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The New Dogma of Fairness

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IN 1980, the Democrats' platform declared, "The Democratic Party has long stood for an active, responsive, vigorous government. . . . In all of our economic programs, the one overriding principle must be fairness." Almost three decades later, on the campaign trail in 2008, candidate Obama frequently invoked fairness to justify raising taxes on the wealthy and correcting policies that benefited Wall Street at the expense of Main Street. As he explained in Ohio in October of that year to Samuel Joseph Wurzelbacher, soon to be known across the country as Joe the Plumber, "When you spread the wealth around, it's good for everybody."

Accordingly, progressives insist on fairness in housing and health care. But progressives hardly believe that the requirements of fairness are exhausted by governmental regulation of the market and redistribution of wealth. Fairness, they further contend, requires government to protect an expansive right to abortion, to pursue an aggressive affirmative-action program, to promptly legalize same-sex marriage, to drastically reduce worldwide carbon emissions, and, of course, to reform health care by placing one-sixth of the nation's economy under federal supervision.

In short, fairness is the name progressives have given their chief political goal. Indeed, they seem to believe that fairness and progressivism are one and the same. This rhetorical and intellectual conflation has consequences. By imposing on a concept that seeks to stand above partisanship an exclusively partisan meaning, progressives exacerbate political polarization and compound the



difficulties of thinking accurately and speaking clearly about freedom's presuppositions.

Fairness is among our simplest and most complex concepts. Little children are quick to understand and demand it even as the wisest never cease grappling with its implications. In a liberal democracy, opinions about fairness are inextricably bound up with beliefs about freedom, or the rights that all citizens equally share. Keeping claims about fairness and freedom in harmony is, for a liberal democracy, an abiding political challenge. Over the last forty years, however, the new dogma of fairness championed by progressives has increasingly gained currency in America and threatened the balance.

The new dogma holds that fairness has comprehensive public policy implications that can be derived from theory and which enjoy the status of truths of reason. Fairness's concrete content of invariably turns out to be progressive, requiring greater state action, particularly through government regulation of economic life and the redistribution of income, to ensure a more substantive equality among citizens. This dogma has been elaborated abundantly in scholarly books and articles over the last several decades and has become solidly entrenched as conventional wisdom in the academy.

The trouble does not consist in bringing considerations of fairness to bear on the rough-and-tumble of democratic politics. When all is said and done, fairness is another name for justice, or giving each his or her due. Rather, the trouble is that the new fairness doctrine masks the complications and dissolves the controversies that surround the application of our convictions about justice to politics. It does this by equating a single debatable interpretation of fairness with justice, delegitimizing alternative interpretations as unreasonable, and suppressing empirical considerations vital to the formulation of responsible public policy. A good start in restoring the balance can be made by appreciating the controversies embedded in claims about fairness.

Even before we can begin to teach fairness to them formally, children seem already to have acquired a rudimentary understanding

of it. "Me" and "mine" are invariably among their first words. And of course what toddlers, or grown-ups for that matter, believe to be theirs they believe belongs to them of right, regardless of whether they can articulate the theory—from might makes right to giving each one's due—that underlies their claims.

Children are especially keen to get what they believe they deserve and to demand that they get treated equally or that other kids not receive more of some good thing than they do. Parents and teachers build on this moral sense to socialize and civilize children. That the fundamental ideas about fairness that come easily to children reflect enduring principles facilitates the process. That the fundamental ideas often conflict, because children sometimes deserve different things, unavoidably complicates it.

Furthermore, children tend to apply their fundamental ideas about fairness in self-serving ways. The young demand what they deserve except when they deserve something bad, or when equal treatment would get them more than they deserve. And they insist on equal treatment except when they believe they deserve something special, or equal treatment would leave them with less than others. The anger and resentment that frequently accompany children's demand for fairness is understandable. Fairness implies a universal and objective standard, but sometimes it can't be met. In addition, children invoke it selectively, out of self-interest, to get more good things or fewer bad things for themselves. Children's abuse of the term dramatizes the temptation to make unreasonable and unfair demands for fairness.

If all goes well, we learn as we grow older to apply the requirements of fairness, to ourselves and to others, in a reasonable and fair or adult manner. Ascent to the adult perspective begins with seeing things from others' point of view. Eventually it involves an appreciation that determining who deserves what and ascertaining the shape and content of equal treatment frequently depend on shifting circumstances, complex calculations, and subtle judgments. At the core of the adult view is the understanding that "desert" and "equality" are open to a variety of reasonable interpretations, and that reasonable interpretations of both can bring them into sharp conflict.

Put differently, justice involves, as Aristotle observed, treating like cases alike and different cases differently. The difficulty consists in knowing what counts as a like case and what counts as a different one, or, what factors are morally relevant to classifying cases properly. If eight-year-old Tony is allowed to stay up until nine o'clock, isn't it only fair that twin sister Abby also be allowed? But what if Abby requires more sleep than Tony in order to get up for school in the morning? And if Abby is allowed to have a fudge brownie for dessert, doesn't fairness require that Tony be allowed one, too? But what if Abby eats all her vegetables and is slender and fit as a fiddle and Tony prefers pasta and pizza and is pudgy and out of shape? As most any parent can attest, achieving fairness in the family is an endless and exasperating task. How much more endless and exasperating will be the task in a continent-spanning nation of more than 300 million citizens that promises freedom and equality to all?

To be sure, fairness in the family and fairness in politics differ in crucial respects. Citizens are not family members. But for both fairness involves treating like cases alike and different cases differently, along with the host of challenges that arise in identifying the factors relevant to properly distinguishing the like cases from the unlike ones. And both require the reconciliation of competing principles—giving each what he or she deserves and treating each equally—at the heart of our conception of fairness.

In a liberal democracy, in which both conservatives and progressives affirm the bedrock principles of individual freedom and equality before the law, questions about fairness inevitably revolve around the kinds of freedom the state will safeguard and the kinds of equality the state will guarantee. Answers tend to divide along partisan lines.

While conservatives emphasize freedom and progressives stress equality, in practice the divisions are not always clear-cut, in part because conservatives also cherish formal equality and because progressives are devoted to individual freedom in a variety of spheres. Conservatives generally think government should interfere as little as possible with individual freedom, particularly religious, political, and economic freedom; that the equality that the state is charged

with protecting consists in impartial treatment under the law; and that firm limits should be maintained on the measures government may undertake to protect citizens from misfortune and their own foolish conduct. Progressives, for the most part, think that economic freedom should be aggressively regulated; that the state must guarantee a high level of substantive equality, even if it means compromising freedom by limiting choice and personal responsibility; and to do so the state must substantially redistribute wealth so that all the citizens enjoy a certain minimum level of material well-being and financial security.

The contest between the conservative understanding of fairness or justice and the progressive view cannot be settled once and for all within the terms posed by liberal democracy because both draw on intuitions and principles fundamental to liberal democracy. The new dogma of fairness, however, is determined to end the debate. It seeks to accomplish this by reducing fairness to the progressive interpretation, and by devising stratagems to suppress and silence rather than engage the conservative perspective.

One could see such a stratagem at work in the recent talk about reviving the federal policy known as the Fairness Doctrine. Introduced in 1949, at a time when access to the airwaves was severely limited, it served a salutary purpose, requiring broadcasters to air both sides of controversial political issues. In the past few years, however, congressional Democrats have publicly contemplated bringing it back on the grounds that conservative dominance of talk radio must be balanced by left-leaning talk radio. Of course in the age of cable TV, satellite radio, the Internet, blogging, Facebook, and Twitter, the original reason for the Fairness Doctrine—the scarcity of opportunities for broadcast to the public—has disappeared. Progressives' barely disguised intention in contemplating the revival of the Fairness Doctrine was to weaken their right-wing adversaries where they were prevailing in a competitive market, and strengthen left-wing allies through government restrictions on consumers' choices.

Progressives' determination to co-opt the word "fairness" exclusively for the progressive political agenda has a history. The appeal to greater fairness became a familiar refrain in post-1960s America. By the end of the 1970s, progressives led by Jimmy Carter had managed to define the Democrats as the party of fairness. Certainly, the left took the lead in passing laws—the 1964 Civil Rights Act and the 1965 Voting Rights Act—obliging the federal government to ensure more energetically that individual rights, especially of minorities and women, were respected. Through LBJ's Great Society programs, progressives placed themselves at the forefront of government efforts to meet the needs of the poor, the sick, and the elderly.

At the same time, in the name of fairness, progressives effected a transformation in the meaning of equality and of rights. Traditionally, equality was understood in terms of rights that all shared, and rights were understood negatively, to protect spheres of individual freedom from government action. For example, the Bill of Rights prohibits Congress from making laws interfering with freedom of religion, speech, press, assembly, and so on. Such positive obligations as it imposes concern the formal legal process that is due in matters of crime and punishment. Progressives, however, championed a new conception of rights—entitlements—which imposed positive obligations on government. They argued with increasing success in the 1960s and 1970s that the job of government was not merely to ensure equality before the law, but to use law and public policy to bring about greater substantive equality in social and economic life. The classic case is welfare.

Conservatives resisted this rights revolution. They defended the claims of formal equality, rejected many of the new interventions of the federal government as contrary to the principles of federalism, criticized welfare programs for providing perverse incentives that encouraged single mothers and fathers not to marry and able-bodied men and women not to work, and attacked the high taxes that supported entitlements as a drag on the economy and an impairment of individual freedom. Yet progressive politicians, professors, and

pundits portrayed conservatives as not just opposed to the progressive theory of government on constitutional and pragmatic grounds but as adversaries of fairness itself.

One of Ronald Reagan's historic achievements was to go beyond restoring the case for individual opportunity, limited government, and growth-oriented economic policies in terms of efficiency and also to vindicate them as requirements of fairness. In addition to the right to participate in the political process, what individuals were owed from government, according to Reagan, was the room and security to develop their talents, earn a living, care for their families, and contribute to their communities. He regarded the cultivation of private virtue as a public good. While Reagan recognized government's obligation to provide a safety net for the less fortunate, he rejected any policy that smacked of equality of result.

In fact, both fairness as equality of opportunity and fairness as equality of result have roots in the American political tradition and in the bedrock principles of liberal democracy. Consider affirmative action. Equating equality with equality of result, progressive proponents have argued since the 1970s that the state should take race into account in hiring and promotion decisions, and universities should take it into account in admissions decisions as well, to correct for disadvantages caused by the long and ugly history of government-enforced discrimination. Race and sex are also relevant in such decisions, they maintain, because the state has an interest in fostering a diverse labor force. In contrast, equating equality with equality of opportunity, conservative critics contend that the state must be color-blind in doling out benefits and burdens because each citizen deserves to be treated as an individual and no citizen should be given an advantage or deprived of an opportunity because of race. The color of one's skin, they emphasize, is morally and politically irrelevant to the determination of individual merit.

Both left and right have a point. When a state devoted to liberal and democratic principles is responsible for tilting the playing field, the state should level it. But a liberal democracy should not itself tilt the playing field to advantage favored groups and classes. The hard

question is what counts as a level playing field. And it cannot be answered without a heavy admixture of empirical evidence, a careful consideration of concrete circumstances, and pragmatic analysis of government's competence to intervene effectively. In some cases progressives have the better argument about fairness, and in some cases conservatives have it, but in many of the hard cases that have roiled our politics, fairness involves a synthesis of progressive and conservative concerns. Unfortunately, in both the academy and in the present Obama administration, the need for a synthesis is not merely resisted but determinedly obscured by insisting that fairness requires progressive outcomes.

Harvard philosophy professor John Rawls (1921–2002) developed the most theoretically sophisticated expression of the progressive ambition to equate fairness with the progressive understanding of justice. He devoted his career to the task and in the process became the most influential philosophy professor of his generation. One of his earliest professional papers was called "Justice as Fairness" (1957), and the last book he wrote, published more than four decades later and a year before his death, was titled *Justice as Fairness: A Restatement* (2001). In between, he published two major works, *A Theory of Justice* (1971) and *Political Liberalism* (1993), which were devoted to elaborating the equation. They became the two most discussed books of political theory of the last fifty years.

To be sure, few officeholders or policy makers have read Rawls, let alone with care. Many have never heard of him. But his thinking permeated the atmosphere of the colleges and law schools in which they were educated. His approach and arguments make explicit premises and reasoning that underlie progressive thinking, and the ambiguities in his thoughts about fairness reflect ambiguities common to much progressive thinking.

According to Rawls, justice concerns the principles that free and equal citizens would adopt to govern themselves if they thought rationally about their situation. It has two basic parts: fundamental and inviolable liberties, and an obligation on the part of the state to adopt "measures ensuring for all citizens adequate all-purpose

means to make effective use of their freedoms." In fact, virtually all conceptions of justice in a liberal democracy recognize fundamental rights, and obligations on the part of the state to provide for those who can't provide for themselves. The main task of Rawls's justice as fairness is to articulate abstract principles that structure the public debate about politics. But it also claims to derive policy from the proper principles. Suffice it to say, however, that "justice as fairness" builds a great deal of the government intervention and redistribution that it purports to derive into the words "adequate," "all-purpose," and "effective," and infuses the formal reasoning that is supposed to structure public debate with considerable substantive content. So it is no surprise that the Rawlsian is rare who has derived even a single public-policy position from Rawls's theory that does not more or less harmonize with the progressive political agenda.

Rawls acknowledges that "justice as fairness" is but one of the many political conceptions of justice that deserve consideration in a liberal democracy. But he makes no such concession about his understanding of fairness. His concession about justice, moreover, is unconvincing. By equating his favored conception of justice with fairness itself, and by demonstrating throughout his half-century career in academic philosophy a decided lack of interest in other interpretations of justice, Rawls powerfully signaled that the progressive understandings of fairness did equal justice.

A legion of second- and third-generation Rawlsians, today representing a major, if not the dominant, school within academic political theory, developed an offshoot of the theory of justice as fairness they often called "deliberative democracy." Many variants have been put forward, and the approach has been extended to international relations and international law, but all respond to a common problem, develop a common solution, and embody a common conceit.

The problem was that despite the pride they took in their democratic bona fides, the professors regarded as dictates of justice as fairness progressive policies—on abortion, affirmative action, welfare, taxes, and others—that frequently failed to command majority support.

The professors' solution was to argue that the policies their theories demonstrated were fair and just were democratic in a higher sense: they reflected the choices people should make and would embrace but for poor education, and passions and prejudices corrupted by the imperfections of social life and the inequities of the market economy.

The professors' conceit was to suppose that their own education was adequate and that their theory yielded rational truths unshuffled by rationalizations of their own passions and prejudices. Pleased with their analytical abilities and persuaded of the purity of their moral intentions, the deliberative democrats rarely considered the illiberal and antidemocratic implications of a theoretical approach to politics that systematically disdains the expressed preferences of majorities of their fellow citizens, and which not only appoints professors as guardians of the fair and the just but also equates this self-aggrandizing arrogation of power with greater democracy.

A similar sensibility, which equates fairness with the progressive agenda but obscures the gap between the progressive agenda and popular preferences, has become visible in the Obama approach. It can be seen in candidate Obama's carefully choreographed efforts to present himself as not only a determined Democrat and devoted progressive but also a moderate, postpartisan pragmatist; in Chief of Staff Rahm Emanuel's "Rule one: Never let a crisis go to waste"; in a massive stimulus bill sold to the public as necessary to jumpstart the economy but loaded with nonstimulus social spending; in health-care reform bills defended by the president as cost-cutting measures and required to address the economic crisis, but which are destined to generate massive deficits over the next decade and beyond and diminish individual choice; and in the president's and his Supreme Court nominee then Judge, and now Justice, Sotomayor's repeated insistence in the years before her Senate confirmation hearings that empathy was a crucial judicial virtue coupled with her repudiation of empathy's importance in her testimony before the Senate Judiciary Committee. The pattern involves a concerted effort to conceal the inspiration, ultimate aim, and full cost of positions,



policies, and programs that, though advanced in the public's name, would not, if forthrightly explained, garner majority support.

It is an awkward orientation for progressives. For the sake of fairness it treats the public as too simpleminded or mean-spirited to adopt the correct policies for the correct reasons. It overlooks that government is often a bad judge of what citizens deserve and poorly equipped to ensure equal outcomes. And in seeking to expand government's responsibility for managing citizens' lives, it diminishes citizens' freedom.

Most important, the progressive equation of fairness with progressivism itself suppresses the vital lesson that parents seek to impress on children: life is often not fair, and frequently neither parents nor politicians possess the wisdom or power to make it so. And frequently neither parents nor politicians possess the power to make it so. To be sure, we are not merely creatures of our circumstances, in many undertakings we can honor the claims of fairness, and numerous injustices can be rectified by individual initiative and appropriate government action. But to make fairness itself the be-all and end-all of public policy is to ensure a citizenry that is never satisfied and that is constantly consumed with anger, indignation, and resentment. For progressives in America to go further down that road by making a partisan interpretation of fairness government's "one overriding principle" is to inflame partisanship by teaching that those who embrace individual freedom for all but differ about its political requirements are enemies and monsters.

Understood exclusively in progressive terms, as the dominant perspective in the academy and the Obama administration favor, fairness threatens freedom. To fortify freedom, the ambiguities of fairness must be fairly understood.

