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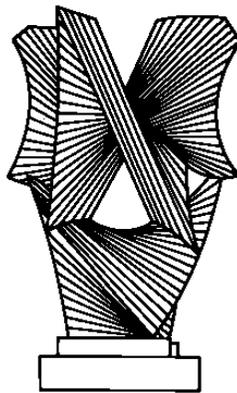
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Public Choice and Constitutional Design

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PUBLIC CHOICE AND CONSTITUTIONAL DESIGN

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Edited by Daniel Farber and Anne Joseph O'Connell

Abstract: This chapter reviews the literature on public choice theory and constitutional design, focusing in particular on the sub-discipline of constitutional political economy. The basic framework of constitutional political economy has been in place for several decades and has produced some important insights into particular institutions. Other institutions, however, have been ignored, and there is a relatively small amount of empirical work testing the propositions. The chapter summarizes the work to date and identifies areas for more attention in the future. The chapter first reviews the core assumption that constitutional politics are really different than ordinary politics, and the corollary that the constitutional level is more likely to produce public-regarding behavior. It finds these assumptions to be less than fully convincing, in part because constitutional endurance seems to require some level of interest group behavior, and because constitutions can be transformed through amendment.

Thanks to Adam Fleisher and Emily Winston for excellent research assistance. Thanks also to Daniel Farber and Saul Levmore for helpful comments and to Maxwell Stearns for sharing a draft of his forthcoming volume with Todd Zywicki (2009). Online readers should note that this piece will appear in a larger collection of papers, and so intentionally leaves many particular topics of interest to other papers in the volume.

Public choice and the centrality of constitutional design

Constitutional design is a central concern of public choice and its related discipline of constitutional political economy. Public choice, typically described as the application of economics to political science, seeks to understand problems of aggregating preferences in collective decision-making (Mueller 1997; Farber and Frickey 1990). Constitutional political economy focuses more narrowly on the role of rules in structuring and constraining decision-making, shifting the terrain from choice within rules to the choice of higher order “constitutional” rules. As Buchanan and Brennan (1980 at 10) put it, “If rules influence outcomes and if some outcomes are “better” than others, it follows that to the extent that rules can be chosen, the study and analysis of comparative rules and institutions become proper objects of our attention.” (For more on the relationship among law and economics, public choice and constitutional political economy, see Rowley 1989; Voigt 1997; Van den Hauwe 2000).

Political constitutions of nation states are only one example of “constitutional” rules and institutions. They are, however, a particularly central set for public choice scholars to consider because constitutions are central to the production of public goods. The basic assumption is that different constitutional schemes can have different incentive effects on public good production and its paradigmatic challenge of interest group influence. The research program on optimal constitutional design is now nearly five decades old, and has incorporated contributions from many different disciplines (see eg Cooter 2000; Voigt 1997; Stearns and Zywicki 2009; Riker 1964; Persson and Tabellini 2003).

The focus on rules as decision-making structures flows naturally from Arrow’s impossibility theorem generalizing the 18th century Condorcet Paradox (Arrow 1951; see ___ in this volume for a discussion). Arrow famously showed that under certain plausible conditions, there is no voting mechanism, or indeed any other mechanism, that is guaranteed to prevent cycling among options in pairwise voting: any choice that beats another will in turn be beaten when paired against the third. The outcome of such

a decision-making process will depend entirely on the way in which the choices are presented. Thus control over the agenda is crucial for determining outcomes (Cooter 2000, pp. 38-46). Because the outcome of collective choice mechanisms was inherently unstable and reflected mere agenda control or perhaps insincere voting on the part of strategic actors, the idea that collective choices reflected the “true” public interest was suspect. But voting rules, procedures, and norms in the legislature could provide coherence and helped overcome agenda control problems, and would in any case frequently be dispositive of social outcomes. The normative implication was to design agenda control and aggregation mechanisms so as to minimize the possibility of private capture of the process while also ensuring that legislative gridlock does not ensue. Thus, the basic skeptical insights of public choice led to a focus on institutional design to minimize incoherence.

James Buchanan, working alone and with numerous other authors, has played a crucial role in triggering this research program. Buchanan and Tullock (1962) analogized politics to economics, a central move in the evolution of public choice ideas more generally. They viewed politics, like markets, as fundamentally a process of exchange through which individuals seek to advance their interest (see Voigt 1997, pp. 13-17; Van den Hauwe 2000 for the antecedents of this idea.) Because ordinary politics was infused with self-interest, there was a great risk that the public interest would not be served and that private interests would dominate the political process.

Buchanan and his co-authors placed great weight on the importance of unanimity rules in political processes to insure that no individual was dominated by others. Alternative decision rules, including majority rule, were at best an expedient and not morally superior to various other possibilities (see Hayek 1960). Of course, as a practical matter unanimity would require higher decision costs of selecting the rules. The problem of constitutional design thus becomes specifying the decision criteria for different types of problems so as to minimize the costs of decision-making (such as negotiation and information acquisition) while maximizing consent over issues that affect any individual in the group

(Buchanan and Tullock 1962, Sec. 3.6.)

Interest groups are of central concern in this literature, and are suspect. Interest groups are not always well defined but can be said to include any group between the individual and the state that seeks to influence public policy for its private gain. They include industry, consumer, and workers' groups; in some of the literature they might also include more primal language, ethnic, and religious groups. In contrast with the approach of other analysts who celebrate civil society (Putnam 1993), groups are suspect in public choice theory because of the logic of collective action: smaller groups with more intensely held interests will be more easily able to organize over larger more diffuse groups such as consumers and taxpayers (Olson 1965). Public choice theorists view interest groups as a source of rent-seeking, in which groups expend resources to acquire poorly specified assets (Macey 1986, 1988). These expenditures can dissipate the social value of the asset and lead to wasteful competition.

The normative task is to find a constitutional design that minimizes rent-seeking. As Macey (1988, p. 12) put it, “[B]y agreeing ex ante (i.e., at the time of constitutional creation) to constrain rent-seeking, everyone can be made better off, because even those few who expect to be net winners from the wealth transfer game can be induced through side payments to support a constitutional structure that restricts coercive, inefficient wealth transfers.” The conception here is of aligning private interest with public interest to the greatest extent possible.

How can constitutions optimize decision-making processes and minimize rent-seeking? Various approaches have been offered. Several have argued that successful constitutions ought to reduce the stakes of politics (Przeworski 1991; Weingast 1997; North, Summerhill and Weingast 2000, pp. 26-27; Sunstein 2000). By providing for rights, constitutions maximize consent over issues of great importance to individuals. This limits the harm that can be imposed through political processes, which in turn facilitates collective decision-making over less central issues. Among other benefits, a lower stakes of politics will reduce expenditures by groups to capture government processes. This in turn will influence

the incentives to organize groups. The interest group structure is itself endogenous to constitutional design.

A related line of argument emphasizes the intertemporal nature of constitutional design (Sunstein 2000; Holmes 1995). Constitutions guard against preference shifts over time, taking issues off the table and helping to make commitments credible. This provides a basic stability to the rule-making framework that in turn facilitates ordinary politics. Another approach emphasizes equality of treatment. To the extent that the constitution provides for differential treatment of its subjects, it encourages interest groups to form (Buchanan 1993b, p. 6). In contrast, when rules apply equally to all, they cannot be used to impose external costs on individuals.

The basic framework of constitutional political economy has been in place for several decades and has produced some important insights into particular institutions. Other institutions, however, have been ignored and there is a relatively small amount of empirical work testing the propositions. This chapter summarizes the work to date, while identifying areas for more attention in the future. We begin with a discussion of the fundamental assumptions of the research program.

Are constitutional politics really different?

Bargaining over rules and bargaining within rules

Nearly all the normative and positive work on constitutions proceeds from the assumption that constitutional politics are fundamentally different in character than ordinary politics. This is a central assumption of constitutional political economy, but also of much other thinking about constitutions and constitutionalism (Ackerman 1993; see Macey 1988). The basic idea is that legal or political entrenchment distinguishes choice about rules from choice within rules. Because constitutions are more difficult to change than ordinary law, the structures of decision-making that they introduce will be more stable, enduring, and consequential than the decisions produced within those structures.

Furthermore, constitutions are typically adopted at great moments, and so likely to produce more attention to the general welfare and less likely to be dominated by particular interest groups.

These assumptions need to be defended. After all, constitutions are themselves produced through collective decision and negotiation, the stuff of ordinary political processes. Furthermore, constitutions are not written on a blank slate and so may reflect existing power distributions. A logical extension of the observation about the primacy of interest groups in ordinary politics is that, so long as we are not able to choose rules unanimously, we should expect a certain level of rent-seeking at the constitutional level. Actors engaged in constitutional design may seek to adopt rules that will advantage them in post-constitutional politics (Przeworski 1991, 1997; Ginsburg 2003). If this is true, then it follows that the distinction between constitutional politics and ordinary politics may not be as great as is sometimes supposed (Brown 2008).

Why should constitutional design be better able to embody higher order principles? A central theme in the literature is that the more abstract level at which constitutional design occurs will force greater attention to the public good (Buchanan and Tullock 1962, Sec. 3.6.25). One way in which it does so is through introduction of a new level of uncertainty into politics, akin to the veil of ignorance (Buchanan and Tullock 1962; Rawls 1972). By introducing uncertainty into the position of a subject in the post-constitutional arrangements, veils of ignorance can mitigate incentives to provide for domination: each designer has to consider the possibility that they will be relative losers in post-constitutional politics. Thus, constitutional design can facilitate the selection of neutral rules oriented toward the general interest, reflecting impartial judgment of the choosers, because of uncertainty about post-constitutional governance. Because constitutional design always involves a bit more uncertainty than does ordinary political competition, there will be incentives to produce more public interest rules at the constitutional level.

There is something of a tension in the information assumptions here and the normative perspective

of constitutional political economy as articulated by Buchanan and Tullock. The normative position is that designers should tailor decision rules to different kinds of issues based on anticipated costs and benefits of decisions and externalities. This assumes, somewhat heroically, that constitutional designers can anticipate the relevant costs in advance. There is a tension, however, between assuming this level of foresight—which requires a certain level of social scientific reasoning in institutional design (Tarrow 2003) —while also assuming that constitutional designers can not foresee their prospective position in the future constitutional order. Designers can forecast costs and benefits accurately but not anticipate which players will bear those costs and benefits. If we relax this restrictive assumption, self-interest at the constitutional design stage becomes a more significant concern.

Even if one believes in theory that veil of ignorance rules can solve the problem of self-interest at the constitutional level, true veils of ignorance are unlikely in the formation of real world constitutions. Political actors in the real world are embedded into constitutional orders to which they sometimes invest strategic energy. And they seem willing and able to move across levels when need be. To take only one example, proponents of abortion rights were unable to impose their views in the ordinary legislative process in many states, though they were able to secure victory in others. Shifting terrain to the constitutional level allowed a victory in *Roe v. Wade*, but also triggered intense constitutional backlash from abortion opponents. These opponents then proposed national constitutional amendments as well as restrictive legislation at the state level (Devins 1996). Both sets of actors seem to switch effortlessly from one arena to the other depending on where advantage is to be had.

Is there reason to think that such interest group activity will be less intense at the constitutional level? One possible story focuses on the visibility of the process. Constitution-making typically, though not always, involves discrete moments that occur with great public fanfare. This greater visibility may reduce rent-seeking and self-interest, as interest groups seek to exploit the relative anonymity of ordinary politics (Mueller 1991). The visibility of constitutional design also might affect the ability of

certain kinds of interests to organize, particularly those groups focused on the general interest. Groups that face collective action problems in ordinary politics may be more likely to organize for the relatively infrequent iterations of constitutional politics (Boudreaux and Pritchard 1993; but see Sutter 1995, p. 129). If this is so, constitutional politics might indeed achieve the normative ambition of greater focus on the common good.

Of course, there is the offsetting consideration of stakes. Groups may invest more energy in playing for rules at the constitutional level precisely because of the presumptively higher stakes in the selection of rules. This might lead to *more* rather than less rent-seeking behavior at the constitutional level. One might imagine that single-interest groups would seek to entrench their gains in the constitution, and hence we would observe more detailed documents full of special protections rather than a general framework for government. This would tend to soften the distinction between constitutional politics and ordinary politics.

The problem of endurance

Constitutional endurance is another dimension that has received relatively little attention to the literature to date (see Sutter 1997; Niskanen 1990; Elkins, Ginsburg and Melton, forthcoming; Hammons 1999). Constitutional politics are different than ordinary politics because their products are presumed to be more enduring. Yet Elkins et al. (forthcoming) observe that in the real world, constitutions die with great frequency. What is to preserve the bargain as laid out by the founders, even if it is optimal?

As a positive matter, we might predict that expectations about endurance would affect constitutional bargaining, and one can imagine the effects would be positive. Van den Hauwe (2000 p. 632) points out that stability is a distinct dimension of constitutional choice that can mitigate the incentive to dominate ones opponents: “the concern for stability will induce a concern for fairness or impartiality even in persons who may be perfectly aware of the particular effects that alternative rules

will have on them. It is not the uncertainty about one's own particular position that will induce impartiality, but the anticipation that a constitutional arrangement is unlikely to be stable if it is only designed to serve one's own particular interests." Thus, the concern for stability and endurance of the rules can mitigate the effects of self-interest at the constitutional level to some extent.

This is a story in which normative concerns about constitutional quality are aligned with concern for constitutional endurance. One can, however, imagine cases when these factors cut against each other. A constitution that focuses on the public interest may generate insufficient political support at the phase of ordinary politics to withstand interest group pressures for modification. In sorting out which situation is likely to obtain, we must shift our attention to the mechanics of constitutional endurance, in which interest groups are likely to play some role.

One conception of the constitution is as a solution to collective action problem *among* interest groups. One can conceive of interest groups in the constitutional bargain as exchanging mutual promises not engage in rent-seeking (Brennan and Buchanan 1985; Macey 1988), solving the prisoners' dilemma problem among the groups. Sutter (1995, p. 131) points out, however, that this "social contract" idea will not serve to constrain interest groups completely, as they have the possibility of seeking exceptions at the level of ordinary politics. Such exceptions might obtain either through reinterpretation of the constitution (through judicial decision, for example) or by simply violating the rules. If citizens and interest groups have preferences over outcomes, then it is difficult to understand why they would oppose achieving the outcome simply based on the fact that it requires a constitutional violation.

One thus needs a concept of constitutional endurance that incorporates the importance of ongoing support for the document. A growing literature treats constitutions not as contracts but as self-enforcing conventions, which endure only because parties to the bargain wish them to. The first step in this argument is to point out that the contract metaphor, so central to much first-generation literature

in constitutional political economy, implies an external enforcer to uphold the bargain (Hardin 1989). But for most constitutions, the presence of an enforcer outside the constitution seems unlikely. Internal “enforcers” such as constitutional courts are part of the structure of the constitution, and obedience to their decisions is not automatic. Thus constitutions require self-enforcement (see Ordeshook 1992; Przeworski 1991; Weingast 1997), and will endure so long as parties believe they are better off within the bargain than in risking new constitutional negotiations. The constitution becomes an equilibrium outcome.

The equilibrium is enforced through groups in society policing transgressions. When a violation occurs, the subjects of the constitution face a severe coordination problem. They can take steps to uphold the terms of the constitution, but only if they can engage in collective action, which requires coordination among the individuals or groups that make up society. If they successfully resolve the coordination problem, the constitution is enforced, and it is possible that the ruler will refrain from transgression in anticipation of such enforcement.

The equilibrium concept of constitution is not a normative theory. It says nothing about the quality of the document as being public-regarding or dominated by private interest. But it suggests a quality that will be as necessary for either type of constitution to endure, namely that a coalition of interest groups must support the constitution’s continuing efficacy. Why might groups do so?

A first conceptual step is to suppose that interest groups can be characterized as having two simultaneous cost-benefit calculations: whether to support a particular policy outcome as adopted, and whether to support the constitution as a whole. The groups interact in the political system, with winners and losers. Each group is then called on to support the constitutional arrangement or not. Groups will do so, so long as their calculation as to the present value of prospective costs and benefits is higher than anticipated alternative schemes that might obtain.

The relative winners in ordinary politics are likely to want to maintain the constitutional scheme as well. But what about the relative losers? Even if they have the power to force a new negotiation, it MAY make sense for them to remain in the constitutional order, so long as they believe their situation is not permanent. Presumably the distribution of costs and benefits is subject to change over time from exogenous pressures, so that losers are not permanent. If present-day losers believe that there is a chance they will be in the winning coalition in a future period, they may wish to maintain the constitution even though they lose in ordinary politics. Constitutional endurance allows interest groups to iterate their interactions, extending the time horizons over which the calculus is conducted.

Even if losers are permanent, they may not be able to overturn the constitution. Since they lack the political strength to win in ordinary politics, they are unlikely to be able to effectuate constitutional change. They might alternatively seek to impose costs on the winners, so as to expand the circle of dissatisfaction with current arrangements, even if they cannot overturn the bargain. Or they might seek to align with other losers. The key question is whether a coalition of groups can form a plurality of power so as to be able to overturn the current bargain. If even a small number of “loser” interest groups believe in constitutional maintenance as an independent value, perhaps because they anticipate some benefits in the future, they can tip coalitions away from violation and toward constitutional enforcement.

We have assumed so far that support for the constitution is a distinct calculation for interest groups. Suppose alternatively that support for the constitution perfectly mirrors the costs and benefits in ordinary politics. Constitutional politics and ordinary politics are unified. When one is unhappy with a policy outcome produced under current constitutional arrangements, one will choose to change the system. Some countries’ constitutional histories seems to resemble this pattern. For example, the Dominican Republic has had 29 constitutions in its history, with many of them exhibiting a kind of cycle among liberal and conservative models. Each group that comes to power solidifies its rule with the

passage of a new constitution that shuts out other groups. Note that this pattern can become self-reinforcing. If one expects the constitution to die relatively quickly, one may seek maximum advantage from the next draft of the constitution by dominating others—in turn hastening its downfall as other groups challenge the constitutional order at the first available opportunity. This is what we identify as a self-fulfilling cycle of constitutional death (Elkins et al forthcoming).

From a public choice perspective, constitutional endurance seems to have some independent value. It can extend the time horizons of interest groups, potentially making winners less extractive and more public-regarding. Elkins, Ginsburg and Melton (forthcoming) provide some evidence for the association between endurance of the formal constitution and various political and economic goods, including wealth, human rights protection, and democracy, although they do not directly analyze rent-seeking behavior in the constitution.

One outstanding question, though, is whether or not constitutions that endure are good ones. The focus on endurance implies that a certain amount of redistribution and rent-seeking may be tolerable and even valuable to the extent that it gives interest groups an interest in enforcement of the bargain down the road. Sutter (2003) derives conditions under which durability will facilitate the general interest rather than rent-seeking. He argues that constitutions that make rents transferable and that require rent-seekers to turn over periodically can dis-incentivize interest groups from rent-seeking. Because any rents acquired early on will be potentially taken away in later stages by new coalitions, such constitutions reduce the value of rents. He suggests that democracy, by requiring periodic turnover, approximates the second condition. On the other hand, if interest groups have already secured advantage in the current system, autocracy might provide a mechanism for breaking through rent-seeking equilibria.

The problem of amendment

Even if constitutions endure, they can be transformed in practice. This can occur formally through the amendment process typically provided in the constitution or through more informal mechanisms such as judicial reinterpretation. Amendment poses some challenge to the constitutional political economy framework because it cuts against entrenchment.

Given that amendments tend to be, though are not always, incremental in character, they are more akin to ordinary than constitutional politics, and there is certainly no veil of ignorance operating. Hence, one should expect interest group activity at this level (Boudreaux and Pritchard 1993; Crain and Tollison 1979; Anderson et al. 1990). Interest groups may seek to secure constitutional amendments for their greater durability, even though they costlier to secure than ordinary legislation. Boudreaux and Pritchard (1993, p. 118) focus on maintenance costs, those that “an interest group incurs over time in order to continue to lobby effectively for privileges conferred by the government.” If a group anticipates ongoing costs, it may seek to incur the one-time costs of locking in a constitutional policy through amendment. Boudreaux and Pritchard speculate that ideologically oriented groups, such as those who lobbied for Prohibition in the United States in the early 20th century, may anticipate higher maintenance costs over time than groups characterized by more narrow material interests. If ideology is more ephemeral than material interests, groups that coalesce around ideological goals will prefer to lock in their policies with a constitutional amendment, while materially oriented groups will focus on the ordinary legislative process. Similarly, if one expects one’s opposition to improve its bargaining position over time, locking in the policy today in the form of a constitutional amendment makes sense.

Boudreaux and Pritchard conclude that very few US Constitutional amendments are rent-seeking devices. This may be, of course, because the amendment threshold of the national constitution is particularly high. In contrast, in their empirical study of U.S. state constitutions, Berkowitz and Clay (2005) show that those American states with civil law origins have an easier constitutional amendment

threshold which, they argue, contributes to greater insecurity of property rights. They also find that these states have longer, more detailed constitutions. This provides yet further evidence that constitutional amendments may be utilized by interest groups to embed policies.

Another issue for analysis is the question of calibrating amendment thresholds. Real world constitutions implicitly adopt the Buchanan and Tullock ideal of varying the decision rule across issues through relative levels of entrenchment. Just as those rules characterized as constitutional are typically entrenched relative to normal legislation, so too some constitutional rules may be entrenched more than others. For example, in the United States Constitution, Article V provides that no state may be deprived of equal representation in the Senate without its agreement. This provision sets the decision threshold as unanimity, entrenching the representative scheme in the Senate far more strongly than the representative scheme in the House.

Other constitutions tailor the levels of majority required for different rules. The Indian Constitution is a particularly complex example. The Constitution itself is relatively easy to amend, requiring only an absolute majority for some issues. Frequent amendments themselves modify the parts of the constitution subject to the different amendment formulae. The constitution also has complex rules around judicial review. The first amendment to the Indian constitution established the Ninth Schedule to the Constitution, which laid out certain provisions that would not be subject to judicial review. These can be seen, optimistically, as attempts to reduce uncertainty and increase stability of certain policies adopted by the constitutional supermajority. Alternatively they can be seen as successful examples of constitutional rent-seeking. By removing the possibility of judicial review, the constitution-makers increase the chance that a majority will dominate a minority without its consent. The fact that the Ninth Schedule has been invoked several times with regard to land reform legislation suggests that it has indeed played such a role, facilitating dominance of one large interest group of poor farmers over a smaller group of rich landholders.

Tailoring the entrenchment rule highlights the fact that ordinary legislative processes are merely one endpoint on a spectrum of relative entrenchment. The distinction between constitutional and ordinary politics is a valid one, but also a complex one with infinite possible configurations. This complexity itself can create new kinds of problems. Differential decision rules generate new kinds of costs, including administrative costs of identifying the proper rule, and substitution costs that result from strategic shifting of arenas (McGinnis and Rappaport 2002).

The analysis so far focuses on the difficulty of enactment, and situates amendment on a spectrum between legislation and constitutional adoption. Shifting perspective to the public choice literature on preference aggregation, however, may paint amendments in a more positive light. The central issue here is the breadth of proposals presented to voters in adopting rules, specifically the question of how many issues are aggregated together. Initial drafting of a constitution involves multidimensional tradeoffs across many issue areas. Constitutional amendment, in contrast, tends to be narrower in scope. In some places they are limited by rule to a single subject rule, preventing bundling (Lowenstein, 1983; Gilbert 2006; Cooter and Gilbert forthcoming).

Bundling is generally viewed with some skepticism in the public choice literature. By aggregating several issues together, voters may, in some circumstances, choose a bundle that does not reflect their true preferences. Of course, if there were no transactions costs to bargaining, it would not matter whether issues were presented individually or as a bundle. In the real world, however, the agenda setter may determine the outcome by presenting issues as a bundle. Bundling might allow interest groups to piggy back on generally-approved principles by sneaking in unnecessary policies. This might take the form of logrolling (when two policies supported by different minorities are aggregated to generate majority support), or a rider (in which a policy supported by the majority is bundled with one that would only generate minority support).

When voters are presented with a choice as momentous as the adoption of the constitution, in which the prospective costs of reaching no agreement might be overwhelming, they may accept a certain amount of interest group benefits in the bargain. Bundling at the outset of the constitution could produce a document full of special interests and logrolling. In contrast, the more incremental change of a constitutional amendment is rarely as momentous. The cost of failure is less high. Further, because amendments are focused on fewer subjects, we might expect them to produce a more accurate reflection of voter preferences than would an up or down vote on the initial bundle of compromises. If a single subject rule is in place, it might restrict interest group activity, and eliminate Condorcet losers (Levmore 2005). From this point of view, we might *favor* amendment over constitution-making as less susceptible to rent-seeking in some circumstances.

Summary

To summarize, constitutional politics may not be as distinct from ordinary politics as originally anticipated by Buchanan and Tullock. The conceptual distinction is rooted in the greater levels of entrenchment at the constitutional level. Effective entrenchment, however, requires endurance and we have little understanding of the forces that allow constitutions to survive. It is at least plausible that a certain amount of interest group activity is necessary to maintain a coalition willing to enforce the bargain.

Early theorists assumed that greater level of entrenchment would ensure more attention to the general interest in constitutional bargaining, but others have pointed out that interest groups may be drawn to the relatively more enduring constitutional level precisely because they seek to entrench their policies. Furthermore, one cannot ignore the prospect of logrolling and bundling at the constitutional level which involves multidimensional choices. In theory, the visibility of the process, reduced stakes of politics, and other design features can mitigate these tendencies to some degree at the constitutional

level. Even if constitutional politics do involve self interest, the balancing factors of passion and reason (Elster 1994; Brown 2008) as well as the relative abstraction of the biggest issues to be decided may be sufficient to make constitutions *relatively* insulated from interest group influence.

Perhaps the best conclusion to this issue is a modest one. Constitutions are relatively entrenched; they can be but are not always relatively focused on higher order politics; and it is at least plausible that some interest group support is necessary for endurance of constitutional bargains.

Normative analysis of design dimensions

From a public choice perspective, there are two main tasks of constitutional design. First, constitutions must limit the ability of interest groups to capture public decision-making processes for private ends. A related task (Stearns and Zywicki 2008) is to minimize agency costs associated with government, once decisions have been made. How well do individual design choices achieve these goals? There is a huge literature in law, political science and economics relevant to these questions. Here we summarize only some of the larger debates, leaving others for elsewhere in this volume (see also Chapters ___ on Federalism; Judicial Review and Direct Democracy.)

Presidentialism and parliamentarism

A massive literature in comparative politics has debated the relative merits of presidentialism and parliamentarism (Stepan and Skach 1993; Linz 1994; Mainwaring 1993, 1997; Cheibub 2002; Ackerman 2000). Much of the work on the normative debate concerns regime endurance (Stepan and Skach 1993; Boix 2005) with the best current view being that the observed instability of presidential systems is not attributable to their presidential character but rather to selection effects in which more fragile regimes choose presidentialism (Cheibub 2002; 2006). As Cheibub (2002, p. 176) summarizes, “if

parliamentary regimes have a better record of survival than presidential regimes, it is not because they are parliamentary.”

There are numerous general arguments in favor of each regime type. Advocates of parliamentarism (e.g. Linz and Valenzuela 1994) criticize presidential systems because of their winner-take-all logic, the potential for anti-democratic populism, and the potential for institutional conflict between the executive and legislature. They argue that systems which require the prime minister to have strong support from political parties in the legislature will be more effective in translating policy into legislation. They also point out that the chief executive in parliamentary systems will be guaranteed to be an experienced politician, while directly elected presidents can be political outsiders with little experience. Because presidents have a specifically limited term and typically have limited re-election opportunities, it is suspected that they will be amenable to short-term policy biases, and strategic behavior toward the end of their terms. Prime ministers in parliamentary systems, it is said, have longer time horizons and will therefore produce better policies.¹

Linz (1995, p. 65; see also Moe and Caldwell 1994) criticizes legislators in presidential systems. Because they do not represent the national interest, they "turn to the representation of special interests, localized interests, and clientelistic networks in their constituencies." Thus the legislature will be more likely to be captured, and the public interest will suffer. Yet another reason to suspect greater rent-seeking in presidential systems is the lack of visibility of political bargaining. The separation of

¹ Other scholars have argued there is an empirical basis for parliamentary systems' success. For example, Stepan and Skach (1993) found that, of non-OECD countries, none of the 36 new countries that emerged after World War II that adopted presidentialism were continuously democratic between 1980 and 1989, while 14 of 41 of such countries that adopted parliamentary systems were democratic during that period. (Cheibub and Limongi 2002) note that one out of every 23 presidential regimes died between 1946 and 1999, whereas only one in every 58 parliamentary regimes died. A recent paper by Boix seems to provide further support for the proposition that parliamentary systems are better for democratic survival (Boix 2005). The logic of the argument is that presidential systems tend to lead to minority executives and government gridlock; this in turn can encourage actors to take extra-constitutional steps to gain power, leading to political instability and eventually the death of democracy.

powers can give rise to accountability problems as it becomes unclear who to blame for unpopular policies. This can lead to yet great interest group activity.

Advocates of presidential systems respond that institutional design can overcome many of these alleged flaws. A particular focus is electoral systems (Ames 1995; Horowitz 1990; Shugart and Carey 1995). The reason that legislators in presidential systems seem to focus on localized interests, it is argued, is not presidentialism per se but the combination of weak party discipline and plurality-based district voting. Where party systems are stronger, rent-seeking can be reduced, but where this does not obtain, there is no reason to prefer parliamentarism (Shugart 1999). And parliamentary systems are hardly immune from localism and rent-seeking. Pure systems of proportional representation seem to empower small fringe parties as king-makers necessary to produce government coalitions. In contrast, the separation of powers, a core feature of presidentialism, increases the cost of legislation to interest groups (Macey 1988, p.32).

Presidential systems are distinctive in that they feature one individual who is elected by the entire national constituency, and thus is responsible for providing public goods such as national defense (Shugart and Carey, 1995). Proponents of presidentialism believe that having a single figure responsible for policy can improve political accountability, especially vis-à-vis multiparty coalitions (Mainwaring and Shugart 1997). In addition, presidential systems can serve to push candidates toward the median of the electorate in order to gain the largest share of the vote. Finally, with regard to the critique that presidentialism leads to gridlock, parliamentary systems are hardly immune from this. Cheibub (2002) shows that legislative gridlock is likely to occur only under very specific institutional configurations, namely, when the legislature cannot initiate legislation or if the president can veto legislation without being overridden.

In all this literature, there has been little work focused squarely on issues of interest groups and aggregation. One exception is the body of work focused on the executive veto. Some see the veto as an

additional check on self-interested legislation, raising the political threshold of legislation. Alternatively, it may render existing self-interested legislation more durable (Crain and Tollison 1979). Some have also analyzed the line-item veto, which gives the president the chance to strike out particular provisions of bills rather than the whole bargain. This might disincentivize legislators from seeking to produce special interest bargains.

In terms of the broader presidential/parliamentary comparison, one of the few contributions focused squarely on interest groups is that of Cowhey and McCubbins (1995) who focus on how different political institutions encourage politicians to prioritize different sets of interests. They find that Japan's parliamentary system encouraged particularistic local interests, while the more open US system provides more points of entry, though it is more difficult to change the status quo. Similarly, Vogel (1993) finds that many points of access in the separation of powers system facilitate interest group politics, but shows that this access can facilitate success for diffuse interests such as the environmental and women's movements and consumer organizations. Once these interests obtain access their policies can be relatively entrenched. In contrast, Japan's particularistic context of parliamentary lawmaking tends to focus on narrow rather than diffuse interests. They also tend to focus on the dominant political party and bureaucracy as sites of activity.

Persson, Roland and Tabellini (1997, 2000), analyze the difference in bargaining incentives in the legislature. In parliamentary systems, the threat of a government crisis disciplines bargaining. Government crisis and reformation could lead to the loss of valuable agenda-setting powers for the dominant coalition, and even lead to loss of power for smaller coalition parties. This promotes party discipline and stable legislative coalitions. Presidential systems, in contrast, provide weaker incentives for party discipline, and have more diffuse agenda-setting powers. They argue that this should lead to more wasteful public spending in parliamentary systems, a finding for which they find empirical support (Persson and Tabellini 2001, 2003).

Although the scholarly pendulum tends to have swung away from a preference for parliamentarism, no consensus yet exists as to systematic institutional differences in interest group access in parliamentary and presidential systems. Other institutional variables, such as electoral systems, federalism and the structure of interest groups themselves seem to have greater significance for outcomes (Eaton 2000).

Bicameralism

Buchanan and Tullock (1962) placed great emphasis on bicameralism as a means to ensure supermajoritarian support, echoing James Madison's preference in Federalist 51 for multiple bases of representation. They provided a formal analysis arguing that bicameralism functions somewhat like a supermajority rule in that it raises the difficulty of passing new legislation, without raising the deliberation costs of ordinary legislation, because the size of each deliberative body is smaller. Furthermore, bicameralism may reduce the agenda setter's power because the need to gain approval from the second chamber diminishes the importance of the order of consideration. Cooter (2000, pp. 185-90) further argues that bicameralism encourages bargaining among houses and leads to more consensus legislation. More houses, and a more difficult legislative process generally, have been viewed as ways of minimizing the chance of passage and thus limiting rent-seeking legislation (Macey 1988, p. 30; Eskridge 1988). Levmore (1992) makes the additional point that strong Condorcet winners that would win under majority rule in both houses might not win in a single house with a supermajority rule, where small minorities could block new legislation. Bicameralism thus allows more public-regarding legislation to pass, while exposing legislation that embodies wasteful rent-seeking and corruption.

The flip side of this literature is that bicameralism provides more veto points than unicameralism with a supermajority rule. If bicameralism makes passage of new legislation more difficult, *some* public regarding legislation may not go through because of blockage by well-situated

interest groups. While a supermajority rule allows, say, a 1/3 minority to block legislation, bicameral legislatures have more individuals in key positions who can be captured by interest groups. Bicameral legislatures have not one but two agenda setters who must be convinced to support a bill, and possibly two sets of committee chairs who can block legislation. There is also the conference committee to resolve discrepancies. This might allow for a very small but well situated minority to block legislation (Tsebelis 2002). This veto analysis may generate a status quo bias, comports with some of the literature on presidential systems discussed in the previous section.

Federalism and Secession

Another solution that has gained some attention in the literature is the possibility of introducing exit options and competition among governments (Macey 1988:26). Federalism is a key structure in this regard (Riker 1964). Separate governments within a constitutional structure, when accompanied by freedom of movement, can induce competition that restricts government ability to coerce (Epstein 1992; Inman and Rubinfeld 1997). The assumption is that the availability of exit options, combined with incentives on the part of jurisdictions to attract residents, will reduce rent-seeking as well (Van den Hauwe, p. 621). Multiple governments also can facilitate political bargaining (Cooter 2000, ch. 5). A full discussion is found in Chapter ___ of this Handbook.

Exit options are also found in clauses allowing secession, and there has been some debate in the literature on the merits of such clauses. While Buchanan (1990) and Mueller (1996, pp. 330-34) argued that secession would provide a constraint on domination, Sunstein (2000, ch. 5) argued that a right to secession can undermine constitutional bargains by giving minorities hold-out rights. Constitutions should facilitate ordinary politics, but a right to secession can paralyze them. Keeping a right of secession outside the constitution will facilitate the function of pre-commitment that constitutions achieve. Choudhry (2006) uses pre-commitment theory to respond that secession clauses can minimize

legal disorder, as well as domesticating threats to secede.²

Taking the view of constitutions as self-enforcing conventions, Chen and Ordeshook (1994) suggest that it makes little difference whether a right to secede is found in the constitution or not. A group determined to leave, and powerful enough to do so, will be able to do so whether or not the constitution formally provides for such a right. Still, it may be in the interests of a dominant group to commit to a right to secede as a way of making a credible commitment, so long as the right depends for implementation on prior agreements (Chen and Ordeshook 1994, p. 53).

International Law

Public choice theory could easily be utilized to analyze the international law dimensions of constitutional design. Treaty accession rules vary widely across systems and sometimes differ from legislative processes; in the United States formal treaties require a supermajority, but only of the upper house. The interaction of treaty accession with issues of federalism, bicameralism and legislative process sets of problems of comparative institutional choice for interest groups. Some groups may prefer to entrench preferred policies in the form of international treaties rather than domestic legislation at the federal or sub-national level. Treaties can also be used to take policies out of the sphere of ordinary politics.

Rights

Constitutional rights play a central role in the normative literature of constitutional political economy and have been subjected to some public choice analysis (see Cooter 2000). The basic orientation is that rights are useful to help limit political externalities and maximize consent over important policies.

² In an important case that marked the first time a constitutional court has pronounced on secession, the Canadian Supreme Court held that there was no unilateral right to secession. Reference re Secession of Quebec, [1998] 2 S.C.R. 217. The Court did, however, suggest that a referendum passed by a clear majority on a clear question would trigger a constitutional duty on the part of political actors to negotiate.

Further, by reducing the stakes of politics, rights minimize the power to be achieved through control of government, reducing rents. Rights help ensure that majorities do not impose costs on individuals.

There is some tension in this story. By reducing the stakes of politics, constitutional rights reduce the damage government can do, and implicitly limit rent-seeking. But reduced stakes, if credible, also reduce the incentives of citizens to monitor any rent-seeking that does occur in the more constrained realm of politics that remain. Reduced stakes also reduce incentives to organize to overcome the formidable collective action problems in constitutional enforcement generally. Effective rights are surely important; but they may perversely help to sustain ordinary rent-seeking by reducing incentives to monitor and enforce.

Much of the emphasis in the literature to date has been on limitations of government takings of private property (Cooter 2000; Stearns and Zywicki 2009). Cooter frames rules against expropriation as a device to minimize agency costs. Representatives might be tempted to take private property and use it to the benefit of their own supporters. By ensuring that the government will compensate property owners for their full market value, the possibility of such government capture is reduced (Farber 1992; Levmore 1990, 1991; Fischel and Shapiro, 1989; but see Levinson 2004). Furthermore, public use requirements mean that, at a minimum, governments will need to find a plausible public reason for the taking. Some have argued that the takings framework can be applied not only to physical property but should also be applied to regulation more generally, reflecting the general suspicion of regulation as the product of capture (Fischel 2004).

Stout (1992) extends the basic insight to other areas of law. “Fundamental” rights are those for which the affected individuals have especially intense preferences unlikely to be reflected in ordinary legislative voting, which weights all votes equally. In her analysis, due process and suspect classifications under the equal protection clause are designed to ensure that these weights are given adequate attention, and the independent judiciary is the device to do so. This analysis brings a public

choice gloss to the “footnote 4” paradigm that has dominated normative constitutional law for so long.³

Public choice analysis of specific other rights provisions remains somewhat underdeveloped. One exception is Dripps (1993, p. 1089), who argues that legislators systematically undervalue the rights of the accused in criminal proceedings because “a far larger number of persons, of much greater political influence, rationally adopt the perspective of a potential crime victim rather than the perspective of a suspect or defendant.” Perhaps for this reason, criminal procedure is a special focus of constitutional design, recommitting the polity to avoid imposing particularly severe costs on individuals.

Another area for richer analysis is social and economic rights. Public choice theory, arising out of modern economics, tends to be skeptical about the value of minimal rights to education, housing and social welfare, as it considers the market the superior institution to provide these goods (Brennan and Pardo 1991). Yet the increasing demand for positive rights suggests that these are not merely the product of rent-seeking by interest groups. Indeed, many of the economies in which social and economic rights are demanded (South Africa, Latin America) are transitioning from situations of extensive capture by narrow interest groups, and so demands for redistribution are in an important sense motivated by the general interest. We do not really yet have such an account of positive rights from a public choice perspective. A certain amount of redistribution may be in the public interest and necessary to create conditions for constitutional endurance.

³ There is some empirical support for concern about majoritarian discrimination. Baker (1992) argues that there is a particular danger from direct democracy, an institution celebrated in certain public choice analyses. Gamble (1997, pp. 245-47) finds that popular initiatives restricting civil rights have been approved seventy-five percent of the time in contrast to the overall rate of thirty-three percent approval.

Constitution-making processes

As described in the first part of this Chapter, much of the research program in constitutional political economy has proceeded from the assumption that there is a distinct level of constitutional politics that can be bracketed off from normal rules of self-interest. To what degree do real-world constitution-making exercises meet this test? What is the relative balance of passions, interests and reasons in constitution-making, as Elster (1994) helpfully frames it?

Because of the general dearth of truly comparative material on constitution-making, much of the scholarly attention has focused on the United States experience. Holcombe (1991) analyses the role of constitutional rules as constraints on government using three United States constitutions: the Articles of Confederation (1781), the Constitution of the United States and the Confederate Constitution. He notes the expansion of federal power under the Constitution as compared with the Articles, but also points out that this meant there may have been greater constraint on the power of state governments and so aggregate government power may have been lower. Riker (1984) examines the choice of method to elect the president in 1787, identifying cycling among alternatives and the creative act which led to the creation of the electoral college. Another line of work on the US constitution focuses on interest group activity and self-interest. Following Beard's (1913) classic argument, McGuire and Ohsfeldt (1986, 1989a and 1989b) use statistical analysis to evaluate the voting behavior of the delegates to the U.S. constitutional convention, and find some support for public choice hypotheses of self-interest among drafters.

Analyses of other country experiences from a public choice perspective are rare. One exception is Brennan and Pardo's (1991) examination of the Spanish Constitution of 1978. Noting that the constitution includes vague statements of qualifications on rights, they note that this deviation from public choice ideals may have been necessary to secure agreement among a divided public. The sense that real world constitutions must accommodate principle to pragmatism rings true to many analysts. As

they put it (p. 65), “ there is an interesting practical tension between the two senses in which a Constitution can satisfy contractarian norms – between the content and process dimensions of contractarian evaluation. Specifically, there seems no good reason to expect that the kind of Constitution public choice theory believes likely to be best for the citizenry would automatically commend itself either to popular enthusiasms or to professional politicians.” We again see some accommodation to the idea that some degree of interest group activity may be needed to sustain constitutional rules politically.

Beyond these case studies, much work needs to be done. Those studies that do exist are hampered by the lack of large-n data and the difficulty of producing research. One exception is Widner (2006, 2007), who heads a project at Princeton to document and analyze constitutional design processes in post-conflict settings. As this and other data become more widely available, it will be possible to try to more systematically test hypotheses about public choice and constitutional design.

The public choice account of more constrained interest group activity at the constitutional level turns, ultimately, on accounts of broader participation at the relatively infrequent intervals of constitutional politics. Much then turns on the extent to which popular participation is instantiated and effective. While there is general agreement that participation in constitution-making is a valuable thing (Samuels 2005; Voigt 2003), in part because it can ameliorate capture by special interests, there is, alas, little systematic evidence in the literature as of yet as to the virtues of participation (but see Moehler 2006, 2007). Empirical analysis on the intensity of interest in constitution-making is also quite limited. In France, the 1958 Constitution was approved by just over 1/3 of registered voters (Voigt 1997, p. 26) and a recent set of amendments, with virtually no public debate, ended over 200 years of parliamentary sovereignty by allowing for constitutional court supervision over existing legislation.⁴ In other

⁴ More attention was paid to the issue of whether or not the President could address the national assembly in an annual address.

circumstances, however, the public seems to be very engaged in constitution-making processes, with great effect (Selassie 2003; Moehler 2006, 2007).

We can imagine several hypotheses about participation and its effects on the constitution that results (Elkins et al 2008). For example, writing in the public choice tradition, Voigt (2003) suggests that inclusive processes will lead drafters to create more independent bodies, delegating powers away from the legislature. Voigt also believes that participatory documents will be more stable, in that there will be fewer demands for renegotiation down the road, as well as more legitimate with the public willing to enforce the document.

We might also expect that as the power of the citizenry in design processes increases, the number and extent of constitutional rights will increase as well. The American case, in which the Bill of Rights was inserted only after public discussion and debate in the ratification process, makes the point quite dramatically. The Anti-Federalists wanted to include a bill of rights in the original bargain, but were able to gain agreement only as a condition of approval. Participation, then, begat a more extensive set of limitations on federal power—limitations that many believe embody the genius of the constitution. (In more recent examples, we might expect that participation would be associated with “positive” socio-economic rights, as the constitution becomes an instrument of redistribution.)

In a recent comparative contribution, Elkins, et al. (2008) evaluate the extent of self-interest by comparing constitutions drafted with and without public approval processes (typically referenda). They find that public approval of constitutional texts is associated with a different set of governance institutions than found in other constitutions. Public approval is associated with higher numbers of elective offices and greater use of referenda in ongoing governance. We do not, however, find that there is significantly greater likelihood of public initiative in such constitutions. Clearly, however, there is much more to do to evaluate the degree of self-interest in constitution-making. Do constitutions drafted by sitting legislatures, for example, include more powerful legislative bodies? Do executive-

centered processes empower the executive? How do designers choose among the range of different institutions that can provide protection from special interests?

Conclusion and Future Directions

Public choice analysis of constitutions is in many ways in its infancy. A core assumption of constitutional political economy is that the constitutional level is distinct, and more likely to produce public-regarding behavior. The extent to which this obtains is large question calling out for a range of research strategies. Furthermore, the whole range of constitutional institutions has not been subjected to public choice analysis, nor have the more complicated issues of interaction among various institutional choices.

The public choice assumption of self-interest generates a number of hypotheses about constitutional design which are potentially subject to empirical verification. One approach might be to examine constitutional debates themselves, to see whether and how self-interest comes into play. Much attention, naturally, has focused on the American constitution, whose Madisonian design reflects public choice concerns. But the techniques of public choice analysis can be used to understand other constitutional bargaining processes and designs. For example, the Indian and Brazilian Constitutions were extensively debated before their enactment and detailed information is available on the content of these debates. The small but growing literature on public participation in constitution-making described above will be helpful in this regard.

A general assumption in the literature is that simple, short, framework constitutions that focus on structuring process rather than substance would be advisable to minimize rent-seeking (Madison, Federalist 51; but see Hammons 1999). This is assumed to preserve the constitution as a device to structure politics, rather than a repository of interest group benefits. The very idea of keeping the constitution “pure” and unpolluted with rules not truly constitutional in character may itself reduce the

amount of rent-seeking that goes on, as special interests are forced to state their preferences in general terms. As in so many areas of constitutional design, however, we have very little empirical work on this question (but see Hammons 1999 in the context of American states).

The dynamics of constitutional change also call out for attention. I have described amendment as an intermediate level between constitution-making and ordinary politics. Whether amendments are more or less public regarding depending on the entrenchment rule is a fruitful area for analysis. The relative amount of bundling in amendment versus constitution-making also is relevant for a normative evaluation. The analysis here has tentatively suggested that amendments arguably should be restricted to the single subject rule, but we observe this relatively rarely at the level of national constitutions. Some empirical work has been done on amendment processes and the responsiveness of amendment to entrenchment (Lutz 1994; Rasch and Congleton 2006; Ferejohn 2003). Further work can be done here, though the question presents complex methodological problems of endogeneity and incommensurability.

Another area for further work is constitutional endurance (see Elkins et al, forthcoming; Weingast 2006). Does the quality of the constitution affect endurance? Constitutions may be more or less rent-seeking, and we do not have strong predictions about whether one is likelier to survive than another. Our suggestion above is that a certain amount of interest group activity can be helpful to stabilize a constitutional bargain—the optimal level of rent-seeking may be greater than zero if one assumes that (1) interest groups exist; and (2) constitutions need some sustained support if they are to endure and be enforced.

In many ways, enforcement is a distinct dimension from endurance (Van den Hauwe 632-33). Conceptually, one can distinguish constitutions that are ignored from constitutions in which players actively renegotiate the rules. Unfair arrangements that impose costs on important groups will tend to induce efforts to renegotiate. Fair arrangements that do not impose costs may simply be ignored.

Tackling the large question of when and how constitutions matter should help to inform further public choice theorizing.

Another area for further exploration would utilize the public choice techniques of examining aggregation mechanisms (Gilbert 2006; Cooter and Gilbert forthcoming). This branch of public choice analysis has been relatively underdeveloped (Levmore 2005) but may have important normative payoffs both about how constitutional design ought to proceed and about structuring decision-making processes under the constitution.

Constitutional design is a central issue for both scholarship and policy to understand. The literature on public choice and constitutional political economy have done a service by focusing attention on issues of rent-seeking and providing a normative framework for analyses of particular design choices. The next generation of the research program will add empirical detail, will extend public choice insights to a broader array of constitutional institutions, and may eventually develop models to understand the interaction of institutional choices, so as to lead us closer to the promise of a science of constitutional design.

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