

Reform and Equal Justice

By Gene Steuerle

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For a long time I have struggled with how to make better use of the principle of equal justice to restrain or eliminate bad policy. By “bad” policy here I refer mainly to special favors shown to particular groups — favors that clearly discriminate against other citizens. What makes the issue so speculative is that there are great limits on our ability to define concepts like equal justice and discrimination precisely. Furthermore, the courts are reluctant to step into the breach since only some forms of discrimination are illegal. But the courts do act occasionally, and legislatures themselves could adopt reformed processes or enact laws that give greater weight to the principle.

Whatever the difficulty of applying the principle of equal justice, it does come up repeatedly in disputes over policy, whether in the legislature or in the courts. No jurisdiction can provide greater voting rights for one group or another. Public education must be made available to all students in a jurisdiction, and state courts around the nation are embroiled over such items as how to provide equal access to education from poorer to richer jurisdictions. Penalties apply equally, at least in theory, to individuals committing the same crime. Legislators cannot enact a general sales tax and then exempt their own family from paying it. Court battle after court battle ensues over who is eligible and who is not for all sorts of benefits; effectively, once a criterion of eligibility is granted by the legislature, justices do apply an equal justice principle to ensure that the criterion is applied evenly. Many issues, of course, are not resolved in court, and appeal is often made to the legislature to redress the inequities.

Clearly, I have picked my examples selectively. Anyone familiar with tax and expenditure legislation knows full well that interest groups constantly win special favors from federal and state legislators. The legislature often violates any reasonable notion of equal justice, and the courts refuse to get involved. National attention has focused recently on some of the most outrageous examples, in which members of Congress receive in compensation payments that are illegal. Whatever the merits of this recent exposure of political corruption, the potential danger is that it misses the main point. Most cases in which unequal justice arises through exchanges of political favors do not involve outright bribery, much less bribery that can be proven. If reform attempts only to limit the most egregious cases of unequal justice, very few elected officials would ever be held accountable for their behavior, and very little reform would ever ensue.

If pursuing criminal behavior has severe limitations as a means of restricting or overriding legislation that clearly favors special interests over the public good, where else might one turn to strengthen the political process? Some look mainly to reform of financing of elections because many of the “bribes” paid to elected officials come in a quite legal form: campaign contributions or other forms of help with fundraising. There is probably merit in that approach, although I doubt whether contributions denied in one form cannot easily be transferred into another form that achieves the same purpose for the donor.

I wonder if there are not other paths toward promoting equal justice — occasionally involving the courts, more often the legislative process itself. The courts have generally been reluctant to stretch themselves into deciding cases on the grounds of equal justice. Suppose there is some energy tax incentive and Congress indicates that it has enacted the incentive to provide for energy independence. A court would be unlikely to claim it knows better, regardless of how much evidence might be provided that industries other than energy were suffering discrimination or that the subsidy was largely ineffective.

Recently, however, the courts have addressed discrimination issues based on the Commerce Clause of the U.S. Constitution. I recently attended the New Mexico Tax Policy Conference of the New Mexico Tax Research Institute, where Peter Enrich from Northwestern University outlined some of the battles over constitutionality of particular tax incentives provided by states for companies that located in their states. His interest was in a case involving business tax incentives provided in Ohio, but similar issues have arisen in other states recently as well, such as North Carolina and Minnesota.

Whatever the merits of the cases, they show that the courts get involved in judging whether there is discrimination when the question is whether there is a constitutional or legal prohibition against it.

Think now about other issues in which equal justice is violated by any reasonable standard. Take the clear-cut discrimination in property tax burden imposed by California against new homeowners, many of whom may have arrived recently from out of state. In California, existing homeowners get a break on the rate of increase in property tax, a benefit that tends to rise the longer one owns a home. The highest tax is usually paid by the new owner of a house. Given that new homeowners are often less wealthy and more likely to have moved in from out-of-state than existing homeowners, there is no “equal justice” here.

Or consider the hundreds of rifle-shot provisions thrown into tax and expenditure bills at the last minute. Perhaps a few of those redress some existing imbalance, but a huge number of them deny equal justice to those of us who have to pay for the rifle shots.

If the courts can't deal with those issues right now, what type of rule or law would put those types of provisions into some legislative or court procedure, subject to consideration as violations of justice?

From about 1990 to 1997, Congress adopted and operated under a set of budget procedures that restricted bills from increasing the deficit in various ways. In 2001 it limited how permanent tax cuts could be under the so-called Byrd rule in the Senate. What is to prevent Congress from adopting other rules that constrain its actions when justice is at stake? Why not allow one senator to call a point of order on any bill that does not firmly identify what special interests are targeted to receive benefits under any part of a bill? Or why can't a chair of the taxwriting committee require as his own rule that any member favoring any provision aimed at one set of taxpayers must indicate an approximation of the size of the benefit to the favored population and the average tax increase borne by the rest of the population to pay for it? Why can't the IRS automatically indicate the administrative requirements imposed on it by any special interest legislation — hopefully before a bill passes, but, if there isn't time, then afterwards? Why can't the president, with or without a line-item veto, direct the Office of Management and Budget to provide a list of the beneficiaries of special interest legislation?

Yes, I know, Congress can override its own procedural requirements, as it did many times in recent years. Defining what is special interest is also subject to inter-

pretation. No set of rules works without some willingness to make it work. But Congress is in big trouble now. The budget is totally out of whack. The situation is much worse than the fiscally constrained period from 1982 to 1997 when most budget legislation involved deficit-cutting of some type or another. There is now considerable impetus for Congress to find rules that would constrain actions by members that further exacerbate the budget situation.

Why not also establish a permanent Equal Justice Commission? That might be done by legislation, by Executive Order, or by the private effort of some foundations from left, right, and center. Its job would be to point out relatively flagrant violations of equal justice at both federal and state levels, the beneficiaries involved, and the members of Congress who took the lead in serving those beneficiaries. Would it be controversial? Of course. Would it always be right? No. But if set up in a truly bipartisan way, it might just serve to reduce the extent to which legislation has become more and more hostage to interests who, whatever the merit of their arguments, seldom start out with the public good as their primary objective.

Dear Reader: Help me here. Perhaps the options presented here would not work. Yet I can't believe there aren't some better ways to engage courts, legislatures, and executive branch agencies in addressing violations of equal justice. Suggestions are welcome.