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The Classical Discipline

CONSTITUTIONAL LIBERALISM, I HAVE BEEN ARGUING, NOT ONLY imposed limits on state power but also enabled states to become powerful within those limits. How to subject government to a discipline that would protect liberty and strengthen overall societal powers was a central challenge generally for classical liberalism—by which I mean now to include classical *economic* liberalism as well as constitutional doctrine.

Rulers have often followed a policy of “divide and conquer”—dividing their people the better to control them. Liberalism follows the reverse policy—dividing power the better to control it. Many of the liberal principles for the discipline of power call for drawing lines to partition spheres of action that were previously fused, closely connected, or poorly distinguished. A typical liberal strategy to avoid tyranny or monopoly is to set autonomous centers of power against each other—ambition against ambition—by creating boundaries and countervailing pressures between state and society, within the state, or in civil society and the private economy. The public-private distinction, the separation-of-powers and checks-and-balances doctrines in constitutional design, and the theories of economic competition, societal pluralism, and contested political elections are all applications of this strategy.

Organic theories of politics often claim wholeness and harmony as their virtues. Monarchical political theory, for example, often represented society as a family or as a body, in each case with the king as its head. Liberals rejected this vision because it assumed that monarchical

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rule and popular dependency were built into the natural order of things. Modern communitarian theories, from both left and right, have bemoaned the loss of social unity, blaming it on liberal individualism, and sought to restore a singleness of purpose in public life. From this perspective, divisions and disagreements are symptoms of a disease in need of cure. Liberalism's view is different. While seeking to tame violent and destructive forms of discord, liberalism accepts divergent values and opinions and views public disagreement as a constructive method of resolving conflict and discovering new ideas. Liberalism values various kinds of separation (separation of powers, of church and state, of knowledge and politics) as a means of protecting values specific to particular institutions and spheres of life. These separations and boundaries—as well as the rules about when the lines may be crossed—constitute the inner structure of liberalism and the basis of the classical discipline of power.¹

PUBLIC VERSUS PRIVATE

Critics of liberalism often describe it as favoring the private over the public, and self-interest over civic virtue. Liberals have certainly upheld rights to private choice and argued that government ought to reflect a realistic appraisal of human motivation. But rather than single-mindedly preferring the private to the public, liberals have sought to establish a balance between the two, giving each one clearer definition and a stronger legal foundation.

The rise of liberalism in the eighteenth and nineteenth centuries brought about a redrawn and sharpened public-private distinction: on the one hand, the privatizing of religious belief and practice and of economic activity formerly regulated by the state; on the other, a commitment to public law, public political discussion, and public knowledge. Liberals called not only for making a person's life and property more securely private but also for making government and politics more thoroughly public. Strengthening the public character of the state is not a recent modification of liberal doctrine; it is a continuity in liberal

thought from its classical to its contemporary phases. Classical liberals understood that representative government requires eliminating some kinds of markets, such as the buying and selling of votes. Like other modern state-builders, they sought to suppress private armies, private justice (revenge), and private ownership of governmental offices and instead to reserve such functions exclusively to the state itself. These extensions of government were vital to limiting the arbitrary and unauthorized use of its powers and ensuring civil peace. Liberals also sought to make government more public by subjecting its performance to public examination in the press and opening up politics to public discussion.

Here two meanings of the public-private distinction need to be distinguished. First, public may be to private as the whole is to the part: “public opinion,” “public health,” and the “public interest” each refer to something that pertains not to a specific individual or class but to all of society or to “any member or members of the community, without distinction.”² “Public” in this sense may mean “governmental,” but the two terms do not always coincide.

Second, public may be to private as the open is to the closed: A “public event,” a “public meeting,” or a “publication” all refer to something that is open and accessible and may therefore be available to any members of the community. Public and private here vary along a dimension of visibility: the transparent versus the secret, hidden, and confidential.

Liberalism called for making government and politics more public in both of these senses. Liberals held that government, rather than being the private domain of a ruler or venal officeholders, exists for the public’s benefit and ought to serve its interests. And to ensure that government does so, liberals sought to make it more transparent—to publish laws, to open up trials and legislative proceedings, to require government officials to disclose their actions, and to allow the press to circulate political news and critical discussion that would enable citizens to form their own judgments.

At the same time, liberalism marked out a private sphere where individuals enjoyed strengthened rights against the state, such as rights to practice their own religion and control their own property. Here the presumptions were reversed. Unless reasonably suspected of violating

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the law, private individuals and associations were neither publicly answerable for their actions nor obligated to open up their churches, homes, or other property to government officials or the public at large. Indeed, liberals sought to guarantee individuals protections against such demands (for example, against unreasonable searches).

Yet while liberals supported contrary principles for the two spheres, the underlying purpose was the same. Liberalism provided—and still provides—a deeply resonant vocabulary for making claims against the state. On the one hand, because public officials in a liberal state are answerable for their performance, citizens believe they have a right to expect their government to be public not only in its ends but also in its processes. To claim that something is rightfully public is to invoke those expectations. The rules here are not absolute; some aspects of government, such as diplomatic communications, are still accepted as legitimately confidential. But the default expectation of a liberal state is for it to act in a fully public way. Exceptions need to be justified—and over time fewer exceptions have been accepted as legitimate.

On the other hand, when people say that their homes, businesses, churches, and other forms of association are private, they are claiming another set of limits to the state's power. These limits are also not absolute—the government, for example, can assert “eminent domain” and override private property rights for a public use if it provides compensation. But when crossing from public to private the presumptions shift, and any state intervention must meet tests of a compelling or rational public interest. Both sets of rules, in other words, are aimed at getting government to serve public purposes and those alone.

For just this reason, while “public” and “private” both constrain the state, they can also strengthen it. As the development of the English state in the late seventeenth century shows, a more public government may be a more powerful one. Eliminating the private ownership of government offices increases the state's unity of control, and making the government more transparent may reduce corruption and inefficiency and strengthen confidence and loyalty. Conversely, some kinds of privatization do not weaken the state; the privatization of rancorous religious differences promotes peaceful cooperation, and more secure guarantees

of private property encourage people to make long-term investments that ultimately redound to the state's advantage.

Like other liberal antinomies, the public-private distinction can be complex and frustrating. What is public in one respect may be private in others. And some things may change over time. The modern distinction between the public and private sectors of the economy is the outcome of a historical process. Medieval Europe did not distinguish clearly between a public realm of sovereignty and a private realm of property; a feudal lord's rights over land included the power to administer justice on it. In early modern European states, chartered corporations included cities, monasteries, universities, guilds, and overseas trading companies; no clear line separated public from private corporations. Even in the United States, there was at first no clear public-private legal boundary separating cities and business enterprise. By the mid-1800s, however, the law classified cities as agencies of the state, while treating business corporations as if they were individuals. As public agencies, cities possessed only such powers as states delegated to them; as fictive individuals, private corporations enjoyed rights protected by the Constitution.³ This bifurcation between powers and rights lies at the foundation of the modern legal distinction between the public and private sectors. So much came to hinge on the public-private dichotomy that every organization and relationship had to be classified and analyzed in its terms.

The dichotomy is critical to understanding liberal thinking about the public or common good. Classical liberals believed that, with certain limited exceptions, the individual pursuit of self-interest in the private economy yields a spontaneous harmony. That is not to say they celebrated "possessiveness" or the gratification of the self; they generally believed that competition leads not only to economic but also to moral exertion—to virtues such as frugality, thrift, perseverance, personal responsibility, and self-control. The pursuit of self-interest in the private economy was therefore a positive moral force as well as a rational basis of economic activity. But classical liberals had more complicated views of action in the public realm. Here what many of them feared was not so much calculating interest as the unruly passions, particularly the

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passions for glory and honor that led men to turn to violence and go to war, even over slight causes. By comparison, rational self-interest seemed to them a more trustworthy source of motivation, less likely to produce cruelty, fanaticism, and self-destructive conflict.⁴ Moreover, education and public discussion could raise self-interest to a higher level—to enlightened self-interest—which could be a powerful force for progress. Some liberals, notably John Stuart Mill, believed that the very experience of participating in government would lead an individual “to weigh interests not his own; to be guided, in case of conflicting claims, by another rule than his private partialities: to apply, at every turn, principles and maxims which have for their reason of existence the common good.” Like many other liberals, Mill believed that public action required different values from private life and that those in public office, as well as voters, had a responsibility to act on behalf of public interests rather than “private partialities.”⁵

Earlier republicans also held that politics demands a devotion to the public good, but they conceived of civic virtue as a quality that only leisured gentlemen could be trusted to display. Skeptical of such claims, liberals looked to political institutions as a machinery for the public good that could work reliably with men as they really are, not as dreamers and dissemblers might wish them to be. This impulse lay behind their rationale for representative government and the deliberative procedures embodied in it. And nothing was more critical to this aspect of the classical political discipline than the idea of dividing power.

RULE OF LAW AND
THE DIVISION OF POWERS

Dividing power is a method not only for enabling the people to control their rulers but also for pursuing two ancient ideals, the rule of law and the public good. Law plainly never rules by itself, but the ideal calls for governing a society according to standing, general laws known to all rather than by diktats that are ad hoc, peculiar to particular classes, secret, retroactive, vague, contradictory, impossible to carry out, or