of liberty yields the aggregate demand curve $D_1 + D_2$. The value of liberty as measured by standard cost-benefit techniques equals the sum that the two people will pay for it: $D_1 + D_2$. The curve labeled $D_1 + D_2$ in figure 10-3 indicates the aggregate demand for liberty in a two-person state. Including more people in the state requires summing vertically more demand curves to obtain the aggregate demand.

At the cost-benefit optimum, the cost of increasing the extent of liberty by a small amount equals the aggregate amount that people are willing to pay for
Wealth

\[ \$ \]

\[ \text{Liberty} \]

Fig. 10-3 Liberty as a Public Good

the increase. Consequently, optimal liberty in figure 10-3 corresponds to the point \( l_p^* \) where aggregate demand \( D_1 + D_2 \) intersects the cost curve \( S \). If a court applied this method to decide the extent of a liberty given to citizens by law, the court would find the optimal extent of the liberty by comparing the demand for it by citizens and the cost of increasing its supply.

Notice that I computed aggregate demand for liberty by summing vertically. Summing vertically implies that everyone receives the same quantity of the good and different people value it differently. This is a characteristic of public goods such as military security and clean air. In contrast, demand for private goods such as apples or shoes aggregate by summing individual demand curves horizontally, because everyone in a free market pays the same price and different people buy different quantities. Treating liberties as public goods emphasizes the equality constraint according to which everyone enjoys the same quantity of each liberty supplied by the state, even though different people value liberties differently.

**Questions:** I discussed free speech and clean air as public goods. Discuss reasons for valuing free speech and clean air by the same method and by different methods.

**Welfare**

Jeremy Bentham, the English philosopher who invented utilitarianism, thought that liberty, apples, safe streets, and all other goods trade off at rates determined by the amount of pleasure they yield to a person. In contrast, many philosophers, lawyers, and judges treat individual rights as if their value must
be measured differently from apples or safe streets. Bentham complained that the lofty language surrounding rights, especially among philosophers of natural rights, disguises the plain truth. For this reason he called natural rights "nonsense on stilts." Many modern economists, who disagree with Bentham's use of pleasure as the universal measure, agree with Bentham in preferring pragmatism over philosophy of rights. Such economists would apply standard methods of cost-benefit analysis as described in the preceding sections to decide questions involving individual rights.

In spite of Bentham and pragmatic economists, philosophies that evaluate rights by methods other than cost-benefit analysis are very influential. I will, consequently, extend economic analysis to these philosophies. As depicted in figure 10-1, rich people will pay more for liberty than will poor people. In other words, the demand for liberty increases with wealth. Many lawyers and judges, however, assert that liberty is equally valuable to everyone. This assertion implies a distinction between market values and social values. I will use economics to distinguish between market and social values, and then I will apply the distinction to liberty.

A long tradition in economics, which is now out of favor, uses welfare, not wealth, to guide public policy. According to the "material welfare school," a person's welfare depends on the satisfaction of needs (Cooter and Rapoport 1984). Needs form a hierarchy in order of urgency, with material needs at the base. Nonmaterial needs such as culture and entertainment are higher in the hierarchy. People usually satisfy urgent needs at the hierarchy's base before satisfying less urgent needs at the top of the hierarchy. For example, a person who is very hungry and very bored needs nourishment more than entertainment, so he usually prefers to eat rather than go to the opera. (A modern psychologist, A. Maslow, also arranged human needs in a hierarchy with a material base.)

According to the material welfare school, most people have the same hierarchy of needs, so comparing the level of satisfaction of the same needs by different people permits interpersonal comparisons of welfare. To illustrate, assume that person A has food and no entertainment, whereas person B has no food and no entertainment. The material welfare school says that person A has a higher level of welfare than person B. Furthermore, the material welfare school says that a malnourished person needs food more than a well-fed person needs entertainment. So giving food to person B increases total welfare in society by more than giving entertainment to person A does.

12 This famous phase of Jeremy Bentham is the title of a recent book. See Waldron 1987. For Bentham's formulation of cost-benefit principles, see Bentham 1973, chapter 4, section 5, para. 6.

13 For high points in the history of "welfare" as developed in Anglo-American economics, see Bentham 1973; Marshall 1925; Pigou 1930; Bergson 1938; Sen 1970a. For an overview, see Schumpeter 1986; Blaug 1978.

14 From observing clients in clinical practice, Maslow distinguished five types of needs and arranged them in this order: physiological (survival, food, water, sleep), safety (security, protection), social needs (emotional attachments—friendship, love), ego (self-esteem, respect), and self-actualization (personal growth and development) (Maslow 1954).
Needs provide a basis for comparing levels of welfare for different people. Comparing welfare levels sometimes provides enough information to allocate resources. To illustrate, if providing nourishment to one person costs the same as providing entertainment to someone else, welfare increases more by spending the money on nourishment.

Often, however, comparing welfare levels does not provide enough information to allocate resources. To illustrate, assume that food for one malnourished person costs the same as a movie for fifty bored people. The fact that people need nourishment more than entertainment does not determine whether welfare increases more from feeding one person or entertaining fifty people. Allocating donations or subsidies between food and entertainment to maximize welfare requires measuring how much more food increases the welfare of a malnourished person than watching a movie increases the welfare of a bored person. In general, allocating resources to maximize welfare requires measuring differences in welfare between people, not just comparing levels.\(^{15}\)

To solve such problems, scholars and international agencies like the World Bank have developed “welfare weights” to guide public policy (Feldstein 1974; Squire and Van der Tak 1975). For example, if $1.00 spent on nourishment increases welfare by the same amount as $2.00 spent on entertainment, then assign twice as much weight to expenditures on food as movies. Much like progressive taxation, welfare weights set public priorities about income redistribution.

Like other people, economists disagree about priorities for income redistribution. Consequently, no method of computing welfare weights commands a consensus among economists. Instead of explaining controversial ways to compute welfare weights, I will show how to apply any given set of welfare weights to liberty. To measure welfare, I will adjust the amount that people are willing to pay in light of their ability to pay.

To apply welfare weights to figure 10-3, assume a world consisting of one rich person and one poor person. The demand curve \(D_1\) in figure 10-3 indicates the price the poor person will pay for liberty, and the demand curve \(D_2\) indicates the price the rich person will pay. The philosophy under consideration asserts that liberty has the same social value for rich and poor people. To apply this philosophy to figure 10-3, convert prices to social values by using a welfare weight \(w\) that adjusts unequal prices. Specifically, using the rich person’s price as a baseline, define \(w\) as equal to the difference between the rich person’s price and the poor person’s price.

To illustrate in figure 10-4, the welfare weight \(w\) equals the vertical distance between the demand curves \(D_2\) and \(D_1\), or, in notation, \(w = D_2(l) - D_1(l)\). The rich person would pay \(p_2\) for \(l_w^\ast\), whereas the poor person would pay \(p_1\). At \(l_w^\ast\), the welfare weight \(w_1\) equals \(p_2 - p_1\). By assumption, the social value of providing \(l_w^\ast\) to the rich person equals \(p_2\), and the social value of providing \(l_w^\ast\) to the poor person equals \(p_1 + w_1\), where \(p_2 = p_1 + w_1\).

\(^{15}\)“Welfare differences” refer to the change in welfare caused by a change in consumption. Welfare differences must be measured to compare marginal values as required for maximizing welfare. In general, maximizing welfare requires different information than does comparing welfare levels.
To compute the optimum in figure 10-4, I proceed as in figure 10-3 except I use weighted prices instead of market prices. Applying welfare weights to the poor person's price, the state should supply the good until its cost equals the sum of its value to rich and poor: $S = D_2 + D_1 + w$, or, equivalently, $S = 2D_2$. In figure 10-4, the optimum occurs at $L_w^*$. Comparing figure 10-3 and figure 10-4, welfare weights increase the optimal supply of liberty relative to cost-benefit analysis from $L^*$ to $L_w^*$. The increase is caused by assuming that the price poor people will pay for liberty underestimates its social value. (The opposite result follows from assuming that the price rich people will pay for liberty overestimates its social value.) If a court applied this method to decide the extent of a liberty given to citizens by law, the court would find the optimal extent of the liberty by comparing the weighted demand for it by citizens and the cost to the state of increasing its supply.

In this section I discussed how to determine the social value of each good by its contribution to welfare. This method of determining social value reduces all goods to a single good called welfare. In this respect, welfare analysis treats liberty the same as apples or safe streets. In the next section I consider another approach that attributes greater distinctiveness to different kinds of goods, including liberty.

**Question:** The rich presumably will pay more for liberty than will the poor. Assume that courts accept the principle that liberty is equally valuable to everyone. To implement this principle, the courts can use a weight either to increase the willingness-to-pay of the poor or to decrease the willingness-to-pay of the rich. Describe some differences that the choice will make to the court's decisions about the value of liberty.
CHAPTER TEN

Merit Goods

For conventional economics, the price that people are willing to pay for a good measures its value. For welfare economics, the welfare provided by a good measures its value, where welfare equals the price weighted by level of income. Outside economics, however, prices and welfare are not exclusive or ultimate standards of value. For example, when critics discuss a symphony's value, they do not mean how much people will pay to attend a performance. Similarly, when libertarian philosophers discuss the value of liberty, they do not mean how much it contributes to welfare.

Many discussions about liberty concern its true value. In terms of figure 10-1, the discussion concerns what the slopes of the indifference curves ought to be. Philanthropists and the state often subsidize cultural goods such as symphonies and opera. People presumably donate to the symphony or vote to subsidize it because they believe that symphonies have more value than their market price.

John Stuart Mill, a nineteenth-century British philosopher, developed this argument in a famous example. Pleasures, in Mill's opinion, differ in quality.16 Thus poetry affords a higher quality of pleasure than "pushpin," which was a mindless barroom game of the nineteenth-century rather like pinball. Even if poetry yields the same quantity of pleasure to one person as pushpin yields to another, Mill asserted that the former should receive more weight in the social calculus than should the latter. For Mill, poetry is a good whose value exceeds some peoples' actual preferences for it.

In economics, the phrase merit goods refers to goods whose value to society exceeds their value to individuals.17 Merit goods have irreducible social value, which tilts the optimal allocation of resources in their favor and may justify a subsidy from philanthropists or the state. The subsidy drives a wedge between the good's cost and the amount people are willing to pay for it.

Figure 10-5 applies merit to liberty. Recall that the aggregate demand curve $D_1 + D_2$ in figure 10-3 indicates the sum of the amount people would be willing to pay for a given extent of liberty. $D$ in figure 10-5 represents such an aggregate demand curve, which I make a straight line for simplicity. The social value of the good exceeds what people will pay for it by the amount denoted $M$ for merit. The social value of a good is the sum of its price and its merit. In figure 10-5, the good's social value is found by adding $D$ and $M$, which is represented graphically by rotating the demand curve $D$ upward by the amount of merit $M$ to obtain the curve labeled $D + M$.

$S$ in figure 10-5 indicates the cost of supplying liberty as its extent varies. The optimal amount of liberty differs depending on whether its cost is equated to its market value or its social value. Standard cost-benefit analysis measures value by willingness-to-pay, not by merit. Applying standard cost-benefit analysis to

16 See "Utility" in Mill 1951.
17 The concept of merit goods was pioneered in Head 1970 and Musgrave 1959. For more recent discussions, see the contributions in Brennan and Walsh 1990, including Cooter 1990.
figure 10-5, the optimal supply of the good equals \( l_1 \), where demand \( D \) intersects supply \( S \). An analysis of merit reaches a different conclusion. Applying the merit approach, the optimal supply of the good equals \( l_m^* \), where \( D + M \) intersects supply \( S \).

If a private market supplies a merit good, achieving optimality requires state subsidies or private donations. If private sellers cannot collect a fee from users, as is the case for a purely public good, then the private market supplies none of the good. If private sellers can collect the price \( D \) from users of the good, a competitive market will equate cost \( S \) and demand \( D \), resulting in the equilibrium quantity \( l_1 \) and price \( p_1 \). A subsidy \( M \) from the state or private philanthropists can increase the supply to its optimal level. With a subsidy equal to \( M \), the market will equate cost \( S \) and the sum of demand and subsidy \( D + M \), resulting in the equilibrium quantity \( l_m^* \). At the equilibrium quantity \( l_m^* \), the buyers pay price \( p_2 \), the state or philanthropists pay subsidy \( M \), and the sellers receive \( p_2 + M \). In figure 10-5, the subsidy is a wedge between private demand and supply.

If a court applied this method to decide the extent of a liberty given to citizens by law, the court would find the optimal extent of the liberty by comparing the cost to the state of increasing its supply and its social value, where social value equals the demand by citizens plus the good’s merit.

Whose preferences determine the merit \( M \) of a good? The National Academy of the Arts? The Catholic bishops? The donor who created the Ford Foundation? This problem, which troubles economists, should trouble everyone who believes that the economy and the state should respond to the preferences of its citizens. In spite of troubling questions, however, the fact remains that the production of poetry in most countries enjoys substantial subsidies, especially through free education, whereas no state or private philanthropist subsidizes pinball.18 As a

18 At my university, some citizens got very upset when they realized that the student association runs an entertainment center that includes bowling, and state funds pay the costs of the building.
matter of fact, public policy and private philanthropy implement the merit goods concept.

Liberty resembles cultural goods in that some people attribute special merit to it. Judges and other officials seldom discuss individual rights as if they were commodities whose value can be established by voting or cost-benefit analysis. Instead, judges and other officials ascribe social value to liberty that is distinct from the value actually placed on it by individuals. The values in question are not regarded as matters of personal preference but of public responsibility. Public responsibilities concern what people ought to do, which can conflict with what they prefer to do. Thus some judges believe that people ought to value liberty more than they do. Instead of accepting passively the results of elections or cost-benefit analysis, defenders of liberty try to make people recognize its true value. If debate and discussion fail, then defenders of liberty try to prevail in the legislature and the courts.

The concept of merit spans the analytical gap between the values that people actually have and the values that people think others ought to have. To illustrate, D in figure 10-5 might denote the amount that voters will pay for liberty, as determined by political processes such as voting or technical evaluations like cost-benefit analysis. Judges, however, might believe that the constitution attributes merit M to liberty. Reasoning in this way, judges might conclude that the constitution requires liberty $ l_1 $, even though technical evaluations and elections indicate that people prefer liberty $ l_2 $.

A pluralistic society harbors alternative philosophies that diverge on some issues and converge on others. Convergence on the belief that the basic liberties should be entrenched in the constitution helps democracy flourish. Competing philosophies typically diverge over issues such as environmental protection, cultural subsidies, and redistribution for the sake of equality. When philosophies diverge over the values that people ought to have, cost-benefit analysis, while useful, cannot be decisive in convincing people to adopt one public policy rather than another. Instead the parties maneuver for political power or try to change preferences through debate. In general, people who feel responsibilities keenly are attracted to changing other peoples’ preferences.

Questions

1. Does attributing “merit” to a good preclude cost-benefit analysis or merely modify the way it is conducted?

2. From a formal viewpoint, the merit M in figure 10-5 resembles the welfare weight w in figure 10-3. Explain how their interpretations differ.

3. Some judges take pride in “reasonableness” or “proportionality.” Use some examples to discuss the connection among merit, reasonableness, and proportionality.

Perhaps the state and private philanthropists subsidize pinball, but they do not do so eagerly or even knowingly.
The analytical device developed in figure 10-5 combines actual and ideal preferences. Sometimes, however, ideal preferences count for everything and actual preferences count for nothing, which brings me to my next topic. Some judges speak as if liberty's merit swamps its price. For example, a person cannot sell himself into slavery in most countries of the world, regardless of how much he values money and how little he values liberty. Sale is blocked even though buyer and seller agree on a price and both want to proceed with the exchange. Rights that the individual cannot transfer or extinguish are called "inalienable." With inalienable rights, private value receives no public weight.

As in discussions of slavery, some people say that liberty is priceless, which implies that people ought not to sacrifice a small amount of liberty to obtain a large increase in wealth. Figure 10-1 above depicts this situation with a vertical indifference curve. As the quantity of liberty decreases toward \( L_0 \) in figure 10-1, the slope of the indifference curve \( U_1 \) becomes vertical, which indicates that no additional amount of wealth will compensate for a further loss of liberty. When the slope of an indifference curve becomes vertical, the two goods do not trade off.

Constitutions impose order on reasons, with some kinds of reasons defeating others. Many U.S. judges interpret the Constitution as giving so much weight to individual rights that very few reasons can justify their infringement. Trade-offs are common with consumer goods, and, if you believe the language of judges, rare with individual rights. For example, some U.S. judges give little weight to the effects of individual rights on the nation's wealth or its people's welfare. Political philosophies with long pedigrees bolster courts in Western countries that refuse to trade off individual rights for other values such as wealth. For example, one of the most celebrated political treatises of our age, John Rawls's *A Theory of Justice* (1971), contends that a society with moderate scarcity should not trade off liberty for wealth. When faced with a public choice, officials in such a state should always choose more liberty, according to Rawls, even at the cost of a large loss of wealth. (See the next chapter for details.)

A card designated as "trump" in a game beats every other card. Similarly, constitutional rights trump other laws. In the United States, the rhetoric of judges suggests that individual rights trump legislation enacted by the representatives of a majority of citizens. In practice, however, the extent to which constitutional rights trump legislation depends on the constitutional court's willingness to resist the legislature. To illustrate, the U.S. Supreme Court frequently rejects acts of Congress as violating individual rights found in the Constitution. In most other democratic countries, however, the constitutional court seldom oppose the legislature's interpretation of constitutional rights.

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19 Rose-Ackerman 1985.
20 Here is an exception: A person who owns right and left shoes in equal numbers does not trade them off, because more right shoes are useless without more left shoes.
21 An interesting discussion is in Epstein 1985a, pp. 9-16.
When interpreting individual rights, officials often deny that costs and benefits affect their decision. To illustrate, if the American Nazi Party would pay less to speak than others would pay to silence it, then cost-benefit analysis favors silencing the American Nazi Party. U.S. courts, however, would not use a cost-benefit test to decide whether the legislature can curtail the American Nazi Party’s speech. Cost-benefit reasoning seldom figures in court interpretations of constitutional rights. In addition to trumping legislation, constitutional rights often trump cost-benefit analysis.

If officials accept the principle that liberty trumps wealth, then they do not balance the former and the latter. Officials, however, may still trade off one liberty against another. For example, an increase in freedom of speech might justify a restriction on freedom of religion. To the extent that officials regard constitutional rights as trumps, constitutional argument trades off individual rights against each other, but does not sacrifice them for wealth or welfare.

Questions

1. Automobile insurance companies charge young men much higher rates than they do young women. When sued for unconstitutional sexual discrimination, an insurance company makes two arguments. First, charging different rates by sex increases national wealth. Second, the constitutional right of contract protects the practice of charging different rates by sex. Relate the effectiveness of these two arguments to whether the judge regards constitutional rights as commodities, merit goods, or trumps.

2. Courts may enforce a contract to work for one year, two years, or even five years, but a lifetime contract is unenforceable against the worker as “slavery.” Use the concepts of wealth, welfare, and trumps to discuss where to draw the line.

Conclusion

Preliminary to analyzing philosophies of rights, this chapter discusses methods for valuing rights in democratic countries. Cost-benefit analysis measures the value of private and public goods by peoples' willingness-to-pay. Evaluating rights by cost-benefit analysis implies treating them as a source of wealth and trading off with other sources of wealth. Regarded as sources of wealth, constitutional rights resemble commodities or public goods depending on whether they are distributed unequally or equally.

Instead of regarding rights as sources of wealth, regarding them as sources of welfare requires weighting willingness-to-pay by ability-to-pay. Regarded as sources of welfare, individual rights trade off with other sources of welfare, such as health care and housing.

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22 A review of economic influences on the U.S. Supreme Court is in Easterbrook 1994. Also see Dau-Schmidt 1990.
Courts, however, often speak as if markets and votes do not express the true value of individual rights. According to this view, individual rights have social value distinct from the value that individuals assign to them. To encompass this idea, I expanded economic value to include merit and trumps. Regarded as merit goods, intrinsic worth supplements price. Regarded as trumps, constitutional rights trade off with each other but not with other goods.