The Rule of Forces, the Force of Rules

Anthony de Jasay

All is not well with our politics. Never before in history, perhaps with the exception of ancient Greece, has civil life been politicized to quite the same extent as today. It might appear that society should be better, more fully served by its government than ever before. Yet few would think that this is the case. The principal products of more intrusive, more caring, and more comprehensive politics seem to be disaffection with, and dysfunction of, government. Where the process has gone furthest, under "real existing socialism," failure reached staggering dimensions. But whether governments now profess to live by democratic or socialist precepts, or by the near-ubiquitous, ungainly crossbred of the two, their relations with the governed are sour.

The causes of this state of affairs are by now quite widely understood. They have become the commonplace wisdom of political science and political economy. The study of public choice convincingly explains why political decisions are biased toward self-defeating, perverse effects and suboptimal, "negative-sum" outcomes, and why we, as rational players in the political "game," nevertheless keep asking for more of the same. Given the rules of the game, any other outcome is unlikely as long as enough people behave prudentially, in the sense of maximizing some not wholly implausible combination of material ends. Selfless voters or suicidal politicians could, of course, produce less depressing solutions, but they seem to be a rather rare breed. Failing a wholesale change of hearts, one possible solution to the dilemma suggests itself: change the rules. Hence the rising interest in constitutions as they are, and as they should be.

Seeming to be close to a state of despair by the very public choice logic that he coinvented and whose workings no one grasps better than he, James Buchanan (1993: 1) put it pithily:

Cato Journal, Vol. 14, No. 1 (Spring/Summer 1994).

The author is an independent scholar living in France. An earlier version of the paper was presented at the Mont Pélèrin Society meeting in Rio de Janeiro, September 1993.

> How could the constitutional framework be reformed so that players who advance generalized interests are rewarded rather than punished? . . . The response is clear. *The distributional elements in the political game must be eliminated.*

Who Gets What, Who Pays What?

Any constitution that would eliminate the distributional element would, in truth, abolish politics itself. The reason for holding that politics is quintessentially distributional is fairly simple. When all benefits and all related costs come in finely divisible pieces, rather than in great indivisible lumps, each person's benefit can be made contingent on his paying a price that fully covers the cost of production, including the cost of excluding nonpayers. Individuals, in free contractual or quasicontractual interactions, will then profitably produce reciprocal benefits for each other, each paying for what he receives. There is no need for any collective decisions. If, and only if, important indivisibilities exist or are felt to exist (e.g., on the grounds that if peace, justice or security from life's risks is to be produced at all, it must be produced for all at once), do some politics become inevitable. Though it is quite a step from "some politics" to the fully fledged state, it is basically from our "need" for indivisible public goods (of which public order is a special case) that many political thinkers derive the need for a coercive supreme authority. Costless, non-scarce goods call for no decisions; each can take as much as he wants, and so can the person coming after him. However, public goods that cost something to produce involve political cost-allocation and political benefit-sharing. No matter how austere a notion of "need" for such goods we adopt, even a bare night-watchman service assuring public safety must involve collectively deciding who shall bear what part of the cost. Setting a global standard for the common benefit to be provided is, no less inevitably, a political matter with distributional consequences. Seen broadly, these decisions affect not only the present, but prejudge the future, too, through the grant of unrequited rights ("entitlements") and the assignment of the corollary obligations to involuntary obligors. Within this view of politics, arguing that political choices must not be about distributions means to argue that political choices must simply cease to be made.

On a closer view, however, Buchanan's postulate turns out to be, not that questions of distribution should be purged from politics (which in strict logic would be a contradiction in terms), but that they should be resolved in conformity with the principle of "equal treatment" or generality, applicable in politics no less than in law. Buchanan (1994: 2) suggests that 18th-century constitutions duly gave

effect to this requirement. However, I believe that such a view gives these constitutions more credit than, at least judging by the American experience, they can rightly claim. With the passage of time, the U.S. Constitution, far from enhancing the safeguards of property as its Lockean inspiration called for, has proved to be very apt to accommodate redistributive group politics and sanctimonious, busybody, legalistic modern American liberalism.

I will come back to the content of the equal treatment principle presently. For now, it suffices to note that, if the principle were true to the promise its name seems to hold out, it would not abolish politics, but would assuredly take out some of its appeal; for if equal treatment really meant what at first blush it seems to mean, its adoption would change the world. No longer could politics enable some to gain at the expense of others, no longer could majorities despoil minorities, no longer could organized groups take turns to exploit each other, trying to get from politics what the economics of property and contract denies them.

A constitution that succeeded to hold nonunanimous collective choices to the purportedly straight and narrow path of the equal treatment principle postulated by Buchanan would by the same token drastically lower the stakes in the political game. Most of the fun, and most of its point, would be gone; it would hardly be worth playing. Welfarism could not favor particular groups. Interventionism would be unable to pander to its natural constituency, the corporatist interests.[1] Constitutional rules effectively ensuring equal treatment would utterly transform the incentive structure of public life. The net effect would be a reversal of the trends of the last century or more, and the relative places of state and civil society would start moving back toward the classical liberal ideal. Can any constitution achieve this much? And can it, for that matter, achieve anything significant at all?

Contract or Vow?

There are only two ways of reaching nonunanimous collective decisions that are binding on all. One is for the greater force to prevail over the lesser, bending it to its will. It need not always twist the weaker party's arm, and humiliate it into open surrender. Mutual recognition of the relative forces often suffices to produce a semblance of unanimity. There is always a presumption in favor of avoiding actual tests of strength, for the use of force to bash one side into submission

[1]Politics would be left with one irreducible constituency, the diehard intellectuals who cannot help believing that one must "reinvent government," because social engineering is a force for good that must never willingly be surrendered.

is costly to both sides. Also, the risk that bullying and arm-twisting get out of hand and escalate into a mutually wounding all-out fight is a deterrent to making too many controversial "social choices," and to multiplying them immoderately and even frivolously, simply because each one seems a good idea to the stronger party of the moment.[2]

At the same time, the stronger party to this shadow arm-twisting, or to the real fight, does not have much chance to remain the stronger faction for long. History tells us that shifting alliances usually preserve, or restore, rough balance between opposing coalitions. No group retains quasi-permanent superiority, if only because imbalances create incentives to break up coalitions, whose members are induced to change sides until a rough balance of power is reestablished.

Let us call this somewhat informal method of reaching decisions in the face of incompatible interests or preferences "the rule of forces." To this day, it is this rule that governs the *modus vivendi* in international relations. However, in medieval Europe, as well as in modernity until the emergence of an effective monopoly of the use of force in centralized nation-states, basically the same balance-of-power rule governed the respective spheres of decision. Principally, these spheres were concerned with the roles and prerogatives of the prince and the "live forces" of civil society, such as major feudal lords, the estates, and the leagues of towns, some of which were allied with the prince, while others opposed him as contentious issues arose. The "constitution," to the extent that it existed, was no more than a summary expression of the balance of these social forces.

The alternative to the "rule of forces" is the "force of rules." Under the former, collective decisions obey, roughly speaking, the will of that coalition within society which could beat, or is seen as capable of beating, the rest into submission by using armed force, economic power, or moral ascendancy.[3] The "force of rules," on the contrary, rests on a prior commitment by all the parties concerned to abide by unwelcome decisions provided they have been arrived at in a manner laid down and agreed upon in advance.[4] The "rule of forces" prevails in a Hobbesian world of two principals, government and society, in a partly cooperative, partly adversarial arm's length relation that has

[2]In contrast, collective decisionmaking by rule, when all have the duty peacefully to accept whatever comes out of the vote-counting machine, is not a deterrent but a positive incitation to social choicemaking: the risks of strife and rebellion are removed, only the victors' rewards remain.

[3]Though given the perceived capacity to do so, the need to use this force will seldom arise.

[4]Of course, this agreement must also be respected after the fact by all.

the essential features of a tacit contract. In this state, the provisions of a constitution are substantive, for it is meant to lay down, though not in so many words, what government must and must not do if it is to earn obedience and avoid rebellion. The "force of rules" fits the fantasyland in which dwell the General Will of Rousseau and its successor, the to-be-maximized social welfare function of contemporary social choice theory. Here, government is not a principal, not a party to an implicit contract with society enforced by forces located on both sides. There is only one principal, society. Government is its subordinate agent. There is the usual principal-agent problem between them, but it is not of first-order significance. The purpose of the constitution is no longer to smooth the rough edges of an adversarial relation, but to elicit the General Will by specifying the procedure for identifying it. As we now prefer to say, it is to provide an agreed-upon method of "social preference-revelation and aggregation." Constitutional rules are thus invested with a putative moral force, since they are the instrument through which "social preference" manifests itself.

Two consequences follow as a matter of strict logical entailment from this distinction. One concerns the respective functions of the two types of constitution, the one resting on forces, the other on rules. Forces yield to each other, when they must, on matters of substance, but they need not bother about procedure. Procedure is unimportant unless a procedural decision has a foreseeable effect on a substantive result. In that case, however, the apparent matter of procedure is in reality a matter of substance, albeit once removed. Conversely, rules for deciding in advance which alternative shall be accepted by all as the "socially preferred" one are by the nature of the case procedural.[5] They say, or can be made to say, that if an alternative was selected by certain agreed upon rules about how selections are to be made, that alternative is to be taken *by* all as better *for* all *on balance* than any other that could have been selected but was not.

Procedural rules go with the democratic grain; substantive rules go against it. At first sight, there is something incongruous about the idea that society should adopt a constitution that rules out certain

[5]Norman Barry (1989: 279) notes that today liberalism is often interpreted "as embodying agreement to procedures irrespective of the outcomes that might emerge from them." This is the position Barry (1989: 277) attributes to Hayek, in that "there are no *substantive* limitations on what legislatures may do, only strict procedural ones" in Hayek's constitutional proposals. Substantive rules seek to prejudge "end-states," which is now widely held to be an illiberal ambition. Only procedure, "procedural justice" and "process" (as in "the peace process," as distinct from peace) are politically correct objectives. Here is another example of trendy jargon clouding thought. Barry's diagnosis seems regrettably exact.

alternatives—for example, interference with the freedom of contract —since by doing so society may bind itself to choosing an alternative that, come some future day, it might not prefer. Though good enough sense can be made of such a resolution, it takes a mental and moral effort that may not always be forthcoming. Substantive rules that tangle up the social choice machinery in apparent self-contradictions of this kind, do not sit easily with democracy. I cannot think of a way of proving that he is right, but I unhesitatingly follow Buchanan (1994: 2–4) when he affirms that it is substantive, not procedural, rules that make a liberal constitution. I would wish, though, that he would press home this judgment a little more dogmatically than is his wont; for it touches a serious question about the systemic compatibility of democracy and liberalism. More on this presently.

The second consequence is that a constitution that is not the expression of some balance of power between principals who hold each other in check on specific matters, but a mechanical procedure for collective decisionmaking in all things, has the incentive structure of a vow ("a contract with oneself") rather than of a contract properly speaking. It may be that not all contracts are honored, but they are contingently enforceable, depending on the forces directly or indirectly interested in their fulfillment. (All who have occasion to rely on contracts have an indirect interest in any given contract being honored.) Vows may be kept, but they are not enforceable. "Society" might respect a constitutional "vow" stopping it, on some occasion, from choosing a tempting alternative. But should it wish to yield to the temptation, all it has to do is suspend, reinterpret, or amend its vow. There is no greater force protecting the integrity of a vow than the strength of character of the individual (or in our case "society") that made the vow. Assume that a procedurally proper decision is reached, e.g., by majority vote, whose substantive content would be unconstitutional, vow-breaking. The sole force that could be devoted to upholding the "vow" is, according to the rules, directed by the very procedural "social choice" that is proposing to break it. The case need never arise, for there are usually ways of twisting a political vow so as not to have to break it. But if such a case were to arise, it is hard to see what could be done about it, except to protest impotently or look the other way.

A constitution that rests on the "force of rules" rather than, as of old, on the "rule of forces", has something of the character of a benign confidence trick. It is respected by most, in the spirit of David Hume, as long as most believe that it is respected by most. But under majority rule, the trick must be adapted to the majority view, the majority taste, the majority interest. This is why, under the system of judicial

review, constitutional rules *evolve*. Failing it, they could hardly survive. The changing fortunes of the "takings" clause and the commerce clause in American history are telling examples. The few existing constitutional rules that could have inconvenienced "social choice" have in time all been reinterpreted out of recognition. As an example, one need only reflect on the fact that Italy is constitutionally held to a balanced budget.[6]

Equal or Differential Treatment

Take, however, a substantive rule that looks powerful, has not (to my knowledge) been tried in application, and promises to change the whole perverse incentive structure of politics for the better, deflating its sphere of competence instead of inflating it as at present: the rule of equal treatment proposed by Buchanan (1994). Buchanan is aware that putting this principle into practice would pose many problems of detail. By and large, however, he clearly believes that it could be translated into readily understandable guidelines that governments would find hard to flout openly.

They would be forced, for instance, to impose taxes at uniform rates; differential rates among persons, organizations, locations, industries, products, or other possible classifications of taxable subjects, would be ruled out (Buchanan 1993: 5). At least formally, no less than four types of taxation, each with a uniform rate of its own, conform to this guideline. We could have a uniform lump sum tax on natural and legal persons alike; or a poll tax on all natural persons, rich and poor, and another lump sum tax on all legal persons, large or small; or a flat rate tax on all incomes, high or low; or a tax at a uniform rate on all capacities to pay (this would be our progressive income tax under a different name). Nevertheless, while all four tax regimes may appear uniform, it can be argued that they are, in fact, differential: they all treat some members of a given class of taxable subjects worse than others.

Another possible guideline mentioned by Buchanan would lay down uniform subsidies for every industry. However, a uniform subsidy on labor employed distributes state aid among industries one way, a subsidy on capital employed another way, one on physical output or sales yet another way. Analogous arguments can be found to show that guidelines meant to tighten the nexus between benefits from

[6]I owe this startling item of information to Antonio Martino. The Italian budget is, of course, balanced like every other by the proceeds of vigorous treasury borrowing. Everyone who votes for this state of affairs must be trusting that his children, when they grow up, will manage to shift the burden of debt to other people's children.

public goods and their costs (e.g., "The region receiving the new major road should pay for it") can, given the political will, always be circumvented by unfalsifiable claims of large, bountiful external benefits. Financing more and more education, a benefit to local families and their children, from central rather than local revenues would be a likely result of heeding such claims—the same result we are apt to get anyway, without an equal treatment guideline.

The long and short of it is that every "equal" treatment is equal with respect to a selected category or class of cases and unequal with respect to another. Giving the same stipend to all able or all deserving students treats all able or all deserving students equally, but treats all students—some of whom are not able and not deserving—unequally. Equal treatment of all poor old people is unequal treatment of all old people (poor and rich) and of all poor people (young and old). The inequalities generated by achieving equality for some category of subjects or cases are countless. Their number depends only on the richness of our vocabulary for formulating ever more and finer categories, within each of which the same treatment must be accorded to all.

Of course we have known since Aristotle that what we call equality is really equiproportionality, a fixed ratio between every member of one class of entities and every member of another class. A uniform proportion between each member of the class "families" and each member of the class "income dollars" yields "equal family incomes," but unequal "incomes per head," "per gainfully employed person," or "per dependent child." This is a relatively innocuous case of different distributional results being obtained by strictly adhering to "equal treatment", but shifting the reference class. One can trust the ingenuity of lobbyist lawyers and politicians worried about the next election to think up others whose distributional bite is sharper and deeper, while still conforming to some plausible construction of equal treatment and generality.

Choosing Procedure, Choosing Substance

A little more needs to be said about procedure, substance, and the prospects for a liberal constitution. Constitutional rules are not Moses's tablets. They are not made in heaven, and even if they were, men on earth would soon unmake them. It is a strange supposition that politics goes on within constitutional constraints, but that the constraints themselves are somehow above politics, determining it without being determined by it like any other product of collective decisionmaking. This is why, alas, no constitution is a "fixed" one. As values change, and views of how the world works—and the social forces associated

with those views—change, constitutions also change. Either their letter is amended or their spirit (their "intent") is reinterpreted. No great technical difficulty obstructs these developments. Any obstacle to change—for instance, a restrictive rule protecting property from expropriation—is maintained because it is in the blocking minority's interest to have the rule. Its removal permits a redistributive gain whose value, in a world of no frictions and no "leaky buckets," approximates the value of the interest. The prospective gainers can buy off part of the opposing interest, (unblocking the blocking minority) and still have something left over. Relaxing the rule that protects property releases resources whose new distribution can dominate, politically defeat the old, in the same way as every existing distribution can be defeated by a new redistributive bargain, in obedience to society's apparently circular preference rankings.

Each set of constitutional rules permits an associated maximum of redistributive gains to be made by a winning coalition. Under a liberal constitution, the greatest possible gain is likely to be relatively small. That it minimizes the scope for redistributive policies is, in fact, as good an operational definition of a liberal constitution as I can think of (though the reader will perhaps decry it as question-begging; for it supposes that constitutional limitation of the scope of redistribution is a feasible result). If it chooses according to the motivation usually attributed to it in modern political science, and notably in public choice theory, the winning coalition will seek to get the set of rules adopted that will maximize its potential redistributive gain. What is sauce for the goose is sauce for the gander. Choosing the rules that maximize the winners' gains from politics is fully on par with maximizing the gains once the rules are given. If the latter is a realistic assumption, so is the former, and thus we must say goodbye to the ideal of the minimal protective state.

Substance—a heavily redistributive state with everyone subsidizing everyone else, and strongly intrusive politics—can be "chosen" by choosing procedure. The smaller is the winning coalition that can decide a given issue in its favor, the greater is the residual losing coalition and, consequently, the greater is the total of spoils the winners can extract from the losers. Under democratic equality, where every person and his vote weighs the same as every other, the smallest possible winning coalition is one-half of the voters and a tie-breaker, the median voter. Hence the procedural rule that will best deliver the desired substantive result is one that makes a simple majority decisive for every issue. So does the analysis of constitutions show liberalism and democracy as inexorably divergent, like the up train and the down train, running in opposite directions on parallel tracks.

References

Barry, N.P. (1989) "The Liberal Constitution: Rational Design or Evolution?" *Critical Review* 3(2): 267–82.

Buchanan, J.M. (1993) "How Can Constitutions Be Designed So That Politicians Who Seek to Serve 'Public Interest' Can Survive and Prosper?" *Constitutional Political Economy* 4(1): 1–6.

Buchanan, J.M. (1994) "Notes on the Liberal Constitution." *Cato Journal* 14(1): 1–9.