

## Liberalism, Constitutionalism, and Democracy

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*Liberalism, Constitutionalism, and Democracy* is an effort to explain the workings of its three topics. The chief argument is to show that they are strategically related so that their workings are similar. Defenders often assert that each of these is morally right or good. I give only a pragmatic defense of them. That defense leaves open the possibility that for pragmatic reasons some nation should not attempt democracy or constitutionalism because it would work badly. If that is true, then democracy or constitutionalism is not necessarily, but only contingently good or right. Indeed, it might fail in disastrous ways, such as in a bloody civil war, as happened in Burundi when a dictatorial regime attempted to use democracy to elect a new government. That civil war spilled over into a murderous war in Rwanda, one of the bloodiest civil wars on record.<sup>2</sup> When liberalism, constitutionalism, and democracy are pragmatically defensible, that is because they work to secure and maintain social order while leaving the citizens to determine their own goals in life. If we can coordinate on some outcome, then by definition that outcome serves our mutual advantage.

Most political theorists and observers tend to think of liberalism, constitutionalism, and democracy as all generally normatively good and they often have little concern with the social scientific understanding of their possibilities. There is great concern with the logic of democracy, as in social choice theory, but not much with its practicality. Hence discussions of democracy are almost entirely normative. And discussions of liberalism seldom are concerned with creating it but only with how it works or how good it is. Actual debates during periods of creating constitutions often focus on practical issues that vary from nation to nation, so that it is hard to believe that there is an ideal constitution that would fit all nations. Yet all three face the same principal practical constraint. If they are to work well in a given society, they must successfully coordinate citizens, which implies that they must be mutually beneficial to the most important and powerful groups in the society.

If citizens are harshly divided into factions with great conflicts of interest, they cannot readily be coordinated on a mutually beneficial regime of liberalism, democracy, or constitutionalism. For example, the two principal groups in Rwanda are probably too harshly divided for them to achieve mutually beneficial order through democratic procedures, in which the Hutu are virtually guaranteed to win numerically and then to face a high probability of civil war with the Tutsi. Until their economic prospects change substantially, so that the chief source of welfare is no longer special favors from or employment by the government, deep conflict over which of the two groups controls the government must block any chance of a regime of mutual advantage.

Perhaps in a given polity either all three — liberalism, constitutionalism, and democracy — are feasible or none is. I have not addressed this issue in this book, although it probably

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<sup>2</sup> Russell Hardin, *One for All: The Logic of Group Conflict*. Princeton, N. J.: Princeton University Press, 1995: 168-172.

should be addressed both in theory and in practice for any given society. It seems likely that the fact of the possibility of coordinating a polity on any of the three is tantamount to at least the possibility of coordinating it on all three. For example, although England was coordinated on a relatively highly developed liberalism by about 1700, it was not until much later coordinated on extensive (as opposed to narrowly aristocratic) democracy, and its constitution, which is not a written constitution, has developed slowly over at least eight centuries (beginning in 1215 with the Magna Carta, which was an agreement between the monarch and barons on the rights of barons), becoming very stable only after 1700. Seventeenth century England was grossly illiberal; it had periods of autocracy alternating with very limited democracy, while its constitution was often in abeyance. Religious divisions during the middle part of that century virtually ruled out any possibility of a regime of mutual advantage. In the United States, there was liberalism in some colonies virtually from the beginning (for example, in Pennsylvania) and religious autocracy in others until the formation of the nation. There was fairly extensive democracy, sometimes severely limited by property requirements, even more so by slavery, and in most states by failure to allow women to vote. And there were frequent efforts at constitutionalism in many of the colonies before two efforts at the national level in the Articles of Confederation (drafted 1776-1778) and soon afterwards the Constitution (1787-88).

### LIBERALISM

Liberalism has two faces: economic and political. On the evidence of Chinese and Indian experience it is clear that these two can work independently. Perhaps in the long run, they must go together because a very prosperous populace might strenuously object to being kept out of politics. Again, I have not addressed this issue although it is one that should be taken up, perhaps especially by Chinese political theorists who live in the most dramatically split of all major nations. It is liberal in economics and illiberal in politics. It is possible that without economic progress, which is easiest with economic liberalism, political liberalism cannot flourish, so that there might be a causal connection between the two.

Strangely, one might say that liberalism is beginning to flourish in China well before democracy. So far it flourishes more in the economy than in politics more generally, although the ground seems to be getting laid for political liberalism, which is generally easier when there is prosperity, as there increasingly is in China, than when there is widespread poverty, as there is in Rwanda. It is possible that economic prosperity virtually requires economic liberalism, which enables capitalism. Liberalism and capitalism are not logically tied. But if capitalism is enabled, then it seems likely to take hold and prevail. Its internal drives are nearly unstoppable from any spontaneous forces.

The benefits of capitalism are two. First, it is an extraordinary engine of economic growth, especially in developing countries in which it is allowed relatively free rein. Max Weber says that capitalism “has been the unequivocal criterion of economic modernization since the Middle Ages.”<sup>3</sup> In the period after 1989 in the former Communist world, China is distinctive in

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<sup>3</sup>Max Weber, *Political Writings*, edited by Peter Lassman and Ronald Spiers. Cambridge: Cambridge University Press (1994; the essay cited here dates from 1917): 145.

permitting economic liberalism while still blocking political liberalism. India between 1949 and 1991 followed essentially the opposite path, with political liberalism constraining economic developments through massively illiberal state control of the economy. Its economy grew at dismal rates during those years of state control and only took off to nearly Chinese rates of growth after the economy was substantially freed from government control in 1991.

The second value of capitalism, once it is substantially developed, is that it is a liberalizing force in politics because large capitalist enterprises can stand against the state. Weber argued forcefully for this thesis. Writing during the first World War against romantic anti-capitalists of the early twentieth century, he says that without capitalism the romantics would find themselves not freer but less free before an all-powerful, uncontestable, pervasively hierarchical state. "The situation would resemble that of ancient Egypt, but in an incomparably more rational and hence more inescapable form."<sup>4</sup> He seems to have got the twentieth-century possibilities entirely right. There were two contending forces: the state and the capitalist economy. Where the latter was subjugated to the state, individuals were commonly brutalized and their hopes for economic progress were stymied. In at least one instance, India, there was only economic harm without massive direct attacks on individual liberties. Nevertheless, history has so far been much too kind to Nehru and his crippling leadership.<sup>5</sup> Economic growth in India after economic liberalization in 1991 surpasses all the growth for the previous four decades (while much of east Asia boomed), when economic growth rates did not differ substantially from population growth rates, an appalling fact that suggests the numbers in poverty grew steadily throughout the vaunted era of Nehru and his Congress Party successors. Growth rates in India now rival those of post-1989 China. The compounding effect of these rates is astonishing. At 7 percent growth per year, the Indian economy doubles in size in a decade. India is now in its second decade of such growth and if it continues for a total of three decades it will have grown by a factor of eight.<sup>6</sup> Education, however, still lags and India has extraordinarily high levels of illiteracy in comparison to east Asian norms. And agriculture, which supports two-thirds of the population in 2004, is still under government control.<sup>7</sup>

Let us summarize the major implications of this discussion of capitalism and liberalism. Sweeping the economy under government control would likely kill the entrepreneurial spirit of capitalism. If there were no private capitalism, then individualism, freedom, and democracy

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<sup>4</sup> *ibid.*, pp. 157-8.

<sup>5</sup> Gurcharan Das (*India Unbound*. New York: Knopf, [2000] 2001: 175) tells of a meeting at which an industrialist, Rahul Bajaj, is threatened with jail for producing more scooters than his quota allowed. He retorts, "Sir, my grandfather went to jail for my country's freedom. I stand ready to do the same for producing on behalf of my motherland."

<sup>6</sup> To put this in perspective, note that, if "the United States had begun in 1870 at a real per capita GDP of \$2244 and had then grown at a rate of 0.75 percent per year over the next 120 years, then its real per capita GDP in 1990 would have been \$5519, only 2.5 times the value in 1870 and 30 percent of the actual value in 1990 of \$18,258. Then, instead of ranking first in the world in 1990, the United States would have ranked 37th out of 127 countries with data. To put it another way, if the growth rate had been lower by just 1 percentage point per year, then the US real per capita GDP in 1990 would have been close to that in Mexico and Hungary and would have been about \$1000 less than that in Portugal and Greece" (Robert J. Barro and Xavier Sala-i-Martin, *Economic Growth*. New York: McGraw-Hill, 1995: 1).

<sup>7</sup> See Saritha Rai, "India Sets a Fast Pace, Expanding 8.2% in Year," *New York Times*, 1 July 2004, W.1; Amy Waldman, "In India, Economic Growth and Democracy Do Mix," *New York Times*, 23 May 2004, 4.3.

would all be at greater risk. But politics and government would also suffer; government needs capitalism. As Charles Lindblom argues, not only can capitalists be a countervailing force against the state but the state must turn to them to provide what government needs: production and income for workers. In a market society, business has power and resources far beyond what other interest groups have; it is the necessary partner of government, and where government intrudes too heavily in controlling it, government loses. Moreover, capitalism has greater possibilities for spontaneity than government has. "In market systems, tiny minorities of one can innovate, but they cannot veto."<sup>8</sup> Hierarchical government can more readily suppress innovations. "It is extremely rare for a businessman to be so intent on selling what he thinks the public ought to have that he is willing to lose his business rather than sell the public what it wants. Only in politics is there place for the ideologue or the doctrinaire."<sup>9</sup>

### CONSTITUTIONALISM

A successful constitution is likely to attempt no more than to seek to coordinate a populace on the limited set of values that are widely shared. This will obviously be a smaller set in a pluralist society than in, say, a society in which virtually everyone is strongly committed to a common set of religious beliefs. No issue on which two major groups strongly disagree can be easily constitutionalized. Arguably the only way to bring order to a pervasively pluralist society with divergent values on many issues is to protect an array of individual rights and liberties and to coordinate on an open economy. For example, the US constitution secured a commercial society by turning issues of interstate commerce and tariffs over to the federal government, taking them out of the control of the individual states. James Madison supposed that the overall bias and tenor of that constitution was to guarantee individual liberties against intrusions by the state or federal governments. Others feared that individual liberties could be secure only if they were explicitly enumerated and guaranteed in the text of the constitution, and the first ten amendments, the so-called Bill of Rights, were added soon after the constitution and its government were in place.

In sum, when a constitution governs a pluralist, individualist society, it must be relatively limited in its scope and perhaps it must often even be vague. A strictly religious constitution might be very exacting in what it regulates and enables. China is somewhere between these two relatively extreme cases. Hence, in some ways a liberal Chinese constitution could be more sweeping in its coverage than can the constitutions of the US and many other pluralist societies. But at the same time there is hardly any reason to include fundamental moral, religious, or group values in a constitution. They can all be allowed to survive or fade on their own without state intervention for or against them. The values of liberalism are inherently universalistic and a Chinese constitution can be entirely liberal and universalistic in its coverage. It can come very close to Madison's ideal of protecting an open economy that will continue to grow.

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<sup>8</sup> Charles E. Lindblom, *Politics and Markets: The World's Political-Economic Systems*. New York: Basic, 1977: 348.

<sup>9</sup> *Ibid.*, 218.

Many constitutions, such as that of India and of some other third world nations in Africa and elsewhere, include so-called positive rights, such as a right to adequate housing, a right to employment at a fair wage, and so forth. Such rights cannot be fulfilled in many relatively poor societies. For example, India does not even succeed in educating its population in minimal literacy and it has no hope of soon providing the other positive rights that its constitution announces. Critics of constitutionalizing positive rights therefore argue that it is dishonest to include them in the constitution. Defenders of such rights say they are aspirational, they are what the society would do if it were wealthy enough, and it will be forced to take such rights seriously as its wealth increases. In India, they are not strictly rights but only “directive principles” that are to guide the actions of agencies of government and that are not subject to enforcement by courts. Critics say that including provisions that no one believes will be met undercuts the legitimacy of the constitution in everyone’s eyes.

These positions are both inherently sociological, not simply normative, and there does not appear to be much if any evidence for or against the value of including such rights in a constitution. There may, however, be an institutional logic to the argument against constitutionalizing positive rights. At least in the case of the US, it appears that the issues addressed by positive rights must eventually be left to legislatures — they require policies, institutional arrangements, and funding, none of which courts are capable of providing.<sup>10</sup> Protection of ordinary civil liberties, on the other hand, can be done through the courts and simple injunctions. This is true only for nations in which the courts have a reasonable degree of respect from other agencies of government, but if courts do not have such support then they cannot do anything for those seeking enforcement of positive rights. Hence, it may be legally pointless to include positive rights in a constitution unless the relationships between courts and legislatures and administrations is different from those in European nations and the US.

## DEMOCRACY

In its Greek origins, democracy made sense as simply all of the people deciding together, usually by majority vote. This was direct democracy. Already at the time of its constitution, with only three million inhabitants, the US was far too large, both geographically and numerically, for direct democracy. In a society of large scale, direct democracy is not possible and some form of representative democracy is the best that we can do. From the very beginnings of its use, there has been debate on what representative democracy means and how it can work. Optimists assert the possibilities of participation and deliberation by the populace. Pessimists assert the unworkability of both of these and they focus on voting as a method for establishing who is to govern and give up on any claim of the meaningfulness of a democratic vote in many contexts.

Almost all of the debate at the time of the adoption of the US constitution supposes that representatives are to represent their own communities. (The revolutionary war against England was prompted by the lack of representation of the colonies in the British Parliament.) Indeed, the major divide between supporters and opponents of the constitution of 1787-1788 was over the

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<sup>10</sup> For qualifications on this view, see Cass Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More than Ever*. New York: Basic, 2004: chapter 12.

question whether communities and various kinds of groups could be adequately represented if the communities exceeded relatively small sizes. Under a law of 1776, the colony of Massachusetts provided one representative for a community of 120 citizens plus an additional representative for each additional 100 citizens.<sup>11</sup> With such representation, the national legislature would be huge and unworkable. In England this problem was addressed with the claim that many people received virtual representation, because all delegates to Parliament represented the entire nation, as especially argued by Algernon Sidney and Edmund Burke.<sup>12</sup> When the American colonists complained that they were taxed without any representation in the English government, Thomas Whateley replied that they were virtually represented, which was as good as any Englishman in the mother country got.<sup>13</sup>

The problems of scale that riddled debates between supporters and opponents of the US constitution have since been analyzed by political economists including Joseph Schumpeter and Anthony Downs.<sup>14</sup> Their chief conclusions, which are very well known, are that citizens commonly lack incentive to vote in elections and that, even if they do vote, they lack even more the incentive to learn enough about candidates and issues to vote intelligently in their own interests.<sup>15</sup> Institutionally, we can reduce the costs and tedium of voting by increasing the number of polling places, making absentee voting easy, and so forth. But we still cannot readily get voters to learn what they need to know. Indeed, this problem may be getting harder as the economic issues that once clearly separated liberal from conservative parties cease to be the dominant concern in elections. These problems have helped to spur changes in the electoral and therefore in the governmental process. Two of these have been analyzed as audience democracy and corporate democracy. To date, there are no institutional innovations in the works to deal with these problems.

Audience democracy is the term of Bernard Manin.<sup>16</sup> He argues that the nature of campaigning has changed in ways that reward performance on the stage more than stances on issues. The playwright Arthur Miller notes that successful politicians today tend to master performing before the camera and that, in fact, we the voters value them in part for their success

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<sup>11</sup> Gordon S. Wood, 1969. *The Creation of the American Republic, 1776-1787* (Chapel Hill, NC: North Carolina University Press, 1969; reprinted, Norton, 1972): 186.

<sup>12</sup> Algernon Sidney, *Discourses Concerning Government*, edited by Thomas G. West (Indianapolis, Ind.: Liberty Classics, [1698] 1990): section 44, 565; Edmund Burke, "Speech to the Electors of Bristol" (in 1774) (in Burke, *Speeches and Letters on American Affairs*. London: Everyman, 1969: 68-75): 72-74.

<sup>13</sup> For much of the debate see Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* (Cambridge, MA: Harvard University Press, 1993): 164-8; this book, chapter 4; John Phillip Reid. *The Concept of Representation in the Age of the American Revolution* (Chicago: University of Chicago Press, 1989): 50-62; Wood, *The Creation of the American Republic 173-181*).

<sup>14</sup> Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper, [1942] 1950. 3rd edition); Anthony Downs, *An Economic Theory of Democracy* (New York: Harper, 1957).

<sup>15</sup> For a range of views, see John R. Hibbing and Elizabeth Theiss-Morse, *Stealth Democracy: American's Beliefs about How Government Should Work* (Cambridge: Cambridge University Press 2002); Donald A. Wittman, *The Myth of Democratic Failure: Why Political Institutions Are Efficient* (Chicago: University of Chicago Press, 1995); and several contributions to Arthur Lupia, Mathew D. McCubbins, and Samuel L. Popkin, eds. *Elements of Reason: Cognition, Choice, and the Bounds of Rationality* (Cambridge: Cambridge University Press, 2000).

<sup>16</sup> Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997).

in their acting.<sup>17</sup> After a long lifetime in the theater, and some experience in the very different world of film, Miller's comments add great force to Manin's argument. He analyzes changes in performance style from Franklin Roosevelt to George W. Bush. Unfortunately, given the great difficulty of imparting any useful information to large numbers of voters, performance may be the best ticket many politicians have. Indeed, a great performer can be politically shallow and still triumph. Short of making politics intrinsically so interesting that potential voters actively want to read about it, there is no institutional reform that seems likely to overcome the impact of a good performance — other than putting an end to campaigning.

Contemporary government in the United States and many other nations can be characterized as “corporate democracy” in the following sense.<sup>18</sup> Adolph Berle and Gardner Means note that the rise of the corporate form of organization of private firms breaks the link between ownership and management, thus opening the possibility of conflict of interest between owners and professional managers.<sup>19</sup> Among the legal forms that property in the corporate form might take as a result of such separation is analogous to what we have seen in many corporations historically, including many in recent years during the extraordinary stock bubble of the 1990s. This form creates “a new set of relationships, giving to the groups in control powers which are absolute and not limited by any implied obligation with respect to their use.” Seven decades before ENRON, Berle and Means argue that through their absolute control of a corporation the managers “can operate it in their own interests, and can divert a portion of the [corporation's income and assets] to their own uses.” We therefore face the potential for “corporate plundering.”<sup>20</sup>

In a variant of this argument, John C. Calhoun says, “The advantages of possessing the control of the powers of the government, and thereby of its honors and emoluments, are, of themselves, exclusive of all other considerations, ample to divide ... a community into two great hostile parties.”<sup>21</sup> The political class can be parasitic on the society that they ostensibly serve and that has the power of election over them. The supposedly powerful citizenry with its power of election over officials does not have the power to refuse to elect all of them; it can only turn out the occasional overtly bad apple. In the United States, it seldom has the temerity to overcome incumbents' advantage.<sup>22</sup>

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<sup>17</sup> Arthur Miller, *On Politics and the Art of Acting* (New York: Viking, 2001).

<sup>18</sup> Russell Hardin, “Transition to Corporate Democracy?” In *Building a Trustworthy State in Post-Socialist Transition*, edited by Janos Kornai and Susan Rose-Ackerman (New York: Palgrave Macmillan, 2004): 175-197.

<sup>19</sup> Adolph A. Berle and Gardner C. Means, *The Modern Corporation and Private Property* (New York: Macmillan, 1932): 119-25 and passim.

<sup>20</sup> *Ibid.*, pp. 354-5.

<sup>21</sup> John C. Calhoun, *A Disquisition on Government*. In *Union and Liberty: The Political Philosophy of John C. Calhoun*, edited by Ross M. Lence (Indianapolis, IN: Liberty Fund: 3-78): 16.

<sup>22</sup> Consider the 2002 congressional elections in the United States. Only four incumbents in the House of Representatives (which has 435 members, all of whom are elected at two year intervals) lost to non-incumbent challengers (a few incumbents lost to other incumbents because their districts were changed to reflect demographic changes). Overall, ninety percent of all candidates won by margins of more than ten percent of the votes cast. When districts are redrawn by a state government after each decennial census (as for the 2002 election), they are often gerrymandered to insure election of the candidates in the state's dominant party. For data, see Richie 2002.

Alternatively, Berle and Means (1932, 352) suppose that the corporate form might develop into what would now be called a socially conscious institution. They quote Walter Rathenau's 1918 view that the private "enterprise becomes transformed into an institution which resembles the state in character."<sup>23</sup> The reverse seems to have happened. The state has been transformed to resemble loosely controlled corporations. Elected officials act as "professional" managers on behalf of the citizenry who "own" the nation. The officials are co-owners along with the citizens, but their rewards from management often far transcend anything they can gain as their share of the general good produced by their contributions to government, just as the corporate managers of Tyco, WorldCom, and Enron gained far more from looting these firms than from the genuine increase in value of the stock they owned.

### LESSONS FROM FAILURE

Most constitutions ever written failed more or less immediately. Many of those I have tried to understand failed because they did not coordinate two or more major groups in their societies, often because one group had the upper hand in designing a constitution that would have to be imposed on other major groups. There might be no constitution that could work for a particular society that is split over some major issue, as Rwanda is and as Yugoslavia was after the passing of the era of Marshall Tito, who, unlike his successors, was seen as a representative of all Yugoslavs and not only of Serbians, Croatians, or Bosnian Muslims. Many others have failed because the relevant political regimes did not seriously intend to follow them. Some constitutions have failed from flawed designs or impossible demands. Let us consider two partially failed constitutions that are flawed in their designs: the EU constitution and the US Articles of Confederation. Both of these have had an ill-conceived requirement of unanimity, and both have been too focused on present, momentary issues to be taken entirely seriously as constitutions for new, long-term governmental entities.

The constitutional debates and the draft constitution of the European Union are instructive for any other state attempting to draft a successful constitution in our time. The EU constitution has two deep flaws. First, it is very similar to the Articles of Confederation in the US in its requirement of unanimity for constitutional changes and in its limited range of powers. This requirement of unanimity was the downfall of the Articles. Rhode Island voted against any effort to improve trade within the nation or to regularize trade with foreign states, and its vote was a veto that killed any changes.

One might have thought that all subsequent constitutionalists would see the potential disaster in requiring such unanimity. But now the EU constitution has also fallen on its unanimity requirement for constitutional changes. Had only, say, three-fourths of the member states been required to ratify the constitution in order to put it into effect for those ratifying, it likely would have passed easily. Thereafter, any nation that voted against ratification of the constitution during the first round, as France and the Netherlands did in 2005, could have been brought into the fold later. The US constitution required ratification by only nine of the thirteen states to go into effect. Rhode Island and North Carolina voted against the constitution at first

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<sup>23</sup> Berle and Means, *The Modern Corporation and Private Property*, 352.

and became states of the union only later. Rhode Island waited about two years before it finally voted yes to the constitution.

Second, the EU constitution is far too tied into particular issues of the present moment, with economic groups of all kinds attempting to get their interests secured in the constitution. The urge is to lock in the present state of affairs. This move blocks or at least impedes potential developments that any dynamic economy is bound to face. Consider two cases of short-sightedness in constitutional design that is too focused on present conditions. First, consider a fairly trivial flaw in the US Articles of Confederation. Unanimity was not always required under the Articles — a few things could be done by only nine states acting together. For example, nine of the thirteen states could admit another territory as a state (Article XI). This was an awkward provision because, if other states were admitted, they could be among the nine voting to admit yet others. After six more states were admitted, a minority of all the states could then act to admit others. Even while thinking about a grander future of a larger nation, the drafters could not escape their visions of the moment, with only thirteen states, although leaders of several of those states were already thinking of annexing territories to the west to augment their own states. A requirement of a vote of a fixed fraction, such as two-thirds, of the states voting for admission would have made far better sense in the long-run. Such short-sightedness is common in constitutional drafts.

For a second, far more pervasively distorted case, note that the EU constitution gives the sense of having been written primarily to address issues of this moment, although the general vision motivating the creation of the EU is far more expansive and open than this. The EU grew out of an effort in the early 1950s to have joint policies on coal and steel. That origin is almost emblematic of the irrelevance of constitutional arrangements that address momentary, and likely fading issues. Today coal and steel are relatively minor parts of contemporary European economies. The US constitution appears genuinely to leave open large aspects of the empowered political system to future generations. This is a wise stance for any constitution because its drafters are very unlikely to foresee the issues or even the kind of society to which it will apply.

For a third, potentially devastating example of short-sightedness, consider the changing views of agriculture in constitutional arrangements. The drafters of the US constitution and other leaders of that time expected the agricultural organization of the world to remain as it was for centuries to come. The vast majority of people would, they believed, be farmers forever. In their time perhaps 85% of the US population lived on farming, indeed very nearly subsistence farming. Today less than 3% are involved in primary food production.

The US constitutional generation had no sense of the industrial revolution that was beginning to sweep over them even then. Their lack of foresight is almost certainly a good thing. Had there been real concern about the impending decline of agriculture, two of the biggest economic groups of the era would have blocked the constitution or would have put extensive protections of agricultural interests into it. Those two groups were the plantation owners of the southern states and the large estate farmers of the northeast. The latter group did work against the constitution and nearly blocked its ratification in New York. The plantation owners — including Madison, George Washington, Thomas Jefferson, and many other major figures of the era — were allied with urban financial and shipping interests in crafting the constitution for the mutual benefit of these two groups. Knowing the generally downward fate of agricultural work, China might craft constitutional protections, such as permanent subsidies, or coercive demographic

policies to keep farmers on the land, as India does to some extent in its constitution and as China does in part through policies to slow movement into cities.

Desires to block economic development are common, especially among farmers. American Farmers mobilized themselves as populists only toward the end of the nineteenth century when they had ceased to be a majority of the voting population, and they never won a national election thereafter. Similarly, small shop-keepers in France mobilized behind Pierre Poujade in the 1950s when their decline in the face of larger-scale merchants doomed any chance of their having great political clout.<sup>24</sup> As World War II approached its end in 1944, President Franklin Roosevelt proposed massive protection of farmers in his “second bill of rights.” From their earlier 85% of the workforce, farmers had declined to about 30% by this time. Ignoring this massive trend, Roosevelt proposed “the right of every farmer to raise and sell his products at a return that will give him and his family a decent living.”<sup>25</sup> Had this right been implemented and enforced by some policy, it would have grossly harmed the economic future of the United States and its people by locking in that moment’s otherwise transitory state of affairs. If nearly a third of the workforce today were involved in farming and if their incomes were to be about half of those of the rest of the workforce, food costs would be more than a fifth of the expenditure of the average American. If their incomes were at the average of all workers, food costs would be almost half of all expenditures. Having to spend half your income on basic food might be a reasonable definition of poverty. That is only fifty percent better than being a subsistence farmer.

Although it sounds like the voice of decency and reason, Roosevelt’s proposal was extremely foolish, and implementing it would have been massively destructive. In this case, economic growth and migration off the land was a far more promising avenue for improving lives than was government protection of workers on the land. In the contemporary world less than two percent of the labor force is in farming in the US, and in many other very prosperous nations not much more is in farming. Even then the numbers are this high because of heavy government subsidies. Food costs that low leave almost our entire incomes for expenditure on things other than basic foodstuffs. Many nations have used land reform ostensibly to improve the lives of their rural poor. The result all too often is to lock people into rural poverty for an extra couple of generations.

Chinese today can anticipate various stages of a similar revolution simply because every advanced society has gone through that revolution. China, however, can skip some of the stages of development of so-called heavy industry and early forms of computers, for example, and go much more quickly to the frontier of hi-tech developments. But a Chinese constitution that attempts to freeze a major group, such as farmers, into the present structure of the larger economy would substantially slow the transition of China into a modern, prosperous, and highly creative economy. It would also lock into place a social difference between rural and urban, between agricultural and industrial workers. Madison and his fellow constitutionalists did not make such a mistake, but only because they did not foresee developments that everyone must foresee today. Writing a constitution today that does not kowtow to rural interests must be more

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<sup>24</sup> Poujade was a small book seller whose rise peaked with the election of 52 Poujadist candidates to the French national assembly in 1956. The party never again achieved that level of representation. An early follower, elected to the national assembly that year, was Jean-Marie Le Pen. (“Poujade,” in *Encyclopedia Britannica*, 2004, electronic edition.)

<sup>25</sup> Sunstein, *The Second Bill of Rights*.13.

conflictive than it was in Madison's time, especially if rural interests are mobilized into a political party.

### CONCLUDING REMARKS

We face the fundamental problem that we need government to enable us to accomplish many things and to protect us from each other but that giving government the power to do all of this means giving it the power to do many other, often harmful things as well. We depend on constitutional cleverness to design institutions that accomplish the former and block the latter and to match policies with the supposed views of the populace. The cleverest person in this task historically was probably Madison. But Americans have long since lived past the institutions he helped design and the present government under his constitution would be unrecognizable to him. These changes have happened while a few hundred million Americans essentially acquiesced. The resulting constitution and the practices associated with it might be a poor model for nations drafting constitutions today.

Yet, that constitution and various others are surely better than no model, even though the only thing that might make an extant system right is that it is extant. We could not expect to design an ideal or even a much better system because we could not be sure how it would work in the longer run. As Madison writes in *Federalist 37*, "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."<sup>26</sup> Hence, rationalist theories of morality and government are inherently irrelevant to our lives. At the margins, however, we might be able to revise our constitutional system by drawing on the experience of others. We could eliminate parts of any constitution that seem to have gone wrong and borrow the seemingly best parts of various constitutions.

In the end, however, our constitution will be essentially a device for coordinating the citizenry, it will be a convention, similar to but far grander than, say, our convention of driving on the left or the right. Conventions do not have a normative valence per se. Some are beneficial and some are harmful. Both beneficial and harmful conventions can be self-reinforcing even when their only backing is sensibly motivated individual actions. If we could easily redesign government, law, norms, practices, and so forth, we might immediately choose to do so in many cases. The very strong Chinese convention of foot-binding was horrendously harmful, and it was deliberately changed.<sup>27</sup> The still surviving convention of female genital mutilation is similarly horrendously brutal and it is being eradicated in some parts of Africa. In the light of such harmful norms, we must grant in general that it is possible that some pervasive convention costs us so much that it would be in our interest to overturn or change it; but successful major

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<sup>26</sup> James Madison, *Federalist 37*. In, Alexander Hamilton, John Jay, and James Madison. *The Federalist*, edited by George W. Carey and James McClellan. Indianapolis, Ind.: Liberty Fund: 179-185, at 183.

<sup>27</sup> Gerald Mackie, "Ending Footbinding and Infibulation: A Convention Account" *American Sociological Review* 61 (December 1996): 999-1017.

constitutional change is rare — perhaps largely because successful constitutions have been relatively rare until recently.

In sum, constitutions are essentially weak devices. They can coordinate us if we can coordinate ourselves, and probably not otherwise. Democracy is an even weaker device, because we cannot make it work in any grand sense and we cannot be sure whether its results match popular views, which are generally inarticulate, so inarticulate as to suggest that there may be no popular view. Liberalism is no device at all, but when it prevails, constitutionalism should be workable. Perhaps the great difficulty of, even logical problems in, making democracy work is finally a saving grace for stability, because what we need for constitutional government to work is for the populace largely to acquiesce in its actions.

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