IDEAS ON LIBERTY
MARCH 2002

A New Old American Concept of Political Liberty

by Norman Barry

It is odd that a libertarian should have a conception of political liberty at all. Isn't it the case that there is a permanent war between freedom and politics? Surely any reduction in the political sphere produces a concomitant increase in individual liberty. Has not choice in the market, characterized by personal autonomy and spontaneity, been the biggest victim of the voracious appetites of the rent-seekers (privilege-seekers) who constitute the political class? Does not the most meretricious and superficially appealing form of coercion come exclusively from politics? Sometimes this is so skillfully marketed that it is not even noticed as coercion, especially when it is linked to the allure of democracy. But, of course, democracy has not restrained Leviathan and modern liberal democracies generate little more than coalitions of private interests intent on redistribution.

Yet libertarianism (also called classical liberalism) is undoubtedly concerned with politics: even an attempt to reduce seriously the range of politics is a kind of a political act. And it is true that libertarians have written extensively about politics, albeit from a negative perspective. This can be summed up in one question: how do we reduce the range of human activities subject to collective-choice procedures? For although communism may be more or less dead, it is the increasing range of human actions subject to collective procedures that is the most pressing concern of our times.

For classical liberals this is partly a problem of welfare economics: if the market has been removed from economics, what mechanism is there for determining the production of so-called public goods that is consistent with individual choice? But also it is a matter for ethics: what moral philosophy can mandate the state in its exercise of that power which peaceful and moral citizens do not have?

Libertarians have traditionally answered both questions from a constitutionalist's perspective. A constitution not subject to majoritarian procedures could both delineate the appropriate range of public activities *and* provide protection for individual rights. In a libertarian political (but constitutional) world there would be a set of delineated rights, with economic and civil rights being symmetrical. Even if that were a common-law order without a rights document, its *unspecified* liberties would be immunized from the otherwise remorseless contagion of statute, which has been the fate of Great Britain.[1]

However, the libertarian's depoliticized constitutional order has proved to be little more than a utopia; it has been unable to resist the seemingly inexorable encroach-

---

Contributing editor Norman Barry (Norman.barry@buckingham.ac.uk) is professor of social and political theory at the University of Buckingham in the U.K. This is a shortened version of "A Classical Liberal's Conception of Political Liberty: America and Europe Compared," published in the European Journal, *vol. 9, no. 3, 2001.*

ment of politics on our liberties. Mere "parchment protections" have proved to be fragile defenses against vote-maximizing in a democracy. Indeed, in Europe the replacement of allegedly arbitrary monarchies by democracies has probably reduced liberty and generated a new type of lawlessness.

But the unleashed majority has not been the only agent in this process, for one of the much-vaunted protectors of liberty has proved to be a significant factor in its corrosion—I mean the judiciary. As we shall see, in America especially, some of the most decisive events in the retreat from liberty have been controversial judicial decisions, many of which, ironically, did not even have the imprimatur of the majority.

One of the major reasons for the decline of liberal constitutionalism has been the gradual judicial destruction of the one liberty-preserving aspect of that order—competitive federalism.[2] Just as choice in the marketplace ensures the best goods and services, so choice in the market for law and other public goods guarantees a meaningful political liberty. In America constitutionally protected (specifically by the Tenth Amendment) competitive federalism has been whittled away. In Europe, which does not have a constitution, it is being eliminated by the decline of jurisdictional competition between the member states of the European Union.

Competitive federalism to a great extent removes the malign influence of the judiciary in the determination of crucial elements in the legal order and reduces the role of the *monopoly* state in the production of public goods. It does this by restoring choice and removing the need for complex and unworkable constitutional rules for the limitation of political authority. Most important of all, it makes *exit* a realistic option compared to the costly, freedom-reducing, and cumbersome method of *voice* in the determination of policy. If you don't like the regime under which you live, you simply leave it subject only to a narrow framework of rules that guarantees the right of entry and exit.

Competitive federalism requires minimal constitutional rules. This is not devolution, or even conventional federalism with its vain attempt to preserve appropriate spheres for layers of governments. Importantly, it excludes the possibility of "subordinate" tiers in a federal regime externalizing their costs onto the center, that is, the taxpayer. This is a process that leads to massive rent-seeking by employees of the "national" government. Note that the much-heralded welfare reform in the United States in 1996 was thought to be partly a triumph of federalism since taxpayers' money was returned to the states for them to spend as they wished. But it wasn't competitive federalism since it removed financial autonomy from the states. Under competitive federalism they need have no welfare at all; whether they did would be a function of the choice of citizens with the exit option for those who object. If they did have welfare the states' taxpayers would have to pay for it themselves. A welfare system would, presumably, be unattractive in the political market.

Competitive Federalism and the American Founding

We can get a good idea of what competitive federalism means by looking back at the founding of the United States.[3] Under the Articles of Confederation (ratified in 1781) there was no executive government and the passing of any law was a matter of unanimity of the component states, as was the collection of taxes. This meant that in practice the 13 states were entirely self-governing. In the debate between the federalists and the anti-federalists the defects of the prevailing system were undoubtedly exaggerated. And they were certainly not insoluble. Even the internal tariffs that apparently existed under the confederacy would have eventually been competed away: that is what competitive federalism does.

But the reflections on human nature and political man of the federalists and the anti-federalists were remarkably similar. Both sides took a realistic, pessimistic view of man. The potential depravity of political man was recognized and with it the need for appropriate institutions to protect freedom

What the anti-federalists were supremely aware of was the difficulty for the citizens to control their governors over a wide area and with an increasing population; the extended republic reduced the power of the citizens.

and property. Both were aware of the "social dilemma," namely, the fact that unbridled egoism, especially outside the market, would produce outcomes unwelcome to everybody, including the egoists. Self-interest is not always benign, especially in politics. Those in office would use the privileges of government to their own advantage unless there were agreed-on rules of restraint. The anti-federalists shared Madison's fear of factions: groups smaller than the whole that would use politics to secure income they could not earn in the market. They were especially cognizant of the peril posed by *majority* factions.

Where they differed was over the remedies for these deficiencies. The anti-federalists favored political competition, the federalists a sanitized state and constitutional order, though it is apparent that Madison was groping toward some notion of political competition. In a famous phrase from Federalist 51 he said that "ambition must counteract ambition" and went on to describe a system that he hoped would provide the right incentives to make individual striving consistent with the public good. He probably thought that the federal system he devised would provide a surrogate version of market competition.

But in his equally famous demonstration of the virtues of republicanism, as opposed to democracy, he revealed his misunderstanding of federalism. In Federalist 10 Madison claimed that the worst effects of factions would be dissipated by the "extended republic." That over a wide area and under two layers of government, state and federal, factions would not be able to organize effectively to divert income and power to themselves. However, that proved not to be the case, and the federal government ineluctably increased its power and accumulated the citizens' wealth despite the elaborate protective devices of the Constitution.

It was not just the amendments added later, such as Fourteenth (1868), the Sixteenth (federal income tax, 1913), and the Seventeenth (direct election of senators, 1913), that were decisive, though I do not wish to underestimate their importance. The seeds of ultimate decay were already written into the original document, for example, the direct effect of laws (bypassing the states), the power to raise revenue, and extensive judicial review exercised by the Supreme Court. (While some argue that the Constitution contains no authority for judicial review, the anti-federalists feared the judicial powers as stated in the Constitution and described in *The Federalist Papers*.)

What the anti-federalists were supremely aware of was the difficulty for the citizens to control their governors over a wide area and with an increasing population; the extended republic reduced the power of the citizens. The anti-federalists were quite familiar with what is called by modern public-choice theory "rational ignorance." The costs and benefits of political activity are such that it is just not in the rational self-interest of most people to expend any time and energy on it. This means that only a minority, whose opportunity costs are quite low, will bother to participate. They are the least likely to promote the public good and the most likely to grab the economic rent created by others.

Local Government Favored

The answer, according to the anti-federalists, was not the extended republic but enhanced *local* self-government. That government which is closer to the people is more easily controlled by them and, ultimately, removable by them. Under proper competitive federalism people would leave jurisdictions that did not meet with their approval. Any order that persisted with costly import controls, high taxes, and regulation would quickly be punished by the market—a much more effective mechanism than the democratic vote or a written constitution for the protection of liberty. Note how the congressional power to regulate *interstate* commerce, originally designed to ensure free trade between the states, eventually, with the help of the Supreme Court, became the power to regulate *intrastate* commerce. This did not mean a freer market—quite the reverse.

And the anti-federalists grasped a key point about modern democratic federalism when they observed that while it may be relatively easy to impose new legal restrictions on trade and personal liberty, in a world of rational ignorance and voter apathy it is extraordinarily difficult to get them removed.

The anti-federalists also saw that protection for liberty provided by an independent judiciary was paper-thin. In their view the federal judiciary was ultimately a body of the central government and was therefore bound to pass judgments favorable to it. That is exactly what has happened. The Supreme Court has struck down little more than a hundred congressional statutes while it has outlawed thousands emanating from the states. And in an uncanny premonition of modern liberal jurisprudence, the anti-federalists noted how activist judges would try to distort the meaning of the law in a deceptive attempt to capture its hidden meaning. As "Brutus" brilliantly put: "And in their decisions they [the judges] will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution."[4] This is the perfect anticipation of modern liberal jurisprudence, with its notion of the "living Constitution."

Uncanny Predictions

In retrospect, it is amazing how so many of the predictions of the anti-federalists proved to be true. Or not at all surprising if their comments on human nature are accurate, as libertarians believe they are. In the absence of competition, they noted, the inherent profligacy of government was virtually uncontrollable.

And once again it was the percipient Brutus who posed the serious question: would the new government "absorb and swallow up the state governments"?[5] Under the proposed constitution he thought that it would. And he was right. At the turn of the twentieth century, 70 percent of public spending was by the states and a mere 7 percent by the federal government (the rest was by local governments). Now the position is almost exactly reversed and all attempts to control federal spending under the present constitutional rules have failed. In law, the old constitutional constraints are more or less senescent and in economic matters the federal government can do almost what it likes.

Under "liberal" justices the arm of the federal government has extended to repressive economic regulation; and they have vastly expanded "civil rights" in a manner not authorized by the Constitution. Both forms of intervention favor particular groups (factions) and render the rule of law meaningless. And it was the Supreme Court that officially declared the death of federalism in *Garcia v. San Antonio Transit Authority* (1985). Here, the Tenth Amendment, which states that all powers not granted to the Congress under Article 1, are reserved to the states (or the people), was ignored and federalism was redefined to mean the representation of the states in Congress. But without constitutional (as opposed to political) protection, federalism is a fragile instrument indeed.

Many libertarians in America, especially public-choice theorists,[6] recommend a constitutional revolution by which they hope to

recapture the form of the original system: to restore proper federalism, dilute taxation power, reduce the power of the executive under a rewritten separation of powers, and severely limit the power of government, especially the federal element. But I wonder whether such a reconstruction would be adequate, for it still depends on the delineation of the various powers and enforcement by an impartial judicial system committed to not expanding these powers. It still *licenses* government rather than strictly *limits* it.

Only in Switzerland have federal constraints been preserved: there the 26 cantons still spend more than the federal government and, despite some nationalized welfare, they still handle the things that affect people directly. The original federalist intent, in America and elsewhere, can only be restored if the original *political* liberty is recaptured: that means jurisdictional competition underpinned by the ultimate right of secession.

The European Union had a splendid opportunity to foster jurisdictional competition within an international framework, but it quickly embarked on a centralizing path, led by politicians and an activist European Court of Justice and proceeding at an even faster rate than the American federal union. The right of secession has never been included in the treaties that make up the curious constitutional order of Europe. "Harmonization," not jurisdictional competition, has become the lodestar of European politics; with some brave resistance from Britain and Ireland, which have preserved some independence in taxation.

All written constitutions are inadequate surrogates for a genuine political liberty. For true freedom is found in the active exercise of choice: either in the market for goods and services or the competition for laws and institutions. If that competition is attenuated, and citizens are left with only the threadbare protections of democracy and an activist judiciary, they will soon have little liberty at all. □

1. See F.A. Hayek, *Law, Legislation and Liberty*, vol. 3 (London: Routledge and Kegan Paul, 1979).

2. See Thomas R. Dye, A*merican Federalism*: *Competition among Governments* (Lexington, Mass.: Lexington-Heath, 1990).

3. I have taken much of the following from an unpublished paper by the late Peter Aranson, "Federalism at the Founding," Liberty Fund, Bad Homburg, May 1991.

4. *The Anti-Federalist Papers*, Herbert J. Storing, ed. (Chicago: University of Chicago Press, 1981), p. 165.

5. Ibid., p. 138.

6. Known collectively as the Virginia school. Prominent figures are James Buchanan and Gordon Tullock.