

And Equal (Tax) Justice for All? (Part 1 of 8)

Part One: Equity on the Highest Throne

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Nothing is more fundamental to the character of a successful democracy than the trust of its citizens that its judicial and legislative processes will protect basic human rights and provide equal justice under the law. It is an extraordinarily powerful notion, one for which many have given freely of their lives and property. From the Magna Carta to the U.S. Constitution and the Bill of Rights to the French Declaration of the Rights of Man, one can trace the continual efforts to assert for each citizen—defined in broader and more inclusive terms over time—his or her fair due. Many declarations and conventions, such as the Universal Declaration of Human Rights, assert that universal rights are derived from the human condition; they are not merely temporary, national, or cultural preferences.

Efforts to assert equal justice extend far beyond those lofty documents that serve to define the basic rights of citizens and the processes of government that can best guarantee these rights. Indeed, one can hardly think of any major governmental action—legislative, regulatory, or even symbolic—in which fairness is not a dominant concern. Consider the titles legislators give to bills. How often are terms such as equity, opportunity, and fairness used? Consider how regulatory processes are set up so that anyone claiming to be unfairly treated can receive almost judicial consideration of being denied equal justice. How many times are regulations delayed or even reversed because of such considerations? Or consider the use of symbols in a public setting. What authority can as a matter of equity deny a new statue to some excluded group—veterans of a forgotten war, women who served as well as men, black heroes as well as white ones—in a park already cluttered with statues to others who have already gotten their share of tribute?

The status of equity as a principle is unique, but it is not always the driving force behind action. Often other objectives—efficiency, growth, simplicity—take precedence. Emergencies demand attention even when shortcuts must be made. Still, the pursuit of other objectives is almost never undertaken without attention to whether the corresponding burdens or benefits are shared fairly. Take education as one example. Government may want to subsidize education to promote growth. Educational programs, however, will include significant elements of redistribution to those students with lesser means. Equality of opportunity, somehow defined, will become a standard by which the policy is pursued. Equal access will permeate debates over subsidies for those receiving higher education.

While there are many exceptions, the same consideration does not apply so universally or to the same degree to other principles. The same level of bowing is not normally accorded to these lower thrones. Compare the two standards of equity and simplicity. Simplicity constantly falls by the wayside in tax bills that start out to make some final outcome more progressive or more evenly distributed among those in similar circumstances. A simplification bill, on the other hand, cannot veer too far in the direction of greater inequity. An arbitrarily applied tax might be easy to administer, and, if simplification were the only goal, a random tax might be the most efficient way to achieve the objective. But such a tax cannot be enacted.

That tax and expenditure laws are constantly subject to demands for fairness and justice at first may sound strange, as these laws are simultaneously considered to be among the principal "honey pots" of policymaking. Within the tax and expenditure systems occurs so much of the logrolling and bargaining endemic to democratic legislatures. Even pieces of legislation that historically have been recognized as "fair" or good for society often include many questionable riders. The additional provisions are often attached to buy votes so that a majority is achieved. And many of the riders at first seem to fail to meet a standard of equal justice.

Examine, however, the arguments put forward in favor of even the poorest of legislation. Lobbyists for special treatment don't attack the equity standard, they try to convert it to their own use. They never argue that they or their clients should arbitrarily be favored over others. Instead, they point to some source of inequity that

they suffer elsewhere as a justification for some compensating treatment now. They might suggest that past Congresses intended for them to receive some benefit, so it is only fair that the law now be recrafted to grant them their just due. Wherever a line is drawn currently, they suggest that they really belong more on the side of the line that receives more expenditures or pays less tax. The examples they give are dominated by cases in which someone in an almost identical situation is treated more favorably than they are. Of course, the reverse situation—in which they are preferably treated—is seldom mentioned.

Raise one standard of equity, and another will often be cited in its stead. Equal treatment of those with equal incomes may be fine, but if one is a veteran, a group suffering from past discrimination in the tax or spending laws, a person in ill health, or someone who simply starts out with less opportunity to acquire income, then equal income is rejected as an adequate standard for defining equals. It is not the equity standard that is rejected, it is its application.

The demand for equity and equal treatment is so natural we often take it for granted. C.S. Lewis, a theologian known best for writing children's tales, once suggested that as a matter of natural law we humans always justify our actions. We don't say to a spouse or a friend, or anyone else for that matter, that we should be favorably treated because we want to be and nothing else really matters. Whatever our behavior, we must provide justification so that we can live with our own consciences. We tend to justify even our most abusive actions by some counterclaim. "I was mean to you because you deserved it, or you started it, or on net you were meaner than I was." In effect, we tend to argue that even our worst behavior is justified as a matter of equity.

Under a rule of law, all government actions must be lawful. But lawfulness and justice are synonymous terms. Thus, the individual demand for justification, identified by Lewis, is enhanced by a societal demand in legal matters. The most seedy of clients must be represented as a matter of fairness. Think of the classical legal joke about the defense against stealing a pot that goes, "I never stole it, it was broken, and, besides, it was worthless in the first place." An argument such as this has at its core an equity claim—that I should be exonerated or charged with nothing because that would be the only fair outcome, one way or the other. Tax and expenditure laws, just like matters of representation before a court, must always be made to appear to face the standard of justice.

Equity, then, must be considered as the first and most basic of principles applied to constitutions and laws. Unlike equal justice, there is no requirement for greater efficiency or simplicity under the law. No other standard reaches the lofty status of equal justice in the affairs of government or the souls of humans. While conflicts abound, they are much more likely to arise over how to apply the principle consistently, how to measure who are equals, and the extent to which compensation or special consideration should be applied to those who are different along some scale of luck, need, or ability. For the moment, however, let us give equity its due homage.

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