

The Ethics of Constitutional Order

Early in my own career as a political economist, Robert Dahl and Charles Lindblom published a challenging book entitled *Politics, Economics, and Welfare* (1953). One of the central themes or arguments of the book was that we, as individual citizens, do not make choices among the grand organizational alternatives; we do not choose between “capitalism” and “socialism.” We choose, instead, among the pragmatically defined and highly particularized policy alternatives as these are indirectly presented to us through the political process. And we make our choices on the basis of that combination of ignorance, ideology, and interest that best describes our psychological state.

I distinctly recall that I was somehow quite disturbed by this Dahl-Lindblom argument, but that I could not quite work out for myself a fully satisfactory response or counter-argument. Perhaps now, nearly four decades later, I can make such an effort.

First, let me translate the problem into terminology that is more familiar to me, and also more general. Let me refer to the whole constitutional order, that is, the structure of legal-political rules, within which we act both in our private and our public capacities. The Dahl-Lindblom thesis is that we do not consciously choose this structure. Empirically, they seem to be correct. We go about making our ordinary choices, which involve complex interactions with other persons and groups, within a framework or a structure of rules that we simply take as a part of our environment, a part of the state of nature, so to speak. This descriptive characterization applies equally to ordinary socio-economic and to political interaction.

If, however, we do not consciously choose, or even think about choosing,

From *Essays on the Political Economy* (Honolulu: University of Hawai'i Press, 1989), 25–31. Reprinted by permission.

among structures of rules, that is, among alternative constitutional orders, how can we be responsible for the regimes under which we live? And if we are not responsible for the ultimate choice among constitutional alternatives and could not, in fact, choose among them, is it not then meaningless to talk about constitutional change or constitutional reform?

The implication seems clear. We must, willy-nilly, acquiesce in the regime under which we live, and simply do our best to behave rationally as we confront the pragmatically generated choices that emerge. Something seems wrong with this argument. For most of the time, and for most practical purposes, it is perhaps best that we accept the existing constitutional order as a “relatively absolute absolute” (about which I have more to say in Chapter 5 [“On the Work Ethic”]). But such acceptance is not equivalent to a denial that change is possible, even for the single person who thinks about, analyzes, evaluates, and proposes alternative structures. I want to suggest here that each one of us, as a citizen, has an ethical obligation to enter directly and/or indirectly into an ongoing and continuing constitutional dialogue that is distinct from but parallel to the patterns of ordinary activity carried on within those rules that define the existing regime.

Let me illustrate the problem here by reference to a poker game example that will be familiar to those who have ever had any exposure to my own attempts to present the elements of constitutional political economy. In any observed and ongoing poker game, individuals, as players, abide by the rules that exist and that define the game itself. Players adopt this or that strategy in attempts to win within the existing rules. At the same time, however, the same persons may evaluate the rules themselves, and they may enter into side discussions about possible changes in the rules so as to make for a “better” game. If, as a result of such discussion, agreement is reached, then rules are changed and the regime shifts. A new constitution emerges.

This poker example helps me to make two elementary but highly important points. First, the example facilitates the distinction between the choice of strategies within the existing set of rules and the choice among alternative sets of rules, or, more generally, between in-constitutional and constitutional choice. Secondly, the examples allow us to see that an individual, as player, may behave responsibly and rationally in choosing and implementing strategies, within the rules that define the game, without necessarily concerning himself or herself about changes in the rules themselves. That is to say, the

individual player may, but need not, enter into the dialogue and discussion about changes in the rules. To remain a player in the game, the choice among strategies of play is necessary, but participation in the potential choice among sets of rules is not necessary. The first of these two points has been elaborated at length in the modern analyses; the second point has not been fully examined, and it provides the focus of attention here.

Let me remain within the more familiar realm of discussion about the first point in order to summarize the now-standard argument. The distinction between the levels of choice—between post-constitutional, or within-rules, choice and choice among rules—has proved helpful in allowing a bridge to be constructed between rational choice behavior by the individual and the emergence of agreement on something that might be called the “general interest.” If persons are unable to identify their own narrowly defined interests, due to the presence of some sufficiently thick veil of ignorance or uncertainty, they will choose among alternatives in accordance with some generalizable criteria such as fairness. In this setting of constitutional choice, therefore, no need for an explicit ethical norm seems to arise.

The poker-game, veil-of-uncertainty model has proved helpful in introducing the setting for constitutional choice, and it is a model that I have often used. But the model is highly misleading in respects relevant for my purposes here. If we are considering games with effectively large numbers of participants, there may exist little or no incentive for any single player to participate actively in any serious evaluation of the rules. Each player will, of course, have an incentive to maximize his or her own payoffs within whatever set of rules that exist, and each player may also have an interest in the presence of rules that satisfy generalizable criteria when that player does not know what his or her own position will be. But having the latter interest is not equivalent to having an interest-based incentive to act unless the individual expects that his own action will influence the outcome of the collective selection among alternatives. This point will be familiar to those who recognize the elementary public-choice logic, and especially in application to the theory of rational voter abstention and rational voter ignorance. In a large-number setting, the individual player may not consider himself or herself influential in controlling the ultimate selection among sets of rules; hence, the fully rational player may well refrain from participating in the choice among regimes.

The poker-game analogy is misleading in a second respect, and especially

by extension to politics. A poker game is voluntary; hence, rules must, at least in some sense, be agreed to by all players because those who are dissatisfied may withdraw from play altogether. In this context, the large-number setting may not be so problematic as it seems, since each player retains a low-cost exit option. But there is no such exit possible in national political regimes. The political game is compulsory, and we all must play. Individually, therefore, we cannot exercise even residual influence over the rules through an effective exit option. The conclusion is clear: if the individual cannot ultimately influence the choice among regimes, it is not rational to participate actively in any discussion of constitutional change or to become informed about constitutional alternatives.

The argument suggests that becoming informed about, and participating in the discussion of, constitutional rules must reflect the presence of some ethical precept that transcends rational interest for the individual. The individual who acts on such a precept behaves “as if” his or her own influence on the ultimate selection among regimes is more than that which a rational-choice calculus would imply. Behavior in accordance with such a precept embodies an ethical responsibility for the choice among regimes.

Note that this ethic of constitutional citizenship is not directly comparable to ethical behavior in interaction with other persons within the constraints imposed by the rules of an existing regime. An individual may be fully responsible, in the standard ethical sense, and yet fail to meet the ethical requirement of constitutional citizenship. The individual may be truthful, honest, mutually respectful, and tolerant in all dealings with others; yet, at the same time, the same individual may not bother at all with the maintenance and improvement of constitutional structure.

On many occasions I have referred to what I have called a loss of constitutional wisdom, and especially as observed over the decades of this century. My argument here suggests that this loss of understanding and loss of interest in political structure may reflect the straightforward working out of rationally based individual self-interest, accompanied by an erosion of the ethical principle of constitutional responsibility. To the extent that we, as individuals, do not act “as if” we do, individually, choose among the grand alternatives, then the constitutional regime that we inherit must be vulnerable both to nonprincipled exploitation and to the natural erosion of historical change.

The result is precisely what we seem to have observed over recent decades.

The vision of constitutional order that informed the thinking of James Madison and his peers among the Founders was carried forward for more than a century of our national history. This vision embodies both an understanding of the principles of constitutional order and recognition that the individual, as citizen, must accept the ethical responsibility of full and informed participation in a continuing constitutional convention.

The Madisonian vision, with its embodied ethic of constitutional citizenship, is difficult to recapture once it is lost from the public consciousness. The simple, yet subtle, distinction between strategic choices within rules and constitutional choices among sets of rules, the distinction that was illustrated in the poker-game example introduced earlier, must inform all thinking about policy alternatives. The individual, as citizen, cannot restrict his or her attention to policy options within rules; the individual cannot simply reflect on the alternatives that emerge under the operation of a collective decision rule, say, majority voting in a legislature. Choice cannot be limited to a determination of that which is "best," either in terms of the individual's own interests or in terms of the individual's own version of some general interest. Constitutional citizenship requires that the individual also seek to determine the possible consistency between a preferred policy option and a preferred constitutional structure. (This point may be illustrated by a personal-choice example. An individual may prefer a dish of ice cream, but eating a dish of ice cream may not be consistent with the furtherance of the rules dictated by a self-imposed diet plan, an eating constitution.)

Much of what we have observed in modern politics is best described as action taken without understanding or even consideration of the rules that define the constitutional order. I have referred to this politics as "constitutional anarchy," by which I mean a politics that is almost exclusively dominated by and derivative from the strategic choices made by competing interests in disregard of the effects on political structure. This politics has come to its current position because we, as citizens, have failed to discharge our ethical obligations. We have behaved as if the very structure of our social order, our constitution defined in the broadest sense, will remain invariant or will, somehow, evolve satisfactorily over time without our active participation.

Simple observation of the behavior of our political and judicial agents should indicate that such a faith is totally without foundation. We may, of

course, continue to default on the ethical obligation of constitutional citizenship. If we do so, however, we leave unchecked the emerging tyranny of the unconstrained state, a tyranny that can be dislodged only with revolution. Neither such tyranny nor its consequent revolution is necessary if we, as individuals, can recover, even in part, the ethical principle upon which our constitutional order is established.

We must attend to the rules that constrain our rulers, and we must do so even if such attention may not seem to be a part of a rational-choice calculus. The amorality of acquiescence generates despair and longing; the morality of constitutional understanding embodies hope as a necessary complement.