RICHARD EPSTEIN'S THE CLASSICAL LIBERAL CONSTITUTION: A PUBLIC CHOICE REFRACTION

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In The Classical Liberal Constitution, Richard Epstein argues that the American constitutional system was founded on principles of classical liberalism. Those principles are reflected in the complex structural framework of the American Constitution. Governmental powers are not concentrated but are distributed among legislative, executive, and judicial offices. They are also distributed among the states and the federal government through what was a robustly federalist form of government. The powers of the federal government were enumerated and limited with the federal government mainly limited to repelling foreign invasion, keeping peace among the states, and maintaining competition and free mobility across states. While the federal government could restrain state action, so

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too could the states restrain federal action. Perhaps especially significant in this regard was the Constitutional provision that members of the federal Senate were appointed by state legislatures. The Senate was originally an assembly of states, as it were. This constitutional structure was a genuine as distinct from a spurious form of federalism.³

Epstein tells a story of the erosion of the classical liberalism on which the American regime was founded. Epstein dates this erosion as becoming significant starting in 1937, though the erosion began much earlier. Vestiges of classical liberalism still remain: there is still a separation of powers and the form of government is still federal. But we now have an anemic shell of the classically liberal republic we once had. Epstein is a lawyer, so judicial rulings lie at the core of his analytical orientation, and this is reflected both in his examination of how judicial rulings have eroded the classical liberal foundation of the American regime and in his presentation of how that erosion might be stopped. As an economist, my analytical orientation lies in political economy and public choice and how these conceptual frameworks pertain to that constitutional erosion. Hence, I explore constitutional erosion from this alternative analytical perspective by adding a flying buttress to Epstein’s narrative. While judicial rulings understandably form the core of Epstein’s narrative, I doubt that those rulings are themselves the linchpin on which a liberal republic founders or flourishes. The original liberal republican constitution has clearly suffered significant erosion. Whether that erosion can be stopped and the regime set in a more liberal direction requires some understanding of the challenges that led to its erosion, for restoration requires the ability to overcome those challenges.

I. Benjamin Franklin and Constitutional Erosion: A Theoretical Challenge

At the conclusion of the Constitutional Convention in 1787, Benjamin Franklin is reputed to have responded "a republic if you can keep it" to a questioner who asked Franklin what kind of constitution had just been created. Franklin was well aware, as was nearly everyone at that time that regimes could morph into something with sharply different qualities from where they began. The commonly held view in Franklin's time was that democracy was a temporary form of government that eventually would give way as people came to learn that they could vote largesse for themselves through imposing costs on others, which William Niskanen describes with reference to the Scottish historian Alexander Tytler:

A democracy cannot exist as a permanent form of government. It can only exist until a majority of voters discover that they can vote themselves largesse out of the public treasury. From that moment on, the majority always votes for the candidate who promises them the most benefits from the public treasury, with the result that democracy always collapses over a loose fiscal policy, always to be followed by a dictatorship and then a monarchy. 4

The ancients recognized that a constitution of liberty could morph into a constitution of servility through a sequence of piecemeal changes, each of which seemed marginally innocuous at the time. In this respect, it would be easy enough to speculate on how rugby might be transformed through stages into American-style football, or vice versa. Each rule change might seem to be but one

change to the rules of rugby, yet the product of a sequence of such changes could have transformed rugby into American-style football. A Rip Van Winkle could go to sleep while watching a game of rugby, and wake up not recognizing what he was watching despite the game’s still being called rugby.

A regime grounded in a constitution of liberty can through piecemeal actions erode into a constitution of servility.5 Epstein argues that such erosion has occurred over the past three-quarters of a century or so in the United States. While I share Epstein’s evaluation, my disciplinary orientation points me toward extra-judicial forms of analysis. This is where Ben Franklin comes into my line of sight while thinking about Epstein’s argument. We can stipulate that the original constitution of liberty has not been kept and has been replaced by a constitution of servility. But what are we to make of this change in regime? Perhaps liberty receded because it was not serviceable for modern life. Alternatively, the liberal republic could have been perfectly serviceable, but could not withstand predation through interactions among politicians, interest groups, and bureaucrats which eroded the liberal order.6

In this essay I refract Epstein’s Classical Liberal Constitution through Franklin’s recognition that there is no necessity that a liberal republic will continue to be a liberal republic as the years pass. In choosing to take this tack, I am reminded of Ross Emmett’s examination of Frank Knight’s response to George Stigler and Gary Becker’s claim that economists should assume that preferences are

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6 This was the diagnosis of the fall of the Weimar Republic advanced by Walter Eucken, GRUNDSÄTZE DER WIRTSCHAFTSPOLITIK (Edith Eucken-Erdsieck & K. Paul Hensel eds., 1952). In this respect, it might be noted that Adolph Hitler was a democratically elected politician.
invariant across time and place. Adherence to the Stigler-Becker claim would place the full burden of economic explanation on exogenous changes in relative prices, thereby reducing economics to a branch of ethology through the genetic determination of preferences. In contrast, Knight repeatedly claimed that one feature of human nature was its reflexive character which led people often to seek to cultivate different values. For Knight, prices were not wholly exogenous facts to which people responded but were themselves objects that people generated through their interactions as they formed and pursued their economic activities.

Emmett’s presentation of Knight’s response to Stigler and Becker is an exercise in creative imagination, for Knight died in 1972. As Emmett explains, however, we know enough about Knight’s thought to render reasonable speculations about how Knight might have responded to the Stigler-Becker proposition. What makes Emmett’s paper particularly noteworthy is that the contrast he draws between Knight and Stigler-Becker points to a cleavage within Chicago-style economics across the generations, and with the generations largely separated by World War II. Similar to Emmett, I invoke the spirit of Benjamin Franklin to gloss Epstein’s *The Classical Liberal Constitution*. The founding republic was clearly a constitution in the classical liberal motif. Just as clearly, the constitution is no longer classically liberal, just as our system of government is no longer a republic. Epstein argues cogently for a reversion to the classically liberal constitution, suitably updated by doing such things as eliminating the distinction between free people and slaves.

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8 Much of what we know about Knight, moreover, has been systemized in Ross B. Emmett, *Frank Knight and the Chicago School in American Economics* (2009).
I have no quarrel with Epstein about the constitution of liberty that he regards as superior to the constitution of servility that has been in the ascendency for around a century. In the manner of Emmett’s recourse to Knight, I want to explore some of the conceptual ideas that might have informed Ben Franklin’s response. Just because one particular system of government was established, there is no necessity that it will be maintained as the years pass. If there is rhyme and reason to all that happens under the sun, there is rhyme and reason to the decline in classical liberalism in our constitutional order. We thus face one of those proverbial forks in the road. Down one branch lies an explanation grounded in historical necessity that might explain why classical liberalism disappeared but which also explains why it cannot be established anew. Down the other branch resides an explanation grounded in historical indeterminacy or openness which says that we have some scope for selecting among possible historical paths, though that selection and those paths are governed by some natural principles that, like gravity, can be worked within but which cannot be repealed.

The theoretical issue beneath Epstein’s narrative is how to explain observations formed over distinct periods of time. At t₁ we observe a constitutional arrangement we describe as classical liberal, while at t₂ we observe something like what Jonah Goldberg describes as liberal fascism.⁹ There are two explanatory schemes that can be brought to bear on explaining that pattern of observations. Those different schemes, moreover, correspond to the distinction between old-style and new-style Chicago economics that Emmett set forth. One scheme is close-ended and grounded in necessity in response to exogenously changing data. The other scheme is open-

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ended and grounded in non-equilibrium processes of motion. The equilibrium scheme must treat all observations as Pareto-efficient in light of the underlying data. Within this scheme, classical liberalism would give way to liberal fascism through changes in the relevant data that became favorable to liberal fascism. Within the alternative, open-ended scheme, the data themselves are generated through social interaction within a context where present positions may limit future possibilities but does not determine them. Similar to Knight, the future has a range of possibilities though not an unlimited range. This open-ended range that connects present and future means both that there is no assurance that a liberal republic will be kept as the years pass and that a severely eroded liberal republic can be regenerated, and with Epstein pointing out how alternative judicial rulings can support such regeneration. In my effort to offer a flying buttress, I seek to plumb some considerations of political economy and public choice that also must be reckoned with in any regenerative effort.

II. CHOOSING RULES VS. PLAYING BY RULES: HOW APT IS THE DICHTOMY?

The emergence of the field of constitutional political economy can reasonably be dated from the 1962 publication of The Calculus of Consent. The theme of this book was that the complex organizational structure of the American Constitution reflected a sensible

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10 Richard E. Wagner, Mind, Society, and Human Action: Time and Knowledge in a Theory of Social Economy (Mario J. Rizzo & Lawrence H. White eds., 2010), elaborates a non-equilibrium scheme for economic theory against a conventional scheme of equilibrium theory. A similar orientation toward economic theory was presented earlier in Gerald P. O'Driscoll, Jr. & Mario J. Rizzo, The Economics of Time and Ignorance (Mario J. Rizzo & Lawrence H. White eds., 1985).

economic logic regarding the ability of a set of economizing individuals to generate systemic order within a set of political arrangements. This explanation of how organizational complexity supports systemic order clashed severely with the Progressivist claim that a governmental system of separated powers created chaos which required centralized government for its removal.12 The economizing logic that Buchanan and Tullock expounded was grounded in the simple presumption that people pursued the plans that interested them within some institutional environment that governed interactions among those people. Buchanan and Tullock explained how the complex pattern of separated powers and overlapping and fragmented governments that comprised the federalist system allowed a strong measure of individual liberty while at the same time allowing genuine collective business to take place within the appropriate governmental bodies.13

Scholars working within the framework of constitutional political economy have mostly embraced the distinction between a set of people choosing rules for playing a game and those people selecting the strategies and actions by which they subsequently play the game. This distinction is commonly illustrated by such parlor games as poker. Eight people gather for an evening of poker. Before they can start playing, they must decide on the type of poker they will play along with such matters as betting rules. Later in the evening, someone might raise the possibility of playing a different type

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12 Woodrow Wilson, Congressional Government (1885) is a lucid presentation of this claim by a President who was antagonistic toward the structure of government he promised to uphold in his position as President.

13 An especially significant flying buttress to The Calculus of Consent was set forth in Vincent Ostrom, The Political Theory of a Compound Republic (Univ. Neb. Press 2d ed. 1987). While I cite the second edition, I should note that the first edition was published much earlier, in 1971, only this edition is rare and the publisher has long been out of business.
of poker. If the players agree to the change, the change will take place for subsequent hands.

This distinction between the choice among rules and the selection of actions within those rules has been the foundational principle of constitutional political economy. That principle is not wrong, but neither is it readily or simply extensible from parlor games to constitutional republics. Eight people can get together and decide on the type of poker they will play. At some later time during the evening, it would be equally easy for them to discuss changes in the rules of play, and with subsequent play follow the new rules if the players agree to make the change. Within this formulation, the players agree to the rules before play starts. Likewise, they suspend play while they discuss possible revision to the rules. The image of the parlor game conforms to a strict distinction between players agreeing to abide by common rules and players subsequently trying to do the best they can within those agreed-upon rules. There is consensus over the rules, while subsequent play entails the ordinary mixture of cooperation and antagonism that fits any competitive setting. The consensual quality of parlor games is made especially apt by the ability of people to cash out and walk away from the game whenever they choose. For the players to keep the game going, the players must continually choose to remain in the game rather than to withdraw. The players in the parlor game are not imprisoned but are there because they choose to be.

The situation is different for constitutional republics. The American constitutional founding did not represent some consensual choice of rules after which ordinary political activity would proceed. While the members of the Constitutional Convention voted to

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14 Some of the problematic involved in moving from parlor games to political constitutions is explored in Shru Jayagopalas & Richard E. Wagner, Constitutional Craftsmanship and the Rule of Law, 24 CONST. POL. ECON. 295 (2013).
replace the Articles of Confederation with a new form of government, there was much opposition to this replacement throughout the land. Only 39 of the 55 delegates present at the Convention signed the Constitution. The ensuing controversy between the federalists and the anti-federalists reflected the intensity of this controversy. Moreover, many Americans did not support succession from England in the first place. The Constitution was agreed to by the members of the Constitutional Convention, and that agreement spread through the subsequent debates over ratification within the states. Nonetheless, the parlor game analogy gives overly expansive scope for constitutional concord when discord surely has as much a presence in constitutional politics as it does in ordinary politics. It might be reasonable to describe the moment when the ninth of the thirteen states ratified the Constitution as a "constitutional moment," but such a moment in no way represents an instant when everyone said "we agree to go forward under this constitution."

The analogy between parlor games and political constitutions is understandably easy to work with despite its problematic features. Constitutions do establish a structural shell within which governments operate; however, there is perhaps no more agreement over that shell than there is over particular points of political controversy. To acquiesce in a constitutional system is not the same as to agree with it. There was not even full agreement among the 39 delegates who signed the Constitution, though those 39 delegates did acquiesce in allowing the constitution to go forward to possible ratification. Within a particular constitutional structure, coalitions are formed and actions are taken, whether there is genuine consent or just acquiescence. In either case, the actions that are undertaken are shaped by the rules that govern interactions among the participants.

Structures can also be changed, and we would expect different structures to generate different outcomes. In this manner, constitutional political economy operates with a bi-level framework where actions take place within some given framework of constitutional rules, only those rules are as much the subject of contestation as are the particular actions.

Collective action is impossible without some framework of rules that provide structure to interactions among those to whom that structure pertains. Any collective entity will be able to take action only within the shadow of some set of governing or constituting rules. To be sure, any effort to enumerate those rules would far exceed the explicitly articulated constitutional rules that describe what people mean when they refer to a constitution. Most constitutional process operates not though any explicit change in governing rules but rather through changes in how existing rules are interpreted in relation to particular settings and controversies. The requirement that the federal President must be at least 35 years of age leaves no room for interpretation. The requirement that appropriations from the federal treasury must be to promote the general welfare leaves gigantic space for creativity in interpretation. In the early years of the Republic, the general welfare clause was generally interpreted to mean that appropriations were limited to items that could plausibly be said to benefit everyone within the nation. Throughout the 19th century there were changing interpretations regarding whether particular actions conformed to or violated the general welfare clause, as Charles Warren sets forth pithily.16 Where early in the 19th century appropriations for public works were often rejected by Congress on the grounds that there was no constitutional authority for such appropriations, by late in the 19th century such

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appropriations began to capture Congressional favor. During this period constitutional text was unchanged. What changed was some combination of publicly expressed sentiment and the numbers of people affected by the appropriations in question.\(^\text{17}\)

The distinction between choosing rules and playing within the rules is not reasonably treated as sequential in character. Both types of action occur simultaneously, only they pertain to different analytical levels where actions taken on the level of ordinary politics \textit{supervene} on actions taken on the constitutional level. The two levels operate simultaneously and not sequentially. It is not that play is suspended while rules are revised, and with play then resuming under revised rules. Rather, both processes occur simultaneously. Much activity can be described as taking place within some given framework of constitutional rules. Yet some activity also takes place regarding changes in those constitutional rules. While this alternative formulation is surely more realistic, it also creates analytical openness in contrast to the closure that is created by the analogy from parlor games.

\section*{III. NETWORKS, COLLECTIVE PROPERTY, AND CONSTITUTIONAL PROCESS}

Private property is an institutional arrangement that allows individual property owners to undertake the actions they prefer, provided only that they don't impinge on the equal rights of other property owners. Private property provides a simple framework that is capable of governing incredibly complex patterns of relationship among property owners, as Richard Epstein explains lucidly.\(^\text{18}\)

\begin{footnotesize}
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\item[\(^{17}\)]\textit{As a matter of positive political economy, the notion of a living constitution has much descriptive cogency as explained by Petri\'k Runst & Richard E. Wagner, \textit{Choice, Emergence, and Constitutional Process: A Framework for Positive Analysis,} 7 J. OF INST. ECON. 131 (2011)}.
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A framework of simple rules regarding property, contract, and liability can enable people to put together the complex forms of enterprise and relationships among those enterprises that we observe throughout the world.

Political entities, however, operate within frameworks of collective property. Much economic theory operates within an analytical framework that reduces collective property to a form of private property by treating collective action in choice-theoretic terms. Hence, collective action is treated as an outcome of a median voter's choice, the choice of someone designated as "policy maker," or the choice of some ruler who is guided by a social welfare function. These constructions are fictions that allow modelers to give closed-form answers to the questions they pose to themselves.

To the contrary, collective action is not the outcome of choice. It is the outcome of interaction among people who are implicated in some framework of collective property. As a field of study, public choice should have been named something like public interaction. Market outcomes can reasonably be described as being optimizing for those whose actions are being described. This is not so, however, for collective outcomes. Few such outcomes would correspond to optimal for particular participants. Most people are in the position of facing other outcomes they can imagine that they would regard as superior. The challenge such people face, of course, is how to achieve those preferred outcomes. This situation suggests that collective outcomes have weaker stability properties than market outcomes. Where market outcomes might reasonably be described as residing in the core of an economy, the same cannot be said for collective outcomes. The contested quality of collective outcomes is

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inherent in the nature of collective property where it's very meaning is dependent on the particular rules in place for arriving at collective actions.

Constitutional processes involve multiple participants, and this involvement suggests that those processes are especially suitable to network-based modes of analysis. Networks are characterized by varying patterns comprised of nodes and edges. With respect to constitutional interpretation, the participants would be represented by nodes and the pattern of connection among those participants would be characterized by edges. The two panels in Figure 1 illustrate two distinct network configurations. Each panel depicts seven nodes and eight edges, but with dramatically different structures.

**Figure 1: Alternative Network Representations**

Panel A depicts a monocentric or hierarchical network. The circles denote the nodes or participants in the network. That network has an apex and is arrayed in three levels. The node at the top has direct relationships with three subordinate nodes. Those three

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20 JASON POTTS, THE NEW EVOLUTIONARY MICROECONOMICS (2000) is a lucid examination of economic theory by using formalisms found in graph theory and network formulations.
nodes in turn have relationships with three further subordinated nodes, and in a particular pattern. Two of those lowest nodes respond to two nodes above them while the third of those lowest nodes responds to only one higher node. The network described by Panel A denotes any organization that can be described by a table of organization. In principle, the node at the apex can control the entire network, which makes it reasonable to speak of the organization as having goals or objectives. To be sure, full control is an idealization and not a reality because subordinates face some slack in the ties that bind them to superiors.

Panel B depicts a polycentric network. The first thing to be said about this network is that it has no apex. Each node has relationships with a subset of the nodes that comprise the network. Such nodes have to respond to the nodes with which it is directly connected, and the entire network has properties that are not encapsulated in any particular node. The distinction between monocentric and polycentric is categorical as just presented. There are, however, many different architectural configurations that fit the polycentric motif, with some resembling monocentric architectures. For instance, one of the nodes in Panel B might develop a greater density of connections with the other nodes, and in the limit might develop connections with all of the other nodes, in which case hierarchy would have been created.

Consider a mayor who would like to locate a park on a particular plot of land and who also has particular desires about how that park should be equipped. In the architecture described by Panel A, the mayor would be in the position of a private property holder during his tenure of office. It’s possible that subordinates might not perform exactly as the mayor would like them to perform, as described by ideas from the theory of agency. Nonetheless, the location of the park in a particular place and the type of equipment with which it is furnished reflect the mayor’s optimizing choice.

Panel B depicts a different political system. The mayor is but one node in that system, and with that system requiring concurrence among multiple nodes. He may be the same mayor as the one
depicted in Panel A. As depicted in Panel B, however, the mayor has to get agreement from independent participants before going forward with the park. Some of those nodes might be members of a city council, a majority of whom must agree to the specifications of whatever park is created. Another node might denote an office of human services which administers equal access requirements on behalf of a state agency and which has a veto over public projects. What emerges out of this collective process will depend on the particular network pattern that governs relationships among the participants. Changes in the network pattern denote changes in the substantive content of what is denoted as collective or public property. In the manner suggested by Figure 1, graph theory can convey in an abstract fashion how different structures of constitutional relationships can exert differing impacts on the outcomes of constitutional processes.

IV. HUMAN NATURE, MORAL IMAGINATION, AND THE CROOKED TIMBER OF HUMANITY

But structure isn’t the only place where constitutional work is done. Structure pertains to the edges that connect the nodes in the graph. Significant work is also done inside the nodes. The edges depict the paths that must be traversed to attain success in collective action. The nodes identify the people who occupy those nodes. It is here where the moral imagination enters the picture. The same

21 I take the section title from Isaiah Berlin, THE CROOKED TIMBER OF HUMANITY: CHAPIERS IN THE HISTORY OF IDEAS (Knopf 1991). The original source is from Immanuel Kant’s IDEA FOR A UNIVERSAL HISTORY WITH A COSMOPOLITAN PURPOSE: “Out of the crooked timber of humanity no straight thing was ever made.” IMMANUEL KANT, IDEA FOR A UNIVERSAL HISTORY FROM A COSMOPOLITAN POINT OF VIEW (Lewis White Beck trans., 1963).
node can be occupied by people with differing moral imaginations or sympathies.

What is particularly notable in reading the controversy between the federalists and the anti-federalists was the empirical rather than theoretical points of controversy. They agreed that government should prevent foreign invasion, but disagreed whether individual states or alliances of states were sufficient to do that. They agreed about the importance of some general public works, but disagreed about whether this required a federal government with independent authority to tax. Behind such differences about empirical possibilities was a common recognition that employment of government power entailed a form of Faustian bargain.\textsuperscript{22} The mere creation of a political apparatus is to establish positions of rulership that run contrary to the democratic ideology of a largely classless society. The American system was based on a rejection of the class-based systems with their aristocrats and peasants which were common to Europe at the time of the American constitutional founding. Under those systems, people were not regarded as having created their governments, so no type of bargain was involved, Faustian or otherwise. Government was rather the province of nobles who ruled as they chose. How they ruled was their business. The remainder of the population was born into some governmental arrangement that for them was a fact of life.

It is here where the Faustian bargain intrudes into the American constitutional founding. Within democracies of the American form, there is no class of nobles who dispense largesse and who might be exhorted to use their superior standing to perform some public good. There is no superior standing aside from that which people

might freely grant, and which they can just as freely take away. This is the classical form of liberal ideology that was present at the American founding. Yet the act of constituting a government creates positions and offices in society that resemble those of the aristocracies of old, and which create what Carl Schmitt described as autonomy for the political.²³ Political officials are entrusted with instruments of power which they are to use for public benefit. What public benefit means in this case is determined not by those political officials but by the remainder of society. Yet the possession of power will be used for harm as well as for good. Power always has this two-edged quality about it. The ability to force people to do things against their will is to insert an evil instrument into society under the hope that the comparative weights of the good and evil that results will be mostly beneficial. Like the legend, the bargain is made because of a belief that the good the bargain will provide will exceed the harm that is also part of the bargain. The bargain might work out this way. But it might not. The situation becomes particularly muddled once it is recognized that this bargain is not made by a single person with the devil but is made on behalf of many persons who can differ among themselves in how they appraise the bargain.

Government has the power to force people to do things they don’t want to do, both through its budgetary and through its regulatory powers. While it is possible to advocate the insertion of political power into society as a means of promoting activities of general

²³ Carl Schmitt was a liberal who thought that liberalism failed to wrestle sufficiently with the reality of power in politics, which in turn led to an emphasis on abolishing the political rather than finding a reasonable accommodation with what he thought could not be abolished in any case. Schmitt speaks for himself in CARL SCHMITT, THE CONCEPT OF THE POLITICAL (Univ. of Chicago Press 1996). Two valuable studies of Schmitt are PAUL EDWARD GOTTFRIED, CARL SCHMITT: POLITICS AND THEORY (Greenwood Press 1990); and RENATO CRISTI, CARL SCHMITT AND AUTHORITARIAN LIBERALISM (Univ. of Wales Press 1998).
benefit, it is also widely recognized that the possession of power can be used for public harm. To be sure, no holder of political power ever claims to be using power to wreak harm upon society. Invariably it is the public good that holders of positions of power claim to be promoting with their uses of power. Every political official will claim that his or her programs and activities promote the public good. But how are other people to judge such claims? If there is no disagreement within the population at large, it would be reasonable to accept the claims of political officials. But short of such unanimity, we face a different and difficult situation where conflicting claims are held at the same time within the population.

V. RENT SEEKING, RENT EXTRACTION, AND THE DEMOCRATIC EROSION OF LIBERTY

Federal budgetary powers at the time of the American constitutional founding were strictly limited both by the uniformity clause with respect to taxation and the general welfare clause with respect to appropriation. That revenue would be raised in a uniform manner and that appropriations would be for the general welfare as distinct from the welfare of particular individuals attests to the founding constitutional vision that democracy should be rendered congruent with private property. This pair of constitutional requirements supports a framework of non-discriminatory democracy, as William Hutt recognized.24 While individual members of Congress would always be free to play Santa Claus with their own capital, they could not do so in their capacities as members of Congress. In

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his masterful treatment of how Congress came to play Santa Claus all the same without any change in express Constitutional language, Charles Warren described a century long process that began with a constitutional bar to appropriating for the interests of particular people and ended in the 1930s with recognition that the general welfare is what Congress declares it to be.  

The contemporary theories of rent-seeking and rent-extraction are illustrations of how political processes have become more enemies than protectors of liberty. Rent seeking and rent extraction both refer to politics as a process of taking and redistributing property rights, in contrast to the presumption on which the American constitutional system was founded that the point of government is to preserve and protect property rights. The prime difference between the two theoretical formulations is in the passive or active character of politicians. With rent seeking, passive politicians are besieged by people seeking favors, and with those favors requiring the placement of restrictions on other people. With rent extraction, politicians become active pushers in extracting rents, in many cases by announcing an intention to sponsor legislation that is withdrawn when the target convinces the legislative sponsor to do so. This is politics as extortion, as McChesney notes in his subtitle.

It is common to think that majority rule means that the basic division between winners and losers in any instance is on the order


of 51-49. This is the world of majority faction. But there is plenty of scope for minority faction to secure political domination as well. In these situations a few people reap large gains while many people bear small losses. What allows this situation to persist is the power of faction in conjunction with the existence of minimal thresholds inside of which people treat small differences as non-existent. For a society of 1,000 people, a faction of 50 people will be able to get their way about 80 percent of the time, and with a faction of 75 people being about to do so about 99 percent of the time. These calculations are based on the presumption that those outside the faction are equally likely to vote for or against a motion. Such illustrations as this one convey the ability of voting blocs to be effective even if their numbers are small. Democratic processes have strong tendencies to support minority faction unless those processes are offset by other constitutional measures that restrict the ability of legislative majorities to control political outcomes.

VI. Liberty and Democracy: A Perilous Alliance?

It is a triumph of wishful thinking over sober analysis to think that liberty and democracy necessarily complement one another, at least so long as democracy is taken to mean majority rule. To be sure, the American founders were sober realists who did not engage in wishful thinking, so in turn did not equate democracy with majority rule. Indeed, they established numerous obstacles to the reduction of democratic processes to simple majority rule, many of which have since been weakened or even dismantled. For instance,

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27 On the limited ability of people to discern small differences, see Gary A. Miller, The Magical Number Seven, Plus or Minus Two, PSYCHOL. REV. 63, 81-97 (1956).
the Constitution divided Congress into two chambers, the House and the Senate. Furthermore, different principles of selection were adopted for each chamber: where House seats were filled by direct election, Senate seats were filled by state legislatures. This arrangement created diversity between the chambers that was reduced when the 17th Amendment established the direct election of Senators.

This original constitutional arrangement was based on recognition that requiring concurrence between legislative bodies whose members were selected by different processes would more strongly reconcile liberty and democracy than when membership in those bodies was established by the same electoral process. These days, however, democracy is commonly thought to be synonymous with majority rule. But if democracy is synonymous with majority rule, it must be inconsistent with liberty. Put differently, if democracy is to be consistent with liberty, its processes and institutions must entail more than majority rule. While majority voting might come at the end of the line, so to speak, other substantial obstacles must be surmounted before a vote can be taken if democracy and liberty are to be allies and not enemies.

So how is it possible for democracy to conflict with liberty? Democracy is a scheme for governing human interaction. But so is liberty, which is a system of regulation grounded on private property. Private property is a regulatory system that accommodates the voluntary organization of social interaction. Economic theory explains how it happens that a society where individual action is largely organized through private property is able to generate coherent patterns of societal activity without there being any entity or organization to plan that pattern. As Leonard Read once explained, we take the use of pencils for granted and yet there is no person in society who can issue all of the orders extending over decades and
centuries that would be necessary to produce pencils.\textsuperscript{30} The owner of a stand of trees has no idea that some of the wood that will be harvested will be used to make pencils. Nor does the manufacturer of saw blades have any idea that some of those blades will be used to shape wood into housings for pencils. The central lesson of economic theory is that societies generally generate coherent patterns of activity not because there are some smart and wise people who organize that activity but because there is no one who even attempts such an impossible task. Societies where people relate to one another within an institutional framework grounded in private property secure coordination among those people even though no one can create that coordination. Each person in society knows a lot about his or her small area of expertise and knows very little about everything else, and yet an economic system based on private property is able to achieve widespread coordination.\textsuperscript{31} The central thrust of economic theory, in other words, is that societies grounded in private property and personal liberty are effective in generating coherent patterns of economic activity that promote flourishing societies.

For democracy to be rendered congruent with liberty, it would be necessary for collective action to receive unanimous support from those who contributed to its support. In contrast, simple majority voting creates a conflict with liberty, at least without auxiliary arrangements that restrict the reach of majority voting. To illustrate the potential incongruence between democracy and liberty, suppose


\textsuperscript{31} This point is explained lucidly in Lee Cronk & Beth L. Leech, Meeting at Grand Central: Understanding the Social and Evolutionary Roots of Cooperation (Princeton Univ. Press 2012).
a set of people think it would be nice to have a large plot of wetlands established as a bird sanctuary. In contrast, the owners of the land have plans to convert the land into an amusement park. Within the liberal framework of private property and the market economy that grows around that framework, the supporters of the sanctuary can always buy that land from the present owners. Doing this would replace the amusement park with the bird sanctuary. It would also require the supporters of the sanctuary to use their own capital for this purpose.

Alternatively, the supporters of the sanctuary could resort to political action to create the sanctuary. This course of action might be superior to the supporters of the sanctuary because they could replace their own capital with capital attained from tax extractions imposed on other people. To stay with the example of majority voting, suppose a bare majority of the population would answer yes if asked the question: "would you approve of converting this land into a bird sanctuary?" A motion might be put before a legislative assembly or before the population in a referendum. If the motion passes the bird sanctuary will be established.

What we have are two different social processes for deciding on the use of a plot of land. The market process operates through negotiation between owners of the land on the one hand and those who desire to acquire use of that land on the other hand. In this case, the land will tend to be used by those who can advance the highest bid to the owner. The political process involves negotiation between those who desire to use the land and political agents who can take control of the land if a majority of political officials choose to do so. The reason why people who covet that land would resort to politics is that they can get that land more cheaply if they can take it through politics than if they had to secure the permission of owners to do so. To create a simple illustration, suppose all members of the polity pay equal taxes. If so, using the political process allows proponents of the bird sanctuary to cut their costs in half as compared with having to buy the land directly from the owner. Once such a gambit is successful, the incentive to resort to politics to secure price
reductions increases. Liberty is then diminished as private property becomes increasingly restricted as politics replaces liberty as a basis for social organization. Market transactions are voluntary among interested participants while political impositions through majority rule confer benefits on some by imposing costs on others, diminishing liberty in the process.

VII. FEDERALISM, CARTELIZATION, AND CONSTITUTIONAL STRUCTURE

Federalism is generally described as a pro-liberty form of government. Yet it is surely reasonable to wonder how the presence of two sources of political power within the same territory can be more favorable to liberty than when there is but a single source. The ability of a federalist form of government to preserve and protect individual liberty depends on some significant details concerning its constitutional structure. The American federal system was founded on a principle of competition among governments as the appropriate institutional complement to the individual liberty on which the nation was founded. Over the past century or so, however, the federal system has become increasingly monopolistic or collusive.

Just as economists have studied the properties of an economic system based on free and open competition, which is governed by an institutional framework centered on private property, so can one study the properties of a political system based on open competition among the political entities that reside within a federalist system. Such a political system based on independent and competi-

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32 On federalism as a system of competition among governments, see Thomas E. Dye, American Federalism: Competition among Governments (Lexington Books 1990); Daphine A. Kenyon & John Kincaid, Competition among States and Local Governments (Urban Institute 1991); Richard E. Wagner, Competitive Federalism in Institutional Perspective, in Federalist Government in Principle and
tive entities would be the political counterpart of an economic system based on private property. As originally established, American federalism was based largely on open competition. The federal government possessed enclaves of monopoly, not least of which was the so-called Supremacy clause that asserted that federal legislation trumped state legislation in cases of conflict. For the most part, however, the American political system was envisioned as one that carried principles of free and open competition into the political organization of society.

Theories of rent seeking and rent extraction explain how political coalitions can seize gains by infringing on the liberties of other members of society. This restriction on liberty is a latent quality of democratic government where majority rule is in conflict with private property and liberty of contract. Within the Constitution, the federal government has responsibility for maintaining free trade among the states. Through cartelization of the federal system, this responsibility is mutated into one where offices of the federal government act as cartelizing agents. For instance, between its creation in 1938 and its elimination in 1984, the Civil Aeronautics Board did not allow a single new airline to carry passengers across state lines, despite the vast growth in air travel that occurred during this period. This is using the federal government to sponsor a form of cartel federalism as distinct from competitive federalism.33

This situation points to a significant constitutional asymmetry within the American system.34 Citizens can challenge the constitu-

33 For a wide-ranging treatise on the ideal of competitive federalism in relation to the reality of cartel federalism, and how a restoration of competitive federalism might be approached, see Michael S. Greve, The Upside-Down Constitution (Harvard Univ. Press 2012).

34 This asymmetry is explored in William A. Niskanen, The Prospect for Liberal Democracy, in James M. Buchanan & Richard E. Wagner, Fiscal Responsibility in
tionality of state actions in a federal court. This ability fits with the principle that no man should be a judge in his own cause. In this instance, a state should not be able to issue a judgment in a case advanced against it, even if it is different offices of the state that are involved under the separation of powers. Judicial, legislative, and administrative authority may reside in independent offices, though such independence must always be incomplete because all are staffed through variations on the same selection process. Hence the ability of people to challenge state actions in federal courts makes constitutional sense. What does not make similar constitutional sense is the requirement that challenges to the constitutionality of federal actions must be taken to federal and not to state courts. In such cases, the federal government will be a judge in its own cause. Short of a situation where state courts could judge on federal actions to restore constitutional asymmetry, it is not clear whether federalism provides protections for liberty that go beyond what would be part of a national government or whether it shifts the locus for the supply of restrictions on liberty and competition to the federal government.

It has often been noted that all politics is local politics. This simple observation conveys a deep truth about political competition and the difficulty of maintaining independent action among political entities within a federalist system. Politicians face periodic election. In significant degree electoral success is a matter of becoming familiar in a warm way to voters. An important ingredient in attaining such familiarity is to develop a reputation for addressing issues that voters care about. Within the original constitutional framework, most of the matters of interest to voters stemmed from local and state levels of government. This isn’t to deny the importance of

matters of war and peace that were the province of the federal government. It is only to say that those were not issues that people could do much about in any case. In contrast, the condition of schools, of roads, or of parks where things of concern to people and, perhaps more significantly, were things they might conceivably do something about.

When faced with this type of setting, what might an ambitious politician do? A successful politician must be able to address issues of interest to the various audiences he or she faces. An ambitious aspirant to federal office could increase his or her odds of success by addressing topics of local interest. For the most part, however, those topics are not part of the enumerated powers of the federal government. Grants in aid allowed an expansion in the agenda of federal politics. The Morrill Act that established land-grant universities, for instance, brought the federal government into education, even though constitutionally education was the province of states and of individual citizens.

The position of political parties surely reinforces the emergence and growth of cartel federalism. Political parties did not exist at the time of the Constitutional founding, but within a few years had made their presence felt. In the absence of parties, several candidates might stand for office and those candidates would likely hold a variety of positions. When political parties appear there is surely a narrowing of the options over which competition occurs as compared with a system without parties. Indeed, this would be one of the primary consequences of the development of parties, particularly in the two-party system that tends to come about when only one candidates is elected per district, and which stands in contrast to systems of proportional representation. In thinking of competition, people typically think of the competitors as acting independently of one another. Without parties, open competition among candidates would likewise reflect this independence. Political parties act as collusive agents by creating coherence among candidates across levels of elections. Within this context, a natural progression is to move for local to state offices and then perhaps to national offices.
Electoral competition still takes place as elections are the vehicle through which offices are staffed. But the diversity of opinion expressed through such elections is narrower than it would be without political parties, as a reflection of the cartelizing influence of political parties. In other words, the combination of ambitious politicians and political parties that are vertically integrated across all levels of government creates a cartelizing or centralizing tendency due to the ordinary desires to politicians to advance to higher office.

VIII. CONCLUSION

It has been long noted that eternal vigilance is the price of liberty. Good government is not a destination or final resting point. It is a continual, never ending process. There are two basic though complementary tasks involved in securing good government. One task involves the moral imagination, and concerns the principles by which we are to live together. History and our imaginations can present us with many options in this respect. This essay starts from an affirmation of the values of liberal and open societies where human relationships are fashioned through interaction among equals as governed by principles of private property and freedom of contract. Government is not the source of property rights, for law precedes government, but is rather an arrangement for supporting and maintaining the liberal order of human interaction.

Ideals are at best realized only imperfectly in practice, of course, and the Faustian character of the bargain that government represents assures us that this will be the case. The second task requires us to undertake the cognitive work of relating our institutional arrangements to the types of practice that those arrangements promote or block. This task leads in several directions and generates a number of general associations. For instance, it is inconsistent to support both a free and open society and a simple democracy dominated by majority rule because democratic practice will undermine the values of the open society, by replacing relationships based on mutuality with relationships based on domination-and-
subordination. It is, however, possible to maintain democratic poli-
ties in a federal form of governance, provided that that form of gov-
ernance operates according to polycentric and competitive princi-
ples and not hierarchical or collusive principles.

Most fundamentally, governance in a liberal order must be ap-
proached in a bottom-up type of manner. With respect to valuation,
democracy is a derivative value, with governance grounded in rela-
tionships of mutual respect among equals being primary, and with
fragmented and overlapping civic association emerging out of the
extension of those relationships. With respect to cognition, the actu-
al institutional arrangements of governance must be conformance
with those principles of value; otherwise, contrary practice will set
in motion a process of erosion whereby a competitive federalism
becomes cartelized or monopolized. Eternal vigilance is indeed the
price of liberty, for power always pushes its own expansion and
keeping power in check is a task that never ends and about which
success is not guaranteed. Richard Epstein’s The Classical Liberal
Constitution provides wonderful service in helping us better to un-
derstand the difficult challenges we must continually confront if we
are to live as a free and not a servile people.