

NOTES ON THE LIBERAL CONSTITUTION

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No existing or proposed political constitution contains sufficient constraints or limits on the authority of the agencies of government over the activities of individuals and groups, and most notably over their economic activities. There is no *liberal* constitution in existence or in prospect. In this sense, all existing constitutions are failures, and almost all serious proposals for reform fall short of any promise of full success. I advance this blanket criticism of existing and proposed constitutional structures without knowledge of particular details but in full and conscious awareness of the historical fact that, for well over a century, all political discourse has been informed by, and the institutional results thereby influenced by, the "fatal conceit" (Hayek 1989) that political direction can facilitate rather than retard economic progress. All constitutions that have been put in place since the 18th century, and all that have been "reformed" either explicitly or by usage and interpretation since that time, must reflect, to some degree, the romantic image of the benevolent state, whether actual or potential, the image that was introduced by the political idealists on the one hand and by the visionary socialists on the other.

The constitution that embodies "politics without romance" (Buchanan 1979) exists nowhere today, and no reform proposals that reflect such a realist model of politics enter directly into any ongoing dialogue. Residues of such a vision may be found only in some of the Madisonian elements that remain in the United States documents and records, and in the arguments of the relatively small number of classical liberals now extant. Despite this negative assessment, which may seem to be nearly total in its condemnatory sweep, there may be bases for some optimism as we look far enough forward into the

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post-revolutionary epoch, and especially into the next century. Ideas do have consequences, and we have lived with the consequences of false ideas for almost two centuries, far too long to have expected shifts to occur by the early 1990s. But consequences, or rather events, also feed back on ideas, and, after the unpredicted revolutions of 1989-91, the romantic image of the benevolent and capable state must prove increasingly difficult to sustain. The theories of political failure, advanced sparingly by classical liberals throughout the period of socialist hegemony only to have been treated with scorn and derision, have been corroborated by history in what was perhaps the grandest of all experiments in social science. And unless we totally despair of human capacity for rational action, we must anticipate that, sometime in the post-socialist century, men and women will exhibit constructive constitutional capabilities that can now be scarcely imagined.

In this sense, Francis Fukuyama (1992) is surely right. Call it what one will, something of historical note did effectively end with the great revolutions of 1989-91. And Fukuyama is also correct in suggesting that economic science, which explains how the market economy operates independently of politicized direction and control so as to produce the largest bundle of goods and services available within given resource constraints, has finally been vindicated. But is Fukuyama also right when he predicts that this scientific result will be incorporated into institutional-constitutional reform? To agree with him here, we perhaps must think beyond the horizon of a few decades.

As a start, it may be useful to extend our hindsight into the pre-romantic, pre-socialist epoch, back to the 18th century, and to try to recapture the constitutional understanding that so excited the philosophers as well as the politicians. Until and unless such a shift in the modern mind-set is somehow achieved, all efforts at constitutional dialogue aimed at basic reform will essentially be wasted. Governments, no matter how organized, will remain basically unchained, and the politicians-bureaucrats will continue to facilitate the mutual exploitation of each by all, in Anthony de Jasay's "churning state" (1985). Economies will founder, and, increasingly, potentially valued product will disappear into the "black hole" of that which might have been (McGee, Brock, and Young 1989).

The Constitutional Order of Classical Liberalism

The classical liberals of the 18th century, whether represented by the members of the Scottish Enlightenment or by the American Founding Fathers, were highly skeptical about the capability and willingness of politics and politicians to further the interests of the

ordinary citizen. Governments were considered to be a necessary evil, institutions to be protected from, but made necessary by the elementary fact that all persons are not angels (Madison 1966[1787]: 160). Governments, along with those persons who were empowered as their agents of authority, were not to be trusted. Constitutions were necessary, primarily as means to constrain collective authority in all of its potential extensions. State power was something that the classical liberals feared, and the problem of constitutional design was thought to be that of insuring that such power would be effectively limited.

The devices aimed to accomplish this purpose are the familiar ones. Sovereignty was split among several levels of collective authority; federalism was designed to allow for a deconcentration or decentralization of coercive state power. At each level of authority, separate functional branches of government were deliberately placed in continued tension, one with another. In some polities, the dominant legislative branch was further restricted by the constitutional establishment of two bodies, each of which was organized on a separate principle of representation.

It is important to recognize that these basic organizational-procedural elements of political constitutions were designed, discussed, and put in place by the classical liberals within the context of a shared aim or purpose, which was that of checking or constraining the coercive power of the state over individuals. The motivating force was never one of making government "work better" in the accomplishment of some arbitrarily selected "public good," or even one of insuring that all interests were somehow "more fully represented."

The organizational-procedural elements of the classical liberal constitution, those listed above and others, were deemed to be less important than those provisions that laid out the range and scope of activities that were appropriately to be undertaken by collective authority. That is to say, the constitutional instructions as to what governments might and might not do were always considered to be much more important than how governments do whatever it is that they, in fact, do. This critical distinction, which was central to the whole classical liberal conception of social order, was essentially lost to the public consciousness during the ascendancy of electoral democracy, especially during the 19th and 20th centuries. There was generalized acceptance of the fallacy that equated the emergence of electoral democracy with a reduced need for explicit constitutional constraints on the range and scope of governmental activity.

In the classical liberal constitutional order, the activities of government, no matter how the agents are selected, are functionally restricted to the parameters for social interaction. Governments, ideally, were

to be constitutionally prohibited from direct action aimed at “carrying out” any of the several basic economic functions: (1) setting the scale of values, (2) organizing production, and (3) distributing the product. These functions were to be carried out beyond the conscious intent of any person or agency; they were performed through the operation of the decentralized actions of the many participants in the economic nexus, as coordinated by markets, and within a framework of “laws and institutions” that were appropriately maintained and enforced by government.

This framework-maintenance role, properly assigned to government in the classical liberal order, included the protection of property and the enforcement of voluntary contracts, the effective guarantee of entry and exit into industries, trades, and professions, the insured openness of markets, internal and external, and the prevention of fraud in exchange. This framework role for government also was considered to include the establishment of a monetary standard, and in such fashion as to insure predictability in the value of the designated monetary unit. (It is in this monetary responsibility that almost all constitutions have failed, even those that were allegedly motivated originally by classical liberal precepts. Governments, throughout history, have almost always moved beyond constitutionally authorized limits of their monetary authority.)

A central principle inherent in the classical liberal constitution dictated that, regardless of what governments do, and whether or not collective activities are contained within the indicated limits, all persons and groups are to be treated equally. The generality principle, applicable to the law, was to be extended also to politics. There was no role for governmental action that explicitly differentiated among separate factions or classes of persons. In the classical liberal conception, successful majority coalitions could not impose differential taxation on members of political minorities, even for purposes of “doing good” (Buchanan 1992).

The Constitutional Order of Socialism

The classical liberal vision of a constitutional order did not command widespread public and philosophical acceptance for more than the several decades that straddled the turn between the 18th and 19th centuries. In small part, the reaction against this vision was due to the zealotry of those advocates who extended the central *laissez-faire* precept too enthusiastically, even to the rejection of a collective-governmental role in setting the parameters for economic interaction. But, primarily, the reaction against classical liberalism stemmed from

the generalized unwillingness of participants in the body politic to accept the spontaneous allocative and distributive results generated in the operation of a market economy. These results were not taken to be "natural"; they were not understood to be the working out of the whole complex of separated choices made by persons in their many capacities. The results of market process were taken to be "artifactual"—produced rather than emergent, and hence subject to direct manipulation, change, and redirection by politicized collective action.

The reaction against classical liberalism was specifically stimulated and fueled by two separate sources. First, the genius of Karl Marx lay in his ability to isolate, identify, and publicize those elements in the operation of market capitalism that seemed most open to criticism, especially in the intellectual context of an incompleting classical economic theory, along with prevailing confusion as to the distinction between constitutional and within-constitutional operations of governments. Marx concentrated on the vulnerability of capitalism to financial crises, on the tendency toward concentration in industry, and on the alleged distributive exploitation of the proletariat. Secondly, political idealists for many centuries had implicitly used models of the state that involve presumptive benevolence and omniscience. Any failures of markets could, under this presumption of the idealized collectivity, be fully corrected by directed political action. The generalized Marxist critique, along with the presumption of idealized political governance, essentially destroyed the intellectual-scientific basis that had been constructed in justification of the classical liberal constitutional order.

From the middle of the 19th century, some vision of a socialist order emerged to capture, in varying degrees of enthusiasm, the minds of persons in all developed societies, even in those societies where Marxism, as such, was able to secure relatively little direct support. At base, the socialist vision categorically rejected the classical liberal conception of a self-regulating economy that operates within a set of constitutional limits enforced by government which, in turn, is itself limited largely, if not totally, to the enforcement role. And, if the self-regulating, or nonpoliticized, economy is rejected as the basic organizing principle, the controlled or regulated economy becomes a necessary component of any alternative model for social organization. This shift from the self-regulating model of an economy to that of a controlled or regulated economy may be, but need not be, directly related to issues that involve organizational-procedural changes involving ways and means that agents and agencies of governance are selected, along with constitutional dictates concerning how the control and regulatory functions are to be performed.

The socialist constitutional order, whether this be defined in application to a single party, a self-appointed authoritarian regime, or a social democratic parliamentary majority, necessarily extends the range and scope for politicization well beyond the narrowly defined limits of collective authority under the classical liberal order. If the whole economy is opened up for control and regulation "in the general interest," there can be, by definition, little or no prior constitutional constraint on the definition of what such interest is by those agents and agencies charged with the responsibility for allocative and distributive results. Whereas governments in a classical liberal constitutional order have only a limited responsibility for the results that emerge from the interaction of persons in many capacities, governments in the socialist constitutional order have full or total responsibility for all results, including the size, composition, and the distribution of the "bundle of value" generated in the whole system. This ultimate responsibility remains with government even if the market, as a means of organization, is allowed to operate without detailed direction over wide areas of interaction. In the socialist model of government, there is, and can be, no constitutional guarantee offered to economic actors, whether persons or firms, against politically generated intrusions into liberty of commerce, whether this be marginal or total. In a genuine sense, with reference to the structure of the economy, the very term "socialist constitution" is oxymoronic. At best the constitutional order of socialism embodies constraints only on the procedures of politics and the behavior of political agents in carrying out those procedures; it cannot extend to include constraints on politicization of the economy, as such.

As we now know, as we have been informed by the great revolutions in central and eastern Europe in 1989-91, as well as by the cumulative historical experience from other parts of the world, as supplemented by analytical argument, the central principle for socialist order is fatally flawed and has been from the outset of its promulgation. The presumption that politicized control-regulation of economic relationships can, and will, generate a satisfactorily large bundle of goods and services, as valued by participants themselves, has been shown to be grounded in fallacy. In sum, the grand socialist experiments of the century did not work, and improved variants on these experiments cannot work, given the motivational, epistemological, and imaginative limits of the human animal. There is now generalized acceptance of the proposition that only market organization of the economy, which exploits the human potential, can produce an acceptably adequate aggregate of economic value.

The Post-Socialist Constitutional Contradiction

The set of public, professional, political, and philosophical attitudes that seem most descriptive of the immediate post-socialist years of the 1990s is internally contradictory. The socialist vision of politicized control-regulation of economic interaction has by no means been exorcised from the modern mind-set despite the evidence from reason or from history. The belief that persons, acting jointly through their membership in collectivities, can effectively "improve" on the spontaneously generated outcomes of market processes remains imbedded in the modern psyche. Despite the overwhelming strength of the evidence, and despite supporting argument, persons cannot readily acquiesce in the stance suggested by post-socialist reality. The romance of socialism, which is dependent both on an idealized politics and a set of impossible behavioral presuppositions, has not yet disappeared.

Whether or not the romance will, in fact, fade away as we move further beyond the post-revolutionary turbulence of the 1990s and into the next century, cannot be settled outside futuristic speculation. Several questions may be posed: Will truth finally triumph over romance? Will the constitutional order of classical liberalism return, in some form, and come to command acceptance as the only order that combines personal liberty and economic prosperity? Will the public's interest in aggregative economic growth, in economic progress itself, finally carry the day and be reflected in genuine constitutional reforms? Or, may we expect the emergence of some new ideology that will offer renewed sustenance to a romantic image of collectivized utopia? Without the emergence of such an ideology, can we expect public acquiescence in authoritarian grabs for power? Without some equivalent of the Marxist class struggle as an ideological crutch for sloganeering, can the politicians escape skeptical censure by the public, even if there is little understanding of the functioning of the market? Is some tacit knowledge of constitutionalism likely to surface as the 21st century approaches?

The politics of my own country, the United States, in 1993 does not offer much basis for short-term optimism in putative response to these questions. The rhetoric of class warfare is now used to generate support for an enlargement of the already swollen governmental sector of the economy, and the provisional skepticism of the 1980s about the efficacy of regulatory efforts seems to have been replaced by reversion to nostrums of a half-century past. "Socialism in the small" is on the ascendancy, as if the demise of "socialism in the large" is totally irrelevant. Politics aimed at "improving" on the outcomes of market processes is presumed capable of succeeding, despite the working of the selfsame incentive incompatibilities, knowledge limita-

tions, and entrepreneurial disregard that produced the background for the great revolutions of 1989-91.

As noted earlier, if we are to find grounds for constitutional hope, it may be necessary to extend our sights, both temporally and locationally. We must recall Keynes' insistence on the long-range influence of ideas. Perhaps the post-socialist period is simply too short for us to have expected shifts in public and political attitudes, and especially in those societies that did not themselves go through the revolutionary upheavals. Perhaps any rebirth of classical liberalism must be expected to occur in those societies that did indeed suffer the revolutions; perhaps only in those countries has there been a sufficient loss of belief in politics and politicians to allow some reconstruction of the 18th century ideal of constitutional order. Only one prediction seems safe here. The constitutional prospect for the next century will be one of surprises.

Conclusion

I have discussed only briefly the whole set of constitutional issues that involves organizational and procedural alternatives of governance. I have not addressed such issues as republican versus parliamentary forms of government; proportional representation versus two-party structures; effective federalism versus political centralization. But my neglect of these issues has been quite deliberate. All such organizational-procedural matters fade into insignificance by comparison with the constitutional challenge of placing constraints on the authority of government over the operation of the economy. Until and unless the government is severely constrained in its economic overreaching, along more or less classical liberal principles, including the principle of generality, the particular choices made among the organizational and procedural alternatives becomes relatively insignificant.

A democratically elected parliamentary majority imbued with socialist ideas and vision can destroy the potential value that might be forthcoming from an unfettered market economy as much or more than the activities of an authoritarian regime. To the extent that constitutional constraints do effectively limit governments in their regulatory, financial, and taxing powers, the particular constitutional form for governance itself assumes secondary rank. To the extent that the powers of government remain open-ended and nonconstrained, the forms of government may seem to matter. But in some final sense, the overextended politics must surely fail, regardless of structural particulars.

In almost all countries, the continuing dialogue and discussion is centered on the establishment, maintenance, and preservation of

“constitutional democracy.” My central argument may be summarized in the statement that “constitutional” is the critically important one of the two words here. Economic prosperity and progress, as measured in value produced and consumed, can only occur in settings where the activities of government are constitutionally constrained, quite independently of how governmental agents are selected.

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