PN-ABY-432

isn 99024

CONSTITUTIONAL DEMOCRACY

Dennis C. Mueller

New York Oxford
OXFORD UNIVERSITY PRESS
1996

N

Oxford University Press

Oxford New York
Athens Auckland Bangkok Bombay
Calcutta Cape Town Dar es Salaam Delhi
Florence Hong Kong Istanbul Karachi
Kuala Lumpur Madras Melbourne
Mexico City Nairobi Paris Singapore
Taipei Tokyo Toronto

and associated companies in
Berlin Ibadan

Copyright © 1996 by Oxford University Press, Inc.

Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016

Oxford is a registered trademark of Oxford University Press

All rights resrved. No part of this publication
may be reproduced, stored in a retrieval system, or transmitted,
in any form or by any means, electronic, mechanical,
photocopying, recording, or otherwise, without the prior
permission of Oxford University Press

Library of Congress Cataloging-in-Publication Data
Mueller, Dennis C.
Constitutional democracy / Dennis C. Mueller.
p. cm.
Includes bibliographical references and index.
ISBN 0-19-509588 X
1. Democracy. 2. Representative government and representation.
3. Comparative government. 4. Democracy—United States. 5. United
States—Politics and government. I. Title.
JC425.M744 1996
321.8—dc20 95-30858

1 3 5 7 9 8 6 4 2

Printed in the United States of America
on acid-free paper

b

To Judith for her patience

Suppose a group of rational, self-interested individuals were to write a constitution that would best advance the common interests of their community. What political institutions would that constitution define, and what improvements would it make over the constitutional democracies now in existence? Using the perspective of public choice, and assuming that all individuals are rational and self-interested, *Constitutional Democracy* seeks to answer this question.

Dennis C. Mueller illuminates the links between the structure of democratic government and the outcomes it achieves by drawing comparisons between American and foreign government systems. The questions examined are not what constitutions *have* been written, but rather what constitution *should* be written to advance a community's interests. The book explores the major issues a polity faces when drafting a constitution: Is a two-party or a multi-party system better? Should it adopt federalism? Bicameralism? Should the executive and legislative functions be combined? What role should the judiciary play? How should citizenship be defined?

Addressing these questions and much more, *Constitutional Democracy* is a comprehensive and up-to-date normative analysis of these issues. Provocative and intriguing, this work will be of great interest to scholars and students of political science, economics and law.

Acknowledgments

It is almost a decade since I started work on this book. During this time many people have commented on various aspects of the work, more people than I probably can remember. Those whom I do remember include Martin Bailey, Silvio Borner, James Buchanan, Josep Colomer, Bruno Frey, William Keech, Brendan Kennelly, Karol Soltan, Robert Tollison, Gordon Tullock, Stefan Voigt, and two referees for Oxford University Press. My hearty thanks go to each of these people for their help.

My thanks also go to the IRIS Program at the University of Maryland, which funded some of my time spent on the book. Their support in turn was provided by the U.S. Agency for International Development under Cooperative Agreement No. DHR-0015-A-00-0031-00 to the Center on Institutional Reform and the Informal Sector (IRIS) and administered by the Office of Economic and Institutional Reform, Center for Economic Growth, and Bureau for Global Programs, Field Support and Research. Chapter 15 reproduces much of an article published in the *Journal of Law, Economics and Organization* with the same title. This article/chapter benefited from comments from that journal's editor, Oliver Williamson.

I have been particularly fortunate to have had Rebecca Flick as my secretary over the last ten years in College Park. This will be the last of several manuscripts on which she and I worked together, and so I want to close with a particular note of gratitude to her for all of her help over these years.

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead. I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain under the regimen of their barbarous ancestors.

THOMAS JEFFERSON

Contents

I The Problems

1 Democracy in America, 3
2 Democracy in Other Parts of the World, 21

II The Constitutional Perspective

3 The Constitutional Premise, 43
4 Why Have Government?, 50
5 The Nature of a Constitution, 59

III Institutions to Reveal and Advance a Community's Interests

6 Federalism, 77
7 Direct Democracy, 95
8 Representative Democracy: Proportional Representation, 101
9 Representative Democracy: Two-Party Government, 114
10 The Two Systems of Representation Compared, 127
11 The Parliamentary Voting Rule, 152

IV Institutions to Constrain Government

12 The Referendum, 177
13 Bicameralism, 192
14 Rights, 209
15 The Market and the State, 225
16 Redistribution, 237
17 The Executive Branch, 247
18 Dictatorship, 263
19 The Judiciary, 279

V Getting Started

20 Citizenship, 299

21 The Constitutional Convention, 314

VI Coming to an End

22 Epilogue, 341

Glossary, 349

Bibliography, 351

Name Index, 371

Subject Index, 377

I

THE PROBLEMS

1

Democracy in America

Small nations have . . . always been the cradle of political liberty; and the fact that many of them have lost their liberty by becoming larger shows that their freedom was more a consequence of their small size than of the character of the people. . . .

It is generally believed in America that the existence and the permanence of the republican form of government in the New World depend on the existence and the duration of the federal system; and it is not unusual to attribute a large share of the misfortunes that have befallen the new states of South America to the injudicious erection of great republics instead of a divided and confederate sovereignty. . . .

The confederation of all of the American states presents none of the ordinary inconveniences resulting from large associations of men. The Union is a great republic in extent, but the paucity of objects for which its government acts assimilates it to a small state. Its acts are important, but they are rare. As the sovereignty of the Union is limited and incomplete, its exercise is not dangerous to liberty; for it does not excite those insatiable desires for fame and power which have proved so fatal to great republics. As there is no common center to the country, great capital cities, colossal wealth, abject poverty, and sudden revolutions are alike unknown. . . .

ALEXIS DE TOCQUEVILLE

It is a fraud. It is a fraud. We have defrauded the country to get ourselves elected. This is a terrible bill on the floor of the Senate. This is a giveaway, nothing bill. The tax bill was a terrible bill.

SENATOR, JOHN C. DANFORTH, Missouri

The United States is the world's oldest constitutional democracy. For more than two centuries, those living under oppression, tyranny, and economic hardship in other parts of the world have dreamed of going to America. Millions have seen those dreams fulfilled after immigrating to the United States. It is appropriate that the motion picture industry is centered in the United States, for this country has truly been the world's "land of dreams" since its birth.

But not all dreams come true in America. No traveler from France today would write, as de Tocqueville did more than a century and a half ago, that there is no abject poverty in the United States, nor could he ignore its colossal wealth. The United States today is an urban society, whose great cities are filled with crime, pollution, congestion, and decay, much like those of South America. The latter development is fairly recent.

Alexis de Tocqueville's observation that America has no "sudden revolutions" was, on the other hand, to be falsified within a generation.

No government can fulfill all of the dreams of its citizens, but most Americans today agree that their government is not doing an adequate job solving the country's problems. This failure comes despite the federal government's growth to more than ten times its relative size when de Tocqueville wrote about it. Indeed, not only is the government not solving many of the country's most pressing problems, but it is often the *source* of a problem. The United States has become the kind of "great republic" with "great wealth and extreme poverty, capital cities of large size, a lax morality, selfishness, and antagonism of interests" that de Tocqueville did not observe when he visited here 160 years ago.[1]

In this chapter we recount some of the problems the United States faces today, and the relationship of government to them. We do so briefly, because much has already been written about the failures of American democracy, and most readers are familiar with these issues. The objective of this book is not to belabor past and present problems, but to analyze possible solutions. In Chapter 2 we look, again briefly, at democracies in other parts of the world. There, various democratic institutions exist, along with a wide range of performances. This dispersion is fortunate, from a scientific point of view, as it holds the promise of allowing us to select better from worse sets of political institutions on the basis of their performance. Parts III and IV of the book describe and analyze the different options for constitutional government. But we begin with American democracy as it exists today.

Governmental Failure

Crime

Wilhelm von Humbolt regarded "the first positive principle" of his inquiry into the proper role of the state to be "that the maintenance of security, both against the attacks of foreign enemies and internal dissensions, constitutes the true and proper concern of the State."[2] Certainly, no government service is more fundamental than the protection of citizens against crime. Yet there are neighborhoods in Washington, D.C., minutes from where the laws of the United States are written, in which someone is shot and killed almost every night, in which gunfire is so prevalent that adults and children are routinely killed by stray bullets as they sit in their homes or on their front porches or as they drive in their cars. Students are no longer allowed to go out of the high schools for lunch in the nation's capital out of fear that they may be shot or otherwise harmed as they go to and from the schools, or stand in front of them (Horwitz, 1992). The probability that a resident of Washington, D.C., was murdered was eight times higher than for the rest of the country in 1989 (U.S. Department of Commerce, 1991, p. 178). Life is equally dangerous in New York, Detroit, Atlanta, and many other American cities.

Education

For the past century Americans have believed that the government should provide a basic education to all children. Over time, the amount of education that government is

expected to provide has increased, so that today most Americans expect government to educate their children up through high school, and that this education prepares even those with average ability and motivation to attend college. During the 1970s, however, a steady decline was observed in the performance of the American public school system. This decline is conveniently summarized in the final report of The National Commission on Excellence in Education (1983, pp. 8, 9), which was appointed to study the problem:

1. International comparisons of student achievement . . . reveal that on nineteen academic tests American students were never first or second and, in comparison with other industrialized nations, were last seven times.
2. Some 23 million American adults are functionally illiterate by the simplest tests of everyday reading, writing, and comprehension.
3. About 13 percent of all 17–year-olds in the United States can be considered functionally illiterate. Functional illiteracy among minority youth may run as high as 40 percent. . . .
4. The College board's Scholastic Aptitude Tests (SAT) demonstrate a virtually unbroken decline from 1963 to 1980. Average test scores fell by over 50 points. . . .
5. Between 1975 and 1980, remedial mathematics courses in public 4–year colleges increased by 72 percent and now constitute one-quarter of all mathematics courses taught in those institutions. . . .

The National Commission recommended several reforms within the existing educational structure to remedy these deficiencies. But in a recent, influential analysis of the American school system, John Chubb and Terry Moe attribute the deterioration in student performance to "the very institutions that are supposed to be solving the problem: the institutions of direct democratic control" (Chubb & Moe, 1990, p. 2, see also their Chap. 6). They recommend more radical reforms that would alter the institutional structure itself.

Poverty

Depending on the definition of poverty one uses, between 9.5 and 13.5 percent of Americans lived in poverty in 1990 (Council of Economic Advisers, 1992, pp. 143–47). Nearly one out of four children is born into poverty, one in two if the child is black (*Washington Post,* Dec. 19, 1989, p. A1ff).

These poverty levels existed not at the bottom of the Great Depression when widespread unemployment was present, but at the end of a decade of prosperity in which gross domestic product (GNP) grew by 25 percent and unemployment was at its lowest level in nearly 20 years (Council of Economic Advisers, 1992, pp. 300, 340). Yet poverty levels were as high at the end of the 1980s as at the beginning. Indeed, the incidence of poverty was slightly *higher* at the end of the 1980s than at the end of the 1960s.

What is particularly troublesome about these figures is that poverty has persisted in the United States despite expanding governmental efforts to reduce it. Outlays on social insurance and social welfare programs expanded from just over 4 percent of gross domestic product (GDP) in 1967 to more than 9 percent in 1990. Social welfare outlays expanded even faster (Council of Economic Advisers, 1992, pp. 126–34), yet despite

Table 1.1. Federal Receipts, Outlays, Deficits, and Debt 1929–1991 (Billions of Dollars)

Year	Total Receipts	Total Outlays	Surplus or Deficit (−)	Gross Federal Debt held by Public[a]	Outlays as fraction of GDP[b]	Deficit as fraction of GDP[b]	Debt as fraction of GDP[b]
1929	3.9	3.1	0.7	16.9	0.030	0.007	0.162
1930	4.1	3.3	0.7	16.2	0.036	0.008	0.178
1931	3.1	3.6	−0.5	16.8	0.047	−0.006	0.220
1932	1.9	4.7	−2.7	19.5	0.080	−0.047	0.333
1933	2.0	4 6	−2.6	22.5	0.082	−0.046	0.402
1934	3.0	6.6	−3.6	27.1	0.102	−0.056	0.416
1935	3.7	6.5	−2.8	28.7	0.090	−0.038	0.396
1936	4.0	8.4	−4.4	33.8	0.102	−0.054	0.408
1937	5.0	7.7	−2.8	36.4	0.085	−0.031	0.401
1938	5.6	6.8	−1.2	37.2	0.079	−0.014	0.436
1939	6.3	9.1	−2.8	48.2	0.100	−0.031	0.529
1940	6.5	9.5	−2.9	50.7	0.094	−0.029	0.504
1941	8.7	13.7	−4.9	57.5	0.109	−0.039	0.457
1942	14.6	35.1	−20.5	79.2	0.221	−0.129	0.498
1943	24.0	78.6	−54.6	142.6	0.408	−0.284	0.741
1944	44.3	91.3	−47.6	204.1	0.432	−0.225	0.965
1945	45.2	92.7	−47.6	260.1	0.434	−0.223	1.218
1946	39.3	55.2	−15.9	271.0	0.264	−0.076	1.297
1947	38.5	34.5	4.0	257.1	0.149	0.017	1.109
1948	41.6	29.8	11.8	252.0	0.115	0.046	0.977
1949	39.4	38.8	0.6	252.6	0.151	0.002	0.983
1950	39.4	42.6	−3.1	256.9	0.150	−0.011	0.902
1951	51.6	45.5	6.1	255.3	0.139	0.019	0.777
1952	66.2	67.7	−1.5	259.1	0.196	−0.004	0.750
1953	69.6	76.1	−6.5	266.0	0.209	−0.018	0.730
1954	69.7	70.9	−1.2	270.8	0.194	−0.003	0.743
1955	65.5	68.4	−3.0	274.4	0.172	−0.008	0.691
1956	74.6	70.6	3.9	272.7	0.169	0.009	0.652
1957	80.0	76.6	3.4	272.3	0.174	0.008	0.618
1958	79.6	82.4	−2.8	279.7	0.185	−0.006	0.626
1959	79.2	92.1	−12.8	287.5	0.186	−0.026	0.582
1960	92.5	92.2	0.3	290.5	0.180	0.001	0.566
1961	94.4	97.7	−3.3	292.6	0.184	−0.006	0.550
1962	99.7	106.8	−7.1	302.9	0.187	−0.012	0.530
1963	106.6	111.3	−4.8	310.3	0.185	−0.008	0.515
1964	112.6	118.5	−5.9	316.1	0.183	−0.009	0.488
1965	116.8	118.2	−1.4	322.3	0.168	−0.002	0.459
1966	130.8	134.5	−3.7	328.5	0.175	−0.005	0.427
1967	148.8	157.5	−8.6	340.4	0.193	−0.011	0.418
1968	153.0	178.1	−25.2	368.7	0.200	−0.028	0.415
1969	186.9	183.6	3.2	365.8	0.191	0.003	0.381
1970	192.8	195.6	−2.8	380.9	0.194	−0.003	0.377
1971	187.1	210.2	−23.0	408.2	0.192	−0.021	0.372
1972	207.3	230.7	−23.4	435.9	0.191	−0.019	0.361
1973	230.8	245.7	−14.9	466.3	0.182	−0.011	0.346
1974	263.2	269.4	−6.1	483.9	0.185	−0.004	0.332
1975	279.1	332.3	−53.2	541.9	0.210	−0.034	0.342
1976	298.1	371.8	−73.7	629.0	0.210	−0.042	0.356
1977	355.6	409.2	−53.7	643.6	0.207	−0.027	0.326
1978	399.6	458.7	−59.2	706.4	0.205	−0.027	0.316
1979	463.3	503.5	−40.2	776.6	0.202	−0.016	0.312

continued

Table 1.1. (continued)

Year	Total Receipts	Total Outlays	Surplus or Deficit (−)	Gross Federal Debt held by Public[a]	Outlays as fraction of GDP[b]	Deficit as fraction of GDP[b]	Debt as fraction of GDP[b]
1980	517.1	590.9	−73.8	828.9	0.218	−0.027	0.306
1981	599.3	678.2	−79.0	908.5	0.224	−0.026	0.300
1982	617.8	745.8	−128.0	994.3	0.237	−0.041	0.316
1983	600.6	808.4	−207.8	1136.8	0.237	−0.061	0.334
1984	666.5	851.8	−185.4	1371.2	0.226	−0.049	0.363
1985	734.1	946.4	−212.3	1564.1	0.234	−0.053	0.387
1986	769.1	990.3	−221.2	1817.0	0.232	−0.052	0.426
1987	854.1	1003.9	−149.8	2120.1	0.221	−0.033	0.467
1988	909.0	1064.1	−155.2	2345.6	0.217	−0.032	0.479
1989	990.7	1142.2	−153.5	2600.8	0.219	−0.029	0.498
1990	1031.3	1251.8	−220.5	2867.5	0.227	−0.040	0.520
1991[c]	1054.3	1323.0	−268.7	3206.3	0.233	−0.047	0.565

[a]Figures prior to 1939 are Public Debt at end of year as given in the 1964 *Annual Report*, p. 274.

[b]Figures through 1945 are as percent of GDP.

[c]Estimated.

Source: Annual Reports 1964, 1976, and 1992 (Council of Economic Advisers). Figures for 1930–32, 1934–38 are from 1964 *Annual Report*. Figures for GDP from 1940–45 are from 1976 *Annual Report*. All other figures are from 1992 *Annual Report*.

this rapid growth in governmental spending on programs to reduce poverty, it was more of a problem in 1990 than it was in 1967.[3]

Not only have government programs failed to reduce the extent of poverty but they may actually contribute to it and aggravate other social problems because of the perverse ways in which benefit eligibility is calculated. "The existing system of means-tested transfers thus provides low-income families with incentives not to work, not to save, and not to keep families intact" (Council of Economic Advisers, 1992, p. 149).

The Deficit

The attraction of "buying now and paying later" is obvious. Many governments have fallen prey to this attraction. Mushrooming deficits, a debt "crisis," or a runaway inflation fed by money printed to cover the deficit have preluded the collapse of democracy in many countries. A responsible government controls deficits and avoids the intergenerational transfers and political instability they can bring.

Three turning points in the expenditure-deficit history of the United States can be identified. The first occurred in the mid-1930s. Although an upward drift in the relative magnitude of the federal government's influence can be detected throughout the nineteenth century (Kendrick, 1955, pp. 10–12), federal outlays were still only 3.1 percent of GDP in 1929 (see Table 1.1). But in the 1930s the New Deal programs began an expansion of the federal government that, when combined with post–World War II defense expenditures, increased its share of GDP to nearly 25 percent.

Although the Great Depression and the war that ended it caused the federal government to run deficits, the expenditure programs introduced in the 1930s were accompanied by self-financing taxes, so that the budget came into rough balance when the economy returned to normal following war's end. It maintained this approximate balance until the end of the 1960s. But when Congress failed to raise taxes to cover the expendi-

Table 1.2. Federal Budget Deficits as a Percent of GNP

	Total Budget		General Operating Budget	
	Actual	High Employment Inflation Adjusted	Actual	High Employment Inflation Adjusted
1950s	0.3	−0.7	0.6	−0.5
1960s	0.8	0.2	1.1	0.3
1970s	2.4	0.4	2.5	0.5
1980s	4.1	1.7	4.7	2.4

Source: Schultze (1992, p. 37). (Reprinted by permission of the American Economic Association.)

tures that it had authorized for the Vietnam War and the Great Society programs, the federal budget deficit began to grow relative to GDP. The end of the 1960s marks a second turning point in the United States fiscal history.[4]

Robert Eisner (1986) has emphasized that the increases in federal debt in the 1970s did not engender a major fiscal crisis because, somewhat ironically, the inflation that accompanied these increases simultaneously wiped out some of the real-valued debt outstanding. Inflation-adjusted, high employment deficits in the 1970s were only slightly higher than in the 1960s (see Table 1.2).[5] But at the beginning of the 1980s, Congress approved the Reagan Administration's program of simultaneous increases in defense spending and a reduction in taxes, and the real value of new deficits began to expand faster than inflation could reduce the real value of the debt outstanding. By the early 1990s interest on the federal deficit was the fastest-growing portion of the federal budget.

Governmental Overachievement

Pork Barrel Programs

Section 8 of Article I lists the powers that the drafters of the U.S. Constitution thought Congress should have. These included the coinage of money, establishing a postal system, determining uniform rules regarding the naturalization of immigrants, and of course the authority to raise and support an army and a navy. All of the enumerated powers pertain to government activities that potentially affect all parts of the nation. The only borderline cases are the powers "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States" and "to establish . . . post Roads." While there are probably some gains to having uniform bankruptcy laws across the nation, one could also allow each state to determine its own bankruptcy laws as they do with, for example, incorporation. If it is proper for states to control entry into business, why not exit?

A system of interstate highways as has been developed since the 1950s fits the definition of a national public good,[6] but authority for building other roads could be left with states and cities. The extent of interstate travel 200 years ago was such that one might have left post roads to the states. With these possible exceptions, however, the framers of the Constitution appear to have intended that the Congress limit its attention to the provision of public goods and services that would have a national impact.

The great innovation in the U.S. Constitution was the establishment of a federalist system (Riker, 1964). The logic of federalism is that local public goods are supplied by

local governments, and national public goods are supplied by the federal government. The city government is responsible for protecting the city's shopkeepers; the federal government protects merchant shippers on the high seas. But this simple logic is routinely violated by the federal government. A dam in Kansas, a bridge in Michigan, a subway system in San Francisco, these and countless other items that benefit only those in a small area of the country, items that by the logic of federalism would be provided by local or state governments, find their way into the federal budget.

These projects do, of course, provide benefits to those living close to them, and they are the sorts of goods that governments typically provide. The danger in having the federal government provide them, however, is that the benefits are less than the costs. If the citizens in the San Francisco Bay Area do not foresee sufficient benefits from the BART subway-rail system to induce them to cover its full costs, why should citizens in Illinois and South Carolina pick up the difference? What benefits do they receive? Is there not a danger that the citizens of San Francisco press for the BART system precisely because they must pay but a small fraction of its costs? If the citizens of the Bay Area are willing to cover the full costs of the system, why tax those in Illinois and South Carolina and all the other states of the Union? Pork-barrel projects are among the most egregious wastes of the U.S. political system.[7]

Defense

Defense against foreign aggression is the quintessential national public good. Raising and maintaining an army and a navy is one of the powers explicitly granted to the Congress by the Constitution. But defense today is not an army and navy that is assembled and equipped to fight off an enemy and then disbanded when the threat has passed. Defense today is a giant bureaucracy with a budget in 1992 of over $300 billion, the biggest expenditure item in the federal budget, over 5 percent of GDP. Defense is army and naval bases, weapons built in one city, parts purchased in another one. Defense is jobs and profits distributed to different parts of the country. Defense is part of American pork-barrel politics. Franklin Spinney (1988), a member of the secretary of defense's staff, describes the situation as follows:

> Over the last eight years this country has spent $1.83 trillion on military weapons, manpower, operation and maintenance. Where did the money go?
>
> First, what the money did *not* buy [is] . . . larger forces, . . . newer forces, [or] . . . higher operating tempos. These are facts.
>
> Second, . . . we don't know if the defense budget bought better, if fewer, weapons.
>
> Third, what the defense budget did buy: It bought jobs, votes in elections and votes in Congress. Complicated weapons designs and success-oriented weapons testing combined with astute political engineering to convert the defense budget into a giant, self-perpetuating public-works budget.
>
> The money trail is the key to unlocking defense politics.

As Spinney follows this trail he describes how "political engineering" determines the choices of weapons and their characteristics. The key is not *what* the money is spent on, but *where* it is spent.

> Political engineering corrupts the entire defense decision process. It aims to paralyze Congress by buying constituents bit by bit. In so doing, it subordinates military

> needs to pork-barrel politics and it reenforces perverse behavior: We exaggerate threats, . . . we underestimate costs to make it easier to get weapons into production, we soften testing requirements lest they disrupt development and production and, most importantly, we design overly complex weapons that maximize the number of sub-contracts and jobs. In this environment, issues of real defense—force structure, modernization, readiness, the fidelity of operational tests—get short shrift. (Spinney, 1988)

Citing a General Accounting Office (GAO) study, Congressman Denny Smith (1989) described how the government agency charged with testing whether new weapons met their required performance standards filed incomplete and inaccurate reports that exaggerated performance and downplayed flaws in the weapons. Smith asks: "Why does operational testing try to sell the weapon rather than actually test it? Because its real goal is not to provide our fighting men with weapons that work, but to keep money flowing to the Pentagon." Both the Executive and the Legislative branches have their constituencies to please and do so by sending them money.

Once a program is launched, the incomes it generates create a constituency that can sustain a program after it is no longer needed. The "Star Wars" (Strategic Defense Initiative, or SDI) program for intercepting intercontinental missiles was launched in the 1980s to deter possible future attacks by the Soviet Union. When the Soviet Union collapsed, so too did the threat of future missile attacks, but the SDI continued to expand, until a new administration killed it in 1993. Likewise, the Seawolf attack-submarine is no longer needed to deter a Soviet threat, but survives to preserve jobs in Connecticut and Rhode Island, where the sub is built (Pianin, 1992).

The logical extreme in thinking of the defense as pure pork barrel activity has come in proposals to allocate defense contracts across states in proportion to the tax revenues raised in the states. Defense is no longer to be thought of as a public good bought in the quantities and quality needed from the suppliers best suited to provide it, but as a pie like other government pies to divide fairly among the various members of Congress.[8]

Agriculture

Government interference with normal market processes has usually been justified as a way to protect the public interest from a particular market imperfection. The intent behind the Interstate Commerce Act passed in 1887 was, for example, to protect the public from discriminatory pricing by railroads, pricing the railroads were able to undertake because of their "natural monopoly" positions (Kahn, 1970, p. 55). Over time, however, many regulatory agencies were captured by the industries they were supposed to regulate and became managers of industry cartels transferring income from consumers to the regulated firms (Stigler, 1971).

Agricultural products like wheat and milk are not natural monopolies, but rather textbook examples of goods that the market supplies efficiently. Government interference in agricultural markets has not been rationalized, accordingly, by appeal to market-failure arguments. The objective has been simply to protect farmers from the normal ups and downs of agricultural markets, a form of redistribution of money from taxpayers and consumers to farmers. Government interventions in agricultural markets cost American taxpayers and consumers more than $20 billion annually in the late 1980s (Gardner, 1990, pp. 51–52).

The U.S. farm program forces farmers to hold productive land idle and encourages the inefficient use of land in production through its more intensive cultivation to achieve higher outputs at artificially raised prices. To these losses should be added the costs of subsidies for water for agricultural purposes in arid regions. A 1987 study in New Mexico estimated that water diverted from a river for farm irrigation yielded $40 per acre-foot of benefits. The benefits from the same water for recreational uses were estimated at between $700 and $1,100 per acre-foot (*Economist,* Aug. 4, 1990, p. 19). In parts of California water that costs taxpayers $212 per acre-foot is sold to farmers for $3.50 per acre-foot. All states appraise agricultural land below its value for commercial and residential uses, thereby allowing farmers to pay lower taxes and diverting more land from its socially productive uses. These costs are not included in the $20 billion figure cited above, nor the $400 million per year to run the Agricultural Stabilization and Conservation Service (Gardner, 1990, p. 52), or the costs of employing 100,000 people in the Department of Agriculture (Bovard, 1990).[9]

At the end of the 1980s an average family of four paid $375 in taxes to provide an average subsidy of $8,000 to each farm in the country (Gardner, 1990, p. 58). This $8,000 figure might be compared to the $9,750 received from the government by an average mother with two children on welfare. Unlike the mother and her two children, however, the recipients of farm subsidies do not have to undergo a means test before they receive their payments from the government. The bulk of agricultural payments go to the highest income farms. In 1987, 60 percent of crop support money went to the richest 1.5 percent of the farms, to those farms with incomes over $100,000 (Gugliotta, 1990). Each farm with over $500,000 in sales that participated in the government's programs received an average subsidy of $66,037 (Rausser, 1992, p. 145).

The U.S. government's farm program introduces inefficiencies into what should and could be well-functioning markets to the loss of both consumers and producers alike. It does so to bring about transfers from the average taxpayer and consumer to the wealthiest corporate and private farms, to individuals who are among the wealthiest in the nation.[10]

Implications

There are some goods that markets provide efficiently, like shoes and clothing, and others that they do not, like roads and defense. Direct government intervention is needed to achieve the optimal allocation of resources to roads and defense; only indirect government action (e.g., legal institutions to protect market transactions) is needed to provide shoes and clothing efficiently. But that government could provide the optimal quantities of roads and defense does not imply that it *does.* In this section we have described how the federal government inefficiently provides goods like defense that are its *raison d'être,* inefficiently provides goods like urban mass transportation that should be the responsibility of lower government levels, and damages the efficiency of some private goods' markets like those for agricultural products, where it has no justification at all.

The source of all three inefficiencies is the same. The government intervenes not only, if at all, to improve the allocation of resources. It intervenes to affect incomes, to enhance or protect the incomes of those who produce the weapons, or the roads, or the crops. Although some groups obviously do benefit from such redistribution, the average American citizen is harmed. People pay too much for milk and sugar. Citizens pay for

some roads that they do not use. They get too much of some public goods (e.g., dams) and too little of others (environmental protection). Defense dollars buy less protection and offensive capability than they could.

The federal budget is a cornucopia of items to help this industry or that firm, this county or that city, this group or that one. It is so crowded with pet projects, and the President and Congress are so deadlocked over tax and expenditure options, that the federal government cannot respond to national needs and opportunities as they arise. The single most important cause of the increase in crime and violence in America in recent years is the growing use of drugs. More than four times as many Americans selected drugs as this country's "most important problem" than any other in a poll taken at the beginning of this decade (*Washington Post,* Jan. 21, 1990, A24), yet Congress and the President have been unable to find the money in the trillion-dollar federal budget to fund the "war on drugs" (Hoffman, 1989).

Ever since the iron curtain went up at the end of World War II, the United States has spent several trillion dollars preparing to wage war against Communist countries. Thousands of lives and billions of dollars were spent, in vain, to prevent the spread of communism from North Vietnam to South Vietnam on the grounds that this prevention advanced the American national interest. If preventing the spread of communism is worth such sacrifices, then one presumes that the displacement of communism by democracy and capitalism should elicit similar efforts. But it has not. When the iron curtain came down at the end of 1989, Lech Walesa requested $10 billion from the United States to help Poland transform its Communist society into a democratic and capitalistic one. The response of the American President was to propose $125 million to help *both* Poland and Hungary, an amount that was *1/20 of 1 percent* of the 1989 defense budget (Hoffman, 1989). Despite the waste contained in the federal budget, projects are difficult to cut, *even weapons to counter a Communist threat that no longer exists,* for such cuts mean reductions in some voters' incomes and therefore a loss of votes for some members of Congress or the President.

Citizen Disenchantment

The Iowa farmer, the San Francisco subway rider, and the shareholder of a defense firm in Connecticut all benefit from U.S. government programs. In many cases, as with the farmers, the benefits are direct and easy to calculate. The costs are diffused across the entire population. It might be, therefore, that Americans have been fooled into believing that these programs are not wasteful, and that government was doing a good job.

But Americans have not been fooled. Seventy-five percent of the 1,512 individuals questioned in a *Washington Post*–ABC poll in October 1991 believed that "people in government waste a lot of money we pay in taxes." When asked how much is wasted, the average reply was 49 cents out of every dollar (Balz & Morin, 1991).

Skepticism regarding the efficacy of government has translated into alienation. Whereas in 1966 only 29 percent of respondents to a Harris poll felt alienated from the power structure, in 1986, 60 percent felt alienated. Fifty-five percent responded that "the people running the country don't really care what happens to me," up from 26 percent who felt that way in 1966. Over 70 percent of blacks felt alienated from the power structure (Harris, 1987, pp. 33–36). This alienation is further evidenced by de-

clining participation of Americans in the political process. One hundred years ago four out of five of those who were eligible voted. Thirty years ago more than three out of five did (Burnham, 1987, pp. 113–14). In 1988 only one out of two did. In recent off-year elections (i.e., no presidential race), less than two out of every five citizens who could vote did so (*Washington Post,* Jan. 21, 1990, p. A24).

Alienation with American institutions also evidences itself in other ways—increased instances of cheating on taxes, increased vandalism, an unwillingness even to fill out and return Census forms (P. Taylor, 1990). The riots in Los Angeles in April 1992 are a more conspicuous example.

But all citizen responses have not been negative. Californians can pass legislation directly through the referendum process, and they have increasingly turned to this method for achieving their collective goals out of frustration with the normal electoral process (Mathews, 1988). Large numbers of citizens were attracted to the anti-system campaign of Ross Perot, who ran for the Presidency in 1992, and his presence on the ballot helped to reverse—at least for one election—the decline in voter turnout. These developments signal a latent demand for radical changes in U.S. political institutions and, indirectly perhaps, a demand for constitutional changes.

Why Does the Federal Government Fail?

Geographic Representation

A politician's primary goal is to get elected, and once elected to get reelected (Downs, 1957, p. 28; Fiorina, 1977; Mayhew, 1974). Under the U.S. system of representation, the country is divided into 435 congressional districts, and one representative is elected from each district. Each of the fifty states elects two Senators.

On any given national issue—abortion, an increase in defense spending, a boost in the federal tax on petroleum, for example—all citizens in a congressional district or a state do not agree. In staking out a position on national issues a candidate for the House of Representatives or Senate wins the votes of some citizens and loses those of others. But nearly *all* residents of Montgomery County, Maryland, are likely to favor increased federal support for the Metro system that serves their county; nearly all Texans favor more federal funds for highways in Texas. Getting the federal government to fund local projects is a sure win strategy for any representative or senator. Thus, geographic representation in the national legislative bodies leads to "the parochial imperative," an excessive preoccupation with the local impact of a spending decision, *any* spending decision, even for those on defense and other national issues (Fitzgerald & Lipson, 1984, p. xviii).

The New Deal, the Great Society, and the other initiatives of the last 60 years have increased tremendously the number of federally funded programs, federal regulations, and federal bureaucracies to administer them. Compliance with federal regulations (e.g., regarding environmental or worker protection) can be costly. Winning a federal contract can be lucrative. Every company, university, and local government has an incentive to ask those who represent their areas in Congress to help them in their dealings with the federal government. Each member of Congress has an incentive to respond to these requests, to try to get the agency in question to relax its enforcement of a particular

regulation, to pay particular attention to the research proposal of a given university. Each federal bureaucracy in turn has an incentive to comply with these requests, for it is Congress that funds it.

The attention that members of Congress give to ombudsmen activities on behalf of their constituents has grown dramatically over the last 30 years. This growth can be measured by the size of congressional staffs, the people who do most of the actual work in responding to requests from "back home." Between 1960 and 1974, personal staffs of members of Congress doubled (Fiorina, 1977, pp. 56–58). Between 1972 and 1987 they doubled again. By the end of the 1980s each member of Congress was making an average of 200 written inquiries to the Pentagon per year (i.e. about one every working day) and about five phone calls per day. The number of written reports requested of the Department of Defense increased from 36 in 1970 to 719 in 1988 (Liedl, 1990). Do these developments reflect a growing concern with national security on the part of Congress, or a growing concern with income security in the home district or state?

When a phone call or a written request will not suffice, a member of Congress must take more direct action. Instead of simply appropriating money for research, housing, and the like, and allowing the federal agency responsible for the program to allocate the funds across the country according to general principles laid down by Congress, members of Congress have increasingly chosen to make the awards themselves in the form of "riders" to the appropriation bill—a $2,250,000 grant to the Economic Development Administration of Polk County, Des Moines, and Ankeny, Iowa, sponsored by Representative Neal Smith of Iowa; $1,000,000 for fish oil research to the Charleston (South Carolina) Seafood Lab sponsored by Senator Fritz Hollings of South Carolina; a $250,000 grant for radiation calibration to the University of Arkansas sponsored by Senator Dale Bumpers of Arkansas (Morgan, 1989a). Nor are special favors restricted to interventions on the expenditure side. Prior to becoming an anti-system candidate for the presidency, billionaire H. Ross Perot hired former IRS Commissioner Sheldon Cohen to draft a special loss carryback tax provision that would have saved his companies $15 million in taxes. The House Ways and Means Committee obligingly included the provision in a bill under consideration.[11]

The work of members of Congress can be divided into three broad categories: passing legislation dealing with national concerns, passing legislation dealing with local concerns (pork barreling), and ombudsman activities on behalf of constituents (Fiorina, 1977, p. 41). For example, Congressman's vote on national legislation may or may not win him votes in his district or state; pork barrel and ombudsman activities are certain to win votes and campaign contributions. Naturally, these concerns take up the bulk of his time and energy and that of his staff. The cost of this "parochial imperative" is not simply the waste it generates in dams and weapons that should not be built, or research that should not be funded. The cost is that, by focusing the attention of each representative onto million-dollar development and quarter-million-dollar research grants, the parochial imperative diverts him from considering the benefits to the nation of the trillion dollars in the total federal budget. By providing greater rewards to representatives who serve local interests than to those who seek to advance the national interest, the American electoral system populates its legislature with local-interest lobbyists and ombudsmen rather than statesmen who possess the vision and capacity to deal with *national* problems.

Centralization

Geographic representation in the national legislature gives members of Congress an incentive to represent local interests at the national level.[12] As a consequence of the resulting overcentralization of government activity, U.S. citizens are unable to make informed choices about government programs. It is conceivable that a citizen living in Montgomery County, Maryland, could make an informed and rational choice regarding whether benefits from the Metro system that serves the citizen's area are greater than her share of its full costs if it were funded locally. It is inconceivable that any citizen can weigh with comparable accuracy the costs and benefits of a dam in Kansas to those residents living in Kansas, a road in Texas to Texans, and so on. A cost of the overcentralization of governmental activity is that citizens cannot as easily evaluate the job their representatives are doing. Consequently, it is easier for the government to do a bad job.

Furthermore, citizens can do nothing to prevent the resulting governmental waste given the electoral rules in the United States. Even if the citizen of Montgomery County knows that the benefits she receives from the Metro are less than the full costs she actually pays, once the taxes to pay for the dam in Kansas, the road in Texas, and the BART system in San Francisco are added in, she is powerless to alter the outcome when she goes to the polls. She can either vote for the representative and senator who helped bring federal funds to Montgomery County to build the Metro or vote against them. But defeating these representatives will not prevent future pork barrel projects from passing and might even worsen Montgomery County's chances of getting "its fair share" of the pork. The voters of Montgomery County, like all other voters in the United States, are trapped in a classic prisoners' dilemma. They would be better off if they could somehow bring about the defeat of all candidates who engage in pork-barrel and ombudsmen activities, including their own representatives, but they cannot. Given that they cannot, these voters are better off retaining those representatives most adept at bringing pork back to their county and state. The prisoners' dilemma nature of the voters' predicament is revealed by the paradox that voters' routinely reelect their representatives to the House and Senate by huge margins, and at the same time tell pollsters that they disapprove of the job Congress is doing by equally large margins (*Washington Post,* Jan. 21, 1990, p. A24). This is further underscored each time American voters elect a President, one who promises to eliminate governmental waste and the budget deficit, and reelect representatives to the House and Senate because of the fine jobs they have done bringing federal programs to their districts or states, and avoiding tax increases that would adversely affect their constituents.

The Separation of Powers

Each member of Congress is elected to represent the interests of a particular district or state. The president, on the other hand, is elected by the entire nation. Presidential candidates must choose issues that win votes in all parts of the country and that appeal to broad cross sections of the population. If a representative of national interests is to be found anywhere in Washington, it is in the White House.

In a presidential campaign the two, or occasionally three, main candidates run on "platforms" of promises as to what they will and will not do if elected. "I will *not* raise

taxes" ("Read my lips"), "I will increase defense spending," "I will wage a war on crime [poverty, drugs, etc.]." These promises are gleaned from the latest polls on what Americans think government should or should not be doing and, not surprisingly, they often resonate with many of the voters. On occasion a candidate so captures the aspirations of the voters that he is elected by "a landslide." When this happens the person elected, the press, and the public at large all perceive that the President has a mandate to implement the program he promised during the election campaign. But the Constitution does not provide the President with the power to implement his program, mandate or no mandate. Any program that is put into effect must be approved by Congress. The president can propose legislation, cajole and threaten the Congress, delay and frustrate it in various ways, but in the end it is the program on which Congress agrees that is implemented, not the one the president requests. The most powerful weapon the president has is his constitutional authority to veto an act of Congress. This veto can prevent Congress from implementing a part of *its* program, but it does not allow a president to implement his, unless his program is one of no action. The president cannot even bring about this outcome if the Congress is at least two-thirds united in support for its own program.[13]

As head of his party and of the federal bureaucracy, a president possesses considerable *de facto* power. Over time, presidents have expanded their constitutional authority as Commander-in-Chief to exercise considerable power in time of war, real or imagined, in the area of foreign policy (Schlesinger, 1989). By skillfully wielding or threatening to wield the veto a president can usually accomplish some of what he wants. But he cannot accomplish all, and increasingly has been able to accomplish very little.

No American president has been more popular or has had a stronger mandate since World War II than Ronald Reagan. His promises during the 1980 campaign were to increase defense expenditures, cut taxes, and "to get government off the backs" of citizens by cutting domestic spending and regulations. Increasing defense expenditures meant increases in contracts and jobs to congressional districts, and so Congress went along. Tax reductions are always popular, and so Congress went along. But cuts in domestic programs, entitlements, and regulations would have meant trimming the pork that helps Congress get reelected, reducing the bureaucracy that makes ombudsmen valuable. Predictably, Congress did not go along. The result was that taxes fell, defense spending rose, and the federal government began to produce the largest peacetime deficits in its 200-year history. This outcome was not part of the Reagan program. The Reagan administration was the most conservative—fiscally and in every other way—administration that the United States has had since at least the Hoover administration. It had the biggest mandate since the Roosevelt administration, yet it could not get Congress to make significant cuts in domestic and entitlement programs. Thus, it produced exactly what Reagan promised it would not, namely mushrooming budget deficits.[14]

Constitutional Reforms

> New Yorkers tried, but they could not entirely contain the violence of the poor within their closed districts. The mayor's mail was filled with complaints about banditry in the streets. . . . Disrespect for law merged into a general scorn for politics, government, and politicians. Businessmen tended to blame the government and politicians for introducing unnecessary, indeed the principal, uncertainties into enterprise.

The above quotation describes the New York not of the 1980s or the 1970s, but of the 1870s.[15] Governmental failure is not new in the United States. For a generation after the Civil War, corruption, waste, and mediocrity characterized government at both the national level and in many states like New York. The Civil War itself must be judged the most colossal *political* failure in the history of the United States.

Two conclusions can be drawn from this observation. First, there may be something inherent in politics that brings out the worst in *all* who participate in it. The problems we have discussed are not endemic to the United States and its particular set of institutions but to all democratic systems. Second, there is something very basic in the particular set of political institutions the United States has adopted that can, and often does, produce undesirable outcomes. There is truth in both interpretations.

Representative democracy is a principal–agent problem. The optimal institutions for acquiring defense, police protection, roads, and the other natural public goods typically require that some members of the community make decisions for the others. This arrangement provides opportunities for the decision-makers to choose outcomes that benefit themselves at the expense of those on whose behalf they are supposedly acting. The larger the community, the less diligent are citizens likely to be at policing their agents, and the greater discretion the agents have. Principal–agent relationships coupled with "free riding" by the principals are inherent in all democratic systems to a degree.

James Madison served in the Virginia legislature following the Revolutionary War. He found the experience so disgusting that he attempted to design a set of institutions that would channel the selfish interests of individuals and control the evils of faction in the body politic. The result was the "Virginia Plan," which the Philadelphia Convention more or less adopted as the U.S. Constitution (Wood, 1987, pp. 73–77). This chapter suggests that Madison's solutions for the problems he encountered in the Virginia legislature have not been fully effective in preventing the evils that he feared. A part of the explanation may reside in the political institutions embodied in the Constitution itself.

One might object that the main features of U.S. representative institutions upon which we have laid stress—geographic representation and checks and balances—have been in place ever since the Republic's founding, and yet many of the problems enumerated seem of recent origin. There are several points to observe in this regard.

First, many of the problems mentioned *have* been around for a long time, but at lower levels of government as the quotation regarding New York in the 1870s indicates. The federal government accounted for only 3 percent of GDP in 1929. Even if the average citizen's assessment of federal governmental waste in the 1991 *Washington Post*–ABC poll was true for 1929, only 1.5 percent of GDP would have been wasted in 1929. The same degree of governmental waste in 1991 amounted to 12 percent of GDP. The failures of the federal government are more prominent today than they were during the first 150 years of the Republic because the federal government is much more prominent.

The growth of the federal government in the last half century was facilitated by the Supreme Court's reinterpretation of Section 8 of Article I of the Constitution in *U.S. v. Butler* (1936). Section 8 limits the Congress of the United States to eighteen rather narrowly defined powers. But, in *Butler* the High Court ruled that "the power of Congress to authorize appropriations of public money for public purposes is not limited by the direct grants of legislative power found in the Constitution."[16] The door was thereby opened to the growth in federal government expenditures that was to follow.

Although the constitutionally defined relationship between the President and Con-

gress is not much different now from what it was 200 years ago,[17] the deadlock that it can produce is considerably worse today as a result of the growing parochialism of the Congress. When voters held political *parties* responsible for the performance of government, a presidential landslide would sweep many candidates from the president's party into the House and Senate. Not only would these newcomers be beholden to the president for their past success, but they would realize that, should the president not perform well, the next landslide could sweep them out. But pork-barrel politics and ombudsmen activities have severed the link between a congressional candidate's success and that of his party or the president. To a considerable degree "*Congress* [has become] *composed of professional officeholders oblivious to the changing political sentiments of the country*" and oblivious to those sentiments to which the president responds.[18] Each marches to its own mandate.

We conclude (1) that the failures of the U.S. representational system became more significant in the aftermath of the Supreme Court's 1936 reinterpretation of the Constitution, which allowed the federal government to expand its activities greatly; (2) that this expansion coupled with geographic representation led to the present overcentralization of government; and (3) that this centralization coupled with geographic representation strengthened the link between memnbers of Congress and their constituents at the expense of ties to party and president, further advancing the deadlock aspect of the checks-and-balances system.

In recent years the idea that some of America's problems might be resolved by constitutional reforms has been in the air. A constitutional amendment to implement James Madison's recommendation that Congress be forced to increase members' salaries only during election years has resurfaced after 200 years of dormancy. A constitutional amendment requiring a balanced federal budget has been considered. The belief that the problems America faces cannot be solved merely by sending some "new faces to Washington" is now widespread.[19]

This book discusses some options. It tackles the same question taken up by Madison from the same premises. Given that most individuals most of the time seek to advance their own interests, what set of institutions best allows them to advance their collective interests?

In this chapter we focused upon that portion of America's political glass which is empty. The reader may object that we have painted an overly negative and distorted picture of America. The average American's income is one of the highest in the world. Although the trillions of dollars spent on defense over the last couple of decades may not have bought the best military capability that money could buy, it was not all wasted. The military acquitted itself well in the Persian Gulf War. No country in the world has more people trying to enter it than the United States. Much in American society and political institutions is good. The point is not that America's political outcomes are the worst in the world, but that they might be better.[20] There is room for improvement, and these improvements may (I believe do) require constitutional changes.

It is of course possible that, although the United States does not have a perfect constitution, some other country does, and a citizenry wishing to adopt a new constitution, or amend an existing one, only has to copy this exemplar. In the next chapter we shall look at some other democracies to see how they fare. Some do better than the United States; some fare worse. But in all it is probably safe to say that institutional improvements might be made. Part II introduces the constitutional perspective that underlies this book and which will be used to describe the constitutional options available.

Notes

1. All quotes from de Tocqueville in this chapter, including the one at its beginning, are from Chapter 6, vol. I of *Democracy in America* (1835, pp. 168–70).

2. *The Limits of State Action* was apparently written around 1791/92, but was not published until 1854. See J.W. Burrow's introduction (p. xvii) to the 1993 Liberty Classics Edition. The quotation appears on page 39.

3. Edgar Browning (1989) has questioned whether the extent of poverty in the United States is as high as the Commerce Department's figures, since these figures are not based on lifetime incomes and ignore wealth levels. On the other hand, he notes that the extent of "behavioral dependency" (people who are permanently dependent on others for support) is a serious and probably growing problem.

4. Both Robert Lucas (1986) and Aaron Wildavsky (1986) identify the late 1960s as the point in time when U.S. fiscal policy became unhinged. Hoover and Sheffrin (1992) reach the same conclusion following a sophisticated econometric causation analysis. Buchanan and Wagner (1977) attribute the rising budget deficits of the 1970s to the triumph of Keynesian thinking during the 1950s and 1960s and the general acceptance of deficit financing that this brought about.

5. High employment deficits are calculated on the assumption that the country is at full (high) employment each year to eliminate the fraction of the deficit attributable to the built-in stabilizers of the fiscal system.

6. Terms like "public good" with which the reader may be unfamiliar are defined in the Glossary following Chapter 22.

7. Douglas Arnold (1981) presents a good overview of the causes and consequences of pork-barrel politics in the United States. The Reagan administration attempted to take on the congressional pork barrel as part of its early efforts to reduce the size and waste of government. The report of the "Grace Commission" charged with investigating the problem gives numerous examples of pork barreling and its wastes (Fitzgerald & Lipson, 1984). But one need only read any newspaper that covers Washington politics to find countless examples of pork-barrel politics still today, e.g., Morgan (1989a,b).

8. See Weida and Gertcher (1987, p. 95ff). Weida and Gertcher (1987, p. 95ff) discuss other examples of unneeded and unwanted—*even by the Defense Department*—weapons programs that continued to be funded because of the revenue flows they entailed to certain districts and states. For additional examples and analysis, see Higgs (1988, 1989) and the papers in Higgs (1990). Kenneth Mayer (1991) downplays the importance of pork-barrel politics' effect on the compostion and size of the defense budget. He also describes the inefficiencies and waste that do occur as the inevitable consequence of "Democracy in action, warts and all" (p. 218). His sanguine view of the defense program as the inevitable outcome of politics as usual arises to a considerable degree, however, from his acceptance of geographic representation and the simple majority rule as unalterable elements of the politcal process.

9. The *Economist* (June 27, 1992, p. 21) reports that in 1985 there were only 363,000 recipients of farm subsidies, roughly 3.5 for every government bureaucrat running the subsidy programs.

10. A $100,000 income in the late 1980s was roughly four times the average for a family of four. The *net* worth of the average farm at that time was over $1,000,000 (Bovard, 1990). Roughly 300,000 farmers have a net worth of $1,000,000 or more (*Economist,* June 27, 1992, p. 21).

11. See Page (1983, p. 47). In this particular instance the *Wall Street Journal* chose to feature the action in one of its columns, causing enough bad publicity for committee members that they reversed the decision.

12. All state constitutions are clones of the U.S. Constitution, and so all states have geographic representation in state legislatures, resulting in a second-tier overcentralization. However, city and county governments are sometimes chosen under rules that treat the entire polity as

a single electoral district. These distinctions and their significance are discussed in Chapters 8 through 10.

13. For further discussion of the deadlock problem caused by the separation of powers in the U.S. Constitution, as well as of other constitutional issues, see Sundquist (1986).

14. As Fitzgerald and Lipson (1984, p. xvii) note in their discussion of the Reagan administration's attempt to take on the pork-barrel system, "the true conflicts over spending lie not just between the major parties, or even between conservatives and liberals, but between the executive branch and Congress." David Stockman (1986), the Reagan administration's chief architect and general in the battle with Congress over tax and spending cuts, gives an insider's account of the problem.

15. Mandelbaum (1965, pp. 46–47).

16. As quoted by Niskanen (1992a, p. 14) upon whom this discussion draws.

17. The important exception being, of course, that the Senate was not directly elected 200 years ago, and thus could exercise the greater detachment and statesmanship envisaged for this *Upper* House by the Constitution framers.

18. Quote is from Fiorina (1977, p. 14); italics in the original.

19. For example, although William Niskanen and Charles Schultze represent opposite sides of the ideological spectrum, both indicate that the deficit problem faced by the United States requires fairly radical institutional change. Niskanen (1992a) suggests a balanced-budget constitutional amendment. Schultze (1992, pp. 38–39) attributes the deficit to the deadlock between Congress and the President, and thus indirectly implies the need for constitutional modifications in the separation of powers.

20. *The Economist* (Dec. 25, 1993, pp. 39–42) ranked 22 countries around the world on the basis of a variety of social, economic, and political criteria in 1983 and again in 1993. The United States came in eighth on the basis of the overall ranking on both occasions. (Although political institutions impact most of the criteria used, some, like the weather, are beyond the control of citizens and politicians alike.)

2

Democracy in Other Parts of the World

My dear friend:

Give to the people, especially the workers, all that is possible. When it seems to you that already you are giving them too much, give them more. You will see the results. Everyone will try to scare you with the specter of an economic collapse. But all of this is a lie. There is nothing more elastic than the economy which everyone fears so much because no one understands it.

JUAN PERON (taken from a letter of advice to the president of Chile, quoted by Hirschman, 1979, p. 65)

We have been fed on bones for long, and it is our turn to feed on meat, while others feed on bones.

DANIEL MOI, President of Kenya

The democratic form of government exists today, or has been tried, in every corner of the world. In some parts, it has been planted only recently, and perhaps in infertile soil, and so it is not very surprising that it has not taken firm root. We shall, therefore, not canvas every country that has now, or has had in the past, democratic institutions. Instead, we shall briefly survey problem and constitutional issues as they arise in different parts of the world, beginning with Europe where democratic institutions have in most countries taken firm root.

Europe: Government Failures

Crime

Crime exists everywhere in the world, and has so for all times. No political system will ever eliminate all crime. But when significant differences in crime levels exist across communities, people living in the communities with high crime rates naturally question whether their system is doing an adequate job. These questions have also arisen in Europe.

In the United States, crime that is of most concern today tends to be spontaneous and anarchic in nature. The crimes that most Europeans are concerned with are perpetrated by organized groups, which are often well funded and highly efficient at carrying

out their activities. Some groups have certain political objectives, and might be regarded as simply political parties whose tactics fall outside the bounds of legitimate political activity. Others are essentially businesses with the same objectives as other businesses, but which compete using tactics that fall outside of the bounds of legitimate business.

TERRORIST AND SEPARATIST GROUPS

Several terrorist groups seek a clearly political objective—separation and autonomy from the country of which they are now a part. In Corsica, Brittany, and the Basque regions of France separatist groups resort to bombings, murder, and other methods of violence to pursue their goals. In Spain, the ETA (an accronym for Freedom for the Basque Homeland) pursues the same end with the same means. Over the last generation, more than 600 deaths in Spain have been attributed to the ETA (Clutterbuck, 1990, pp. 95–96).

The most violent of the nationalist-separatist groups in Europe, however, is the Irish Republican Army (IRA). From 1969 through 1989 nearly 1,500 deaths have been attributed to the IRA in Northern Ireland alone (Clutterbuck, 1990, pp. 72–74). Violence begets violence. The killings of the IRA elicit retaliations by militant Protestant groups, British soldiers, and the police. Total deaths in Northern Ireland from terrorist activities and government responses are thus double those caused by the IRA. In the bloodiest year in recent history, 1972, some 467 people died from terrorist or police actions (Clutterbuck, 1990, pp. 72–74). Given Northern Ireland's population of 1.5 million, this figure makes death from violence in Northern Ireland relative to the population comparable to the frequency of homicides in Washington, D.C., in a recent year.

To sustain its activities a terrorist group needs a steady source of income. Voluntary contributions from loyal sympathizers are an unreliable source, and so all well-established groups engage in the same sorts of criminal activities to raise revenue as do the nonideological, profit-oriented groups like the Mafia—racketeering, extortion, bank robberies, cartelization, etc. For example, the IRA owns the only two taxi companies in West Belfast. To increase profits from this business, it systematically bombs the competition off of the streets (Clutterbuck, 1990, p. 76). From these operations the IRA earns a tidy $8 million annually.[1]

Where the ETA and IRA would like to secede from the ruling polity, groups like the Red Army Faction in Germany and the Red Brigade in Italy seek to overthrow the government. The targets of their violence have generally been leading figures in business and government. During the 1970s the Red Brigade virtually declared war against the Italian state. The highwater mark of terrorist violence in Italy occurred in 1978 when Aldo Moro, a five-time prime minister, was kidnapped and murdered.

CRIME-AS-BUSINESS ORGANIZATIONS

In Washington or Detroit when a car stops for a red light, armed men may jump out of hiding and steal the car at gunpoint. In Italy, they steal the driver. Kidnapping for ransom is one of the activities of organized crime in Italy today. On average one person is kidnapped in Italy daily. Add to these the person-per-day that organized crime murders, and Italy begins to look like a violent country.

The most profitable business of the Mafia (Mafia is the generic name for the various crime organizations—families—in Italy) today is drugs. Profits from drugs run into the billions of dollars, and they are so large that they guarantee an elastic supply of young men willing to join the Mafia and kill for it—and police, prosecutors, judges, and politicians willing to accept bribes from it. The most important political objective the Mafia

has is for government to leave it alone to run its "businesses" without interference, and in Italy it has been quite successful in pursuing this objective (Clutterbuck, 1990, pp. 108–11; *Economist,* May 30, 1992, pp. 14–17). Organized crime has also been active in "legitimate" businesses in Italy, such as the construction industry. Here the Mafia simply bribes politicians and public administrators to get contracts, say for construction work, at inflated prices. When the extent of the links between organized crime and business and government was exposed in 1993, the Italian citizenry reacted by turning the main political parties that had governed the nation since World War II out of office, and by demanding constitutional reforms.

DISCUSSION

The violence caused by organized crime and terrorist groups in Europe raises three kinds of constitutional issues. The first and most obvious is it brings into question the efficacy of the government in fulfilling its most basic duty, to protect the citizens. Would other institutions of government work better? If Catholics and Protestants can live together peacefully in Germany and Switzerland, why not in Northern Ireland? Are the political institutions of Northern Ireland or the relationship between Northern Ireland and the rest of Great Britain partly to blame?

The separatist movements in the two Basque regions, in Corsica and Brittany, and again in Northern Ireland raise further questions of citizenship and the definition of the state. If Malta can be a separate state, why not Corsica? If San Marino is, why not the two Basque areas? How are the dimensions of a polity and its membership ideally defined?

Finally, the violence and tactics of these groups raise issues regarding individual rights. How are the rights of innocent citizens to life and liberty in their homes and on the streets weighed against the rights of individuals who are accused of having committed crimes? The IRA, Mafia, and other organized groups that practice violence have successfully avoided prosecution in part because they murder and intimidate witnesses, jurors, and judges so that it is difficult to obtain convictions against them. In both Northern Ireland and Italy, government authorities have suspended certain rights normally possessed by individuals against the state so as to arrest and prosecute members of organized groups engaged in violence. What criteria does a society use to delineate the rights of citizens relative to one another, and relative to the state? (See Clutterbuck, 1990, Chaps. 14, 15).

Governmental Waste and Inefficiency

The form of geographic representation that exists in the United States is conducive to having local interests served by the national legislature. By and large, the European parliamentary systems produce parties with national constituencies and these tend to represent more dispersed interests.[2] But with this exception, the same kind of interest-group politics exists with its ensuing waste and inefficiency.

One of the most spectacular governmental failures of all times was the joint effort by Great Britain and France to produce a supersonic passenger aircraft. At its inception, the development of the Concorde could be said to have several objectives that might be regarded as the kinds of national public goods that national parliaments should finance—development of technology with military potential, "infant industry" subsidies to allow the British and French aircraft industries to compete more effectively against the Ameri-

can aircraft industry, national pride, etc. But once the project was underway, and it became obvious that it would be a financial disaster, interest-group pressure from the aircraft industry, pressure from the regions where the plane was being developed and produced, and pressure from the government bureaucracy that had sponsored the Concorde kept it alive. Private redistributive interests won out over the interests of the two nations' taxpayers. The cost of developing the Concorde and producing fourteen commercial aircraft through the end of 1978 was $4.28 billion.[3] Each plane wound up costing $267 million, nine times the originally estimated costs. The planes were so uneconomical to operate that in the end they could not even be given away (Feldman, 1985, p. 112).

In addition to the usual interest group forces, the Concorde was hampered by considerable flux in the administration of its program. Between 1958 and 1983, a total of twenty-three different individuals had ministerial responsibility for the Concorde (Feldman, 1985, pp. 138–42). Such turnover in political supervision results in the program's being monitored by individuals who are new to their jobs, and thus at a disadvantage relative to those in the industry who have a vested interest in seeing the project extended. Such instability can arise when the executive and legislative branches are combined as under the British system, and ministerial posts are frequently shuffled.[4] This instability is aggravated when control of the cabinet shifts back and forth between parties with substantial ideological differences, as was the case in Great Britain during a substantial portion of that period.

Farmers are also well represented in Europe. The results here are analogous to those in the United States—government subsidies and higher prices. Individuals are encouraged to remain in an industry in which Europe is at a comparative disadvantage. In 1980 consumers in the nine European Community (EC) countries contributed $34.5 billion in higher prices, and taxpayers contributed another $11.4 billion to provide $30.6 billion in income to farmers.[5] These figures resulted in $15.3 billion in net losses to Europeans owing to the inefficiency of transferring income to farmers through a program of subsidies and price supports. Each dollar a European farmer received cost a European consumer-taxpayer $1.50.

These average figures conceal huge differences in benefits and costs across countries, products, and farmers. The biggest inefficiencies are in the United Kingdom, Italy, and Germany where the costs of each dollar redistributed to farmers range between $1.80 and $2.07 (Koester & Tangermann, 1990, pp. 91–92). Those with a taste for wheat products are particularly unlucky as the price of wheat in Europe can be as much as three times the world price (*Economist*, Feb. 23, 1991, p. 16). As in the United States, a few large farms that are particularly adept at exploiting governmental programs receive millions of dollars of subsidies (Koester & Tangermann, 1990, p. 90). Should governmental redistribution be predicated on an individual's occupation or income? Should the redistribution that government undertakes be provided by programs that interfere with the price system or by direct transfers? These questions are explored in Chapters 15 and 16 along with the potential for obtaining superior outcomes with alternative constitutional arrangements.

Inflation and Unemployment

Reflecting on the state of political institutions in Great Britain three quarters of the way through the twentieth century, Samuel Brittan (1975, p. 129) identified "Two endemic threats to liberal representative democracy:

Table 2.1. Annual Average Inflation (P) and Unemployment (U) Rates 1966–90 for European Countries

	Years									
	1966–70		1971–75		1976–80		1981–85		1986–90	
Country	P	U	P	U	P	U	P	U	P	U
Austria	3.2	2.7	7.3	1.8	5.3	2.0	4.9	3.7	2.1	3.5
Belgium	3.4	3.5	8.5	4.1	6.4	8.2	7.0	11.0	1.9	10.2
Denmark	5.0	3.4	9.3	2.6	10.4	6.4	7.9	9.8	3.8	6.6
Finland	4.6	2.6	11.8	2.2	10.8	5.7	9.6	5.9	4.8	4.2
France	4.5	2.2[a]	8.9	2.9	10.5	5.4	8.4	8.7	3.1	9.8
Germany	2.7	1.2	6.1	2.1	4.0	4.2	3.9	7.1	1.4	7.1
Greece	1.8	5.1	9.4	2.3	15.1	2.1	20.6	6.5	17.0	7.4
Iceland	12.3	3.8[a]	26.2	0.5	42.2	0.4	49.7	—	20.0	—
Ireland	5.3	6.6	13.4	8.5	14.1	10.9	12.4	14.8	3.2	16.1
Italy	3.0	5.6	11.5	5.9	16.4	7.3	13.8	9.1	5.6	11.4
Netherlands	5.0	1.5	8.7	3.0	6.1	5.3	4.2	11.5	0.7	8.9
Norway	5.0	0.9	8.4	1.0	8.4	1.3	9.1	2.7	6.4	3.2
Spain	5.1	1.0	12.1	2.5	18.1	7.9	12.4	17.8	6.3	18.5
Sweden	4.4	1.9	8.0	2.3	10.5	1.9	9.0	3.0	5.9	1.7
Switzerland	3.5	—	7.7	0.3[a]	2.3	0.4	4.3	0.6	2.1	0.6
UnitedKingdom	4.6	2.2	13.2	3.2	14.4	6.2	7.2	10.3	5.5	8.0

[a]Data for all 5 years not available; average is for available years.

Sources: Inflation data are from International Monetary Fund, *Financial Statistics*, Oct. 1986, and Supplements on Economic Indicators, 1972, 1985 (Washington, D.C.). Unemployment data are from OECD, *Main Economic Indicators*, July 1983, July 1986, and *Main Economic Indicators*, Historical Statistics, 1960–90 (Paris).

1. the generation of excessive expectations; and
2. the disruptive effects of the pursuit of group self-interest in the marketplace."

Each group—whether dock workers, farmers, teachers, etc.—seeks to raise its income relative to the rest. Dock workers press their case by refusing to load and unload ships. Shipping comes to a halt, thus increasing hardship, and economic losses ensue; pressure then mounts on the government to "do something about it." Farmers press their demands by destroying crops and livestock, by blocking highways with their tractors, creating traffic pileups and long travel delays for large numbers of citizens, leading again to pressure on the government. Teachers press their demands by calling in "sick" in great numbers, by striking and thereby closing schools and disrupting both the education of children and the lives of their working parents.

Elected governments often find it impossible to withstand these interest-group pressures for higher incomes. When the group is employed by the government, as with teachers, the solution is straightforward. Farmers generally seek protection from imports, price supports, and direct transfers, and these are all within the government's direct control. For groups in the private sector, the government's response is more indirect. When a union secures higher wages for its members, employers are forced to substitute capital for labor and to raise product prices, thus causing layoffs and temporary unemployment. The government responds to the resulting pressure to stimulate the economy and reduce unemployment by increasing the money supply and/or running a deficit. Inflation results.

Table 2.1 presents inflation and unemployment figures for European countries from 1966 to 1990. A great disparity of outcomes is apparent. Samuel Brittan's United Kingdom was experiencing double digit inflation at the time he was analyzing its problems.

Many authors for several countries agree that poor macroeconomic performance is linked to government policies designed solely to win votes.[6]

Samuel Brittan attributes Great Britain's poor economic performance to the combination of excessive group expectations, the pursuit of self-interest by groups in the marketplace, *and* the principles of majoritarian democracy that characterize Britain's politics. Each group expects to increase its income relative to the rest. Each group expects the government to help it achieve this end. All voters expect the government to eliminate any negative side effects of these pursuits. To avoid the negative consequences of interest group politics and majoritarian democracy, Brittan recommends requiring coalitions among the main competing interests in the formulation of economic policies.[7]

Deficits

All voters like to see their taxes cut, but all government expenditures provide benefits to some voters. Even a worthless weapons system generates jobs and profits. Thus, any person or party running for political office is tempted to promise higher expenditures *and* lower taxes. Such promises if fulfilled lead to deficits. When these deficits are covered by printing money they produce inflation. Even when inflation does not result, government deficits create interest obligations that future generations of taxpayers must honor. The United States has had a chronic deficit problem for over a decade. The same is true for some European countries.

During the prosperous 1950s and 1960s, European governments were able to keep their budgets more or less in balance, with the exception of Ireland. The economic slowdown of the 1970s caused tax revenues to decline and many European countries did not reduce expenditures accordingly. Deficits in some nations, averaged over a 5-year period, swelled to more than 10 percent of GDP (see Table 2.2). Although prosperity in the 1980s brought deficits back down in most countries, it did not bring them down in all. In recent years Italy has continued to run a deficit of more that 10 percent

Table 2.2. Central Government Surpluses (+) or Deficits (−) as a Percent of GDP

	Years			
Country	1971–75	1976–80	1981–85	1986–90
Austria	−2.1	−5	−4.6	−4.9
Belgium	−3.5	−6.7	−11.9	−7.4[a]
Denmark	1.4	−1	−1	2.2
Finland	0.6	−1.6	−1.5	0.13
France	−1.2	−1.8	−2.9	−2.2
Germany	−2.1	−3.5	−1.9	−1.0
Greece	−3.1[a]	−4.4	−12.6	NA
Iceland	−4.1[a]	−2.7	−2.4	−3.1[a]
Ireland	−8.5	−11.2	−11.2	−7.05
Israel	−19.9	−13.8	−17.8	NA
Italy	−12.5[a]	−11.5	−11.8	−12.1
Netherlands	−1.0[a]	−3.6	−7	−3.5[a]
Norway	−2.9	−7.3	0.3	0.542
Spain	−1.2	−2.9	−6.5	−4.0[a]
Sweden	−3.8	−4.9	−7.8	1.9
Switzerland	−0.6	−0.4	−0.3	NA
UnitedKingdom	−4.9	−5.6	−3.5	−0.18[a]

[a]Data for all 5 years not available. Average is for years where data are available.

Source: IMF, *Government Finance Statistics Yearbook,* Washington, D.C., 1983, 1988, 1991.

of GDP, and Greece's deficit has become equally large. Austria, Belgium, Iceland, Ireland, the Netherlands, and Spain all have fairly large deficits. These deficits imply a continually growing tax obligation of the citizens to pay for the accumulating interest on the government's outstanding debt.

Not all European governments have run large deficits, however. The budgets of Denmark, Germany, Norway, Sweden, and the United Kingdom were in rough balance during the recent period (although reunification has altered this for Germany in the early 1990s). Indeed, the differences across the countries are in some cases quite dramatic. Over the 1970s and 1980s, Ireland and Italy had government deficits averaging about 10 percent of GDP, whereas Finland and Switzerland kept their budgets in balance. Can these outcomes from the political process be explained by the rules that define that process? Does the fact that Switzerland's voters can veto any act of its legislature by calling a referendum help to explain its fiscal conservatism?[8] Does Finland's unique use of a two-thirds majority rule in its parliament explain its fiscal conservatism? We take up institutions of direct democracy in Chapters 7 and 12, the choice of parliamentary voting rule in Chapter 11.

Constitutional Questions in Europe

Governmental Instability

In most European countries, voters with radically different perspectives on governmental policies can vote for radically different parties. With a small fraction of the national vote a political party can win a small fraction of the seats in parliament. Consequently, as many as ten, twenty, or more parties may be represented in the parliament. No single party holds a majority of seats and, since the parliamentary voting rule is the simple majority rule, a coalition of parties is needed to choose a prime minister and cabinet, under the usual parliamentary system in which the cabinet is formed out of the parliament. These multiparty coalitions can be unstable, resulting in the *fall* of a government. Such has been the history of Italy and was so of the Fourth Republic of France until the constitutional changes introduced by Charles de Gaulle in 1959. The government formed in Italy in June 1992 was its 51st since the constitution of 1946 took effect. An average government in Italy has lasted fewer than 11 months.

Such instability leads to ineffective government, because no government is in office long enough to introduce a program and carry it out. We have already discussed Italy's inability to deal with organized crime and its huge budget deficits. Its education system is virtually unchanged since the 1920s and is badly in need of reform. At the university level, there are overcrowded classrooms and an underpaid faculty (Wilson, 1990, p. 391). Government corruption and ineffectiveness in Italy have in turn spawned voter alienation. Italians have until recently revealed their contempt for their government not as in the United States by failing to vote, but by failing to pay their taxes, actively participating in black market activities, and the like (Spotts & Wieser, 1986, pp. 1–4; Wilson, 1990, p. 389). In the spring of 1993, however, Italian voters used the ballot box to express their demands for constitutional reform (Drozdiak, 1993).

Citizen Representation

The United Kingdom (except in Northern Ireland) uses a first-past-the-post (plurality) system to elect members of the British Parliament. With four parties contesting a seat

in a district, a party might win a district's seat with little more than 25 percent of the vote. When it does, 75 percent of the voters in the district go unrepresented. The result is that minority parties claim far fewer seats in Parliament than their fractions of the popular vote. The "majority party" falls far short of obtaining a majority of the votes cast. In the April 1992 election, the Conservative party won the election and a majority of seats in the British Parliament with less than 43 percent of the popular vote (*Economist,* April 18, 1992, p. 63). The majority party was opposed by a substantial majority of the voters. Two out of every five MPs elected received less than half of the votes cast in their districts. Outcomes such as these in Britain have led to disenchantment among supporters of opposition parties and calls for constitutional reform.

Although the European Union (EU) has a separate parliament elected more or less along the lines of other continental parliaments, the main decision-making body for the EU is the Council of Ministers, which meets in Brussels. All citizens in Europe are represented by a Minister appointed by their government. The method of representation in the Council of Ministers is essentially the same as that in the U.S. House of Representatives—one representative per district—except here the district is now a country. The consequence is the same as in the United States. Liberals living in a country with a conservative government find that their interests on pan-European questions having to do with the environment or defense are represented by a conservative, albeit one from their own country. Only on those *European* issues for which everyone in a country has the same views does this method of representation accurately reflect the views of Europeans. Sensing this, in June 1992 the Danes rejected the treaty that would have expanded the EU's powers over the individual member states. This action by the Danes indirectly raised a series of constitutional questions about the division of governmental responsibility in a (con)federation and the optimal mode of representation, issues taken up in Chapters 6 and 8 through 10.

Citizenship

Denmark's rejection of a closer political union with the rest of Europe in June 1992 also raised constitutional questions regarding citizenship. Is a Dane first of all a citizen of Denmark and second of all a European, or does European citizenship take precedence over Danish citizenship? Should rulings of the Council of Ministers in Brussels or the European Parliament in Strasbourg take precedence over actions taken by the Danish Parliament? Should the Danes be able to place requirements on who can and cannot vote in a Danish election independent of those established by the European Union?

The Basque, Corsican, and other separatist movements in Europe raise similar issues regarding citizenship although often in a more violent manner. Should citizenship depend on geography or ethnic-religious-cultural identity? Can one be both Corsican and French, and if so does one citizenship take precedence over another?

Since World War II, citizenship issues have arisen in Europe in yet another way. During the booming 1960s "guest workers" immigrated from Turkey, Yugoslavia, and the poorer countries of Europe and took jobs in the wealthier ones. Most of these newcomers intended to return to their homelands after a few years, but many did not. What rights should these guest workers have while living in a country that has offered them employment? Under what, if any, conditions should they be allowed to obtain full citizenship?

More recently, large numbers of immigrants from North Africa and Eastern Europe

have sought residency in the Europe Union countries. Their presence has been resented by some people and has led to violent clashes between immigrants and citizens. Political parties have arisen and won votes by promising a halt to the influx of immigrants (Wilson, 1990, pp. 399–400; *Economist,* April 11, 1992, p. 50). Again, the basic question raised concerns the criteria for and rights of citizenship. These criteria are discussed in Chapter 20.

Citizen Rights

We have already pointed out that the existence of organized groups bent on committing crimes against other citizens, overthrowing the state, or seceding from the state raises questions concerning the rights of citizens. The primary function of the state is to protect its population, and when the rights of people accused of crimes are defined in such a way as to prevent the state from carrying out this fundamental task, these definitions are called into question. This questioning has already taken place in Great Britain and Italy.

Great Britain has no written constitution and thus no individual rights that cannot in principle be revoked by a majority vote of Parliament. In the absence of a right to "free speech" as in the First Amendment to the U.S. Constitution, the British Parliament can and has used the Official Secrets Act of 1911, originally intended for use against spies and saboteurs, to suppress the publication of at least one book, and has interfered with the activities of the press in other ways. No freedom of information laws exist in Great Britain, and so a British Watergate or Irangate is far less likely there than in the United States. These lacunae in the "British Constitution" have from time to time led to debate over the desirability of a written set of constitutional rights along the lines of the U.S. Constitution (Wilson, 1990, pp. 102–5). We discuss the justification for and nature of constitutional rights in Chapter 14.

Japan

Japan's constitution was written immediately after World War II, while the country was still occupied by the Americans, and it reflects the Americans' presence. The system of representation is a halfway house between the kind of geographic representation that exists in the United States and the representation systems that produce multiparty government in continental European countries. From two to seven representatives to the Japanese legislature, the Diet, are elected from each geographic district, with most districts choosing three to five. Although obviously different from the kind of one-member-per-district representation that exists in the United States, the number of representatives per district is still small enough to give a strong geographic component to Japan's national politics. Consequently, one is not surprised to find pork-barrel politics and other features that resemble politics in the United States.

Pork-Barrel Politics

As in the United States, the Japanese national party organizations do not play a great role in the election and reelection campaigns of the candidates. Candidates run their own campaigns and raise their own campaign funds. They do this by accepting gifts from businesses, trade unions, and other groups interested in political outcomes, and by

fund-raising dinners. Places at these dinners are even bought by members of the government bureaucracies, who also seek favors from the Diet. The result is the same kind of costly political competition, interest-group influence, and pork-barrel politics found in the United States (Woronoff, 1986, pp. 92–93; Curtis, 1988, Chap. 5; Van Wolferen, 1989, pp. 127–38).

Indeed, the process leads to even greater excesses in Japan. The Americans forced the Japanese to place severe restrictions on the use of the mass media for campaign purposes into their Constitution. Therefore, to acquaint voters with themselves candidates often rent large meeting halls at which food and gifts are given to voters. In the two weeks allowed for campaigning prior to the February 1990 election, the Liberal Democratic party (LDP) spent $1.5 billion, a figure that might be contrasted with the $0.4 billion spent on the 1988 presidential election in the United States. (*Economist,* Feb. 3, 1990, p. 31; see also, Curtis, 1988, pp. 176–77). The cost to a Diet member of maintaining contacts and goodwill with his constituents, even in an off-election year, averages $3 million (Van Wolferen, 1989, p. 134). With 512 representatives in the Diet, this too comes to $1.5 billion per year. Given that Japan's population is less than half that of the United States, the cost of political competition in Japan seems high. It seems even higher when one considers that the LDP did not lose an election between 1955, the time it came into being, and 1993. Campaign expenditures did not determine which party won each election in Japan, but only by how much.[9]

The sums needed to win and retain office are far more than can be raised from legitimate, voluntary contributions to candidates. In no developed, democratic country in the world have corruption scandals been more numerous and on a larger scale than in Japan. A 1954 scandal involved the secretary general of the LDP. A 1964 scandal involved a former prime minister, vice prime minister, cabinet member, and sixty-four other Diet members. The 1976 Lockheed bribery scandal implicated then Prime Minister Tanaka Kakuei (Curtis, 1988, pp. 160–64). One scandal has followed another until Japanese voters became sufficiently disgusted with the LDP to turn it out of office in 1993, and a non-LDP coalition took power. In April 1994 the leader of the new coalition resigned amidst rumors that he had accepted bribes.

Bribes and legitimate campaign contributions buy the same kinds of contracts, pork-barrel projects, and ombudsmen services that campaign contributions purchase in the United States (Woronoff, 1986, pp. 90–93, 314–18). During his political career, the small, poor, rural district from which Tanaka Kakuei came acquired an array of bridges, tunnels, superhighways, and bullet-train stations that would make the most senior committee chairman in the U.S. Congress envious. The reported price of engaging a member of the Diet to speed a contract through the Japanese bureaucracy is 2 to 3 percent of the value of the contract (Van Wolferen, 1989, pp. 130–35).

Agriculture

When one thinks of geographic redistribution, one thinks first of agriculture. Inefficient and wasteful programs to redistribute income to farmers exist in Japan as in the United States. Indeed, both the cost of these programs and the inefficiency they produce have been relatively larger in Japan than in the United States and Europe. In the 1970s and early 1980s, the level of effective protection for agricultural products was three to five times the average for Europe. Even with recent reforms Japanese agricultural products enjoy double the level of tariff protection that exists in the United States (Hayami, 1990,

pp. 184–95). In 1970 the agricultural budget in Japan was 46 percent of the government's total budget, and it still accounts for about 20 percent of the total today. Of this, 80 percent is subsidies for producers (Hayami, 1990, pp. 197–99). Rice producers are the biggest beneficiaries. In 1977, one-third of the Ministry of Agriculture budget went for subsidies to rice growers (Curtis, 1988, p. 54). The price of rice in Japan has been more than five times the world price. Seventy-five cents out of every dollar a rice grower receives comes from either consumers' surplus transfers or transfers from taxpayers (Hayami, 1990, p. 201).

Farmers are tied to cooperatives for both the purchase of their inputs and the sale of their products. The cooperatives in turn are directly tied to the LDP. Historically, the LDP has received strong support from farm areas. This support has been turned into disproportionate strength in the Diet through a gerrymander that at times gave some rural voters as much as 4.4 times the representation of some urban voters (Curtis, 1988, pp. 44–50; Krauss, 1989, p. 42). Farmers have benefited from their close ties to the LDP in seeing their incomes rise from below those of urban workers 30 years ago to now being higher. These redistributive policies, regulations, and price supports have kept Japanese farms inefficiently small. Although Japanese industry leads other developed countries in productivity growth, its agriculture trails (Hayami, 1990, pp. 188–89).

Deficits

Japanese political institutions provide the same incentives for politicians to spend money and avoid taxes as elsewhere. From time to time the result in Japan as elsewhere has been bulging government deficits. In some years during the 1970s, the ratio of Japan's government deficit to GDP was the highest of the developed countries with as much as one-third of the budget financed by debt (Curtis, 1988, pp. 47–48). Although Japan's fiscal policies are much more conservative today than they were in the 1970s, no institutional changes have taken place that would prevent some future government from resorting to the more liberal practices of the 1970s.

Discussion

One can add other governmental failings to the list. Public provision for automobiles has not kept pace with private purchases, so that "medium-sized" traffic jams can keep Tokyo commuters in 6-hour backups. Pollution levels are high, and organized crime is openly tolerated by both the police and the government (Van Wolferen, 1989, pp. 100–107). But as with the United States and Europe the good news from Japan outweighs the bad. Its economic performance since World War II has been nothing short of spectacular. Some attribute its economic success to an enlightened industrial policy of the government. Others argue that Japan has thrived *in spite of* an ill-conceived industrial policy.[10] But even critics of Japan's industrial policies would have to give the government credit for not being so aggressive as to *prevent* the Japanese economic miracle. India's citizens should have been so lucky.

While organized crime in Japan is conspicuous and healthy, the kind of anarchic crime that exists in the United States is virtually nonexistent. In a "bad" year, there may be as many as thirty homicides in Tokyo. New York City surpasses that total in a normal week (*Economist*, June 6, 1992, p. 33). When a 16 year old Japanese exchange

student, who mistakenly approached the wrong house when going to a Halloween party, was shot and killed by a Louisiana home owner, the Japanese public and press were shocked. Although such events are commonplace in the United States, they are very rare in Japan (Reid, 1993). The "visual pollution" of an American city—trash, graffiti, derelicts asleep on the street—far exceeds that of any Japanese city. Poverty in Japan simply does not exist.[11]

Nevertheless, scope for improving Japan as a democracy certainly exists. A harsh critic might even question whether Japan truly is a full-fledged democracy. Does democracy not require that voters have a choice? Can they be said to have a choice when everyone believes that one party is certain to win each election? Are some of Japan's failures not attributable to the lack of political competition that has characterized Japan over its entire democratic history?[12]

India

Where Japan's political system resembles that of the United States in many ways, India's resembles that of the United Kingdom, at least in its formal structure if not in all of its outcomes. Delegates to the lower house of India's legislature (the Lok Sabha) are elected from single-member districts under the first-past-the-post (plurality) rule as in Britain. Parliamentary elections must be held at least every five years as in the U.K. But in India these election rules have not produced a viable two-party structure as in the Britain The dominant positions of Gandhi and Nehru in India's political history have led to the dominance of their Indian National Congress party, since India won its independence from Britain after World War II.[13]

Japan is small in population and geographic size compared to India. But while Japan has used its post–World War II era of democracy to become an industrial giant in the world, India has remained an industrial dwarf. During the last 30 years its GNP has grown at a rate of roughly 2 percent per capita, a rate that places it, along with Pakistan, Kenya, Sri Lanka, Egypt, and Bangladesh, among the laggards of the developing countries. The economies of South Korea, Hong Kong, Taiwan, and Singapore have grown twice as rapidly. Inflation is high and government debt is growing. Half of India's population today lives in poverty, roughly the same fraction as a half century ago when India obtained its independence (Brass, 1990, pp. 255–57; *Economist,* May 4, 1991).

At least some of the blame for this poor performance must be placed on India's government and its political institutions. The goal of the Congress party after independence was to create a self-sufficient, capital intensive economy like those of the U.K. and the United States. To do so, it relied on a series of 5-year plans that targeted industries and areas for subsidies, regulated some industries, and nationalized others. It restricted imports through high tariffs and regulations. A vast bureaucracy was created to guide the economy, a bureaucracy that has grown more corrupt and inefficient over time. The inefficiency of India's managed economy is symbolized by the fact that a nation with widespread poverty, and unemployment or underemployment, has at the same time one of the world's most capital intensive developing economies. Proposals to adopt a labor-intensive development strategy have not been lacking, but

> [s]uch a policy shift . . . remains remote because the Indian state and its policies continue to be dominated by a political class which adheres ideologically to the drive for industrial and technological modernity through state-directed economic develop-

> ment planning. The main beneficiaries of those policies continue to be the politicians themselves and their corrupt allies and dependents in the bureaucracy, business entrepreneurs who manipulate the system effectively or thrive in the black economy, and the urban classes who obtain growing access to indigenously produced or smuggled foreign luxury products and the amenities of urban life. (Brass, 1990, pp. 277–78)

India's failures illustrate the importance of determining those activities that government should do and those that should be left to the market, and then establishing institutions that protect the market from government interference. (We discuss these issues in Chapters 4 and 15.) The Indian government engages in the production of steel (where its plants cost 30 to 40 percent more than in the private sector, *Economist,* May 4, 1991, p. S11), chemicals, and many other activities where it suffers disadvantages relative to the market, and fails to do a good job in those areas that should be its main responsibility. It spends much less on education than many other developing countries and has a relatively high illiteracy rate to show for it (*Economist,* May 4, 1991, pp. S14, S15). Violence has been increasing in the country for the last 20 years, and some parts like Bihar have experienced a total breakdown in public order. Not only are the Indian police not able to control the violence but they very often contribute to it.[14]

India poses the question of the proper role of government in providing those goods and services that government can provide more efficiently than the market, and also the question of the optimal amount of redistribution. Given the amount of poverty in India, some redistribution to the poor may obviously be desirable, but India's redistribution programs have not benefited the poor, and poverty in India has remained unchanged (Brass, 1990, pp. 260–67).

India is a diverse country composed of people with different religions, ethnicity, and languages. These groups form natural coalitions for engaging in zero-sum redistribution through the political process. When government focuses heavily on redistribution policies, the danger of increasing animosity among the various groups engaged in the redistributive struggle arises. The increasing violence in India reflects this growing animosity. The kind of winner-take-all, competitive democracy that *may* give acceptable results in a fairly homogeneous and prosperous country like Great Britain[15], can produce social divisions, hatred, and violence in a diverse and poor country like India. Kohli (1990, p. 385) describes the situation in the following terms:

> [W]eak political institutions have encouraged undisciplined political competition, and that has politicized all types of social divisions, including caste, class, and ethnic cleavages. Numerous strategies, including the use of violence, have been used to gain access to the state's resources, thus adding to the growing political chaos.

Some suggestions for improving the situation in India have focused on changing its political institutions. One proposal is to switch to a presidential system modeled after that of France, in which a single individual in New Delhi would wield considerable power and could thereby, it is hoped, better cope with the disintegration of governmental authority that has been occurring in India. A second proposal is to return to the ideals of Gandhi and create a more decentralized state with considerably more authority vested in state and local governments (Brass, 1990, pp. 314–20).

The degree of centralization, the scope of federalism, the power of the executive relative to the parliament—these are fundamental issues that fall into the constitutional stage of collective decision making in a constitutional democracy. We discuss them in Chapters 6 and 17.

Latin America

All of the problems that we have encountered in the other democratic countries, we encounter again in Latin America. Brazil might be regarded as the India of South America. Huge in size, it covers an area slightly greater than that of the continental United States, an area with rich agricultural potential and immense mineral deposits. With a population of less than three-fifths of the U.S. population, and less than one-fifth of India's, it has even less reason not to have succeeded (Wiarda, 1990, p. 198). But Brazil, like India, has been saddled with a centralized, bureaucratic government that has nationalized and regulated its industries, followed misguided policies of import substitution, and in general has managed to thwart the natural advantages Brazil's economy has. As in India, the large government bureaucracy has taken advantage of the government's interventionist policies to enrich itself, and bribery and corruption are prevalent (Lamounier, 1990, pp. 109–10). Income disparities are as large as in almost any developed or underdeveloped country. Brazil is also among the world's leaders in the fraction of its population living in poverty (Lamounier, 1990, pp. 110–11). One is as likely to get mugged on the streets of Rio de Janeiro as in New York City, perhaps more so.[16]

Where Rio de Janeiro resembles large U.S. cities in its level of unorganized crime, Peru and Columbia resemble Italy and Northern Ireland in their serious problems with organized crime. Marxist guerrilla groups like the Shining Path and Tupac Amaru in Peru have terrorized civilians and those in government for the last 15 years, just as the Red Brigade in Italy, the Red Army in West Germany, and left-wing groups in other parts of Europe engaged in terrorist activities in the 1970s. By mid-1989 some 12,000 deaths and $15 billion in property damage were attributed to terrorist activity in Peru (D. Palmer, 1990, p. 270).

The Columbian government has waged war against both leftist terrorist groups and Mafia-style drug families since the mid-1980s. It is a war that it might well lose. A 1988 study estimated that 90 percent of the crimes in Columbia go unsolved (Kline, 1990, pp. 233–34). Police, prosecuting attorneys, judges, journalists, and any others who oppose the drug cartels are routinely assassinated. In August 1989 the leading candidate for the presidency was assassinated (Kline, 1990, pp. 248–51). Crime perpetrated by organized terrorist and drug groups, along with the government's inability to control it, has resulted in the growth of vigilante "death squads" that murder those *suspected* of terrorist or drug-related activity. Today, as in the 1950s, Columbia borders on the violent anarchy once described by Thomas Hobbes (Kline, 1990, p. 256; *Economist,* June 6, 1992, pp. 41–42).

Governmental failures of a more mundane form can also be found in Latin America. Pork-barrel politics is alive and well as in the United States (Ames, 1987). Governments are much more willing to increase expenditures than to raise taxes, with the result being large, in some cases astronomical, budget deficits (Frieden, 1991). Two-digit inflation rates are routine in Latin America; three-digit inflation is often observed. In sum, all of the political failures that we encountered in the United States, Europe, Japan, and India are present in Latin America, only often on a larger scale.

There is one form of governmental failure that is common in Latin America, however, that these other countries have apparently conquered—the failure of democracy to sustain itself. Although dictatorship is common in developing countries (witness Africa and Asia) Latin America's predilection for dictatorship cannot as easily be explained.

All Latin American countries were settled by Europeans and received their independence more than a century and a half ago, before Canada, Australia, and New Zealand. Most experimented with democratic forms of government in the nineteenth century and have contained large, well-educated middle and upper classes throughout the twentieth century. Early in this century Argentina had a living standard comparable to that of southern Europe (Snow & Wynia, 1990, pp. 136–37). Uruguay's was even higher. But Uruguay adopted economic policies of import substitution and protectionism, which led to inefficient domestic and foreign monopolies and a relative decline in its prosperity. When the workers organized and demanded higher pay, the increases were granted. Governments sought support through expenditure and subsidy programs that produced deficits, inflation, and further decline (McDonald, 1990, pp. 323–26). When the Tupamaros, a left-wing terrorist group, became active in the 1970s, the military stepped in. Uruguay was ruled by the military from 1973 to 1985 (McDonald, 1990, pp. 328–29).

Redistributional politics has been at center stage in Argentina since at least the first election of Juan Peron in 1946. Inflationary wage increases, government deficits, and economic instability have been the rule.[17] Over more than 50 years *no* civilian president served a full term, and thirteen had been removed by force (Snow & Wynia, 1990, p. 129).[18] Bolivia had a one-party or military government from 1952 to 1985. Mexico has had almost no democratic experience at all throughout this century (Levy, 1990). "No Paraguayan government has ever been made or unmade by an election" (Roett & Sacks, 1990, p. 337). And so it goes. Look at any country in Latin America and one finds dictatorships existing at some point in time or another, democracy regularly giving way to dictatorship, only to reappear again.

Chile would, until 1973, have been an exception to this pattern. It had a strong democratic tradition dating back to the early nineteenth century. In the 1960s it could claim to be one of the world's most democratic countries (Valenzuela, 1990, pp. 39–40). But in 1973, one of the world's most democratic nations became one of its most oppressive dictatorships. It remained so for 16 years.

If a country with venerable democratic institutions and a well-educated, cosmopolitan population like that of Chile can see its democracy disappear, so can any Latin American country, or so it would seem. Although there are many explanations one could give for this Latin American disease, we shall explore in this book the possibility that its constitutional structures have been the cause, for all Latin American countries have tended to adopt political structures that combine an independent presidency as in the United States with a legislature that is elected under rules that produce multiparty structures. The result is that, as in the United States today, neither the president nor the legislature can carry out an effective program. When, as in Chile in 1970, a president is elected who promises major structural changes (e.g., nationalization of large portions of the private sector) and redistribution, but does not possess the parliamentary majority to bring about these changes, social strife and political instability ensue. In Chile they led to the military overthrow of the government and the Pinochet dictatorship (Valenzuela, 1990, pp. 62–66). Several observers have argued that constitutional changes are needed to break the kind of deadlocks between the president and the legislature that led to democracy's demise in Chile in 1973 (Sigmund, 1990, pp. 208–10; Valenzuela, 1990, p. 66; Lamounier, 1990, p. 129). We examine the issue of the relationship between the executive and the legislative branches in Chapter 17, and the specific problem of dictatorship in Chapter 18.

The potential importance of constitutional structures is also illustrated by Latin

America's other great democratic success story. Costa Rica has the highest income, health, and education levels of any country in Central America. It also has the longest and deepest democratic traditions (Seligson, 1990, pp. 455–56). It was a dictatorship from 1870 to 1882, but returned to democracy at the end of that interval (Ameringer, 1982, p. 17). When the president refused to step down following a close election in 1948, a brief civil war ensued and democracy was reestablished. With this brief exception the Costa Ricans have experienced democratic government for more than a century.

Following the civil war of 1948 a specially elected constitutional assembly drafted a new constitution for Costa Rica (Ameringer, 1982, p. 37) repeating the procedure followed when the first constitution was drafted in 1812 (Seligson, 1990, p. 460). We shall argue in favor of having a separately chosen assembly for writing a nation's constitution in Chapter 21. Costa Rica, like other Latin American countries, has its share of crime, deficits, and inflation (Ameringer, 1982, chap. 6), but in Costa Rica these problems are unlikely to give rise to a military dictatorship. Costa Rica's constitution of 1949 removed the danger of military dictatorship by abolishing the military. The absence of dictatorship in at least one Latin American country almost certainly has its roots in that nation's constitution.

Africa

Democracy has been tried in Africa for only a generation or so. As in Latin America, it has often given way to dictatorship, and even when democracy exists its performance as measured by inflation and unemployment rates, government deficits, governmental waste and corruption, and the overall welfare of the population has been dismal.

Robert Bates (1989) has recently described an exception to this rule. Kenya's gross domestic product grew at roughly three times that of the rest of sub-Saharan Africa from 1965 through 1984, an achievement that Bates attributes to differences between Kenya's political institutions and political history and those of other African countries. Bates argues that Kenya succeeded where other African countries failed because its first democratic government chose to focus on policies that *created* economic wealth rather than just *redistributed* that which was already there. This focus on positive-sum-game activities was maintained by Kenya's one-party governmental rule, which tended to suppress redistributional coalitions and ideological factions.

Bates' thesis was foreshadowed by W. Arthur Lewis (1965). Observing West African countries in their democratic infancy, Lewis argued that winner-take-all democracy as it is practiced in Europe and North America did not transplant well in West Africa. Two-party in-and-out systems resulted in attempts by the "ins" to take as much as possible from the "outs." If the outs later came to power, they returned the favor. If they did not come to power, they became disenchanted with democracy and resorted to nondemocratic, often violent, actions to express their displeasure.

Lewis's recommendations were that West African countries would do better with multiparty systems in which all parties were fairly represented in the legislature, and coalition governments in which all major parties took part. Such a system would induce the various tribal factions in a country to focus upon those positive-sum governmental programs that can make all factions better off, rather than on the zero-sum redistribution that has dominated African politics. In effect, Lewis was recommending for West Africa

what Kenya was able to achieve in East Africa, albeit through one party governmental rule rather than by a multiparty coalition.

The advantages of consensual politics in Africa have been demonstrated by events in Kenya over the last decade. Kenya has reverted to zero sum politics and its leaders have used political power "to plunder the economy on behalf of their own ethnic groups." Consequently, Kenya's economic miracle has come to a screeching halt (*Economist*, June 12, 1993, pp. 47–48). Daniel Moi, quoted at the beginning of this chapter, heads a tribal faction that has taken its turn at plundering while Moi is president. The emphasis by Lewis and Bates' on positive-sum politics rather than zero-sum redistribution is a theme of this book.

Conclusions

In his discussion of Japanese politics Jon Woronoff (1986, p. 90) distinguishes "between 'small-time' and 'big-time' politics," by which he means to differentiate between the activities of politicians that serve the short-run, narrow interests of their constituents, and those oriented toward the long-run, national interests of the country. Woronoff (pp. 95–96) goes on to describe Japanese politicians in the following terms:

> There is no doubt that most Japanese politicians are first-rate when it comes to small-time politics and catering to the specific interests of their constituency. They would not long remain in office otherwise. But these tasks are so demanding that there is relatively little energy left over for big-time politics. Constantly engaged in meeting people, exchanging favors, getting something from the 'pork barrel,' the politician of any party has little enough time to think of broader or higher things. Beset with the hopes and desires of his local backers, he can rarely devote himself to regional or national, let alone international, affairs. It is thus that most remain nothing more than professionals for the best, and hacks and politicos for the less distinguished, while scarcely any ever rise to the heights of statesmen.

If "Japanese" were replaced by "American" in the first line of the above quote, the statement would be recognized by most Americans as a description of their representatives in the House and Senate. The similarities stem from the geographic basis for representation in both countries.

The most recent bribery scandals in Japan, again extending to the very pinnacles of government, have aroused sufficient indignation to suggest that Japan, like Italy, may soon engage in significant constitutional change (*Economist*, May 22, 1993, pp. 19–20). Ironically and mistakenly, it appears that Japan, again like Italy, may shift to single-member-per-district representation. The objective of the reforms in Japan as in Italy is, presumably, to create a viable two-party system. But, single-member-district representation is neither a necessary nor a sufficient condition for producing an effective two-party system of representation as India so clearly demonstrates, *and* it maintains the geographic links between politicians and their constituents that produce pork-barrel politics and their attendant inefficiencies.

Constitutional issues of one form or another surface in every democracy. Today it is the method of electing representatives in Italy and Japan. Yesterday (and tomorrow?) it was (will be) the status of Quebec in Canada's federation. South Africa struggles to eliminate a tyranny of whites over blacks without creating a tyranny of blacks over

whites. Germany struggles with the constitutional rights of those seeking asylum in its country. Enough examples have been presented to establish the importance of constitutional institutions to the functioning of democracies around the world. All democracies are not alike. Some function better than others. All probably could be improved in one way or another. In this book we explore some of the options for improving the performance of democratic government.

Notes

1. This is nothing, however, compared to the $1.25 billion per year that the PLO has taken in (Clutterbuck, 1990, p. 7).

2. Under the British system, each member of Parliament is selected from a particular geographic district under the plurality rule so that local interests *can* elect members who represent local interests if they choose to do so. The Scottish Nationalist party is an example. Under the British parliamentary system, however, party discipline is strong, and parties like the Scottish Nationalists cannot join in logrolling coalitions with other parties to win on certain issues. They remain in the "loyal opposition" unable to implement their goals. For this reason, regional parties such as the Scottish Nationalists remain small and largely ineffective. Characteristics of both the British and ideal two-party systems are discussed in Chapters 9 and 10.

3. Feldman, (1985, p. 112) gives a balanced account of the Concorde's development and the political factors that were behind it (Chaps. 4 and 5).

4. The effects of this kind of supervisional instability were even worse in the case of the abortive effort to build a third airport in the London area (Feldman, 1985, Chap. 3).

5. These figures are from the study by Koester and Tangermann (1990, pp. 90–94). The *Economist* (Feb. 23, 1991, p. 16) reports $85 billion in consumer overpayments for agricultural products and another $49 billion in government subsidies for 1990. It also presents much higher figures for the United States than are given in Chapter 1.

6. See, e.g., for the United States, Frey and Schneider (1978a) and Tufte (1978); for the United Kingdom, Frey and Schneider (1978b, 1981); for Germany, Frey and Schneider (1979); and for Australia, Schneider and Pommerehne (1980) and Pommerehne and Schneider (1983).

7. Alesina (1989) identifies polarization and political instability as causes of poor economic performance. This conclusion is consistent with Brittan's interpretation of the British problem, because party rivalry and a preoccupation with redistributional issues in multiparty systems can induce polarization and political instability (Sartori, 1976). Austria and Switzerland have employed the kind of consensual decision-making process Brittan has recommended for the U.K. and have achieved much lower levels of inflation, while maintaining more than acceptable economic performance measured in other dimensions (see Table 2.1). For a discussion of the economic performance of these two countries, and the role that consensual decisionmaking plays, see Katzenstein (1984) and our discussion in Chapter 13.

8. Evidence suggesting that this and other institutions of direct democracy in Switzerland do make a difference is presented by Pommerehne (1978), Pommerehne and Schneider (1983), and Frey (1992, 1993).

9. They have also determined the number of seats each faction of the LDP wins, which is important in determining the identity of the prime minister and composition of the cabinet.

10. For skeptical views on the role of industrial policy in producing the Japanese miracle, see Hadley (1983), Trezise (1983) and Odagiri (1986).

11. Nor is there a conspicuous, large upper class that is resented by the average citizen. Ninety percent of the Japanese think of themselves as being in the middle class (Van Wolferen, 1989, p. 268).

12. As yet no member of the non-LDP coalition has emerged as a likely strong opposition

party to the LDP. Thus, the longevity of the current reign of this coalition and of the LDP's absence from power is still in doubt.

13. For a brief review of recent Indian political history and institutions, see Brass (1990).

14. See Brass (1990, pp. 322–35) and Kohli (1990, pp. 3–9). Kohli discusses the experiences in several of the individual states (Chaps. 3 through 7) including Bihar (Chap. 8).

15. Mancur Olson (1982), however, attributes Great Britain's relatively poor economic performance after World War II to the redistributive struggles among its organized interest groups.

16. At the national level Brazil was second to Mexico in 1990 in murders per 100,000 men in a survey of 22 countries conducted by *The Economist* (Dec. 25, 1993, p. 40). Brazil had 29.4 murders per 100,000 men. The United States was fifth highest among the 22 countries with 13.3 murders per 100,000 men. In contrast, the figures for Switzerland, Germany, and Japan were 1.4, 1.0, and 0.7, respectively.

17. In his historical-political analysis of inflation, Charles Maier (1987, Chap. 5) identifies three distinct types of inflation. One of these he labels "Latin inflation" because it is typical of Latin American and southern European countries. This inflation stems from strongly divided group antagonisms over distributional issues and governmental attempts to satisfy the various groups' distributional demands.

18. Carlos Menem finally broke this unhappy record.

II

THE CONSTITUTIONAL PERSPECTIVE

3

The Constitutional Premise

> You could have the 25 heads of state meeting and saying, "Voilà, Mr. Dupont is named president of the European executive for three years." He'll choose his own ministers. He could perhaps be sacked by either the European Parliament or the European Council. . . . In other words, we need a drastic revision of the institutions.
>
> JACQUES DELORS
> PRESIDENT, EUROPEAN COMMISSION

A constitution can be thought of as the set of rules that define a community's political institutions. By this definition all communities, even dictatorships, have a constitution.

In many cases history delineates the boundaries of the community and writes the provisions in its constitution. Great Britain is a collection of disparate peoples formed into a political community by a history of wars both among themselves and against common enemies. Its constitution, like the political community it defines, has evolved through a series of steps large and small over the course of centuries.

In contrast, the United States, originally, was a far less diverse collection of people forged into a political community by the necessity of fighting a war against Great Britain. Having been suddenly apprised of their political identity, Americans were forced to choose consciously the political institutions that would govern them. The United States is the archetype of a constitutional government created by design and with purpose.

In this book we focus on constitutions of the second sort, constitutions consciously chosen and designed by the citizens. The premise underlying the book is that these constitutional issues *can* make a difference, although they do not inevitably do so. Many will not agree with this premise. Examples of constitutional provisions, like the balanced budget requirements of the Italian and German constitutions, that are routinely circumvented come readily to mind. In Brazil a new constitution seems to be written almost every year without any noticeable impact on the country's persistent economic and political problems.

But counterexamples can also be found. The United States, I would argue, is one. Citizen involvement in the writing and ratification of the original U.S. Constitution was rather limited. But, because it was written so soon after the War for Independence, and because some of the giants of that period like Franklin, Madison, and Hamilton played important roles in its writing and ratification, the Constitution has been regarded by many Americans as a higher law that places real restraints on what they and the government can do. Indeed, because of its origins it quickly became, as Woodrow Wilson

Partial Page Break

observed, the object of "an undiscriminating and almost blind worship." The reverence in which Americans have held their Constitution has contributed in no small part to the longevity of American democracy.[1] But this example is, perhaps, too close in time to be considered objectively. Consider, therefore, one example much further removed—the creation of democracy in ancient Greece.

Ancient Greece

Democracy was invented during the sixth century B.C. in Attica, in ancient Greece, through a series of reforms begun by Solon and largely completed by Cleisthenes.[2] Prior to and during much of that period Attica was ruled by individuals (tyrants) and groups (oligarchies) drawn from the aristocracy. These aristocrats were the heads of various clans (*phylae*). The *phylae* were defined by a combination of kinship and geography that made them natural coalitions for redistributional, rent-seeking activities. Rent-seeking in Attica pitted tribe against tribe, city against countryside, economic interest (e.g., agriculture) against economic interest—patterns familiar from other times and places. Cleisthenes proposed a set of reforms, a constitution, that destroyed these patterns. He divided Attica into small geographic political units called *demes*. Each *deme* contained about sixty citizens. New *phylae* were defined by combing *demes* from different parts of Attica, *demes* from different clans and with different economic interests.

Cleisthenes obviously understood the costs that factional strife places upon a community. Like Madison over two millennia later, he sought institutional reforms to neutralize the harmful effects of faction.[3] His solution was to redefine the *phylae* to transform them from coalitions representing narrow tribal, geographic, and economic interests into coalitions that included a broad cross section of the interests of the citizens of Attica, what Olson (1982) would call "encompassing organizations." The interests that members of a newly defined *phyle* had in common were those which all citizens of Attica had in common. Cleisthenes's constitution "by its admirable mixture of all the elements [of Attican society] guaranteed the concord and welfare of the community."[4]

Attachment to the larger community was further strengthened by the rules in Cleisthenes's constitution for selecting representatives to the Council, a kind of executive committee of the Assembly of all citizens. Members of the Council served for a year and were chosen by lot from each *deme*. Every citizen had a chance of serving on the Council, and over time many did. The Council included citizens from all parts of Attica, and from all economic groups, and evolved into the most important decision-making body in Attica. Its broad-based membership engineered in the citizenry an interest in the community and a sense of responsibility for its welfare. Because the Council met in Athens, the interests of the whole of Attica and of Athens became intertwined.

During the sixth century B.C. the political concept, *isonomy*, developed. This word came to connote both the democratic constitution of Athens and the equality of rights of its citizens, the notion that all citizens were equal before the law (Meier, 1990, pp. 152–62). The invention of democracy in Athens gave all citizens a stake in the welfare of the *polis* (city state), which they defended by actively participating in politics, and by serving in the military when required. It was on the strength of this citizen participation that Athens would rise to dominance over the next 200 years.

What made the people of Attica abandon their traditional modes of political organi-

zation and governance? What made Cleisthenes, an aristocrat, propose reforms that would transfer power from the aristocracy to those of common birth? What led the latter to gamble on a set of proposals of such novelty?

Kitto (1957, pp. 106–7) argues that the Greeks had such confidence in the creative powers of the human mind and enthusiasm for that which was new, that one should not be surprised by their willingness to adopt radically new political institutions, especially since they were invented by one of their admired citizens. For our purposes, it is not important *why* they adopted Cleisthenes' constitution, but that they did, and consciously so. In so doing, they created the world's first constitutional democracy, a polity that at its zenith would become the standard for all future democracies. Those who regard constitutions as inconsequential must bare the burden of proof that Athens' glory in the fifth and fourth centuries B.C. would have been just as great had Cleisthenes never proposed his constitutional reforms, or the Atticans had not adopted them.

Weimar Republic

Bad constitutional structures have also had important consequences. The Weimar Constitution that Germany adopted after World War I is often cited as an example, and it is, but not necessarily for the reasons usually given.

The weakness of the Weimar Constitution most frequently mentioned was the German electoral system that produced a multiparty legislature and allowed parties on both the far right and the far left to take seats. The number and diversity of the parties made it difficult for the legislature to function effectively over the final five years of the Weimar Republic's life (Hermens, 1933, 1941).

The causal links among electoral rules, number of parties, and political stability are not direct, however (see Chaps. 8 through 10). *More* parties were represented in the Reichstag (parliament) of 1912 under a plurality system of the kind associated with two-party government than during the Weimar Republic (Lakeman, 1974, pp. 208–13). Nor is it clear that such a system would have prevented the Nazi's rise to power. Indeed, a British-style first-past-the-post system invariably overallocates seats to the biggest parties. Such a system would certainly have transformed the Nazi's 37 percent of the popular vote in 1932 to an even larger fraction of seats in the Reichstag, and therefore might even have accelerated Hitler's seizure of power.

In addition to the number and diversity of parties in the Reichstag during the Weimar Republic, at least four other factors contributed to its demise: (1) the unusually divisive issues the Reichstag faced, (2) policy errors, (3) the method of cabinet formation, and (4) the power of the German president in relation to the legislature. The third and fourth factors are a direct result of provisions in the Weimar Constitution; the effects of the first two factors could be mitigated by some of the constitutional features discussed in this book.

Germany's defeat in World War I and the humiliating terms of the Treaty of Versailles afforded nationalistic and authoritarian parties a basis upon which to build support. The treaty saddled Germany with occupational forces, large reparation obligations, and constraints on future military programs. The nationalistic parties and those committed to maintaining democracy and good relations with other countries were continually divided over reparation and rearmament issues (Eyck, 1963, Chaps. 5, 6).

In 1927 the Reichstag passed an extremely generous system of unemployment insurance under the optimistic premise that the economy would soon improve and unemployment would drop (Eyck, 1963, pp. 135ff). At the same time it voted large salary increases for all civil servants. Such fiscal optimism and generosity to political supporters is frequently observed in democratic countries and is a common cause of budget deficits. These actions resulted in a severe financial crisis following the economy's collapse in the early 1930s and became a further source of parliamentary strife.[5] Add to these subsidies for farmers and interregional transfers, and one finds that much of the attention of the Reichstag in the late 1920s and 1930s was devoted to distributional questions that are inherently zero sum and divisive (Eyck, 1963). Although no constitution could have allowed the Reichstag to sail through this troubled period without some strife, we shall discuss several features of constitutions that can deter legislatures from focusing upon zero-sum redistribution policies (Chaps. 6, 15, and 16) and prevent them from myopic and fiscally irresponsible actions (Chap. 17).

Under the Weimar Constitution the German president selected the chancellor, who then selected the other members of his cabinet (Eyck, 1962, Chap. 3). The cabinet did not need to be approved by a majority of the Reichstag. On several key occasions proposals of the cabinet were voted down by the cabinet members' own parties (Eyck, 1963; Lespius, 1978). The division of legislative and executive authority *within the Reichstag* allowed under the Weimar Constitution, and the paralysis it caused, helped to destroy popular support for parliamentary democracy in the Weimar Republic.

The feature of the Weimar Constitution that contributed most to the impotency of the German government and the demise of the Weimer Republic, however, was the division of authority between the president and the Reichstag. In building a strong presidency into their constitution the Weimar Convention had sought to achieve the kind of stability the United States had experienced with its strong presidential system (Eyck, 1962, p. 72). Max Weber was one of the intellectuals at that time who favored a strong president to counter the political paralysis that might arise when power is shared in a multiparty legislature (Peukert, 1991, p. 39). In the Weimar Constitution, the president's power stemmed from his authority to disband the Reichstag and call new elections, and to rule by decree in the interim and in other emergency situations. The octogenarian President von Hindenburg made repeated use of this authority in the waning years of the Weimar Republic, undermining both the effectiveness of the Reichstag and the legitimacy of the German government. The most serious failure of the Weimar Constitution was the ambiguous and contradictory division of authority among the president, the chancellor, and the Reichstag (Lepsius, 1978, pp. 47–50; Carstairs, 1980, pp. 165–66). The president could appoint the chancellor and dissolve the Reichstag, but could not legitimately implement a program (although he could and did govern by decree). The chancellor could form a cabinet and propose a program, but could not necessarily get it through the legislature. The rank and file legislators could block legislation but, with the leadership of several parties in the cabinet, was unable to initiate and pass legislation.

As we have already stressed, constitutional divisions of authority between president and a legislature have also resulted in political paralysis in the United States and Latin America, and have undoubtedly contributed to political instability in Latin America and the recurring appearance of dictators there (Linz & Stepan, 1978). We discuss various options for establishing effective parliamentary government and avoiding paralysis between the executive and legislative branches in Chapters 8 through 10, 17, and 18.

Constitutional Democracy's Optimistic Premise

The notion, that individuals have the capacity to design a set of political institutions that will advance their joint welfare, embody them in a constitution, agree to it, and live by it expresses a good degree of optimism about human intelligence and capacity for self-government. The Greeks in the sixth century B.C. appear to have had this optimism. Those who study modern democracies and adopt the rational self-interest assumption regarding individual behavior often do not. Riker (1982b) and Ordeshook (1992), for example, associate this kind of optimism with populism. They reference public choice regarding the inconsistency or irrationality of the outcomes from political processes to question the populist's confidence in the capacity of democratic institutions to reveal and advance people's common interests. They appear skeptical about our ability to design and implement institutions that generate good outcomes and, accordingly, emphasize the constraints that must be placed on government.

The Founding Fathers of the United States certainly were appreciative of the need to restrain government, and of humankind's proclivity for selfish and shortsighted behavior, but they clearly also subscribed to views spawned and developed during the Enlightenment regarding the ability of people to reason and learn from their mistakes. They believed that they possessed the capacity to design political institutions that took account of humanity's selfishness and yet avoided the pitfalls of past governments. As Edward S. Corwin (1925 [1971], p. 94) observed that, "surely if any man of the time may be regarded as representative of the sober, unimaginative intelligence of America" it was George Washington. Yet he too was imbibed with the same optimism.

> The foundation of our empire was not laid in the gloomy age of ignorance and superstition; but at an epocha when the rights of mankind were better understood and more clearly defined, than at any other period. The researches of the human mind after social happiness have been carried to a great extent; the treasures of knowledge acquired by the labors of philosophers, sages, and legislators, through a long succession of years, are laid open for our use, and their collected wisdom may be happily applied in the establishment of our forms of government. . . . At this auspicious period, the United States came into existence as a nation; and, if their citizens should not be completely free and happy, the fault will be entirely their own. (From George Washington's "Circular Letter Address to the Governors" dated June 8, 1783)

Washington and his fellow eighteenth-century Americans seemed as willing to gamble on the capacity of the human mind to define workable political institutions as were the Greeks in the sixth century B.C. Any contractarian theory of constitutional democracy must rest on a similarly optimistic premise about the capacity of humans to reason collectively on at least some occasions.[6]

Based on their understanding of human nature and knowledge of political history, the Founding Fathers of the United States designed a system that, in some respects, as in its federalist structure, was quite innovative. Most of the world's experience with democratic government has come in the 200-plus years *since* the U.S. Constitution was written, however. Given their faith in mankind's capacity to learn and reason, Jefferson, Madison, and the other Founding Fathers would certainly argue that we should know more today about political institutions than they did, and we should be capable of designing better institutions than they did.

Public choice and political science have given us a great appreciation and under-

standing of democracy's limitations. But they have also increased our understanding of how these pitfalls can be avoided and how the potential gains from collective action can be realized. The premise underlying this book is that this knowledge can be harnessed, and that rational individuals can design and agree to political and social institutions that channel and constrain individual self-interest to the betterment of all.

A Guide for the Reader

In the next two chapters we discuss the nature of government and the nature of constitutions. The focus is not on what governments actually do, which is the usual subject matter of public choice, but on what they should do if they are to advance the interests of the citizens. Thus, the emphasis is normative. We seek to describe that which government ought to do, and how constitutionally defined institutions may help to ensure that it does that which it is supposed to do.

Chapters 6 through 21 take up the different sorts of institutions that might be included in a constitution. The perspective is always that of rational individuals choosing institutions to advance their collective interests. I have tried to cover all of the main components of a constitution that a community might wish to consider including. Although a stronger case can be made for some institutions than for others—and I shall propose a few rather novel institutions for consideration— the objective is not to delineate a single best blueprint for a constitution. Rather, I hope to show that there are alternatives to existing political systems that have the potential of improving their outcomes, and that in considering these options a community should not simply restrict its attention to different combinations of the institutions extant in other countries. An additional objective is to indicate how the different parts of the constitution fit together and, therefore, how the choice of one part depends on the others.

Part III focuses upon institutions that are primarily intended to reveal individual preferences and thereby to achieve an optimal allocation of goods and services, an optimal set of governmental policies. Part IV examines institutions that are more of a brake on government, institutions to control the agent. The line between Parts III and IV should not be drawn too darkly, however. Federalism (Chap. 6), and even the parliamentary voting rule (Chap. 11), can serve as both institutions for revealing individual preferences and as checks on governmental authority. Referenda (Chap. 12) and the market (Chap. 15) can both reveal citizen preferences and check a government's discretionary authority. The grouping of these topics reflects my judgment regarding their potential primary roles in a constitutional democracy.

Part V takes up questions that must be answered before a constitution can be drafted. Who are the citizens? Who is to write the constitution and how will it be ratified? Despite their temporal priority, I have left these questions to the end because I believe that their answers are more apparent once one has a clear picture of how the constitution is likely to look. Part VI consists of a single chapter summarizing the main points of the book. The reader who wishes a more detailed overview than is contained in this section should begin with Chapter 22.

The book is long and the reader may not wish to read every word or every chapter. Chapters 8 through 10, on representation, form a package, with the discussion of voting rules in Chapter 11 closely related. Chapter 18, on dictatorship, builds on Chapter 17, the executive branch. The remaining chapters more or less stand alone.

Many of the arguments draw upon results in public choice and political science that are rather technical. I have chosen not to belabor the reader with technical detail, and so the main text gives only descriptions of more complicated theoretical arguments, simple examples, and intuitive illustrations. Where a little mathematics might clarify an argument, I have placed it into footnotes. The footnotes also contain amplifications of some points using more technical jargon as well as references to the formal literature. The reader who seeks the path of least resistance should soon be able to recognize those footnotes that should be skipped. A short Glossary is provided after Chapter 22 that covers specialist terms frequently used in the main text.

Notes

1. Arendt (1963, pp. 198–200). Arendt references the Wilson quotation (p. 198).
2. The discussion of this event is based mainly on Meier (1990) and Farrar (1988).
3. James Madison, like many of the other Founding Fathers, was a student of politics from the classical period. Thus, it is likely that his ideas about factions and how to curb their detrimental effects were influenced by Cleisthenes' reforms.
4. Attributed to Pericles by Plutarch as quoted by Meier (1990, p. 61).
5. The decline in output in Germany between 1929 and 1931 was comparable to that in the United States, and much greater than elsewhere in Europe (Childs, 1980, p. 44).
6. For additional discussion of optimism, populism, and contractarian thinking, see Mueller (1990) on James Buchanan.

4

Why Have Government?

> What made the establishment of societies necessary was . . . the fact that the interests of individuals clashed. But what made their establishment possible was the fact that those same interests *also* coincided. *In other words:* It is the overlap among different interests that creates the social bond, so that no society can possibly exist save as there is some point at which all the interests *concerned* are in harmony. Now: society should be governed exclusively in terms of the common interest *of its members*. (Italics in original.)
>
> JEAN JACQUES ROUSSEAU

> The only orthodox object of the institution of government is to secure the greatest degree of happiness possible to the general mass of those associated under it.
>
> THOMAS JEFFERSON

Rousseau like Thomas Hobbes before him reasoned that government emerged to control the clash of interests that existed in anarchy and to satisfy the common interests of the community. The contractarians' depiction of anarchy as a clash of interests resembles the economist's description of the clash of interests that occurs when individuals meet and compete for scarce resources in the marketplace. When analyzing this competitive struggle, economists generally assume that individuals act rationally to advance their well-defined interests. This behavioral postulate underlies the study of politics in the branch of economics called "public choice," and is increasingly assumed in more formal work in political science and sociology.[1] It is the assumption about human behavior that we shall adopt throughout this book.

As the underlying behavioral postulate for the purely positive analysis of all human behavior, the applicability of the rational self-interest assumption can be challenged.[2] But as the foundation of a *normative* analysis of political institutions, the assumption seems unassailable. Even if individuals do not always act in perfectly rational ways, they would presumably wish to be governed by those institutions that they would rationally choose.

Some might object to the assumption that individuals seek to advance their interests as a premise for a normative analysis of politics. But individuals can have "interests" that include not only those things that enhance their own personal welfare. They may wish to see the welfare of at least some other individuals advanced, or to see a particular conception of the "good life" realized in their community. Therefore, we do not assume that all individuals behave as the kind of ethical dwarfs conjured up by the term *Homo economicus*. On the other hand, we will at least allow for the possibility that most

individuals, most of the time, have rather narrowly self-interested goals. Greed is a fact of political life as it is of economic life. Were this not true, the catalogue of problems faced by the world's democracies with which this book began would not exist.

Given that some people are selfish some of the time, and that the "things" that make people happy—food, shelter, companionship—are provided in limited supply, conflict over their distribution can be expected, and indeed has been the main subject matter of mankind's history. Not surprisingly, therefore, the protection of individuals from these sorts of conflicts has been cited by political philosophers as a primary justification for government. Some argue that it is government's *sole* justification (e.g., Nozick, 1974). We take up this question first.

The Social Dilemma

The gains from collective action to reduce conflict have been frequently depicted as a prisoners' dilemma.[3] Table 4.1 presents the payoffs to two individuals in a conflict situation, say two ranchers on neighboring properties in the Wild West of late-nineteenth-century America, with Rancher Row's payoffs appearing first in each parentheses. Both ranchers are better off living peacefully adjacent to one another than they are trying to kill one another and steal each other's land (square 1 provides higher payoffs to both than does square 4). But either rancher would be still better off if he could succeed in taking the other's land (squares 2 and 3 each provide a higher payoff to one of the ranchers than he obtains in square 1). The result, as anyone who has ever seen a cowboy movie knows, is that the two ranchers both try to steal the other's land.

The "dilemma" arises in this situation because the steal-kill strategy *dominates* the cooperative, live-peacefully strategy. Regardless of what the other rancher decides to do, each rancher is better off if he chooses the noncooperative, steal–kill strategy. The two dominant strategies intersect at square 4 in Table 4.1 in which both individuals are worse off than they could have been had they both chosen the cooperative strategy. An institution that would lead both individuals to square 1 would satisfy the normative goal we have set for ourselves. It would advance the interests of all members of the community.

Once a rancher recognizes the nature of the dilemma, he has an obvious incentive to approach the other and to try to work out a settlement where each party agrees to live peacefully *in exchange* for the other's doing the same. But each must also recognize the incentive the other has to *break* that agreement. Both ranchers refrain from stealing

Table 4.1. Ranchers' Strategy Choices

		Rancher Column	
	Strategy Choices	Live peacefully	Steal and kill
Rancher Row	Live peacefully	(1) (100, 100)	(3) (0, 150)
	Steal and kill	(2) (150, 0)	(4) (10, 10)

the other's cattle until the calves are born in the spring. Then, mysteriously, breaks appear in the fence separating the ranches, and each rancher suspects the other of stealing his unbranded, new-born calves.

The potential losses to all members of a community are such that all communities have developed some forms of institutions to bring about the cooperative, nonstealing outcomes in so-called prisoners' dilemmas. *Norms* of behavior are impressed upon people from childhood on to induce them not to steal almost out of habit—that is, without thinking. Religions demand obedience to commandments and an unquestioning *belief* in God. Norms and religions forbid most acts like stealing, which lead to noncooperative equilibria in prisoners' dilemma games.

Where norms and religion tend to bring about cooperation in prisoners' dilemmas by preventing people from even contemplating undertaking a particular action, cooperative solutions to prisoners' dilemmas can arise even when individuals consciously calculate the payoffs from each action and act only to advance their narrowly defined self-interest. Cooperative solutions can even occur in the absence of formal communication between the parties involved (cf. Axelrod, 1984; M. Taylor, 1987). This can happen, for example, when the same players confront the same situation over and over again. Each party, realizing that he faces a string of outcomes like square 4 in Table 4.1 (involving, say, stealing but not killing) as against square 1, chooses to cooperate on an early round as a signal of a willingness to cooperate, and then continues to do so as long as the other person also cooperates. If both people behave in this way a string of cooperative outcomes occurs, even though in any single repetition of the game situation the stealing strategies still dominate.

Perhaps the most remarkable example of this occurred during World War I (Axelrod, 1984). The kind of trench warfare that characterized World War I resulted in the same troops facing each other across barbed wire for prolonged stretches. If each side targeted the other's trenches with pinpoint accuracy, fatalities could be high. The cooperative solution to this "dilemma," at least from the perspective of the troops in the trenches, was to target the mortar fire *behind* the lines and at set intervals so that the opposing troops could avoid killing one another while maintaining the pretence of trying. This was done to placate the officers far behind the lines, who thought it was the duty of their troops to kill those on the other side.

If opposing troops in combat can learn to cooperate over time, without any formal communication, so too can individuals engaged in normal social activities, when they confront recurring prisoners' dilemmas. Each person, when contemplating breaking the (perhaps tacit) cooperative agreement, must weigh the likelihood that the other player(s) will retaliate in future plays, and thus that his eventual loss will exceed his short-term gain. Even the narrowest calculation of self-interest can induce a rational person to cooperate in an infinite series of prisoners' dilemmas.

The resident of a small town leaves her door unlocked when she goes shopping, in the knowledge that she and her neighbors are engaged in an infinitely repeated prisoners' dilemma supergame, and that they, recognizing as she does the nature of the game, will not steal from her. When she stays in a hotel in a big city, however, she locks her door when she goes out.

For as long as cities have existed, they have had the reputation of being places where crime is more prevalent than in the countryside. Although cities may be more "wicked" than small towns, the people who live in cities are not necessarily more

wicked than those living in small towns. City dwellers face different incentives. They, like people in small towns, encounter opportunities to lie, steal, and commit other acts that may advantage them at the expense of others. But, unlike the small-town resident, the other people the city dweller confronts in the many prisoners' dilemmas she encounters are continually changing. Both the size and the mobility of urban populations result in prisoners' dilemmas played with large numbers of players with changing identities. Cooperation is less reliably rewarded, noncooperation less predictably punished. The rational self-interested individual responds to these incentives by behaving noncooperatively in a greater number of the prisoners' dilemmas that she confronts.

He who violates a community norm is punished by the approbation and ostracism of the community. He who violates a religion's commandment is punished by his conscience telling him that he has injured God, and by the fear that God may someday repay the injury. He who chooses not to cooperate in a prisoners' dilemma supergame is punished by the other player(s) in later plays of the game. When none of these forms of punishment suffice to induce cooperation in prisoners' dilemmas, then other, more formal means must be found if a society is to avoid the losses resulting from the noncooperative outcomes. Thus, as communities become larger and more mobile, the norms and customs that govern behavior in the small, traditional community are supplemented and replaced by codified laws and by police and judges who enforce them. Hence, a fundamental justification for the state is to define and induce cooperative behavior by all citizens in the many social dilemmas that they face.

Cooperation in the Provision of Public Goods

Laws and an agency to enforce them are an example of what economists define as a *public good.* When stealing, vandalism, and other forms of antisocial behavior are prevented, all citizens are better off. All consume the benefits of law and order provided by the state.

Other examples of public goods include the defense of the community from outside attack, preservation of the environment, roads, and parks. All public goods have the property that when once provided to one member of the community, they must (may) be consumed in equal quantities by all members. If the public good is in fact a good—that is, we are all at least potentially better off by its provision—then its provision constitutes a form of prisoners' dilemma with each of us preferring not to pay. To overcome this "free rider problem" some form of collectively enforced contribution scheme is required (Olson, 1965).

Another category of activities often cited in explaining the need for government is externalities. Ronald Coase (1960) has illustrated, however, that the existence of an externality does not always necessitate intervention by government to achieve an outcome that leaves both parties better off than before. If your tree blocks my view of the valley, I offer to purchase an easement that requires you to trim the tree, an offer that potentially improves the welfare of both of us.

Most readers have undoubtedly observed that disagreements between neighbors are not always amicably settled by one neighbor offering the other a payment. My first action might be to approach you and threaten to cut down your tree claiming that you have no right to block my view. You might understandably claim such a right. At a

minimum, then, an institution like government is needed that defines and enforces property rights. Before we begin bargaining about a compensation, each of us must know who must compensate whom.[4]

Even when property rights are clearly defined, however, this private solution to the externality problem is only feasible when the number of affected parties is small. Suppose, for example, that residents and factories along a river have the right to dump sewage and trash into it, and large numbers of them exercise this right. The many people who wish to swim and fish in the river might be willing to offer compensation that in aggregate would be large enough to induce the polluters to cease polluting. But the cost of each swimmer and fisherman negotiating separate compensation with each polluter would surely be prohibitive. In even the most orderly anarchy, this potential improvement in community welfare would likely be missed.

Prisoners' dilemmas, public goods, and externalities are instances of possible improvements in allocative efficiency, situations in which all members of the community can be made better off through coordinated or constrained actions. They arise because one person's action, perhaps unintendedly so as in the case of an externality, affects the welfare of another. Such situations must sometimes arise when people come into contact with each another. If we define a community as a group of people living and working in proximity to one another, then all communities must confront situations in which its members can all be made better off through collectively organized and constrained actions. In small, stable communities like tribes, informal mechanisms (norms, taboos, customs) often suffice to bring about cooperation among members. But no large society has ever relied solely on custom and tradition to coordinate its members' actions and satisfy their collective wants. The transaction costs of gathering information on individual preferences to establish what those wants are, and of sanctioning deviant behavior, are simply too large (Dahlman, 1979). More formal information gathering and policing institutions are required. These formal institutional arrangements we call government.

Government Intervention and Redistribution

An important distinction in economics, and one that we shall emphasize in this book, is between an action that makes everyone better off and one that makes some individuals better off and others worse off. The former we shall call an improvement in allocative efficiency, the latter a redistribution. There are certain kinds of redistribution, or, more accurately, institutions for bringing about transfers of income and wealth that can make everyone better off. We shall describe two of these before we discuss redistributive activity of the more traditional kind, where some people are made worse off by the transfers taken from them.

Recall that our conceptualization of individual interests allows for the possibility that I get utility out of seeing you better off. Now it might seem that this form of externality could be efficiently removed without the need of governmental action. I can experience the joy of seeing you better off by simply giving you something, like money, that will make you better off. You presumably have no reason to stand in the way of such a transfer.

It may be, however, that what would give me utility is not seeing a particular person better off (i.e., not transferring money to a single individual) but seeing a large group of people better off—for example, seeing all of those in poverty made better off. To

attempt this with my own resources would exhaust my wealth, but if I am willing to give a certain amount to achieve this end, and enough other people are also willing to make contributions, it is possible that together these contributions would be enough to achieve our goal. The alleviation of poverty is, for those of us willing to contribute, a public good—that is, something we all "consume" in equal quantities. All contributors might be made better off if an institution existed to facilitate these transfers. We again have a situation in which government could be the lowest transaction-cost institution for advancing the interests of the community.[5]

Insurance also brings about redistribution. Income is transferred from the healthy to the sick, from the employed to the unemployed. Even people who pay no regard to the welfare of others may contribute to an insurance pool when they are healthy and employed to insure against the risk that these conditions may change. All members of the community may be better off contributing to insurance pools than bearing all of the risks themselves. The creation of such insurance programs is another possible way in which a government can advance the interests of all members of a community.[6]

Of course, much insurance is provided not by government but by private firms, perhaps subject to government regulation. Thus, the fact that all members of the community may be better off contributing to an insurance pool does not automatically imply that government is the optimal institution for creating and managing this pool. The same institution that provides police protection need not provide insurance against theft. Additional arguments are needed as to why government is the most efficient institution for providing certain kinds of insurance. These arguments are examined in Chapter 16.

Redistribution that Makes Some Individuals Worse Off

If our goal were to explain why governments *do* exist, and not why they ought to, we would have to discuss the other, more typical, form of redistribution—that which makes some people worse off so that others are made better off. Indeed, some political anthropologists claim that the state came into existence so that one group in a community could more effectively exploit the other members.[7] Some economists argue that what all governments do today is engage in this kind of redistribution.[8] But our concern here is not with what the state does do, but with what it ought to do. We seek institutions that are better than what we now have.

Nevertheless, some will assert that the state *ought* to engage in redistribution activities beyond those that have already been described. The voluntary contributions of the well-off to the poor and the redistribution that comes from insurance-type programs will be inadequate. Too many people will remain at unacceptably low levels of income or some other measure of welfare.

To make such a judgment one needs a normative criterion to compare or trade off welfare gains for some people against losses for others. A utilitarian principle is the obvious choice. One gives weight to and aggregates the welfare of all citizens to find the *best* distribution in society. But this position forces the question of who it is that assigns the weights and does the aggregating arithmetic. If it is a specific person or group, then the danger arises that this person or group places extra weight on its own welfare. History is filled with examples of rulers and ruling classes that justified extra claims on society's wealth with a variety of often ingenious arguments as to why their own welfare *ought* to receive higher weight than that of others. Once institutions are

established that allow one group to be made better off at another's expense, the danger arises—in a world in which some individuals are narrowly selfish—that these individuals succeed in using the institutions to their own advantage.

It is at least conceivable, on the other hand, that all members of a community agree to the same principle of redistribution and establish an impartial set of institutions for implementing it.[9] We are now back to essentially the same kind of redistribution we described in the previous section except that a different principle from that involved in, say, an insurance program would be involved. Any principle of redistribution that all members of the community agreed should be implemented satisfies the contractarian justification for collective action.

The Sorcerer's Apprentice Problem

The specter has been raised that a government once created will turn upon its creators. This danger is most conspicuous in Thomas Hobbes's alternative to anarchy—transfer all authority to an absolute monarch—but is present in all solutions that rely on a government, if those in government are even partly motivated by self-interest. In creating a constitutional government the citizens face a fundamental "principal-agent" problem. Ideally, they would make all decisions collectively and unanimously, just as they choose the constitution collectively and unanimously, but such a collective decision rule is impractical. While decision-making costs are economized by choosing agents to make decisions for the citizens, opportunistic behavior by the agents may lead to outcomes that do not advance citizen interests to the maximum degree possible. In extreme cases the agents may claim most or all of the gains from social cooperation.

The Founding Fathers of the United States sought to mitigate this principal-agent problem through the "checks and balances" built into the Constitution. But these checks and balances have not prevented the government from becoming a Leviathan, and they now produce deadlocks that hinder it from efficiently providing those goods and services that everyone expects from government.

Any society that creates a set of democratic institutions must confront the Sorcerer's Apprentice Problem. How can government be given sufficient authority to act effectively on the citizens' behalf to advance their interests, and at the same time ensure that those in government or with influence over it do not use this freedom and authority to advance their interests at the rest of the citizenry's expense? In effect, once government is created, the citizens become involved in two sorts of prisoners' dilemmas, one among themselves, which government is supposed to help solve, and one between the citizens and the government, or, more accurately, the citizens in the government. Obviously, the government cannot be relied upon to resolve the second prisoners' dilemma. It is here that a constitution can play a crucial role. If the citizens create the government, and do so by writing a constitution, then this constitution must define institutions and create incentives so that all parties to the constitutional contract, including those who will someday have the authority to enforce it, abide by it.

Summary

The constitutional perspective is well captured by Abraham Lincoln's description of American government as being *of* the people, *by* the people, and *for* the people. A

government formed by rational people to advance their individual interests, however noble or narrow these may be, will be a government for the people. If all people participate in and agree to the institutions of government, then these institutions will serve the interests of all the people. The constitutional perspective toward government sees its normative foundation as resting on the unanimous agreement of the community in the constitutional contract that creates that government, a unanimous agreement that arises because the institutions defined in the constitutional contract are designed to advance the interests of all citizens.

Numerous other normative objectives have been proposed. Whatever their intrinsic merits, if they cannot secure the unanimous support of the community, they effectively impose the opinion of some person or group as to what is best for the community over the opinions of other members of the community. Any normative defense of such objectives must be based on an elitist line of argumentation. The ethical observer, those born with divine rights, the chosen few are to select goals for the community, design the institutions for achieving these goals, and presumably run the institutions once they are in place. In rejecting this elitist position, we are forced to confine ourselves to the investigation of those goals and institutions that are, in principle, capable of unanimous support.

Fortunately, the set of institutions meeting this criterion is rich and varied. Social life presents many situations in which the welfare of all can increase through agreements that place certain constraints on future behavior, that commit everyone to contribute time or money for the provision of public goods. The common risks a society faces and the common affection that people have for one another can induce them to establish institutions for transferring income from those who are more fortunate to those who are less so. Various institutional arrangements are available for achieving the common goals of the community. Our task will be to characterize their properties.

Notes

1. In public choice and political science, see Downs (1957, pp. 3–20) and Buchanan and Tullock (1962, pp. 17–39); Riker and Ordeshook (1973, pp. 8–37), Mayhew (1974), and Ordeshook (1986); and in sociology, Coleman (1990).

2. Attacks on the use of the rational self-interest assumption in the social sciences have been frequent and sometimes strident. Some recent examples include Margolis (1982), Mueller (1986), Etzioni (1988), and the essays in Mansbridge (1990).

3. See, for example, J. Buchanan (1965), R. Hardin (1982), Cornes and Sandler (1986, Chap. 8), M. Taylor (1987), Mueller (1989a, Chap. 2), and Ostrom (1990).

4. Ellickson (1991) has illustrated the important role that norms can play in reaching cooperative outcomes in externality situations. This solution to externality problems, however, again relies on sufficiently small and stable communities to ensure that commonly held norms exist and are enforced.

5. The pioneering discussion of this type of redistribution is by Hochman and Rodgers (1969). See also von Furstenberg and Mueller (1971) and Thurow (1971).

6. For arguments that government is the lowest-cost institution for providing some forms of insurance, see Arrow and Lind (1970).

7. This view is held by Marxist anthropologists, among others. For an excellent review and references to the literature, see Haas (1982). Douglass North (1981) distinguishes this predatory theory of the state from contractarian theories.

8. For example, Aranson and Ordeshook (1981) and Brunner (1978).

9. In Chapter 5 we discuss the possibility that individuals would unanimously agree to a set of institutions that would, among other things, distribute the society's resources. In Harsanyi's (1955) theory the resources would be distributed according to utilitarian principles as captured in a Benthamite welfare function. But in this case it is not an outside observer or a subset of the community that does the maximizing but *all* members of the community themselves. They unanimously agree on a single distribution, because they assume that they have an equal-probability of being every member. The risks built into this equal probability assumption in Harsanyi's theory would lead rational individuals to include insurance-like redistribution into the institutions defined by the social-welfare function, just as the uncertainties that Rawls (1971) builds into the original position produce an insurance-like redistribution in his nonutilitarian social contract.

5

The Nature of a Constitution

All speculations concerning forms of government bear the impress, more or less exclusive, of two conflicting theories respecting political institutions, or, to speak more properly, conflicting conceptions of what political institutions are.

By some minds government is conceived as strictly a practical art, giving rise to no questions but those of means and an end. Forms of government are assimilated to any other expedients for the attainment of human objects. They are regarded as wholly an affair of invention and contrivance. Being made by man, it is assumed that man has the choice either to make them or not, and how or on what pattern they shall be made. Government, according to this conception, is a problem, to be worked like any other question of business. The first step is to define the purposes which governments are required to promote. The next is to inquire what form of government is best fitted to fulfill those purposes. Having satisfied ourselves on these two points and ascertained the form of government which combines the greatest amount of good with the least of evil, what further remains is to obtain the concurrence of our countrymen, or those for whom the institutions are intended, in the opinion which we have privately arrived at. To find the best form of government, to persuade others that it is the best, and, having done so, to stir them up to insist on having it, is the order of ideas in the minds of those who adopt this view of political philosophy. They look upon a constitution in the same light (difference of scale being allowed for) as they would upon a steam plow or a threshing machine.

To these stand opposed another kind of political reasoners who are so far from assimilating a form of government to a machine that they regard it as a sort of spontaneous product, and the science of government as a branch (so to speak) of natural history. According to them, forms of government are not a matter of choice. We must take them, in the main, as we find them. Governments cannot be constructed by premeditated design.

JOHN STUART MILL

The body politic is formed by a voluntary association of individuals. It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.

JOHN ADAMS (as drafted for the preamble
of the Massachusetts Constitution)

The historical, evolutionary perspective on government is well illustrated in Friedrich Hayek's (1973–79) treatise (*Law, Legislation and Liberty*) written more than a century

after John Stuart Mill's *Considerations on Representative Government* (1861). To understand why a particular set of political institutions exists in a country and how they affect its citizens, one must study its history. The purposeful actions of individuals combine with chance in an evolutionary process that determines a country's political institutions. These institutions are not the direct consequence of conscious choice, nor would the citizens necessarily choose them if given the opportunity. The approach is entirely positive. No claim is made that the institutions that exist satisfy any normative properties, save their ability to survive.

The British "constitution" has been "written" by such an evolutionary process. On a more micro-level the usefulness of this positive approach to political theory might be illustrated by following the development of the concept of sovereignty in British and American political thinking. The word "sovereign" originally referred to a single person, *the* sovereign, the king, the person above all others from whom all political authority stemmed. On June 15, 1215, at Runnymede the English king was forced to share some of his sovereignty with the English barons, and by fits and starts this process continued with the nobility, and eventually those of common rank claiming an increasing share of political authority. By the time of the American Revolution, Sir William Blackstone, the great English jurist, would describe "the sovereignty of the British constitution [as] lodged in . . . the trinity of king, lords, and commons."[1] The political history of Great Britain transformed sovereignty from being the authority of a single person into a generalized political authority that could be shared by many.

The Americans rejected the sovereignty of the British king and Parliament, and thus had to locate a new source of their sovereignty. In so doing they developed the idea, itself revolutionary, that ultimate sovereignty rested with the people themselves, with *all* of the people (Palmer, 1971 [1959]). John Adams expressed this idea in the preamble to the Massachusetts Constitution, and most certainly thought that the citizens of the United States possessed a similar sovereignty. Although this Revolutionary American interpretation of sovereignty can be understood in a purely historical, evolutionary, and positive context, it also reflected the view that political institutions were, or least could be, consciously chosen by the citizens. John Adams, Benjamin Franklin, Thomas Jefferson, and their contemporaries believed that individuals possessed the capability of inventing good political institutions just as they could invent stoves, timepieces, and other artifacts. Moreover, *all* individuals had this capacity.

Mill's (1861) treatise, from which the opening quote of this chapter is taken, clearly conceives of government "as strictly a practical art" whose specific forms are "an affair of invention and contrivance." Political institutions are assumed to be *potentially* subject to human design. The constitution can thus be a description of at least the broad outline of that design.

Viewed from this perspective there are essentially three questions we need to answer: (1) What are the potential normative properties of a written constitution? (2) To what extent can these normative properties be achieved in an actual written constitution? (3) What are the institutions that such a constitution would define?

Most of this book (Chaps. 6 through 20) is concerned with answering the third question, and also describing the various institutions rational self-interested individuals may wish to place in a constitution to advance their collective interests. Chapter 21 discusses how a constitutional convention might be called and how it would function, and thus indirectly seeks to answer the second question.

The present chapter also touches on the issue of whether individuals writing a consti-

tution would actually behave in a manner that would justify any normative claims for the outcome, but its main focus is on the normative claims themselves. Several works have discussed the normative properties of constitutions, or social contracts, and still others bare a close enough affinity to the question to be relevant. In reviewing these, we seek to link the kind of constitutional contract we see as optimal to the broader constitutional-contractarian literature. We seek to show in what normative sense a better constitution might produce a better society. We begin by describing the property of a constitution that makes it resemble a contract.

The Constitution as Contract

We think of a constitution as a form of social contract joining the citizens of the state and defining the state itself. As such, it possesses the properties of all contracts. We define a contract as follows:

> *Definition.* A contract is an agreement among two or more individuals specifying certain duties, obligations, and rights of each individual, and rewards and penalties for complying or violating the terms of the contract.

Contracts can be explicit or implicit, or combinations of the two—that is, all terms of the contract need not be defined explicitly—and the entire agreement could be informal and tacit. There are two further properties of contracts as constitutions to which we wish to lay stress, given the normative discussion in Chapter 4 on the purpose of government. Contracts are *unanimous* agreements among the affected parties. Joining a contract is a *voluntary* act.

Contracts owe their existence to the presence of uncertainty. If a landlord knows with certainty that a tenant will always pay the rent on time, take care of the property, etc., he will demand no rental contract of the tenant. If the tenant is certain that the landlord will provide heat, make repairs promptly, etc., she will demand no rental contract from the landlord. Uncertainty on the part of each as to how the other will act in the future in certain situations can lead them both to willingly join a contract specifying the actions required of each and the rewards and penalties for abiding by the terms of the contract, or breaking them. It follows that if the constitution is a sort of social contract, it too owes its existence to uncertainty in each individual's mind about the future of the society in which one lives, and in particular about the future behavior of other members of that society.[2] Accordingly, assumptions about uncertainty figure prominently in several contractarian theories about constitutions and the state.

Constitutional Choice: The Transformation of Self-Interest into Collective Interest

This book began with a review of deficiencies of real-world democracies. Many deficiencies can be traced to the success various groups have using the political process to achieve their narrow interests. Dairy farmers secure higher milk prices to their benefit and to the detriment of milk consumers. If narrow self-interest is so readily apparent and blatantly triumphant in everyday politics, why will it not also be present in constitutional politics? Why is the choice of a constitution not driven by the same narrow

interests and to the same end as ordinary legislation? Why are votes on constitutional provisions not simply votes on milk price supports one step removed; and if they are, how can one make normative claims for them?

There are several reasons to expect that a different kind of calculation underlies constitutional choices than underlies everyday political choices. First, the nature of the choices made is fundamentally different. At the constitutional stage, one chooses the institutions that will be used to make all future political choices, (e.g., the voting rule to decide on milk price supports, the construction of bridges, laws to regulate driving, and so forth). Because the same institutions will be used to make both choices that can benefit individuals and those that can harm them, in making a constitutional choice people may find institutions, for example, that limit future rent-seeking activities to be optimal. This might occur for two reasons. (1) The long-term nature of constitutional provisions makes it difficult to predict if a particular institution, like a voting rule, will benefit one's pursuit of narrow self-interest more than it hurts by facilitating the pursuit of self-interest by others.[3] (2) The aggregate deadweight losses and rent-seeking costs of institutions that allow narrow interests to triumph over the general interest may be seen at the constitutional stage to be so great that one is willing to place constraints on one's own ability to rent seek in the future to curb that of all others.[4]

An additional reason to expect that outcomes from a constitutional assembly differ qualitatively as well as substantively from those obtained through normal political action is related to both the nature of the choices made and the nature of the convention itself. It is one thing to stand in the parliament as the representative of the "dairy state" and argue that dairy farmers are special people whose incomes should be subsidized by consumers and taxpayers. It is another to argue at a constitutional convention that dairy farmers should be granted special rights or be treated specially in some other way in the constitution. Representatives to a parliament have a continuing relationship—they hope—with their constituents. They and their fellow representatives all understand the necessity of representing these interests well. But, at a constitutional assembly, it is the interests of all future citizens that are to be represented. Elster (1993a), drawing on the proceedings of the American and French constitutional assemblies at the end of the eighteenth century, emphasizes that participants in a constitutional convention generally feel compelled to defend their proposals in terms of the general interests of the nation, and not those of themselves or their constituents. Moreover, the general-interest nature of these arguments can place constraints on the types of measures that can eventually pass.

These points are well illustrated in a work by McGuire and Ohsfeldt (1986) testing whether delegates to the Constitutional Convention in Philadelphia voted to advance their own personal interests or those of their constituents. One of the seven variables they use to measure the personal interests of the delegates is whether they were deeply in debt. Now it would be easy to see how a member of Congress who was deeply in debt might favor large budget deficits and other inflationary actions to wipe out the real value of his debt. But what could a delegate to the Constitutional Convention have done to achieve this end? McGuire and Ohsfeldt (1986, pp. 87–88) argue that the delegate might oppose a strong national government because it would be more likely to enforce debt obligations. Perhaps. But the time gap between voting against a strong national government at the Constitutional Convention, the ratification of the U.S. Constitution, the Constitution's taking effect, and the eventual impact of the actions of the federal

government on debtors is great. If, how, and when a strong central government would affect the value of one's debt obligations are much more difficult questions to answer than whether a particular tax or expenditure bill will. Moreover, a strong central government can affect one's welfare in countless other ways. A rational delegate might well give little weight to his personal debt position when voting on whether the country should have a strong central government in the future. Constitutional choices are different, and so too therefore is the role of self-interest.[5]

The Constitution as a Fair, Just Contract

The different nature of constitutional choices figures prominently in Buchanan and Tullock's (1962) classic study. They emphasize the importance of the difference between agreements on the rules of a game and agreements on the outcomes. Constitutions define the rules under which all future political games are to be played. Although it is unlikely that all individuals agree on whether a particular bridge should be built, it is reasonable to assume that they can agree on the rules to decide this and all other similar decisions in the future.[6] The impact of a bridge on someone's welfare is direct and predictable, but the impact of a constitutional provision, like a voting rule, is more uncertain. I may benefit from a particular voting rule on one decision and be harmed by it on another. The long-term nature of constitutional choices forces the individual to consider their likely effects on him in different future situations. Buchanan and Tullock assume that uncertainty at the constitutional stage is sufficient to make participants assume that they have an equal chance of being anyone else in the society, and thus to agree to a set of rules that maximizes their expected gain from collective action.

Buchanan and Tullock's description of the constitutional stage closely resembles Rawls's (1971, pp. 3–10) description of the *original position* from which individuals choose a social contract. Rawls does not argue that individuals are placed in the original position by the inherent uncertainty of the long-term choices they must make, but rather that they voluntarily choose to step behind a *veil of ignorance,* that shields all person-specific information about future positions from their view. Stepping behind the veil of ignorance is a moral action that individuals undertake to ensure that their choices are impartial. The uncertainty produced by the veil of ignorance leads to unanimous agreement on the social contract in Rawls's theory, just as it leads to unanimous agreement on the constitution in Buchanan and Tullock's theory. Given the similarities between their starting and ending points, one could make the normative claim that the constitutional choices Buchanan and Tullock describe have much the same properties of fairness and, hence, justness as does Rawls's social contract.[7]

Buchanan and Tullock view their study as normative (pp. 3, 312), employing a contractarian criterion for their norm.[8] A good constitution is one to which all citizens have agreed. If all people are rational and self-interested then they must expect to be better off with the constitution than without it. The constitutional contract has, therefore, the additional normative property of promising Pareto optimal outcomes.

John Harsanyi's (1955, 1977) modeling of social choices has close affinities to both Buchanan and Tullock's and Rawls's discussion. He first assumes that individuals' personal preferences satisfy certain postulates commonly employed to define rational choices in the presence of risk.[9] He then assumes that the social choice process exhibits

the same consistency or rationality. This postulate is considerably more controversial and would surely be objected to by Buchanan and many others, because it calls forth an organic view of the state.[10] Harsanyi's third postulate is that society should be deemed to be indifferent between x and y if every individual in society is indifferent between x and y. With these three assumptions, Harsanyi proves that all social choices must maximize a Benthamite social-welfare function of the following form:

$$W = a_1U_1 + a_2U_2 + \ . \ . \ . \ + \ a_nU_n, \tag{5.1}$$

where the a_is are positive weights attached to each person's utility.

Harsanyi reasons that when an individual makes choices that affect only himself, he uses his personal preferences, but that when he makes choices that involve the welfare of all of society, he uses his ethical preferences. His ethical preferences require him to place himself in the position of every other individual and assume that he has an equal probability of being each. If individuals use their ethical preferences to make choices that affect society's welfare, then they will place equal weights on the welfare of every citizen. All a_is in Equation 5.1 are the same and can be set equal to 1.0 yielding the welfare function originally proposed by Bentham.

$$W = U_1 + U_2 + \ . \ . \ . \ + U_n. \tag{5.2}$$

When individuals employ their ethical preferences as defined by Harsanyi, they act identically to the way Buchanan and Tullock assume they do at the constitutional stage. Although Rawls rejects all information that would allow people to make probability calculations behind the veil of ignorance, in other respects Harsanyi's ethical choices resemble Rawls's fair ones. That most individuals employ ethical preferences *a la* Harsanyi when they vote for representatives and engage in other everyday political activity is perhaps questionable. But that they might so act in writing a constitution is at least a possibility. If individuals are ever moved to weigh the welfare of others out of ethical arguments such as Rawls's, it is likely to be when they choose the basic rules under which they and future generations of citizens will live. The long-term nature of these choices must introduce some uncertainty over the impact of at least some provisions in the constitution. If one is then willing to marry the uncertainty over future position at the constitutional stage of either Buchanan and Tullock or Rawls to the utilitarian logic of Harsanyi, the constitution would define a set of institutions that are not only Pareto optimal but would also maximize Bentham's social welfare function (Equation 5.2).

Many people may accept these theories as normative justifications for *hypothetical* constitutional contracts but reject claims that they offer normative underpinnings for any real-world constitutions. Buchanan and Tullock appear to have the United States Constitution in mind in their normative investigation of constitutions.[11] However, the treatment of slavery and the method of representation chosen for the Senate suggest that the Constitution's framers knew who they were, who they would be, and whom they were representing. Delegates to the Philadelphia Constitutional Convention appear, at least in some instances, to have acted as their personal and constituents' interests dictated.[12] One needs to inquire, therefore, about the normative content of a constitution written by rational self-interested people who are not uncertain about their future positions under the constitution.

The Mutually Beneficial Constitution

Most social contract theories assume that the contract is written by individuals in a state of anarchy. When the anarchy is as Thomas Hobbes described it, it is not surprising that agreement can be reached to eliminate it. Figure 5.1 presents the utility levels of two individuals, *A* and *B*. In anarchy they are at point *S* with each experiencing very low levels of utility. Anarchy's elimination can improve both *A* and *B*'s welfare with the maximum possible improvements depicted along the line *PP'* (the Pareto possibility frontier). Rational self-interested people will establish institutions to eliminate anarchy and move to some point along the *PP'* frontier. No contract is possible without the unanimous agreement of the parties, and no rational individual will voluntarily sign a contract that does not promise to make her better off. If agreement is reached, it must be on a set of institutions that produces an outcome that makes both parties better off, a point like *E* lying between *X* and *Y*.

Under the assumptions made by Harsanyi, and by Buchanan and Tullock, each individual is, or assumes she is, uncertain of her future position and chooses that set of institutions which maximizes her expected utility. If all people envisage the same future

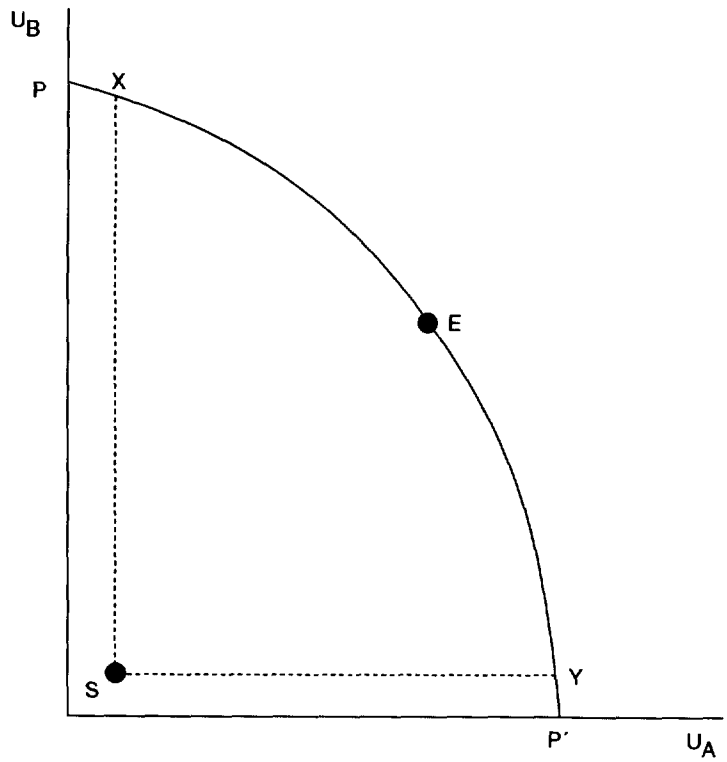


Figure 5.1. The Constitutional Choice

utilities for everyone in society, all will choose the same set of institutions as optimal. The equal probability assumption makes each person's calculation of expected utility identical to everyone else's. No disagreement exists, and everyone chooses the same set of institutions as optimal. The same thing occurs in Rawls's theory without the help of the equal-probability assumption. But when individuals at the constitutional stage are not uncertain about future positions, disagreement over the choice of institutions will occur. Thus, A favors institutions that result in Y, and B favors those that result in X. E is selected as a compromise. It represents the highest utilities each party can get out of the bargaining process that takes place at the constitutional stage.[13]

Without further discussion of the characteristics of the status quo S and the negotiations taking place from it, nothing can be said about the properties of E other than that it makes both better off than they were at S. John Nash (1950) in a now classic paper analyzed a similar "bargaining problem" to this one and put more structure into it. He placed certain constraints on the form of the utility functions, required Pareto optimality, a form of "independence of irrelevant alternatives," and symmetry.[14] Nash's independence of irrelevant alternatives axiom requires that if E is chosen out of a set of options O from a given status quo point S, then E must also be chosen from S out of any subset of O that contains E. Symmetry requires that if the utility levels of the bargainers are the same at S, then they must be the same at E. Nash proved that the only outcome to the bargaining game that satisfies his four axioms maximizes

$$W = (U_{EA} - U_{SA})\,(U_{EB} - U_{SB}) \tag{5.3}$$

where U_{EA} is A's utility at E and U_{SA} is A's utility at S. In more general form, with n individuals this W is often called the "Nash social-welfare function."

$$W = (U_{E1} - U_{S1})\,(U_{E2} - U_{S2})\,.\,.\,.\,.\,.\,.\,(U_{En} - U_{Sn}) \tag{5.4}$$

For those who find Nash's axioms a plausible descriptions of the likely outcomes from negotiations of rational individuals over the provisions of the constitutional contract, his theorem defines more explicitly the normative properties of any agreement reached, even when the individuals bargain from a known starting point with no uncertainty over future positions. All of the axioms can be criticized, but none is so outlandishly unreasonable to make Nash's solution to the constitutional bargain seem totally implausible, at least as a first approximation.

Nash's social-welfare function exposes a possible normative objection to accepting the outcomes of an agreement reached from an existing status quo by individuals who correctly perceive the agreement's impact upon them. The final outcome depends directly upon the relative positions of individuals at the status quo. If B is considerably better off than A at the status quo, as at S' in Figure 5.2, this differential is preserved in the agreement. With S' the status quo E is no longer even a feasible option under the unanimity rule. The chosen point must lie between X and Z at a point like E'.

The dependence of the final outcomes from a unanimous contract on the status quo causes some people to reject any normative claims for them on contractarian grounds. Implicit in this objection seems to be an assumption that the status quo must contain wide disparities in welfare levels, that the gains to the worst off are small, or both. But such an assumption is often unwarranted. Most new constitutions are written following the defeat of a country in war, a total collapse of a regime, or when the condition of

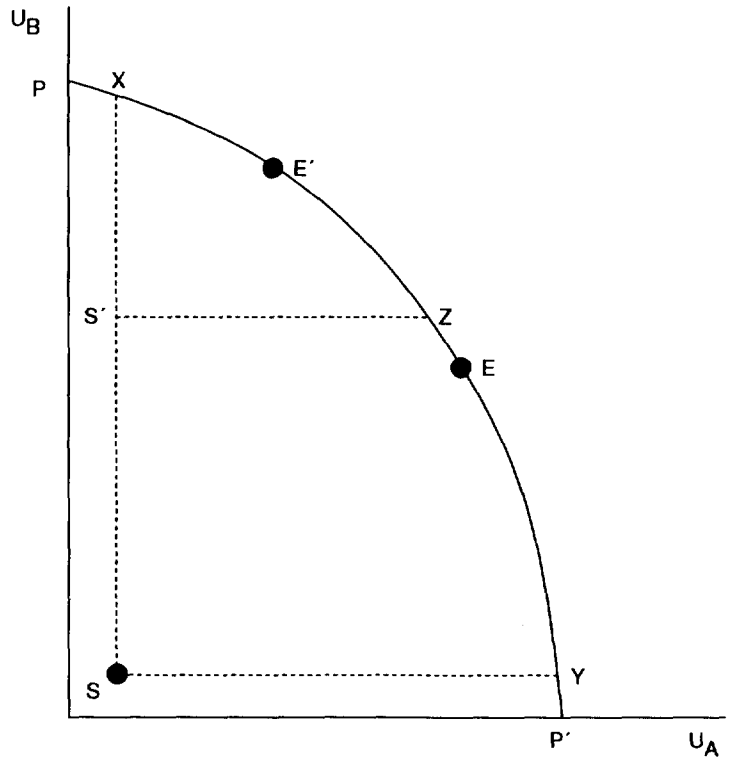


Figure 5.2. Effect of Change in Status Quo on Constitutional Choice.

the citizenry gets so bad that they choose to start all over again. From such starting points, large potential gains exist for most if not all of the population.

The collapse of Communism in Eastern Europe nations and the Soviet Union plunged these countries into conditions that have elements of a Hobbesian anarchy, and in central Yugoslavia into a literal Hobbesian anarchy. The failures of the Italian political system became so large and apparent to its citizens by the close of 1993 that they were willing to undertake a wholesale change in regimes. Differences in the positions of individuals in these countries certainly exist, but if the citizens in any one of them were able to agree upon a set of economic and political institutions that they thought would improve their welfare, who would deny that this would be a good thing? While they most likely would agree to a somewhat different set of institutions if each individual placed herself behind a Rawlsian veil of ignorance before reaching an agreement, would this suffice to reject the constitutional contract to which people did agree as having no normative value? Would we not rejoice for the Russians or Yugoslavs if they were able to agree upon and implement a set of institutions like those of Western Europe or the United States even though they would not necessarily be the best set possible, and might perpetuate some existing inequities?[15]

The Contractarian Perspective on Constitutional Democracy

Both Russell Hardin and Peter Ordeshook object to conceptualizing the constitution as a contract. Ordeshook (1992, pp. 143–51) prefers to think of a constitution as a "de-

vice" for coordinating actions in the various prisoners' dilemma-like situations that individuals encounter over time, a device to avoid the Pareto-dominated outcomes that these social dilemmas are prone to produce. Hardin (1989, p. 119) prefers to think of it as a "convention" accomplishing the same end. Both objections rest to some degree on Hardin's and Ordeshook's views regarding what constitutions actually are and how they function in reality. Considered from this perspective their points are well taken. But thinking of the constitution as a contract among the citizens can provide a normative underpinning to the theory of constitutional democracy. In the three preceding sections we have discussed why agreement on a constitution may be possible, and some normative properties of such an agreement. These normative properties—Pareto optimality, maximization of a social-welfare function—are utilitarian in nature. In this section we take up some normative properties that are more contractarian in spirit.

A dictator promulgates rules that all subjects are supposed to follow. If the dictator is wise, she chooses rules that avoid Pareto-dominated outcomes so that the economic surplus generated by the community is maximized subject to the constraint that most (all) of it goes to the dictator (North, 1981, Chap. 3; Olson, 1991). With the surplus the dictator can pay a police force to ensure compliance with the rules of conduct laid down.

A primitive society might contain a group of hereditary chiefs and shamans who, by custom and tradition, receive a large fraction of the community's economic surplus. These same customs and traditions might also lead the community's members to coordinate their actions and avoid the inferior outcomes of social dilemmas. In both cases we could speak of there being constitutions of sorts—that is, devices or conventions for bringing about cooperation in repeated social dilemmas. In neither case are we likely to regard the functioning constitution as one we would like to live under.

If one accepts individualism as a *normative* postulate—that is, that social institutions are good to the extent that they advance the interests of the individuals in the society—then a constitutional contract voluntarily joined by all members of the society must establish good political institutions. No rational individual joins a contract if she does not believe its provisions would advance her interests.[16]

With this normative property in mind, the contract metaphor can be seen to have three conceptual advantages in a theory of constitutional democracy: (1) It solves the infinite regress problem with respect to the choice of voting rule, (2) it fosters compliance with the terms of constitutional contract, and (3) it suggests how the legitimacy of and compliance with the constitution can be enhanced.

Contractual Agreement and the Infinite Regress Problem

When all members of a community must approve a proposed collective decision for it to be instituted, the entire community functions essentially as a committee of the whole; it is in adjournment perhaps much of the time as individuals engage in the everyday activities of life; and it is reconstituted when an issue requiring a collective decision arises. Such a community need not concern itself with the question of what rules it uses to decide issues, for there is effectively but one rule involved—the rule of consensus among all citizens. When responsibility for a community's collective decisions is delegated to representatives it faces the additional collective decisions of defining procedures for selecting representatives and the voting rule that they will use. Rules for making rules must be selected; thus the community confronts the infinite regress problem.[17] The

only satisfactory way to solve this problem is for the community to agree unanimously on both the rules for selecting representatives, and on the rules which these representatives will use to make subsequent decisions.

If the political rules under which a community is to operate are not the outcome of an agreement among all members of the community, then they must be effectively selected by *some* members of the community, say the "Blues." With selfish individuals, the possibility certainly exists that the Blues select rules leading to outcomes that the Blues favor. If those who are not Blue, say the Reds, object that their interests are not being treated fairly, it is difficult to see what argument the Blues can put forward to counter this objection effectively. With selfish individuals the possibility certainly exists that a group of Blues would simply proclaim the existence of a polity and enslave the Reds, drawing up a constitution that places all subsequent power in the hands of the Blues. The only satisfactory way to avoid this essentially elitist imposition of a constitution is for all citizens to agree to it.[18]

Compliance

Even if all citizens have agreed on the content of a constitution, the possibility exists that some will not comply with some of its provisions, (e.g., provisions that make them worse off). An attractive consequence of forming the constitution by unanimous agreement among all members of the community is that its contractual nature may induce greater compliance with its provisions. Keeping promises is dictated undoubtedly by all moral codes, and most individuals are more likely to keep a promise that they openly and explicitly made than one that is tacit and implicit. A formal contract binding the citizens makes the political promises open and explicit. The potential of inducing greater compliance has figured prominently in the social-contract literature.[19]

Enhancing the Constitution's Legitimacy

The standard criticism of the contractarian legitimacy of a constitution is that the citizens of a country typically have not participated in its drafting, have not agreed to its provisions, are not in any meaningful sense parties to a genuine constitutional contract. This criticism has much obvious merit, but it also suggests its own undermining. If one accepts the argument that a constitutional democracy founded on a contractual agreement among the citizens would be desirable, if it could come about, then the obvious implication is that societies should strive to reach such agreements. Citizens can be represented in the convention that drafts a constitution, can participate in public debate surrounding its proposed provisions, can participate directly in its ratification. Contractarianism provides more than a *normative* justification for a constitutional form of government; it has implications for how the legitimacy and performance of actual governments can be improved. We take up this issue in Chapters 20 and 21.

Summary

The ways in which governments operate, the ways in which rules are interpreted, and the outcomes they produce are all altered over time by chance events. All are to some extent the unintended result of the course of history. Nevertheless, an important *poten-*

tial difference exists between a set of rules that is entirely the product of a series of separate events and decisions down through history and one that has been consciously designed on at least one occasion. The evolved constitution can be optimal only by accident or by some sort of Darwinian definition of optimality. The designed constitution must have been thought to be optimal by its designers at least one point in time and, more importantly, might conceivably be redesigned to make it optimal again.

In this chapter we have discussed several sets of assumptions under which a constitution might be deemed to be optimal, or normatively defensible. These range from an individualist-contractarian justification that emphasizes the voluntary consent attribute of a constitutional contract, to the more demanding theories that derive a Kantian normative underpinning by invoking uncertainty over future positions. Despite the contractarian nature of the main arguments, the underlying assumptions even allow one to associate the properties of the constitution with some social-welfare function theories, and thus offer a defense of them on utilitarian grounds.

All of the normative arguments assume a *unanimous* agreement among *all citizens*, however. Many readers may regard this assumption as being sufficiently far removed from the way real-world constitutions are written as to make these theories of little consequence as descriptions of actual constitutions. I share this opinion with respect to many existing constitutions, but not with respect to all existing constitutions, and certainly not with those constitutions that it is possible to write.

I shall defend this optimism in Chapter 21. Until then we shall examine the various institutions that citizens might wish to include in the constitution, maintaining for the most part the assumption that to do so the citizens will have to agree unanimously on them.

Notes

1. See discussion by James Smith (1971, p. 75) from whom this quote is taken.

2. One might object that, given the structure of the prisoners' dilemma, an individual is not uncertain about how others will behave. He or she *knows* that they will all defect (not cooperate). The purpose of the contract is, therefore, not to remove uncertainty but to give people incentives to behave cooperatively. However, this argument strikes me as too strong. In the absence of formal contracts, people are engaged in a variety of prisoners' dilemma supergames. Some will behave cooperatively some of the time. Some cooperation will be rewarded; some will not. By reducing uncertainty over what behavior is rewarded and when, contracts increase the incentive to cooperate.

3. To see this point more clearly, assume that a community produces and consumes the two goods x and y. Good y requires 2 units of labor; x requires 1. There are no other inputs. The price of a unit of labor is 1. Let each member of society have the same Cobb-Douglas utility function

$$U = x^{1/2}y^{1/2}.$$

With perfect competition the price of y is twice the price of x. Each citizen chooses quantities of x and y to maximize

$$U_1 = x^{1/2}y^{1/2} + \lambda(1 - 2y - x).$$

which yields x = 2y. Each person divides his or her income equally between x and y. Each achieves a utility level

$$U = \sqrt{1/2}\sqrt{1/4} = \sqrt{1/8}.$$

Now suppose that the government, which consumes no x or y, intervenes and raises the price of x to 2, with each worker in x allowed to earn a wage double that of producers of y. Each consumer again distributes his income evenly between x and y, and the new equilibrium has $x = y$. One-third of the population is producing x; two-thirds produce y. Those lucky enough to remain in the production of x achieve a utility of

$$U = \sqrt{1/2}\ \sqrt{1/2} = 1/2$$

Those producing y achieve

$$U = \sqrt{1/4}\ \sqrt{1/4} = 1/4.$$

Because everyone prefers to produce x when its price is artificially raised, the government has to select those who are allowed to produce it. If it does so fairly, each individual has a one-third chance of obtaining U = 1/2 and a two-thirds chance of obtaining U = 1/4 (i.e., an expected utility of 1/3). If the government did not intervene, all would achieve U = $\sqrt{1/8}$ = 0.354, a utility slightly higher than the 0.333 expected when the price of x is artificially raised. If people were uncertain whether they would be the lucky ones chosen to produce x or the unlucky y producers, they could achieve higher expected utilities by including in the constitution a prohibition on the government's authority to interfere with prices. Provisions of this type are discussed in Chapter 15.

Although this example treats an interference with the price system, there are many other examples of distortions introduced by the government to bring about redistribution that reduce the expected utility of all citizens. For example, consider tax loopholes that distort the behavior of those seeking to benefit from the loophole and require higher rates on general taxes that then distort other choices (e.g., higher income tax rates that distort work/leisure and consumption/savings choices).

4. Assume that government-induced income transfers are not free. Lobbyists and lawyers must get government to intervene on a group's behalf, and their employment uses up resources that have higher (i.e., nonzero) social value in other activities. Suppose, for example, to obtain the price increase in x discussed in note 3, its producers must spend half of their gains on lawyers, lobbyists, and other rent-seeking activities. Obviously this loss further strengthens the argument for constraints on the government's authority to intervene with the price system. But it would not deter those allowed to produce x from seeking the price increase, if they were sure that they would be the lucky ones. If the rules allow one group to rent seek, they generally allow all to do so. If the y producers can raise the price of y from 2 to 4, they benefit. With the price of x at 2 and the price of y at 4, the equilibrium again involves 2 units of x being produced for each unit of y. The two price increases offset one another and there will be no distortion in consumption. The rent-seeking outlays of the producers of both x and y lower their realized utilities from 0.354 to 0.295, however. Thus, even if an individual knew he would be successful at rent-seeking in the future, he might favor general prohibitions on the government's authority to redistribute income to eliminate the social waste from all groups striving to better themselves at the expense of others.

5. Of course, the interests of slaveowners were represented and protected in the U.S. Constitution, and delegates from slaveholding states did oppose a strong central government. More recently, former Communist countries have chosen to protect worker rights to form unions, which in turn can be expected to promote rent-seeking. In both cases one might argue that the interests protected in the constitution were somewhat broader than those typically served in everyday politics. But these examples and the formal tests of McGuire (1988) and McGuire and Ohsfeldt (1986) do indicate that all considerations of self- or constituent interest are not necessarily suppressed at the constitutional stage. In addition, they underline the importance of the process of selecting delegates to the convention, a question we take up in Chapter 21.

Eavey and Miller (1989) argue that both self- and constituent interests were also important in the ratification of the Pennsylvania and Maryland constitutions. They note, however, that the actions of many individuals are not readily accounted for in these simple terms.

6. Buchanan and Tullock (1962, pp. 77–80). The importance of the distinction between the choice of rules and the choice of outcomes within rules is often emphasized in Buchanan's work; see, e.g., Brennan and Buchanan (1985).

7. Buchanan and Tullock's description of the constitutional stage allows individuals to have far more information about the future society they will live in than Rawls's theory allows. Measured against Rawls's theory, therefore, their constitution would be less just than his social contract.

8. See also Buchanan (1986a, p. 240). I discuss the ethical content of contractarianism in Mueller (1989c).

9. These axioms were first employed by von Neumann and Morgenstern in their original study of the theory of games. Their use is not particularly controversial, if one is willing to assume individuals act rationally to begin with.

10. Buchanan's (1954) critique of Arrow's social-welfare function might be applied to Harsanyi's based on this postulate.

11. See Buchanan's (1986b) observations.

12. The classic study propounding this position is Charles Beard's (1913, 1968). More recent contributions include Lynd (1967), Wood (1987), Jillson (1988, p. 16), McGuire and Ohsfeldt (1986), and McGuire (1988).

13. The movement from Hobbesian anarchy is discussed from a contractarian perspective by Buchanan (1975).

14. For a clear statement and discussion of the axioms and theorem see Luce and Raiffa (1957, pp. 124–34).

15. The movements from S to E and from S' to E' can be normatively defended on contractarian grounds. Each person voluntarily chooses to join the contract, and each is made better off by doing so. For those contractarians who do not view the contract as a purely hypothetical construct, some normative defense of the status quo is obviously necessary. James Buchanan has presented an "existential defense" of the status quo in several of his writings (e.g., 1975, p. 78; 1986a, pp. 271–72).

16. If individuals are rational and self-interested, the outcomes expected to arise out of the contract will be Pareto optimal. But from the contractarian perspective what is important is not this utilitarian property of the contract, but rather that the contract has been voluntarily joined by free individuals. One may question whether any individuals are ever truly free to join the constitutional order of their community, or to refrain from doing so. The normative content of any constitutional contract may be deemed to be conditional upon the extent to which the individuals of a community possess this freedom. The stress laid by the Founding Fathers on men being born "free and equal" as a starting point for the constitutional government that they created reflects a concern for this issue. We return to it in the section titled "Enhancing the Constitution's Legitimacy" later in this chapter, and in Chapters 20 and 21.

17. See the discussion by Buchanan and Tullock (1962, pp. 6–8).

18. Peter Ordeshook (1992) is concerned with the contractarian metaphor's ability to resolve a different sort of infinite regress problem—ensuring that individuals comply with the constitution's provisions. "But if contracts ensure that people do things that they would not otherwise do, it is difficult to isolate the ultimate source of a constitution's durability. Are its provisions enforced by yet a second contract, that is enforced by a third, and so on? Are they enforced from within, by the police, the courts and the military? Or must they be enforced by force to be administered by an oligarchy that stands removed from constitutional limits? The answer to the first question is obviously 'No,' the second question merely pushes the problem back a step so that we must ask, 'How are the provisions enforcing those enforcement mechanisms enforced?' " (Ordeshook, 1992, p. 144).

This infinite regress problem is "solved" by the two-stage nature of constitutional democracy and the ultimate sovereignty of the citizens as unanimously exercised in the constitutional contract. When the contract is first written, all citizens favor provisions that require and induce cooperation among them. All wish that the provisions of this contract will be enforced. They

design institutions to the best of their ability to bring about this goal. These institutions are likely to entail the appointment of agents of the citizens, the design of mechanisms to control the agents, and incentives to induce agents to advance the citizens' interests. The ideal constitution *will be* a self-enforcing contract in that it will solve this principal/agent problem between the citizens and the government once and for all. But this is obviously a difficult ideal to achieve. If it becomes apparent that it has not been achieved, that the agent is overstepping its authority under the constitution, the citizens can exercise their ultimate sovereignty and rewrite the constitutional contract, placing new constraints and incentives on the (perhaps a new) agent.

Enforcement of cooperation as specified in the constitution is a (difficult) principal/agent problem, not an infinite regress problem, *if* the constitution is a set of institutions designed and agreed on by the citizens, and they retain the authority to redesign them. Authority regresses back only as far as the body of citizens acting in unison. They must design and be prepared to redesign institutions that best advance their long-term interests.

19. In his contractarian theory of justice, John Rawls (1971) is much concerned with the question of compliance with the principles included in the social contract. This concern shapes both the description of the setting from which the principles are chosen (i.e., the original position and the veil of ignorance), and the justification for the redistributive principle chosen, maximizing the primary goods going to the worst off individual. Buchanan (1975) emphasizes compliance issues in his Hobbesian-contract theory of government.

III

INSTITUTIONS TO REVEAL AND ADVANCE A COMMUNITY'S INTERESTS

Previous Page Blank

6

Federalism

> The very object of local government is in order that those who have any interest in common, which they do not share with the general body of their countrymen, may manage their joint interest by themselves; and the purpose is contradicted if the distribution of the local representation follows any other rule than the grouping of those joint interests.
>
> JOHN STUART MILL

> In government, as well as in every other business of life, it is by division and subdivision of duties alone, that all matters, great and small can be managed to perfection. . .(1) the general federal republic for all concerns, foreign and federal; (2) that of the state for what relates to its own citizens exclusively; (3) the county republics for the duties and concerns of the county; (4) the ward republics for the small and yet numerous interesting concerns of the neighborhood.
>
> THOMAS JEFFERSON

When one individual consumes a pure public good all other members of the community either *must* consume the good in equal quantity, as with protection provided by the police, or *may* consume the good in equal quantity, as with a bridge. Public goods generally have a geographic component to them.[1] The San Francisco Police Department protects the citizens of San Francisco, not those of Chicago. The Golden Gate Bridge is used by residents of the Bay Area of San Francisco, not those of Chicago. The same can be said of most externalities. If a student sets off fireworks on the Berkeley campus it disturbs, or perhaps benefits, other Berkeley students, but probably not people in San Francisco, and certainly not those in Chicago.

The geographic attributes of public-goods make each individual a member of not one community of public-goods consumers but of several. To provide public goods efficiently it may be preferable to create several polities, each matched to a separate community of public goods consumers.[2] Such a federalist structure exists in the United States and in several other democratic countries (e.g., Canada, Australia, Switzerland, and the Federal Republic of Germany). We explore the issues of federalism in this chapter.

Federalist Structure

In a world of zero-transaction (decision making) costs, and in which the unanimity rule is used in the national (highest) legislative level, no other level of government would

be necessary. All collective decisions for all citizens could be made in a single legislative body formed of representatives from across the entire country. If either one of these conditions does not hold, a federalist democratic structure may be superior to a unitary one.

Assume, however, that both conditions do hold. Residents of San Francisco will benefit from a bridge across the Bay. Residents of Chicago object that they will obtain no benefits from the bridge and wish to bear none of the costs. A proposal is made in the national legislature to build the bridge and finance it with bonds to be retired using revenue from a sales tax levied in the Bay Area. If the bridge does promise net benefits to those in the Bay Area some such proposal must be possible that would win unanimous approval from residents of that area. If no costs are imposed on those outside of that area, they will not oppose the bridge and it could win unanimous support in the national legislature. The unanimity rule guarantees that only those proposals are enacted that promise net benefits to everyone. The zero-transaction-costs assumption ensures that all such proposals come before the legislature. No other democratic decision-making body would be needed.

But the zero-transaction-costs assumption is untenable. San Francisco wants a bridge, Chicago more police protection, Berkeley a second, weekly trash pickup. The agenda of the single, national legislature would be too crowded to ever discover all of the combinations of expenditures and revenue sources that both promise net benefits to the individuals affected and win unanimous support. Moreover, the number of representatives needed in the national legislature to convey the required information concerning the nature of the local, regional, and national public goods and externalities would be so large that it would be unable to function. A breakdown of the polity into smaller political units is required to economize on decision-making costs.

At the other extreme, one can imagine a separate polity for each collective decision—one to decide whether to build the bridge, another for national defense, a third for trash pickups. Where the decision had only local impact, citizen participation could be direct. Even on national issues like defense, it would be more likely that a citizen's views were effectively represented if the person or party one voted for represented one's views on only one issue. But, under this arrangement, the citizen, or the citizen's representatives, could literally be member to hundreds of assemblies. Although every voter's preferences would be represented more effectively, and each assembly could make decisions more efficiently, the time required of the citizen to participate directly and to select representatives, coupled with the costs of running each assembly, make this option unfeasible. A trade-off is required between the costs of combining different collective decisions in a single assembly, and the costs of establishing different assemblies.[3]

The Initial Boundaries

Two issues must be faced in drawing boundaries for a federalist system: how the initial boundaries are drawn, and how they are changed over time. When a polity is formed by several autonomous states coming together, the initial boundaries of the second-highest level of government are likely to be those of the previously autonomous states. Each has functioned as a state in the past, and there are likely to be ethnic, religious, or cultural differences between them, homogeneities within them. Decision-making costs are likely to be economized by making the previously existing autonomous states political subdivisions of the new federalist state.

When a unitary state reconstitutes itself as a federation, the framers of its constitution must concern themselves at a minimum with the task of drawing the boundaries of the next lowest level of government. Let us call this the *regional governmental level.* Once established, each regional government could assume the task of drawing the boundaries of the lower level governmental units within it, or the constitutional convention could map out the entire federalist structure.

The initial constitution is assumed to be drafted by an assembly of representatives from all parts of the country using the unanimity rule. Because all members of the constitutional convention must agree on a single set of regional boundaries, these boundaries must be both Pareto optimal and Pareto preferred to the status quo (i.e., a single unitary national government). These twin criteria suggest drawing boundaries for regional governmental units to maximize the benefits from the collective action net of collective decision-making costs. Benefits increase as political boundaries are tailored to the dimensions of public goods and externalities, and collective-decision procedures more accurately reveal citizen preferences for public goods. The costs of federalism include not only the costs of running each governmental unit, but also the bargaining costs that arise when political boundaries are drawn more narrowly than the dimensions of a public good or externality's impact, and thus give rise to intergovernmental bargaining.

Changing Federalist Boundaries

THE OPTIONS

There is no reason to expect that a given set of political jurisdictions remains optimal forever. Changing population patterns, economic growth and decline, new technologies, and the increasing mobility of a society can necessitate periodic redrawing of lower-level governmental boundaries. The federalist constitution must specify procedures for redefining lower-level political units. We discuss three options.

1. Any political institution that is optimal at one point in time may become suboptimal later. The drafters of the original constitution may wish to include a requirement that a new convention be called periodically, say every 25 years, to consider changing or entirely redrafting the constitution. New regional political boundaries if deemed optimal could be drawn as a part of this periodic constitutional review.[4] The same holds, of course, for reconvening constitutional conventions at regional governmental levels.
2. The purpose of government is to enable individuals to advance their common interests through collective action. If two or more groups of people living in separate geographic areas believe that their mutual interests would be better served by a government that encompassed all of them, then there is no reason to prevent formation of such a government. The federal constitution could allow new regional governmental units to form by combining formerly separate political jurisdictions, as long as citizens of the merging political units approve. Such approval could be expressed either through separate referenda in each political unit, or by a constitutional convention with representatives from each of the jurisdictions. If representatives to this convention can agree on a constitution for the larger political unit, the lower units are dissolved and replaced by the new, more aggregate political unit. Should the referenda procedure be used, and the

new jurisdiction win approval, a constitution for it would still have to be agreed to by a convention of delegates from all lower-level political jurisdictions.

3. The task of redrawing lower-level political boundaries can be assigned to the courts. Indeed, a separate court or system of courts could be established to deal with judicial questions that arise because of the country's federalist structure. These courts could also periodically review and redraw, if necessary, federalist boundaries. As an ideal solution to the question, this one is inferior to either of the above two, because it allows an agent of the citizens to draw political boundaries that are the primary concern of the citizens. But delegation to the judiciary can be the first best, real world solution, if the transaction costs of citizens making the decisions directly are too large.

DISCUSSION

Calling a new constitutional convention every 25 years may also involve too high a cost, measured as the sum of the actual decision-making costs of the convention, the distortions to individual choices that arise in the last years before a new convention as a result of uncertainty over changes in the constitution, and the adjustment costs that occur following any constitutional changes. These considerations might lead the constitution framers not to require its periodic review, or if they do, to allow federal boundaries to be redrawn by an alternative procedure.

The transaction costs of joining or dismembering political units when such actions are to everyone's benefit should not block these Pareto preferred outcomes from coming to pass. But sometimes the residents of two adjacent polities experience sufficient spillovers from public goods and externalities to warrant combining them, and yet one political unit resists the union out of fear that it would actually be worse off as a result of redistribution that would accompany such a union. For example, residents from community *A*, which lies downstream from community *B*, experience air and water pollution externalities from *B*. The costs of bargaining between the two communities would be reduced sufficiently by joining them to make all citizens in *A* and *B* *potentially* better off. But if the definitions of rights in the constitution are such that *A* must bribe *B* to abate its pollution, *B* may oppose political unification out of fear that *A* will be able to shift the cost of curtailing pollution back onto *B*, once pollution abatement became a decision to be decided in the new parliament in which both *A* and *B* were represented.

This situation is another example of conflict over distributional questions standing in the way of achieving allocative efficiency. In an optimal constitutional structure, in which these issues are separated procedurally, the existence of an externality between *A* and *B* would not prevent their forming a political union when it would make both communities better off. The initial assignment of rights would be one to which members of both *A* and *B*, or their representatives, once concurred. When joining with *B* the residents of *A* ought to be able to propose institutional arrangements that ensure that both groups experience the gains that their unification allows. For example, by requiring that the legislature in the newly formed polity use a supramajority rule, *A* could preclude *B*'s combining redistribution and allocative efficiency issues. We conclude that the third option, assigning the task of redrawing political boundaries to a system of courts, is unlikely to be necessary if the other parts of the constitution are optimally drawn, but could become so if the constitution was not successful in separating distributional from allocative efficiency issues.

Interjurisdictional Disputes

The problem of public-good–externality spillovers from one political jurisdiction to another is likely to exist no matter how jurisdictional boundaries are drawn. Some activity of a polity *A* will impact positively or negatively some other polity *B*. Just as rational individuals can bargain in such situations to achieve Pareto optimality (Coase, 1960), so too can political jurisdictions (Inman & Rubinfeld, 1992). Three implications follow. First, and most obviously, regional and other lower level governments must be empowered to argue in court as the legitimate agents of the citizens in their jurisdictions. Second, constitution framers must consider the bargaining that will take place in the postconstitutional period. One set of rights with respect to environmental issues may produce significantly lower bargaining costs in interjurisdictional conflicts than another. Transaction costs must be considered in the choice of constitutional rights. Third, the constitution must specify which courts are responsible for interjurisdictional disputes. Should much political activity devolve onto lower levels of government, a special branch of the judicial system could be created to deal with issues arising because of federalism. Federalist courts of this type exist today in Cyprus, the Federal Republic of Germany, and Italy.[5]

Secession

One way to think of government is that it is like a club. Just as a tennis club exists to advance the interests of its members playing tennis, government exists to advance the common interests of its citizens. The club analogy is also useful in thinking about the question of secession. Just as the right to withdraw from a club, if it no longer serves one's interests, seems reasonable, so too under certain circumstances is the right to secede.

The withdrawal of an individual from a club can adversely affect the other club members. Suppose, for example, that the club's facilities were built under the assumption that 1,000 members would cover amortization of construction and maintenance costs. If membership falls below 1,000, the remaining members must pay higher annual fees than originally planned. With this in mind, the founding members of a club may agree to impose a penalty on those who withdraw, or require that they put up a bond to be forfeited upon withdrawal, unless they can find a new member to take their place. We take up the secession issue again in Chapter 21.

Examples of Public Goods in a Federalist System

The levels within a federalist system can be described under the headings of local, city, regional, national, and world governments.

There are several public goods and services that are typically or at least could feasibly be provided at a very local level—the neighborhood of a city, or the entirety of a village or small town. In an urban neighborhood these might include schooling, parks and related recreation, trash and leaf pickups, etc. In a small town, police, fire, and other public services could also be efficiently provided at the local level. In many cities all public services are provided by the city government, even when local provision is

feasible. We review arguments in the next chapter for why at least one level of government should involve direct citizen participation in assemblies. If direct democracy is introduced it must be at the neighborhood or town level.

Many public goods and externalities affect an entire city or its greater metropolitan area—police protection, traffic control and road maintenance, air and water pollution, to name some of the most obvious. Depending on the size of the city, one or more governmental units encompassing a metropolitan area is certainly required.

In a large country there are likely to be several public issues that go beyond the boundaries of any metropolitan area, and yet fall short of affecting the entire nation. Communities on or near a major river have an interest in environmental policies governing the river, traffic control along the river, flood control, and the like. Roads, airports, and similar economic infrastructure have regional effects. When enough overlapping issues accumulate, a regional government is called for.

If governments exist to provide public goods and correct for externalities, and governmental boundaries are to be optimally drawn in accordance with the extent of public goods and externality impacts, then very few city and regional governmental boundaries appear to be anywhere near where they should be in the United States and in other parts of the world. New York City is a polity that is at once too large and too small. For many issues, the old boroughs of New York (Manhattan, Staten Island, etc.) formed and isolated by natural boundaries make logical political units.[6] For other issues like air pollution, traffic control, and crime prevention, it is clear that the affected areas go beyond the city boundaries, and even beyond those of the State of New York into New Jersey, Connecticut, and Pennsylvania.

In no area is the dysfunctional character of existing political boundaries more evident than with respect to the public-goods–externality problems that concern rivers and their surrounding areas. In many cases a river valley is the logical choice for a regional political unit. But more often one finds rivers forming the *boundaries* of existing political units rather than being their core. Such political constellations result in the river valley being the sole jurisdiction of no appropriately sized polity. Consequently, its problems can only be resolved through interjurisdictional bargaining, with its attendant bargaining costs. The cumbersome nature of this process causes problems to go unresolved or, at best, partially resolved. The Rhine, the Danube, the Potomac and many other rivers exemplify this problem.

Placing the boundary of the highest level of government to coincide with an existing nation-state seems the most obvious of all of the choices. National boundaries often reflect natural boundaries that give people common interests (e.g., the United Kingdom, Australia, and New Zealand). Given these natural boundaries to migration, language, cultural, and religious differences have arisen across countries that further differentiate the interests of one nation-state from those of another. When new constitutions get written, they are generally written at the level of the nation-state. The breakup of the Soviet Union has led to a search among the former Soviet republics for the kinds of ethnic and linguistic homogeneities associated with nation-states. But even when the boundaries of nation-states are clearly defined, incongruities and anachronisms arise. Pollution, traffic, and even crime problems spill across national borders. If language is the common denominator of a nation-state, then the boundaries of Germany, Austria, Switzerland, and Italy might be redrawn, and the north and south of Belgium united with Holland and France, respectively. Quebec should be a French-speaking island in an English-speaking North American mega-state in which the rest of Canada and the

United States are joined. If religion is the binding cultural element, then perhaps Belgium remains intact, but Germany is divided yet again, this time between north and south. And the task of drawing boundaries to form new nation-states out of the former Soviet Union is a political geographer's nightmare.

Defense (and offense) are the most conspicuous and often the most expensive public goods provided at the level of the nation-state. But if it is defense one really wants, a more effective governmental jurisdiction would be much larger. A world polity with a military police force to prevent international conflict would, ideally, be superior than trying to accomplish this end by a balance of powers.[7] Many other public-good–externality issues involving the environment, wildlife preservation, international travel, and terrorism also require collective action beyond the boundaries of individual nation-states.

If existing national boundaries are taken as given, and nation-states are the fundamental political units in which citizenship is defined and constitutions are written, then some international (world) political body is needed to deal with problems such as the environment and world peace that spill across national boundaries. If the nation-state is the fundamental political unit, then participation by representatives from each nation in an international political body must be voluntary. Although we are getting ahead of our story here, it is worth noting that the more encompassing unanimity rule actually proves to be *more* effective in such a body than the simple majority rule, as witness the greater success of the European Union achieving its limited goals, than of the United Nations or its predecessor, the League of Nations. In a voluntary association, all members must benefit from its actions or they will opt out. The unanimity rule focuses the confederation's attention on those relatively few decisions benefiting all.

The Allocation of Assignments

Vincent Ostrom (1971, p. 137) and Peter Ordeshook (1992) have emphasized the important role the existence of separate governments can play in protecting the citizens from government, in solving the Sorcerer's Apprentice Problem. Barry Weingast (1992) has argued that the U.S. federalist structure successfully protected the market system from governmental encroachment *until* the courts gave in to the pressures of the New Deal. William Niskanen (1992a) also sees the New Deal as the great turning point in the federal government's seizure of authority from both lower governments and the market process.[8] To achieve its potential, the functional division of governmental authority that defines federalism must be protected. We consider five possible ways to provide this protection.

Constitutionally Defined Division of Authority

The constitution of the nation-state can delimit explicitly the issues that the national legislature can and cannot consider. Defense budgets are a legitimate national issue, but elementary school budgets are not. The constitution of each governmental unit lists those issues to which each is to concern itself, *and* requires that the unit in question confine its attention to just the issues delineated in its constitution.

Alternatively, or in addition, the national constitution could define the conditions necessary to place an issue on the national legislature's agenda. Any issue that concerns

only the citizens in a lower political unit should not be decided at the national level. If citizens in only two lower political units are affected, the issue can probably be efficiently resolved through bilateral negotiation. Government action at the national level may save on interjurisdictional bargaining costs, however, when an issue affects several lower level governmental units. To provide for these cases the constitution could stipulate that an issue having a substantial impact on the citizens of more than X regional governments can be included on the national agenda, where X might be one-half of the regional jurisdictions.[9] The determination of whether an issue satisfied these criteria would be subject to judicial review. If a special court dealt with federalism questions, then such issues would fall naturally into its purview. A member of the national legislature could propose any issue not explicitly prohibited from consideration by the constitution, with other members free to challenge in front of the appropriate court whether the proposal substantially affected the citizens in the required X regions.

The Choice of Voting Rule

No overcentralization problem would exist if the national legislature made decisions under the unanimity rule. Assuming effective representation of all citizens, only issues or packages of issues that promised net benefits to all citizens in the nation would pass. San Francisco would get its bridge only if it paid its entire costs. Knowing this, San Francisco residents would not bother trying to get the issue on the national agenda, for the transaction costs of passing it at the urban or regional level would be lower. But under the simple majority rule, San Francisco might join forces with Chicago and other cities and get a majority of the national legislature to favor a package of local public goods for the coalition of city interests, unless such bundling of separate issues was effectively prohibited by the constitution, as it should be if a "germaneness" clause is attached to the proposal made in the previous section (see note 9). The lower the effective majority required to pass an issue in the national legislature, the more stringent must be the constitutional constraints on the issues that can come before it to avoid such geographic redistribution through logrolling.

The Method of Representation

The danger of local issues gravitating upward in a federalist system is greater if representatives are selected on a geographic basis than if they are selected at large from across the nation. If the citizens of San Francisco select one or more individuals to the national legislature to represent their interests, they are likely to try to get the rest of the country to finance their bridge. But it is unlikely if the United States were a single electoral district from which citizens from San Francisco and all other parts of the country choose representatives or parties that any person or party can win enough votes to be elected by promising a bridge for San Francisco. Competition for votes across the nation will drive candidates to focus more on national issues. Candidates must choose issues to win votes in both San Francisco and Chicago. This is not to say that no local issues will find their way into candidates' platforms. A pork-barrel party might package many local issues together. A Western party might represent the interests of a particular region, and so on. Constitutional constraints against interference with the market, as discussed in Chapter 15, and against the introduction of local–regional issues at the national level would be needed even under a representation system in which the entire

nation is the sole electoral district for electing the national legislature. But the tendency for centralization should be weaker, when representation in the national legislature is not geographically based.

In a nation-state composed of diverse ethnic and religious groups located in separate geographic regions, a legislature formed through proportional representation may simply reproduce these ethnic-religious differences as each party is associated with a particular, geographically concentrated group. If each group presses its redistributional–property rights claims, then constitutional constraints on the issues that can come before the national legislature and/or a very high required majority to pass legislation, may be the only ways to avoid continual legislature strife over distributional issues.[10]

A Second House of the Legislature

An alternative way to protect a federalist structure is to represent the individual regional governments directly in a second chamber. There are different ways to do this, but the simplest would have a delegation from each regional state, with the membership of the delegation roughly proportional to the distribution of party representation in the region's legislature. The constitution could require either that all legislation must pass in both chambers, or, more narrowly, that any legislation that might affect the several regions differentially pass both houses.

There are two likely consequences of such a procedure. First, as with all bicameral legislatures, the required support for a proposal increases before it can be enacted. It must obtain the required majority of votes in the chamber where representatives are elected from across the nation, *and* it must improve the welfare of citizens in whatever fraction of regions is required for this issue to pass in the second chamber. Second, representatives chosen by the legislatures or parliaments of each region can be expected to have a special interest in seeing that tax-and-spending authority that traditionally is held by the regions does not get usurped by the central government.

Both the Swiss Council of States and Germany's *Bundesrat* have this characteristic. In Switzerland, federalism seems to have retained its strength, but in Germany both the federal and regional (Länder) governments share overlapping authority in most governmental areas, and the postwar period has seen a gradual shifting of power to the central government. The same has occurred in the United States (Goldman, 1973, pp. 528–36; G. Smith, 1989, pp. 266–77; Wilson, 1990, pp. 282–83).

Referenda

The fifth and final possible protection of a federalist structure is to allow citizens to demand a referendum to approve any legislation passed by the federal legislature. This option exists in Switzerland and it is one reason why government in Switzerland has remained smaller and more decentralized than in its European neighbors (see Chapter 12).

The possibility of calling a referendum is a restraint against all legislation that the citizens do not favor. As a particular check against centralization and interregional redistribution, the constitution could require that federal legislation that is likely to have a differential impact across the regions must also be approved by a referendum in at least X fraction of the regions, where X might be one-half, two-thirds, or more. Constitutional amendments in Switzerland must be approved by a majority of the cantons in referenda.

Voting via Exit or Voice

Much of the literature on political institutions,[11] including most of this book, takes the population of the polity as given. An electorate exists, and the question is: What set of institutions best advances the interests of this electorate, best satisfies the collective wants of this community? For private goods, goods that one person alone can consume, individual interests and wants are best satisfied by market institutions. Individuals reveal their wants by buying from this seller and not from that one; by selling their labor services to this firm and not to that one; by *exiting* and entering different firms and markets.[12] But all members of a community must consume the *same* public goods and in the same quantities. Exit to other firms is not an option, and interests must be expressed in some other way. Enter the voice-voting institutions of politics.

At the level of the nation-state, the assumption that citizens do not move to another "firm" if they do not like the basket of public goods provided is a reasonable, if not totally accurate, assumption. (Recall the exit of Jews and other German citizens from Nazi Germany in the 1930s, the emigration of draft-age American men to Canada and Sweden in the 1960s, and East European migration into Western Europe in the 1980s.) As one moves down to lower levels of government within a nation-state, the assumption that the community's membership is fixed becomes more inaccurate. People *do* move from one local community to another often, and their choice of communities is affected by the bundles of public goods and services offered.[13] The lower the level of government, the more viable exit is as an option for satisfying individual preferences for public-goods bundles.[14]

The positive potential of this option is indeed considerable. Difficulties arise in the provision of public goods because all individuals must consume the same public good in the same quantity, yet all individuals do not have the same "tastes" for every public good. If people can "vote with their feet," they can sort themselves into groups of homogeneous tastes for public goods. No conflicts need remain, and voice voting, if it takes place, can use the unanimity rule. Each citizen chooses that polity which allows him to consume exactly the bundle of public goods and services he desires at a tax-price he is willing to pay.

Five conditions are necessary for "voting-with-the-feet" to achieve these results:[15]

1. All citizens are fully mobile;
2. A range of community options is available spanning the full range of public-goods possibilities desired by each citizen;
3. All citizens have complete knowledge of the characteristics of every community;
4. No public-good spillovers exist across communities; and
5. No geographic constraints are imposed on individuals with respect to their earnings.

None of these conditions are strictly fulfilled in practice, of course, but the first three are sufficiently satisfied so that voting-with-the-feet does in fact occur. The quality of schooling in a community, its crime rate (police protection), and other amenities (parks, pollution) affected by government services do influence individuals' choices of where to live. Moreover, intercommunity migration is sufficiently great so that the resorting of individuals into more homogeneous communities has been taking place.[16] This process can be encouraged or thwarted through the choice of provisions made at the constitutional stage. The smaller lower-level communities are, and the larger the

number of governmental functions assigned to lower levels, the greater the diversity one can expect across communities, and the greater the homogeneity one expects within communities (Pennock, 1979, pp. 149–57; Oates, 1972, pp. 54–63; Breton & Scott, 1978, pp. 51–61). The more decentralized the provision of government services is, the greater the scope for revealing individual preferences through intercommunity migration.

However, two difficulties exist with this option for revealing individual preferences for public goods.

Externalities from Migration

People do not move only in response to the different constellations of public-goods bundles available across communities. Jobs, climate, access to recreation areas like beaches, and a variety of other factors unrelated or at best loosely related to government activity affect location choices. Communities with beautiful climates and physical surroundings like Santa Barbara, California, prove to be popular places to live. Communities such as Utica, New York, prove less popular. If Santa Barbara and Utica could expand and contract costlessly to accommodate this migration, these differences would present no problem and, as with exit in the marketplace, social welfare would be enhanced as people relocate to communities which they consider to be most attractive. But there are limits to Santa Barbara's ability to expand without experiencing a deterioration in the quality of those physical and environmental characteristics that make it a desirable place to live. The departure of citizens from Utica can be costly to those left behind, because it raises the average costs of paying for the social capital that was invested on the assumption that the emigrants would pay part of its costs.

We face a classic externality situation. Residents of Utica when contemplating a move to Santa Barbara consider only their personal welfare, their utility levels, in the two communities. They ignore the negative externality imposed on those in Santa Barbara from the overcrowding new arrivals cause, and they ignore the negative externality imposed on those left behind in Utica who must pay higher taxes to cover the overhead social capital that was created on the assumption that the emigrants would remain in Utica. As with all externalities, the social optimum can be achieved with taxes and subsidies to internalize the external effects of migration. Once overcrowding begins to reduce the welfare of citizens of Santa Barbara, a tax must be placed on either residents in, or immigrants into, Santa Barbara. Similarly, if the costs of maintaining social capital rise when a resident leaves, either emigration must be taxed, or immigration into (residence in) Utica subsidized. Utica faces the same problem from the emigration of its citizens as a nation can face from the unwanted secession of one of its provinces.

These problems pose difficult constitutional issues. Freedom of movement within the nation would seem to be a basic freedom one would like to protect, yet with no constraints imposed on migration, the anarchic settlement of citizens can be socially suboptimal. Rearrangements of people and wealth can be found—fewer people living in Southern California, more living in upstate New York—in which *all* citizens are better off than with anarchic settlement. To advance the interests of all future citizens the constitution must establish optimal incentives for migration.

There are basically two ways to accomplish this objective. First, the constitution can implicitly or explicitly grant local communities the right to impose taxes on immigration and emigration, thereby allowing each community the right to control its own population

size as it sees fit. (These taxes could take many forms. For example, a tax on new water and sewer hookups to prevent immigration; a tax on the seller of property, say in the form of a title transfer tax, refundable if the seller purchases a house in the same community, to discourage emigration.) This solution vests locational rents with those lucky or quick enough to be residents of the more desirable communities before overcrowding becomes a problem.

Alternatively, one could treat locational rents from residence in the more desirable communities as belonging to all citizens of the country, regardless of where they are born or how quick they move. The highest level of government must then impose taxes and subsidies to provide the proper incentives for migrants. A possibility here would be a national tax on the value of land, a proposal reminiscent of Henry George's (1879, 1979) single tax. If individuals at the constitutional stage can and do put themselves into the positions of others, and assume that they might be born in either Utica or Santa Barbara, then they quite possibly will vest locational rents with the entire citizenry of the nation. Our objective here is not to define what the constitution framers should do, but to point out the desirability of addressing the migration issue in the constitution.

Redistributional Consequences of Migration

If public goods are normal goods, then the quantity (quality) an individual purchases increases as her income increases, just as the quantity and quality of clothes a consumer buys increases as her income rises. Individuals enjoy a larger and higher quality bundle of public goods if they live in a community with higher incomes than their own. Because everyone in the community consumes the same quantity of a public-good, a form of redistribution from rich to poor occurs when people with different incomes purchase the same public good, even when tax prices are such that all are better off from the public-good's provision.[17] Knowing this, people have an incentive to move into communities of higher average income; community residents have an incentive to prevent the immigration of lower-income people. When communities can control immigration, voting-with-the-feet leads to a resorting of individuals into communities of like incomes. This process has visibly occurred in the United States through the resorting of suburbanization (Miller, 1981, Chaps. 6, 7). Consequently, the poor are worse off than they would be if migration across communities were not possible. The poor consume a smaller and lower-quality bundle of public goods than they would if all communities contained a cross section of income groups.

These consequences of migration have important implications for choices at the constitutional stage. There are obvious and potentially large gains from not interfering with individual choices of where to live and work. There are also large welfare gains from allowing people to define the characteristics of their local communities. If they wish to create a particular kind of community environment by excluding chemical plants and other types of industrial development, this option should be theirs if the constitutional goal is advancing individual interests. By the same logic communities should have the freedom to prohibit certain forms of housing that detract from the environment (high-rise apartments, rundown shacks, trailer parks). But restrictions on these inevitably imply restrictions on the types of people who are able to reside in the community, and these in turn have distributional consequences. The constitution framers must weigh the gains from allowing people to define the characteristics of their local communities against the distributional consequences of these choices.

If communities are allowed to define their characteristics, and the restrictions on immigration they impose sort people by income level, then the constitution framers need to take this into account in dealing with distributional questions. An individual who turns out to be poor in a world in which local communities are segregated by income will be worse off than she would have been had such segregation not been possible. If the constitution includes insurance-type provisions to protect against the possibility that a citizen is poor, additional constitutional protection will be needed in a world with geographic segregation of income groups. These protective measures could take the form of higher levels under the incomes of individuals to allow them greater access to higher-income communities, or cross-community subsidies for certain types of public goods (e.g., education, sanitation, police) to ensure minimum quantity and quality levels for these public goods even in communities of low income.

Federalist Rights

A constitution defines a variety of individual rights and constraints upon these rights—such as the right to own slaves. Ideally, these rights are defined with a certain degree of impartiality by people who are or pretend to be uncertain about their future positions, by people who place themselves in the positions of the slave and the slaveholder. But what if it is impossible for the slaveholder to imagine ever being a slave, and those for and against abortion rights are unable to compromise on this question? Under these circumstances, how can the framers unanimously agree on a set of rights to be protected in the constitution?

Two options exist: The first is to retain the unanimity rule with the constitution remaining silent about any rights over which consensus is not possible. This option gives at least the initial victory to those who favor a freedom-to-act alternative over those favoring a constraint on such a freedom. The constitution must implicitly if not explicitly permit individuals to do anything that is not explicitly prohibited, the alternative presumption being untenable—i.e., that all actions are prohibited unless explicitly allowed by the constitution. If unanimous agreement on a constitutional provision regarding abortion were not possible, the right to have an abortion would rest with the citizen. (Without explicit protection in the constitution the victory may be temporary, however. The national or a lower-level legislature may under a less-than-unanimity rule vote to curtail or abolish this right. If the courts decide that this right is not one of those implicitly protected by other clauses of the constitution, then ultimate victory will go to those favoring a curtailment of individual liberty; see Chapter 14.)

The second option is that a less-than-unanimity rule can be used at the constitutional stage. As long as the required majority is more than a simple majority, any less-than-unanimity rule still favors those who wish to retain a freedom to act. If only one-third of a constitutional convention favors protecting the right to have an abortion, this right is preserved under a rule requiring a three-fourths majority to pass a constitutional provision—that is, a provision to curtail abortions by protecting fetuses. Only the simple majority rule gives both sides the same chance to win on this issue.[18]

This "fairness" inherent in the majority rule is an attractive property when issues involve but two options and the proponents of each have an equal stake, an equal expected gain from their preferred option's victory (see Chapter 11). Although this equal intensity condition is plausible for some issue pairs, it does not seem reasonable to

assume that it holds for *all* of the decisions that a constitutional convention must make. Furthermore, a constitutional convention writes the rules for all other political bodies. The future legitimacy of the decisions of these bodies will depend on the legitimacy of the rules that created them, which in turn is likely to be greater, the greater the consensus achieved at their creation.

Unanimity is not possible on the definition of a particular right, if the constitution drafters cannot agree on a package of rights that includes it. Perhaps they are unable to place themselves in the positions of others on this issue, or are unwilling to do so in this particular case. At least some people would appear to place extra weight on their own preferences and positions as they exist at the convention, and they presume will exist in the postconstitutional society. When unanimous agreement on rights is not possible, members of a minority run grave risks. What prevents the majority from imposing a great welfare loss on the minority for a small gain for itself? What makes the equal-stake assumption plausible?

Envisage, for example, a constitutional convention in which a majority of the participants believed, as Aristotle did, that some people, like those in the majority, were predestined to be slaveowners, while those from an ethnic group in the minority were predestined to be slaves. If provisions of the constitution are approved by the simple majority rule, the Aristotelians could both permit the ownership of slaves in the constitution and stipulate who is to own whom. In a world of individuals seeking to advance their own interests, constitutional constraints on individual freedom passed under majority rule may have ethical legitimacy in the eyes of only those who are in the majority.

The unanimity rule can be retained at a nation's constitutional convention to avoid a tyranny of the majority on all constitutional rights issues, and yet the *total* victory of those favoring freedom-to-act positions on all issues be avoided if the nation is constituted along federalist lines. Lower-level communities can be allowed to define rights and place constraints thereon in their constitutions, as long as such provisions do not directly conflict with explicit provisions in the national constitution. If the national constitution does not explicitly guarantee the right to have an abortion, a lower government's constitution could protect or constrain that freedom.

Allowing lower governmental units the option of defining constitutional rights for their citizens could advance the interests of all members of a nation. If fundamental differences on certain value questions exist, then any provision in the national constitution makes one group a winner, the other a loser. In a federalist system, however, all sides can have a partial victory. The national constitution can remain silent on the issue, and lower levels of government can enforce the particular values in their community. If individuals feel strongly about these values, they can sort themselves into homogeneous communities, with all citizens thereby left better off. Something like this occurred in the United States after the repeal of Prohibition. Although the right to purchase alcoholic beverages was no longer prohibited across the nation, several states and counties did prohibit or curtail this right. For those who felt strongly about the issue one way or the other, options existed to live in a community that shared their values.

William Riker (1964, pp. 146–47) has objected that federalist rights are vulnerable to a kind of Gresham's law. If the citizens of New York try to protect the institution of marriage by making divorce difficult, their effort can be frustrated by those citizens in another state, say Nevada, who make divorce easy. The right to an abortion is another possible example. There are three points to make regarding this objection. (1) All federalist rights issues are not subject to the same objection. Although a citizen of New York

might go to Nevada to obtain a divorce or an abortion, she will not go there just to buy a bottle of gin. Some rights can be effectively protected or constrained at the local level. (2) Others might be effectively protected by local communities exercising additional authority over citizens. The marriage laws of New York could stipulate that marriage contracts formed in New York remain binding unless dissolved by its courts or by those from other specified states. Police can be given the authority to check cars crossing the state border to see whether they contain alcoholic beverages, and so on. Each of these solutions infringes upon individual freedom to act in certain ways, but such trade-offs are common on rights issues. If the citizens of New York unanimously agree at their constitutional stage that protecting marriages is of sufficient importance to the welfare of the community that it should constrain individual freedom to obtain out-of-state divorces, then such constraints should be imposed. (3) If such local rights options are not allowed, and yet unanimity on rights issues at the national level is not possible, an effective tyranny of the majority on rights issues will exist for all parts of the country. Riker (1964, p. 155) regards the mistreatment of blacks in the South as a cost of federalism. But if individual states had not possessed the constitutional right to prohibit slavery in their territory, the constitutional compromise that brought this country into existence might very well have forced all states to allow slave ownership.

Value differences on issues like abortion and alcohol consumption typically stem from religious, ethnic, and cultural differences of a very basic kind. To the extent that individuals are allowed to form local and regional polities and define the rights of their citizens to conform to a particular set of values, both the cultural homogeneity of lower governmental units and the cultural heterogeneity of the nation are preserved and enhanced.[19] Indeed, it is the existence of regional cultural heterogeneities that often has led nations to adopt a federalist political structure. When passions run high on a rights issue, as they often do, some may object to citizens in any other community in the nation being free to undertake a particular action. Merely forbidding it in their region or their local community will not appease them. But if the uncertainties and other factors at work at the constitutional stage do not bring about a consensus on rights issues, then the federalist rights option is the only one that neither imposes one group's values on all others nor prevents the polity from forming.

Federalism and Increasing Mobility

People are born and die in the same local community. Their children grow up in the community and often take over the family business or professional practice, or go to work in the factory where their parents worked. Citizens are concerned about what takes place in the community; they are busybodies to some extent. After school when children play, they play under the eyes of watchful adults—women at home preparing supper, shopkeepers peering from their windows, adults who know the children by name and who will intervene to break up a quarrel or curtail rowdyism.[20] This picture of "our town" or of "our neighborhood" is a picture from the past; a picture of communities that are disappearing where not already gone.[21]

Today's community is a condominium high-rise or a townhouse subdivision. It appears overnight on a field where yesterday cows grazed. Most residents move out in a few years. None expect their children to live there. Most children do not grow up with their two natural parents, who in turn may never marry. Residents do not know one

another. During the day, houses and apartments are empty. After school, children play under the watchful eyes of day-care personnel, or go unsupervised in the playgrounds and open spaces near the community.

Neither picture is totally descriptive of all communities of their respective eras, but the resemblance is close enough to suggest the trends. Voting and other forms of political participation increase with length of residence in a community (Silver, 1973; Ashenfelter & Kelley, 1975). Voice—be it a vote at the town meeting, a motion at the PTA, gossip at the drugstore—is the most effective way of controlling the environment in which one lives, the behavior of one's neighbors, and the basket of collective goods one consumes in the small towns and neighborhoods of yesteryear. Voice still plays a role in today's communities; residents' associations and PTAs still exist, but expression of preferences by exit is clearly more important than it used to be, and most often dominant. Recreation facilities, street layouts, playgrounds and day-care centers, even police protection (security guards) are provided in different packages by developers. One can choose to live in a three-bedroom townhouse in a community with elaborate playground and day-care services, or an efficiency condominium in a high-rise where children are not allowed.

In a few towns like Reston and Columbia near Washington, D.C., developers have literally offered residence buyers a total package of community characteristics including schooling, police, sanitation, and other local public goods. If these public services were unbundled from the larger city and county governmental units that now provide them, such packages would appear in smaller sizes, and community shoppers could pick the community having precisely the characteristics they want at the price they are willing to pay. Tiebout's (1956) hypothetical world in which people voted with their feet would be a reality.[22]

Making voting-with-the-feet a more effective means of expression by privatizing schooling (coupled with vouchers, perhaps), sanitation, recreation, and other services is an option constitution framers must seriously consider. To make the option more effective, local communities must possess the freedom to provide or contract for the direct provision of public goods and services that traditionally have been provided by higher governmental levels (e.g., schooling), and to place certain constraints on the types of people that can live there (e.g., people without children). An attraction of "market" provision of communities by developers is that they are more capable of solving the externalities from mobility discussed above. A private developer can require residents to put up bonds to protect against the negative externality of their leaving and not being replaced, and can limit the community's size to avoid overcrowding.

Even without special inducements, the increasing mobility of society is shifting the emphasis from voice voting to voting-with-the-feet at local and regional levels. The distributional consequences of mobility and population sorting, and the externalities they engender, must be considered when constructing a federalist system.

Summary

Government goods and services have differing geographic characteristics. To provide public goods most efficiently, multiple governments will generally be needed. An individual will be a citizen in several concentric and sometimes overlapping polities, each responsible for the provision of a particular bundle of public goods and services.

The framers of the first constitution must design the initial federalist structure. The initial boundaries of at least the next lowest level of government must be drawn, procedures for redrawing them established, and functional responsibilities delineated.

Alexis de Tocqueville (1835, pp. 165–71) thought that the United States had preserved the political liberty of a small country, despite its size, because of its federalist structure (see quotation at the beginning of Chapter 1). The Founding Fathers did place language in the U.S. Constitution to constrain the federal government to specific activities. But the Constitution's general language and broad interpretations by the Supreme Court have allowed a tremendous centralization of governmental activity at the federal level.[23] The lesson from the experience of the United States is that special effort must be made to safeguard a nation against these eventualities. We have suggested that a constitution specify not only the issues that are allowed to come up at the federal, and perhaps lower governmental levels, but also that it require that all legislation coming before the federal legislature have potential benefits for citizens in a substantial fraction of its lower-level geographic units. The constitution can further prohibit omnibus bills that merely package unrelated issues, each of which is of concern to citizens only in a smaller polity.

While in most federalist systems the greatest danger to the appropriate assignment of functions appears to be overcentralization, the reverse can happen if the authority of the central government is not clearly defined and protected. Quebec's resistance to the central government's efforts to raise an army using the draft system in World Wars I and II is an example. The constitution must protect each level of government from encroachments by other levels.

A federalist structure is a potentially powerful aid to advance the interests of all individuals, but for it to serve this purpose it must be constructed and protected from the pressures that arise over time to bend it to advance the interests of only some. At the same time procedures must be designed to reshape it to accommodate the shifts in population, economic activity, and technology that will make its initial structure obsolete. No greater challenge faces constitution framers than this one.

Notes

1. See Oates (1972, Chaps. 1 and 2) and Starrett (1988, Chap. 4).

2. Such a matching of governmental units to the geographic attributes of public goods and externalities is referred to as *utilitarian federalism* by Peter Aranson (1990, 1992a). See also Oates (1972), Tullock (1991, Chap. 3), and Inman and Rubinfeld (1992).

3. See Dahl (1967), Tullock (1969), Oates (1972, pp. 38–49), Breton and Scott (1978, pp. 4–9, 34–47), and Tullock (1991, Chap. 3).

4. We take up issues regarding procedures for selecting representatives to a constitutional convention, the voting rule used at the convention, the status of any existing constitution in this process, etc., in Chapter 21.

5. Mill (1958, 1861, pp. 243–44) made the same suggestion.

6. The borough of Staten Island has voted to secede from the City of New York. Staten Island is much smaller than the other boroughs, and would appear to suffer from this disadvantage when expenditure-tax proposals are decided for the city.

7. The idea (dream) is, of course, old. It appears in Dante's *De Monarchia* written about 1310 (see Schneider's translation, 1957), again in Kant's *Eternal Peace* written almost five centuries later (1795), and has been recently developed with Western Europe in mind by Peter Bernholz (1985).

8. Peter Aranson (1992a,1992b) recounts the sometimes valiant yet ultimately unsuccessful efforts of the U.S. Supreme Court to protect the governmental authority of the states from the encroachment of the federal government. He concludes that the courts are not capable of protecting a federalist division of authority. The task of the courts in the United States was made difficult by the lack of a clear delineation of authority over different tasks in the U.S. Constitution. As Elazar (1966, p. 33) points out, "In the American federal system, sharing of functions by all levels of government is and always has been the norm." The method of geographic representation in America also makes centralization from the pressures of pork-barrel logrolling more likely.

A third threat to federalism in the United States is created by the role assigned to the executive and legislative branches in the selection of Supreme Court judges. The judiciary's dependence on the other two branches makes it a less impartial branch that it otherwise might be. On this, see the discussion in Chapter 19.

9. To avoid logrolling packages of issues in which the required X was obtained by putting together X separate issues each of concern to only one region, the constitution would further need to prohibit the bundling of unrelated issues into a single bill by including a "germaneness" clause.

10. Some observers of Yugoslavian politics claimed that the use of the unanimity rule at the national level prevented the national government from being able to act during the 1970s and 1980s (Burg, 1983). Interpreting the political history of Yugoslavia as evidence one way or the other on the effects of using the unanimity rule is made difficult, however, by the unrepresentative nature of the national decision-making councils. The Communist party sent delegates from each region of the country; the citizens did not elect them. Given the suspicions and animosity that existed between the separate "nations" that made up Yugoslavia, much of what would have passed under a simple majority rule would have no doubt involved redistribution and rights issues. That such legislation could not pass may have delayed the splitting apart of the country. Once the Soviet Union collapsed, the one public good that could hold the different nations that made up Yugoslavia—a common defense against a Soviet invasion—disappeared. When it did, the animosities and desires for redistribution of power and land were set free.

11. For a recent discussion of the exit/voice alternative in a federalist system written from a constitutional perspective, see Marlow (1992).

12. Albert Hirschman (1971) was the first to emphasize the distinction between and use the terms "exit" and "voice."

13. For evidence of the extent of mobility across local polities and its effects on them, see Miller, Shughart, and Tollison (1984).

14. Charles Tiebout (1956) was the first to emphasize the positive potential of the exit option for revealing preferences on local public goods. See also Oates (1972), Starrett (1988, Chap. 5), and Mueller (1989a, Chap. 9).

15. See Tiebout (1956), Buchanan and Wagner (1970), Buchanan and Goetz (1972), M. McGuire (1972), Oates (1972), Pestieau (1977), Sandler and Tschirhart (1980), Wooders (1980), Starrett (1988, Chap. 5), Mueller (1989a, Chap. 9), and Inman and Rubinfeld (1992).

16. See, again, Miller (1981, Chaps. 6,7), and references in Mueller (1989a, pp. 168–70).

17. See the discussion in Mueller (1989a, pp. 61–62, 170–73).

18. See the discussions of Rae (1969) and Barry (1965, pp. 312–15).

19. See also Tullock (1991, Chap. 4).

20. For a description of a small American town of yesteryear, see Hicks (1946). For a description of urban neighborhoods of yesteryear, see Jacobs (1961).

21. The transition of American communities is described by Warren (1963).

22. See also Tullock (1991, Chap. 2).

23. See Friedrich (1968, pp. 17–24).

7

Direct Democracy

> Town meetings are to liberty what primary schools are to science: they bring it within the people's reach, they teach men how to use and how to enjoy it.
>
> ALEXIS DE TOCQUEVILLE

The optimal federalist structure divides the work of government into several jurisdictional levels, and assigns functional responsibilities to each in accordance with the geographic impacts of each public service provided. The geographic spillovers of most public goods and externalities are sufficiently large to preclude defining the polity so that citizens can assemble and vote directly on public issues. But *some* issues may have a small enough geographic impact to make direct democracy feasible for their resolution. Moreover, many observers have argued that there are public-good benefits from the direct participation of citizens in the democratic process. If so, one might want to tailor the dimensions of at least one level of government to allow direct democracy to be used, even if that led to political jurisdictions somewhat smaller than might otherwise be optimal. We explore the issues involved in this chapter.

The Advantages of Direct Democracy

The two main justifications for direct democracy are (1) that it leads to better outcomes, and (2) that it leads to better citizens (Pennock, 1979, pp. 438–45). The instrumentalist justification builds on the premise that no one knows better whether a shoe fits properly than the individual trying it on (Dewey, 1939, 1970, p. 14). This presumption implies that the most accurate expression of preferences occurs when individuals in the community express their preferences without the aid of intermediaries. No one represents people's interests better than the people themselves.

The first justification for direct democracy would appear to assume, or at least be consistent with the view, that individual preferences are given and immutable. The task of democratic institutions is to elicit an accurate expression of these preferences, and to aggregate them optimally. As such, it is fully consistent with the assumptions that underlie much of the economics and public-choice literature. The second justification assumes that individual preferences are endogenous. Direct participation in the democratic process can *change* individual preferences. Democratic participation educates the citizen. The citizen comes to understand the issues better, and is made aware of the interests and viewpoints of others. The citizen learns the "art of compromise." By dis-

covering the viewpoints and preferences of others the citizen learns that it is not possible for every member of the community to obtain the exact set of public policies that each desires. Compromise is necessary if any set of policies is to be implemented. Because she has participated in the political process directly, the citizen is more willing to accept the compromises that occur. The outcomes are "our" decisions, not "their" decisions, and the citizen accepts them because she knows that they represent the best compromise to which the community was able to arrive.

Both Rousseau and Mill were concerned that citizens would act to advance their "private interests" and that the "public interest" would suffer thereby.[1] Direct participation was seen by both men as a process of educating the individual not only as to what the interests of her fellow citizens are, but of the advantages of undertaking collective actions in the interests of *all* community members. Indeed, the ancient Greeks also stressed the advantage direct participation in the democratic process has in developing a sense of community in the individual (Ehrenberg, 1969, pp. 38–59, 99–100). James Wilson, citing the example of Athens, pressed the Constitutional Convention in Philadelphia to adopt measures that would induce citizens to participate actively in the political process (Nedelsky, 1990, Chap. 4).

These views may seem strange if not misguided to economists and public-choice practitioners, who view the advancement of purely private interests as the legitimate goal of market institutions, and view government as an analogue to the market for aggregating private (i.e., selfish) preferences for public goods. However, this book allows for the possibility that individuals are altruistic, patriotic, or have other motives generally viewed as unselfish. Altruistic and patriotic citizens are likely to seek to advance these values through collective action. Moreover, preferences are formed and reshaped by one's environment. One is not born an altruist or a patriot, but acquires these values from family, school, church, and other institutions that instill values and educate.[2] If this fact is admitted, then so too must be the possibility that participation in the political process can alter preferences. Active participation in a direct democracy may change an individual's preferences regarding the optimal set of outcomes from the collective-decision process.

The two justifications for direct democracy reinforce one another. The case for direct transmittal of individual preferences into final outcomes rests upon the premise that citizens know best what their (the community's) interests are, and is strengthened if participation educates the citizens, and thereby helps them to make better choices.

The Disadvantages of Direct Democracy

Critics of direct democracy from Plato to Joseph Schumpeter have questioned whether the average citizen possesses sufficient knowledge and expertise to judge what best advances her collective interests. This criticism is buttressed if voters act rationally to advance their narrow self-interest. Even if an individual could *potentially* obtain sufficient knowledge and expertise to make collective decisions intelligently, she lacks the incentive to do so. Her contribution to collective decisions is so small that the rational citizen does not invest the time required to become informed about the issues (Downs, 1957, Chaps. 11–14). Alternatively, if the dimensions of the polity are circumscribed sufficiently to give the voter an opportunity to have a nonnegligible impact on collective

decisions through direct participation, the issues assigned to the polity become so trivial that the individual has little incentive to participate (Pennock, 1979, pp. 459–60).

Proponents of direct democracy envisage citizens engaging in dialogue and discussion until a compromise is reached with which all citizens are satisfied. Direct democracy's opponents, on the other hand, foresee factions developing in the community with long and rancorous debates ending in bitterness, frustration, and deadlock (Dahl, 1967, pp. 98–99; Pennock, 1979, p. 459). Alternatively, the assembly may be swayed by oratorical hyperbole and demagoguery, so that first one side and then the other succeeds in carrying the debate, resulting in costly instability. The vulnerability of the assembly to demagoguery and excess is thought to have been an important factor leading to the downfall of Athens's early experiment with direct democracy (Ehrenberg, 1969, pp. 71–74). The claim that greater degrees of citizen participation and activity would actually worsen the outcomes from the political process by creating political instability, even in representative systems of government, is a recurrent theme in contemporary political writing (Pateman, 1970, pp. 2–18).

Commentary

In assessing direct democracy, one must keep in mind both the nature of the issues to be decided and the voting procedure to be used. Direct democracy is more likely to lead to impasse with property rights and redistribution issues than with allocative efficiency. Will schools often remain closed because citizens cannot agree on the school budget? Will trash fail to be collected because agreement is impossible on the frequency of pickups? The possibility that the assembly undertakes a foolish action after being swayed by an impassioned demagogue is more likely when a mere majority of the assembly suffices to pass a proposal than when a consensus is required.

Debate over the merits and demerits of direct democracy began with the ancient Greeks. For them *democracy* meant *direct* democracy, and the local polity at which it was practiced was the only polity to which the citizen belonged. All collective decisions that the city-state faced had to be resolved using the same procedures.[3] When scholars discuss direct citizen participation in the political process in more recent times, they often join the debate by addressing the same issues that concerned the Greeks, thus implicitly assuming that the full spectrum of issues is to be decided. But even the smallest nation-states today are too large to make collective decisions using procedures in which citizens actively debate and decide issues in open meetings.[4] Discussions of direct democracy today must focus on whether a definition of the local polity and a set of issues to be assigned to it can be found for which direct democracy is the optimal form of government.

The experience of the ancient Greeks suggests that the maximum number of citizens consistent with a well-functioning direct democracy is 5,000 or at most 10,000 (Ehrenberg, 1969, p. 32). Citizenship was far more circumscribed in ancient Greece than in modern democracies, so this number of citizens was consistent with the existence of a much larger total population in the community than would be possible now. Even in ancient Greece membership to the assembly had to be restricted once the size of the polity grew beyond these limits (Ehrenberg, 1969, p. 53).

Communities in which direct democracy is practiced today usually have smaller

populations than Athens and the other city-states.[5] In Switzerland and some New England towns, direct democracy is practiced in communities of 10,000 or even 20,000 or more (Zimmerman, 1986, pp. 20–23), but the most successful direct democracies are likely to be smaller communities. Five thousand or perhaps 10,000 citizens can be a reasonable upper limit. Thus, direct democracy would have to be restricted to small rural communities and urban neighborhoods.

In a small town virtually all of the local services can be provided and decided upon by the community. In an urban neighborhood issues like police protection, traffic control, and sanitation have sufficiently large-scale economies or spillovers to warrant provision at a higher level of government. Thus, the array of public services the local polity controls may be very limited. In the parishes of England and Wales where direct democracy is practiced, for example, "the parish council is only responsible for allotments, village halls, playing fields, public benches, and bus shelters, street lighting, and footpaths" (Humes & Martin, 1969, p. 621). With such a restricted set of public issues to decide, many citizens do not find the issues sufficiently important to warrant active participation in the democratic process. The potential of direct democracy as an educative force is lost. Attendance at New England town meetings averages only 10 percent of the voters (Zimmerman, 1986, p. 21).

But the fact that many local communities concern themselves with a small, and rather unexciting, set of public issues does not imply that they must inevitably do so. Both police and fire protection can be supplied at neighborhood and town levels as supplements to their provision at higher levels of government. Trash collection can be provided either directly by smaller units of government, or by these units contracting with private haulers. Moreover, the latter arrangement appears to be a more efficient method for providing the service (Borcherding, Pommerehne, & Schneider, 1982). Most importantly, the local community could be responsible for educating its children.

In many neighborhoods and towns the number of families with children is such that the community could efficiently support a primary school up through the sixth or eighth grades. Although street lighting and trash collection are not such weighty issues as to draw a large fraction of citizens into active participation in politics, for many parents the education of their children is. In the United States many families pay high premiums for housing to live in communities reputed to have better schooling. In some large school systems, particular schools have been designated as "magnets" and receive greater funds for supplementary programs for the gifted in mathematics, music, and the like. Parents have, on occasion, stood in line all night to obtain a place for their child at a magnet school. That these same parents would not take an active part in a democratic assembly, if it had full authority for the local school's personnel and program, is inconceivable.

Not only might local control of schools and direct democracy produce better adult citizens but it might also produce better-educated children. Two institutional developments have accompanied the dramatic decline of educational performance of American public schools mentioned in Chapter 1. School districts have become larger and more centralized, and school teachers have become unionized. Sam Peltzman (1993) has examined cross-sectional data for U.S. school systems and found evidence that both of these developments have had a significant negative effect on school performance. Peltzman finds a much stronger effect from unionization, and thus provides more support for the constitutional provisions to protect markets taken up in Chapter 15. David Friedman

(1993), on the other hand, presents additional evidence linking school district size negatively to school performance. Decentralization of American school systems with more (full) control returned to parents and local communities seems like a promising way to improve educational performance. Such reforms would be a natural accompaniment to the introduction of direct democracy at the neighborhood and town levels of government.

If the dimensions of the local polity can be drawn to include a sufficiently small number of citizens so that direct democracy is feasible, and yet a sufficiently large number of citizens and area so that a meaningful set of issues can be assigned to this level of government, then at least two major objections to direct democracy can be satisfactorily countered. Citizens have both the opportunity and the capability of becoming informed about local issues. For these issues, citizens can become sufficiently expert to play a direct role in the democratic process. If the community's agenda includes *some* issues that are important to citizens, like schooling and crime prevention, then people have an incentive to become informed and to participate.

The above arguments are not meant to deny that, even at its best, direct democracy exhibits the faults raised against it. Some citizens participate more actively than do others in the democratic assembly, just as some parents participate more actively in the PTA than others. Activists have more influence, and thus outcomes have an oligarchic character to them. But so too, of course, do those implemented by a council of representatives elected at the local level, and even more so do the decisions imposed by elected bodies or bureaucratic administrators at higher levels. In studies of Swiss municipalities it has been found that outcomes conform more closely to the preferences of voters where direct democracy is employed than where representatives are elected (Pommerehne, 1978; Pommerehne & Schneider, 1982). One form of distortion observed is that budget levels are systematically higher in the representative-democracy municipalities than in the direct democracies. Given the interests those in government have in seeing government expand, these findings imply that *even in communities as small as Swiss municipalities,* representative government has additional oligarchic elements to those found in direct democracies. Given the *potential* for all citizens to take part in a local direct democracy, this form of government cannot be *more* oligarchic than the alternatives.

Conclusions

The set of public issues of concern to the members of a local polity, which is small enough to make direct democracy feasible, is obviously limited. Nevertheless, it can contain salient concerns of the community like education and crime prevention. Thus, the establishment of direct democracy at the local level could serve as a vehicle for drawing concerned citizens directly into the democratic process. Through participation at the local level, citizens could, ideally, acquire both a greater interest in and knowledge of political issues at all levels of government. Thus, active participation in local government could facilitate and encourage a wider and more informed participation in the political process.

Although direct democracy seldom seems to achieve the lofty goals set for it by its most ardent supporters, its venerability in Switzerland, New England, and some other parts of the world implies that it often avoids the pitfalls predicted by its harshest critics.

Direct democracy, the process in which citizens meet face-to-face, deliberate issues, and collectively decide the questions facing the community, remains a potentially important component of a society's democratic institutions.

Notes

1. See discussion by Pateman (1970, pp. 22–35) and references therein. Joseph Tussman ([1960], 1970) presents an interesting, modern version of this argument. Pateman's book is an excellent overview of many of the issues raised in this chapter.

2. These institutions condition behavior by meting out rewards and punishments following principles that rely on people's selfish nature. At one level or another all human behavior may be viewed as "self-interested" (Cohen, 1978; Mueller, 1986).

3. Some delegation of authority to various councils and officials would occur—these positions often being filled by citizens chosen by lot for limited periods of service—but the assembly of citizens retained primary authority at those times and places where democracy flourished in ancient Greece (Ehrenberg, 1969, pp. 52–71).

4. Some authors refer to referendum voting as direct democracy. We take up the referendum in Chapter 12.

5. Popular assemblies at the village and town level have existed in recent years in Japan, Poland, Iceland, Turkey, West Germany, England, and Wales in communities of only a few hundred citizens (Humes & Martin, 1969, pp. 85–89).

8

Representative Democracy: Proportional Representation

The more these works are studied, the stronger, I venture to predict, will be the impression of the perfect feasibility of the scheme and its transcendent advantages. Such and so numerous are these that, in my conviction, they place Mr. Hare's plan among the very greatest improvements yet made in the theory and practice of government.

In the first place, it secures a representation, in proportion to numbers, of every division of the electoral body—not two great parties alone, with perhaps a few large sectional minorities in particular places, but every minority in the whole nation, consisting of a sufficiently large number to be, on principles of equal justice, entitled to a representative. Secondly, no elector would, as at present, be nominally represented by someone whom he had not chosen. Every member of the House would be the representative of a unanimous constituency. He would represent a thousand electors, or two thousand, or five thousand, or ten thousand, as the quota might be, every one of whom would have not only voted for him, but selected him from the whole country, not merely from the assortment of two or three perhaps rotten oranges which may be the only choice offered to him in his local market. Under this relation the tie between the elector and the representative would be of a strength, and a value, of which at present we have no experience. Every one of the electors would be personally identified with his representative, and the representative with his constituents. Every elector who voted for him would have done so either because, among all the candidates for Parliament who are favorably known to a certain number of electors, he is the one who best expresses the voter's own opinions, or because he is one of those whose abilities and character the voter most respects and whom he most willingly trusts to think for him.

JOHN STUART MILL

The purpose of government is to provide those goods and services to the community that the market fails to provide efficiently. To achieve this goal those in government must know what goods the community desires. What are the quantity and quality characteristics of the public goods and services the community demands, and how does it wish to pay for them? What are the laws by which it wishes to be constrained, and how much is it willing to pay to enforce them? The hallmark of democracy is that the answers to these questions are supplied by the citizens themselves.

The most active role for citizens in answering these questions occurs under direct

democracy, where the citizens literally come together to discuss and decide what collective actions the community will undertake. But direct democracy is capable of answering these questions at best only for issues that have a limited range of spillovers, issues that impact the citizens in an area and community size that allows them to physically gather together and effectively debate and resolve issues. For collective goods that do not have this limited geographic scope, an alternative means for gathering information regarding citizen preferences is required. Representative government is the common solution to this problem.

Suppose in establishing representative government, citizens sought to create an institution that would mimic direct democracy. Each citizen would be represented in the legislative assembly by someone whose views on the issues were similar, if not identical, to those of the citizen. During debate of an issue, the citizen's representative would rise to present the position that the citizen would have taken had she been present and if she had the time and perhaps ability to study and evaluate the issue as the representative did. When the vote on the issue comes, the representative votes the same way that the citizen would have voted, again under the proviso that the citizen was equally well informed. If this is what a citizen desired from a system of representative government, what sort of an institution would she create? This question is taken up in the present chapter. In the next chapter we discuss a quite different notion of representative government. In Chapter 10 the two models of representative government are compared. We begin by discussing the mechanics of electing a fully representative assembly.[1]

The Mechanics

One person can represent the views of several citizens on public issues only if those views are close to one another. If no two citizens' views are similar, then each citizen requires her own personal representative to have her preferences faithfully represented. The twin objectives of economizing on the number of people in the assembly, and yet having someone present who thinks, speaks, and votes as each citizen demands, would not be feasible, at least not for all citizens. Let us assume that the desired system of representation is feasible, specifically that there are s groups of voters with n_g voters in Group g. All members of a given group have *identical* preferences on the issues that come before the assembly. In such a polity an assembly of s representatives, one drawn from each group, would suffice to achieve full and accurate representation of all citizens' views. If the number of votes each representative was allowed to cast was proportional to the size of the group he represented, the assembly would mirror exactly an assembly that would contain all citizens in the polity.

Obviously if s is so large that an assembly containing s individuals each representing one of the s homogeneous groups would nevertheless be too large to function efficiently (e.g., $s = 10{,}000$), then representative government of the type sought would still be infeasible. Let us assume, therefore, that s is much smaller, say 200. How in this case could one select an assembly to represent each of the 200 groups? One possibility would be to make the representative office sufficiently attractive in terms of income and other emoluments to induce all sorts of individuals to wish to be elected as representatives, and then hold an election across the entire jurisdiction, with all candidates receiving votes getting seats in the assembly and being authorized to cast votes in direct proportion to the number of votes they received.

If the benefits of being a representative are very attractive, many people might run for office even though their positions are no different from those of other candidates; many might "represent" but a few voters. These complications can be avoided in several ways. (1) A minimum number of votes can be required before a person can take a seat in the assembly, the minimum chosen to ensure that the maximum number of seats filled (i.e., the number of voters divided by the chosen minimum) yielded a manageable number of representatives in the assembly. The number of seats actually occupied following any election, however, would vary depending on the dispersion of votes across the candidates. (2) The number of seats in the assembly can be limited to a number large enough to accommodate most if not all groups even with some duplication, say 300, with the 300 highest vote recipients getting seats. To ensure that all voters are represented by someone for whom they had voted, and thus that the proportions of votes allocated to representatives in the assembly are an accurate reflection of the number of citizens who support each representative, a runoff election for the 300 top vote-getters could be held. Such a system would result in some voters, members of very tiny minorities, being represented by someone who did not precisely share their views on all issues. But with 300 candidates to choose from, all voters ought to be able to vote for someone who comes tolerably close to sharing their views.[2]

This property of proportional representation is one of its most important advantages over a plurality system in which only the candidate receiving the most votes in a district takes office. With three or more candidates, a plurality system can easily produce a representative for a district who has the support of less than half of the electorate.[3] Moreover, even those voting for the winning candidate may favor positions on the issues that lie a great distance from those positions espoused by the winner. With 200 seats in the legislature, under the type of multicandidate representational system described here a candidate guarantees a seat by winning one half of 1 percent of the vote. An incentive exists for candidates to seek out positions favored by even fairly small groups of voters. Virtually all voters under this system would be represented by someone for whom they had voted, and who took a position on the issues similar to theirs.

We have not mentioned political *parties* to this point, and there is no obvious reason to do so, given the goals and mechanics of the procedure. Each voter seeks some*one* who shares her views to represent her in the legislature. If a group of voters has the same views on issues, one person can represent the entire group. A *group* of representatives—a party—is not required. Parties play such a pervasive role in politics—even dictators often feel the need to belong to a party—that this aspect of our first option for representation will surely strike most readers as unrealistic if not bizarre. Before describing how political parties can be accommodated in the first system of representation, let us briefly defend the idea that politics could function without parties.

One important role party labels play in a democratic process is to provide voters with a quick synopsis of a candidate's position on the issues. For example, the Greens are for radical measures to protect the environment; the Farm Party is for radical measures to protect farm incomes. For many voters the task of choosing a candidate need go no further than determining the candidates' party affiliations. That these voters would take the time to evaluate the positions of 200 or more competing candidates boggles the mind.

Two comments are in order. First, it is not clear that one would need 200 representatives, all taking different positions on the issues, to span the range of preferences of the polity. The correspondence between being conservative on one issue and being conser-

vative on others might be sufficiently high that only 50 or 25 seats in the legislature would suffice to provide adequate coverage of voter preferences. Even a legislature composed of 25 individuals, each taking a different position on the issues, would offer voters five times the options available under a typical party system of government.[4]

Second, voters could be provided with better information on candidates' positions than is now generally the case. The most relevant information for incumbent candidates is their voting record during the previous legislative session. This information could be sent to each registered voter in, say, booklet form with all the (major) issues listed and each candidate's vote recorded. Challengers could be included, with each one listing how she would have voted on the issues had she been in the legislature. It is common practice in the United States now for various interest groups to rate representatives' voting records. The closer a representative's American Civil Liberties Union (ACLU) rating is to 100, the closer the representative's votes on issues correspond to those favored by the ACLU. If the ratings of the major interest groups like the ACLU were supplied to voters in the same booklet that provided information on candidate voting, a citizen could obtain the same kind of information about a candidate's general ideological position as is contained in a party label. Information is a quintessential public good. The provision of information about candidates to voters at state expense is, therefore, a justifiable use of public funds. Publicly funded radio and television stations could be required to devote time during elections to acquaint voters with candidates' present and past positions on issues. During the 1992 presidential campaign in the United States, independent and previously unknown candidate Ross Perot relied almost exclusively on television to acquaint voters across the country with himself and his positions on issues.

Although some states in the United States have been "one party" states, in the sense that voters at, say, the final election of a senator inevitably have preferred the candidate from the same party (e.g., the Democratic party in the South, the Republican party in Vermont) most states select candidates from both parties, and the latter tendency is increasing (Vermont now [1995] has the only Socialist representative in the House, however). Thus, voters in most states appear to consider more than just a candidate's party affiliation. In many local polities and school districts, candidates do not reveal their party affiliation. Nebraska's unicameral legislature is filled with nonpartisan representatives. A system of representation in which voters chose candidates entirely on the basis of their positions on issues and other personal characteristics would not be a totally radical innovation.[5]

The Role of Political Parties

Let us now consider how the above system of representation can be modified to allow for the existence of political parties. As polar cases, consider two types of party systems that we might describe as "loose" and "disciplined." A loose party system would be like that in the United States in which party members have considerable freedom to vote as they choose, even when that conflicts with the position taken by the party leadership. In such a system parties might help with fund raising, provide ideological labels for the candidates, and the like. But voters would still have to take into account the personal characteristics of the individual candidates when making a final choice, if the same rules for electing representatives were employed as previously described. A voter might know from experience that her preferred candidate will be a member of the Green party, but

if all members of a party do not always vote the same way, she will prefer some Greens to others. Party affiliation will simply help the voter reduce the number of candidates that must be carefully evaluated. A loose party system should function similar to the one in the previous section, with party labels, like ACLU ratings, serving as one of perhaps several aids to the evaluation of candidates.

In a disciplined party system every member of a party votes, with rare exceptions, the same way on all issues. Thus, individual candidate positions and party positions on issues cannot be distinguished. The citizen chooses a party to vote for under a disciplined-party proportional representation system, whereas with no party affiliation or loose party affiliation the citizen votes for the individual. The mechanics of proportional representation now become those of the European list-systems. Each party places a list of candidates who are members of the party on the ballot. The citizen votes not for an individual candidate, but for a party. The same lists are presented to all voters. Seats in the legislature are allocated to parties in proportion to the number of votes they receive across the entire jurisdiction. Each member of the legislature can cast but one vote. Under the system described in the previous section, voters select *persons* to represent them, and each representative person casts votes in the legislature in proportion to the size of the group of voters represented (i.e., voting for that representative). Under the second system, each citizen selects a *party,* and the parties are represented in proportion to the size of the group they represent, with each member of the assembly casting one vote.

With the list system not all of the candidates included in the list win seats. Because voters expect all members of a party to vote the same way, the task of selecting which members are to be on the list can be left to the parties themselves. This authority can be used then to enforce discipline. For example, actual list-systems tend to select candidates from a party list from top down. If the number of votes cast for a party gives it 15 seats in the legislature, the 15 names at the top of the list take seats. Party leaders place their own names at the top of their lists under this arrangement to ensure that they will be in the legislature. A member of one legislative session who rebelled against the party leadership and voted differently on some occasions can be moved to a low position on the party's list in the next election, a position low enough to ensure that the rebel loses his seat. The authority to determine the ordering of names on the party's list at election time should suffice to maintain party discipline. Thus, to have citizens represented by *parties* taking postions close to those favored by the citizens, two conditions are required: Party discipline must be maintained by allowing leaders to effectively remove recalcitrant representatives by placing them in low positions on the party lists at elections. Voters are allowed to cast one vote for a party. Knowing that parties are disciplined, voters ensure that their preferences are best represented by voting for the party with the closest position on issues to their own.

In no-real world democratic system of which I am aware do individual representatives get to cast votes in proportion to the votes they receive. The parliamentary systems of the Netherlands and Israel come closest to the disciplined-party proportional representation (PR) system just described. The nation serves as a single jurisdiction for selecting the national legislature, and parties are allocated seats in rough proportion to the percentage of the votes they receive. (In Germany the number of seats a party can occupy is determined by the number of votes each party receives across the entire nation, although the voters can also influence the composition of a party's delegation.) In most other parliamentary systems the nation is broken down into subdistricts, with each sys-

tem sending one or more representatives to the national legislature (parliament). In general, the fewer the number of districts a nation is divided into relative to the number of seats in the legislature, and the greater the number of candidates that can be selected from any one district, the closer the correspondence of the system to the kind of proportional representation system described here.[6]

The Issue of Stability

With Respect to Voting

The charge is frequently made against proportional representation that it leads to political instability. The old Weimar Republic is cited as the arch example of this problem, with some twenty parties being represented ranging from the Communists on the left to the Nazis on the right.[7] In contrast, the long and stable political histories of the United States and Great Britain are attributed to their use of the plurality system for electing representatives, and the much smaller number of parties this system tends to produce.

But the relationship among electoral voting rule, the number of parties, and political stability is not straightforward. There were, for example, never more parties represented in the Weimar Republic under PR, than the twenty-one parties elected to the Reichstag in 1912 under a form of plurality system (Lakeman, 1974, pp. 208–13; Carstairs, 1980, pp. 163–4). Sweden has had a PR system since 1907, with from three to seven parties holding seats. Yet its politics was dominated by a single party, the Social Democrats, for more than half of this century and has been stable by any standard (Lakeman, 1974, pp. 187–90; Carstairs, 1980, pp. 98–109). Norway, Denmark, the Netherlands, and Switzerland have also had PR systems throughout most of the twentieth century, and yet few would regard these countries as politically unstable. We shall return to the evidence regarding the relative stability of plurality and PR systems in Chapter 10 after discussing the logic of two-party systems in the next chapter. Now, however, we wish to take up some of the conceptual issues regarding political instability in a PR system.

Recall that the objective is to form a legislative assembly with each group of voters represented in proportion to their number in the polity at large by a party or person who shares their ideology (preferences) over the issues. The assembly will function as a committee to decide the public expenditures to be made, taxes levied, laws created, and so forth, much as a town meeting would decide the public issues for the local polity. *A priori* there is no reason to expect the outcomes from a town meeting to be unstable just because *all* citizens can participate. Similarly, there is no reason to expect that the outcomes from a legislative assembly will be "unstable" in some fundamental sense simply because the preferences of *all* citizens are *represented* in the assembly.

The notion that the committee process can be unstable has generally been interpreted in the literature on voting to mean that the committee *may* get hung up in cycles (Sen, 1970a, pp. 68–77). For example, issue a defeats b, b defeats c, but c can in turn defeat a. Much has been made of the negative consequences for democratic institutions of the possibility that voter preferences can be such as to produce a cycle.[8] Without denying the somewhat sinister significance of the impossibility and cycling results, several points should be noted with respect to their consequences for the choice of system of representation. (1) Although a pure two-party system with well-disciplined political parties would never fall into a cycle, actual two-party systems that produce more than two

Table 8.1. Payoffs in Billions ($) to Groups Forming Redistributional Coalition

Proposal	Party A	Party B	Party C	Party D	Party E
1	4	4	4	−6	−6
2	5	5	−6	2	−6
3	6	−6	−6	3	3
4	−6	−6	2	5	5
5	4	4	4	−6	−6

parties and/or undisciplined parties can exhibit cycling. For example, it is certainly possible that the preferences of members of the U.S. House or Senate would be such as to produce a cycle if the appropriate issues were brought to a vote in the appropriate order.[9] (2) Given this possibility most legislative bodies adopt procedures like Robert's "Rules of Order," which prevent issues that have once been defeated from going to a vote again or in other ways avoid cycles. These procedural constraints spare the legislators the time and embarrassment of literally carrying out a cyclic voting sequence (Shepsle, 1979; Shepsle & Weingast, 1981). Although these procedures raise their own normative issues, it is not clear that their limitations *in practice* are so severe as to doom all efforts to come up with normatively defensible democratic institutions. It certainly is not obvious that these institutional arrangements for avoiding cycling would not work just as well in an assembly constituted to represent each group of preferences in proportion to their number in the polity, as they work in one in which the representatives are selected using the plurality rule with one representative per district.

The problem of cycling is most pervasive when the simple majority rule is used to decide pure redistributional issues. Let there be five parties in the legislature, each having 20 percent of the seats. A coalition of any three suffices to pass redistributional measures. Suppose parties *A*, *B*, and *C* form a coalition and propose tax changes that benefit their supporters by $4 billion at the cost of the supporters of parties *D* and *E*, as depicted in Table 8.1. Members of parties *D* and *E* have an incentive to try to join the winning coalition by offering a more attractive proposal to at least one of the other groups. Thus, *D* might counter with Proposal 2. Party *E* can now put forth Proposal 3, which is more attractive to both *A* and *D*, however, and so the cycle continues. Party *C* can now climb back into the winning coalition with Proposal 4, which in turn would lose to the original Proposal 1.

Cycles of the kind just depicted are not limited to multiparty systems, however. They can also appear in two-party systems where party discipline is loose. With geographic representation, as in the United States, *A*, *B*, *C*, etc., may stand for geographic coalitions containing members of both parties. Such redistributional cycling is most visible when omnibus redistribution bills are put together, like tariff increases, farm subsidies and price supports, and public works. Amendments to a bill propose that tariff protection for x be included in the bill, protection for w raised, and protection for y and z dropped. Each new proposal changes the composition of the winning coalition slightly.[10]

We envisage the work of the legislature as largely devoted to positive sum activities like providing public goods, eliminating externalities, and passing laws to achieve the cooperative outcomes in prisoners' dilemma situations. Although distributional issues arise even here, as in determining the tax shares for providing a public good, they are of a quite different nature when a positive-sum game is being played than when a zero- or negative-sum game is played.

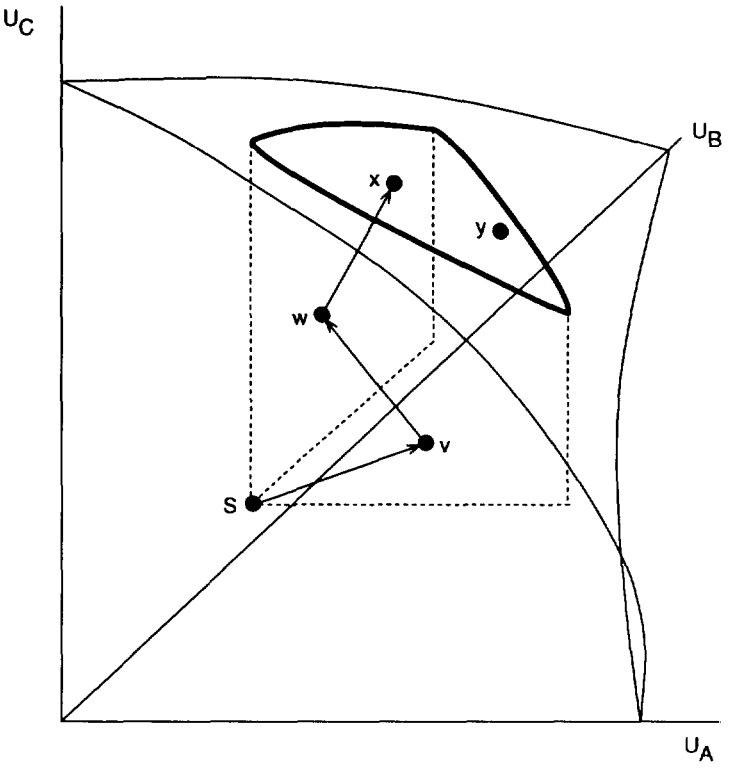


Figure 8.1. Outcome Sequence with Three Groups of Voters Represented

Consider, for example, Figure 8.1 in which the utility possibility frontier for the provision of a public good is depicted. *A*, *B*, and *C* can be thought of as parties whose supporters have identical preferences over the issues. The status quo point *S* inside of the utility possibility frontier represents the utility levels of a member of each group if no public good is provided. The heavy-lined curvalinear triangle on the surface of the utility-possibility frontier contains all of the points that are both Pareto optimal and Pareto preferred to *S*. *All* members of the polity prefer a point in this triangle like *x*, where the public good is provided with some set of tax shares, to the status quo with no public good. If the unanimity rule were used, a sequence of proposals *v*, *w*, *x* could transpire, with each new proposal unanimously preferred to the previous one. Once the point *x* was obtained, no other proposal could defeat it. Of course, other points in the triangle like *y* will be preferred to *x* by some group like *A*. But as long as *x* has been obtained by a procedure that seems fair (e.g., group *C* could not set the agenda to assure that most of the gains from providing the public good accrued to it), point *x* would seem to be a normatively defensible outcome from the collective-decision process.

Although the distributional attributes of the outcome *x* may be somewhat arbitrary—the product of the chance sequence of proposals that leads from *S* to it—this in itself need not cause members of *A*, *B*, or *C* to object to it. All are better off at *x* than at *S*, and if one group has benefited slightly more than another from the public-good's provision, what of it? The outcome that emerges from a majority-rule cycle in a zero-sum

game,[11] as that depicted in Table 8.1, may also be somewhat arbitrary. Perhaps time runs out, leaving Proposal 4 the winner. But here it seems more likely that the final outcome will strike members of *A* and *B*, and perhaps even *C*, as not only arbitrary but also unfair. It also seems more likely that members of these groups suspect, rightly or wrongly, that the outcome arrived at, Proposal 4, was not a result of the chance ticking of the clock, but was achieved by some form of manipulation of the agenda by members of *D* or *E*.

If the unanimity rule were used in the legislature, no cycles would be possible. The distributional attributes of the outcomes might be somewhat arbitrary, as in whether *x*, *y*, or some other outcome in the triangle is selected, but instability in the form of an endless cycle over outcomes could not occur. But the incentives to engage in strategic behavior and the potential delays in reaching a consensus are such that the unanimity rule is impractical (D. Black, 1958, pp. 146–47; Buchanan & Tullock, 1962, Chaps. 6, 8; Barry, 1965, pp. 242–50; Samuelson, 1969). However, the judgment that unanimity is an impractical voting rule does not justify the conclusion that the simple majority rule is optimal. Given that the goal of collective decision-making in the legislature is to reach those decisions that benefit all citizens, the most obvious alternatives to the unanimity rule are qualified majority rules such as, say, a three-fourths or two-thirds majority rule. Once one allows a proposal to pass over any opposition, the possibility of a cycle arising appears. But for any given set of preferences, the probability of a cycle will be lower when the majority required to pass an issue is higher. Indeed, Caplin and Nalebuff (1988) have proved, under quite reasonable assumptions about voter preferences when voting is on issues like public goods quantities, that a two-thirds majority rule eliminates the possibility of a cycle (actually, a 64 percent majority suffices). Thus, the instability of cycling should be of limited importance in a legislative committee, which confines itself to positive sum games and employs a supramajority of votes to pass an issue. In Chapter 11 we discuss additional voting rules that achieve, without cycles, outcomes like *x* that are in the Pareto set.

For any given qualified majority rule, the probability of a cycle declines the more homogeneous the voters' preferences are—that is, the more agreement there is among the voters on the rankings of the different alternatives.[12] The amount of consensus among representatives in the ordering of the issues will be greater if the issue set is effectively confined to positive-sum-game issues like the provision of public goods. The possibility of voting cycles need not preclude the adoption of a system of proportional representation, if the issues coming to a vote are restricted to public good and other allocative efficiency-decisions, and/or a voting rule that does not (is unlikely to) produce cycles is employed.

With Respect to Cabinet Formation

In many proportional representation systems the parliament has both legislative *and* executive responsibilities. The task of this assembly is not simply to vote on various public expenditures and taxes, pass laws and the like; it must also constitute the executive branch of the government. It must decide who is to be the prime minister and who is to be in the cabinet. It must "form the government."

When a single party holds a majority of seats in the parliament, and the parliament functions under the simple majority rule, forming a government presents no challenge. The head of the majority party becomes the prime minister, and the cabinet members

are selected from party ranks. But when no single party holds a majority of seats, a coalition of parties must agree on the prime minister and cabinet composition. Because the parties receive votes based on differences in their positions on issues, these differences can stand in the way of a coalition forming immediately following an election, or sustaining it to the next election. The second alleged instability of multiparty parliamentary government is that it produces weak and short-lived cabinets. Coalition governments are difficult to put together and to maintain once formed.

The allegation is well-founded. There is a strong negative correlation between the effective number of parties in a parliamentary system and the average duration of its cabinets.[13] Lijphart (1984, p. 112) notes that unstable cabinets do not always translate into unstable government policies, as the examples of the Fourth Republic in France and recent experience in Italy show. But in extreme cases the problem of forming the government can detract from efforts to run the government and can lead to the need for more frequent elections than are required by the constitution, thereby wasting the time and resources of both the electorate and its leaders.

This problem, when it exists, is not a problem of proportional representation (PR) and multiparty government per se, however, but stems from the practice of combining this method of representation with the requirement that the parliament also form the executive. If the objective in forming a parliament were limited to that of selecting representatives whose views on public issues faithfully represent those of the electorate, and then having them vote on these issues, no instability could arise other than cycling over issues, for which remedies exist. The solution to the problem of cabinet instability in a multiparty PR system need not entail doing away with PR, but could be accomplished by simply separating the legislative and the executive functions.

The constitutional reforms that transformed the unstable PR system of the Fourth Republic of France into the stable Fifth Republic were of two types. First, the PR system was replaced by single-member district representation and a double-ballot majority method for electing representatives. Second, and arguably more important, the executive branch was effectively separated from the legislative (parliamentary) branch. The president of France is elected independently of the French National Assembly for 7-year terms, the National Assembly for only 5 years. The president is elected by a double-ballot method that ensures that he receives a majority of the votes cast. Both the prime minister and the cabinet are dependent on the president for their appointments and serve at his discretion. The responsibility for maintaining stability of government lies with the president, not with a parliamentary majority. Note that while these constitutional reforms have been effective in introducing stable cabinets into the French parliamentary system, they have *not* produced two-party government. The effective number of parties in the French National Assembly under the Fifth Republic has averaged more than three, and has ranged as high as 4.6.[14]

The U.S. Congress is a representative body that is elected and functions independently of the executive branch. It can initiate legislation and could in principle operate without a chief executive, dealing directly with the administrative agencies that are responsible for carrying out the policies legislated. That it must deal with a powerful president who heads a massive executive branch is partly to the checks and balances built into the U.S. Constitution, and partly to a growth in the power inherent in the office of the president that was unforeseen by most of the Founding Fathers.

We conclude that it is not an essential feature of a representative system that the leaders of the executive departments of the government and the chief executive be se-

lected *by* the legislative assembly, or that they be members *of* that legislative body. Both France and the United States have separately elected presidents and cabinets whose positions are not filled by members of the legislative assembly.

We have described two mechanisms for electing a legislative assembly that fully represents the preferences of all groups of voters in the polity. In the one, groups are represented by individuals who are empowered to cast votes in proportion to the votes they receive from the citizens. In the other, parties serve the representative function. Under either institutional arrangement there is no reason to believe that the legislative assembly could not adequately initiate and pass legislation. Someone would have to be chosen to chair the committee's meetings, procedures would have to be established to introduce and consider legislation, etc., but there is no reason why all of this could not occur without a prime minister and cabinet within the legislative body. Once passed, the legislation could go either to a chief executive who would oversee its execution, or directly to administrative agencies.

The problems of cabinet instability in European proportional representation systems have arisen because they have combined two functions of government in a single institution. In so doing they have created an institution that performs neither function ideally. When the representative assembly must both choose a cabinet and decide policy questions, the voter—when choosing which party to vote for—must consider both the possibility that the party will become a part of the cabinet, and its stance on public issues. This dual role of parties could lead voters to vote for a party that was not their first choice on the basis of its position on the issues, but had a better chance of becoming a part of the cabinet. If voters behave in this manner, the parliament will not accurately and propotionately reflect voter preferences on issues (Ordeshook, 1993). The implication is obvious. The goals of choosing a representative body and choosing a government are different, and they should be pursued separately with different institutional arrangements. We have described institutional arrangements for choosing a representative assembly in this chapter. We next discuss the institutions best suited for choosing a government.

Notes

1. The system of representation outlined here has been described in more detail, with some variation, by Tullock (1967, chap. 10), and Mueller, Tollison, and Willett (1972, 1975).

2. If s were quite small, say 20, an assembly could be chosen by a random draw from the population (Mueller, Tollison, & Willett, 1972). With 500 individuals in the assembly, a random-selection process would result in each group's being represented reasonably closely in an assembly of 500 to their number in the polity. With this procedure each representative would cast one vote in the assembly, and the larger groups would receive more votes as a result of the greater number of their members selected via the random draw. The ancient Athenians chose representatives to one of their assemblies, the Council, via a random procedure (Ehrenberg, 1969, pp. 63, 69ff), and many countries choose juries by this procedure. Martin Bailey (1994) has recently defended this procedure.

3. In the 1992 British elections, 40 percent of the MPs elected received less than 50 percent of the votes cast in their districts.

4. Table 10.3 reports the effective number of parties in the major developed-country democracies of the world, where this number is calculated using the formula presented in note 13 of the present chapter. The actual number of parties exceeds the effective number, but outside of the

recently democratized, former Communist countries, it has rarely arisen above 10 since World War II.

5. The permanence of political parties compared to individuals in politics allows more time and may induce more effort by "special interests" preoccupied with distributional issues to capture parties than would be expected if unaffiliated individuals were the only representatives. Representation by parties may thus contribute to the debilitating effects of time and stability on the outcomes from democracy, which Mancur Olson (1982) has emphasized. In Africa, party politics has merged with tribal differences and resulted in a heavy emphasis on zero- or negative-sum activities. To try to break out of this trap, President Yoweri Museveni of Uganda abolished parties in favor of an entirely nonpartisan representative system (*Economist,* April 23, 1994, p. 92).

6. F.A. Hermens (1938, p. 15) asserted that over 300 PR systems have been invented. Thus, a mapping of these into any simple pattern is no easy task. Douglas Rae (1971) has undertaken the most exhaustive examination of electoral rules and representational outcomes. Lijphart (1990) has updated and corrected Rae's study. See also Carstairs (1980), Blais (1991), and Amy (1993).

7. See Hermens (1938, pp. 15–74; 1951); Riker (1982a); and Breton and Galeotti (1985).

8. The seminal piece in this literature is Arrow's 1951 classic work (rev. ed. 1963). See also Sen (1970a, 1977a, 1982); Riker (1961, 1982b); and Mueller (1989a, Chap. 20). Daniel Bell (1973) references Arrow's work to justify abandoning democracy in the postindustrial society in favor of rule by technocrats.

9. See general discussion of cycling by Riker (1982b) and, for one specific example, pp. 192–95.

10. In a recent paper, Thomas Stratmann (1993) offers the first, to my knowledge, test for the presence of cycling on votes in the U.S. Congress. His results *reject* the hypothesis that a cycle occurred over a series of votes on agricultural bills.

11. The reader should note that most redistribution games as actually played are negative-sum rather than zero-sum—e.g., the market distortions tariffs and agricultural price supports introduce imposed losses on the rest of the community that exceed the gains to those who benefit from these distortions. Dissatisfaction with the outcomes from redistributional games under majority rule should be even greater as a result.

12. See the results surveyed in Niemi (1969), Riker and Ordeshook (1973, pp. 94–97); Plott (1976), and Mueller (1989a, pp. 81–82).

13. See Lijphart (1984, pp. 78–85, 124–26), Schofield (1981, 1987), and references therein. Different ways exist to define the effective number of parties in a parliament. A useful and easy-to-understand method is to calculate a measure called "the numbers equivalent" for a parliament—N. If s_i is the number of seats in the parliament held by party i, then

$$N = \frac{1}{\sum_i s_i^2}$$

For example, with five parties each having 20 percent of the seats in the parliament, $N = 1/(0.04 + 0.04 + 0.04 + 0.04 + 0.04) = 1/0.2 = 5$. With five parties and an uneven distribution of seats, the numbers equivalent is lower; the more uneven the distribution of seats is, the lower N is. With percentage shares of 0.4, 0.3, 0.2, 0.05, and 0.05, $N = 3.4$. With percentage shares of 0.6, 0.2, 0.1, 0.05, and 0.05, $N = 2.4$. For an alternative criterion, see Sartori (1976, pp. 122–23).

14. See Lijphart (1984, pp. 122, 151–52), Macridis (1978b), and Carstairs (1980, pp. 178–86). Note also that in the highly unstable multiparty Third Republic of France the National Assembly was elected by a double-ballot majority system as has been used during much of the Fifth Republic (Lakeman, 1974, pp. 219–26; Carstairs, 1980, pp. 178–86), i.e., one representative was chosen from each geographically defined district. Thus, the Third Republic of France, although perhaps a good example of the instability brought about by multiparty government, cannot

be used as an example of instability caused by electing several representatives from a single district—that is the rules that usually produce PR. If one claims, as Hermens (1951, p. 143) did, that even though the Third Republic did not employ electoral rules that are expected to produce PR, because they produced several parties and unstable outcomes, the Third Republic illustrates the evils of proportional representation systems, then one converts hypothesis into tautology.

9

Representative Democracy: Two-Party Government

> The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers. No doubt by the traditional theory, as it exists in all the books, the goodness of our constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation. The connecting link is *the cabinet* [italics in the original].
>
> WALTER BAGEHOT

> Men by their constitutions are naturally divided into two parties: 1. Those who fear and distrust the people, and wish to draw all power from them into the hands of the higher classes. 2. Those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe, although not the most wise depository of the public interests. In every country these two parties exist, and in every one where they are free to think, speak, and write, they will declare themselves. Call them, therefore, Liberals and Serviles, Jacobins and Ultras, Whigs and Tories, Republicans and Federalists, Aristocrats and Democrats, or whatever you please, they are the same parties still, and pursue the same object.
>
> THOMAS JEFFERSON

Under proportional representation (PR), citizens vote for individuals or parties with the expectation that these representatives will vote in the legislative assembly in accordance with the views of the citizens who support them. Those voting for the Green party are not under the illusion that this party will be able to induce the legislative assembly to accept without compromise the radical policies to protect the environment espoused by the Greens. Rather, they hope that the Greens' presence in the assembly and their radical stance on environmental issues shift the set of outcomes in the direction of greater protection for the environment. The success of the Green party in this endeavor will depend on its size, the size and constellation of views of the other parties, its skill at parliamentary maneuvering, the voting rule and democratic procedures employed by the assembly, and perhaps still other factors. In choosing a party to support, the voter cannot predict the legislative outcomes his vote will help produce, but he should be able to make a reasonable prediction of the stance his party will take on the issues at stake.

Under two-party representative government the link between a citizen's vote for a particular party and the outcomes from the legislative process is more direct. The two

parties compete for the right to form the government, or, more accurately, to *be* the government. With the simple majority rule as the parliamentary voting rule, the party that wins a majority of the seats in the parliament can pass its entire program. With only two parties competing, one *must* win a majority of the seats. When, during a campaign, a member of one of the parties proclaims what her party will do if it receives a majority of the seats in the parliament she is not, or at least need not be, engaging in hyperbolic rhetoric. Her party can implement its platform without alteration, if it so chooses. When the citizen compares the platforms of the two competing parties, he compares not just the *stances* on issues the parties will subsequently take in the parliament, but also the packages of outcomes that each party is fully capable of providing should it win a majority of seats. The voter chooses, as it were, among final packages of outcomes.

In this chapter we explore the properties of the two-party form of representation, beginning with the mechanics of establishing such a system.

Mechanics of the Two-Party System

The goal is to establish a system of representation that results in collective decisions at a given level of government that correspond in an acceptable way to the outcomes desired by the citizens who are affected by these decisions. Under a PR system this goal is accomplished, in principle, by representing the preferences of all individuals in the nation on national issues in the national parliament. To find out what these preferences are, citizens across the nation choose from a common set of candidates or parties. The votes of citizens receive equal weight, whether they reside in, say, Hamburg or Stuttgart. The number of seats a party gets is determined only by the number of votes it gets, not by where the votes come from. A given number of votes has the same impact on the electoral outcome, whether they are cast by people concentrated in Hamburg, people concentrated in Stuttgart, or people spread between the two cities.

Under a two-party political system, the objective is to choose the single party whose platform is most preferred by the citizens, or the party that most citizens want to see in charge of the government. Once again, if it is the national government that is at stake, it is the preferences of all the people in the nation that are to count, and presumably all should count equally. The party with the most votes from across the nation should be empowered to form the government, again, regardless of whether those votes come from Hamburg, Stuttgart, or a combination of the two.

This logic implies that all of the citizens throughout the nation be allowed to choose from the same list of parties in a two-party system as in a proportional representation system. To ensure that there are only two parties represented in the parliament, a second run-off election can be held between the two parties receiving the most votes on the first ballot, when no party wins a majority of seats on this ballot. The final allocation of seats in the parliament is based on the percentage of the vote in the runoff election each party obtains. Thus, as described here, the mechanics of a PR system and of a two-party system would be the same up through the first ballot. They would differ only in that under a PR system there would be but one round of voting. All parties would take seats in the parliament in proportion to the votes they received in that first balloting (perhaps subject to some minimum cutoffs). Under the two-party alternative, voting on the first ballot determines which two parties get to compete on the second ballot, unless

one party receives a majority of the votes on the first ballot. It is the second ballot that determines the number of seats each of the two leading parties gets in the parliament.

The advantage of two-party government is, as the opening quotation of Walter Bagehot indicates, that the executive and legislative functions of government are combined. A single party is authorized by the electorate to form the government and implement its legislative program. This objective is accomplished even under a PR system, whenever a single party wins a majority of the seats of the parliament, if the parliament uses the simple majority rule. But one has no guarantee when there is only one ballot that a party wins a majority of the seats. Holding a second ballot with the voter's choice restricted to the two leading parties ensures that one party has a majority of the seats and can form the government. As discussed below, a two ballot system should reduce the number of parties over time, resulting in a two-(main) party system.

The Effects of Two-Party Government: Single-Dimensional Issues

Political competition is often described in liberal-conservative, left-right ideological terms. In virtually every two-party country in the world, one of the parties is associated with labor and lower-income groups and advocates social-welfare programs. The other party is associated with business interests, middle- and upper-income groups, and favors a smaller role for government, particularly in the social-welfare area. This ideological battlefield is depicted in Figure 9.1. The potential ideological positions of each party are given along the horizontal axis, the number of voters favoring each ideological position on the vertical axis. A unimodal, symmetric distribution of voters is depicted as would be found in a country in which the average citizen is a moderate. Both the radical left and the radical right are tiny minorities.

With such a distribution of voters, competition for votes by the two parties or candidates induces them to take ideological positions at the center of the distribution of voters, at M.[1] If each citizen votes for the party with the platform that comes closest to that he most prefers, the L party would lose if it took a position even slightly to the left of M, since R would then get all of the votes of citizens preferring points to the right of M, and the votes of those to the left of M, who prefer points closer to R than to L. If each party maximizes the number of votes it expects to win, and voters choose parties entirely on the basis of the ideological position the parties take, the two parties then take the identical ideological position at M, the position favored by the voter whose preferred position is at the median of those of all voters.

The outcome from two-party competition depicted in Figure 9.1 has a certain resonance with what is sometimes observed, or thought to be observed, in two-party systems. Candidates are often described as being "middle-of-the-road" despite being members of the party on the left or the party on the right. The complaint is often heard that one cannot tell the two candidates apart. Two-party systems produce a competition between Tweedledum and Tweedledee.[2]

On the other hand, some voters do perceive important differences between competing parties or candidates in a given two-party race (judging from the quotation at the beginning of this chapter, Thomas Jefferson would be one of them). In some particular contexts, say the British parliamentary election of 1979, or the U.S. presidential elections of 1972 and 1980, the difference between the competitors can seem large to most

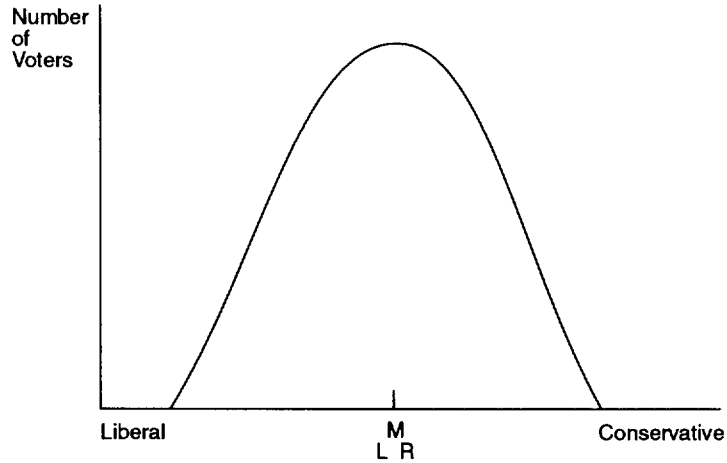


Figure 9.1. Equilibrium Outcomes with a Unimodal Distribution of Voters

voters. Situations such as these can be depicted with the help of Figure 9.2. There are two groups of voters in the polity, an upper and a lower class, and a binomial distribution of the most-preferred ideological positions of the voters. If every voter opts for the candidate whose position is closest to the one the voter most favors, competition for votes between the candidates forces them to the median position in the distribution, namely point *M*. But if voters choose to abstain from voting, when no candidate takes a position very close to the one they prefer, competition for votes can lead to the two candidates taking positions at points *L* and *R*. The dashed lines in Figure 9.2 illustrate the distribution of citizens who will vote if the two candidates are both at *M*. With this distribution of active voters, candidate *L* gains more votes around and to the left of point *L* than she loses near *M* by moving to point *L*. The same argument holds for candidate *R* and point *R*.

If the two modes of the distribution contain roughly the same number of voters, the situation depicted in Figure 9.2 can be expected to result in fairly dramatic shifts in

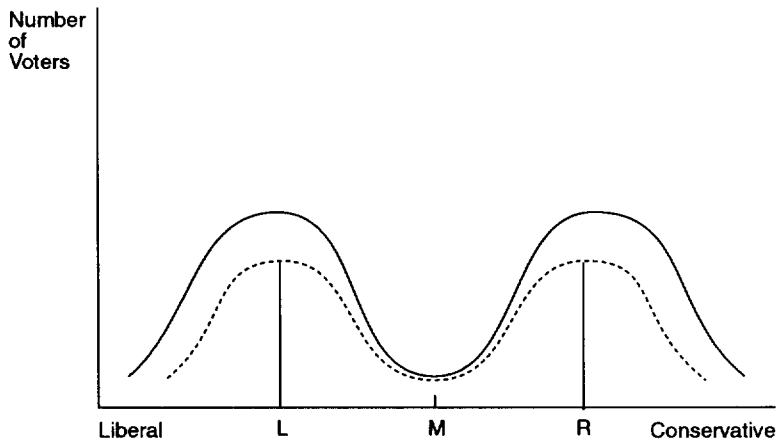


Figure 9.2. Equilibrium Outcomes with a Bimodal Distribution of Voters

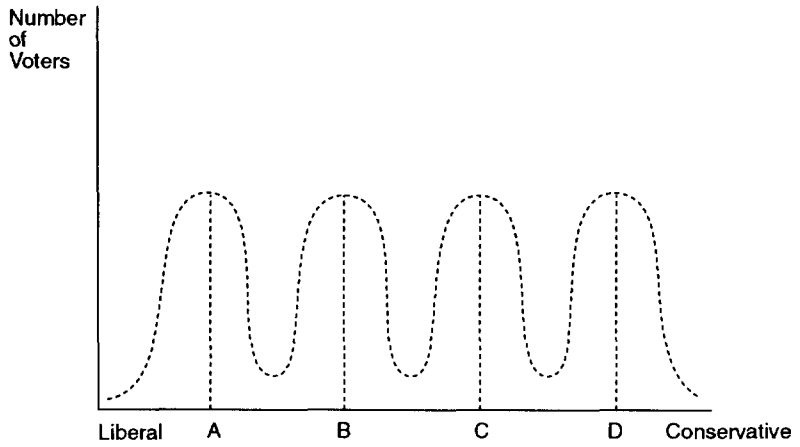


Figure 9.3. Multimodal Distribution of Voters

government policies, when one party is replaced by the other. Such dramatic shifts might be judged to have occurred in the United Kingdom in the 1960s and early 1970s, as the Labour and Conservative parties took turns nationalizing and denationalizing British industry.

If one of the modes of a bimodal distribution contains significantly more voters than the other, two-party competition can result in a single party dominating the electoral outcomes. Indeed, this can even happen under a multiparty system, and may describe the resilience of the Social Democratic party's reign in Sweden since the 1930s, or that of the Liberal Democratic party in Japan over most of the post–World War II period.[3]

In Figure 9.3 a distribution of voters with four modes is drawn. If alienation causes voters to abstain when no candidate comes close to their most preferred position, one might expect to find four parties competing for votes by taking positions at points *A*, *B*, *C*, and *D*. If the numbers of voters contained in each mode are roughly the same, each party would have the same probability (0.5) of being among the top two in its share of the vote. If *C* and *D* were to merge, however, and take a position midway between points *C* and *D*, this merged party might well retain enough support from the voters in the two modes of the distribution on the right to guarantee itself a spot in the final runoff. Even if the parties do not merge, once the first ballot is completed the two winning parties have an incentive to move to maximize their expected vote in the runoff election. If *A* and *C* were the competitors in the runoff, for example, and voters abstained out of alienation when candidates take positions beyond a certain distance from their most preferred points, *A* would have an incentive to move to the right, as would *C*.[4] Given that a successful party in the first round of voting is likely to have to shift its position in the second round to win, a merger with an adjacent party in the ideological spectrum prior to the first round may appear attractive. Both merging parties avoid the risk of not making the runoff, and both avoid the potentially embarrassing and costly need to shift ideological positions after the first ballot. Thus, one expects a two-stage, winner-take-all system of government to lead to the disappearance of minority parties either by attrition or merger until two viable contenders are left. The winner-take-all aspect of U.S. presidential elections, coupled with the importance of the presidency in American politics, accounts for the lack of success of third parties in the United States

and, consequently, for the success of its two-party structure. No second ballot is required to produce a two-party structure for the presidency, since only one seat is at stake, and thus one party's candidate must win on the first ballot.[5]

Two-Party Competition with Multidimensional Issues

When issues are single-dimensional, for example the amount to be spent on defense, the assumptions one needs to make about voter preferences and behavior to demonstrate that competition for votes between two candidates leads to an equilibrium seem reasonable. For example, if voter preferences are single-peaked, and voters opt for the candidate whose platform promises the highest utility, an equilibrium pair of strategies exists for the two candidates.[6]

The assumption that all issues in a campaign can be collapsed into a single ideological dimension does not seem reasonable, however.[7] One person could easily be a liberal on women's rights issues and a conservative on environmental issues. Others could be liberal or conservative on both. To be realistic one must allow for the possibility that issues are multidimensional. But the natural generalizations of the assumptions that suffice to guarantee an equilibrium with a one-dimensional issue space do not suffice when there is more than one dimension.

Let x and y in Figure 9.4 measure the amounts of two public expenditures, say defense and environment, with tax formulae to finance each activity given. Points 1

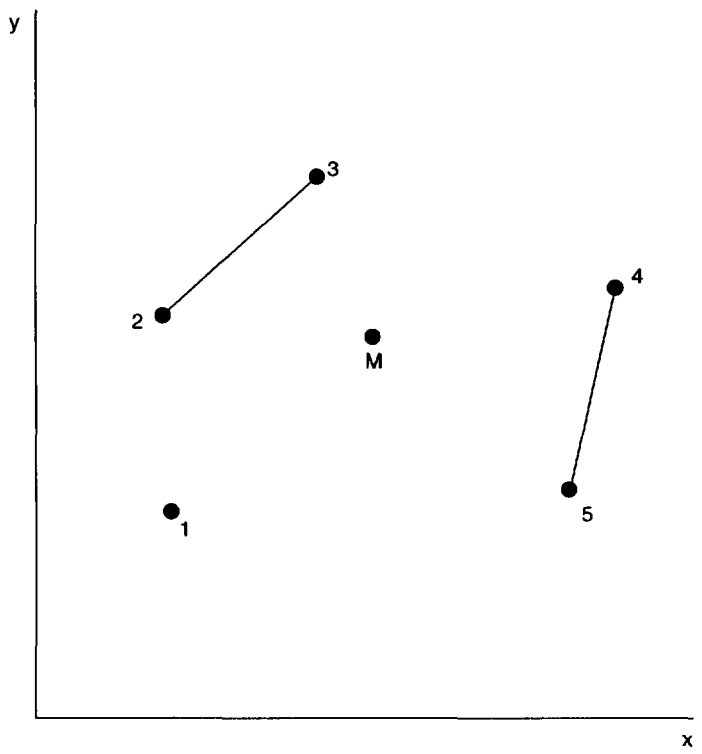


Figure 9.4. Equilibrium Outcomes with Two-Issue Dimensions

through 5 are the ideal points, the combinations of x and y that promise the highest utility levels for five groups of voters. Let the numbers of voters in each group be such that the votes of any three constitute a majority. Then it is easy to show, even when each voter's utility function has a single peak, that no equilibrium pair of strategies exists under the assumption that all voters vote for the candidate whose platform promises the highest utility (M. J. Taylor, 1971; Riker & Ordeshook, 1973, Chap. 12; Enelow & Hinich, 1984, pp. 22–24). Any point the one candidate picks as a platform can be defeated by a point—indeed, many points—that the other could pick.

The standard cycling results of multidimensional voting models assume that each citizen votes with certainty for the candidate whose platform promises the higher utility. *All* of group 3 votes for either L or R, and a slight shift in either candidate's position could shift all of the votes of group 3 to the other candidate.

More recent spatial modeling of electoral competition makes the more plausible assumption that there is some "white noise" in the voter–candidate communication process—e.g., because the voters do not know the candidates' positions exactly, or the candidates are uncertain of the positions of the voters' ideal points. These models, therefore, assume that a change in the position of one of the candidates changes the *probability* of a given individual's voting for the candidate (Hinich, 1977). The closer a candidate's platform is to a voter's ideal point, the higher the probability is that that voter votes for the candidate. The closer a candidate's platform moves toward the ideal point of a group, the greater the fraction of the votes of that group the candidate receives. But neither candidate receives all of the votes of a group. A proposed increase in income tax progressivity costs the liberal candidate votes from corporate managers and wins votes from blue collar workers, but some corporate managers still support the liberal party, while some blue collar workers support the conservative party.

With this key change in assumption about voter responses to party positions (or party perceptions of voter responses), and some additional, reasonable assumptions, it can be shown that the competition between two parties for votes leads to an equilibrium pair of strategies.[8] In most models, as in the one-dimensional literature, the parties adopt the *same* platforms—some point like M in Figure 9.4. This point M turns out to be a weighted mean of the ideal points of the different groups.[9]

Under the probabilistic voting assumption, each party maximizes its expected number of votes. When the L party chooses the amount of defense expenditures to promise voters, it weighs increases in the probabilities that voters on the left do not support the party if it increases defense expenditures against the increases in probabilities of support it will get from voters on the right. It chooses that platform for which the expected increase in votes from the right from promising slightly more defense just equals the expected loss of votes from the left. This balancing of expected votes takes place in all dimensions of the issue space.

In Chapter 5 we presented arguments for why individuals at the constitutional stage would unanimously agree on institutions that maximized a social-welfare function, as in Equations 9.1 or 9.2.

$$W = U_1 + U_2 + \ . \ . \ . \ + U_n \tag{9.1}$$

$$W = U_1 U_2 \ . \ . \ . \ U_n \tag{9.2}$$

If x^* is the quantity of defense that maximizes W in Equation 9.1, then a slight increase in x increases the sum of utilities of all those favoring more x by the same amount as it

reduces the sum of utilities of those wanting less x. Citizens at the constitutional stage would like the institutions of government to balance the gains and losses in utilities of voters as parties in a two-party system are forced to do to win votes. Indeed, under the assumptions of the probabilistic voting models, competition leads the two parties unintentionally to platforms that maximize a welfare function of the form presented in Equations 9.1 or 9.2.[10] The welfare function that is implicitly maximized by two-party competition is a *weighted* sum or product of the utilities of the voters, with the weights dependent on the probabilities that voters respond to changes in platforms. If individuals are members of groups with similar preferences and behavior, then the more responsive a group's voting is to movements in party platforms, the more weight this group receives in the social-welfare function that is implicitly maximized through party competition.[11] The marginal probabilities that a group votes for a party are the weights that determine the weighted mean (M in Figure 9.4) that is the equilibrium to the candidate-competition process.

Thus, competition for votes in a two-party system produces both an equilibrium outcome, and an outcome possessing some fairly attractive properties—at least when this competition leads the candidates to adopt the *same* platforms. However, some probabilistic voting models have demonstrated the existence of equilibria in which the candidates choose different platforms (e.g., L. Samuelson, 1984). These models seem more realistic in that they predict what we sometimes think we observe—candidates or parties having different platforms.

Suppose, for example, that there are limits to how far R can move to the left and up in Figure 9.4, and on how far L can move down and to the right. Point M might not be attainable for either, and L might find its vote-maximizing point to be somewhere on the line connecting points 2 and 3, while R's vote maximizing point is between points 4 and 5. L goes after the votes of groups 2 and 3, R after groups 4 and 5, and group 1 is ignored. (The situation would be a little like the outcome with the bimodal distribution in Figure 10.2, where the two candidates take positions at the center of each mode.) The normative characteristics of this outcome would be quite different from those described above with respect to M, however. If, say, R won the election, it would be only the welfare of groups 4 and 5 that received weight in the social welfare function that R's platform implicitly maximized. The constraint that R could not move far to the left would effectively force it to give zero weight to the utilities of groups 1, 2, and 3. More generally, even when all groups' utilities do get a positive weight in the welfare function maximized through candidate competition, we shall be interested in knowing what those weights are when making a normative judgment about the two-party system of representative government.

Two-Party Systems in Practice

The only national electoral system extant that closely resembles the one described in the opening section of this chapter is the French system for electing a president.[12] If no candidate receives an absolute majority of the votes cast, a second vote takes place between the two candidates receiving the highest number of votes on the first ballot. The president of France is always elected with an absolute majority of the votes cast on the final ballot.

The president of France appoints both the prime minister and the cabinet. The latter resembles the U.S. cabinet more than the British cabinet in that its members need not

be, and often are not, elected members of the parliament (French National Assembly). If they are they must resign their seats in the National Assembly before taking up a position in the cabinet. Although the president obviously holds a position of much authority in France, the post does not fit the model of this chapter in that the elected president cannot simply proceed to fulfill his election promises once he is elected. All legislation must pass through both the National Assembly and the Senate, although the government (cabinet) and National Assembly can force legislation through over the Senate's opposition. Thus, in choosing among the presidential candidates, the French voter cannot simply consider the ideological positions of the candidates, the policies they would like to implement if they are elected, and vote for the candidate whose policies come closest to those favored by the voter. The winning candidate will not generally be able to induce the National Assembly to pass all of the legislation he would like to see passed. As in the United States, the party of the president need not have a majority of the seats in the French National Assembly.[13] The French voter is wise to consider other factors when choosing a presidential candidate, like the canditate's skill in working with the National Assembly. Because the choice of a president does not necessarily lead to the implementation of his platform, the electoral outcomes from this two-candidate competition do not have the normative properties described in the previous section.

Candidates for the presidency of the United States often campaign by making promises of what they will, or will not do, if elected president. They too cannot necessarily deliver on their promises when elected, for all legislation must pass in both houses of Congress, where the president's party need not have a majority, and the lack of party discipline can prevent the president from getting all of his legislation passed.

Although presidential candidates and their running mates for the two major parties are always on the ballots in every American state, the rules for getting the names of candidates for other parties on the ballot differ from state to state, and there typically are minority candidates who are missing from some state ballots in any election. The votes in each state are added to determine how the votes of the Electoral College are to be cast. The existence of this peculiar institution—the Electoral College—creates the possibility that a presidential candidate can win an absolute majority of the national vote and not be elected. Several presidents have been elected with less than an absolute majority of the national vote. Bill Clinton won with only 43 percent of the vote in 1992.

Given the procedures for electing a U.S. President, voters need have no illusion that a candidate could implement all of the promises in his platform, if he is elected. In voting for a presidential candidate citizens are not indirectly selecting a set of public-policy outcomes that they prefer to those of the other candidate. The normative properties of two-party systems that we described in the previous section do not characterize outcomes from the U.S. system of presidential elections.

Under the parliamentary systems of Great Britain, Canada, Australia, and New Zealand,[14] a party that wins a majority of the seats in the parliament can implement the policies it promised in the election campaign. The parties are generally well disciplined, and a majority of seats in the parliament allows a party to override the votes of the opposition consistently. Thus, in choosing which party to vote for, citizens in these four countries can assume that the platform of the party they vote for will, or at least could, be implemented should this party win a majority of the seats in the parliament.

But in each country a single member of parliament is elected from each district, and no allowance is made for a runoff election should no party receive an absolute majority of the seats in the parliament. Thus, in each country it is possible to have more

than two parties win seats in the parliament, and for there to be no party with an absolute majority of seats requiring the same sort of coalition governments that are regarded as a disadvantage of proportional representation relative to "two-party" plurality systems. It is also possible for a party to win a majority of the seats in the parliament while obtaining *neither* a majority of the votes cast nor even the most votes of any party—an event that occurred as recently as 1974 in Great Britain (Finer & Steed, 1978, pp. 87–88). Indeed, there were two elections in 1974 in Britain and, in both, the party chosen to govern received less than 40 percent of the popular vote (Carstairs, 1980, p. 199).

Parliamentary systems as in Great Britain do allow voters to choose among parties that *can* implement their platforms, if they win an absolute majority of seats, and allow voters effectively to choose the platform of policies they most prefer from the set being offered in the election. Thus, these systems correspond to the sets of procedures described in this chapter. But they also have the negative features of allowing election outcomes in which no party has an absolute majority of the seats, or in which the party with an absolute majority of seats is actually placed second to some other party by a majority of voters. To avoid these twin pitfalls, parties must compete for votes in elections in which the entire nation is a single electoral district, and a runoff must be held should no party receive an absolute majority of seats.

Persons or Parties?

The procedures in France for electing the president are essentially those that we have described at the beginning of the chapter. If the French president were empowered not only to appoint his cabinet but also to implement government policies as he saw fit, the French system would be the same as that outlined here. Candidates for the presidency would presumably run for office on platforms that described the policies that they intended to implement if elected. An incumbent president would be judged to some extent on his record. In selecting a president the French citizens would in effect be selecting the policies this candidate promised to provide. The president would have the incentive to implement the policies he had promised—the policies that a majority of the population had said that they wished to have—by the necessity for running for reelection on his record. The policies such a system selected could reasonably be expected to have the normative properties discussed previously in the chapter.

The above-described system would make an elected president "dictator for a term." As long as the president stayed within the constitution, and stepped down gracefully when he failed to be reelected, there is no reason to believe that such a system could not work well. The goal of two-party government is to choose governments that are effective and responsible to the people. An elected president at the head of a cabinet and executive branch he has chosen should, in principle, be capable of providing a most effective and yet responsible government.

But one can imagine some leaders, in some countries, at some points in time, so enamored with their role as "dictator for a term" that they refuse to give up the role after they have been defeated at the polls. Moreover, illness, illegal activity, or other forms of scandal may make it desirable that a president step down prior to the normal expiration of a term of office. However, in the absence of a parliamentary system, impeachment proceedings may be difficult to institutionalize and implement.[15] For these

and other reasons, it is desirable to make the competing "candidates" parties rather than persons in the two-party system.

Let us suppose that the system works like the parliamentary system of the U.K., with the modifications that the parties compete for votes in elections across the entire nation, and a runoff election is held between the two leading parties should no single party win an absolute majority of the seats in the parliament. In such a system, impeachment is not an issue. Should a party leader become incapacitated, or the need arise to remove the leader for any other reason, this action can be taken within the party that controls the parliament. For a similar reason, the threat of dictatorship should be much less in a parliamentary system. While a would-be Hitler could choose to tear up the constitution and introduce a dictatorship in a two-party system, his fellow party members would probably have some advance warnings that this action was about to take place and could, if they so chose, act to prevent it. An all-powerful president would face no similar checks.

The constraint against actions harmful to the electorate by a person or party forming the government in a two-party system is the requirement that they stand for reelection. Nevertheless, there may be reason to fear the growth in power of a chief executive who remains in office for a prolonged period, even if she continues to be legitimately reelected. Such concerns prompted a constitutional amendment in the United States limiting a president to no more than two consecutive terms in office. Although obviously effective in curbing the power of the presidency, it has two serious disadvantages. First, it makes a two-term president a "lame duck" for half of the president's term in office, and thus perhaps excessively weakens the president's power relative to the Congress in her second term. Second, it removes for the second term the constraint placed upon the president's conduct and policies by the need to stand for reelection.

The problem more frequently faced in the United States other than that of having candidates like Franklin Roosevelt—whose personality and policies were so popular that he was reelected again and again—is that of having no candidate who seems particularly well qualified and capable. When the rare person is found whose policies are so popular that the polity wishes to reelect that individual for a third or fourth term, it seems a waste to have to turn her out of office in the fear that she would become too powerful. The potential control that a party places on its leader—party members can depose her from the party's leadership[16]—would allow, for example, a successful prime minister and her party to remain in office as long as her party continues to receive the support of the electorate in parliamentary elections.[17]

If in a parliamentary system a crisis arises that is so serious that it splits the governing party (e.g., a Watergate debacle), a relatively smooth transition to a new government is possible as the opposition party is already present in the legislature and can take over the reigns of government until the country can express its judgment in the next election.

The presence of both the governing party and the opposition party(ies) in the parliament can hold the governing party to a greater degree of accountability. If, as in the British system, the prime minister and the cabinet members must rise each week and answer questions from the opposition concerning major policy issues, the government is forced to inform the public of its actions and motivations. It cannot dodge tough questions by failing to call a news conference, or leaving the tough questions to a news secretary.

The interaction between the governing and the opposition parties in the parliament

can also have a positive educational effect on the polity. Interested voters can watch on their TVs, or read in their newspapers the challenges posed by the opposition, the defenses offered by the government. During the interval between elections, voters cannot only observe what it is the government is doing and why, but also what the opposition has to say about these policies. Thus, the electorate is in a better position to judge the contending parties at the next election than it would be if the opposition is a "dark horse" appearing out of nowhere a year before the election.

For all of these reasons the most attractive two-party system of government should resemble the British system in that the competition would be between parties, with the winning party empowered to select the chief of state (prime minister) and the cabinet. But is such a system—even in an ideal form as proposed here to ensure that there is a single party with a majority of seats that also received a majority of votes—better than an ideal PR system? An answer to this question is our quest in Chapter 10.

Notes

1. The classic expositions of this model are by Hotelling (1929) and Downs (1957, pp. 114–41). See also Davis, Hinich, and Ordeshook (1970), Borooah & Van der Ploeg (1983), Enelow and Hinich (1984, pp. 8–13), and Mueller (1989a, pp. 180–82). One can think of the competitors as being parties, as in the parliamentary system described in the previous section, or persons, as in a presidential contest. Thus, the terms "parties" and "candidates" can be used interchangeably. We return to the issue of whether it is better to have the executive formed by a person or a party at the end of the chapter.

2. Amy (1993, pp. 78–79) contrasts the positions the two political parties in the United States take with the positions of eight parties in Italy. The Italian parties cover a wide spectrum of ideologies. The two American parties straddle the position of Italy's Christian Democratic party.

3. Japan has employed a modified form of PR that has, however, elements of a plurality system in it. See Lakeman (1974, pp. 86–87).

4. Whether they have this incentive depends on the degree of alienation among the voters. The primary system in the United States is a double-ballot system in which candidates must first defeat challengers within their own party and then of the opposition party. The optimal position for a candidate to take in the primary differs from that in the general election and leads to candidates shifting positions, if that can be accomplished without alienating original supporters. See Coleman (1971, 1972), and Aranson and Ordeshook (1972).

5. I ignore the potential complications introduced by the Electoral College, since it has not been a factor in a presidential election for over a century.

6. Enelow and Hinich (1984, Chap. 2). A voter's preferences are single-peaked if they achieve a maximum at a single ideal point, and if in any direction points further from this ideal point provide lower utility.

7. Poole and Romer (1985) find that they can map all of the rankings of 36 different interest groups into only three ideological dimensions, with a single dimension providing 94 percent of the explanatory power. Koford (1989, 1990), however, has argued that the number of dimensions in the issue space cannot be reduced this far.

8. See, in particular, Coughlin and Nitzan (1981) and Ledyard (1984). For surveys, see Coughlin (1990) and Mueller (1989a, Chap. 11).

9. The L party chooses the platform P_L that maximizes

$$V_L = n_1 f_1[U_1(P_L) - U_1(P_R)] + n_2 f_2[U_2(P_L) - U_2(P_R)] + \ldots + n_m f_m[U_m(P_L) - U_m(P_R)] \quad \text{(F9.1)}$$

where n_i is the number of individuals in group i, $f_i(\cdot)$ is the probability that a member of group i votes for L, $f' > 0$, $f'' < 0$, and $U_i(\cdot)$ is the utility a member of group i expects from the given platform. This produces the following first order condition that P_L must satisfy

$$n_1 f'_1 U'_1 + n_2 f'_2 U'_2 + \ . \ . \ . \ n_m f'_m U'_m = 0 \qquad \text{(F9.2)}$$

where U_i' is the marginal change in utility of a member of group i at the point P_L along the vector running from i's ideal point through P_L. Party R chooses the candidate's platform so as to solve the analogous problem.

Equation F9.2 is the identical first-order condition that one would obtain by maximizing the social-welfare function

$$W = n_1 a_1 U_1 + n_2 a_2 U_2 + \ . \ . \ . n_m a_m U_m \qquad \text{(F9.3)}$$

when

$$a_i = f_i' .$$

Thus, in choosing a platform that maximizes its expected vote, each party maximizes a weighted sum of the utilities of all members of the polity—a weighted Benthamite social-welfare function. The weights placed on the welfare of each group are the changes in the probabilities of each group's voting for the party in response to an increase in the utility the party's platform promises a member of the group. Different assumptions about the way voters compare candidates lead to a weighted Nash social-welfare function being maximized.

10. Which welfare function is implicitly maximized depends on the way voters compare the parties. See references in note 8.

11. For additional discussion of these weights and their normative significance, see Coughlin, Mueller, and Murrell (1990) and Mueller (1989a, pp. 200–205).

12. Some of the U.S. southern states require runoffs to ensure that winners receive an absolute majority.

13. In the 1986 election the right-of-center UDF and RPR parties won enough seats to form a government, while Socialist party leader Francois Mitterrand was French president. The National Assembly of France was elected using a form of PR in 1986. For the 1993 election, which the Conservatives again won, a single-member-per-district, double-ballot majority system was used. For descriptions of how the French political system has functioned, see Macridis (1978b) and Carstairs (1980, Chap. 16).

14. New Zealand has voted to switch to a PR system in 1996.

15. A vice president could be elected along with the president, of course, and thus the identity of a successor could be known. But one would, presumably, want any impeachment proceedings to be initiated by someone other than the vice president. It is also quite possible that the reasons for wanting to impeach the president (e.g., illegal activity) also implicate the vice president.

16. Although probably Great Britain's most successful prime minister since Winston Churchill, Margaret Thatcher could not avoid being removed from the leadership of her party when it deemed it expedient.

17. Both parties and persons can erect obstacles to effective competition, as seems to have been done by the Liberal Democratic party in Japan (Curtis, 1988; Van Wolferen, 1989). The more appropriate remedy for this problem, than having a constitutional provision forcing a popular party out of office, is to have constitutional provisions that facilitate effective competition from opposition parties.

10

The Two Systems of Representation Compared

Of all modes in which a national representation can possibly be constituted, this one [Hare's proportional representation] affords the best security for the intellectual qualifications desirable in the representatives. At present, by universal admission, it is becoming more and more difficult for anyone who has only talents and character to gain admission into the House of Commons. The only persons who can get elected are those who possess local influence or make their way by lavish expenditure, or who, on the invitation of three or four tradesmen or attorneys, are sent down by one of the two great parties from their London clubs as men whose votes the party can depend on under all circumstances. On Mr. Hare's system, those who did not like the local candidates, or who could not succeed in carrying the local candidate they preferred, would have the power to fill up their voting papers by a selection from all the persons of national reputation, on the list of candidates, with whose general political principles they were in sympathy. Almost every person, therefore, who had made himself in any way honorably distinguished, though devoid of local influence, and having sworn allegiance to no political party, would have a fair chance of making up the quota; and with this encouragement such persons might be expected to offer themselves, in numbers hitherto undreamed of. Hundreds of able men of independent thought, who would have no chance whatever of being chosen by the majority of any existing constituency, have by their writings or their exertions in some field of public usefulness made themselves known and approved by a few persons in almost every district of the kingdom; and if every vote that would be given for them in every place could be counted for their election, they might be able to complete the number of the quota. In no other way which it seems possible to suggest would Parliament be so certain of containing the very *elite* of the country.

And it is not solely through the votes of minorities that this system of election would raise the intellectual standard of the House of Commons. Majorities would be compelled to look out for members of a much higher caliber. When the individuals composing the majority would no longer be reduced to Hobson's choice, of either voting for the person brought forward by their local leaders or not voting at all; when the nominee of the leaders would have to encounter the competition not solely of the candidate of the minority, but of all the men of established reputation in the country who were willing to serve, it would be impossible any longer to foist upon the electors the first person who presents himself with the catchwords of the party in his mouth and three or four thousand pounds in his pocket.

JOHN STUART MILL

In the preceding two chapters we have described four "ideal types" of representation: (1) proportional representation (PR) of voter preferences by elected persons (PR persons), (2) proportional representation of voter preferences by elected parties (PR parties), (3) two-candidate competition, where the candidates are persons, and (4) two-candidate competition, where the candidates are parties. Toward the end of Chapter 9, we gave reasons why option 4 above clearly dominated option 3 above when the goal of the electoral process is to choose a government. In this chapter, therefore, we confine our attention to the first, second, and fourth options above. We begin by contrasting the properties of the ideal types of representation and then by examining the characteristics of their real-world analogues.

The Ideal Types of Representation Contrasted

Choosing Representatives Versus Choosing Governments

Under a PR system, be it to elect persons or parties, citizens elect representatives who will literally represent their views in the legislative assembly. In voting for a particular party or person under a PR system, voters cannot make very good predictions as to the effect of their votes on the final policy choices that will be made by the legislature. Policy outcomes will depend on the relative strengths of the parties holding seats and on the voting rule for aggregating their preferences. In contrast, under a two-party system, voters know that the party they vote for will be able to implement its entire platform, if it wins the election. In choosing a party voters come much closer to actually choosing a final set of outcomes.

A PR system produces a much closer correspondence between the views of voters and their representative than does a two-party system. Neither alienation nor indifference should keep citizens from voting under a PR system since (1) every citizen should be able to find at least one party or person with a position on the issues that comes tolerably close to that of the voter, and (2) significant differences in the positions taken by the various parties will exist.[1] With only two political parties in the final competition, many voters are likely to find that neither party comes close to their most preferred position. If the two-party equilibrium is one in which both parties take the same position on the issues, indifference is also a real danger. Thus, both alienation and indifference seem more likely under two-party than under PR systems, and one expects and observes greater voter turnouts under the latter.[2] Breeding alienation and indifference and thereby lower voter participation may be judged undesirable features of an electoral process. If they are, then PR seems to have an advantage over two-party systems. But the objective of two-party systems is to choose a government, to choose more directly the final outcomes from the political process. A final judgment on the relative merits of the two processes must also consider their effects on the outcomes chosen.

In Chapter 9 we discussed one set of outcomes from two-party competition that led to an equilibrium such as point M in Figure 9.1. Under the assumption that voter decisions are based on the differences in expected utilities from the two parties' platforms, M would maximize a weighted sum of the utilities of all voters. What would be the policy outcome under a PR system? The answer to this question depends, of course, on the voting rule used in the legislative assembly. We describe three novel voting rules in

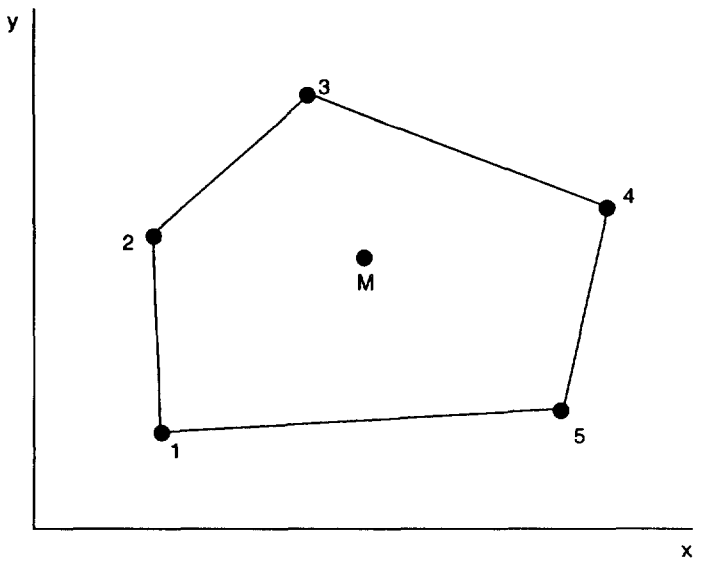


Figure 10.1. Pareto Set with Five Groups of Voters

Chapter 11. Here we briefly relate the outcomes that two of them produce under PR to that of a two-party system, as well as what a qualified majority rule should yield.

Under a qualified majority rule, the winning issue must obtain m fraction of the votes in the assembly. If $m = 1$, a point in the pentagon (Figure 10.1) formed by the ideal points of the five groups,[3]—that is, a point in the Pareto set—would be chosen. While an $m < 1$ will almost certainly be deemed optimal to discourage strategic behavior and save time, even an m of three-fourths or two-thirds can be expected to produce results that are Pareto optimal most of the time. The findings of Caplin and Nalebuff (1988) imply that all qualified majorities greater than two-thirds would be free of cycles when voting is limited to public goods issues, as depicted in Figure 10.1, and each representative has a most preferred combination of public goods.

With point voting, representatives of the five groups each would be given vote-points in proportion to the number of votes they received in the election. Starting from a status quo point, say $x = y = 0$, each representative would vote to increase or decrease the amount of x and y provided by assigning points to that issue. The procedure results in the collective choice of a combination of x and y that maximizes a weighted sum of the utilities of the voters. In principle, it could result in the same outcome being chosen as under two-party competition, M. In practice, voter turnouts, campaign contributions, and the like will differ between two-party and PR systems, and both the weights implicitly assigned to the different groups' utilities and the chosen outcome would differ between the two systems. But their general properties—a chosen outcome that maximizes a weighted sum of voter utilities—are identical. Thus, a choice between the two systems must rest on considerations other than the normative properties of their theoretically anticipated policy outcomes.

Under the probabilistic majority rule, a lottery is formed among the five proposals of the representatives—e.g., their five ideal points—with the probability assigned to each point being the fraction of the voters represented at each ideal point. Rational,

risk-averse representatives will unanimously prefer a compromise proposal, within the pentagon-shaped Pareto set, to the lottery. This, the third of the procedural options, can also be expected to produce outcomes like M in the Pareto set. If the constitution specifies a voting rule for the legislative assembly that encourages compromise among the represented groups' ideal points, then the outcomes from that assembly formed under a PR electoral formula should be normatively comparable to that obtainable under a two-party system.

Consensus Versus Dissidence Building

J. Rolland Pennock (1979, pp. 358–59) describes two-party systems as consensus building, and PR systems as the opposite (see also Hermens, 1938, pp. 256–60). The above discussion implies that the difference between the two is not *whether* or not a consensus is reached, but *where* it is reached. With voter preferences as depicted in Figure 10.1, either one group dictates its most preferred outcome or some compromise among the most preferred outcomes of the five groups must be reached. Under a two-party system the compromise is made during the electoral campaign as each party tries to woo voters from all five groups by choosing a combination of x and y with some appeal to each group. Under PR, the compromise must be reached after the election, when the representatives of the five groups meet in the legislative assembly to decide on the quantities of x and y. That a compromise is necessary is dictated by the lack of agreement among the five groups of voters on what is the best outcome. Proportional representation encourages compromise among the membership of the legislative body (Blais, 1991).

The success that representatives of different groups will have in reaching a compromise depends on many factors: the distances separating their positions on the issues, the proclivities of the representatives to engage in strategic behavior, and, of course, most importantly, the voting rule used in the legislative assembly. The voting rules mentioned above, and still others, can produce outcomes like M in a legislative assembly. But it is one of the fundamental lessons of public choice that no voting rule is perfect.[4] Under PR, radical minorities can elect representatives to the national assembly. Suppose one or more of these individuals obtains representation and refuses to compromise,[5] or worse still, works relentlessly "to bring the system down." The collapse of the Weimar Republic has been attributed in part to the presence in the Reichstag of parties on the far left and right—e.g., the Communists and the Nazis—and their unwillingness to compromise.[6] The frustrating inability of Italian parties to form stable coalitions has also been attributed to their unwillingness to compromise (Macridis, Allen, & Anelem, 1978, p. 492). Although the radically different nature of our ideal PR system from these real world cases (executive separated from legislative; the focus on positive sum collective actions; alternative parliamentary voting rule) makes these forms of instability far less likely in our ideal system, they cannot be ruled out entirely. A possible danger from representing heterogeneous groups in the legislative assembly is that they somehow fail to reach agreement on issues that could be of mutual benefit—they shoot themselves in their collective foot.

There is, however, a negative side to the two-party scenario also. Those like Hermens and Pennock who see two-party government as consensus building assume that the competition for votes pulls the two parties toward the middle of the ideological distribution of preferences. The distribution is assumed to be either unimodal or bimodal, with abstentions due to alienation not significant enough to upset the equilib-

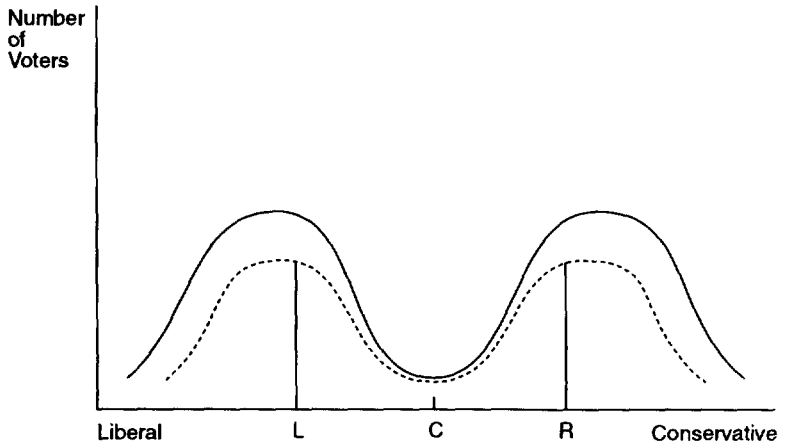


Figure 10.2. Possible Equilibria with a Bimodal Distribution

rium, with both parties taking similar positions at the center of the ideological spectrum—point *C* in Figure 10.2. The desire to win an election forces political parties to move away from their ideological supporters on the left and right and to compete for the votes of the uncommitted citizens in the center.

But suppose abstentions due to alienation are so great when parties move to the center that the equilibrium under two-party competition has the parties at positions *L* and *R*[7] (Figure 10.2). We now have the potential difficulty of large swings in policy outcomes following a change in the governing party. Consider the stop-and-go macropolicies and nationalization–denationalization actions that took place in Great Britain in the 1960s and early 1970s as the reigns of government passed from Labour to the Conservatives and back again. What is more, these radical swings can occur following only slight shifts in voter support. The Labour party in Britain increased its fraction of *seats* in the British Parliament from 41.0 to 50.3 percent between the 1959 and 1964 elections by increasing its fraction of the *popular vote* from 43.8 to 44.1 percent (Mackie & Rose, 1991, Table 24.3b,d). While our ideal two-party system with runoff elections would not allow a party to obtain a majority of the seats in a parliament without obtaining a majority of the votes, it would allow the transfer of government to ensue following slight shifts in voter support. Under two-party government the difference between having 50.1 percent of the vote and 49.9 percent is the difference between implementing one's platform, and objecting to the other party's implementing its platform. Note that with a distribution of voter preferences, as in Figure 10.2, a PR system coupled with a parliamentary voting rule that did force a compromise on policy would actually produce *policies* closer to those favored by the voters at point *C*, even though a party representing these voters would be much smaller than either of the parties centered at *L* or *R*. The application of a voting rule like point-voting would force the parliament to choose outcomes that gave positive weights to the welfare of all represented groups, whereas a two-party system with parties positioned at *L* and *R* could effectuate outcomes that gave positive weights to only one of the two major groups of voters.

We conclude that, when the ideal types of representation work as designed, they both can result in policy outcomes with attractive normative properties. Indeed, they

would produce very similar outcomes in many cases. But with respect to each, one can conjure up examples in which the outcomes are not attractive. In choosing between the two, the constitution framers must try to envisage the kinds of outcomes that can be expected from each system for their particular country. In making such a judgment, the experience of other countries with similar systems may be helpful.

Ideal Types and Real-World Electoral Systems

A few electoral systems do approximate the ideal types described in Chapters 8 and 9. The procedures in France for electing the president are identical to those described for an ideal two-party system—the entire nation is defined as an electoral district. If no candidate gets an absolute majority of the first-ballot votes, a runoff is held between the top two candidates. The major difference between this system and our ideal type, and it is major, is that the president of France cannot simply implement the policies he espouses, and thus the voters cannot choose from among the presidential candidates on the expectation that whoever is elected will implement his promised platform.

The list-systems used in the Netherlands and Israel follow our ideal PR-parties system, with the entire country treated as the electoral district in which each voter casts one vote for the party of his choice, and the seats in the legislature are allocated nearly in proportion to the votes cast for each party. There is no runoff to ensure that all voters are represented by parties for which they voted. The most significant difference between the Dutch and Israeli systems and our ideal system, however, is the requirement that a government—i.e. a cabinet—be chosen by the elected parties using the simple majority rule. This requirement can lead to instability problems. Israel in particular has found it difficult to form stable coalitions among its many parties.

In many U.S. cities, the entire city is treated as a single electoral district for the purpose of electing representatives to the governing assembly, the city council. In some cases candidates do not declare a party affiliation. These nonpartisan electoral systems resemble our ideal PR-persons system, with the exception that an elected member of a city council gets to cast but one vote, regardless of the number of votes that candidate received, whereas our ideal system would give each representative votes in the city council in proportion to the number received from the electorate.

All of the ideal systems envisage parties or persons competing for votes across a single electoral district. Issues that affect the entire nation are to be decided in the national legislature: expenditures on defense, immigration policy, environmental issues affecting the entire country.The vote of a citizen of Paris is to count the same as that of a citizen from Dijon, and each is to have the same options as to choice of party or person to represent them. Similar electoral rules would be used to elect representatives to regional, metropolitan, and perhaps even neighborhood legislative assemblies. Most real-world legislative assemblies differ from these ideal types and from the few real-world examples given above, in that the nation is divided into several electoral districts, and the citizens in each vote separately for the party or person to represent them. The votes from Paris are counted separately from those from Dijon.

Real-world electoral systems of this type can differ in both the number of districts into which the nation is divided and the number of individuals that can be elected from each district. Our ideal PR systems have but one district and as many people elected from that district as there are seats in the legislature. The fewer the number of districts

into which the polity is divided and the more people elected per district, the more a geographically based system resembles our ideal PR system. When but a single person can be elected to represent each district, the electoral system resembles our ideal two-party system *for that district.* With this distinction in mind we divide our discussion of real-world electoral systems into two parts depending upon whether they allow one representative per district or more than one. We call the former "multirep" systems, and the latter "single-rep" systems.

Multirep Systems

MULTIREP LIST SYSTEMS

To see how multirep systems work, consider Table 10.1. A nation of 10,300,000 voters is divided into ten districts based on geography. Seats in the parliament are apportioned to each district in proportion to population—e.g., district 1 has twice the population of district 2, and therefore can fill twice as many seats. We have assumed that the population in each district is such as to make the allocation of seats exact. Every group of 100,000 voters elects one representative. Usually, of course, even the fairest apportionment of seats results in some differences in voters per seat across districts. There are eight parties seeking seats in the parliament, but all eight do not choose to run candidates in each district. When a party fails to enter a list of candidates in a district, an *NL* (no list) is entered. A voter in any district votes for a single party. The seats assigned to that district are allocated in proportion to the votes cast in that district. We have assumed that the allocation rule is the largest-remainder rule. Under this formula, one first calculates the Hare quotient

$$q=\frac{v}{s}, \tag{10.1}$$

where v is the total number of votes cast in a district, and s the number of seats it can fill. The number of seats won by each party is determined by dividing the number of votes won by the party, v_p, by q. This division gives a nonnegative integer I plus some fraction f, $0 < f < 1$, i.e.,

$$\frac{v_p}{q}=I+f. \tag{10.2}$$

The allocation of seats to parties proceeds by first giving each party a number of seats equal to its I. The remaining seats are assigned to each party according to which parties have the largest remainders, f. For example, on the basis of the Is for each party, the allocation of seats in district 1 gave 3 seats to A, 1 to D, and 2 to G. The remaining two seats were given to A and H since they had the highest remainders.

The second-to-last column of Table 10.1 gives the total votes won by each party (v) across the nation and the number of seats (s) each party would obtain if the formula in Equation 10.2 were applied to the national totals rather than district by district. The last column cumulates the seats won across the ten districts. The correspondence between the seats won in the ten districts and what would have been won were the entire nation a district is close, but not perfect. The largest-remainder formula when applied to the

Table 10.1. Distribution of Seats in a Multirep–Multidistrict System

District	1		2		3		4		5		6		7		8		9		10		Totals		
Party	v	s	v	s	v	s	v	s	v	s	v	s	v	s	v	s	v		v	s	v	s	Actual Seats
A	349,851	4	489,441	5	141,222	1	73,444	1	NL		111,422	1	141,383	1	268,317	3	NL		4,525		1,579,605	16	16
B	NL		69,617	1	92,856	1	101,867	1	17,642		71,683	1	155,363	2	182,741	2	81,646	1	115,922	1	889,337	9	10
C	41,442		NL		52,956	1	NL		66,817	1	NL		646,522	7	433,829	4	124,317	1	611,323	6	1,977,206	20	20
D	107,814	1	31,145		NL		32,496		75,323	1	NL		NL		110,009	1	111,666	1	224,103	2	692,556	7	6
E	NL		180,017	2	66,100	1	115,466	1	NL		88,238	1	333,661	3	101,842	1	NL		89,306	1	974,630	10	10
F	23,500		16,333		41,323		304,275	3	80,969	1	NL		141,682	1	NL		NL		79,221	1	687,303	7	6
G	227,275	2	490,376	5	480,727	5	170,631	2	59,249		192,349	2	NL		162,300	2	190,841	2	NL		1,973,748	19	20
H	50,118	1	323,071	3	224,816	2	101,821	1	NL		236,308	2	81,389	1	140,962	1	91,530	1	275,600	3	1,525,615	15	15
Totals	800,000	8	1,600,000	16	1,100,000	11	900,000	9	300,000	3	700,000	7	1,500,000	15	1,400,000	14	600,000	6	1,400,000	14	10,300,000	103	103

Notes: *v* Popular vote for each party.
s number of seats in parliament assigned by largest remainders formula.
NL = no list.

total votes cast in the nation would assign an extra seat to parties D and F, and one less seat to B and G.

Although the Hare quotient coupled with a largest-remainders rule for allocating leftover seats in a district is the most straightforward and easiest to apply, it is not the only one in use. Two variants on the Hare quotient are the Droop quota, d,

$$d=\frac{v}{s+1} \text{ or } d=\frac{v}{s+1}+1 \tag{10.3}$$

and the Imperiali

$$i=\frac{v}{s+2}, \tag{10.4}$$

with d as defined on the left side of Equation 10.3 and i rounded up to the next integer. The d'Hondt system computes no quotient, and simply allocates the seats in a district by repeated application of the largest-remainders principle. The Sainte-Lagué formula uses 1.4, 3, 5, 7 . . . as divisors instead of 1, 2, 3, 4 . . . , as under the d'Hondt system. Still other variants on these have been used.[8] As we shall see, these differ in how well they match party seats to party votes, but all tend to achieve a reasonable correspondence between the two.

SINGLE-TRANSFERABLE-VOTE (STV) SYSTEMS

In STV systems the citizen votes for a particular candidate or, more accurately, candidates, rather than for a party per se, although, of course, a candidate's party is likely to be an important consideration of the voter. Under the STV system, voters rank the candidates running in their district. The determination of winners is made using the second of the two Droop quotas defined above—i.e.,

$$d=\frac{v}{s+1}+1, \tag{10.5}$$

where v and s are the total votes and seats, respectively, in a district as before. One first determines the number of candidates with first-place votes in excess of d. These candidates are all elected. Any first-place votes for a given candidate above those required for him to reach d are assigned to the voters' second choices. If with these transferred votes any candidate has more than d, the extra votes are assigned to the voters' third choices, and so on until the s seats are filled.[9] The STV system is currently employed in the Republic of Ireland, Malta, Northern Ireland (to elect representatives to the European Parliament), Australia (to elect representatives to the Senate), and in some American cities.

When voters confine their ranking of candidates to those from a single party, STV results in the same party representation as under the largest remainder formula (Lijphart, 1986, p. 175). The main difference between STV and a multirep list system is that under the list system the party leadership gets to determine which individuals fill the seats won by the party; under STV, the voters make this determination. Under STV the voters may depose a party leader, for example, by giving her very low ranks, while

under a list system the leader would be elected as long as her rank among the party leadership was higher than the number of seats won by the party.

The STV system would seem to have all of the merits of a party list system—the voters can, after all, rank the candidates in the same order as that advocated by the party—plus the obvious advantage of allowing the voters to provide the additional input into the election process of their views on the relative merits of the party members.[10]

On the other hand, if a party is disciplined, each elected representative winds up voting as do all others. A representative's differential impact has to come in the deliberations about a party's positions. A particular advantage claimed for STV is that it allows ethnic, religious, and gender groups to single out party members from their group for election (Hallett, 1984, pp. 122–23). This potential may obviously be an advantage for these groups in present real-world systems, and may even be one in our ideal system. But in the latter, the focus of the legislature is to be on providing public goods and resolving prisoners' dilemmas, reaching decisions that potentially benefit *all* members of the community. Is there a Catholic position on defense that differs from the Protestant position, a black position on environmental protection that differs from that of whites? If so, then STV has an advantage over a party list system. But it also has the possible disadvantage of encouraging a shift in focus of the legislature to the divisive zero-sum game issues that often divide these groups. These are issues that in our ideal constitutional system are taken up elsewhere in the institutional structure.

LIMITED VOTING

Under limited vote systems each voter can cast c votes, $c < s$, where s is the number of seats to be filled in the district. The s candidates receiving the most votes in a district assume their seats in the legislative body. The votes are cast for persons rather than parties, and so limited voting somewhat resembles STV since voters can indicate which members of a party they wish to see elected. But voters can also cast ballots for persons in different parties. With c and s fairly large, limited voting tends to resemble a PR system. The only country in which limited voting with $c > 1$ is used today is Spain to elect the upper house.[11]

Limited voting is a compromise between pure PR systems, in which the parties or persons receive votes in the parliament in direct proportion to the votes cast for them, and plurality systems, in which representatives are elected with greatly different numbers of votes. This latter characteristic creates strategic problems for both the voters and the parties running candidates. Suppose, for example, four seats can be filled from a district and each voter can cast three votes, the typical case in Spain. A voter might like to see all four seats filled by representatives from his most preferred party, but can cast but three votes. If the party runs four candidates, the voter must choose one candidate not to vote for. If all voters who support this party choose the same person not to vote for, only three members of the party can possibly be elected. If the number of voters supporting this party is large, however, all four seats might have been filled by representatives of this party under an alternative pattern of voting. This may lead some people to vote for their fourth choice from the party, say, and not for their first choice, under the expectation that their first choice will receive considerably more than the number of votes required to get elected. But if large numbers of voters act the same way, their first choice might fail to get elected, while their fourth choice wins election.

A symmetric problem faces the parties in choosing the number of candidates to run. A party that runs four candidates for four seats might spread its votes so thinly that it

elects only two, say, when by running three it could have elected all three. If it runs only three candidates, however, it passes up the chance of electing four. These strategic considerations suggest that limited voting systems are a less attractive means for eliciting information on voter preferences than PR party list and STV systems.

SINGLE-NONTRANSFERABLE-VOTE SYSTEMS (SNTV)

A special case of limited voting has $s > 1$, and $c = 1$. When both s and c equal 1, we have the plurality system, so that SNTV is clearly closer to a plurality system than limited voting systems with $c > 1$. Indeed, when $c = s > 1$, limited voting resembles STV, so that limited voting approximates PR or plurality systems as s and c are large or small. The only country currently using SNTV at the national level is Japan. As one might expect, given its halfway-house status between pure PR and plurality systems, SNTV achieves a degree of proportionality between votes and seats in the parliament somewhere between that of the PR list and STV systems (Lijphart, Lopez, Pintor, & Sone, 1986). If one wants to obtain an accurate reflection of voter support for different parties or persons at the national level, SNTV is inferior to the more popular PR systems.

Single-rep Systems

In single-rep systems each party runs but one candidate in a district, and thus the voter always votes for a particular person in these systems, even though this choice may be heavily or exclusively influenced by the candidates' party affiliations. Single-rep electoral systems are of two types: *plurality systems* in which the candidate receiving the most votes in a district is elected to the legislative assembly, and *majority systems* in which the candidate receiving the most votes in a district is elected, *if* she also has received a majority of the votes cast. When the latter does not occur on the first vote in a district, a runoff is held, with some of the candiates who received votes eliminated. Logically, the runoff should be between the two candidates receiveing the most votes, but this logic is generally not followed.

The plurality system has been used to elect representatives to the national legislative assemblies in Canada, New Zealand,[12] the United Kingdom, and the United States. The Australians use a form of majority-STV system called the *alternative vote*. As under STV, voters express their rankings of the candidates, not just their first choices. As under a plurality or majority system, however, a single candidate is chosen from each district. If a candidate receives an absolute majority of the first place votes, that person is elected. If no candidate receives an absolute majority of first-place votes, the second-place votes of the candidate receiving the fewest first place votes are transferred to the other candidates. If following this transfer a candidate now has an absolute majority, that person is the winner. If no candidate still has an absolute majority, the second-place votes of the candidate receiving the second fewest first-place votes are transferred to the other candidates. This procedure is followed until one candidate achieves an absolute majority (Lijphart, 1984, pp. 152–53).

In France a combination plurality and majority system has been used at various times. On the first ballot a candidate needs an absolute majority of the votes cast to be elected. If no candidate from a district receives an absolute majority, a second balloting occurs and the candidate with a plurality of the votes is elected. On the second ballot, all candidates who did not receive at least 15 percent of the first ballot votes are re-

Table 10.2. Disproportionality of Different Electoral Systems Classified by District Size, 1945–85 (percentages by which overrepresented parties are overrepresented)

Adjusted District Magnitude	LR-Hare and Pure Sainte-Laguë	LR-Droop, LR-Imperiali, Modified Sainte-Laguë, and STV-Droop	d'Hondt	Plurality and Majority	All
1–1.1	—	—	—	12.93 (6)	12.93 (6)
1.1–5	—	4.60 (1)	8.51 (3)	—	7.53 (4)
5–10	—	5.18 (3)	5.83 (6)	—	5.61 (9)
10–25	2.81 (2)	—	4.28 (3)	—	3.69 (5)
100–150	2.46 (3)	3.53 (2)	4.39 (2)	—	3.32 (7)
All[a]	2.60 (5)	4.53 (6)	5.87 (14)	12.93 (6)	6.45 (31)

Source: Lijphart (1990, p. 485).

Note: The numbers of cases on which each average is based are in parentheses. LR = largest remainder.

[a]Except France 1951–56.

moved, however. This feature made France's system approximate a straight majority system (Lijphart, 1984, pp. 153–54).

What Difference Does It Make?

Table 10.2 reproduces the results from Arend Lijphart's (1990) careful analysis of the consequences of electoral law differences. The entries are the percentages by which those political parties that are overrepresented are overrepresented. A zero would be perfectly proportional representation.

The different systems are grouped from left to right according to the theoretical predictions as to which gives the closest approximation to fully proportional representation. This prediction is well borne out. Plurality and majority-rule systems overrepresent the largest parties by five times more than the LR (largest remainder)-Hare and Sainte-Laguë systems. The Droop, Imperiali, d'Hondt, and other variations of PR do worse than LR-Hare and pure Sainte-Laguë, but are clearly better at achieving proportional representation than the plurality and majority systems.

The second characteristic of electoral rules that can be observed in Table 10.2 is that a given PR-type system produces more proportional results the larger the electoral district (and hence the more representatives per district). The most proportional systems of all are the LR-Hare and Sainte-Laguë with the entire nation treated as a single electoral district. The least proportional are the single-member district plurality and majority systems.[13]

Why Geographic Representation?

The idea that one person should represent an entire constituency, as under the plurality system, evolved in Great Britain from the predemocratic institution of representing corporate bodies by individuals sent to London (Eckstein, 1963, p. 248). That this system, when adapted to represent people, should have some inadequacies in serving this function is perhaps not surprising. Consequently, following the invention of proportional representation in the middle of the nineteenth century, one country after another in continental Europe and Scandinavia shifted from single-member representation to PR

(Carstairs, 1980). The one exception to this generalization has been France. It has shifted back and forth between PR and majority systems over the last century depending on the expectations of the controlling parties in the legislature as to which system will serve them better in the next election (Knapp, 1987).

Proportional representation has been discussed as an alternative to single-member representation in Britain on several occasions over the last century. The lack of a written British constitution, and therefore of a constitutional amendment procedure, implies that PR could only be adopted in the U.K. if the British Parliament voted to do so. Because the present rules allow the largest party regularly to convert less than a majority of the popular vote into more than a majority of seats in Parliament, it is not surprising that no British Parliament has ever voted to adopt PR. Among the English speaking democracies, only Ireland has adopted a PR-type system. Even the countries with PR systems have with but a couple of exceptions chosen to subdivide the national polity into geographic districts and elect representatives to the national legislature by geographic district. If the objective of the national legislature is to resolve questions of national consequence, what justifies a geographic mode of representation?

One justification would be that there are significant homogeneities of preferences *on national issues* within geographic areas, and strong heterogeneities across regions. Such might be the case in a country in which religious, ethnic, and economic groups resided in different areas, and if these groups tended to have preferences on national issues that were homogeneous within the groups and heterogeneous across them.

A second justification for electing representatives by geographic district would be to make the representative process more personal. Local "boys and girls" are sent off to the national capital to represent the "folks back home." With electoral campaigns geographically constrained, the chances of a voter seeing and hearing a candidate in person increase. Candidates can learn the wishes of the electorate through direct contact (Blais, 1991).

A third justification, related to the second, is that geographic representation encourages "face-to-face" contact among the citizens and between citizens and their representatives, thereby helping to educate them politically (Schwartz, 1988, pp. 101–03).

Although there is certainly merit in these arguments, their importance should not be exaggerated. Both would carry more weight in a bygone era than they do today. The increasing mobility of citizens in all developed countries has made a citizen's present geographic location a poorer predictor of his religion and ethnic background than was true a century ago. Increasing levels of education reduce the correlation between ethnic and religious background and views about national policy issues. In most countries, citizens obtain their information about candidates for national office from national newspapers and magazines and from national TV and radio networks. Even in the United States where "local newspapers" remain dominant, these papers are increasingly becoming parts of national chains, relying on national news services to cover stories of national importance and publishing the commentary of nationally syndicated columnists. The modern voter is more likely to obtain information about candidates' and party positions from newspapers and television than from personal contact.

The growth of population and people's increasing mobility also undermine the personal, face-to-face contact justification for geographic representation. Establishing personal relationships between representatives and their constituents is more difficult when the constituents are constantly changing and their number is large. Schwartz (1988, Chap. 7) illustrates the advantages of geographic representation with Renaissance Flor-

ence. But Florence was a tiny polity by modern standards, with a representative from one of its quarters representing between only 8,000 and 23,000 citizens. A member of the U.S. House of Representatives has on average more than 500,000 constituents, a senator more than 2,500,000. Even a British MP represents over 100,000 people. With such numbers, face-to-face contact must be fleeting and rare with correspondingly little educative value.

The one issue upon which the views of citizens within a given geographic district are most homogeneous, and over which there is most likely to be disagreement across districts, is the merit of funding projects out of the national budget that provide benefits only to the citizens of that district. The danger of electing representatives to the national legislature on a geographic basis is that they become lobbyists for local interests instead of representatives of citizen views on national interests; they become ombudsmen for their local constituents. The plethora of projects, from metropolitan transportation systems to dams and bridges that are funded out of the national treasury in the United States, indicate that this danger is real. Although many of these projects can be viewed as legitimate public goods from the point of view of the citizens in the local area in which they take place, when viewed from a national perspective they are obviously a geographic redistribution from the rest of the country to the district benefited. That the European parliamentary systems have produced somewhat similar results can be explained in part by their also having chosen geographically based modes of representation.[14]

Many admit that geographically based representation does not yield accurate representation of citizen preferences across the nation on national issues, but defend this mode of representation anyway, on the grounds that it leads to a two-party system of government. The claim has often been made—indeed, it has been proclaimed to be a *law*—that geographically based plurality and majority systems produce two-party government.[15] This claim is part of a broader set of hypotheses linking election laws to the number of parties, a subject to which we now turn.

Electoral Laws and the Number of Political Parties

The Logic

When only one representative can be elected from a district, a candidate can guarantee victory only by securing at least 50 percent of the vote. This characteristic encourages parties adjacent to one another in the ideological spectrum to merge and discourages minority parties. A party with a dedicated following of no more than 10 percent of a district faces the dreary prospect of *never* electing a representative. Thus, plurality and majority systems encourage some parties to merge and others to withdraw, and thereby tend to evolve toward having only two parties compete for votes *in a given district*.

If the relative size and ideological perspective of parties is the same across all districts, a plurality system will tend to produce a two-party system at the national level. But if a party with a 10 percent following at the national level has its support concentrated in a few districts, and can therefore elect representatives from these districts, there is nothing in the logic of a plurality system to prevent it from producing several parties with continued representation in the national legislative body.

By allowing voters to elect several representatives from each district, multirep sys-

tems lower the required number of votes a party must obtain to elect a representative. If a district can fill ten seats in the legislature, a party can guarantee itself representation by securing 10 percent of the vote, and can in most cases elect a representative with a far smaller fraction. Multirep systems can keep minority parties alive by offering them reasonable chances of electing some members of the legislature.

Although multirep systems make it easier for minority parties to survive, they do not of course necessitate their appearance. Should ideological differences in a country be such as to divide the polity into basically two large groups, only two parties might emerge under a multirep system. The logic of electoral representation does not imply unconditionally the survival of but two national parties in single-rep systems and numbers greater than two in multirep systems. We anticipate, however, that when single-rep systems produce multiparty representation, there are important regional differences in ideology that give some parties large regional followings. Two parties should dominate in multirep systems only when the ideological differences separating voters are few and relatively uniform across the entire country.

Examples

The United States epitomizes the single-rep, two-party system. In the elections for the House of Representatives in 1994, 434 of the 435 seats were filled by candidates from either the Republican or the Democratic parties; a lone Socialist party candidate won in Vermont. In the 1988 presidential election, minority party candidates won a *cumulative* total of less than 1 percent of the votes cast across the nation. While offering seemingly strong proof for the law that single-rep systems produce two-party representation, the U.S. results must be qualified to some extent. The American system is characterized by loose party discipline. Party affiliation is a less accurate guide to a representative's ideology and likely vote on a given issue than it is in Canada or Great Britain. A Democrat from rural Mississippi can vote quite differently from a Democrat from the Bronx (New York City). If one defines a party as a group of individuals of similar ideological persuasion who vote the same way on issues, then the number of "parties" present in the U.S. Congress is larger than two.

In the election of the president, the United States is effectively a single electoral district today, the Electoral College having devolved into a rubber stamp of the popular vote. Thus, the two-party nature of these contests does not refute the argument above that single-rep systems produce two-party outcomes at the electoral district level, but not necessarily at the national level.

Regional differences in ideology in the United States were at their apex just before the Civil War when political parties and the nation were divided by the issue of slavery. The same single-rep plurality system that exists today produced in 1860 four major parties, and the two presidential candidates from the Republican and Democratic parties won a combined total of less than 70 percent of the popular vote (Mackie & Rose, 1991, Table 25.3b). Had the United States somehow managed to survive without the Civil War and with the institution of slavery intact, the number of political parties in Congress, and the number contending for the presidency, most likely would have remained greater than two for some time.

Canada resembles the United States in origin, area, and stage of economic development, yet regional differences in ideology and party strength have consistently produced at least three parties with representatives elected to the Canadian Parliament, and more

often four or more, despite its having a single-rep plurality system. The same is true in Great Britain. United Ireland, the Scottish Nationalists, the Welsh Nationalists, and the Ulster Unionists and Loyalists have won seats from time to time, as have the more nationally oriented Liberal and Social Democratic parties. No single political party has won an absolute majority of the votes cast in Great Britain in a parliamentary election since 1931. In an ideal two-party system, one party always would.

Austria provides the best example of the converse situation. This small country's population has been divided, at least until recently, essentially into two ideological groups, Catholics and Socialists. Accordingly, the Peoples and Socialist parties have dominated Austrian parliaments over most of the post–World War II era (Lijphart, 1984, pp. 150–60).

Causality in the relationship between electoral laws and number of parties is generally assumed to run from laws to parties. The use of a multirep system leads to the creation of new parties. But there is historical evidence of two-way causality. When religious or ethnic or other ideological differences are held to be significant, having all citizens of a district represented by a person with, of necessity, a single religious or ethnic or ideological background can lead the "unrepresented" minorities of a district to demand proportional representation. Such occurred in Switzerland in the nineteenth century.

Switzerland is today regarded as a model of stable democracy, a counterexample to the proposition that PR systems inevitably produce political instability. It is a country with considerable ethnic and religious diversity. In the nineteenth century, when Switzerland employed the plurality system for choosing representatives, violence first broke out in Ticino and then spread to other parts of the country as ethnic and religious minorities protested against their not being represented in the national legislature (Lakeman, 1974, pp. 192–94; Carstairs, 1980, Chap. 13). It resulted in Switzerland's substitution of a multirep, modified list system for its plurality system. Belgium replaced its plurality system with a PR system in 1899 following ethnic disputes over the representativeness of its single-rep system (Lakeman, 1974, pp. 197–99; Carstairs, 1980, Chap. 6). More recently, elections in Northern Ireland have taken place under an STV PR system by mandate of the British Parliament to ensure representation of the Catholic minority and to avoid the violence a lack of such representation might cause (Hallett, 1984, p. 117). Thus, PR systems are observed in some countries because of the numerous ideological differences that divide the citizens and the need for several viable parties to represent them adequately.

Statistical Evidence

To examine the relationship between electoral laws and the number of political parties, we need a way to count parties. In a country in which two parties have all of the seats in the legislature, with one having 48 percent and the other 52 percent, it seems obvious that we wish to characterize the country as a two-party system. But what if the two parties divide the seats 70/30, or 90/10? In the last case it would seem that we have nearly a one party state, and should characterize the country as effectively having fewer parties than in the 48/52 case.

A fairly simple way to count parties and take into account differences in their relative sizes is to compute a numbers equivalent (NE). A numbers equivalent can be defined both with respect to the fraction of votes each party receives in the election, and the fraction of seats it obtains in the legislature body. Let v_p be the number of votes of

Table 10.3. Numbers Equivalents for Parties Based on Votes Received in Elections (NEV) and Seats Won (NES), 1945–80

	NES	NEV	*NES* / NEV
Plurality and majority			
Canada	2.4	3.1	1.29
New Zealand	2.0	2.4	1.20
United Kingdom	2.1	2.6	1.24
United States	1.9	2.1	1.11
France V	3.3	4.8	1.45
Australia	2.5	2.8	1.12
Single nontransferable vote			
Japan	3.1	3.8	1.23
Proportional representation			
Austria	2.2	2.4	1.09
Belgium	3.7	4.1	1.11
Denmark	4.3	4.5	1.05
Finland	5.0	5.4	1.08
France IV	4.9	5.1	1.04
Germany	2.6	2.9	1.12
Iceland	3.5	3.7	1.06
Ireland	2.8	3.1	1.11
Israel	4.7	5.0	1.06
Italy	3.5	3.9	1.11
Luxembourg	3.3	3.6	1.09
Netherlands	4.9	5.2	1.06
Norway	3.2	3.9	1.22
Sweden	3.2	3.4	1.06
Switzerland	5.0	5.4	1.08

Source: Lijphart (1984, p. 160). (Copyright © 1984 by Yale University Press. Reprinted by permission of Yale University Press.)

Notes: France IV is the 4th Republic, 1945–58.
France V is the 5th Republic, 1959–80.

party p, s_p the number of seats it has in the parliament, and v and s the total numbers of votes and seats, respectively. The NE measures for votes (NEV) and seats (NES) are then defined as

$$\text{NEV} = \frac{1}{\sum_{p=1}^{n} (v_p/v)^2}, \quad \text{NES} = \frac{1}{\sum_{p=1}^{n} (s_p/s)^2}.$$

If five parties each have 20 percent of the seats in the parliament, then $s_p/s = 0.2$, for each $p = 1,5$, and NES $= 5$. If, however, the fractions of seats held by the five parties are 0.5, 0.25, 0.15, 0.05, and 0.05, then NES $= 2.9$; the greater relative importance of the first two parties leads to a smaller number of parties effectively represented in the parliament.[16]

Table 10.3 presents NEVs and NESs for the leading democratic countries since World War II. We place Japan between the single-rep and multirep systems, since it uses SNTV, which is a compromise between the two to some degree. Table 10.3 reveals both the exceptions and the general tendencies. Single-rep systems do average about two parties being effectively represented in the legislative assembly. France is the major

exception here, having been a multiparty state under both multi- and single-rep modes of representation for over a century (Lakeman, 1974, pp. 219–26; Macridis, 1978b; Carstairs, 1980, Chap. 16). The multirep systems average roughly double the effective number of parties represented in single-rep systems, with Austria being the most prominent exception as essentially a two-party state. Japan falls in between the multirep and single-rep systems as predicted. The numbers equivalent for parties based on seats in parliament averages 24 percent more than the numbers equivalent in the popular vote for single-rep systems. For Japan it is 23 percent greater, and for the PR systems only 9 percent greater.

Electoral Laws and the Representativeness of Electoral Systems

The Proportionality of Representation

Under the ideal PR and two-party systems with runoff elections, *every* voter is represented in parliament by someone he voted for, and the correlation between representative votes in the parliament and citizen votes in the election is perfect. Without runoff elections this correlation is reduced but remains high. With representatives selected from geographic districts this correlation is weakened further, but remains greater under multirep-PR systems than under single-rep systems (see Table 10.2).

The numbers in Table 10.2 tend to *under*state the differences between PR and two-party systems in terms of the adequacy in which voters' preferences are represented in the legislature, however. On average, a citizen in a PR system has twice as many parties from which to choose than does a citizen in a two-party system. Thus, the correspondence between the positions taken by the party a citizen votes for and the citizen's views is closer under a PR system. This property of PR coupled with its greater indices of proportionality suggests a considerably more accurate reflection of voter preferences under actual multirep systems than under their single-rep counterparts.[17,18]

Representing Minority Interests

The inherent logic of PR systems is to represent *all* groups of voters in the polity in proportion to their number. One expects, therefore, to find minority groups better represented in PR systems than under plurality systems. Lakeman (1974, p. 50) and Amy (1993, Chap. 5) report higher percentages of women in parliaments elected using PR rules than in those elected by the plurality and majority methods. Amy (1993, Chap. 6) presents evidence that PR produces greater ethnic minority representation. As we have already noted it was this expectation that led Switzerland and Belgium to switch from a plurality to a PR-type system, and was behind the decision to use STV in Northern Ireland. And it was the expectation of greater black and Puerto Rican representation that led to the adoption of STV on New York City school boards.

Achieving "fair" or "equal" representation of minorities was a stated objective of the U.S. Congress in passing the Voting Rights Act in 1965 and in amending it in 1982. Several cases have been brought under the act against cities and states in which representatives are elected using the limited vote procedure described above (e.g., *Norfolk* v. *Collins,* 1989; *Thornburg* v. *Gingles,* 1986). In Norfolk, for example, the city council had seven members elected for four year terms at two year intervals. In any given election, three or four members were elected. Each voter chose the three or four

individuals he wanted to see on the council from a list of candidates and cast votes for all of them (i.e., the number of votes cast equaled the number of seats to be filled).

In practice this procedure produces smaller percentages of the black minority in the elected assemblies than exist in the population of the jurisdictions (Karring & Welch, 1982; Engstrom & McDonald, 1986). The argument put forward in challenging these systems has been that whites vote mostly for whites and that white majorities elect disproportionately white assemblies. The remedy sought, and generally awarded, has been to replace having the entire city or state as a single district, with all voters able to vote for any of the candidates running, with single-member district representation. The borders of each district are then drawn to produce black majorities in enough districts to result in roughly proportional representation of blacks in the assembly, *under the assumption that blacks too predominately vote for members of their own race.*

The chosen solution to obtaining "fair" and "equal" representation of black minorities in the United States is ironic given the emphasis over the last 30 years on integrating blacks and other minorities into schools, housing, etc. It presumes (1) that blacks and whites will remain geographically segregated, and (2) that both groups will continue to seek representatives of their own race. If current trends in judicial interpretations of the rights of minorities under the Constitution and Voting Rights Act continue, blacks will be entitled to fair and equal representation *only in the event that they remain segregated* geographically. Moreover, to date it has been only black minorities who have been protected by the courts. Current interpretation would seem to imply that black minorities are entitled to fair and equal representation, but other ethnic groups, religious minorities, ideological minorities, or any other group—those whose views as to what government should do differ from their fellow citizens—are *not* entitled to fair representation.

These inconsistencies could be eliminated by replacing the limited-vote–multirep systems with multirep PR systems. That is, the problem with the systems that have been challenged is *not* that the entire city or state has been defined as a single electoral jurisdiction with all voters choosing from the same list of candidates, but rather that the voters can cast as many votes as there are candidates.[19] A superior solution to carving up each city or state into districts to ensure that blacks constitute a majority in a sufficient number of districts to achieve proportional representation in the elected assemblies is to maintain the entire city or state as an electoral district and adopt one of the PR systems. If STV were used, for example, voters would rank their first seven choices if seven seats are to be filled rather than casting seven equal-weight votes. If blacks make up 25 to 30 percent of the jurisdiction, and black voter place black candidates at the top of their lists, blacks can be expected to win a proportionate share of the contested seats. The STV or PR list systems would have the additional advantages of blacks not losing their "right" to be represented by blacks, if they move into a predominantly white district, and of affording other minorities fair representation without their having to live in the same areas. Also, the courts would not have to redefine jurisdictions periodically to make sure that black minorities continue to be "fairly" represented.[20]

Rounding Off Remainders

With the total number of seats in the legislative assembly and the number assigned to each district fixed, it is almost always the case that the representatives are elected with different numbers of votes. The question then arises as to how to apportion seats on the basis of the number of votes each person or party receives. Several formulae exist and all produce a reasonable correspondence between the total votes cast for a political party

Table 10.4. Allocation of Votes and Seats in Parliament Under One-Man-One-Vote Formula

Party	Popular Votes	Seats in Parliament	Votes per Seat
A	1,413,782	37	38,210
B	1,884,096	49	38,451
C	4,002,891	103	38,863
D	989,623	26	38,062
E	3,358,529	85	39,512
Totals	11,648,921	300	

and the number of seats it obtains. The largest remainders formula illustrated earlier in this chapter produces the closest correspondence, and it would appear to be the best choice if one adopted a PR-list system.[21] But it is not obvious why *any* formula is really needed.

The principle of "one man one vote" has an obvious appeal when applied to *citizens*, but why should it be applied to their representatives? If *A* receives more votes than *B*, why should that person not have more influence, e.g., more votes, in the legislative assembly? Indeed, does the principle of one-man-one-vote applied to citizens not *require* that their representatives have unequal voting power if they have received unequal numbers of votes?

Complete obedience to the one-man-one-vote principle can be achieved under either an ideal PR system or an ideal two-party system by giving each party winning seats votes in proportion to the number of votes received by the party. Suppose, for example, in a national election to fill 300 seats in the parliament, the 11,648,921 votes cast are divided among the five competing parties, as in Table 10.4.

The largest-remainder formula allocates the 300 seats, as in column 3 of Table 10.4. If each representative were given votes as in the last column, the relative voting strength of each party or person would exactly reflect their support from the citizens.[22] Under a two-thirds majority rule, an issue would now require 7,765,947 votes to pass, but this is of no matter. Electronic voting devices and computers can handle the arithmetic.

The same principle could be easily applied to our ideal two-party system. It could also be extended to systems in which representatives are selected by geographic districts, although the accuracy of the formula will decline as the number of representatives selected per district declines. Even under a plurality system it would seem to offer some advantages over the present formulae, however. Does an elected representative who receives 70 percent of the 1.2 million votes cast in her district not represent in a meaningful sense more voters than one who defeats two other close challengers with only 40 percent of 0.8 million votes cast? Why *ought* these two people have the same power to influence electoral outcomes in the legislature? The reason that they do harkens back to the origins of geographic representation in sixteenth-century England where the intent was to represent *corporations* and *not people* (Huntington, 1968, pp. 93–98).

The Stability of PR and Two-Party Systems

We observed in Chapter 8 that political instability is not a congenital problem of PR systems of representation. When the instability problem has arisen, it has been because

the constitution requires that the assembly elected under PR rules must not only vote on legislation but must also choose a prime minster and form a cabinet. The major cause of instability can be removed by separating the legislative and executive branches (Johnston, 1984, p. 68).

The only country to have attacked the instability of its PR system by constitutional reform separating the executive and legislative branches is France in 1958. France both separated the executive from the legislature and replaced PR with a majority–plurality system. The latter reform did not create a two-party structure in the French National Assembly, and France returned to a PR system in 1986, only to abandon it again for the 1993 election. Nor did a double ballot majority–plurality system produce stability and two-party government on those occasions when it was used between 1819 and 1945, when the executive and the legislative functions were combined through a cabinet-type parliamentary government (Lakeman, 1974, pp. 219–21; Carstairs, 1980, pp. 175–80). The political stability that France has enjoyed post-1958 relative to pre-1958 must be attributed to the creation of a presidency independent of the National Assembly, and the authority given the president to name the prime minister and to choose the cabinet.

Other countries have combined PR and political stability by other means. The Federal Republic of Germany's legislature is elected by what amounts, although somewhat circuitously, to a PR system (Kaase, 1984). But also important is the requirement in the constitution *(Grundgesetz)* that the legislature (Bundestag) cannot remove a prime minister (chancellor) *unless it can agree on his successor,* the so-called constructive vote of no-confidence (Deutsch & Smith, 1978, p. 216). This provision of the German constitution ensures that a government falls (i.e., a chancellor is deposed) only when another government has been chosen to replace it.

In Norway there is simply no provision in the constitution for dissolving the Norwegian Parliament during the four-year electoral cycle. Minority governments, when they have formed, have managed to maintain the basic institutions of government satisfactorily (Castles, 1978, p. 467). In Switzerland it has become a tradition not to dissolve the Federal Council (the Swiss version of a cabinet) in between the normal elections at four-year intervals (Lakeman, 1974, p. 197). Parliamentary chaos can be avoided.

The civil disturbances in Switzerland and Belgium that led to the replacement of single-rep plurality systems with multirep PR systems remind us that the former can generate their own forms of instability. Advocates of two-party plurality systems seem often to assume that the radical groups on the left and right, who consider themselves to be unrepresented in these systems, calmly accept their fate and go about their business as model citizens. If and when they take to the streets, however—as they often seem to do—the instability that two-party plurality systems avoid in the parliament gets transferred to the streets (Powell, 1982). An important issue to be considered in choosing between PR and two-party systems of government is: Where does one want opposition to government policies to be expressed, in the parliament or in the street in front of it?

Parties or Persons?

In Chapter 8 we described ideal PR systems in which the representatives are either parties or persons. Under the latter, each voter chooses that person in the list of all candidates for the legislative assembly which he most prefers, and the elected represen-

tatives cast votes in the national (regional, city) assembly in proportion to the votes they receive.

Elections in some cities in the United States resemble the system just described except that the individuals elected have but one vote apiece regardless of the number of votes they receive in the election. The experience with these contests indicates that voters consider party identification an important source of information about candidate positions on issues. When such identification is lacking (i.e., in nonpartisan elections), voter turnout is lower, and voters are more likely to vote for "name" candidates.[23] The rational ignorance of many voters in U.S. city council and school board elections seems to prevent them from becoming informed about candidate positions on issues. These findings offer a challenge to any proposal to eliminate parties as representatives and simply have citizens represented by people in the legislature. Can television and the other means of communication in a modern society be harnessed to inform voters of candidate positions on issues without the aid of party labels? Ross Perot's surprisingly popular campaign for the U.S. presidency in 1992 suggests a possible "yes" to this question. Despite the bias against third-party candidates in the U.S. geographically based-plurality system, Perot went from an almost totally unknown candidate to one who could capture nearly 20 percent of the popular vote, largely as a result of the intensive use of television in his campaign. However, if the ultimate answer to this question is "no," then only a PR-parties system of government remains an attractive option within the PR category.

Conclusions

The purpose of government is to provide those goods that individuals cannot efficiently provide for themselves, acting independently or through voluntary cooperation with others, and to take collective actions that make all citizens better off. To know what collective goods to provide and actions to take, information must be obtained from the community. The method for obtaining this information that is most consistent with the principle of individualism is for all citizens to express their views as to the most desirable collective-actions directly—the method chosen by the ancient Athenians.

When numbers and time preclude the direct participation of *all* members of the community, its collective decisions inevitably get made by only *some* of its members. All collective-decision processes other than direct democracy are elitist to a degree. They differ only with respect to the types of elites they select, and to the strength of the relationship between the preferences of the individual citizens and the choices made by the elite on their behalf.

We have described two methods of making collective decisions that tie together the collective outcomes chosen for a community and the preferences of its individual members with respect to those outcomes. Under one method, a representative for each member of the community is selected whose preferences with respect to the collective actions are close if not identical to those of the individuals represented. The assembly of citizen representatives then makes collective decisions on behalf of all citizens using the same type of voting procedure as the citizens themselves might use if they met in assembly.

Under the second method, two parties compete on the basis of the actions they promise to undertake, or on their perceived abilities to advance the community's welfare. The periodic need to compete for votes against another party is relied upon to

maintain the link between the preferences of the individual citizens and the outcomes chosen by the elite acting on their behalf.

All elitist mechanisms contain the danger that the elite undertakes actions different from what the citizens themselves would, if numbers and time were not an obstacle. All suffer from the principal-agent problem. These two mechanisms are not exceptions. Each has its advantages and disadvantages relative to the other.

The two-party alternative has the advantage of always ensuring that someone has the authority to act on behalf of the community. In time of war or economic crisis, when failure to act might cause irreparable harm and hardship to a community, the decisiveness inherent in a two-party system may be invaluable.

Two-party systems should function best when a fair consensus exists in the community regarding the kinds of collective actions that should be undertaken, and the opponents of this consensus are distributed symmetrically on both of its sides. In this environment, the competition for votes between the two parties leads them to similar positions on the issues. Voters choose between the parties on the basis of judgments regarding the relative competence and integrity of the party leaders and other difficult-to-evaluate factors. Many voters will find little to choose between the positions of the parties, and some will find the positions of both so far distant from their own preferences that it does not matter whether the party positions are the same or not. A danger under two-party systems, even in the circumstances when they promise to work best, is that they breed indifference and alienation, leading citizens to drop out of the political process and thereby severing the link between electoral outcomes and citizen preferences.

A possibly worse situation can develop in a two-party system when a consensus on collective actions within the community does not exist. If the community is divided into two or more groups of citizens with radically different views as to what actions should be taken on behalf of the community, the power to act inherent in a two-party system can advance the welfare of only one segment of the community to the loss of the other.

Such cannot occur, or can with a far lower probability, under a PR system, *if the assembly of representatives employs a voting rule, that induces compromise and consensus.* Such a voting rule, combined with the representation of all citizens' views, may result in *no* action being taken when citizen representatives take disparate positions on issues. The counterpoint to the danger of a tyranny of the majority under two-party government is the danger of government paralysis under a PR system. And, should the community's commitment to democracy not be strong, this paralysis could in turn lead to the substitution of an elite system that makes a community's decisions and pays little heed to the preferences of the people.[24]

The choice between two-party and PR government thus depends in part on the nature of the community, the distances separating citizens' views as to what the best collective actions are, and in part on the procedure that would be relied upon under a PR system to reconcile differences among the representatives of the citizens. Thus far we have only touched upon these procedures. The following chapter addresses them directly.

Notes

1. If no party takes a position close to that most preferred by a voter, he is said to be *alienated.* If the parties take positions so close to one another that the voter cannot discriminate

among them, the voter is said to be *indifferent*. Both indifference and alienation can lead people to abstain from voting. See Mueller (1989a, pp. 181–82, and references therein).

2. Blais and Carty (1990) and Amy (1993, Chap. 7). Jackman's (1987) results seem to imply that it is the greater proportionality of electoral outcomes under PR systems and the focus on national issues in large electoral districts that produce greater turnouts where PR is used than the number of parties per se, which, if anything, depresses turnout in Jackman's results.

3. If the utility voters get from x is independent of the amount of y they consume and vice versa (i.e., their utility functions are separable), then the contract curves between any two voter ideal points are straight lines and the Pareto set is the drawn pentagon; see Enelow and Hinich (1984, pp. 15–20).

4. This message is conveyed in many forms starting with Arrow's (1951, rev. ed. 1963) famous theorem. See also Sen (1970a), Gibbard (1973), Satterthwaite (1975), and Riker (1982b).

5. Some voting rules do not require that minorities agree to compromise. Under point voting, for example, a pacifist party might place all of its points on reducing the defense budget, no matter how low it is. If a small minority, it would succeed in reducing the budget somewhat, but could not bring it to zero. The representation of hawkish parties on the far right would also tend to offset the influence of a pacifist party. Under voting by veto, described in Chapter 11, an extremist proposal by a small radical party will be vetoed by one of the other parties. Voting by veto would bring about the victory of proposals near the center of the distribution of party ideal points.

6. See Almond and Powell (1978, pp. 227–28). Carstairs (1980, pp. 165–66) attributes the collapse of the Weimar Republic not to the number of parties represented in the legislature, however, but to the constitutionally defined duties of the chancellor, who was responsible to *both* the president and the legislature. This divided responsibility produced the kind of deadlock that the separation of powers has produced in the United States. According to Carstairs it was the impotence of the chancellor under the constitution that was the primary weakness of the Weimar Republic.

7. Sartori (1976) observed shifts toward the extreme left and right in Italy and Belgium in the late 1960s and early 1970s. The disenchantment of Italian voters with the major governing parites produced a collapse of support in the spring 1994 election for the positions in the center. A coalition of far-right parites formed the Italian government, with the bulk of the remaining seats held by parties on the far left like the Greens and former Communists.

8. The various formulae are illustrated and compared by Carstairs (1980, Chaps. 2, 3), Lijphart (1986), and Amy (1993, pp. 225–38).

9. For further discussion of STV, see Carstairs (1980, Chap. 4) and Amy (1993, pp. 183–91, 193–97, 230–32).

10. For spirited defenses of STV, see Hallett (1984) and Amy (1993, pp. 183–91, 193–97). See also Katz (1984).

11. For a discussion of limited voting in general, and the Spanish experience in particular, see Lijphart, Lopez, and Sone (1986).

12. New Zealand is scheduled to switch to PR in 1996.

13. For further evidence on the consequences of electoral laws, see Rae (1971), Lijphart (1986), and Rose (1984).

14. As noted above, STV does allow voters to vote for individuals as well as parties and thus to express preferences for candidates who favor local interests. Looking after "local needs" appears to be an important attribute differentiating candidates in the eyes of Irish voters (Marsh & Sinnott, 1990). Observe in this regard that the only two countries that have not adopted a geographically based mode of representation are Holland and Israel—countries so small that most "local" public goods have significant spillovers onto other parts of the nation.

15. The first claim that it is a law is attributed to Duverger (1946, 1954).

16. Lijphart (1984, pp. 116–26) discusses this and other measures of party numbers. See also Sartori (1976, pp. 119–25).

17. This statement must be qualified to the extent that considerations of the probabilities of different parties joining the cabinet induce voters to support parties that are not their first choice on the issues alone (Ordeshook, 1993).

18. In her defense of geographic representation using Renaissance Florence as a model, Schwartz (1988, Chap. 7) fails to stress the important differences between the random-selection process used in Florence and a plurality electoral system. Under the Florentine system representatives were chosen by random draw from a pool of citizens in each quarter of the city. A representative served for two months. Each citizen, regardless of how closely his views matched those of his neighbors, could expect to be represented some fraction of the time by a representative with views similar to himself. Indeed, he could expect to be a representative at some time. In contrast, a plurality system tends to select representatives whose views are near the "center" of the distribution of preferences, leaving those with minority views unrepresented.

Another important difference is that a representative in Florence did not have to run for reelection and was therefore less closely tied to the geographically defined interests of his quarter. He could vote for a motion promising great benefits for Florence at a cost to his quarter of the city without fear of defeat in the next election, since there were no elections and he would retire from office soon under any circumstances.

On the merits of random selection of a national parliament, see Mueller, Tollison and Willett (1972).

19. It is worth noting that the limited vote systems challenged under the Voting Rights Act are essentially the same as the procedure used to elect representatives to the U.S. Senate. Each state is a single electoral district, and each citizen has two votes to cast, albeit at different points in time. In 1980, blacks made up at least 25 percent of the population of Alabama, Georgia, Louisiana, Mississippi, and South Carolina. None of these states have ever elected a black to the Senate in a general election. In any state in which at least 25 percent of its population is black, and this population resides in segregated areas, the possibility exists that all three of the conditions stated in *Thornburg v. Gingles* could be established with respect to representation in the Senate. Logically, the methods for electing representatives to the Senate, and even the House, could be challenged.

20. Oredeshhok and Shoetsova (1993) find that having large electoral districts in multirep systems tends to produce large numbers of parties, particularly where ethnic differences are pronounced. For further discussion of the use of PR to achieve fair minority representation, see Amy (1993, Chap. 6).

21. See discussion and review of the literature by Lijphart (1986).

22. The voters of any party that did not obtain enough votes to get even one seat would go unrepresented, but this should not be a serious shortcoming.

23. For a discussion and review of the literature on this topic, see Cassel (1986).

24. This theme is stressed by Usher (1992).

11

The Parliamentary Voting Rule

> Democracy is the recurrent suspicion that more than half of the people are right more than half of the time.
>
> E. B. WHITE

Next to the question of how the representatives to the parliament or legislature are chosen, the most important constitutional issue regarding future collective decision making is the choice of voting rule. We have discussed two quite different parliamentary structures: two-party and multiparty proportional representation. Not surprisingly, the issue of voting rule-selection is quite different in each. We first discuss the two-party case.

The Voting Rule in a Two-Party System

In a two-party system the choice of a voting rule is obvious—the simple majority rule. The logic of a two-party system is that the voters choose that party whose platform they most prefer or they would most like to see constitute the government. The runoff election option ensures that one party has a majority of seats in the parliament. If the parliamentary voting rule is the simple majority rule, the party winning a majority of seats can implement its program without compromise.

We suggest in Chapter 15 that because certain government actions, such as direct interference with private firms' pricing decisions, tariffs, and quotas, are unlikely to have public-good characteristics, they should require a supramajority of votes in the parliament to pass them. If a supramajority (say two-thirds) were required for issues such as these in a two-party system, when the system literally produced two dominant parties, both parties would have to vote for such issues for them to pass, unless the majority party had more than two-thirds of the seats. Thus, if the rules for a two-party system produce only two parties in parliament, then requiring a supramajority to pass certain issues that are likely to be prone to redistributive coalitions is equivalent to requiring unanimity to pass them.[1]

The question of which voting rule to use in a proportional representation (PR) system is more complex. We discuss several options in this chapter beginning with the unanimity rule.

The Voting Rule in a PR System

The Unanimity Rule

The obvious voting rule to constrain a legislative assembly to choose outcomes that potentially benefit all citizens is the unanimity rule. Most observers of politics reject the unanimity rule on the grounds that it imposes undo costs on an assembly in terms of the time required to obtain a formulation of an issue that achieves a consensus, or because it encourages strategic dissent to obtain a more favorable final outcome (D. Black, 1958, p. 147; Buchanan & Tullock, 1962, Chap. 8; Barry, 1965, pp. 242–50; P. A. Samuelson, 1969; J. L. Coleman, 1988, p. 285). Others object to the privileged position of the status quo under the unanimity rule (Rae, 1975).

Some of these critiques do not distinguish between whether the unanimity rule is used to bring about redistribution or allocative efficiency. Rather obviously, self-interested individuals may oppose changes in property rights or other types of redistribution that adversely affect them. Those who do not like the existing distribution of income or property rights will object to using the unanimity rule to change these components of the status quo. But this objection loses force if the proposed change from the status quo could benefit all. The decision-making cost critique also has more bite when applied to a property rights or distributional issue than one where all citizens might reasonably be expected to gain.

On occasion the rule of consensus has been used to make collective decisions, and where it has, the results have been quite good. Switzerland appears to have contained the intercultural hostilities that could have, and one expects would have, broken it apart by the informal application of the rule of consensus in its legislature (Steiner, 1974, p. 6; Katzenstein, 1984, p. 120ff). No two groups have engaged in more strident distributional struggles over the past two centuries than capital and labor. But in corporatist states these groups have been able to find common ground between themselves and with other functional income groups like farmers. This surprising outcome appears to be directly attributable to the necessity of engaging in consensual decision making brought about by the voluntary nature of the association of these groups under corporatism.[2] The success of the European Community as a political institution can be attributed to its use of the unanimity rule throughout much of its existence, and the consequent necessity to focus on decisions benefiting all European countries.[3]

These examples demonstrate that consensus is possible among groups with diverse and seemingly conflicting interests. The unanimity rule forces groups to focus upon those interests they have in common, those that can benefit everyone. Because all participants in a collective decision process are winners when the unanimity rule is employed, the "amicable agreements" it engenders strengthen the participants' support for the collective decision process. We move on now to consider the family of qualified majority rules, but not before stressing that a *near* unanimity rule, like Knut Wicksell's (1896, p. 92) five-sixths or nine-tenths majorities, should not be dismissed out of hand.

The Family of Qualified Majority Rules

Suppose that the decision-making costs of reaching unanimity are thought to be too great, and/or the danger of holdout by some groups to obtain a disproportionate share of the gains from cooperation too costly. What rule would then be optimal?

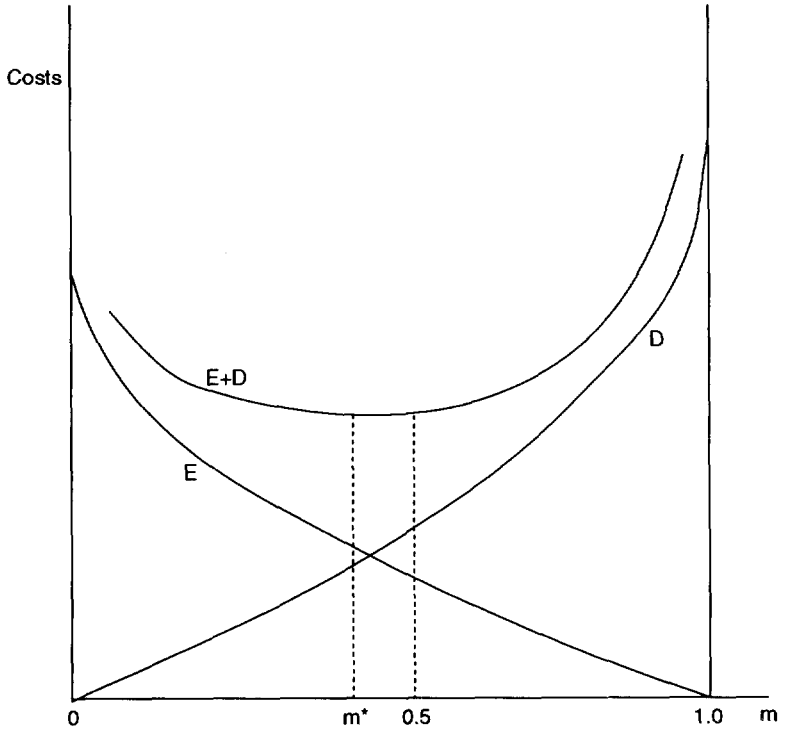


Figure 11.1. The Optimal Majority

This question was first answered by James Buchanan and Gordon Tullock (1962, pp. 63–91). Let D be the costs of reaching a collective decision measured in the time and energy of an assembly. Thus D rises with the fraction of the assembly, m, required to pass an issue (see Figure 11.1). If decision-making costs were the only costs to consider when choosing a voting rule, the optimal rule would let one person choose for the assembly. But such a dictator might abuse her position and impose severe costs on the rest of the community to the dictator's advantage. Buchanan and Tullock refer to these as the external costs of collective decision making, E. They are zero when $m = 1.0$; no issue can pass under the unanimity rule that imposes any cost on any individual (i.e., makes someone worse off). As depicted in Figure 11.1, E rises as m falls. The optimal voting rule for an assembly is that which minimizes the sum of these two costs (assumed to be measured on the same scale); this is m^* in Figure 11.1.

Depending on the nature of the people in the legislature assembly and the issues to be decided, the optimal majority could be high or low. For example, a school board elected from a homogeneous community might have low decision-making costs and might be able to operate under a high m^*. Large assemblies can be expected to have higher decision-making costs than small ones. Issues involving negative externalities are probably harder to resolve than those involving positive externalities. Different communities as they contemplate the kinds of issues that will come up in their parliamentary assemblies in future years choose different qualified majorities for themselves, and may choose different rules for different types of issues. The relative magnitudes of the external and decision-making costs could even yield an optimal majority less than the simple majority, as is depicted in Figure 11.1.

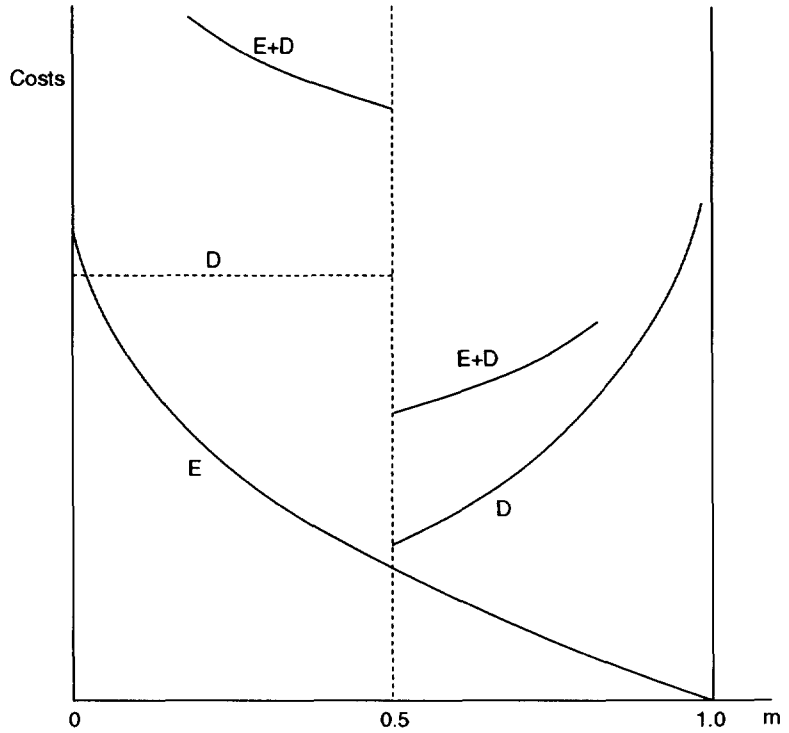


Figure 11.2. Majority Rule as the Optimal Majority

If the only consideration when choosing a voting rule is the minimization of these two costs of collective decision making, it is difficult to understand why the simple majority rule is the ubiquitous choice of democratic assemblies. For the sum of these two costs to be at a minimum at $m^* = 0.5$ for all types of committees and types of decisions, one of the curves has to be discontinuous at that point (Buchanan & Tullock, 1962, p. 81). The D curve might be viewed as having a discontinuity at that point because with $m^* < 0.5$, mutually inconsistent proposals can pass. A proposal to build the bridge, and one not to build it, could both garner a required 45 percent majority to pass. Such occurrences add to the decision-making costs of the committee raising D to the left of 0.5, as depicted in Figure 11.2. Such a discontinuity consistently results in the simple majority rule being the optimum, only if the minimums of $E+D$ would have been to the left of 0.5 without the discontinuity. For the simple majority rule to be almost universally the optimal rule for making collective choices on public goods, all communities must highly value time spent to agree on these issues. The simple majority rule is used because it allows committees to find a motion that passes in the shortest time, while avoiding the possibility of the motion's converse also passing.[4]

With $m^* > 0.5$, a proposal x that defeats y cannot itself be defeated by y. But that does not imply that it cannot be defeated by another proposal, say z, nor that this z cannot be defeated by y. With the simple majority rule, as the voting rule cycling can occur, and when it does decision-making costs rise.[5] Additional procedures must ensure that cycles do not occur or are stopped when they do (Shepsle & Weingast, 1981). The latter can take several forms. For example, if the preferences of a parliament are such

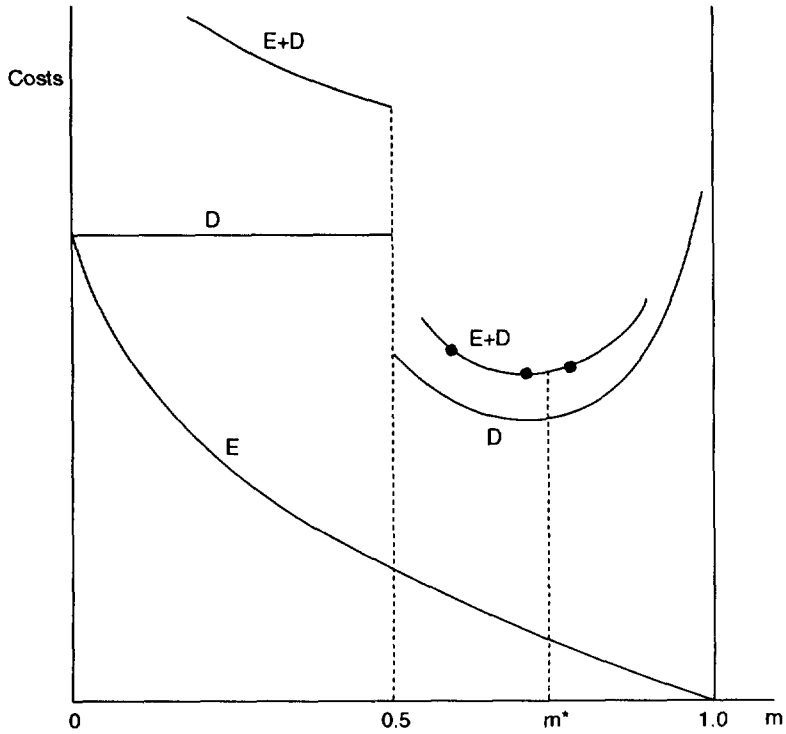


Figure 11.3. A Supramajority as the Optimal Majority

that $y > z > x > y$, an endless cycle can be prevented with the rule that no issue once defeated can again come up for a vote. If the first vote the parliament takes is between y and z, y wins.[6] But x then defeats y and becomes the parliament's choice. If someone who favors x is in charge of the agenda, she can make x a winner, given the cycle, by having it introduced only in the second vote.[7] The potential for agenda manipulation can be regarded as a cost of there being a cycle that in turn can be regarded as a cost of using a qualified majority rule.

The probability of a cycle rises as the majority required to pass an issue falls, causing the costs associated with cycling to rise also (Greenberg, 1979). The decision-making costs curve, D, might then not look like it does in Figures 11.1 or 11.2, but rather as in Figure 11.3. If it does, then the optimal majority is greater than the simple majority regardless of the shapes of the curves to the left of $m = 0.5$.

Decision-making costs are likely to be much greater for redistribution issues than for public-goods issues. For a pure public good, all voters are potentially better off, while for a redistribution issue some voters are inevitably worse off.[8] Thus, more effort has to be spent in searching for a combination of subsidies, or expenditure projects of only local interest, that produce a sufficient number of gainers to achieve the required majority. Because everyone is a potential gainer with a pure public good, the task here is merely to find a tax formula to finance it which creates net gains for a sufficient number. Raising the required majority to pass an issue tends to eliminate redistributive proposals, or public goods proposals with large redistributive components. If the constitution framers want the work of parliament to be chiefly providing public goods and

inducing cooperation in prisoners' dilemmas, then this goal will be fostered by requiring a qualified majority greater than 50 percent to pass legislation.

The importance of the nature of the issues to be decided for the choice of a voting rule is illustrated in an important paper by Caplin and Nalebuff (1988). They make two key assumptions: (1) Individual preferences are unimodal, and (2) the distribution of the points representing individuals' most preferred combinations of x and y (their ideal points) is unimodal. If the quantities of two public goods, x and y, are to be decided, the first assumption implies that an individual's utility falls as one moves away from her most preferred combination of x and y (her ideal point). The second implies that, if, say, M were the combination of x and y, which coincides with the largest number of ideal points, then the number of ideal points one encounters falls as one moves away from M. With a single dimensional issue space, this assumption implies that the frequency distribution of individual ideal points looks like Figure 9.1, rather than like Figure 9.2 or 9.3.

These assumptions seem quite reasonable when collective decisions are limited to providing public goods and eliminating externalities. There is less support for spending 20 percent or 2 percent of GDP on defense than for some intermediate value like, say, 6 percent. The assumptions are less plausible for pure distributional and property-rights issues. For example, in a society with a large middle class, there may be more support for taxes that fall most heavily on the rich *or* for those falling heavily on the poor, with the least numerical support for taxes that fall more heavily on the middle of the income distribution. If the issue set could be constrained to make assumptions (1) and (2) above plausible, as say by placing constitutional constraints on the types of issues that can come before the parliament, then Caplin and Nalebuff prove that a required majority of 64 percent suffices to ensure that *no cycles ever occur* in the parliament regardless of the dimensionality of the issue space.

The possibility that a parliament would not use the simple majority rule for its everyday business may strike some readers as so novel that it must be wrong. However, Finland's constitution requires a two-thirds majority for all important decisions (slightly more than Caplin and Nalebuff's work implies is needed to eliminate the possibility of cycles). Finland's constitution further requires a five-sixths majority for decisions involving property rights—and yet Finland seems to have survived quite well. Indeed, its government sector is only two-thirds of its two closest Scandinavian neighbors, Sweden and Denmark.[9] We surmise that this difference exists in part because less interest-group-driven redistribution survives in Finland. In the United States, Arizona has recently amended its constitution to require a two-thirds majority for all tax increases.

Having shown why the simple majority rule may not be the optimal parliamentary voting rule, we next examine some arguments in its favor.

The Simple Majority Rule

If the work of parliament is to provide public goods and bring about cooperation in prisoners' dilemmas, the only justification for using the simple majority rule in the parliament is that it *may* be quicker than a higher qualified majority. There are two quite different interpretations of what the work of government is, however, that provide alternative justifications for the majority rule. The first dates back to the French mathematician Condorcet.

THE CONDORCET JURY THEOREM

Suppose that the citizens of a country are troubled by the amount of crime arising from the sale and consumption of hallucinatory drugs. Both the sale and the consumption of these drugs are currently illegal; therefore, sellers demand a high price for the risks they take. High profits and much theft and killing by both buyers and sellers ensue. The suggestion is made that this drug-related crime would be eliminated if both the sale and the consumption of these drugs were legalized. The counterargument is made that if drugs are legalized, more people will consume them and become addicted and suffer the consequences.

All citizens wish to improve "the quality of life" in their country, but they disagree over whether this quality is higher when the sale of drugs is legalized than when it is not. If we assume that the probability that an average citizen knows the *right* answer to this question is greater than 0.5, then a national referendum on this issue, with the outcome decided by majority rule, would choose the right answer with a probability of almost 1.0.

This proposition was proven by the Marquis de Condorcet (1785) over two centuries ago. The same idea is expressed by E.B. White in the quotation at the beginning of this chapter. Condorcet first put forward the proposition to defend the use of the majority rule by a jury, where the question is one of fact: Is the accused guilty or not? In such situations there is a right and a wrong answer. Condorcet assumes that citizens are on average right on issues such as these and he treats a jury as a random sample of the citizens. A national referendum is a still larger sampling that would, under the Condorcet assumptions, nearly always get the correct answer.

If all citizens viewed the task of running the government identically (e.g., all citizens believed that the government should maximize the growth in real income per capita) then the Condorcet Jury Theorem could be used to justify a two-party parliamentary system. The issue in an election would be which party will best run the government (achieve growth). An election is a sample of public opinion regarding the right choice, and it makes the right choice if "more than half the people are right."

Elections in a two-party democracy like Great Britain are not merely about which party is best at *managing* the economy or the country, however. The Tories and Labour (pretending for the moment that these are the only two contending political parties) differ in the packages of public goods and other policies they offer the voters. The net benefits for each voter are likely to differ under each party's promised platform. For example, the manager of an automobile dealership in Norwich who votes Conservative and the factory worker in Birmingham who votes Labour *both* may be right as far as advancing their own interests are concerned. If voters choose a party with their own interests in mind, or have different conceptions of what the national interest is, the Condorcet theorem cannot be used to justify two-party systems.

Nor can it be used to justify the use of the simple majority rule in the parliament of a PR system. Each party (or person) in the parliament represents a different group of citizens with different views as to what government policy should be. The outcome from a vote in parliament need not choose the proposal of any one party as the "right" one and, with cycling, could lead to an outcome that *all* parties find inferior to some alternative.[10]

The issue of what a country's air quality should be, and how it should achieve this quality, is not a question of fact in the way that whether John Doe committed the crime is. The Green party has one view about air quality, the Christian Democrats another.

Although differences in views about facts may account for part of the difference between these two parties, they do not account for all of it. The choice of voting rule for a multiparty parliament must be made on the basis of a different set of assumptions from those Condorcet used to justify the simple majority rule for jury decisions.[11]

MAY'S THEOREM

Consider a committee that must choose between x and y. Each member, i, registers a vote, D_i, equal to $+1$ if i favors x, -1 if i favors y, and 0 if the member is indifferent toward the two alternatives. Votes are aggregated using a group decision function, D, that yields a value $+1$, -1, or 0 depending on whether the committee decision is x, y, or social indifference. In 1952 Kenneth May proved that the simple majority rule is equivalent to the following four axioms when it is used to make this binary choice.[12]

Decisiveness: The group decision function is defined and single-valued for any given set of preference orderings.

Anonymity: D is determined only by the values of D_i, and is independent of how they are assigned. Any permutation of these ballots leaves D unchanged.

Neutrality: If x defeats (ties) y for one set of individual preferences, and all individuals have the same *ordinal* rankings for z and w as for x and y (i.e., $xR_iy \leftrightarrow zR_iw$, etc.),[13] then z defeats (ties) w.

Positive responsiveness: If D equals 0 or 1, and one individual changes his vote from -1 to 0 or 1, or from 0 to 1, and all other votes remain unchanged, then $D = 1$.

Each axiom has a certain intuitive appeal. The first, *decisiveness*, assures that the procedure always gives the same answer from the same set of preferences. *Anonymity* introduces the kind of fairness and egalitarian properties many associate with majority rule and that are expressed by "one-man-one-vote." *Neutrality* ensures that a choice between two issues does not depend upon which is called x and which y. *Positive responsiveness* introduces an element of individualism. *Any* individual can break a tie by changing his or her vote.

Anonymity is most appealing on binary issues for which it is reasonable to assume that the intensity of support of an individual who favors x is the same, or the same on average, as for a supporter of y. Consider the following example for which this assumption seems reasonable. George Washington's birthday falls on February 22, Abraham Lincoln's on February 12. The country wants to celebrate them both on the same Monday to give workers a single three day weekend. Should the choice be the second or third Monday of February? A vote by the legislature using the simple majority rule seems a reasonable way to decide this issue. The gain to each delegate who supports the second Monday, if her choice wins, should be about the same as the gain to each supporter of the third Monday.

Now consider an issue in which the equal intensity assumption is less plausible, a bill to prohibit gays from kissing and other acts of affection in public. The assumption that the gain to an individual on one side of this issue is the same as to a person on the other side is less plausible. Majority rule treats this and all other issues the same. Each is decided as if the intensities of preferences on both sides of the issue are equal.[14]

It is difficult to defend either the assumption that all issues are binary or that intensities are equal on both sides of an issue pair with respect to voting in a multiparty parliament. The supporters of the Greens are likely to feel much more strongly on environ-

mental issues than are the supporters of some if not all other parties. Most proposals have three, four or potentially a million alternative formulations, and thus one must reckon with the possibility of cycling. May's theorem and similar ones give a normative justification for using the majority rule for referenda on certain questions when the equal intensity assumption is reasonable. They do not provide an adequate justification for using the simple majority rule in a multiparty parliament.

Point Voting

Where the normative case for the simple majority rule rests on the assumption that intensities of all voters on all issues are equal, the point voting procedure is designed to utilize information on the differences in voters' intensities across public goods issues.[15] One can conceive it being used to decide different characteristics of a single public good, or different amounts to be spent on a package of public goods. We illustrate how it would work in the latter context.

Let there be K issues for which a committee must decide expenditure levels, where each issue includes its own tax to finance it. Each committee member, i, is given a stock of vote points A_i to allocate across the K issues. A committee chairman-auctioneer first announces a set of expenditure levels

$$\begin{matrix} G_1 \\ G_2 \\ \cdot \\ \cdot \\ \cdot \\ \cdot \\ G_k \end{matrix}$$

which might be what was spent last year. Each committee member allocates his A_i points across the K issues, giving positive points to issues that he would like to see have higher expenditures, negative points to those he would like to be lower. The sum of the points he allocates must equal his stock A_i ($A_i = \sum_{k=1}^{K} |a_{ik}|$, where a_{ik} is i's points on k).

The chairman-auctioneer then determines a new set of public good quantities using the following rule

$$G_k' = G_k + \sum_{i=1}^{n} s_i \sqrt{|a_{ik}|},$$

where s_i is $+1$ or -1 depending on the sign of a_{ik}. He then announces this new vector of quantities, and the voters make a new allocation of points. The process continues until the $\sum_{i=1}^{n} s_i \sqrt{|a_{ik}|} = 0$, for all k.[16]

If each voter allocates his stock of vote points to maximize his utility at each iteration, each allocates more points to issues he feels more intensely about. Thus, point voting allows voters to express not only whether they favor an increase or decrease in expenditures but also how strongly they favor the change. Because the aggregation rule

only adds the square root of the points each voter allocates to an issue, voters are discouraged from allocating all of their points to their most intense issue.[17]

If the expected utility gain for the set of all collective actions is the same for all voters, then with an egalitarian distribution of vote points, point voting selects a set of public-good quantities that maximizes a Benthamite social welfare function.[18] Point voting coupled with the square root aggregation rule provides just the intensity information and incentives needed to maximize

$$W = U_1 + U_2 \ . \ . \ . \ + U_n, \tag{11.1}$$

where the U_is are each voter's utility defined over the public-good quantities.

In a parliament, members vote not for themselves but for those they represent. If we assume that each citizen's expected aggregate utility gain from government actions is the same, point voting could be used to obtain a set of public-good quantities that maximizes the Benthamite social-welfare function defined over the citizens' utilities under the assumption we made in discussing ideal PR systems (i.e., that each supporter of a person or party in a PR parliament has the same utility function). Under a PR-party system, each party would get seats in the parliament in proportion to the number of votes it received in the election. Each member of parliament is given the same number of vote points, and the utilities of the citizens are thus properly weighted in the social-welfare function that point voting maximizes.

Under a PR-person system, groups of voters are represented by individuals who are given different numbers of votes in parliament depending on the number of votes they received in the election. If the parliament used the form of point voting just described, each member's allocation of vote points would need to be weighted by the number of citizens she represents.

In the previous section we saw that the normative case for one-man-one-vote majority rule rested on the assumption that voter intensities on both sides of any binary issue are the same. One-man-an-equal-number-of-vote-points requires that the aggregate change in utility *across all issues* be the same for each individual. Although not totally innocuous, this assumption is clearly much weaker than the equal-intensity-on-each-issue assumption. Point voting both allows for intensity differences across voters and issues, and elicits and utilizes this information to determine the quantities of public goods in a normatively defensible way.

The wary reader is probably wondering whether a system of voting like that just described could ever really be used in practice. We delay questions of feasibility until after we discuss two additional novel rules.

Voting by Veto

Voting by veto works as follows:[19] Each committee member makes one proposal. The proposal set consists of the proposals of the *n* committee members and the status quo. A random order of veto voting for the committee is then determined and announced. Following this order each committee member eliminates one proposal from the issue set. When all have exercised their vetoes, there is one proposal left in the issue set. It is the winner.

To see how the procedure works, suppose that a committee of five has ideal points as given in Figure 11.4. Indifference curves (curves representing equal levels of utility)

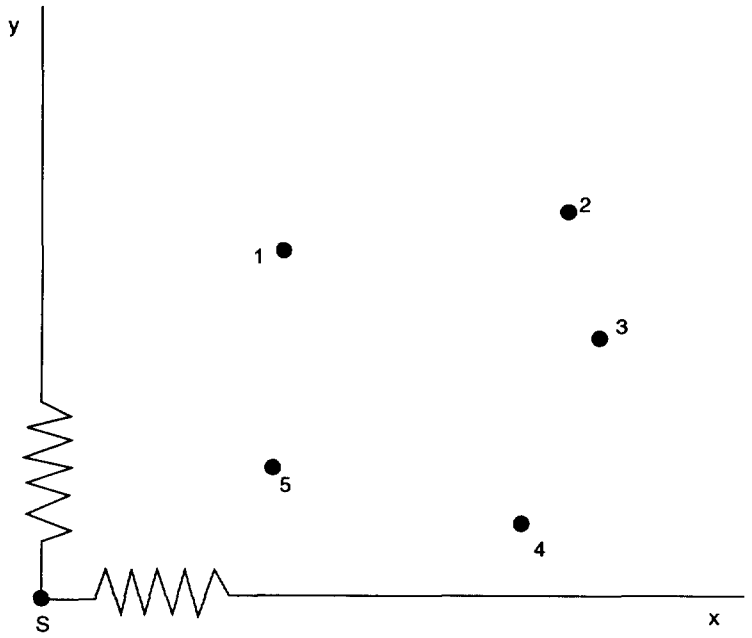


Figure 11.4. Ideal Points and Voting by Veto

are concentric circles around each ideal point. Each member most prefers the combination of x and y at his ideal point, and the member's utility gets lower the further the committee choice is from his ideal point. Let the status quo be (0,0), and assume it lies sufficiently far from the five ideal points so that all members prefer any of the five ideal points to the status quo. Let each member propose his ideal point and the order of veto voting determined randomly be 1, 3, 5, 2, 4.

Because each member knows the proposals of all others, each can form a judgment as to how the others rank the six proposals. Let us suppose that they are correct in these judgments.[20] The five rankings are given in the left hand side of Table 11.1. Knowing that voter 4, the last to go in the sequence, will veto S regardless of which proposal is coupled with it, no one who comes before 4 wastes his veto on S. The circle around S in voter 4's column indicates that he vetoes this proposal.

Similarly, voters 1, 3, and 5 know that voter 2 would never allow proposal 5 to remain in the issue set if he thought it could win, since he ranks it lowest of all remaining proposals, once S (which voter 4 vetoes) is removed. The circle around 5 in voter 2's column indicates that he vetoes this proposal. Working from right to left in this way, we can identify for each voter the proposal he vetoes by eliminating all proposals vetoed by those following him (designated by asterisks), and finding the lowest ranked proposal of those remaining (circled). Proposal 3 is not vetoed by anyone and it would win under voting by veto with the set of preferences and order of voting given in the left-hand side of Table 11.1.

Voter 5 is obviously disadvantaged by his most preferred point lying somewhat far away from the other ideal points. Indeed, given that 5's proposal is ranked second last by two of the five voters (with the same proposal ranked last), his proposal can *never* win under the procedure no matter what the sequence of *votes* is.[21]

Table 11.1. Outcomes Using Voting by Veto

Voter	1	3	5	2	4	1	3	5	2	4
	1*	3	5*	2	4	1*	3	5′	2	4
	5*	2*	1	3	3	5′	2*	1	3	5′
Ranks	2*	4	4	1	5	2*	5′	4*	5′	3
	3	①	3	4	2	③	4*	3	1	2
	④	5*	②	⑤	1	4*	①	②	④	1
	S*	S*	S*	S*	Ⓢ	S*	S*	S*	S*	Ⓢ

Suppose voter 5 surmises this before he makes his proposal and therefore proposes point 5′ in Figure 11.5 even though his ideal point is 5. Should the same sequence of veto voting be drawn, 5′ would now win (see right hand side of Table 11.1). Neither proposal 1 nor proposal 4 can possibly win now, and 5′ has the highest (although not certain) chance of winning. Voter 5 gets higher utility from 5′ than from any of the other four proposals and is thus better off proposing 5′ than proposing his ideal point 5. If he anticipated that the other voters would propose their ideal points, voter 5 would rationally propose a point closer to their ideal points, like 5′, than to his own ideal point.

From this example, two related properties of voting by veto are apparent. First, it selects proposals that stand relatively high in all voters' rankings, thus choosing proposals, viewed spatially, that are near the center of the distribution of voter ideal points. Given this property, it provides an incentive for each voter to propose an outcome that lies between his ideal point and the center of the ideal points of the other voters.[22] In this way, voting by veto brings about the victory of a compromise proposal.

Under a PR-parties system, each member of parliament would be given a proposal

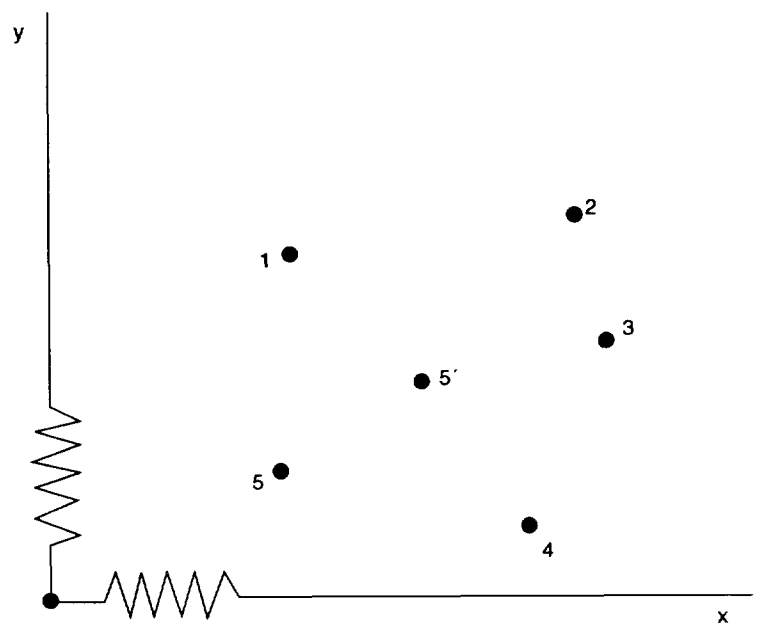


Figure 11.5 Strategy for Winning Under Voting by Veto

and a veto with a random order determined over all members. Each member of a party could be expected to make the same proposal. If a party had a majority of the seats,[23] it could dictate the outcomes (its proposal would be certain to win) as under majority rule. But when no party has a majority of the seats, the proposals of several parties would have a chance of winning depending on the order of veto voting determined by the random draw and the characteristics of the proposals. The winning proposal would generally lie near the center of the distribution of voter ideal points.[24]

Thus, voting by veto would produce with multidimensional issues the same kind of "median voter" result majority rule produces when issues are single-dimensional, and yet would not be subject to cycles.

The Probabilistic Majority Rule

The probabilistic majority rule resembles voting by veto in that it encourages the selection of compromise proposals by (the threatened) use of a randomization procedure. Unlike voting by veto and point voting, however, it also functions well in situations of pure conflict, when property rights and redistribution issues are involved. It might, therefore, be a more realistic option than the other two procedures in a real-world context in which allocative efficiency and redistribution issues are difficult to separate. We first describe how the procedure works, and then its properties in deciding allocative efficiency and redistribution issues.

THE MECHANICS

Let each party or person i in the parliament have received π_i fraction of the vote in the previous election, $\sum_i \pi_i = 1.0$. Let each party or person make a proposal (x_i, y_i). A neutral chairman or arbitrator then announces a compromise proposal (x_c, y_c) formed from the individual proposals as follows:

$$x_c = \sum_i \pi_i x_i \ , \ y_c = \sum_i \pi_i y_i.$$

If all unanimously agree to accept the compromise, it is the outcome of the procedure. If anyone rejects the compromise, the outcome is determined by a random device with probabilities π_i assigned to each proposal (x_i, y_i).[25] The task of determining the compromise is obviously fairly trivial when x and y are scalars like the amount spent on police and education, the degree of progressivity of the tax system, and the like. But compromises are often possible even with more qualitative attributes. For a pure public good, for which all citizens can be potentially better off, some unanimously acceptable compromise must be possible.

ALLOCATIVE EFFICIENCY

Consider again the choice of two public-good quantities x and y with five groups represented in the parliament with ideal points, as in Figure 11.4. The compromise proposal C lies in the interior of the five ideal points, as depicted in Figure 11.6, if each group's representative proposes its ideal point. If the members of each group are risk averse, then they always prefer the compromise to the lottery over the ideal points.[26]

By proposing a point like 5′ instead of 5 (see Figure 11.7), group 5 could shift C toward its ideal point. Although strategic behavior of this type is possible, I do not

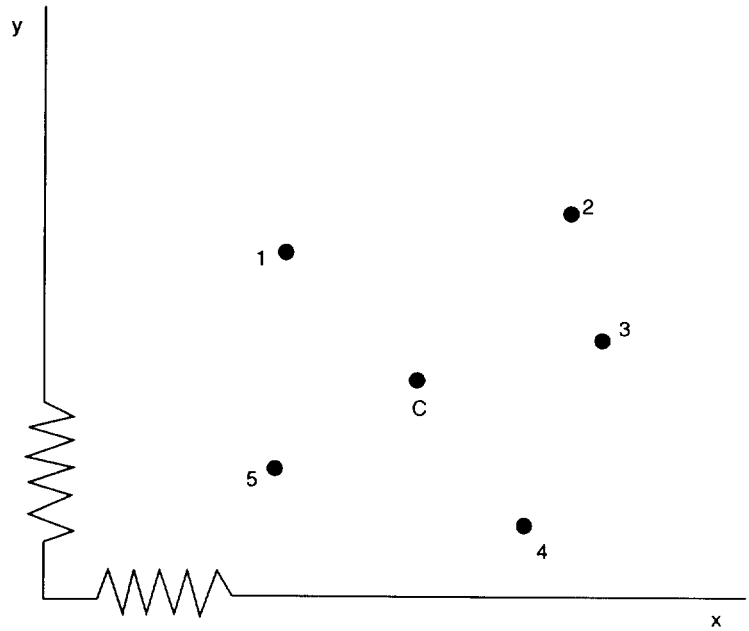


Figure 11.6. A Compromise Under the Probabilistic Majority Rule

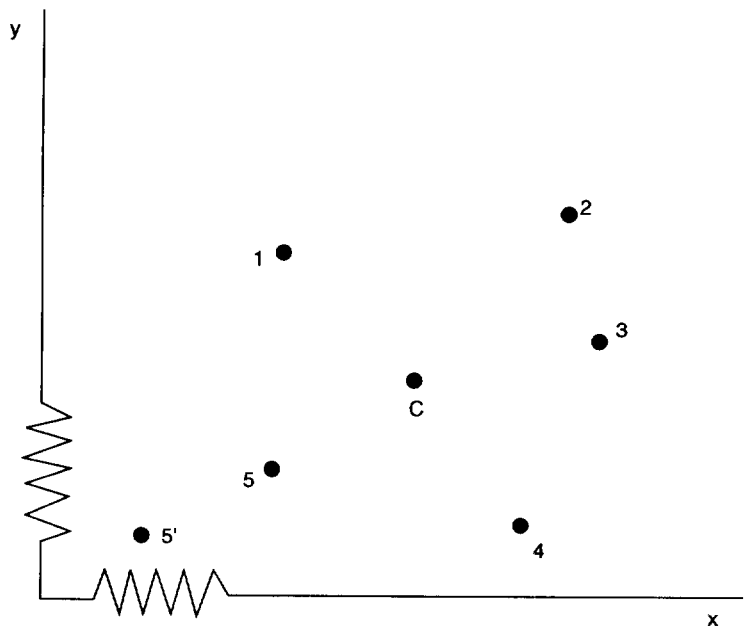


Figure 11.7. Strategic Behavior Under the Probabilistic Majority Rule

believe that citizen representatives would actually adopt such strategies in a real-world parliamentary setting.

The objective for adopting a procedure like the probabilistic majority rule would not be to convert the parliament into a gambling casino, but to help induce compromise and consensus in public good situations. An effort by representatives of one group to exploit the procedure by misstating its ideal point would soon be spotted by both the other groups' representatives and its own constituents, and might be expected to win disfavor even from the constituents. This possibility is particularly likely if one of the other parties called the bluff of opportunistic representatives by announcing that the representatives were trying to "exploit the process" and forced the lottery. A party that proposed a 5′ in Figure 11.7 instead of its true ideal point would then have to explain to its constituents why its proposal was not the best possible for the group, and explain why, if it won the lottery, the party's supporters did worse than they could have done had the party sincerely proposed its true ideal point. Honestly proposing constituents' most preferred set of outcomes is the easiest thing to defend.[27]

An apparent danger of the probabilistic majority rule is that radical minorities might make extreme proposals and then force lotteries over them. If the procedure were used in the parliament, voters would be less likely to vote for the most radical parties, however. A voter under a current PR system risks nothing in voting for a Communist or a Fascist party because he knows that they are likely to be left out of the government and will have little, if any, effect on the parliament's decisions. Under the probabilistic majority rule, this is not the case. Thus, the probabilistic majority rule gives both voters and parties incentives to behave more responsibly.

REDISTRIBUTION AND PROPERTY RIGHTS ISSUES

There is almost no issue on which compromise is not possible and probably mutually beneficial. If the class struggle were to be resolved in the parliament using the probabilistic majority rule, risk-averse capitalists and proletariat would both be better off accepting some sharing of income than agreeing to a gamble in which one group receives a subsistence income and all of the residual goes to the other. A few issues like slavery and abortion are difficult for some people to compromise on, however. Consider how the procedure works when no compromise is possible.[28]

Suppose the country contains two religious groups—one whose sabbath is Tuesday, the other whose sabbath is Thursday. Each wants its sabbath, and only its sabbath, to be honored by the entire country. Both reject the obvious compromise of Wednesday as the sabbath. If we assume that the gain to a member of each religion is the same if her side wins on this issue, the aggregate gains are maximized by choosing the sabbath for which there is most support. The situation fits the assumptions made in deriving the case for the simple majority rule. And if it is the right rule for this issue, it is the right rule for any other binary choice in which intensities on both sides are reasonably assumed to be equal.

Or is it? Binary issues in which no compromise is possible often involve religious, ethnic, or geographic differences in groups that change slowly over time. The same group that is in the majority today is likely to be in the majority tomorrow. The same group wins tomorrow as won today. Over time, if a series of binary, no-compromise issues come up, the outcomes will constitute a tyranny of the majority. In such a situation, the probabilistic majority rule might be regarded as an attractive alternative, for it at least allows the minority to win some of the time.

Rae (1969) builds his case for the simple majority rule by assuming individuals choose a voting rule at the constitutional stage, while being uncertain as to which side of an issue they are on (i.e., if a permanent majority and minority exists, one does not know to which group one belongs). Given this uncertainty, and the other assumptions Rae makes, the case for the simple majority rule follows.

But suppose uncertainty at the constitutional stage is of a different sort. I can conceptualize being other members of my own ethnic or religious group, but not a member of another group. If I anticipate numerous, no-compromise redistribution and property-rights issues arising over time, and my group is always a minority, I may not be willing to join a constitutional contract that stipulates use of the simple majority rule. By promising minorities some future victories on redistribution and property-rights questions, agreement on the probabilistic majority rule may be possible at the constitutional stage, where agreement on the simple majority rule would not have been.[29]

Responsible Goverment Under Proportional Representation

One potential disadvantage of parliamentary proportional representation systems in which the parliament must form a government, (i.e., agree on a prime minister and a cabinet) is that failure to do so is not, or at least is not perceived by the electorate to be, the responsibility of any one party. Thus, when proportional representation (PR) produces unstable coalitions to select cabinets and weak governments, voters cannot (do not) hold any one party responsible, and thus do not punish the parties in parliament. This characterization would appear to describe Italy until very recently when the Italian voters chose to hold *all* of the major parties responsible for Italy's governmental failures and turned them all out. The great advantage of two-party systems is thought to be that one party is held accountable for all governmental policies and can be removed if these policies are found deficient.

An advantage of point voting, voting by veto, and the probabilistic majority rule in a proportional representation system in which the executive is not a part of the parliament is that each rule does make every party more responsbile for the outcomes of government. Some outcome is chosen under all three voting rules. When used to determine the amounts and characteristics of the defense budget, say, each rule gives each party an opportunity to influence the final outcome. If voters are unhappy with the final outcome they can, under point voting, examine how the different parties allocated their points. Under voting by veto and the probabilistic majority rule, the proposals of each party can be compared. Thus, the voters have access to much more specific information regarding a party's position and effect on the final outcome than under the usual yes or no voting rules. By making each party's influence on final outcomes more direct and transparent, these procedures allow voters to hold the parties more responsible for the outcomes the parliament chooses.

The Issue of Complexity

The most obvious objection to point voting, voting by veto, and the probabilistic majority rules is their complexity. This complexity should not eliminate them from consideration, however. First note that the procedures would not be used by the citizens themselves but by their representatives, who in turn are chosen in part because of their

intelligence and knowledge of government. Voters who find the procedures too complicated need not concern themselves with the details of their operation, just as voters do not need to be experts on Robert's "Rules of Order" or other parliamentary procedures to be able to judge their representatives. For those who do pay close attention to politics, each procedure would provide a richer set of information than ordinary voting processes do. One might ask: How did my party allocate its points across the issue set? What proposals did it make? What compromise did it reject?

The complexity of each procedure should not be overdrawn. We live in an age of experts and computers. The latter would allow the counting of vote points and new iterations to occur almost instantaneously. A representative's or party's staff could attend to the details of making the appropriate response. Indeed, one could program a computer to do so once one had determined one's own intensity differences across issues.

Under voting by veto one must make one's own proposal for the issue in question, say the defense budget, and then rank all other proposals once they are known. With five parties in parliament this would imply ranking six alternatives (the five party proposals and the status quo). This information could be fed into a computer that would then determine the random order of veto voting, cast the vetoes in accordance with the parties' rankings, and reveal the winner—all within a few seconds. There would be more entertainment value for those who watch a legislature's sessions in having each member cast her own veto in the order determined by the random process, just as roll-call votes in the U.S. House and Senate sometimes have a certain drama to them. But, if time and simplicity are valued, a computer can make voting by veto competitive with other "simpler" procedures by these criteria. Under the probabilistic majority rule, one must only make a proposal and decide whether or not to accept the compromise. Calculating what the compromise is can be done by a neutral expert.

Some existing PR systems are quite complex and at least implicitly require fairly sophisticated decisions by *voters, not by their representatives.* Ireland's single-transferable-vote system requires that voters rank the different candidates. France's double ballot opens up the possibility for complicated strategic calculations by voters on the first ballot. The rules used to allocate seats to each party are also often quite complicated, yet somehow European voters manage to cope with these complexities. There is no reason to expect that their parliaments could not cope with one of the voting rules described here.

Proportional-representation systems were invented in the nineteenth century. They probably seemed strange and complicated to many at that time, yet they were quickly adopted by the newly formed democracies of Scandinavia and continental Europe (although not necessarily on the first try, as in Belgium and Switzerland). The last three voting rules described in this chapter are inventions of the twentieth century.[30] They are part of a large set of new procedures for aggregating preferences that warrant consideration.[31] They, too, will seem strange and complicated to some. But we live in a complicated world. If the democratic institutions extant today were capable of making collective decisions without flaw, there would be no need to write this book. But flaws exist, and one possible place to improve the process is in the choice of a parliamentary voting rule. Democracy need not be equated to the use of the simple majority rule for all decisions in all countries at all times.

What Happened to Arrow's Theorem?

In perhaps the most celebrated finding of the social choice literature, Kenneth Arrow (1951, 1963) proved that *no* voting procedure existed or could be invented that would satisfy five rather innocuous-looking axioms, including that there be no dictator. Why do the newer voter procedures described here not violate the Arrow impossibility theorem? Why are they not vulnerable to strategic manipulation (Gibbard, 1973; Satterthwaite, 1975)? More generally, why are they not subject to all of the criticisms William Riker (1982b) leveled against populist (i.e., voting) procedures to reveal individual preferences for government action? To some extent they are, of course, but there is good reason to believe that the attractive properties of these procedures are sufficiently great to offset their *shortcomings* in these other respects.

Consider first the Arrow problem. Kenneth Arrow required that the social-welfare function define a complete social ordering over (ranking of) all alternatives using as inputs the ranking of alternatives (*ordinal* preferences) of the citizens. Point voting runs afoul of the theorem because it elicits cardinal utility information. Arrow (1951, pp. 9–11) mistrusted the government's (and implicitly all voting procedures') ability to aggregate and compare individual intensities of preference on different issues. But *some* intensity comparisons are implicit in all democratic procedures. If John and Jane are both allowed to vote on an issue, then presumably both must be expected to experience some possible gain or loss from the issue. If it were known that Jane's expected gains and losses were 100 times John's, most would not think it fair that they should have equal potential to influence the outcome. The normative presumption for one man-one vote rests on their being some correspondence in intensities, and as we noted with the simple majority rule, its normative justification is strongest if intensity differences are equal across all voters on *each* issue. Assuming an equal distribution of vote points, point voting's normative justification requires the much weaker condition that the *sum* of utilities over the full set of issues be equal across all voters. The voters themselves (or their representatives) supply the information on intensities, not a government bureaucrat.

The square-root aggregation rule of Hylland and Zeckhauser's (1979) version of point voting discourages the most obvious strategy to distort the rule's ability to elicit accurate information on preferences—overloading points on one's most intense issues. Although all iterative procedures are vulnerable to strategic manipulation, strategies for taking advantage of the iterative nature of point voting are not obvious. The Satterthwaite and Gibbard theorems demonstrate that strategic behavior is a *possibility* not an *inevitability*. Pending experimental or other evidence that strategic manipulation would often occur, point voting remains an attractive option.[32]

Voting by veto and the probabilistic majority rule fall asunder of the Arrow theorem because they do not define a social ordering. Given the random element in each, a different social choice could be made with successive application of each procedure and the same set of options and individual preferences.[33] Kenneth May's decisiveness axiom is intended to eliminate this possibility explicitly, and Riker (1982b, pp. 118–19) goes so far as to regard the outcomes of voting procedures that involve chance as "arbitrary nonsense." But voting by veto does not establish a lottery with equal probabilities over all feasible outcomes, or even over all proposed outcomes. The highest probabilities are assigned to the proposals near the center of the distribution of ideal points, and proposals a great distance from the center are likely to have zero probability of winning. Both voting by veto and the probabilistic majority rule satisfy probabilistic analogues to the

other three axioms May presented in his theorem about majority rule (Fishburn & Gehrlein, 1977; Mueller, 1984, 1989b). Thus, these two procedures have much the same normative properties as does the simple majority rule, except that they can fail to select the same outcome with the same set of preferences under repeated application.

Voting by veto does encourage voters *not* to propose their ideal points, but this "strategic" behavior has the desirable consequence of shifting proposals toward the center of the distribution of ideal points. The random aspect of voting by veto results in the victory of the kind of compromise proposal that most observers are likely to think should be selected.

The use of the lottery in the probabilistic majority rule can be thought of as a mechanism for inducing agreement in a bargaining game in which a bargain can be struck only if all agree to it. As such, probabilistic majority rule will strike some readers as an odd sort of *voting* rule. But this is in part because one is not used to thinking of politics as a *cooperative* bargaining game.[34] The emphasis in so much of political writing is on conflict and zero-sum game decisions that the notion that all can (should) benefit from collective action seems novel. Once one thinks of politics as a cooperative game, then the analogy to the bargaining literature is direct. Perhaps the closest examples of cooperative bargaining in real world politics are the outcomes from corporatist systems in which the different economic interests of a country are represented. This bargaining typically takes place outside of normal political channels, and is thus forced by its voluntary nature to be consensual. The success of corporatist systems can be attributed to the consensual and inclusive nature of their decision-making process.[35] The voting options described here may be thought of as ways for achieving the same sort of success through a more formal political process in a parliament in which all political interests are represented.[36]

Coleman and Ferejohn (1986) point out, in response to Riker's (1982b) blanket dismissal of all preference aggregation rules, that the fact that two rules produce different, but reasonable, social choices with the same set of options and preferences does not vitiate the use of one of these rules to make collective choices. Coleman and Ferejohn use American football as an example. A given game, if played under different rules (e.g., 4 points are awarded for field goals instead of 3), might have a different winner. Having agreed to a particular set of rules, all those concerned (players, fans, etc.) may well accept as good (fair) the outcome of the game as played, however.

The same argument can be made with respect to the random elements in a voting procedure. If the weather is calm at the start of a football game, and a violent storm arises before the start of the second half, the outcome of the came may hinge on which team wins the coin toss at the start of the game, and the possession of the ball and field positions the coin toss determines. Despite the arbitrariness of the game's outcome brought about by the intersection of the chance elements in the coin toss and the weather, all of those involved may find the outcome of the game fair and acceptable.

More directly analogous are the outcomes from tennis tournaments. In a given tournament it may be that player A could beat B, who could in turn defeat C, but C would lose to A. The different skills of the three players are such as to produce an intransitive ordering of their abilities. If each of the three is capable of defeating all other entrants in the tournament, then the tournament's ultimate winner depends on the order in which these three players face each other in the tournament, which in turn may depend on chance elements in the drawing of opponents. Keneth Arrow included transitivity in his set of required axioms to eliminate such arbitrary outcomes. But again, all players and

fans may agree on the rules for determining pairings in a tennis tournament, and accept the legitimacy of the final outcome, even though they know that in some cases chance plays a role in determining that outcome.

Ultimately, the normative case for a particular voting rule, given the constitutional perspective of this book, rests on the constitutional convention's having unanimously chosen this particular rule over all other possible voting rules. Presumably, the convention's participants would not have chosen this rule had they not expected it to produce outcomes that yield relatively high utility payoffs, distributed reasonably fairly across all citizens. Indeed, if, in weighing the impact of the voting rule on future outcomes, the constitution framers' notions of fairness led then to place equal weight on the utilities of all citizens in the future, as Harsanyi (1955) assumed, then proportional representation combined with point voting would produce the outcomes Harsanyi's theorem required, namely those that maximize a Benthamite social-welfare function. Both voting by veto and the probabilistic majority rule introduce elements of fairness in different ways, but both give minorities an opportunity to influence or choose the final outcomes in some cases, while generally inducing the kinds of compromises most people find desirable. If these properties are what the participants in a constitutional convention seek in a voting rule, then they should find the final three rules discussed in this chapter appealing.[37]

Notes

1. Recall that no runoff election would be necessary in a "two-party" system if one party wins a majority of votes on the first ballot. One could then have a situation in which one party has a majority of the seats and several other parties hold seats. The Japanese and Swedish parliaments have looked this way for much of the post-World War II era. When this happens a two-thirds or three-fourths rule does not require unanimity, but it does force the majority party to get at least one and perhaps several other parties to concur.

2. See Katzenstein (1984) and Marin (1985, pp. 114–15). We take up corporatism further in Chapter 13.

3. Conversely, the institutions of majoritarian democracy adopted by West African countries fostered a winner-take-all attitude toward politics, which has led to a preoccupation with distributional questions, the alienation of the losers, and consequently much political unrest and instability (Lewis, 1965).

4. An alternative way to view the problem of mutually inconsistent proposals passing is to say that the majority rule is not defined for required majorities < 0.5. It cannot pick a winner in these cases.

5. Cycling is discussed with references to the literature in Mueller (1989a, pp. 63–65).

6. This assumes that each person votes for her most preferred alternative from each binary set of choices (i.e., that she votes *sincerely*). Sincere voting was first defined and contrasted with sophisticated (strategic) voting by Farquharson (1969).

7. That cyclic preferences open the door to agenda manipulation was proved by McKelvey (1976).

8. We exclude from consideration here redistribution of the Hochman and Rodgers (1969) type, which is better thought of as a public good.

9. In 1987, total government outlays as a percent of GDP were 58.3 and 59.9 percent in Denmark and Sweden, and 42.0 percent in Finland. Government was 51.6 percent of GDP in the fourth Scandinavian country, Norway (OECD, 1989, Table 6.5).

10. When cycles exist, a committee can move to any point in the issue space (McKelvey, 1976) including, of course, those outside of the Pareto set.

11. We discuss the Condorcet Jury Theorem again when we consider referenda in Chapter 12 and rules for selecting judges in Chapter 19.

12. The names and definitions have been changed slightly to reflect subsequent developments in the literature.

13. The R relationship stands for "is at least as good as" (i.e., xR_iy means that i regards x as at least as good as y).

14. Douglas Rae (1969) proved a somewhat different theorem regarding majority rule, but his theorem also assumes binary issues and equal intensities. By May's theorem we know that the assumptions Rae makes are equivalent to those in the text above. Kendall (1941, p. 117) and Buchanan and Tullock (1962, pp. 128–30) also discuss the importance of the equal-intensity assumption to a normative justification for the simple majority rule. Equal intensity also figures indirectly in the Condorcet Jury Theorem in the assumption that each voter is equally likely to know what the right decision is.

15. Although the idea of point voting has been around a long time, the best discussion of it is by Hylland and Zeckhauser (1979) upon whom the present exposition draws. Intensity differences may also lead to vote trading or logrolling when the simple majority rule is used. Such trading tends to produce cycling, however, and thus this method of revealing intensities is inferior to point voting (Bernholz, 1973, 1974; Miller, 1977; Mueller, 1989a, pp. 82–87).

16. Hylland and Zeckhauser (1979) make a reasonable case for the likelihood that this process would converge.

17. Each voter maximizes

$$U_i(G_i + \sum_{j\neq i}(s_{1j}|a_{1j}|^{1/2} + s_{1i}|a_{1i,}|^{1/2}, \ldots G_k + \sum_{j\neq i} s_{kj}|^{1/2} + s_{ki}|a_{ki}|^{1/2}, \ldots) + \mu_i(A_i - \sum_k |a_{ik}|).$$

Because on any iteration the G_k are fixed and the a_{jk} decisions are made simultaneously, each voter can affect only his own a_ks. His first order conditions are then,

$$\frac{1}{2}\frac{\partial U_i}{\partial G_k} s_{ik}|a_{ik}|^{-1/2} = \mu_{i,} \text{ for } K = 1,k$$

so that the marginal impact of a vote point on an issue falls as the number of points allocated to it rises. This penalty will prevent individuals from loading up all of their points on their most preferred issues.

18. If all voters get the same aggregate utility from the set of public goods, then each voter has the same marginal utility from a vote point, when initial stocks of vote points are equally distributed, $\mu_i = \mu_j$, j = 1,n. But this implies from the preceding footnote that

$$\frac{\partial U_i}{\partial G_k} s_{ik}|a_{ik}|^{-1/2} = \frac{\partial U_i}{\partial G_k} s_{jk}|a_{jk}|^{-1/2}, \text{ for } j = 1,n. \tag{F11.1}$$

For the iteration process to have reached a halt

$$\sum_i s_{ik}|a_{ik}|^{1/2} = 0. \tag{F11.2}$$

Successive substitution from (F11.1) into (F11.2) yields

$$\Sigma \frac{\partial U_i}{\partial G_k} = 0,$$

which is the first-order condition for maximizing W in Equation F11.1 with respect to the G_k.

19. Voting by veto was first proposed by the author in 1978. Subsequent developments appear in Moulin (1979, 1981a, 1981b, 1982) and Mueller (1984).

20. Moulin (1981b) and Mueller (1984) show that if voters follow the *prudent* strategy of vetoing their least preferred proposal of the set from which they choose, the same outcomes with the same probabilities are chosen as under the sophisticated–full-information assumption employed in the text. Thus, under the reasonable assumption that ignorance of other voter preferences would lead to prudent voting, voting by veto has the same properties under the assumptions of full information and complete ignorance.

21. The general rule for determining which proposals can and cannot win under voting by veto is derived in Mueller (1984).

22. Continuing the two dimensional example, let (x^*_i, y^*_i) be i's ideal point, (x^j, y^j) be j's proposal, and $x^j_i = |x^j - x^*_i|$ and $y^j_i = |y^j - y^*_i$. Individual i's utility from j's utility from j's proposal can be written as $U_i(x^j_i, y^j_i)$, which reaches a maximum at $U_i(0,0)$, and can be assumed to satisfy

$$\frac{\partial U_i}{\partial x^i_j} < 0, \frac{\partial^2 U_i}{\partial x^{i2}_j} > 0, \frac{\partial U_i}{\partial y^i_j} < 0, \frac{\partial^2 U_i}{\partial y^{i2}_j} > 0.$$

Let π^i_j be the probability that voter j rejects i's proposal. This probability is higher the further i's proposal is from j's ideal point, i.e.,

$$\frac{\partial \pi^i_j}{\partial x^i_j} < 0, \frac{\partial^2 \pi^i_j}{\partial x^{i2}_j} > 0, \frac{\partial \pi^i_j}{\partial y^i_j} < 0, \frac{\partial^2 \pi^i_j}{\partial y^{i2}_j} > 0.$$

Voter i makes his proposal (x^i, y^i) so as to maximize his expected utility

$$E(U_i) = (1 - \sum_{j \neq i} \pi^i_j)U_i + \sum_{j \neq i} \pi^i_j \bar{U}_i,$$

where $\bar{U}$ is the utility i expects if his proposal loses. The first-order conditions imply a balancing of the marginal gain in utility from making a proposal that is closer to a voter's ideal point against the expected loss from the increased probability of the proposal's defeat

$$\frac{\partial U_i}{\partial x^i}(1 - \sum_{j \neq i} \pi^i_j) = \sum_{j \neq i} \frac{\partial \pi^i_j}{\partial x^i}(U_i - \bar{U}_i).$$

23. Given the presence of the status quo in the issue set, the majority party would actually need one vote more than a bare majority to ensure that its proposal would win under all possible orders of veto voting.

24. Under a PR-persons system, the person elected with the fewest number of votes could be allowed to make one proposal and give one veto. All other representatives would be given proportionately higher numbers of proposals with an equal number of vetoes. A representative with, say, ten vetoes would appear ten times in the veto sequence, each position having been chosen by the random draw. Voting by veto with PR-persons should produce identical results as under PR-parties, if parties are disciplined.

25. The version of the procedure differs slightly from those discussed by Coleman (1973, pp. 61–153), Fishburn and Gehrlein (1977), and Mueller (1989b), but it has similar properties.

26. This conclusion follows from the "sure thing principle." See Rothschild and Stiglitz (1970).

27. It is the *maximin* strategy. The lottery is always inferior to the compromise for any set of proposals. Given the lottery is to take place, proposing your ideal point maximizes your expected payoff.

28. Note, however, that the Founding Fathers of the United States did compromise on both the issue of slave importation and on how slaves were counted in the census.

29. Azzi (1993) discusses the interaction between the form of representation *and* the voting rule used in the representative assembly in generating minorities' perceptions of procedural justice. A PR system coupled with a voting rule like the probabilistic majority rule or voting by veto should strengthen minority perceptions of procedural justice, thereby making agreement on rules at the constitutional stage, and subsequent compliance with the rules both more likely.

30. Point voting is much older, but the discovery of the importance of the square-root-addition rule is quite recent.

31. The recently invented voting procedure that has received the most attention is the "demand-revelation process" (Clarke, 1971; Tideman & Tullock, 1976; and Groves & Ledyard, 1977). This procedure requires that voters express their preferences for public policies by stating a willingness-to-pay for different levels of government action. Such a procedure could work well when voters are individual citizens expressing a willingness to use their own money to change government policies, but it is difficult to see how it would operate in a representative democracy. The representatives could not be expected to vote with their own money. If special money were created to be used in the parliament for the purpose of revealing preferences of representatives, the demand-revelation procedures would essentially function like point voting.

32. Experiments conducted by Vernon Smith (1977) with an iterative procedure that elicited cardinal utility information did not find individuals behaving strategically.

33. Obviously this is true for the probabilistic majority rule only when it *fails* to induce unanimous agreement on a compromise, which it should do only on extreme property-rights issues.

34. Chen and Ordeshook (1993) adopt this perspective and describe several procedures for reaching unanimous agreement on allocative-efficiency choices.

35. See again note 2.

36. At the other extreme an exclusive preoccupation with distributional issues can produce both political and civil instability. Northern Ireland is the most conspicuous example of this; Biharra is a less well known one (Kohli, 1990).

37. In this regard our emphasis on the role of the constitutional convention in the choice of parliamentary voting rule, and the possible constraint it should place on its use is in the spirit of Riker's emphasis on the importance of constitutional constraints in the kind of liberal democracy he advocates.

IV

INSTITUTIONS TO CONSTRAIN GOVERNMENT

12

The Referendum

> The foundation of democracy is faith in the capacities of human nature; faith in human intelligence and in the power of pooled and cooperative experience. It is not belief that these things are complete but that if given a show they will grow and be able to generate progressively the knowledge and wisdom needed to guide collective action. Every autocratic and authoritarian scheme of social action rests on a belief that the needed intelligence is confined to a superior few, who because of inherent natural gifts are endowed with the ability and the right to control the conduct of others, laying down principles and rules and directing the ways in which they are carried out.
>
> JOHN DEWEY

The referendum is a sort of halfway house between a pure form of direct democracy in which the citizens assemble and discuss the issues before taking a direct vote on them, and representative democracy in which the citizen's direct participation is limited to going to the polls and casting a ballot for one's preferred candidates. As in the latter, the citizen goes to the polls and casts a ballot, but in a referendum the ballots cast decide the issue directly. Voting is on issues, *not* candidates. Not surprisingly, the arguments brought forward for and against the referendum are a mixture of those employed in debate over direct versus representative democracy.

The fundamental rationale for holding a referendum rather than a town meeting is, of course, that the number of citizens affected by an issue is too large to meet in assembly. Thus, the logical alternative to holding a referendum to decide an issue is to have the issue decided by a representative legislative body, or in the case of a constitutional amendment to hold a constitutional convention. It is for this reason that we discuss the referendum after both the alternative modes of representation in a parliament and the voting rules to be employed there have been discussed.

We begin by describing the different types of referendum-type procedures in use. This is followed by a review of the arguments for and against the referendum that have traditionally been made. Later sections analyze these arguments with respect to constitutional and parliamentary issues. An overall appraisal concludes the chapter.

What is a Referendum?

Essentially, four forms of referenda are in common use:[1]

1. *The constitutionally mandated referendum.* The constitution may require that certain issues (e.g., constitutional amendments) voted upon by the legislative

assembly be approved by the citizens in a referendum before they can take effect.

2. *The government-initiated referendum.* The constitution may allow "the government" in the form of either the legislative body or the chief executive to place certain issues before the electorate to be decided directly by them in a referendum.
3. *The citizen-initiated veto.* The constitution may allow an action taken by the legislature to be submitted to the citizens, upon the petition of a minimum number of citizens, and to be overturned should it fail to receive the required number of votes in the referendum.
4. *The citizen initiative.* The constitution may allow an action to be placed before the citizenry in a referendum should a minimum number of citizens so petition. Should the action receive the required majority in the referendum, it would have the same stature as an action taken by the legislature.

Although referenda can be merely advisory, we shall concentrate on the options in which the action proposed in the referendum is carried out should the referendum be successful.

Arguments For and Against Referenda

For Referenda

Arguments in favor of employing referenda to decide issues rather than a legislative body claim either that the outcomes chosen by referenda are in some sense *better* than those chosen by a legislature or that the democratic process itself is improved by the use of referenda.[2]

Outcomes from referenda could be better in the sense of being more *legitimate*. If democratic government is based on the premise that ultimate authority for making decisions *ought* to lie with the citizens, then those decisions made directly by the citizens have greater claim to legitimacy than those made by a body of delegates.

Decisions made directly by the citizens can also be more accurate reflections of their preferences. The adage that no one knows better how the shoe fits than the individual who wears it is a valid argument against both dictatorial forms of government and representative forms. The histories of polities in which referenda are used reveal that representative bodies both make decisions that are not what a majority of citizens later reveal by a referendum to be their preference, and fail to consider some issues—typically of high saliency and voter disagreement—that citizens feel should be considered. Requiring referenda on certain issues, and giving citizens the right to bring to a vote issues passed by the legislature or ignored by it, can avoid parliamentary errors of commission and omission.

Referenda force voters to weigh the issues themselves. There is less room for personalties and other extraneous factors to affect a voter's decision, as can happen in a contest between individual candidates or parties. Moreover, when referenda arise on controversial issues because the appropriate representative body has been unwilling to take up these issues, citizens may become actively involved in the political process in a way that would not occur in a candidate/party election.[3] Thus referenda, like direct

democracy of a town meeting kind, may improve the democratic process by making individuals more active and informed citizens.

Against Referenda

Arguments against the use of referenda are, of course, that they result in worse outcomes and weaken the democratic process.

Issues are often presented to voters in referenda in quite complicated forms. Referenda are drafted by lawyers and often seem to presume levels of education and intelligence that go beyond the capacity of the average voter. Even simply stated propositions, like some of the state taxation limitations passed in the United States in the 1970s, may have complicated implications regarding future government expenditures and tax incidence that the average voter may not appreciate. Elected representatives and appointed administrators with specialized knowledge can actually make decisions that are better for the citizens than they themselves make on a simple yes/no referendum proposal.

An assembly of representatives can both debate and amend issues. It can thus agree to compromises that are unavailable to the electorate in a referendum vote. The latter is inevitably restricted to a binary choice. The greater range of outcomes open to a representative body allows it to make better choices than the electorate can make from the limited alternatives it confronts.

Party leaders can weigh the differing intensities of preference of representatives on issues and utilize this information to guide the political process to outcomes that reflect not only the direction of voter preferences but also their intensity.[4] By taking into account intensity differences, the outcomes of a parliamentary voting process guided by party leadership can better reflect the preferences of the electorate than would a simple binary vote of the electorate.

By taking decisions out of the hands of elected officials and representatives, referenda weaken their authority and thereby weaken the process of representative government. To the extent that the health of the democratic process rests on the health of its institutions of *representative* government, a weakening of the authority of representative bodies weakens the democratic process.

The literature defending and criticizing the use of referenda by and large does not distinguish whether the referenda are used to make allocative efficiency improvements or settle redistribution-property rights issues, nor does it distinguish the type of representative government that stands as alternative to the referendum (i.e., whether a two-party or a PR system is used).[5] We shall make use of these distinctions in analyzing the merits of a referendum system. We begin by considering the possibility of a referendum on the adoption of the original constitution and/or on amendments to it.

Referenda on Constitutional Issues

We visualize a constitution as a form of social contract among all citizens of the polity. Except for a few tribes living on isolated islands, no polity today is so small as to allow all citizens to assemble to write the initial constitution. Thus, an assembly of delegates must be chosen to draft the constitution. We shall return to the question of how this assembly is chosen and the rules under which it operates in Chapter 21. For now it

suffices to assume that a procedure for selecting delegates and a voting rule could be found so that all citizens would feel that their interests were adequately represented at the constitutional convention. If such a procedure exists and is employed, then the citizens of the polity can be expected to accept the constitution as *theirs*, to treat the constitution as binding upon them in the same way that it would be if they had directly participated in the constitution writing process and agreed to the final draft of the constitution.

In practice it often is not obvious that the procedures used to draft a constitution are such as would elicit such consensual support. Indeed, constitutions are often written by members of an existing parliament or at the behest of a dictator, and are not surprisingly designed to serve their drafters' interests. As a check on whether such consensual support exists, one could place the entire constitution before the citizenry in a national referendum. In addition to substantiating that the citizens do support the constitution, a national referendum upon it would force each citizen to consider its provisions and decide whether to accept or reject them. A conscious and literal acceptance of the provisions of the constitutional contract should induce greater compliance with its provisions than if it is felt to have been chosen by someone else.[6] Thus, a national referendum to ratify the initial constitution is a potentially attractive way to make it have the status of a real social contract joined by the polity's citizens.

A contract is an agreement among and is binding upon all parties to it. It is by its very nature unanimous, and by this analogy the constitution should also be ratified by unanimous agreement among all citizens. Literal unanimity in a polity of any meaningful size being an impossibility, some supramajority falling short of full unanimity is the obvious compromise. The larger the majority required to ratify the constitution, the more likely it is that it is viewed as a binding agreement by the citizens. The danger in choosing a majority too high is that no constitution is ratified and the polity remains in anarchy. But such are the costs of true anarchy that this is unlikely to be a real danger.

The states of Massachusetts and New Hampshire both required a two-thirds majority of citizens voting in referendum to ratify their original constitutions. In both cases the initial drafts failed to achieve this majority, but did so subsequently following the inclusion of a Bill of Rights (Butler & Ranney, 1978, pp. 68–69). The political instability that plagued France in the years following World War II led more than 79 percent of French voters in September 1958 to approve a new constitution. Constitution-like changes to give Algeria its independence and thus end a bloody war were approved by majorities of French voters in excess of 75 and 90 percent in 1961 and 1962, respectively. Eighty-three percent of those voting in a referendum in Ireland in 1972 voted in favor of joining the European Economic Community (EEC). More than 98 percent of voters in Iceland voted in 1944 to separate from Denmark and form a republic. Constitutional changes can be perceived by the voters as providing substantial collective benefits and thus can receive large majorities in their favor, as these and other examples from political history amply illustrate (Butler & Ranney, 1978, pp. 227–37). The gains from forming a government are so great that it is inconceivable that any people would remain in a total state of anarchy for very long because they were unable to achieve a substantial majority in favor of any one set of constitutional rules.

Although the case for requiring a supramajority of voters to approve the initial constitution seems strong, one might object that requiring supramajorities for all subsequent changes unduly protects the status quo. For example, early in the twentieth century an

amendment was introduced into the U.S. Constitution prohibiting the sale and purchase of alcoholic beverages. Had the Constitution allowed amendments by national referendum, but required a two-thirds or three-fourths majority to pass an amendment, the proponents of Prohibition would have been at a relative disadvantage even though their gains from passing the amendment were arguably comparable to the gains to its opponents from preventing the amendment's passage. If the amendment once did pass, its status would be protected by a supramajority requirement.

A great many issues involving individual rights have been put to national referenda. Several countries have held referenda on the issue of prohibiting alcoholic beverages. Numerous referenda on suffrage issues (e.g., age and sex of voters) have been held. Italy has had a referendum on the right to obtain a divorce (Butler & Ranney, 1978, pp. 227–36). It may be reasonable to assume that the gains to an individual on either side of these questions are equal. Most of these questions are inherently binary, and thus the essential conditions favoring the use of the simple majority rule discussed in the previous chapter are likely to be present. A good case can be made that these rights issues should be resolved by national referendum using the simple majority rule. But the outcome of a referendum on a rights issue that is resolved by a majority vote should *not* be treated as determining whether a *constitutional* right exists. We shall argue in Chapter 14 that constitutional rights should be defined in precisely those cases in which the simple majority rule is *not* the appropriate rule to use. A right to purchase and consume alcoholic beverages decided by simple majority vote in a national referendum is analogous to a "right" to drive one's automobile faster than a given speed or to pollute a river. Rights of this type should, and generally are, decided by the legislature using whatever rule it normally uses (i.e., typically the simple majority rule). Rights such as these can be taken away at any time by a new vote of the legislative body. Similar status should be accorded rights established by a simple majority vote in a national referendum.

The inappropriateness of amending a constitution by simple majority vote in a national referendum is illustrated by another example. On two occasions (June 1959 and October 1968) referenda in Ireland were held to replace Ireland's system of proportional representation with electoral rules favoring a two-party system as in Britain. The referenda were initiated by the Fiana Fail, Ireland's largest political party, in an effort to increase its power. If some groups or parties can change the rules of the political process at points in time when they feel that they can benefit from such changes, support for the political process may in the long run be weakened. The basic rules by which political outcomes are chosen should have a greater permanence than the outcomes themselves. Interestingly enough, the Irish voters seemed to sense this difference, and rejected the constitutional changes proposed by the Fiana Fail on both occasions even though only a simple majority was required to pass them.[7]

Where the government, a political party, or an interest group can by petition bring a constitutional amendment to a vote, and if this amendment carries even if only by a bare majority, the possibility exists that the basic rights and democratic institutions of the polity are vulnerable to short-run shifts in public opinion and shifting majority coalitions. On the other hand, when supramajorities are required to pass all constitutional changes, the mores and values of one generation regarding individual rights issues like slavery, suffrage, prohibition, divorce, and abortion may be imposed on future generations that are increasingly composed of individuals holding different values. To continue

to function as the basic contract underlying the political and social institutions of the community, the constitution must evolve over time to reflect changes in the beliefs, attitudes, and interests of the community.

Now consider the following procedures for accomplishing these two, seemingly inconsistent, objectives. The original constitution is drafted by a convention of delegates and ratified by a national referendum requiring, say, a three-fourths majority of the votes cast for approval. Subsequent amendments can be placed before the polity to be decided by national referendum by either a three-fourths majority vote of the parliament or a petition signed by some minimum fraction of the eligible voters of the polity. Any constitutional amendment proposed in either of these ways must receive the same fraction of votes cast (75 percent) as was required to ratify the original constitution to be ratified.

Periodically, say every 25 years, a new constitutional convention is held with delegates selected according to the same procedure used to choose delegates to the original constitutional convention.[8] The new convention is charged with redrafting the constitution. It can scrap the original constitution entirely, retain parts of the original but also make some changes, or, naturally, it can leave the original intact. Either of the first two alternatives requires the same supramajority of the convention to pass as the original constitution did. If a new constitution receives the required majority of the assembly, it is placed before the electorate in a national referendum. If the newly proposed constitution receives a simple majority of the votes cast, it replaces the old one. If not, the old constitution remains in effect.

The above procedures would allow the constitution to be amended any time a substantial fraction of the electorate thought such amendment was desirable. In addition, it would allow the constitution to evolve to reflect the changing circumstances and interests of the polity. The present generation would not be forever constrained by the attitudes of some past generation. The newly proposed constitution would be a package of changes agreed to by the convention's delegates and would thus reflect the kind of weighing of intensities and compromise that many deem to be lacking in the referendum process. The choice between the newly drafted constitution and the original would be by simple majority vote, however. The assumption here is that those favoring the new constitution have the same to gain from the changes as those favoring the old one have to gain from preserving the status quo. As circumstances change, the polity's social contract would also change, but at periodic intervals.

Referenda on Parliamentary Issues

Conceptually, the distinction between constitutional and parliamentary issues is clear. The former concern the basic political institutions and definitions of rights for the community, the latter the everyday decisions concerning the provision of public services and the passage of ordinary laws. In practice, the distinction is more difficult to draw, however. The United States Constitution has been amended rarely, and does deal with fairly fundamental definitions of rights and institutions. The Swiss Constitution has been amended frequently—through the referendum process —and covers policy issues like old age pensions that would in the United States be dealt with by the legislature. Even within a country there are inconsistencies. For example, the manufacture and sale of

alcoholic beverages was prohibited by constitutional amendment in the United States, but the manufacture and sale of drugs like cocaine and heroine is prohibited by national and state laws. Despite these incongruities, we shall proceed as if the short-run/long-run and basic/nonbasic distinctions between constitutional and parliamentary issues are clear-cut. Because the alternative to deciding a parliamentary-type issue by referendum is obviously to have it decided by the parliament, we divide our discussion of this topic according to the two basic alternative parliamentary systems we have described.

Two-Party Parliamentary Systems

Under a two-party system the voters choose a political party to make public decisions for the polity until the next election. Each election is a form of referendum on the two parties' platforms and/or their capabilities to make decisions for the polity, and thus there would appear to be no need for the parliament—i.e., the party holding the parliamentary majority—to hold yet another referendum on a specific issue. When a new public issue arises, the community needs to wait only until the next election before it can express its preferences on the issue as it is addressed in the platforms of the two political parties. Moreover, if the majority party were to call a referendum on a particular issue and have it fail, it could be interpreted as a defeat for the party. Thus, one expects that parliaments will only call referenda that they expect will go the way the majority party favors. Not surprisingly, therefore, one finds that most issues put to referendum by parliaments pass (Butler & Ranney, 1978, pp. 5–16, 221–37).

Given that the party in control of the parliament could pass any proposal it puts up to a referendum, and tends to put up only proposals it expects to win, it is not clear that giving parliament the right to call referenda serves any desirable purpose in a two-party system. Indeed, many referenda have been called by parliaments or heads of state to strengthen the hand of the head of state relative to the parliament, to strengthen the party leadership against opposition within the majority party, or to strengthen the majority party against the minority parties, as, for example, Fiana Fail's efforts to replace proportional representation in Ireland with a two-party system discussed earlier (see also, Wright, 1978; Butler & Ranney, 1978, pp. 221–23).

In the United States, Oregon school referenda present yet another and well-researched example of elected officials using referenda to achieve their goals rather than those of the electorate. In this case some school board officials are able to obtain school budgets larger than those which the citizens would choose under majority rule, if a full range of expenditure options was available to the voters. School board officials are able to achieve this goal in those school districts in which a budget proposal of the school board, if rejected, results in a much lower (in some cases zero) budget for the district. In districts in which such low reversion levels exist, the school board proposes higher budgets than the citizens are predicted to choose from a full range of budgets, thereby forcing the voters to "approve" the higher budget to avoid the even less desirable outcome of the reversion level budget's being imposed.[9] Examples such as these suggest that the legislative body in a two-party system, and perhaps other elected officials like the school boards in Oregon, should not be empowered to pose the questions placed before the electorate in a referendum. Furthermore, these examples undermine the argument against referenda based on the greater wisdom and expertise of elected representatives and officials. Even if elected officials *know* what is best for the citizens better than

the citizens themselves, it does not follow that they will *do* what is best for the citizens. Those elected to office have their own goals and agendas, and these need not coincide with those of the people they have been elected or hired to serve.

If a case cannot be made for referenda initiated by the parliament in a two-party system, the same cannot be said of referenda initiated by citizens' petition. Indeed, the evidence we have regarding the motives of elected officials when they initiate referenda suggest that additional checks on them may be needed. Citizen-initiated referenda, both to negate an action of the legislative body and to initiate an action where the legislative body has failed to do so, are such possible checks.

In a two-party system, the party possessing a majority of the seats in the parliament can implement or block any action on which its own members can agree. The voters' ability to control such a party is restricted, in the absence of the possibility of forcing referenda, to voting for the other party at the next election. But since each party runs on a platform containing, often implicitly, many issues, the winning party may not always correctly interpret its election "mandate" on every issue. By holding the power to call a referendum on a given issue, the electorate can both force the majority party to consider carefully what its mandate is, and enable it to correct mistaken interpretations of this mandate by the majority party.

One of the attributes of majority-rule parliamentary systems that we have stressed is their tendency to put together packages of legislation benefiting different special interests—e.g., expenditures concentrated in a particular area and financed out of general tax revenue. The ability of parties to "sell" such legislation to special interests would be constrained by the threat of citizens calling a referendum to repeal it. Thus a good case can be made for combining a two-party parliamentary system with the optional referenda for vetoing or initiating parliamentary-type legislation. Because the parliament in a two-party system would use the simple majority rule, it should also be the required majority to pass referenda on parliamentary issues.

The institutions we have suggested so far in this chapter, namely referenda requiring supramajorities on constitutional issues, and referenda initiated by the citizens but not by the government on parliamentary issues requiring simple majorities, resemble those of Switzerland today except that the Swiss do not have a two-party system. To pass a constitutional amendment, a majority of all Swiss voters must be in favor, *and* a majority of the cantons (states) must each approve the issue with a simple majority. These twin conditions effectively require a supramajority of the votes cast to amend the constitution. Laws and decrees cannot be submitted to a referendum of the people by the Swiss Parliament, but can be brought to a referendum vote upon a petition of 50,000 Swiss citizens. Referenda on laws and decrees require only a simple majority of the votes cast to succeed.

Pommerehne and Schneider (1982) have undertaken a study of the effects of the citizen-initiated referendum in Switzerland that makes an interesting contrast with the school board defined referendum in Oregon.

Municipalities in Switzerland operate under three sets of voting rules: direct democracy in town meetings, representative democracy without the possibility of citizen-initiated referenda, and representative democracy with referenda. All thing being equal, government expenditures in toto and in every expenditure category were lower in the municipalities in which the citizens chose outcomes directly than in either type of representative government system. But, in contrast to the referendum system in Oregon in which school board officials can manipulate the outcomes from referenda to obtain

larger budgets, in those municipalities in Switzerland in which the citizens had the right to negate the actions of their representatives by calling referenda, government budgets *(ceteris paribus)* were smaller, although not as small as in the municipalities governed by direct democracy. Citizen-initiated referenda in Swiss municipalities do seem to hold in partial check the proclivity of representative government to expand. Pommerehne's (1978) finding that the median voter model had greatest explanatory power in municipalities that use direct democracy, and greater explanatory power in municipalities that had referenda than in those without them, is of additional interest. It further supports the inference that referenda can help citizens control representative government and obtain outcomes that come closer to those the citizens would choose for themselves in the absence of the intermediary institution of representative government. If significant differences in outcomes can be observed in representative governmental units as small as Swiss municipalities, are they not likely to be present in much greater magnitudes at the level of the nation-state?[10]

Referenda in Multiparty, Proportional Representation Systems

The same arguments against having parliament initiate referenda and in favor of citizen-initiated referenda can be made with respect to multiparty parliamentary systems. Certainly, the justification for permitting citizens to correct errors of omission and commission by the parliament by initiating referenda is the same.

The differences between two-party and multiparty parliamentary systems, at least as we have described them in Chapter 10, weaken the arguments against allowing parliament the authority to initiate a referendum, however. First of all, in a multiparty system, particularly in one using some supramajority rule like the three-quarters rule, no single party is likely to have a sufficient majority to pass legislation over the opposition of all other parties. Thus, the parliament will be able to initiate a referendum only when a coalition of parties wishes to do so. The possibility that a coalition of parties will form to pursue a goal through a referendum that is in their interests, but not in those of the citizens, is less likely than that a single party would choose to do so.

In a two-party system each party must appeal to broad groups of voters. Platforms must be correspondingly broad, and it is unlikely that both parties will be able to avoid taking a stand on an issue sufficiently important to subsequently warrant a referendum. In a multiparty system, on the other hand, the platforms of some parties may be fairly narrow. The Green party focuses on environmental issues, the Farm party on agricultural policy. Enough parties may fail to take a position on some important issue so that the election results fail to serve as a source of information as to the electorate's views on this issue. A coalition of parties may choose to hold a referendum on an issue simply because its members do not know what their supporters' views on the issue are. The second difference between two-party and multiparty systems that favors allowing parliament initiated referenda in the latter case is that the election in a multiparty system may fail to reveal the views of a large fraction of voters on *some* issues.

The views of a party's supporters on many issues, even those not included by the party leadership in its platform, will of course be the same. Thus, the kind of issue that would legitimately require a referendum to reveal the views of voters, views not already implicitly known by party representatives, would be an issue that is orthogonal to party positions on most issues, an issue that "cuts across party lines."

Issues of this type may often be viewed as "controversial," and the objection may

be made that in calling a referendum on such an issue, the parties in parliament are merely choosing to avoid having to take a stand on an issue of controversy. The Italian Parliament's decision to allow Italian citizens to decide the legal status of divorce in Italy in 1974 may be a good example of this (Butler & Ranney, 1978, p. 18). Statewide referenda in the United States have been predominantly distributional and property rights issues or a mixture of these and allocation-efficiency improvements—i.e., issues on which state legislators might not know how their constituents want them to vote (Matsusaka, 1992).

The option of calling a referendum to resolve a controversial, potentially divisive issue may be of particular value in a multiparty parliamentary system. Suppose, for example, that the preferences of citizens in the polity are such as to produce a stable six-party system under proportional representation for the routine decisions of government–defense expenditures, environmental policy, and the like. From time to time "controversial" issues arise that "cut across party lines" (e.g., rights issues involving divorce; abortion; prohibition). If no avenue for resolving these issues is open other than through parliamentary action, they would give rise to the creation of new parties—the Pro-abortion Green party and the Anti-abortion Green party, etc. Resolving these issues by referenda might easily economize on transaction costs over having to create a set of entirely new parties that would be likely to disappear once the issue that brought them into existence had been decided.

When citizens have the right to initiate referenda, any controversial issue affecting a significant fraction of the population is likely to be brought to a referendum whether the parliament chooses to act or not. Nevertheless, the parliament's initiation of the referendum should in most cases save on transaction costs over requiring the gathering of signatures on a petition. If the incentives and scope for the parties to manipulate the electorate by calling a referendum are limited, as they would be in a multiparty system in which a supramajority of votes in parliament is required to call a referendum, then granting the parliament the authority to call a referendum may not be the lowest cost way to resolve constitutional issues. The case for allowing the parliament the authority to call referenda on certain issues seems much stronger in a multiparty system operating under a supramajority rule than it is in a two-party system in which the parliament uses the simple majority rule.

Required Majorities

What majority should be required to pass a referendum/initiative depends on the nature of the action. Consider first the distinction between a citizen initiative and a citizen initiated veto. Under the citizen initiative, the citizens propose and decide the same kind of issue that the parliament ordinarily decides.

The same logic that justifies a supramajority of the votes of parliament to pass public-goods/externality issues implies that the same supramajority must be obtained on these sorts of issues should they be initiated by the citizens. If two-thirds of the votes of the parliament are needed to pass a bill to protect the environment, then a similar proposal initiated by the citizens and voted on in a referendum should require the same two-thirds majority.

The argument is quite different, however, if the proposal in the citizen initiative is to overturn (veto) an action by the parliament. If the parliament employs a two-thirds

rule to pass environmental issues, the logic is that only when this majority is obtained are the expected benefits great enough to warrant the action. A vote by even one-third of the citizens to overturn the parliament's action should suffice to indicate that the citizens are of another mind. The required majority for citizen-initiated vetoes should be one minus the required majority for parliamentary action. (Obviously if the parliament uses the simple majority rule, this will be the appropriate rule for both citizen-initiated actions and vetoes.)

As the discussion of the previous subsection suggests, however, the kinds of issues brought to referendum often involve rights-related questions in which an equal-intensity assumption regarding the preferences of those on each side of the issue is warranted. May's (1952) theorem can again be used to defend the use of the simple majority rule in these cases. But how can one know when a referendum is called, either by a vote of the parliament or upon citizen petition, if a rights issue in which the equal-stake condition is plausible is involved? Neither the parliamentary process nor the process of citizen petition guarantees that an equal-stake condition would necessarily always be satisfied. An appeal to the courts would seem to be justified.

For example, in a multiparty system in which parliament employed a two-thirds majority rule, the constitution could require a two-thirds majority to pass all referenda initiated by either a two-thirds vote of the parliament or citizen petition with the following exception. Any citizen is free to appeal to the court that has jurisdiction over the level of government to which the referendum applies to declare that the proposed referendum involves mainly an issue of citizen rights in which those on one side of the issue can reasonably be assumed to have as much to gain if their position wins as do those on the other side. If the court makes such a determination, the referendum would be decided by the simple majority rule. Such a procedure would also give the courts the opportunity to offer judgment on whether the rights issue in question was one already covered by more general statements of rights in the constitution, or whether it was of such a fundamental nature that it could not be resolved as a simple law or decree, but rather required action at the constitutional level.

Appraisal

A review of the arguments against the referendum reveals them to be either invalid or equally valid against representative parliamentary forms of government (Frey, 1993). Indeed, as Vernon Bogdanor (1981, p. 93) has stated, all arguments against referenda are also arguments against democracy.

Consider first the argument that referenda are bad because they force the citizens to make an up or down choice on an issue, and thus fail to encourage or produce a consensus. This objection can have force only with respect to issues on which a consensus is possible (e.g., the provision of a pure public good) or the protection of a liberty all members of the community agree should be protected. Issues such as these are capable of achieving large majorities if they come before the electorate in a referendum. Moreover, if the goal is to encourage the reaching of a consensus, then the way to achieve this goal is to require a supramajority. This recommendation applies equally well to decisions reached by a vote in the parliament as to decisions reached by a vote of the electorate in a referendum.

Suppose, for example, that nearly everyone in a country agrees that some restrictions

on the sale of alcoholic beverages are desirable—they should not be sold to minors. A smaller but still substantial majority agrees that the sale of alcoholic beverages should be prohibited during certain hours in the night, and so on. Now suppose that a bare majority of the citizens in this country favor outright prohibition of the sale of alcoholic beverages to everyone at all times. If such a prohibition is possible via a simple majority vote in a referendum, one can expect the prohibitionists to petition for such a referendum, with their proposal being total prohibition. If the issue is one of high saliency, and the parliament (legislature) uses the simple majority rule, then the same outcome can be expected if the parliament has the authority to pass a law prohibiting the sale of alcoholic beverages. Certainly, in a two-party system at least one party would put prohibition into its platform, and if it is an issue of sufficiently high saliency, this party could be expected to win an absolute majority in the parliament and would reward its supporters by introducing total prohibition. Only if a supramajority were required to pass such an infringement upon individual liberty would the prohibitionists be forced to seek a compromise with the rest of the population. They would then presumably propose in the national referendum the strictest set of restrictions on the sale of alcoholic beverages that they thought could still achieve the required majority.

Thus, the greater the majority required to pass a referendum, the greater the consensus the proposers of a referendum would have to try to achieve through the formulation of a compromise proposal.

When the parliament employs the simple majority rule, many bills can be expected to pass without a consensus having been achieved. To obtain price supports for milk, American dairy farmers may have to include price supports for other farm products in an omnibus farm bill, and thus a compromise and consensus of sorts among representatives of farm interests may be said to have been reached in this farm bill. But this legislation does not represent a consensus among *all* interests represented in the U.S. Congress. To achieve such a consensus, price supports that raise the incomes of all citizens would have to be included in the bill. But such price supports could not raise the *real* incomes of all citizens, and would probably actually reduce incomes by introducing distortions in the allocation process as well as inflating all prices. Such legislation would never pass if the rule of consensus were employed, and it would be correspondingly more difficult to pass the higher the majority that is needed to pass legislation. The simple majority rule in a legislative body encourages consensus building only to the point where enough votes have been secured to pass legislation. In a two-party system as in the U.K., it encourages consensus formation not at all, since the majority party can pass its entire program without reaching any consensus with the opposition.

Next consider the objection that referenda are bad because they do not weigh the intensities of preferences of those on either side of an issue. Obviously this argument is without merit if a consensus was required to pass a referendum. The larger the supramajority required to pass referenda is, the more likely it is that the gains of the majority outweigh the losses imposed on the minority in opposition when a referendum passes, even though intensities may differ in the two groups. The likelihood that the failure to weigh intensities will lead to aggregate welfare losses when an issue passes is greatest under the simple majority rule. But we have seen that a normative case for using the simple majority rule can be made *only if* equal intensities of preferences for each individual on either side of an issue is a reasonable assumption. The implication to be drawn from the intensity-difference objection is not that referenda should never be used,

but that if they are used in conjunction with the simple majority rule, institutional procedures should be installed to help ensure that the equal-intensity assumption with respect to individuals on either side of an issue is a reasonable one.

A system of mandatory or citizen-initiated referenda will transfer some of the power to determine issue outcomes from the legislature to the electorate. In this almost tautological way, referenda may be said to weaken the institution of representative government by weakening the power of the representative body. But democracy should not be viewed as a test of strengths between the people and their representatives. Surely the criterion for evaluating the referendum as a procedural option ought to be whether the addition of institutions for calling referenda strengthens the democratic process in its entirety. Both the arguments presented in this chapter and the experience with referenda in Switzerland, California, and other countries and states suggest that they can.[11]

If government officials and party representatives have goals that are at least in partial conflict with those of the citizenry (if proof on this matter were really needed the history of government-initiated referenda would suffice to demonstrate that they do), then citizen-initiated referenda at least can potentially bring about outcomes that are closer to those the citizens desire, and thereby come closer to the goal of advancing their interests.

The most serious objection to the use of referenda to decide public-policy questions is that citizens are too uninformed about public issues to be able to make wise choices. Aitkin (1978) has argued that the Australians are generally ignorant of the content of their constitution and remain uninformed about the issues that come up in referenda. Voter ignorance, the partisan nature of politics in Australia, and the cumbersome procedures used in the referendum process contribute to the lack of success of that process in Australia, in Aitken's judgment (1978, pp. 136–37). Observers of the referendum process in other countries and various American states have not reached this same negative conclusion.[12] Indeed, the record for both Switzerland and California, where referenda have been most frequently used, indicates that their voters clearly do possess the capacity to understand the questions posed in the referenda and the energy to become sufficiently informed to make intelligent choices.[13] The presence of referenda not only makes voters more aware of the issues but also enhances their participation in the political process (Frey, 1993). Voter turnouts are uniformly higher in elections where initiatives are on the ballot than where they are not (Cronin, 1989, p. 227). There is no evidence from its use in other countries and states by which one could conclude that the outcomes obtained via referenda are systematically inferior to those obtained through parliamentary votes.

The belief that citizens are too ignorant to vote on issues directly, but are capable of selecting representatives who will make the "right" decisions for them, is one I find puzzling. If one presses the voter-ignorance attack on the referendum very far, it will undermine not only this democratic institution but also the institution of elected representatives and representative government. As the quotation of John Dewey, which opens this chapter, forcefully observes, all attacks on direct democracy are ultimately attacks on all forms of democracy. A more consistent logical argument can be made by assuming that people can in principle evaluate both candidates and issues, and then try to determine what set of institutions will lead to the best set of outcomes from the point of view of the citizens. Luckily for the logic of this argument, experience with the referenda indicates that this assumption is in most cases a reasonable one. Moreover, this

same historical record suggests that the referendum has been a useful addition to the set of democratic institutions in most of the countries in which it has been used. Upon modification it could be even more useful.

Mandatory referenda on constitutional amendments can improve the democratic process by involving citizens directly in the constitutional amendment process, thereby strengthening their commitment to the constitution. Amending the constitution by referendum can be a way to keep its provisions more in line with the needs and wishes of the citizenry.

Citizen-initiated referenda can function as a check on the government. Government-initiated referenda serve a less clear purpose and have been used by officials and party leaders in the past to achieve their objectives rather than those of the citizens. They could easily be omitted in a two-party, majority-rule democracy, but might well be retained in a multiparty, supramajority rule system.

The above discussion is not to imply that there are no problems to be met with a referendum system. Zisk (1987, pp. 245–46), for example, laments the major role that money seems to play in determining the outcomes of state referenda. Money can also play an important role in the elections of representatives, however. Once again we find a problem that affects referenda also affects other parts of the democratic process. Moreover, there are possible reforms for this problem and others in the referendum process (e.g., Zimmerman, 1986, pp. 176–82; Zisk, 1987, pp. 257–66; and Cronin, 1989, pp. 232–40). The referendum remains a serious candidate for inclusion in a polity's set of democratic institutions.

Notes

1. See Butler and Ranney (1978). Butler and Ranney make an argument for using "referendums" as the plural form of "referendum" (p. 4, note 2), but I shall employ the Latin form.

2. For discussions of the arguments pro or con, see Butler and Ranney (1978, pp. 24–33), Zisk (1987, pp. 12–15), Zimmerman (1986, pp. 55–9), Cronin (1989, Chaps. 3, 8, 9), Frey (1993), and Hofstadter (1955, pp. 259–61).

3. Bruno Frey (1993) notes that this occurred in Switzerland leading up to the national referendum in December 1992 on entry into the EC.

4. For forceful defenses of the outcomes from representative government that assume that party leaders perform in these ways, see Haefele (1971) and Koford (1982). More generally, logrolling occurs because of and reflects differences in intensity across issues. Logrolling is not possible when there is only a binary choice to be made. Not all observers think that logrolling leads to superior outcomes, however; see Mueller (1989a, pp. 82–95) and references therein.

5. An exception to the latter comment might be Bogdanor's (1981) proposed reforms for the British two-party system. Bogdanor regards greater use of the referendum and a switch to a PR system as desirable reforms to check the disadvantages of Britain's two-party system. Matsusaka (1992) emphasizes the distinction between allocative efficiency and redistribution.

6. Support for this argument is contained in the experimental work of Frohlich and Oppenheimer (1992, Chap. 8). They found that students in an experimental setting were more willing to comply with the outcomes of a redistributional rule that they had chosen from behind a veil of ignorance about future positions than with the outcomes from a rule chosen by the experimenter, *even* when the experimenter chose the same rule that the students would have chosen themselves.

7. See discussion by Manning (1978). Presumably the supporters of the Fiana Fail stood to gain from such a constitutional change, at least in the short term. The failure of the referenda to achieve simple majorities in their behalf suggests that some voters must have taken a longer-term,

constitutional perspective when voting on the issue (i.e., some votes must have been inconsistent with the narrow, short-term interests of the individuals casting them).

In contrast, the French National Assembly has been able to decide whether the next election will be held under rules that allow several delegates to be chosen from each electoral district or only one per district. Thus, a majority in the assembly has been able to decide whether its chances in the next election are better under the rules favoring a two-party or a multiparty system. The Gaullist reforms of 1958 resulted in a shift from multimember to single member representation from each electoral district. This shift benefitted the Gaullists greatly as they were able to convert 18 percent of the national vote into 40 percent of the seats in the National Assembly (Berger, 1973, pp. 356–57). With the Socialist party's prospects under single-member representation dimming, Socialist President Mitterand led the return to rules favoring multi- (i.e., minority-) party representation. The French readopted single-member-per-district representation for the 1993 parliamentary election.

8. Procedures for selecting delegates to the constitutional convention, the voting rule to be used there, and other matters are taken up in Chapter 21.

9. See the discussion by Romer and Rosenthal (1978, 1979, 1982) and Mueller (1989a, pp. 259–60).

10. For further discussion, see Schneider (1992).

11. See again Butler and Ranney (1978), Zimmerman (1986), Zisk (1987), and Cronin (1989). Although Matsusaka (1992) found that referenda in California tended to be on distributional issues, he also found that, in periods of political corruption and incompetence, Californians used referenda to try to constrain government.

12. See references in previous footnote.

13. On Switzerland, see Aubert (1978); on California, see Lee (1978, especially pp. 112, 119). Matsusaka (1992) finds voters to be more informed about referenda issues in recent years than they were at the beginning of this century, a development he attributes to coverage of referenda issues on radio and TV. Although generally positive in their evaluations of the effects of referenda in the United States, Zimmerman (1986), Zisk (1987), and Cronin (1989) do question whether the most optimistic predictions of the progressives and other strong advocates of referenda regarding the ability of citizens to process the complex information contained in referenda have proven to be correct.

13

Bicameralism

> I set little value on any check which a Second Chamber can apply to a democracy otherwise unchecked; and I am inclined to think that if all other constitutional questions are rightly decided, it is but of secondary importance whether the Parliament consists of two Chambers, or only of one.
>
> JOHN STUART MILL

Great Britain, France, Germany, and the United States have two legislative assemblies with differing powers. Italy has two with identical responsibilities. Each of the Scandinavian countries has only one. Much debate has taken place as to the advantages and disadvantages of these alternative legislative structures. We review the pros and cons of bicameralism in the context of the kind of constitutional system herein described.

Arguments for Bicameralism

To Avoid Bad Decisions Made in Haste

> . . . such an institution [an upper chamber] may be sometimes necessary as a defense to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind? (*The Federalist,* No. 63, pp. 409–10)

The drafters of the U.S. Constitution feared that the House of Representatives might fall prey to the "irregular passions" of the moment because its members were directly elected for short terms by the citizens. To avoid this danger an upper house was created in which citizens were represented disproportionately by state by individuals indirectly selected for longer terms. The nonproportional nature of the representation of citizens in the U.S. Senate was not central to the argument, and of course was included to win the approval of the smaller states, but the indirect selection of senators by state legisla-

tures for overlapping six-year terms was. If the senators voted against a proposal that had excited the momentary passions of the electorate, all members of the House of Representatives would have to confront the wrath of the voters in less than two years. Only a third of the Senate would face reelection in such a short time interval; on the other hand, the wrath of the electorate would be filtered through the elected state legislatures charged at the time with electing U.S. senators.

If this logic is compelling in justifying the original procedures for selecting the U.S. Senate, then the British House of Lords might be thought to be an even more desirable check on the passions of the populace, for most of its members are not chosen by the citizens at all, and all are Lords for life. The danger in granting veto authority to a body with such independence is, of course, that it cannot only block "the temporary errors" of an impassioned citizenry but it can with equal impunity thwart well-conceived proposals that would advance the general welfare. Over time the general public has come to view the latter as the greater danger. The House of Lords has lost almost all of its authority to block acts of the British Parliament (Finer & Steed, 1978, pp. 76–83). The U.S. Senate has for nearly a century been directly elected by the citizenry.

One might argue that the existence of longer overlapping terms still provides enough protection from short-term pressures to allow the Senate to be the kind of reflective check on the House of Representatives envisaged by the Constitution's framers. To test whether it is, is not easy, however, for one needs to identify issues that pass the House in response to temporary tides of sentiment, which later are found to have been clearly bad decisions.

One case that fits this criterion is the Tonkin Gulf affair. If ever an action was taken as a result of "the artful misrepresentations of interested men" it was the resolution that took the authority to wage war that the Constitution assigns to Congress and gave it to President Lyndon Johnson. That the Congress "afterwards . . . [did] lament and condemn" this action there can be no doubt, since it revoked the authority in January 1971. But in August 1964 patriotic passion was brought to a boil by the executive branch's artful allegation of an attack by the North Vietnamese on the U.S. Navy. "The Tonkin Gulf resolution . . . rushed through" the House "in a stampede of misinformation and misconception" (Schlesinger, 1989, p. 179), passing unanimously. Unfortunately, for the checks and balances thesis, the Senate passed the resolution with equal dispatch. The greater job security in the Senate provided by six-year overlapping terms emboldened but two of the 100 senators to stand against the tide of patriotism.

Most bills get voted on toward the end of a congressional session. Thus, the average interval between a vote on a resolution in the House and the next time a member must stand for reelection is less than one year. For the average senator it is less than three years. Intuition and the Tonkin Gulf experience suggest that the difference between time intervals is not great enough to make the Senate significantly more temperate than the House. For it to be so, either a significantly longer interval between elections would be needed and/or direct elections would have to be abandoned. Either step would risk expanding the potential for irresponsible action to gain the potential of greater temperance.

To Avoid Actions That Favor Narrow Interests

Whenever less than unanimity suffices to enact legislation, the possibility exists that one group of interests forms a winning coalition and passes legislation that benefits it and

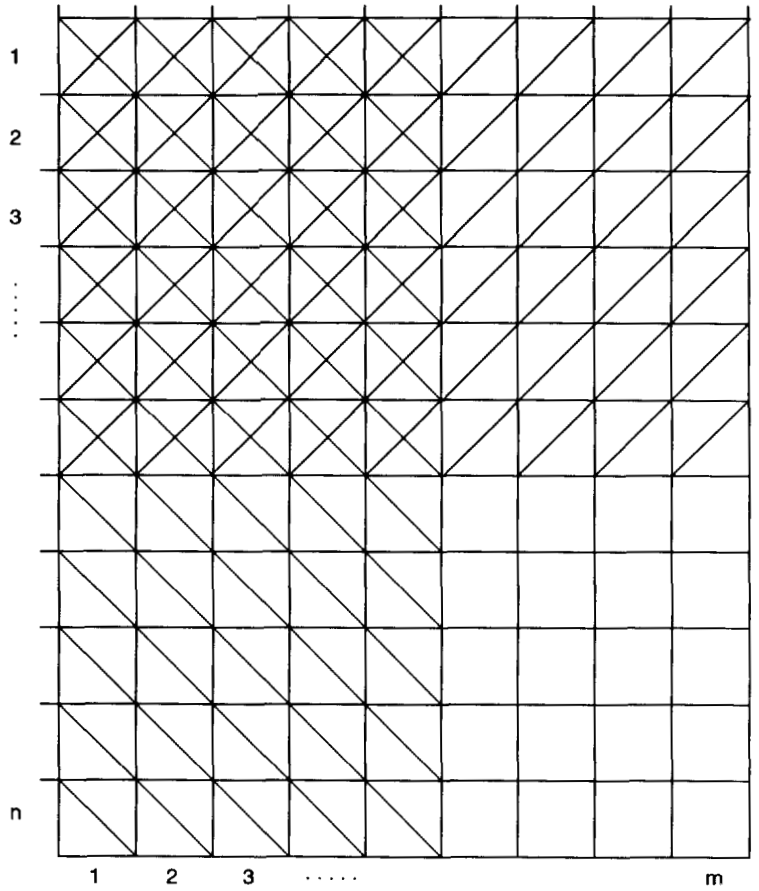


Figure 13.1. Implications of Bicameralism

harms the losing coalition, rather than just passing the kinds of public goods legislation that potentially benefits everyone. Buchanan and Tullock (1962, Chap. 16) have argued that these *external costs* of collective decision making can be reduced by having a bicameral legislature.[1]

To visualize their argument, consider Figure 13.1. The polity is a rectangle with population distributed uniformly across it. The Horizontal House is formed by electing one member from each of n geographic districts, where these districts are formed by n-1 equidistant horizontal lines. The Vertical House is formed by electing one member from each of m geographic districts formed by m-1 equidistant vertical lines. If both houses employ the simple majority rule, and the approval of both houses is required for a bill to pass, then coalitions of at least ($n/2$ + .5) Horizontal Representatives and ($m/2$ + .5) Vertical Representatives are required to pass a bill. If we assume that the representatives of the first ($n/2$ + .5) districts from the top and from the ($m/2$ + .5) districts from the left form coalitions (i.e., the squares with diagonals), then the representatives of slightly more than 75 percent of the population have to agree on a bill for it to pass. While with a unicameral legislature either the North could impose costs on the South, or the West on the East, both the North and the West must concur with a bicameral legislature when the district lines are drawn orthogonally to one another. As

long as district boundaries are drawn differently, bicameralism raises the effective majority required to pass legislation over that needed under the same voting rule with a unicameral legislature.[2]

Although bicameralism can have the advantage just described, to do so it must be constructed using a rather arbitrary mode of representation. Under the federalism described in Chapter 6, only issues involving the collective interests of the entire nation come before the national legislature. The views of an individual in one part of the country on whether to send relief to country *A* struck by some disaster are not necessarily or even likely to be identical with those of individuals in the same geographic area in which he resides. If a form of geographic representation is employed, individuals of differing views on national issues are represented by the same persons in the national legislature. Thus, on truly national issues some individuals in a given district lose on a particular issue, even when their representative wins. As discussed in Chapters 9 and 10, this property of geographic representation can both alienate voters and overcentralize decision making as representatives try to make their constituents happy by passing legislation with benefits targeted to their districts.

To avoid such centralization and geographic redistribution, the entire nation should be treated as a single electoral district for the purpose of electing representatives to the national legislature. If one wants to protect a minority from the kind of external costs of collective decision making that are possible under the simple majority rule, this goal can be accomplished using a unicameral parliament elected from a single national electoral district simply by requiring a larger absolute majority to pass legislation. A three-fourths majority rule in a unicameral parliament would have the same effect as the simple majority rule has in the Horizontal/Vertical bicameral parliament described above.

To Avoid Cycles

It is possible that a bicameral system reduces or eliminates the likelihood of a cycle (Hammond & Miller, 1987; Brennan & Hamlin, 1992). Assume, for example, a two dimensional issue space, as in Figure 13.2. Voter indifference curves are concentric circles around their ideal points. Line pp' divides the set of ideal points with m to the left of pp' and n to the right. For every point like z to the right of pp' there is a point z' at the intersection of pp' and the perpendicular from z, which all m voters on the left prefer to z (Enelow & Hinich, 1984, Chap. 3). Similarly, points like w to the left of pp' are dominated in the eyes of the n voters on the right by points like w'. If separate legislatures are formed with voters to the left of pp' represented in one, and those to the right in the other, pp' becomes a Pareto set for the two disjoint groups, and some point along it can be expected to be agreed to by the two houses. Although bicameralism could in principle avert cycles in this manner, it is not obvious that it is in practice feasible to divide the electorate into disjoint preference groups as required.[3]

To Represent Different Interests

We have thought of the parliament as an institution for representing the preferences of citizens with respect to those public good and prisoners' dilemma-type issues in which all individuals can be better off. In this context, it is information about the interests that individuals have in common that is sought, and a single legislature house is all that is required. But one can think of the people as having quite different sets of interests, and

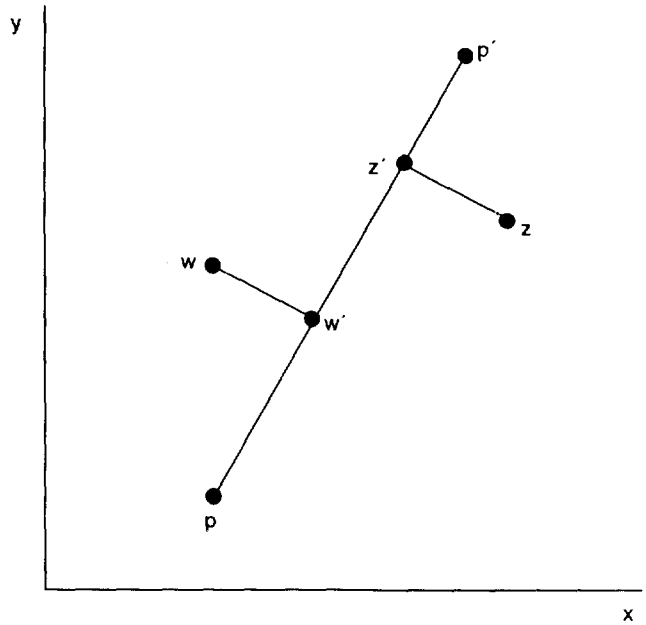


Figure 13.2. Possible Equilibria Induced by Bicameralism

bicameralism as a method for satisfying different interests. In the Horizontal/Vertical example given above, one might think of one chamber as representing one set of geographic interests and the second chamber another. Although this arrangement would not produce better outcomes than under an ideal unicameral system, it might produce better outcomes than would arise if only one of the houses constituted as in the example were to exist as a unicameral parliament.

Once one begins to think of bicameralism as a method for representing different interests in each chamber, the next obvious question is: What interests are to be represented in each chamber? This question in turn leads one to wonder whether perhaps more than two sets of interests warrant separate representation, and thus that tri-, quad-, or some higher multiple "cameralism" may not be optimal. For example, if the outcomes are improved by adding a Vertical House to a Horizontal House, might they not be still better if a Diagonal House, with districts constructed in the obvious analogous way, was added? And a fourth house with diagonals running the other way is also possible.

We take up some examples and proposals for parliaments with different interests represented below, but first we wish to discuss the arguments for a unicameral system—under the assumption that we have employed throughout this book—that the purpose of the parliament is to decide those public goods–externality–prisoners'-dilemma-type issues for which all individuals have interests in common.

Unicameralism in a Two-Party Parliamentary System

The rationale underlying the two-party system is that the voters get to choose that party which they believe is best able to run the government, or that party which promises the

most attractive program (see Chapters 9 and 10). Although a two-party system fails to represent extreme minorities directly in the parliament, the constitution framers may prefer a two-party system if they fear deadlocks and ineffective government under a multiparty system. The main advantage of the two-party form of government is that the party that wins the election can implement the programs it promises.

It is difficult if not impossible to reconcile this rationale for a two-party system with the idea that a second legislative chamber should also exist that can block the actions of the first. The majority party was chosen because the electorate wanted it to carry out its program and will be removed from office if it fails to do so, or if the program fails to have the promised consequences. If a second chamber exists with the power to thwart the majority party's efforts to implement its program, the rationale for two-party government crumbles. The majority cannot be held responsible at the next election for the success or failure of its program. The main check on the majority party under a two-party system must be the danger of defeat at the next election. To have it also checked by a second chamber elected in a different way, or not even elected at all, risks the destruction of the most important check on the government—the need to defend its actions in the next election.

A two-party system is supposed to produce "responsible government." Government cannot be given the freedom to do good without being given some opportunity to do evil. If the threat of defeat at the next election is not a sufficient check on a government, then the constitution framers should not establish a two-party form of government.

In addition to the need to run for reelection, the government under a two-party system can be held in check from committing some evils by the constitution. The opportunity to undertake redistribution and to tyrannize minorities is greater under a two-party system, which must of necessity use the simple majority rule in the parliament, than it is under a multiparty system in which minorities are directly represented in the parliament and a supramajority rule is used. The importance of constitutional protection for minority groups is, therefore, greater under a two-party system. The second check on the government under a two-party system is the constitution and the explicit constraints on government and protection for minority rights it contains.

Two specific institutional constraints on government are the following: (1) A quasi-judicial committee independent of the parliament screens all proposed legislation to determine whether it violates the constitution. Such a committee might have prohibited the Tonkin Gulf resolution from even coming to a vote on the grounds that it transferred to the executive branch an authority explicitly assigned to the legislative branch by the U.S. Constitution. (2) Delays built into parliamentary rules (e.g., bills must be read before the legislative body x times at set intervals before a final vote) would allow passions to cool, and common sense to return.

Unicameralism in a Multiparty Parliamentary System

The rationale for a multiparty system is that all interests in the polity are directly represented in the parliament in proportion to their number. All information on citizen preferences needed to make good decisions is present in the parliament of a multiparty system. How good its decisions are will depend to a considerable degree on the voting rule it uses. Some options were discussed in Chapter 11.

The simplest of these is a supramajority rule. The higher the majority required to

pass legislation, the less likely it is that a coalition can tyrannize a minority group. A supramajority rule can also help to avoid rash actions that later are regretted. Keeping in mind that the parliament should concentrate on public goods and prisoners' dilemma issues, unanimity on a given issue is always in principle possible. To obtain unanimity, a proposal that makes all individuals better off would have to be found. The fear that it would take too long to formulate such a proposal is what leads to an optimal majority, that is less than full unanimity. The higher the required majority, the more time that is likely to be spent reaching it. The delays and discussion that advocates of bicameralism seek by requiring that legislation pass in two houses before it is enacted can be achieved in a unicameral legislature by requiring a supramajority to enact legislation. The greater the fear of the passions of the moment, the greater the required majority to pass legislation should be.[4] If impetuous actions by the legislature are feared, then the extra time a supramajority rule requires becomes a decision-making *benefit* rather than a cost, and justifies a higher required majority than the discussion in Chapter 11 implies.

As under a two-party system, the constitution can check a unicameral parliament from making certain kinds of mistakes. Multiple readings of a proposed bill can be required; constraints can be placed on the kinds of issues that can come to a vote, and so forth.

The Representation of Economic Class Interests

The historical function of an upper house has been to represent the upper class. Only patricians could be members of the Roman Senate. When the House of Lords played an effective role in the British parliamentary system it was to protect the British aristocracy from the common folk represented increasingly over time in the appropriately named House of Commons. With the House of Lords as a model, Gouverneur Morris, and to some extent James Madison, sought to have the aristocracy directly represented in the U.S. Senate (Nedelsky, 1990, Chap. 3; Sundquist, 1986, pp. 22–23). No subtle theory of promoting temperance and deliberation was at work here. The upper house was to protect property from the masses. As the republican form of government replaced the unchallenged rule of the aristocracy, bicameralism emerged as a form of compromise in which the aristocracy agreed to share power with the commoners. As such it is a half-way house between government in which sovereignty lies with the aristocracy, and government in which sovereignty lies with the people.

Although the British have never written a constitution, much less the Romans, one could imagine a constitution being written, to which all would agree, that did provide special protection for those with wealth. If the wealthy are mobile and can take their wealth with them, some guarantee that the redistributive potential of democracy will not be used against them might be required to induce those with wealth to join the constitutional contract. However, other ways exist of providing these guarantees than through a second chamber in the parliament (e.g., by explicitly protecting property rights, or by using a supramajority rule in the parliament). But exclusive representation in a second chamber of parliament coupled with the power to block actions by the other chamber will also protect the wealthy's position. In a two-party democracy with no written constitution like Great Britain, it is about the only way to secure this protection.

Today the notion that a particular class should be represented in one body and everyone else in another strikes most people as at fundamental odds with the inherently

egalitarian foundations of democracy. Thus, not surprisingly the tendency has been for bicameralism to be replaced over time by unicameralism, rather than the reverse (e.g., Denmark, Sweden), or for the upper house to fade into oblivion, as in Canada[5] and Great Britain.

The Representation of Geographic Interests

Germany has a bicameral parliament. Representatives are chosen for the Bundestag from both a national electoral district and separate geographic districts in a way that essentially produces a multiparty legislature in which voters across the nation are represented roughly in proportion to the parties for which they voted (Deutsch & Smith, 1978, pp. 220–25). In the Bundesrat each of the regional governments (Länder) is represented, with each Land getting from three to five votes depending on its population. All of the votes of a Land must be cast in the same way. The Bundesrat does not vote on all legislation that comes up in the Bundestag. Rather, it votes on legislation that involves programs that must be administered by the Länder, or which in other ways raises important geographic issues (Deutsch & Smith, 1978, pp. 225–28). As such, the Bundesrat plays an important role protecting the decentralized nature of Germany's federalist system from the inevitable forces of centralization that seem to exist in all modern democracies.

Where some allowance for differences in population across Länder exists in the Bundesrat, each state gets equal representation in the U.S. Senate (2 votes) regardless of its population. This arrangement, coupled with the selection of senators by state legislatures, was originally expected to help preserve the federalist structure of the United States.[6]

The hope of those in favor of maintaining a united Czechoslovakia after the fall of Communism in 1989 was that a bicameral structure, which would require separate approval of all national legislation by both a Slovak and a Bohemian/Moravian chamber, would provide the Slovaks with enough protection to induce them to remain in a Czech/Slovak (con)federation. It never was tried, however.

Just as a second chamber in which a particular economic interest is represented, if granted the authority to veto legislation by the other chamber, can protect that economic interest, a second chamber in which a particular geographic interest is represented can protect that interest. The Slovaks would have been able to block measures at the national level that largely benefitted the Bohemian/Moravian region but were to be financed by all parts of the federation, or similar discriminatory bills. Although this type of redistribution is perhaps the most obvious sort that might have arisen in Czechoslovakia, it is not the only sort, even of a geographic form, that can arise. Redistribution can take place from the cities to the rural areas, from the North to the South, and so on. More than one additional chamber is needed to avoid all forms of geographic redistribution.

This point is even more germane to the federalist structures of Germany and the United States. In Germany, although the Länder have a common interest in preventing the federal government from transferring administrative programs to them without providing the resources to fund them, a proposal to subsidize dairy farmers creates natural coalitions among the Länder with strong dairy interests and among those without. No one argues that the U.S. Senate has been effective in stemming the tide toward centralization in the United States in this century. Few would claim it has even tried.

In Chapter 6 we suggested the creation of a federalist court to review legislation, a court with authority to block legislation in the national legislature, if it judges that the legislation deals only with regional or local interests rather than with national interests. Such an institution could effectively prevent all forms of geographic redistribution, whereas a second geographically based chamber would at best prevent that form of redistribution upon which the second chamber is constituted. A supramajority parliamentary voting rule discourages geographic redistribution, just as it discourages all other forms of redistribution. It is another weapon for the constitution drafters to consider if they are concerned about the exploitation of one part of the country by another.

Representation of Corporatist Interests

In the last 20 years a rather large literature has developed analyzing how *corporatist* interests are represented in different countries.[7] This literature is mostly positive in its orientation. Indeed, it has arisen to a considerable degree as a methodological critique of the reigning pluralist "paradigm" in political science. Although largely positivist, the corporatist literature indirectly raises normative issues: (1) Do societies perform better when corporatist interests are represented better? (2) If so, how are corporatist interests best represented? (3) What are the implications for constitutional design? (4) In particular, should there be a separate parliamentary chamber in which corporatist interests are represented? We take up these issues in this section.

What Is Corporatism?

> Corporatism can be defined as a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, noncompetitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports. (Schmitter, 1974[1979], p. 13)

Two important characteristics of corporatism need to be noticed. First, it focuses on the representation of functional (i.e., economic) interests, interests closely related to a person's source(s) of income. Second, membership in a "representational monopoly" is involuntary.

The main functional interests represented in a corporatist system are capital (business), labor, farmers, professionals, shopkeepers, etc. Within these broad categories may exist important subcategories—for example, large and small businesses, blue- and white-collar workers, physicians, lawyers, and so on. At least since the writings of Karl Marx it is usually assumed that capital and labor and at least some of the other functional groups have opposing (class) interests. Much of the corporatist literature is Marxist in spirit or tone, and one might expect therefore that it would dwell on the distributional struggles among these groups. But it has not.

Although labor, capital, and the other functional groups appear to have opposing interests, when one thinks of the decision to be made as to how the national income pie should be sliced, they have common interests in seeing this pie grow and in restricting the variability of their individual shares. Perhaps surprisingly, it is these positive-sum-game issues that have dominated the corporatist decision agenda. Corporatist decision

making has focused on achieving full employment, incomes policy, and similar economic issues (Lehmbruch, 1979b; Schmitter, 1982, p. 265; Cawson, 1986, p. 62). An important explanation for this focus has been that corporatism employs an informal decision process that can be aborted at any time by the exit of a participating group. It effectively functions, therefore, under the rule of consensus, thereby eliminating all but positive-sum-game issues from the agenda.[8] We return to this point below.

Does Corporatism Work?

Several studies have attempted to quantify the impact of corporatism on economic and political outcomes. We shall concentrate on two: Philippe Schmitter's (1981) estimation of the relationship between corporatism and political stability, and Manfred Schmidt's (1982) study of the link between corporatism and economic performance.[9]

Schmitter examines two dimensions of political instability: (1) unruliness, which consists of political strikes, antigovernment demonstrations, armed attacks on governmental institutions, attempted and actual assassinations, etc., and (2) unstableness, which combines changes in the prime minister and major cabinet positions, the narrowness of the government's margin of seats in the parliament, changes in the degree of fractionalization in the parliament, and other measures of parliamentary instability. He ranks fifteen developed democracies on the basis of three measures of each form of instability, and then compares these rankings to the strength of corporatism in each country. The top portion of Table 13.1 includes the five countries which Schmitter ranks highest in degree of corporatism (Austria, Norway, Denmark, Finland, and Sweden). To this group we have added Switzerland, which Schmitter ranked ninth in degree of corporatism, but which Schmidt listed among the *strong* corporatist countries (along with Japan, which Schmitter did not consider). Thus, the seven countries listed at the top of the table were rated as strong corporatist states by either Schmitter or Schmidt, and the bottom thirteen were rated strong by neither.[10] Columns 2 and 3 give Schmitter's rankings and Schmidt's categorizations, respectively.

Columns 4 and 5 in Table 13.1 give the combined rankings for the measures of unruliness and unstableness, repectively, that Schmitter estimated. The strong corporatist countries score much better than the medium or weak ones in avoiding civil disobedience and political protests and violence (column 4). They do not, however, do particularly better in terms of parliamentary stability (column 5). Indeed, the two countries ranked worst by this index, Norway and Denmark, are second and third to Austria in terms of their degree of corporatism. These associations and the other results Schmitter reports lead him to conclude that corporatism is more effective at channeling the economic interests of the different functional groups and thereby avoids the kind of political violence that arises from frustration with the economic system.

Schmidt finds a strong negative correlation for the 1974 to 1978 time period among unemployment, the degree of corporatism, and several variables related to other hypotheses (Schmidt, 1982, pp. 246–47). In columns 6 through 8 of Table 13.1, I report average unemployment and inflation rates and deficit levels from 1971 through 1985 for the twenty countries in the Schmidt and Schmitter studies.[11] On average, the countries with strong corporatism perform much better than those with medium or weak corporatism. Their unemployment rates and budget deficits are only half as great as those of the medium or weak corporatism group. Inflation averages 50 percent less for the strong corporatist group, even excluding Iceland and Israel from the bottom group; it is more than 100 percent less if these two countries are not excluded.

Table 13.1. Corporatism and Political and Economic Performance (1971–85)

1	2	3	4	5	6	7	8
Country	Societal Corporatism[a]	Corporatism[b]	Unruliness[c]	Unstableness[c]	U[d]	P[d]	D[d]
Strong Corporatism							
Austria	1	Strong	10	(12.5)	2.5	5.8	−3.8[e]
Norway	2	Strong	15	1	1.7	8.6	−3.3
Denmark	(4)	Medium	11	2	6.3	9.2	−2.1
Finland	(4)	Medium	8	9	4.6	10.7	−0.8[e]
Sweden	(4)	Strong	12	(12.5)	2.4	9.2	−6.0[e]
Switzerland	9	Strong	13	15		4.8	−0.4
Japan		Strong					
Average	4		11.5	8.7	3.2	7.9	−2.7
Medium/Weak Corporation							
Netherlands	6	Medium	14	10	6.6	6.3	−3.9
Belgium	7	Medium	6	5	7.8	7.3	−7.4[e]
Germany	8	Medium	7	6	4.5	4.7	−3.2[e]
Canada	(11)	Weak	5	13	7.4	7.8	−3.8
Ireland	(11)	Weak	9	8	11.4	13.3	−11.3
United States	(11)	Weak	(1.5)	14	7.5	7.0	−3.1
Great Britain	14	Weak	4	4	6.6	11.6	−4.7
France	13	Weak	(1.5)	7	8.7	9.3	−2.1[e]
Italy	15	Weak	3	3	7.4	13.9	−12.0[e]
Australia		Medium			5.4	9.7	−1.9
Iceland		Medium			0.3	39.4	−3.1[e]
Israel		Medium			3.4	100.7	−16.8[e]
New Zealand		Medium				12.4	−6.1[e]
Average	10.7		5.7	7.8	6.4	18.7	−6.1
Average excluding Iceland Israel					7.3	11.8	−5.4

Notes: U = Unemployment rate; P = Inflation rate; D = Government deficit (−) as percentage of GNP.

[a]Schmitter (1981, p. 294). ( ) = tie.

[b]Schmidt (1982, p. 245).

[c]Schmitter (1981, pp. 304–5), see notes. ( ) = tie. Based on years 1958–72.

[d]Mueller (1989a, p. 305), see notes.

[e]Data for all years are not available. Average is for those years where data are available.

Note again the lack of any apparent relationship between parliamentary instability (column 5) and the measures of economic performance in columns 6 through 8. Norway is ranked first in terms of parliamentary instability, and yet it has the lowest average unemployment rate of all of the strong corporatist countries, the second lowest rate of the twenty countries in Table 13.1. Denmark, which has the second most unstable parliamentary record, has the highest unemployment among the strong corporatist countries, but is still below the average for the medium or weak corporatist countries, and also outperforms them in terms of controlling inflation and its budget deficit. The figures in Table 13.1 are consistent with the arguments made in Chapter 10 that fractionalization, cabinet turnover, and other measures of parliamentary instability in a multiparty system need not lead to or signal poor policy outcomes.

Although the correlations reported by Schmitter and Schmidt and the figures in Table 13.1 do not delineate causal relationships, they do lend themselves to the following interpretation. Corporatism allows the *common* interests of functional groups to be channeled and satisfied more effectively, thus leading to superior macroeconomic outcomes as measured by unemployment, inflation, and economic growth. Because the economic interests of the central functional groups are adequately expressed and satisfied in the corporatist system, levels of dissatisfaction in general are lower in strong corporatist countries, and consequently so too is political violence and protest (unruliness). How large and stable the government's majority in the parliament is does not affect the macroeconomic performance of countries with strong corporatist structures; this is because the key decisions determining this performance are largely made outside of the parliamentary process.

How Ought One to Implement a Corporatist System?

Let us assume for the time being, based on the above sketchy review of the evidence, or for whatever reason, that a polity wants to include a corporatist decision-making structure among its set of institutions. How might such a structure best be provided for in the constitution?

Each individual born into a country may upon satisfying certain requirements take part in its political activities. If these include decisions that affect one's livelihood, a citizen ought to be able to participate in these too. Indeed, if corporatist institutions are created through the unanimous agreement of all citizens in a constitution, it seems essential that the constitution provide for the inclusion of all citizens in the corporatist system. One troublesome feature of corporatism in practice has been that some groups (itinerate inventors, panhandlers, welfare recipients, consumers) have been unrepresented. But, of course, existing corporatist institutions have not arisen by constitutional design. Instead, they have evolved to encompass those *organized* interests that already exist. Were one to design a corporatist system one would want to ensure that all citizens are represented. In Austria, the archetype corporatist state, all individuals *must* be a member of at least one functional group (chamber), and can be members of more than one (Marin, 1985, p. 94).

Another troublesome feature of corporatism in practice has been the involuntary nature of its membership and the undemocratic nature of its representational procedures. Recall that a key element of Schmitter's definition is that group membership is involuntary. Schmitter was interested in defining corporatism as a positive, not a normative, concept. Some degree of involuntariness is almost certain to be inherent in the institution, however. A physician cannot be free to join either the association of physicians or the association of dairy farmers, unless he also happens to raise cows. There is no reason, however, why these associations cannot be democratic in the procedures for selecting leaders and positions on issues. Here the state, and perhaps the constitution, could play a role guaranteeing the democratic nature of those functional interest groups that influence public policies.

If we now assume that the constitution allows, if not compels, all individuals to be members of at least one functional interest group, and that these groups are required to be democratic in their own decision making, then the only remaining questions concern the scope of corporatist decision making and the procedures by which corporatist decisions are reached. Since the corporatist decision process in practice has not been a

formal part of the government's institutional structure, it has generally functioned under an informal rule of consensus and thus has been confined to the set of issues over which consensus is possible (Schmitter, 1982, p. 262; Marin, 1985, pp. 114–15). If the institutions of government are designed to advance the interests of all citizens, then a formal decision process involving functional interest groups might be constrained to deal with the same set of issues and to employ a voting rule that required a large qualified majority to pass an issue, if not outright unanimity.

Thus, it would seem relatively straightforward to construct a set of institutions that accomplished in a more formal and more legitimate way what corporatism at its best accomplishes. Provision would have to be made to ensure that all citizens could be represented, that the representation process was democratic, and that the corporatist decision agenda was limited to those issues whose resolution could possibly benefit all members of the community. Assuming that such a set of institutions could be designed, the only question remaining is whether one should be.

Ought One to Implement a Corporatist System?

The economic activities of an individual can be divided into two categories: receiving income and spending it. Spending can be divided into voluntary expenditures on private goods and services, charitable contributions, gifts, etc., and the "voluntary contributions" to the state to "purchase" public goods and services.[12] The aggregation of individual choices with respect to private goods is most efficiently carried out by the institution of a market economy, defined to include rights to contract. The aggregation of individual choices with respect to public goods is optimally undertaken by some form of democratic process. How are individual choices with respect to obtaining income best aggregated?

The answer to this question provided by neoclassical economics is, of course, also by a market process coupled with rights to free contract. A cartel among factor owners raises the prices of finished goods ever so effectively as a cartel among producers, and results in the same kind of aggregate reduction in social welfare, over and above whatever gains accrue to the cartel. However appealing this answer to the question may be to economists, it is an answer many refuse to accept.

When economists look at the political activities of functional interest groups they see rather straightforward cartel behavior (e.g., Olson, 1965, 1982). Physicians demand licensing procedures to protect the public from unqualified medical schools and medical practitioners. In practice, licensing also protects physicians from competition, making them one of the richest of the professions worldwide. Plumbers, electricians, and carpenters follow the path physicians have cut, demanding that the public be protected from incompetence in these trades too. Thus does competition in one skilled trade after another get curtailed, thus raising the incomes of those who have succeeded in obtaining one of the prized licenses.

In Germany and Austria, shopkeepers succeed in keeping nearly all retail stores closed evenings and Sundays when many people in other countries find it convenient to shop. Thus, most Germans and Austrians are forced to shop near where they live or work. The development of large shopping centers and stores is slowed, and the longevity of the small high-cost, high-priced retailer extended.

Farmers seek protection from the vagaries of agricultural prices. European airlines seek protection from uneven demand for air travel. Both get it, and consumers, travel-

ers, and, of course, taxpayers pay dearly for such protection. That functional interest groups pursue and often obtain cartel protection of one form or another or outright subsidies cannot be denied.

But it also cannot be denied that the invisible hand of the market is blind to much hardship that it creates as it deals out rewards and punishments to those who try to earn a living. Were this not so, Marxism would never have achieved the following that it did. Unions and farm cooperatives arose in response to real, nontrivial hardships caused by the unpredictable ups and downs of the market. If they were abolished, one could anticipate that they would arise again, or at least the demand for them would arise, unless alternative institutional arrangements were substituted to protect individuals from the economic uncertainties of the market. Social insurance is one possible institution to protect individuals from particular risks, but an institutionalized corporatism is certainly another possibility.

If the citizens of a developed country were to write a new constitution at the close of the twentieth century, they might well choose to prohibit all cartels—producer, buyer, and factor owner—as suggested in Chapter 15, and rely instead on the kinds of constitutional insurance programs described in Chapter 16 to mitigate the economic uncertainties of the postindustrial era. Whatever advantages unions, farm cooperatives, and producer cartels served to mitigate the uncertainties of the market during the rise and decline of industrialism, these advantages are more than offset in the postindustrial era of worldwide market integration by the rigidities and inefficiencies they cause.

On the other hand, these citizens might not believe that economic history is yet at an end. Recalling their country's history, they may fear that in prohibiting these sorts of associations they might again foster the kinds of economic interest group hostilities that were so much a part of the nineteenth and much of the twentieth century. Rather than prohibiting functional groups, these constitution makers might instead try to focus their activities on the cooperative positive-sum issues that confront all members of society. Creating a second parliamentary chamber, a chamber in which corporatist interests are represented and advanced, would be a less radical and more historically consistent alternative than relying on market competition and social insurance.

Conclusions

Jeremy Bentham thought that a second legislative chamber was "needless, useless, worse than useless." Carl J. Friedrich observed that Bentham's "objection is strictly logical, coherent, unequivocal. . . . If the first chamber has not produced the right kind of legislation, the right check is to turn it out (or to improve it), but not to establish a second chamber. This argument apparently holds only as long as one accepts Bentham's rational view of human beings. If all human beings acted rationally and farsightedly, there would be no sense in a second chamber except under federalism. But since they do not, such chambers may fulfill a variety of useful functions."[13] Friedrich went on to describe how the British House of Lords fulfills some of these functions.

We follow Bentham in assuming that individuals are rational and self-interested, and we are led to essentially the same conclusion he reached. If the task of parliament is to reach decisions that advance a single set of common interests of the community, then a single chamber of representatives, properly chosen and operating under the appropriate voting rule, is all that is needed to complete this task.

The supposition that individuals are capable of designing a set of rules of government and then contracting to obey them rests upon the presumption that individuals are rational and farsighted. The assumption that they are not, and that they know that they are not, and therefore choose rules of government to allow for their irrationality, fits uncomfortably with the basic premises of constitutional democracy. One can appeal to the Ulysses and the Sirens parable to argue (1) that individuals are *more* rational and farsighted at some times than at others, (2) the constitutional assembly is one of these occasions of rationality and farsightedness, and (3) that knowing this the constitution drafters include constraints to check the "temporary passions" of the people or their deputies in the future. As a justification of a second legislative chamber, however, this argument also is fragile. How can one design a second chamber so that it will prevent a temporary passion of the first chamber from bringing disaster to the country, without risking the disaster of the government not being capable of responding quickly and decisively to a real crisis? In Italy both legislative chambers have been elected in the same way and have had the same responsibilities. Bicameralism in Italy may be said to have increased the time spent deliberating governmental actions, but it can also be said to have harmed Italy by slowing up the passage of needed legislation (Hine, 1988, p. 211).[14]

Ulysses had the advantage of knowing who the Sirens were and when he would encounter them; the constitutional assembly cannot anticipate the future crises the nation will face, and whether delay or quick action will be called for. The U.S. Senate failed to restrain the passions of the House in the Tonkin Gulf crisis discussed above. Instances when it has saved the nation from a disaster that the House would have brought down upon it do not readily come to mind. In Britain, the House of Lords has been allowed to decline into obscurity presumably because it too has not been found to play much, if any, constructive role in the British system. We have suggested alternative constitutional constraints on the momentary, or persistent, passions of the legislature than that of a second chamber.

A stronger rationale for a second chamber arises if this institution represents a different set of interests from the first. Friedrich alludes to this argument in mentioning federalism as an exception in the quotation above. The proclivity of the central government to assume taxation and spending authority better allocated to lower governments, or to engage in geographic redistribution, may be checked by a second legislative chamber constituted for this purpose.

We have also discussed the possibility of designing a second chamber in which the economic interests of individuals are represented. Such a chamber would not function as a check on the first, as in the traditional bicameral system, but instead would have its own set of constitutionally defined issues to resolve. Such an institutional structure recalls Richard Musgrave's (1959) tripartite division of the work of government into an Allocation Branch, a Distribution Branch, and a Stabilization Branch. The assignment of the Corporatist Chamber would be to produce economic stability and growth—that is, to reach agreements that avoid strikes and lockouts, limit unemployment and inflation, and yet promote the kind of economic flexibility and innovation that trigger increases in productivity.[15] The other chamber would deal with the public-good "consumption" activities of the polity (environmental protection, defense, etc.). Some of the corporatist literature would suggest that vertical redistributional issues could (should) also be assigned to the Corporatist Chamber.[16] In Chapter 16 we shall suggest that the distributional questions of the polity be dealt with in the constitution in a different way.

Notes

1. J. Roland Pennock (1979, p. 401ff) endorses their arguments. See also Ordeshook (1992).

2. Under the U.S. system of representation, however, the districts represented in one house are all proper subsets of the districts represented in the other. Thus, while it is likely that the bicameral U.S. system raises the effective majority required, it is not necessarily so. If half of the population and half of the states were east of the Mississippi, then an eastern coalition could in principle dominate the west in both the House and the Senate.

3. If preferences for government services varied systematically with income, then the division of the British Parliament along class lines as originally occurred in Great Britain might have resulted in such disjointedness. Such a solution to the cycling problem would seem to run the risk of polarizing society and encouraging "class conflict," however. Against this alternative, cycling seems like the lesser of two evils.

4. Jon Elster (1991, p. 12) has noted that the Marquis de Condorcet favored requiring a supramajority to bicameralism as a check on the passions of the moment.

5. Although, quixotically, recent proposals to redraft the Canadian Constitution have included a strengthened upper chamber, modeled on the U.S. Senate, in which each province gets equal representation. That such an institution might be required as part of a compromise to win the small provinces' support is not surprising. The necessity for compromises of this sort arises, however, because of the way the constitutional process has been taking place in Canada. Instead of holding a convention in which delegates of the citizens are represented to draft a constitution for all Canadians, representatives of the different provinces first draft a constitution and then submit it *to the provinces* for ratification. The process encourages Canadians to think of themselves first as citizens of their province, second as Canadians, and encourages the kind of provincial holdout that has prevented Canada from getting a new constitution. We return to the issue of constitution drafting and ratification in Chapter 21.

6. "[I]t may be remarked, that the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residual sovereignty" (*The Federalist,* No. 62, p. 402).

7. For surveys of this literature see Cawson (1986) and P. J. Williamson (1989).

8. Lehmbruch (1979a, p. 55) in his definition of corporatism places heavy emphasis on the degree of cooperation among groups that occurs under *liberal corporatism* (see also discussion in P. J. Williamson, 1989, pp. 12–13). Schmitter (1982, p. 262) wishes to distinguish between the process of interest *representation,* for which he reserves the name "corporatism," and the process of reaching *agreement* among the interest representatives, for which he prefers the name "concertation." He notes, however, that concertation in corporatist systems is largely a consensual process.

9. For additional discussion of these and other studies, see Cawson (1986, Chap. 5).

10. One difficulty created by the many and broad definitions of corporatism in use is that consensus on what the strong and weak corporatist countries are does not exist. Although Switzerland ranks low on the extent to which its economic interest groups are centralized and involuntary, consensus among all groups is an important aspect of Swiss decision making (Steiner, 1974, pp. 6, 252–53). As mentioned in note 8, Schmitter does not consider the concertation process an integral part of corporatism and thus ranks Switzerland low in corporatism, as does Kriesi (1982, p. 133) using Schmitter's definition. Schmidt (1982, p. 257, note 8) classifies Switzerland as "strong corporatist" because it "displays characteristics of a societal corporatism with comparatively low involvement by the state." The stress placed on consensus decision making in Switzerland is an important part of that country's "societal corporatism," I would argue.

11. Schmidt also includes Luxembourg, but it was not in the table from which Table 13.1 was constructed.

12. I allude here, of course, to Knut Wicksell's (1896) "voluntary exchange" theory of government, which inspires this book.

13. C. J. Friedrich (1946, pp. 422–23). *The Federalist* (Nos. 62 and 63) emphasized checks on irrationality in defending a second house of Congress. See also Pennock (1979, pp. 440–47).

14. Jackman (1987) finds voter turnout greater under unicameralism, which he attributes to the more decisive nature of the electoral outcomes under unicameralism.

15. Note that it might be necessary to achieve these goals that certain macroeconomic monetary and fiscal policies be decided by this chamber as implied also in the Musgrave division. Such an assignment of decision-making authority would differ from that described in some of the corporatist literature—e.g., Schmitter (1982, p. 265).

16. I refer here to what P. J. Williamson (1989, Chap. 8) calls *welfare corporatism*. See also Wilensky (1976).

14

Rights

> There is a remarkable difference between the characters of the inconveniences which attend a declaration of rights, and those which attend the want of it. The inconveniences of the declaration are that it may cramp government in its useful exertions. But the evil of this is short-lived, moderate and separable. The inconveniences of the want of a declaration are permanent, afflicting and irreparable. They are in constant progression from bad to worse.
>
> THOMAS JEFFERSON

On what grounds does a society decide to protect some rights in its constitution and not others? Why would a community deem it necessary to pass a constitutional amendment to abridge an individual's right to purchase or sell alcoholic beverages, and yet abridge by legislative action the similar right with respect to narcotic drugs? Why would a community protect an individual's right to carry a gun, but not one's right to drive a car, when the latter has an arguably greater potential effect on both the welfare of the individual actor and the welfare of the rest of the community?

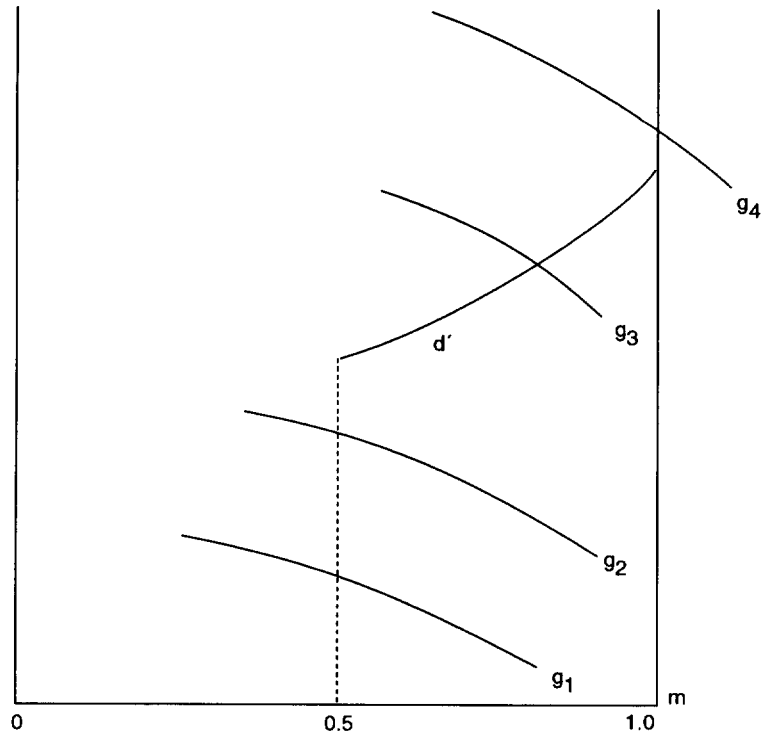
The United States Constitution has been amended sixteen times in the more than 200 years since its first ratification. The Swiss Constitution has been amended more than 200 times since its first ratification. Why would one country choose to amend its constitution so rarely, another so often?

This chapter seeks to shed light on these questions by exploring the attributes of constitutional rights that rational citizens would agree to if they themselves were to write and ratify the constitution.

The Choice of Voting Rule

We envisage a constitution as written and agreed to by all citizens. Each wishes to choose that set of political institutions that maximizes her expected utility. We discussed at length the alternative modes of representation in Chapters 8 through 10 and shall not review that issue here, but rather simply assume either that the polity is sufficiently small so that each citizen can represent her preferences directly, as in a town meeting, or that an ideal proportional representation (PR) system is employed in which groups of citizens having identical preferences are represented in a parliament in proportion to their numbers. With the question of representation eliminated, the remaining central issue involving collective decision-making institutions is the choice of voting rule.

In Chapter 11 several alternatives were considered. The simplest and most familiar



$g = p'(u + v)$

Figure 14.1. Possible Optimal Majorities

of these are members of the class of voting rules in which an issue x defeats an alternative y, if the fraction of the community voting for x is equal to or greater than m, $0 < m \leq 1$. The crucial decision that must be faced when the constitution is written is what m should be.

When making this choice an individual at the constitutional stage must weigh the benefits from a higher m that increases the likelihood that she gains from the collective decision against the decision-making costs of achieving greater consensus. Call $p(m)$ the probability that an individual is on the winning side of an issue, with $p'(m) > 0$, and let us assume it increases at a diminishing rate ($p''(m) < 0$). Call s the gain an individual expects if she is on the winning side of an issue, with $u(s)$ the utility of this gain ($u' > 0$, $u'' < 0$), and t the loss anticipated if she is on the losing side, with $v(t)$ the disutility of this loss, ($v' > 0$, $v'' > 0$). Of course, if s were a cash subsidy and t were a tax we could write $v(t)$ as $u(-t)$. But we wish to allow for the possibility that the gains and losses from collective decisions are of different kinds.

Let $d(m)$ be the anticipated decision-making costs measured in utility units commensurate with u and v. Marginal decision-making costs are positive and increase as the collective decision rule approaches the unanimity rule—i.e., it is reasonable to assume that decision-making costs rise with m, and that $d'(m) > 0$, and $d''(m) > 0$ as m approaches 1.0. In Figure 14.1, we depict d' as increasing over the entire range from $m = 0.5$ to $m = 1.0$. To the left of 0.5 the decision rule is undefined because of the possibility of mutually inconsistent issues being passed.

An individual at the constitutional stage chooses the m that maximizes his or her expected utility from future collective actions, as represented by[1]

$$E(U) = p(m)u(s) - [1 - p(m)]v(t) - d(m). \tag{14.1}$$

The optimum is realized when the marginal gain in utility from increasing the likelihood that the citizen wins on an issue when m increases just offsets the marginal increase in decision-making costs. Formally, this is given by

$$p'(m)[u(s) + v(t)] = d'(m). \tag{14.2}$$

Figure 14.1 can be interpreted as follows. The g_i curves represent the marginal gain in expected utility from increasing the required majority, the left-hand side of Equation 14.2. Since $d(m)$ is undefined for m less than 0.5, no solution to Equation 14.2, m^*, less than 0.5 exists. If $d'(m)$ declined continuously to the left of $m = 0.5$, as it rises to the right of this point, curves like g_1 and g_2 would imply m^*s < 0.5. One way to interpret this possibility is to argue that *were it not for the possibility of mutually inconsistent proposals being passing,* the optimal majority in these situations would be less than 0.5. It is reasonable to assume in these cases that the constitution framers choose the simple majority rule. It is the minimum required majority that avoids the possibility of mutually inconsistent proposals being passed (Reimer, 1951). With marginal expected gains given by g_3, then $m^* > 0.5$, and is given by the intersection of g_3 and the $d'(m)$ curve.

The positions of the g_i curves obviously depend on the relative magnitudes of s and t. To see what the effects of varying t and s are, assume that t is proportional to s, as in Equation 14.3:

$$t = bs, \text{ with } b \geq 0 \tag{14.3}$$

It can now be shown that m^* increases with b.[2] Increasing the size of the loss if one is on the losing side of an issue relative to the gain if one is on the winning side shifts the marginal gain curve, g_i in Figure 14.1, to the right. For a large group of issues in which the harm done to the losers, t, is expected to be small relative to the gains to the winners, the optimal majority is the simple majority. But as t increases relative to s the optimal majority eventually becomes greater than 0.5. With a sufficiently large t relative to s, the optimal voting rule becomes the unanimity rule.

Individuals gathering to write a constitution to govern their future collective decision making and who (1) envisaged the same sorts of decisions to be made in the future, and (2) assumed that everyone had the same probability of being on the winning or losing side, could unanimously agree on the voting rules to be used.[3] Of course, it will not be possible at the constitutional stage to visualize each and every collective choice that will be made in the future and devise a separate voting rule for each. But it is reasonable to assume that the different *types* of collective decisions that the polity will face can be anticipated in a general way. The above analysis then implies that it is optimal to divide future collective decisions into different categories. For those decisions where the expected loss to those on the losing side is large relative to the gain for the winners, a higher majority should be required to enact legislation. Individual rights represent one such possible category of decisions.

The Choice of Collective Decision Rule as It Pertains to Rights

We first define rights:

Definition: A right is an unconditional freedom of an individual to undertake a particular action or to refrain from such an action without interference or coercion from other individuals or institutions.

Comments: One can, of course, define an action as the act of doing nothing and omit the "refrain from action" portion of the above definition. But it is important to make explicit that rights can simply protect one's freedom not to do something, as most conspicuously in the Fifth Amendment to the U.S. Constitution, which protects a person's freedom to remain silent so as not to incriminate oneself.[4]

The first observation to be made with respect to including individual rights in the constitution is that there would *never* be a need to define constitutional rights if all decision-making costs were zero. To see this point, consider Figure 14.2, drawn for either a community of two or a community with two groups of individuals, each of which has identical tastes. A status-quo level of utility, S, exists for A and B at the constitutional stage. If the constitution were written out of a literal state of anarchy, the "initial endowments" of each individual might consist of little more than their abilities to reason and bargain. S lies very near or on the origin. More realistically, as when a new constitution is drafted following a war or revolution, certain de facto property rights define the initial positions of all parties, and thus the status-quo S. Bargaining at the constitutional stage commences from this starting point and, under the unanimity rule, only those voting rules and other political institutions are chosen that promise to increase the welfare of all individuals. If UU' represents the possible utility levels the community can attain through collective action, then only those political institutions that promise to produce an outcome in the PP' set of points that are Pareto preferred to S are possible candidates for inclusion in a constitution unanimously agreed to by individuals at S.[5]

Movement from S to UU' might well follow a sequence of steps—first property rights are defined, then market institutions, etc. Each new agreement shifts the status quo outward from S to S' to S'', and so on until eventually a point like E, on the utility possibility frontier, is attained, a point from which no further mutually beneficial improvements are possible. A community might fail to reach UU' owing to information asymmetries, bargaining and decision-making costs, and other real-world "transaction costs" that stand between actual, realized utility outcomes and those imbedded in a Pareto optimal ideal. But were such transaction costs not present, the ideal would be obtained. Moreover, the community would not need to pause along the path from the initial status quo to Pareto optimality. No institution other than the unanimity rule itself would be required. If decision-making costs are truly zero, the community can function as a continuously convened constitutional convention addressing each new issue and costlessly deciding it to the advantage of all members. With zero decision-making costs, points S and E in Figure 14.2 are as one. Any constraints on the collective decision process, like granting individuals inviolable rights to undertake certain actions, only stand in the way of reaching UU'.

Zero decision-making cost is, of course, a hypothetical ideal. Nevertheless, contemplating the full force of zero decision-making costs does help in understanding a most fundamental part of the argument. Definitions of rights, like the choice of voting rule,

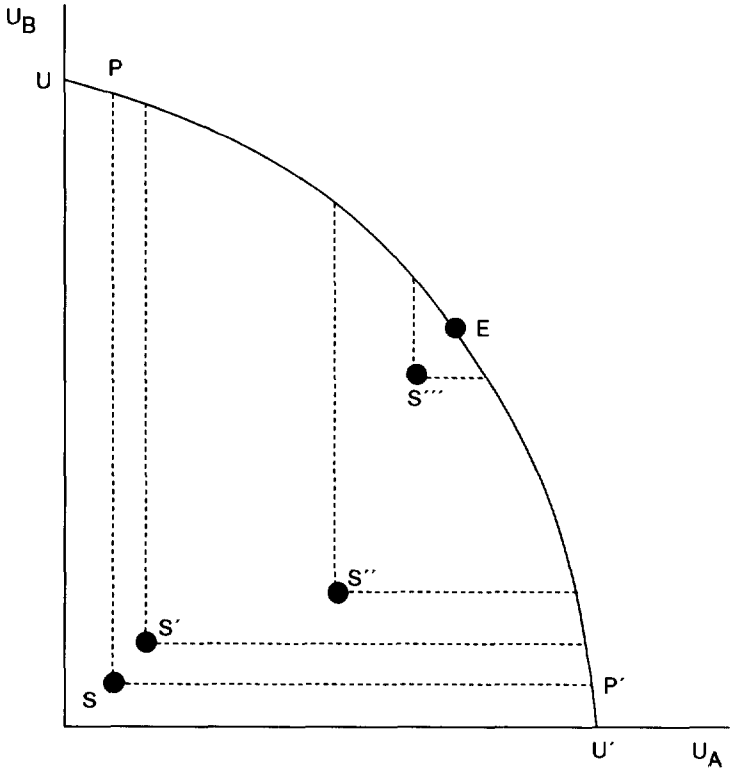


Figure 14.2. Possible Steps from Anarchy to a Pareto Optimal State

enter an optimally designed constitution only as a means for reducing decision costs. A community need define property rights, and other rights and institutions that move it sequentially from S to S' and eventually to E, only if these institutions are essential to the attainment of E. Constitutional rights are a *means* to the more basic end of advancing the interests of all members of the community. They are not ends in themselves.

Most actions—what I eat, what I wear—are of little or no consequence to others. Implicit if not explicit in the constitution will be, therefore, the "right" to do as one pleases *unless* explicitly prohibited from doing so by a collective decision of the community. Such exceptions are in some cases socially optimal. Driving at speeds of 90 or 100 mph imposes costs on the rest of the community in the form of increased probabilities of serious accident. The cost, t, imposed on those wishing to drive at these speeds might reasonably be assumed to be small relative to the gain, s, to others from a law limiting the speed at which people can drive. Laws governing speeding are the kinds of collective actions that individuals at the constitutional stage will wish to allow the polity to make in the future, using the simple majority rule or some other qualified majority rule.

Now consider an example in which t is very large for one individual, and all s's are very small. Individual R practices one religion and everyone else practices other religions. R's religion commands her not to comb her hair. The sight of R's uncombed hair causes other members of the community some slight irritation. The unhappiness R or any other member of the community would experience, if she had to violate one of the commands of her religion, is quite large, however.

As in the driving example, we confront an externality situation. But with t sufficiently large relative to s, the optimal majority equals one. If the community were to make a formal collective decision in externality situations such as this, the optimal voting rule would be the unanimity rule. Requiring that the unanimity rule be used in externality situations of this type is equivalent to giving R a veto over any collective action another citizen or group might propose. R could be compelled to comb her hair only if she willingly agreed to do so, as she might if she were convinced by the rest of the community that their suffering was severe enough, or she were offered a sufficiently large bribe.

One possible course of action given the above considerations is for the constitution framers to include restrictions on religious practices among that class of collective actions requiring unanimous agreement. That is, to recognize that such actions can involve externalities and thus require collective action, but, because of the large expected asymmetries in the welfare of those involved, to require that collective action be taken only if the community is unanimous. The person whose religious practice causes an externality must agree to the collective decision, whatever it is, regarding the externality.

If the expected gains from curbing an individual's action (s) are generally expected to be quite small, however, the community is unlikely to succeed in convincing the individual to incur the large cost t. The likely outcome under the unanimity rule will typically be that the individual does not cast her vote with the community. She uses her veto under the unanimity rule to allow her to act in accordance with her religion's dictates. Thus, if the constitution framers anticipate that all, or nearly all, future conflicts over religious practices will involve extremely large t's for anyone prevented from acting in accordance with a religious dictate, and very small welfare gains for everyone else, they can effectuate the likely outcome from the application of the unanimity rule by specifically granting each citizen the right to practice the religion of her choosing. Such a constitutional right removes restrictions on religious conduct from future parliamentary agendas. A constitutional right to undertake certain actions provides the same protection, with lower decision-making costs, as does the implicit veto each citizen possesses under the unanimity rule. The citizen need not exercise the right, so that both potential outcomes from the application of the unanimity rule are possible.

We are now in a position to provide an answer to a question central to the debate that occurred between the Federalists and the Antifederalists over the ratification of the U.S. Constitution—why an explicit enumeration of certain "inviolable" rights in the Constitution was desirable (Rutland, 1985; Storing, 1985). Almost any action has the potential of altering some other person's welfare (i.e., of creating an externality). When an action creates a negative externality for a large number of individuals, a collective decision curbing the individual's right to undertake this action may advance the welfare of the community. For most actions involving an externality, the relative gains and losses are such that the optimal voting rule for introducing constraints on individuals (e.g., laws against speeding and littering) is the simple majority rule, or some qualified majority less than unanimity.

Religious practices, a public speech, a printed work, even the reading of a book[6] can have external effects, and thus could precipitate some individuals to initiate collective action to curb the offending action. Restraints on individual actions are not in the community's interests when the welfare loss of the individual whose activity is curbed is expected to be quite large relative to the gain experienced by others from such a

restriction, however. Explicitly protecting an individual's right to act in these situations raises the costs to the rest of the community of trying to curb these actions.

The nature of constitutional rights described here also sheds light on a puzzle that has troubled jurists—the seeming inconsistency of a system of constitutional rights protected by the courts and majoritarian democracy.[7] If democracy means carrying out the will of the people as expressed through their elected representatives using the majority rule, is it not antidemocratic to allow the courts to thwart the will of the people by declaring certain acts passed by a majority of elected representatives invalid because the court deems that they violate a constitutionally protected right?

If constitutional rights were delineated following considerations of the type discussed here, then the *sole* purpose in defining them would be to assure that the will of a minority could triumph over that of the majority. All rights would be defined only where the potential of conflict exists because of externalities associated with the actions in question. The whole purpose for defining a right in this externality situation would be so that any conflicts arising from the externality *could not* be resolved by a simple majority vote. The will of the people, as expressed at the time the constitution was drafted, would have been to protect an intense minority from the majority by effectively requiring the use of the unanimity rule in these particular externality situations. The potential for conflict with the majoritarian principle must always exist where rights are defined in the constitution, for if that potential did not exist there would be no need to define them.

The Choice of Constitutional Rights

The analysis in the previous section indicates that citizens will protect certain individual rights when the cost to someone denied that right is very large relative to the gain to others, *and* when there exists uncertainty on the part of those writing the constitution as to whether they will be the one protected or harmed by that right. In this section, we illustrate the importance of both of these distinctions with two specific examples.

Habeas Corpus

Imagine a community in which a majority perceives a gain from imprisoning members of a particular group expected of terrorism, even though it does not have sufficient evidence to convict the particular individuals imprisoned. The majority perceives a small gain—the reduced probability of violence—whereas those incarcerated experience a large loss. The situation is one for which either the unanimity rule or a constitutional right may be optimal. If citizens at the constitutional stage are uncertain whether they might someday be a member of a group that would be held without being brought to trial, they might unanimously agree that everyone who is arrested should have the right to be charged with a specific crime and brought "to a speedy and public trial by an impartial jury."

To make the example concrete, consider the situation today in Israel. Palestinians are sometimes held in jail without being charged with specific crimes. Presumably, this occurs because the majority group, the Israelis, perceive an expected gain in security. If the Israelis and Palestinians were to write a constitution for a country in which both

would have citizenship, the Palestinians might well demand explicit habeas corpus protection. If the Israelis were uncertain over whether they might someday be the minority jailed without trial (say, because the growth in Palestinian population exceeds that of the Israelis), they too might agree to protect such a right.[8]

Involuntary Servitude

The gains to slaveowners (lower labor costs) can be expected to be modest relative to the losses imposed on the slaves. By the arguments presented here, the freedom of individuals from involuntary slavery warrants constitutional protection. But when the U.S. Constitution was first ratified, there was little uncertainty for those present at the Constitutional Convention, or those who later voted for ratification, that they would someday be slaves. Knowing that they could never be a member of the minority that experienced the extreme costs of slavery, the Constitution framers chose not to interpret an individual's right to freedom so as to protect those in slavery at that time. The only rights explicitly protected were those of the slaveowners to their "property."

The Relative Nature of Constitutional Rights

When weighing the costs and benefits from each potential definition of a constitutional right, different societies can be expected to arrive at different definitions. A society composed of people who are all members of the same religion may fail to protect the right to practice a different religion, the right to found a new religion, and so forth. It may simply never occur to those writing the constitution in such a society that anyone would ever choose to practice any other religion, or that a conflict could ever arise among individuals or between an individual and the state over this issue. On the other hand, the anticipated conflicts stemming from religious beliefs and practices in a country with a diversity of religious groups, and especially one formed by large numbers of individuals who have fled religious persecution in other countries, may lead to explicit constitutional protection of an individual's right to practice a religion of one's choice.

A society that has historically had a free market system may fail to protect its market institutions explicitly in the constitution, or the rights that accompany such institutions, it being implicitly understood by all members that postconstitutional economic institutions will continue to involve free markets. On the other hand, if a constitution were written following a revolution that overthrew a socialist regime and had the purpose of instituting a free market system, uncertainty of those writing the constitution over the future political viability of this system might be great. In such a society the constitution drafters might reasonably choose to spell out in considerable detail the rights of individuals that sustain free markets.

Uncertainties surrounding an individual's position versus the state depend, of course, to a considerable degree on the rules defining the operation of the state, and upon the expectations of those writing the constitution as to how the state will operate under these rules (Buchanan, 1975, p. 73). If the constitution required that all decisions by the legislature be made under the unanimity rule, there would be no need to protect any individual rights against the state in the constitution.[9] The veto power granted each individual, or his representative, by the unanimity rule would be the only protection of rights an individual would need. More generally, the larger the majority required to pass

laws restricting individual freedom, the less need there is to protect individual rights in the constitution. Thus, both the nature and the number of rights optimally defined and protected in the constitution depend on the chosen majority for parliamentary action. Similarly, if our ideal system of representation were not instituted, and citizens could go effectively unrepresented or underrepresented in the legislature, they would wish to protect individual rights against state actions more specifically.

We conclude that there is no reason to expect all societies that embody political institutions into a constitution choose to define a single, common set of individual rights. The choice of rights by a particular society will depend upon the specific uncertainties envisaged by the framers of its constitution, and upon their judgments of the relative transaction costs of reducing future conflict by defining certain constitutional rights. The optimal choice of rights is dependent on the mode of representation, the parliamentary voting rule, and the other political institutions established in the constitution. Thus, the individual rights explicitly protected are inherently dependent upon the characteristics, history, and anticipations of the constitution's drafters (Buchanan, 1975, p. 87). Moreover, the set of rights that is optimal for a particular society can be expected to change over time as its characteristics change.

The Evolution of Rights

Although we have defined rights to be *unconditional,* no constitutional right is likely to be truly unconditional. Limits to any right exist at the boundaries of the definition of a particular action, or when different rights clash. For example, when delineating a right to practice the religion of one's choice, the constitution framers are unlikely to want to protect a religious sect's freedom to engage in cannibalism or other forms of human sacrifice. A right to free speech may not be intended to cover shouting "fire" in a crowded theater when no fire exists.

If all "boundary" disputes and rights conflicts of these kinds could be envisioned at the constitutional stage, they could be dealt with by stating explicitly the exceptions or limits to each right. But such omniscience is impossible. Instead, the constitution must define institutional procedures for settling such boundary questions.

Such procedures are also required to amend rights' definitions over time. For example, if asked to consider the issue, the framers of the U.S. Constitution might well have thought that the Constitution's protection of religious freedom should allow an individual to refuse professional medical treatment for oneself and one's children if that person's religion forbade medical treatment and instead demanded that one seek help from God through prayer. Such were the probabilities of recovering with the help of a professional physician versus the help of prayer at the end of the eighteenth century that the Constitution framers might reasonably have thought that the expected gains to society from interfering with religious practices of this sort did not offset the expected cost to those individuals who would be forced to violate the commands of their faith.

But refusing medical treatment for some illnesses at the end of the twentieth century can with high probability result in death. Individuals convened to draft a new constitution for the United States today, if asked, might constrain a parent's right to refuse certain medical treatments for her child from protection under a religious freedom clause, just as cannibalism and other exotic religious rights of human sacrifice would not be intended for protection under a religious freedom clause inclusion now or 200

years ago. Over the last two centuries, views regarding the welfare loss imposed upon those who would be denied the right to purchase and consume alcoholic beverages, and upon the rest of the community from such actions appear to have shifted to and fro, just as they vary considerably across countries. A constitution that would maximize the expected welfare of a society would need to evolve over time to reflect the changing beliefs, preferences, and expectations of the community. The framers of the original constitution must address the question of how the constitution gets rewritten over time. We discuss three procedures for reinterpreting and amending the constitution.

First, a constitutional convention can reconvene whenever a dispute arises over the limits of a constitutionally protected right. Here the citizens themselves or their representatives effectively act as a jury. This solution could involve considerable delays in resolving such disputes, and in general it promises rather high decision-making costs. But it has the advantage of maintaining the constitution as a contract to which the citizens of the polity have agreed.

A second way to involve citizens directly in the clarification of a constitutional right is to put the issue to a national referendum. Here again, some nontrivial transaction costs are likely to be present—all citizens must weigh the potential effects of the constitutional change, all must (should) vote. But these costs are arguably smaller than those of a newly convened constitutional assembly.

The third procedure is to appoint an agent to resolve such disputes. Again, two alternatives come to mind. First, if the polity is sufficiently large to warrant representative government, the body of representatives could, under certain constitutionally defined rules, adjudicate disputes over the interpretation of constitutional rights. This procedure again has the advantage of involving all citizens, although more indirectly than by a referendum. The parliament would, under this procedural option, in effect serve as a constitutional convention. To maintain the consensual nature of the constitutional contract, any alterations in definitions enacted by the legislative body should require the approval of a substantial majority of the legislature.[10] Since both sides of the dispute would be represented in an ideally constituted representative body, resolving the conflict might be time-consuming.

To avoid this potential difficulty, some part of the judicial system could arbitrate disputes over constitutional rights. As arbitration is the *raison d'être* of the judiciary, it may seem optimal for it to arbitrate disagreements over constitutional matters. Were a judge or a court of judges designated as agent for the citizenry on constitutional issues, logically the citizens should desire that the court arbitrate disputes as it believed the citizens themselves would, were they to reconvene as a constitutional convention.[11]

Citizens at the constitutional stage confront a difficult principal-agent choice in deciding what procedures to use to clarify definitional boundaries and settle boundary disputes. As in all principal-agent relationships, a trade-off exists between the savings in time and gain in expertise from having an agent act on behalf of the principals, and the potential loss to the principals from the agent's pursuit of her own goals (or in this case, perhaps, own "ideology" is more accurate) in conflict with those of the principals. Only if all citizens participate directly, as in a newly called constitutional convention or referendum, can they be certain that the constitution as clarified remains a contract designed to best serve their interests. Such procedures involve potentially large transaction costs, however, which are reduced by granting authority to a single person (or three or nine) to settle definitions and boundary disputes. But this procedure has the danger

that the appointed agent makes choices that do not optimally advance the citizens' interests.

The choice from among these options affects the optimal form in which rights are originally defined in the constitution. If the third option for redefining rights is relied upon, broad definitions of rights are optimal. A right protecting each citizen from "cruel and unusual punishment" inflicted by the state could easily be enacted on the basis of the externality calculations described above (t is very large relative to s). But the original constitution writers cannot envisage all forms of punishment that will be invented, or future citizen attitudes toward crime and punishment. A broad (vague) prohibition allows considerable latitude for the agent to redefine the specific punishments prohibited over time. On the other hand, if the constitution can be amended by referendum, the citizens can list explicitly those punishments that are prohibited. If uncertainty over the constitutional status of a newly invented form of punishment exists, that uncertainty can be resolved by referendum. Thus, in choosing among these options, the constitution framers have to weigh (i) the costs imposed on the community from anachronistic definitions of rights, (ii) the transaction costs of redefining rights under the three proposals, and (iii) the agency costs involved with the third option. No one of these three options is necessarily best for all societies, and the choice of option in turn determines the optimal definitions of constitutional rights.

Constitutional Rights versus Natural Rights

The list of conceptualizations of rights extant in the literature is long—natural rights, civil rights, political rights, individual rights, liberal rights, legal rights, economic rights, positive rights, negative rights, moral rights—to name but a few.[12] Our notion of constitutional rights emerging out of a contractarian agreement among rational, self-interested individuals differs from many of these. To further illustrate the properties of these constitutional rights, we contrast them with some other concepts of rights in common usage, beginning with natural rights.

The notion that individuals have "natural rights" has a venerable history in both political philosophy and political history. Although considerable ambiguity surrounds the term, it is presumably meant to imply certain rights every individual possesses or ought to possess in a society owing to the nature of human beings and the nature of human society (e.g., life, liberty, and the pursuit of happiness). Such an interpretation suggests that natural rights are universal, and implies a fundamental conflict between the notion of natural rights and the inherently relativistic concept of constitutional rights developed here.[13]

Consider "life" as a natural right. It is certainly plausible that any society would draft constitutional rules that are protective of individual lives in some way. But will its citizens agree on a single set of rules for protecting an individual's natural right to life? One could imagine one community protecting an individual's right to life by forbidding the state from executing a person regardless of what crime the individual had committed. But another community believes that the threat inherent in the death penalty is a sufficiently strong deterrent to certain crimes endangering other lives that it allows the state to punish these crimes by death. How a society protects the citizen's right to life, and thus in practice what this right means, will depend on views regarding the sources

of threats to life, and the efficacy of various means of minimizing these threats. If these views differ across societies, as they most certainly do, then so will the definitions of constitutional rights—or their judicial interpretations—as they pertain to the protection of individual lives.

Since the definition of a right implies the liberty to commit or refrain from committing an action, no constitution that defines *any* rights can fail to protect *some* liberty. Once again, however, when one drops below this level of generality one expects to find, and does, considerable variations in the specific liberties that societies choose to protect and how they protect them.

Thus once one pushes beyond a most general and vague definition of "natural rights" and attempts to determine specific statements of rights that would actually be written into a constitution, these statements can be expected to differ from society to society.

Constitutional Rights, Moral Rights, and the Unanimity Rule

For many observers, the nature of "rights" would appear to differ substantially from the rather pragmatic view of those rights that would be imbedded into a constitution offered here. David Lyons, for example, draws a clear distinction between moral rights and legal rights (1982, pp. 108–9), and emphasizes "that *merely* legal rights have *no moral force*" (1982, p. 113, emphasis in the original). Constitutional rights are, presumably, part of the class of legal rights that lack moral force.

Keeping promises is, however, a part of most if not all ethical systems.[14] If an individual adheres to promise keeping as an ethical principle, then she must regard honoring the rights defined in a constitutional contract to which she is a party as the morally correct thing to do. The unanimous agreement out of which a constitutional contract arises gives moral weight to its provisions, which is to a considerable degree independent of the reasoning of the individuals in reaching the agreement.[15]

The moral commitment inherent in the unanimous agreement at the constitutional stage may also carry over to those legal rights enacted as parliamentary statutes in the postconstitutional stage. If unanimous agreement has occurred on the method for electing representatives and the parliamentary voting rule, then it would seem that individuals in joining the constitutional contract have committed themselves to honor all legal rights defined by parliamentary action, regardless of whether their own moral position is represented by the winning majority's view or that of the losing minority. The ethical legitimacy of these legal rights defined by the parliament stems not from their having received a winning majority in the parliament, but from the unanimous agreement in which the individual took part that created the parliament and granted it the authority to define legal rights using a particular voting rule.[16] A right created by a simple majority vote in the postconstitutional stage is less secure than one protected by the constitution, since it can be taken away by a majority vote. However, until that day comes these rights do have a certain moral claim to citizen compliance, stemming from the consensual agreement that established the procedures that brought it about.

These arguments illustrate the importance of achieving unanimous agreement among members of the polity on the definitions of rights and other provisions included in the constitution. If all citizens have literally agreed to the content of the constitution, then this agreement adds moral force to the constitution's provisions, and thereby strengthens the commitment of individuals to comply with these provisions.[17] We have suggested

two procedures by which active participation of citizens in the constitution drafting and amendment process could take place: (1) periodic constitutional conventions drawing upon a fully representative assembly of citizens,[18] and (2) amendments put directly to the citizens in referenda. The potential cost of not periodically renewing the contractual agreement among the citizenry is a weakening of the sense of obligation to abide by the constitution's specific provisions, as they become increasingly out of touch with the polity's social and economic structure. The citizen feels less responsibility to uphold the constitution and abide by its provisions, because (1) it does not define a set of institutions and rights to which the individual would today agree if given the opportunity, and thus does not command his support owing to its inherent justness and efficiency; and (2) the time at which agreement occurred is so remote that the citizen does not feel that he in any meaningful sense (e.g., through the actions of his ancestors) participated in its creation. The same sort of alienation from the definitions of rights and constraints on individual behavior can arise when these definitions are altered over time by judicial decree, if the citizen feels that his views are not fairly represented by the judges who interpret the constitution, or if the citizen objects to the constitutional provision that grants the judiciary this authority and would oppose such an institutional arrangement if given the opportunity.

When such alienation occurs, the constitution fails to accomplish its fundamental objective of minimizing the transaction costs of reaching agreements and resolving conflicts in the postconstitutional society. The existing political institutions as defined in the constitution do, of course, determine the way in which the current political process operates. The existing definitions of rights determine the boundaries at which judicial and legislative haggling takes place. However, if these institutions and boundaries are inferior to those that could and would be agreed to today, if they do not command the respect and voluntary compliance of today's citizenry, then they will fail to achieve the objective of minimizing the resources expended to resolve conflicts and to reach mutually beneficial collective decisions.

But what happens if no consensus is possible over a particular definition of a right? How binding can any set of constitutional institutions be if they have not emerged out of consensus? We make three observations in reply, reiterating in part arguments made in Chapter 5. First, the long-term nature of constitutional provisions does introduce uncertainty over future outcomes and helps to reduce disagreements among citizens over optimal constitutional structures.[19]

Second, the original constitution, at least, is a *package* of institutions, not a single and potentially divisive issue. As such it contains greater scope for compromise and consensus. If some citizens object to parts of the constitution, then other parts have to be tailored to win their support, as occurred with the addition of the Bill of Rights to the U.S. Constitution. The alternative of not having a set of political institutions for achieving the collective goals of the community should be sufficiently unattractive to encourage agreement on *some* compromise package of constitutional provisions. Note that this consideration favors the first of the three procedures for modifying the constitution over time. It may be easier to agree to a whole new package of constitutional provisions than to a single change, since the formulation of an entirely new package opens up more opportunities for compromise.

Finally, it must be stressed that *consensus* should not be thought of as an all or nothing condition like pregnancy. A constitutional contract can have more or less consensual support. Of course, once constitutional provisions can be enacted over the oppo-

sition of *some* members of the community, the possibility arises that these members will be discriminated against. Moreover, they may not feel bound by constitutional rules to which they did not consent, and thus pose a noncompliance threat to the community. But discriminatory actions against 49 percent of the community can in general be expected to result in greater welfare losses than against 10 percent. Noncompliance with constitutional rules by 49 percent of the community poses a greater threat to the viability of its political institutions than does noncompliance by 10 percent. The greater the majority required to ratify the initial constitution or any change in it, the fewer future conflicts and lower future decision-making costs one should anticipate. All of the benefits from having citizen agreement on the provisions of the constitution do not disappear as soon as one citizen's consent is not forthcoming.

Conclusions

Much writing on rights presumes that there exists but a single set of rights whose existence and character is either self-evident or capable of revelation to everyone upon proper reflection. Conceptualizations of rights of this type are like ethical principles and are often discussed and analyzed in a similar manner. The lack of consensus among philosophers of ethics regarding the characteristics of a single set of ethical principles tends to belie the presumption that there exists a single set of natural or moral rights. Nor does any other category of rights stand out as a possible candidate for a designation of rights that could be universally accepted.

In this chapter we have concentrated on the nature of those rights that would be included in a constitution unanimously agreed to by members of a polity. Constitutions are social-political contracts defining the rules under which the polity operates and the rights and obligations of its citizens. These constitutional contracts arise to reduce uncertainty over how individuals and the state will behave in the future. They arise to reduce the transaction costs of achieving Pareto optimality in the various game-like social interactions that individuals encounter.

In the absence of decision-making costs, citizens would never define constitutional rights. All collective decisions could be made costlessly and instantaneously using the unanimity rule. The veto each individual possesses under the unanimity rule would be the only protection of rights that the individual would ever need. Rights, like the institution of government itself, emerge as a way to reduce the transaction and decision-making costs of reaching collective decisions.

The transaction costs required to achieve Pareto optimality in a particular context will differ from one community to another depending on their customs, traditions, and mores; on their economic and political institutions; on their size and heterogeneity; and on still other factors. Different communities will delineate and protect different rights. Constitutional rights are inevitably *relative* to both the characteristics of the community and the other elements of the constitution. No single definition of rights is likely to be optimal for all communities for all time. An important implication of this conclusion is that a society should alter over time the set of rights defined in its constitution as its characteristics change (Buchanan, 1975, p. 77). Indeed, a society might optimally institutionalize a process for reviewing and revising the definitions of rights protected in its constitution.

Perhaps unintentionally, the Founding Fathers of the United States opted for the

third of the three procedural options we discussed and that redefine and clarify the boundaries of constitutionally defined rights.[20] The U.S. Constitution contains broad definitions of rights, and the task of amending their definitions to reflect changes in the country's economic, social, and political characteristics has been largely carried out by the Supreme Court. While this method of updating the Constitution's definitions of rights has helped to prevent them from becoming hopelessly out of date, it has failed to build the kind of support for the new definitions of rights that would exist if they had arisen from a wider consensual agreement in the society. The bitter debates and clashes among citizens over civil rights, criminal rights, and abortion illustrate the point. The result of these conflicts has been a loss of respect among some parts of the community both for those rights that have been newly defined by the Supreme Court and for all other actions of the Court. The only way to avoid this outcome is to adopt one of the alternative procedures to review and amend the Constitution periodically. Although these procedures may appear to involve greater decision-making costs, they have the potential for building consensus over the newly formulated definitions of rights. Without such a consensus a constitution cannot serve its function as an institution for reducing the costs of collective decision making and the transaction costs involved in mitigating conflicts among citizens as each strives to advance her own welfare.

Notes

1. For simplicity, we assume that the individual's utility function is separable so that we can focus on the changes caused by the collective decision.

2. Let $z = p'(m)[u(s) + v(bs)] - d'(m)$. Then the sign of $\partial m^*/\partial c$, where c is any parameter in z, is the same as the sign of $\partial z/\partial c$:

$$\frac{\partial z}{\partial b} = p'v's > 0.$$

3. On this see the discussion by Buchanan and Tullock (1962) and Rae (1969).

4. Although all rights need not be thought of as actions, there are some analytic advantages in doing so. See Kavka (1986, pp. 297–98).

5. For further discussion of this kind of collective decision making at the constitutional (social contract) stage, see Buchanan (1975, pp. 38–73).

6. See Sen's (1970a,1970b) infamous example.

7. See discussion by Bickel (1962) and Ackerman (1984, pp. 1013–31).

8. Incarceration of Japanese-Americans during World War II without their having been convicted of any crimes is a good example of the principle of majoritarian democracy triumphing even when a right was explicitly protected in the U.S. Constitution.

9. One can define individual rights with respect either to the state (i.e., all other individuals acting collectively or through their agents), or to other individuals acting alone. Even with a unanimity rule in the legislature, there might be some scope for defining constitutional rights of private individuals against one another.

10. Lacking a written constitution, the British Parliament functions as a constitutional convention when it takes up constitutional matters. Its procedures differ from the ideal ones described here, however, in that constitutional-type acts and ordinary acts of Parliament require the same simple majority.

11. For an alternative view as to the proper role of judges on rights issues, see Dworkin (1977, Chap. 5).

12. For discussions of some of the various concepts of rights, see Hayek (1960, pp. 13–14, 19–20); Lyons (1982); Tarcov (1985); Hamlin (1986, pp. 52–57, 102–9).

13. For a discussion of basic (i.e., natural) rights that argues that they too are relative, see Lomasky (1987, pp. 101–5).

14. Lyons (1982, p. 108) mentions "promise keeping" as a moral action.

15. Indeed, *individualism* is an attractive normative postulate upon which to construct a contractarian ethics, as I have previously attempted to demonstrate (Mueller, 1989c). In that essay I also argue that this individualistic-contractarian ethics is inconsistent with "naive" forms of utilitarianism that see social institutions as maximizing some social welfare function that aggregates individual utilities. What gives both the Harsanyi and Nash social welfare functions *moral* force, by this interpretation, is the unanimous agreement to implement them.

16. See discussion by Hart (1961, pp. 97–107).

17. Compliance was one of the important goals Rawls hoped to achieve from the unanimous agreement to the social contract in the original position (1971, pp. 112ff, 344–48).

18. Although this suggestion will strike many readers as rather novel, it is a proposal once advanced by Thomas Jefferson (1816 [1944]). See the quotation at the opening of this book.

19. See Buchanan and Tullock (1962, pp. 77–80). Rawls (1971) argues that consensus on the attributes of the social contract will be achieved as a result of a self-imposed uncertainty over future positions that occurs when individuals voluntarily place themselves in an original position of equality behind a veil of ignorance.

20. Chief Justice John Marshall, whose opinions did more to define the nature of the U.S. Constitution than perhaps any other individual, claimed that the Constitution was "intended to endure for ages to come and consequently to be adapted to the various crises of human affairs" (quoted by Hodder-Williams, 1988, p. 79). Bruce Ackerman (1991) argues that major shifts in the Supreme Court's interpretation of Constitutional rights regarding property and the freedom to contract (of which there have been only two) have come about only following the Court's perception that a major shift in the beliefs of the citizenry regarding these rights had occurred.

15

The Market and the State

Agriculture, manufacture, commerce, and navigation, the four pillars of our prosperity are the most thriving when left most free to individual enterprise.

THOMAS JEFFERSON

Property is theft.

PIERRE PROUDHON

Property Rights

One of if not the most prominent difference between capitalist-market economies and socialist economies is generally thought to lie in the extent to which property rights exist in a capitalist society and the incentives they provide for exchange and investment. When communism collapsed in Eastern Europe and the Soviet Union, Western economists were quick to stress the need to establish property rights.

The potential gains from a system of property rights are easy to see. Imagine a village located near an apple orchard. No one owns the orchard, and the villagers help themselves to its apples in the fall. Each villager tries to pick only the largest, juiciest apples. Each picks as fast as possible to get the most of the best. Many apples are wasted.

Such an arrangement might persist indefinitely, as long as the orchard's yield exceeds the villages needs. But if the village grows or the orchard's yield declines so that apples become scarce, the villagers may wish to adopt measures to conserve apples and improve the orchard's yield. At the beginning, these might take the form of limits on each villagers take of apples. Eventually, the trees in the orchard might be apportioned among the villagers, with each villager constrained to pick apples only from particular trees—i.e., each villager would be assigned rights to a part of the orchard. Under such an arrangement, each villager has an incentive to tend the trees assigned to him so that they yield more fruit, and to pick the apples so as to minimize waste. Yield from the orchard is maximized.

When the orchard is unowned, or owned in common, the villagers confront a prisoners' dilemma. Yield from the orchard is maximized when each villager exerts effort to tend the trees and takes care when picking the apples. But when the orchard is owned in common, each villager has an incentive to shirk tending and to be careless and greedy when picking.

In small, stable communities peer group pressure and other informal sanctions may suffice to allow the common orchard to be "managed" efficiently (Dahlman, 1980). But

when informal sanctions do not suffice, more formal institutional arrangements can be expected to emerge to avoid the losses from free riding. Property rights eliminate free riding by eliminating the prisoners' dilemma nature of the problem. All of the costs of an individual's shirking and carelessness are now borne by the individual himself. When the value of goods being dissipated under a common property arrangement becomes large, private property rights can be expected to appear (Demsetz, 1967; Barzel, 1989, Chaps. 1, 5).

The villager "steals" from his fellow villagers by not doing his fair share of tending the commonly owned orchard, by taking more than his fair share of its apples. When private property rights are established, theft from other villagers takes a more conventional form. The prisoners' dilemma of free riding on the care of common property is replaced by a prisoners' dilemma involving stealing private property.

Theft, or the threat of it, creates uncertainty over the property owner's ability to obtain the benefits from his property in the future. Thus the threat of theft reduces the value of property and the incentive to invest in its creation and preservation. The existence of theft makes a community worse off because it makes private property less valuable, and thus erodes the benefits to the community from a system of private property rights. Contrary to Pierre Proudhon's famous utterance, property is the antithesis of theft. When theft is ubiquitous, private property is without value; no individual has an incentive to increase property's value, and all suffer from the resulting inefficiencies.

Thus, when societies become too large and complex to manage common property efficiently, all may benefit from the creation of a system of private property. Such a system becomes a public good for the community, and the state has a potential role in providing this public good by enforcing private rights to property and by maintaining property's value by policing theft.

Exchange

Property's value is enhanced if it can be exchanged. A villager will work even harder increasing the yield from his apple trees if he can trade his apples for other goods.

Some 100 years ago the French economist Leon Walras (1889 [1954]) depicted the process of exchange in a particularly revealing manner. Each individual was assumed to be endowed with a bundle of goods, you with apples, me with oranges. Each Monday morning all individuals take their bundles of goods to the market and engage in exchange. Those endowed with apples offer up at least some for exchange, as do those endowed with oranges. Each individual appears in the market as both a seller and a buyer. To facilitate exchange, an auctioneer calls out the prices at which exchange can take place, the number of apples that will be traded for an orange. When the numbers of apples and oranges offered at a given price do not clear the market, the auctioneer chooses a different price. The process continues until a set of prices is found that clears all markets. The exchanges implied by the market clearing prices are then made, and each individual returns home with a new bundle of goods.

Of course, each of us is not born with endowments of apples and oranges. Most of us are endowed with only time, and are forced to trade it away for the money which we use to purchase goods and services. Some of us inherit land and capital that we can rent or lend to earn income. But whatever our initial endowment, the process does

resemble that described by Walras in that we exchange what we have in excess for that which we want but do not have.

The most important theorem in economics, a theorem as old as the discipline itself, states that under certain conditions this process of exchange reallocates resources so that all individuals are better off. If we think of our initial endowment as one possible social outcome, and the allocation arrived at through market exchange as a second, then given a choice between these two social outcomes all individuals would prefer the market exchange outcome. The market accomplishes the goal of advancing the interests of all citizens. In designing a constitution, rational individuals will want to establish an institution that reallocates initial endowments and achieves outcomes like those achieved by the market.

Now we could attempt to achieve this reallocation through a collective decision of the whole community. Alternative allocations to the initial endowment could be proposed until one was achieved that all unanimously preferred. The time required to discover what such an endowment is could be considerable, however, even ignoring the problem of assembling the entire community for the meeting. The tremendous advantage of the market is that it reallocates initial endowments by each individual engaging in binary trades with others. I sell my oranges or labor services to one buyer and then purchase apples from a single seller. For an exchange to take place only two parties must agree, not all. Yet, when all of the binary trades are aggregated, all individuals are better off. The beauty of the market is that a desirable aggregate outcome, a Pareto allocation of resources, is achieved in an orderly anarchy through mutually beneficial binary exchanges. In practice, all individual trades are not made at the same time, and at the same prices. All markets do not clear. The market works its wonders only to an approximation. But most economists believe that it comes tolerably close to the sought after ideal, considerably closer at any rate than the allocation processes in centrally planned economies have come. To advance the welfare of all individuals at minimal transaction costs, those writing the constitution will certainly include rules to define and protect market institutions.

Contracts

If I wish to trade you my orange for your apple, I shall not propose that we write a contract to carry out the transaction. I inspect your apple, you inspect my orange, and if we believe that we will both be better off, we make the exchange. Spot market transactions such as these do not require contracts. Even the purchase of a carload of apples could be made on the spot without writing a contract. If, on the other hand, I wish to purchase a carload of apples to be delivered one year hence, both the seller and I may wish to write a contract. The essential difference between spot-market transactions and exchange over time is the greater uncertainty inherent in the latter. As we noted in Chapter 5, contracts owe their existence to the presence of uncertainty. To facilitate exchange over time a community will wish to allow and enforce contracts. Enforceable contracts can increase the value of private property just as spot market exchange can. An additional possible role for the state is as an arbitrator and enforcer of contracts.

Antitrust

It is voluntary exchange in *competitive* markets that improves the welfare of all individuals. One of two conditions is sufficient to ensure effective competition (i.e., price equal to marginal or average cost) in a given market: (1) Sellers *behave* competitively by being willing to undercut the prices of their rivals, or (2) entry is sufficiently easy so that even a monopolist cannot set its price above its long run average cost.[1] Although, under certain conditions even in a market where entry is blockaded, two firms can reach an equilibrium at which both set their prices equal to their marginal costs (Bresnahan, 1981), generally it is thought that larger numbers of firms are required to ensure the kind of rivalrous behavior that produces competitive price setting. To preserve competitive markets, a community should maintain as many sellers in each market as possible consistent with economic efficiency, ensure that their behavior is rivalrous, and see that the conditions of entry into each market are not artificially impeded.

By and large the thrust of U.S. antitrust laws over the last century has been consistent with these objectives, and European countries have moved in the same direction since World War II. Section 1 of the Sherman Antitrust Act prohibits behavior that prevents firms from competing with one another—price fixing agreements, market sharing agreements, and the like. Section 2 prohibits acts of a predatory nature that would reduce the number of firms and deter entry, thus tending to "create" and preserve a monopoly. The Clayton Antitrust Act prohibits specific business practices that "tend to lessen competition substantially." For example, Section 7 is designed to prevent horizontal mergers that would, in the eyes of the enforcement agencies and the courts, unduly increase market concentration, and to prevent vertical and conglomerate mergers that would raise entry barriers in some markets.[2] In their 100 year history, the intensity with which the enforcement agencies have brought cases under the laws, the strictness with which the courts have interpreted them, and their general support among the community have ebbed and flowed. Nevertheless, a broad consensus exists in favor of some form of antitrust legislation. Indeed, the Sherman Antitrust Act is certainly a form of quasi-constitutional clause, enjoying widespread support and unlikely to be proposed for repeal let alone overturned in Congress. It is difficult to imagine that a constitutional convention in this country, if held today, would not agree on something like the Sherman Act, perhaps further embellished by parts of the Clayton Act.[3] Provisions in a constitution protecting the competitiveness of markets would be an important safeguard of the benefits from voluntary exchange.

The "invisible-hand" theorem requires competition in *all* markets—final goods markets, intermediate goods markets, factor markets. The logic of the theorem allows for no exceptions in a particular class of markets. Until recently, the U.S. Supreme Court has chosen not to apply the antitrust laws to some professional and amateur sports. Farmers' cooperatives are allowed to engage in cartel activity in the United States and many other countries. Workers form trade unions that function as cartels. On average, unions in the United States raise the wages of their members about 15 percent above what nonunion workers earn (Lewis, 1986). A society seeking to maximize its expected welfare gains from market competition would apply anticartel policies to workers, farmers, accountants, lawyers, and all other occupations.

The wary reader may object that such a broad application of an anticartel clause would never receive unanimous support. Perhaps the reader is right. But the different nature of a clause in the constitution from an act of the legislature again enhances the

possibility that a consensus might be reached at the constitutional level. Only about one in six members of the work force in the United States belongs to a trade union. Thus, five out of six workers plus all others not in the work force would be clear gainers if unions could not engage in cartel activities.[4] Moreover, some union members would gain more from a decline in prices on some of the goods they purchased than they would lose from a decline in their wages. Thus, even if each person were to base his decision on a strictly narrow calculation of net benefits from curtailing union cartel activities, taking into account his current position in the economy, a substantial fraction of the population (in the United States quite likely over 90 percent) would be net gainers were an anticartel clause applied to worker cartels. If the long-term nature of constitutional choices led union members to place some weight on the welfare of nonmembers, a vote of the entire population could come very close to unanimously supporting a prohibition of *all* worker cartels.

Of course, the ideal arrangement for any worker is for his firm, or industry, or occupation to be allowed to bargain collectively for higher wages, and all others forced to compete. Each group of workers would be tempted, therefore, to approach some representative or political party to obtain legislation that would grant it an antitrust exemption, as organized labor did in the United States when the Sherman Antitrust Act was applied against it. The advantage of writing basic antitrust restrictions into a constitution is that such interest group pressures are then less likely to succeed. The role of the courts in a constitutional democracy is to protect the interests of all citizens as unanimously agreed to at the constitutional convention and expressed in the constitution from the pressures of some.[5]

One might object that the market can sometimes be a harsh institution meting out incomes to some groups that barely, if at all, sustain survival. Scores of novels, plays, films, and songs recount the injustices some groups of workers and farmers have at times endured. Certainly these individuals deserve some protection against the worst outcomes that arise in competitive economies. But worker cartels do not only prevent some groups from slipping into poverty. They allow other groups to extract large monopoly rents. Airline pilots in the United States have three and four times the average income of other workers, yet their strategic importance to passenger airlines has allowed them to use their collective bargaining power against some airlines to obtain even higher wages. Many professional athletes have incomes in the hundreds of thousands of dollars, with some being in the millions. Yet they too can form cartels and strike for still higher salaries. Granting all workers rights to form cartels is a costly way to protect some people against the undue hardships of the market.

On the other hand, constitution writers who choose to protect competition are unlikely to ignore the costs of competition entirely. The most frequent hardship caused by the market is the loss of income that comes following a drop in the demand for one's services or the products of one's labor. Unemployment compensation is another example of legislation that now has quasi-constitutional stature in many developed countries. A constitutional convention might well choose to define unemployment insurance as a constitutional right. Other forms of income insurance (a negative income tax, income averaging, crop insurance, disaster insurance, etc.) might also be included. Given the market uncertainties that all individuals in a community face, unanimous agreement on social insurance schemes at the constitutional stage is easy to envision. We discussed this possibility in Chapter 5, and return to it in Chapter 16. (Some occupational risks—e.g., injury while on the job—can be covered adequately by private insurance plans,

and so the constitution framers may choose to define a limited role for the state in these areas, or make the state the insurer of last resort.)

Once the general risks of injury and loss of income have been covered by social insurance, it seems unlikely that a constitutional convention would advantage some group over another by granting it the privilege to form a cartel. A steelworker is not made obviously worse off by being made unemployed than is a worker in some other industry. An argument that steelworkers should be granted the right to form a cartel should prove compelling to no one other than steelworkers.[6]

The lower wages of taxi drivers relative to airplane pilots is not a *risk* of the occupation; it is an attribute reflecting the lower skill and training requirements of this occupation. If taxi drivers unionize and raise their wages a welfare loss is imposed on the rest of the community, which exceeds the gain to the taxi drivers, just as a welfare loss is imposed on the rest of the community by a pilots' union that succeeds in raising pilot salaries further up in the highest brackets of the income distribution.

In addition to contracting directly for higher wages and salaries, occupational cartels can raise their incomes by restricting entry into their occupation. While price-fixing agreements coupled to entry restrictions are the most effective way to accomplish this goal, since competition is restricted from both outside and within the occupation, entry restrictions alone can have a significant impact if they are sufficiently tight. A community that protects competitive markets will prohibit cartel imposed restrictions on entry.

Licensing requirements are ubiquitous, cartel-induced restrictions on entry. Although rationalized as necessary to protect the public's interest, the main impetus for licensing restrictions typically comes from the group to be licensed. Their primary effect is to protect the private interests of the members of these groups. Indeed, the task of licensing new members is often assigned to the cartel itself. A constitutional provision granting citizens the right to engage in all forms of commerce and occupations without interference from the state would prevent the state from using licensing restrictions to deter entry and competition.[7]

In occupations in which licensing is now required, the buyer often has an interest in knowing whether the seller has sufficient training to perform the desired service. But such assurance can just as effectively be supplied by certification. Certification can also serve as an entry barrier, and the authority to certify competence also often resides with the cartel itself. But as long as the state does not bar those who are uncertified from competing, consumers retain the option of having their sinks repaired by an uncertified plumber, and this option will constrain the ability of certified plumbers to charge more for their services than the competitive market would allow.[8]

Licensing requirements are but one restriction on entry that occupational cartels employ. We shall not take space to discuss the others. Suffice it to say that the more specific the constitutional prohibitions against the erection of these artificial entry barriers can be, the more vigorous will be the strength of competition in the postconstitutional society.[9]

Tariffs and Quotas

Demonstrations that the unencumbered trade of goods between nations improves the welfare of *both* trading partners are as old as the discipline of economics itself. Restrictions on such mutually beneficial trade are as old as the existence of such trade. This

paradox is resolved when one notes that, whereas *all* citizens in a country benefit in the long run from free trade, *some* benefit even more in the short run from restrictions on such trade. Because the benefits from restricting free trade are concentrated and most visible, while the losses from such restrictions are diffused and thus often unrecognized, kings and parliaments throughout history have bowed to (or been bribed by) special interests and have introduced restrictions on international trade to benefit the few at the expense of the many. Robert Feenstra (1992) has recently estimated that welfare losses from trade restrictions might average as much as 8 percent of national income, and are no less than 2 percent across the world.[10] A community seeking to advance the long-term interests of its members would prevent legislatures from introducing welfare reducing tariffs and quotas.[11]

In some situations, however, a tariff can increase the welfare of a community. Although most trade restrictions protect the geriatric giants of a nation's industries, an emerging infant may come along from time to time whose *temporary* protection is in a nation's general interest. The terms of trade for a good are sometimes such that an appropriately set tariff can increase the general welfare of a country. Thus, a community may wish to allow future legislatures the possibility of introducing those tariffs that are in the general interest. One way of accomplishing this without opening the door to all welfare reducing restrictions on trade would be to require that tariff legislation secure a supramajority in the legislature. If normal legislation required a two-thirds majority to pass, tariffs could require a four-fifths majority. To further guard against the welfare losses from restrictions on trade, the new constitution could stipulate that tariffs can be enacted for a maximum of, say, five years. Such a stipulation would require that a new supramajority of the legislature must agree every five years that the infant industry's further protection is in the national interest. Since industry cartels benefit more from quotas than from tariffs, additional protection against trade restrictions, which only benefit industry cartels, would limit legislation-restricting free trade to the imposition of tariffs.[12]

Regulation and Nationalization of Natural Monopolies

A "natural monopoly's" average costs continually fall, or at least fall for a sufficiently long range, to make competition nonviable and entry either impossible or undesirable.[13] The number of natural monopolies in any country is likely to be small, however—much smaller certainly than the number and variety of industries that one observes around the world that are regulated or nationalized. Often the government helps an industry organize and maintain a cartel. No better example of this exists than the agricultural policy of virtually every developed, capitalist country in the world.

Beyond agriculture, numerous examples exist in the United States of industries where the government has cartels. Trucking is not a natural monopoly, and yet the United States government intervened in this industry as regulator to set prices above their competitive level and maintained them there by restricting entry.[14]

To guard against government intervention in private markets that reduces social welfare, as in agriculture and trucking, and yet allow for government action when a true natural monopoly exists, a provision resembling that discussed with respect to tariffs could be instituted. Legislation to control prices or quantities in a given market or to restrict entry could be prohibited, *unless* it secured a specified supramajority (e.g., four-

fifths). Since all citizens stand to benefit from efficient state control of a true natural monopoly, a proposal to nationalize or regulate such an industry could in principle obtain unanimous support. In recognition of this potential, regulation, nationalization, and other governmental interference with the market should secure a supramajority in the parliament.

Other Forms of Government Intervention and Regulation

Restrictions on entry and on a seller's freedom to set prices are such blatant accompaniments to cartel and monopoly power that special attention to them in the constitution, along the lines described in the preceding section, is warranted. But other forms of government intervention are less detrimental to competition; some intervention even enhances it. These interventions require no special treatment and could be handled like other government actions to correct "market failures."

Information is a classic example of a pure public good. Once created, the marginal social cost of disseminating information is close to zero. Social optimality often requires wide dissemination or at least availability of information. But if information can be readily obtained *and used* there often is no *private* incentive to create or disseminate it. A governmental role in this area can easily be defended.[15]

Patents and trademarks are good examples. To encourage the creation and distribution of information, the government actually grants firms limited degrees of monopoly power. Although there are social costs to these forms of monopoly, like all others, when limited in scope their costs can be less than the benefits arising from the invention, innovation, and product quality they stimulate.[16]

Product quality (technical features, durability, safety, ingredients, even taste) is not always discernible at the time of purchase. Sellers have incentives to provide *some* of this information to buyers, but free markets do not always induce the socially optimal quantities of information for buyers, or do so at a price, in terms of a premium for quality that is higher than necessary. Government-mandated minimum quality standards, required warranties, content labeling, and so on, can improve market efficiency.[17] As with all government activities, there are costs as well as benefits from these interventions. I mention them merely to illustrate that the constitution framers will not want to preclude or make extra difficult all forms of government intervention with market processes.

Externalities

Given the advantages inherent in market exchange, the natural starting point in constitutional design is to allow everyone the freedom to engage in exchange and contract with whomever and for whatever one chooses. If the constitution contains a clause stating that whatever is not explicitly denied by the constitution is allowed, then no more must be said. All individuals are free to engage in all forms of market activity.

One of the conditions necessary for market exchange to improve the welfare of all individuals, however, is that trading does not affect nontraders. When market activity has significant externalities, and the number of affected parties is too large to make private resolution optimal, government becomes the optimal institution for correcting

the externality. The elimination of externalities in such cases improves allocative efficiency. If an arrangement exists in which all citizens can be better off if an activity is conducted at a different level of intensity, then rational self-interested individuals should be capable of figuring out a way to obtain this arrangement. No explicit treatment of externalities at the constitutional stage would appear to be necessary to ensure that citizens in the postconstitutional stage deal with them in an efficient manner. Nevertheless, there may be reason for addressing externalities of some kinds explicitly in the constitution.

If citizens have the constitutional right to engage in all forms of activity, then bargaining in the postconstitutional stage will always take the form of those who are either harmed or benefited by an activity, having to offer bribes to those causing the externality. But there may be some kinds of externalities for which great transaction-cost savings occur from having the bargaining go in the other way (i.e., the constitution prohibits a specific externality-causing activity), thus forcing its perpetrators to bribe those affected by it. This might be the case if those harming the environment are firms and government bureaucracies, while those being harmed are individuals. Because firms and government bureaucracies are collections of individuals, those who benefit from pollution are already organized, and their costs to agree on the proper bribe may generally be lower than for the unorganized citizens harmed by pollution.

This consideration has force even if the subsequent "bribes" are likely to arise through legislative and governmental bureaucratic decisions. If members of firms and government bureaucracies can influence political outcomes more readily than those not so organized, then the expected gains *net of decision-making costs* to those writing the constitution may be maximized by granting some specific environmental rights to all citizens. The desirability and nature of such environmental rights will depend on how the other institutions of government give weight to and aggregate the interests of members of organized groups and of the unorganized.

In addition to the transaction costs of organizing both sides of an environmental issue, consideration must be given to future transaction costs from legal actions in the environmental area. When the constitution contains no statement protecting any person's right to the environment, all actions, whether they harm the environment or not, are allowed. Those seeking to curb some activities must tailor their bribes to the particular actions and actor in question. What actions are allowed and what parts of the environment are protected will be determined on a case by case basis. But if an environmental right is to be protected by the constitution, it must be defined at the outset. Future bargaining, whether in the legislature or in the courts, will revolve around this definition of rights. The constitutional convention will have to weigh likely future legal and associated bargaining costs under alternative definitions of rights.

Summary

The conception of property rights at the end of the twentieth century is quite different from that which existed at the end of the eighteenth century, or that of John Locke in the seventeenth century (Nedelsky, 1990). When the U.S. Constitution was written, one's property could include other persons (slaves). If one "owned oneself," it was important that this property was protected. Rights of self-ownership have the kind of extreme asymmetries of payoffs that warrant constitutional protection in the form of

rights (see Chap. 14). Constitutional provisions prohibiting involuntary slavery, banning arbitrary arrest and indefinite internment, and protecting the individual from self-incrimination are the kinds of constitutional rights people might establish when contemplating the great costs that might be imposed on a person if one of these freedoms is violated.

The notion of property rights today does not typically entail the right to one's person, but rather a *system* of private ownership of the "means to production" and freedom to contract, along with a set of institutions that complements and makes possible a capitalist, market-oriented economy. The antithesis of *private* property is *state* property. The antithesis of a system that relies on the institution of private property is a system that relies on the institution of state property—communism or socialism.

Because all individuals can benefit from the gains in wealth a market system can generate, all will want to protect the institutions that secure those gains. At the constitutional stage, everyone should favor provisions that protect the market from private and public interference.

Many of these constitutional provisions *will not* take the form of unconditional rights to *private physical property,* however—provisions that resemble one's property right to oneself. Ideal definitions of rights to private property are likely to be conditional; conditional, for example, on not harming others or the environment with its use. Freedom to contract will not, ideally, extend to cartel arrangements to raise prices. The closest analogy to constitutional rights to one's person in the realm of physical property is likely to be a "due process clause." But even such a clause would not likely protect an individual's right to a particular piece of property *unconditionally.* Instead, it would only guarantee that state seizures of property follow set procedures and offer fair compensation.

The kinds of constitutional provisions that best protect the market from state and private encroachments are not, therefore, definitions of rights to property that resemble other definitions of rights in the constitution; rather, they are procedural impediments to state interference with the market, and legal impediments to private interference. Supramajority requirements to pass legislation that interferes with the market, along with antimonopoly and anticartel clauses, have been suggested.

Some readers may find the suggestion that the constitution play a central role in protecting market institutions novel, but precedents do exist. The Commerce Clause in the United States Constitution, and its broad interpretation by the U.S. Supreme Court down through the years, has prevented state legislatures from erecting tariffs, quotas, and other restrictions on trade across state boundaries. The result has been to create a huge common market across the central portion of North America some 170 years prior to the creation of the European Common Market, and more than 200 years before the rest of North America became a "free trade zone" through the passage of NAFTA.

The prosperity of the United States over its first two centuries, like Europe's over the last generation, owes much to the benefits from liberalized trade among the states of the union. Hong Kong, a tiny nation devoid of natural resources, has experienced a dramatic growth in income per capita over the last generation with essentially no barriers to international trade. Australia, Canada, and New Zealand, although rich in natural resources per capita, have had trade policies highly protective of home industries. These policies, coupled with strong trade unions and misguided regulation in some cases, have combined to produce an unspectacular growth record over the same time interval. A nation that seeks to realize the same long-term benefits from trade across its borders as from trade within them, will limit the government's ability to respond to short-term

interest group pressures for protection. Requiring a substantial majority in the legislature to implement restrictions on trade will accomplish this end.

As to the novelty of requiring supramajorities, they are already required by the U.S. Constitution for international treaties, which must receive at least two-thirds of the votes in the Senate. More closely related to the suggestion put forward here was the proposal by some delegates to the Constitutional Convention in Philadelphia that the Constitution require a two-thirds majority in Congress for all navigation laws. Some delegates from the South, like George Mason from Virginia, favored this clause because they wanted the South to be capable of vetoing any attempts by the North to pass laws that would help the North cartelize export transportation (Riker, 1987, p. 14). A two-thirds majority of Finland's Parliament is required for all important decisions, and a five-sixths majority for all decisions involving property rights. The proposals in this chapter would treat the freedom to engage in trade and to contract—both domestically and internationally—as of sufficient importance to be treated in an ideal constitution analogously to the way property rights are treated in Finland's Constitution.

The Founding Fathers of the United States put several provisions into the American Constitution to help protect citizens from certain governmental actions. One common way in which governments harm their own citizens is by placing restrictions on market activity to help particular groups of factor owners, producers, or consumers. A wary citizenry will protect itself from these sorts of governmental actions.[18] Substantial constitutional barriers to future governmental interference with market processes are important components of the constraints on government that citizens can erect.

Notes

1. In the first case what is required is that firms act as Bertrand oligopolists, (i.e., each assumes that the prices charged by the other firms will remain fixed, each trys to capture the entire market by undercutting its rivals' fixed prices [Friedman, 1983; Bresnahan, 1981]). On the general importance of entry conditions to market performance, see Bain (1956) and von Weizsäcker (1980). On the sufficiency of free entry for competitive performance in particular, see Baumol, Panzar, and Willig (1982).

2. See the discussion in Scherer and Ross (1990, pp. 174–94).

3. Not all parts of the antitrust laws are equally effective in preserving competition, and some parts like the Robinson-Patman Act are intended to protect competitors rather than competition. Libecap (1992) argues that was even the original intent of the Sherman Antitrust Act. On the other hand, even the harshest critics of U.S. antitrust policy like Robert Bork (1978) believe that the Sherman Act as enforced and interpreted has helped maintain competition in the United States. Its language provides a useful starting point for an effective anticartel policy.

4. Of course, unions can also have positive effects on allocative efficiency by providing managers with information about worker preferences. Thus, one would not want to ban unions per se, only their cartel activities.

5. For a demonstration that *all firms* can benefit from a constitutional prohibition of cartels, see Buchanan and Lee (1991).

6. If anything, a cartel of steelworkers increases unemployment by raising steelworkers' wages and moving the industry back along its demand curve for labor.

7. The state still could constrain or prohibit certain activities like gambling that were thought to have negative externalities. It would only be blocked from requiring that blackjack dealers be licensed should gambling be allowed.

8. For further discussion of licensing and certification, see Friedman (1962, Chap. 9).

9. In addition to routine cartel activity, unions often engage in public demonstrations and strikes to achieve wider political goals. Such activity has been particularly common in Latin America (e.g., in Argentina; see Snow, & Wynia, 1990, pp. 154–55). To the extent that the constitution framers seek to bring about a one-man-one-vote form of democracy, they will wish to constrain the ability of some groups, like organized unions, to achieve their political goals outside of the formal political process.

10. Feenstra's estimates exceed those of many other studies for reasons which Feenstra gives in his article.

11. For a discussion of how trade policy is distorted by the political process, see Magee, Brock, and Young (1989).

12. See Buchanan and Tullock (1975). For a general discussion of the issues about trade raised in this section, see any textbook in international trade; for example, Kindleberger (1978).

13. For a discussion of these cases see Baumol, Panzar, and Willig (1982, Chap. 8).

14. See Moore (1978).

15. See Inman (1987).

16. For a discussion of these issues, see Scherer and Ross (1990, Chap. 17).

17. See Klein and Leffler (1981) and Shapiro (1983).

18. Cass Sunstein (1991) has also emphasized the potential benefits from constitutional protection of certain market activities with particular reference to the problems facing East European countries since 1989.

16

Redistribution

> [T]he natural end which all men have is their own happiness. Now, humanity might indeed subsist if no one contributed anything to the happiness of others as long as he did not deliberately diminish it; but this would be only negatively congruous to *humanity as an end in itself* if everyone does not also endeavor to promote the ends of others as far as he is able. (italics in original)
>
> IMMANUEL KANT

We have described the purpose of government as that of providing those goods and services that can make all citizens better off, of inducing the kind of socially cooperative behavior in prisoners' dilemmas that makes all citizens better off. We have argued that the work of the parliament should be confined to these mutually beneficial activities. What then is done about redistribution? Is there no role for the government in redistribution policy? In this chapter, we take up this question. We first contrast the issue under two-party and proportional representation parliamentary systems.

Redistribution in a Two-Party System

The majority party can do what it wants within the constraints of the constitution in a two-party system. Thus, considerable scope for redistribution exists under a two-party form of government.

We suggested in Chapter 15 curbing redistribution that takes the form of government intervention in private goods markets by requiring supramajorities in the parliament for legislation that would interfere with the freedom of firms or individuals to set prices, to enter and exit industries; supramajorities for legislation that imposes tariffs, quotas and other restrictions on international trade, and so forth. In Chapter 6 we suggested a clause that prevents the parliament from making expenditures or levying taxes that affect only a small fraction of the regions of the country unless they got a supramajority of votes in the parliament. Such a clause would reduce the kind of geographic redistribution that occurs particularly where representatives or parties get their support from particular areas of the country. When the electoral rules produced literally only two parties in parliament, a supramajority requirement would be tantamount to the unanimity rule.

Although provisions such as these would reduce the scope for redistribution in a two-party system, they would not eliminate it entirely. The majority party would have an incentive to reward its supporters, and if it could find a way by redistributing income it would most likely do so. The scope for redistribution in a two-party system would be

greater than under proportional representation coupled with, say, a three-fourths majority requirement for all legislation. For this reason, the need for constitutional constraints on the parliament would be greater under two-party government.

For those who believe that the state should engage in considerable vertical redistribution, the greater scope for redistribution under a two-party system might seem reason to favor this form of government. But the majority party has an incentive to benefit only those groups that promise to give it the most support in the next election, and these need not include the poor. The history of two-party systems suggests that the "party of the poor" is in office at best one half of the time. Although more redistribution can be expected under a two-party system which uses the simple majority rule than under a PR system which uses a supramajority voting rule, there is no reason to expect more redistribution toward the poor under a two-party system.[1]

Redistribution as Altruism

Consider now the possibility for redistribution in a multiparty parliament. Although no real world constitution is likely to require unanimity in the parliament for collective decisions, let us assume that this is the parliamentary voting rule. There are then essentially two explanations for why a parliament may engage in redistribution that are consistent with the assumption that its members and those they represent are rational actors seeking to maximize their utility.

The first is that one individual's utility depends on the welfare of others. Individual i experiences positive satisfaction from an improvement in j's living standard and is willing to give up some of her income to bring this improvement about—i.e., j's welfare is an argument in i's utility function.[2]

That individuals get satisfaction from seeing (knowing) that others are better off is a common observation. Charities exist because of this behavior. Indeed, the obvious question to ask about this form of redistribution is: Why does it requires the intervention of government? Why cannot i satisfy her desire to see j better off by simply giving j some money?

There are two explanations for why government may be a superior institution for charitable giving than either individual actions or private charities. First, i may not get utility from seeing a particular j better off, but only from seeing all js better off, where js are members of a disadvantaged group—say, the blind. As a single individual i's charity makes an imperceptible improvement in the welfare of the blind. If there are many people who feel as i does, however, their combined contributions could make the blind substantially better off. But now the is face a prisoners' dilemma in that each i, given the imperceptible impact of her own contribution, is better off contributing nothing for any given level of contributions of the others. A level of contributions that is less than Pareto optimal results. Government can be the institution for resolving this prisoners' dilemma optimally.[3]

When a group is permanently disadvantaged (e.g., the blind, orphans) private charitable organizations arise to solve the free-rider problem with respect to giving. It sometimes happens, however, that the target of desired charitable giving appears suddenly, as, say, when a flood or earthquake hits one part of a country. Ongoing charitable organizations like the Red Cross exist to provide aid in these cases, but the levels of contributions many individuals would like to make in a particular situation may be very

different from those they wish to make for the panoply of Red Cross projects. If so, another institution for making such contributions may be superior. The government of the country in which the disaster occurs is an existing institution in which those wanting to give can register their preferences. On transaction costs grounds it may dominate both existing all purpose charities like the Red Cross, and any newly created charities intended to respond to this disaster.

It may and it may not. If the parliament employs the unanimity rule, we can be sure that the government is used as a vehicle for redistribution only when the contributors believe it is the best institution for achieving their altruistic goals. When a less than unanimity rule is used, and both the recipients and the contributors vote on redistributional issues, some redistribution takes place that is not explained solely by the altruistic motives of those who are taxed. Nevertheless, the use of a high required majority in the parliament, like three-fourths, would eliminate the most egregious forms of redistribution for purely selfish purposes, while permitting all Pareto-optimal redistribution for altruistic motivations.[4]

Redistribution as Insurance

Altruistic behavior has been observed in virtually all primitive societies. Some anthropologists argue that this behavior can be explained without abandoning a narrow self-interest postulate about human motivation. One individual helps another when in need as part of an implicit contract that the other will come to the helper's rescue in case he needs it.[5] All members of the primitive community become parties to the same contract.

Reciprocal altruism of this type may also underlie acts of charity in more developed societies. Individuals help flood victims because they know that such disasters can strike them and hope for similar generosity should one occur. The people of a nation are joined by an implicit contract to assist one another when floods, earthquakes, and other natural disasters strike.

These contracts resemble insurance contracts. Insurance is a contract signed before an uncertain event to engage in redistribution after it occurs. Health insurance redistributes income from the healthy to the sick. Fire insurance redistributes from those who do not have fires to those who do. Narrowly self-interested individuals have reason to join such redistributive agreements, if they are risk averse. And they do. As with altruistic redistribution, the key question to be raised about insurance-type redistribution is whether the government is the optimum institution for bringing it about. If rational, self-interested people have an incentive to buy health insurance, why will the market not optimally handle this form of redistribution?

The first thing to note is that one cannot build an argument for government intervention based on the free-rider problem. An individual who gets sick cannot claim benefits from a health insurance program unless she is a member and has paid her premiums. She cannot free ride. Rational, self-interested individuals buy insurance of the quality and quantity they prefer like any other private good.

The variance of a pool of revenues subject to random shocks declines as the number of contributors to the pool increases. The optimal size of membership in an insurance pool is infinity. Insurance is a "natural monopoly" optimally provided by the state (Arrow & Lind, 1970).

Although valid, this argument does not create a strong case for government provi-

sion of insurance. The variance of an earnings pool declines rapidly with its size. A single, national insurance company—the government—would have a small risk-spreading advantage over a private firm one-sixths its size. If oligopolistic competition produces lower administrative costs or other efficiency gains over what government provision entails, then market provision of insurance can easily dominate government provision on efficiency grounds, despite government's natural monopoly.[6] More importantly, private insurance firms can, when governments allow, pool risks cross-nationally, where a government cannot. The natural monopoly attributes of insurance, if significant, argue for a handful of large multinational insurance companies (or consortia of national companies) rather than government provision.[7]

For the market to supply insurance optimally, people must be capable of buying it. This implies both knowing how much insurance they should buy and having the money to purchase it. Perhaps the most obvious reason for the government to provide insurance of some sorts to everyone is that without such provision the poor would have little if any coverage.

We have here not just an argument for government redistribution through insurance, but for rich-to-poor redistribution. If the poor cannot *afford* to buy the proper amount of insurance, then government provision succeeds in doing so only if the rich are subsidizing the poor's "purchase" of insurance through the government.[8] To explain why rational self-interested individuals might give to the poor we have to go back to motives for pure or reciprocal altruism. The rich might voluntarily agree to support programs that aid the poor because they are uncertain about whether they themselves may someday be poor.

This explanation for redistribution by government is difficult to reconcile with the rather short-term emphasis of most policies' that political parties advocate and the clear association of economic interests with particular parties. Uncertainty over events like being rich or poor suggests a more long-term perspective than that of normal parliamentary politics. It suggests the perspective of the constitutional stage.

Economic Rights

The constitutional contract defines the political and legal institutions of the society. These institutions are expected to govern the society not just today or tomorrow, but for a decade, a generation, perhaps centuries. Citizens at the constitutional stage should consider the impact of these institutions on not only themselves as they are today, but on the people they might be in a decade or a generation, on their children and their grandchildren.

It was considerations such as these that led Buchanan and Tullock (1962, chap. 8) to suggest that redistributional programs belong in a constitution. Their suggestion resembles more recent discussions of economic rights that argue for a constitutional guarantee that certain economic needs are fulfilled (Shue, 1985). The notion here is that a constitutionally protected right (liberty) requires not only the *freedom* to act, but in some cases the *capacity* to act. That one is free to purchase food and medical protection to sustain life is of little consequence if one lacks the economic resources to do so.

Consider an individual who requires a lifesaving operation but cannot afford it. If prevented from undertaking the action—i.e., from having the operation—a very high cost (t_i) is imposed upon her. If she undertakes the action, a small cost (s_i) is imposed on all other members of the community in the form of the tax to pay for the operation.

The situation resembles those described in Chapter 14 in which constitutional rights are assigned. In the present context, citizens at the constitutional stage might guarantee every citizen the right to lifesaving medical service, *if* they were uncertain over whether they would be the ones needing the operation but too poor to pay for it. Rational, narrowly self-interested individuals might define constitutional rights guaranteeing access to basic medical care, an education, a minimum income level, etc. if the individuals joining the constitutional contract expect the loss to anyone denied these basic goods to be extremely large relative to the sacrifices the rest of the community makes to provide them, *and if* they were uncertain over whether they (their descendants) would be the ones so poor that they were forced to exercise these rights.[9]

All contracts exist because of uncertainty. The traditional definitions of rights as liberties to undertake or not undertake actions are most easily envisioned as arising due to uncertainties over the future *actions* of other individuals. But uncertainty over future states of the world—i.e., whether an individual will be rich or poor—could give rise to provisions in the constitution resembling the kind of economic rights that many have proposed.[10]

At any point in time all individuals face uncertainties that could adversely affect their future economic well-being. To mitigate the possible negative effects of these uncertainties they purchase a variety of forms of insurance—i.e., they sign insurance contracts. But it is conceivable that individuals at the constitutional stage, when contemplating the future uncertainties facing their society, choose to mitigate the adverse economic effects of some common uncertainties through provisions written into the constitutional contract. In so doing, they transform a part of their constitution into a form of social insurance contract.[11] In Switzerland old-age pensions are part of the constitution. In the United States, both Social Security and unemployment insurance have arguably achieved quasi-constitutional status, by which I mean that they are not programs that are in danger of repeal by narrow majorities in Congress. Both would undoubtedly receive substantial majorities for continuance in some form if brought before the citizens in a national referendum.

The Form of Economic Rights

Each polity differs somewhat in its level of economic development, its economic institutions, and thus in the nature and extent of the economic uncertainties facing it. Each differs in the strength of the community's "work ethic," the relative importance of individualism and group solidarity as community values, and the weight given to ethical arguments such as those of Rawls favoring redistribution. Each polity can be expected to differ, therefore, in the amount and form of any economic guarantees written into the constitution, and in the conditions placed upon their receipt. Optimally defined economic rights, like all other constitutional rights, will vary from one polity to another, and in any one polity over time. There are several reasons, however, to expect that economic rights would take the form of minimum guarantees.

Experimental Results

Norman Frohlich and Joe Oppenheimer (1992) conducted a series of experiments in Canada, the United States, and Poland in which students were asked to choose a redistributive formula when they were uncertain of their future positions. In a typical experi-

ment, students were informed that a distribution of payoffs will be selected at random, and that they will be randomly assigned positions in the distribution. Students can select from various redistributive formulae prior to the random selection of payoffs. An efficiency-equity trade-off is built into the payoffs in that the average income a participant receives falls as the amount of redistribution within the group increases. Several findings from the experiments are relevant to the issue of constitutionally defined economic rights.

Participants were generally able to reach a unanimous agreement on a redistribution formula fairly quickly, and when no time limit was set the subjects *always* reached an agreement, again usually quite quickly (Frohlich & Oppenheimer, 1992, p. 57). This finding suggests that unanimous agreement on distributional questions is possible at the constitutional stage if participants are truly uncertain about their future positions. Although reaching unanimous agreement was undoubtedly facilitated by having groups of only five, in 93 percent of the experiments all members did not enter the process with the same redistributive principle as their first choice (p. 97). Unanimity was reached because some participants were persuaded to change their choice to agree with the others. The same dynamics should be at work in larger groups.

Far and away the most popular redistributive principle was to maximize the average payoff to the group, subject to a minimum payoff for any group member. More and less egalitarian proposals (e.g., maximizing the payoff to the worst off or maximizing the average payoff) were almost universally rejected (pp. 58–60). Such consistency, given the diverse backgrounds of the participants, tells us not only that unanimous agreement on redistributive principles is possible, but gives a strong indication of what that agreement might look like.

In some of the experiments, participants were assigned productivity levels, and their payoffs were dependent on their productivity levels. Support for the principle of maximizing the average payoff subject to a floor did not decline *even after* participants learned what their productivities were (Frohlich & Oppenheimer, 1992, Chap. 9). This result implies that the maximize-average-subject-to-a-floor principle may not be chosen simply as a result of uncertainty over future positions, but may be one that many individuals (rich and poor, lucky and unlucky) deem fair. If so, then the likelihood that participants in a real-world constitutional convention would choose this or a similar principle is greatly enhanced.

Constitutional Altruism

As we noted in the section on redistribution as altruism, individuals may wish to redistribute income from themselves to someone poorer than themselves out of altruism. A utilitarian way of conceptualizing altruism is to assume that individual i gets utility from seeing j better off—i.e., that i has j's consumption or income in his own utility function. Under the usual assumption of diminishing marginal utility of any good consumed, i gets more utility from giving a dollar to j than to k, if, and only if, j has a lower income than k.[12] An i maximizes her utility by giving only to the poorest person in the community, until that person's income or consumption is raised to the level of the second poorest, and then gives only to the two, now equally poor, poorest, and so on. *Ceteris paribus,* the higher i's income, the more she would want to give, and the higher the floor that would be placed on anyone else's income. Thus, a utilitarian altruist would favor a floor on the incomes of others that would shift upward as i's income increased (von Furstenberg & Mueller, 1971).

Proposals for altruistic redistribution of this type would pass in a parliament even under a unanimity rule, if all potential givers were altruists. If the parliamentary voting rule is not the unanimity rule, however, proposals to redistribute income will be made for other than altruistic reasons. We described in Chapter 15 some constraints the constitution framers may wish to place on the kinds of issues that can come before the parliament to avoid these other forms of redistribution. A society of utilitarian altruists could unanimously agree to place into the constitution a clause that put an income floor under all individuals, and then choose to constrain future parliaments from engaging in additional redistribution.

Simulation Results

When some people think of distributional equity, they think not only that *j*'s income is beneath some floor, but that *j*'s income is less than *i*'s by an amount that is "too great." Such notions of equity would regard any shift of income from the relatively more well off to those beneath them in the income scale as an improvement in distributional equity.

All redistribution has costs, however, in that it has disincentive effects on *both* those who give and those who receive. These costs can be large. Edgar Browning (1989) has shown how redistribution within the top four quintiles can lower the average incomes of *all four quintiles,* as well as making them more equal. Each dollar of redistribution to the second lowest quintile could cost a member of the highest quintile $8.50.[13] Browning's calculations and analysis suggest that a rational individual who weighed the incentive effects and related costs of redistribution would favor policies that targeted only the poorest members of the population. The choices made by participants in the Frohlich and Oppenheimer (1992) experiments were exactly what one would expect rational, self-interested individuals in the United States to make based on recent income, tax, and work effort data for this country.[14]

The importance of incentive effects as stressed by Browning is further illustrated by William Niskanen's (1992b) recent work. He finds a strong positive influence on national income of redistribution's being an insurance-type, "fixed cost" outlay.

Implications

Most if not all voluntary redistribution is based in one way or another on the mental experiment of "putting oneself in the other fellow's shoes." The altruist imagines what it means to be poor, to be blind or crippled and gives out of empathy even though she does not expect to be poor or blind. Redistribution cum insurance arises out of uncertainty, either real or self-imposed for ethical reasons, over whether one might someday be poor or blind.

It is easier to place oneself in the shoes of a person one knows than in those of a stranger. "Charity begins at home" and extends outward first to the extended family, then to one's neighbors, members of one's ethnic group or religion, one's nation state, and so on. A war makes one aware of commonalities with one's countrymen, of the common risks all citizens face. Dryzek and Goodin (1986) argue that the intense bombings of Britain during World War II engendered strong common bonds among the British people that help to explain the huge welfare state the was enacted in Great Britain in the years immediately following the war. The extent of government social insurance

in other countries is shown to be proportional to the war-related uncertainties each country faced.

The drafting of a constitution is like the birth or rebirth of a nation. In bringing a country into being its founders must define citizenship and the rights of citizenship. They must ask themselves, Who are we? What do we have in common? Very often constitutions are written or rewritten following a war or revolution, a time at which the bonds among citizens are at their strongest. On this occasion the writers of the constitution may wish to place into the constitution certain provisions that offer minimal protection to all citizens from the common risks everyone faces.

If genuine uncertainty or altruism exists, constitutional provisions for minimal-floor-type redistribution programs can make all citizens better off in at least an *ex ante* sense, and thus can achieve unanimous support at the constitutional convention. There is a second reason for including redistribution in the form of minimal rights in the constitution, however. We have stressed the importance of the distinction between allocative efficiency and redistribution. In the long run, viable democratic government that rests on the consent of the people is possible only if that government makes all citizens better off.[15] If the basic redistributional activities of the government are treated as constitutional rights, administered by quasi-autonomous agencies with the courts providing citizens protection as with all other rights, then government can in the future concentrate on those collective activities—notably the provision of public goods and other improvements in allocative efficiency—that promise to make all citizens in the polity better off. The constitutional design of the legislature—i.e., the rules for selecting representatives, voting in the legislature, constraining the issues that come before it—all can be predicated on the assumption that redistribution is *not* a responsibility of the legislature.

Italy and Spain have engaged in considerable interregional redistribution. Separatist parties have arisen in parts of each country, where incomes are considerably greater than the national average. The apparent desire by large groups of citizens to exit the polity suggests the potential instability of having constitutional contracts that do not benefit all citizens, constitutional contracts that allow permanent one-way transfers. Although a constitution that helps spread the common risks all citizens face can add stability to the polity by making each citizen more secure, a constitution that allows one group to exploit another continually may have the opposite effect. The task confronting the constitution framers is to achieve the one and avoid the other.

Notes

1. For a discussion of the whys and wherefores of redistribution in a democracy see Tullock (1983).

2. This rationale for redistribution was first discussed in the economics literature by Hochman and Rodgers (1969).

3. One can imagine private charities circumventing the free-rider problem in this prisoners' dilemma by accepting contingent contributions; i agrees to give x dollars only if all others give at least y dollars. Large contributors to some charities often make such contingent contributions. But the transaction costs of accepting and collecting these contributions, when the number of contributors is large and the average contribution is small, may be so large as to make government the most efficient vehicle for this form of charity.

4. In Chapter 11 we discussed three voting rules besides the family of qualified majority rules. Point voting is strictly intended for allocative efficiency decisions. Levels of redistribution

for Pareto-optimal purposes would be treated just like other public-goods issues, and voters would allocate their points to raise and lower the amounts of redistribution depending on their preference intensities. If zero sum redistribution issues get included in the list of "public goods" it would pull points from both recipients and those taxed, but would otherwise not affect the outcomes. Under voting by veto, if one group couples redistribution to itself to a public-good expenditure, its proposal is likely to fall in the rankings of those groups who would finance the subsidy, thereby increasing the likelihood of its veto. An effort by one group to increase its welfare by coupling redistribution toward itself to its proposal under the probabilistic majority rule could be expected to meet with a like response by other groups. The compromise proposal would tend to balance out the opposing redistributional proposals of the different groups.

5. Cohen (1978). A perverse case of reciprocal altruism is presented by the Iks, an African tribe reduced to extreme poverty when they were cut off from their natural source of food. Among the Iks an individual would try to help another, even when the help was not needed or wanted, to establish an obligation which the unwelcomed helper could benefit from later. This behavior forced people to go to extra effort not to be helped or to be in situations in which their acceptance of help was unavoidable (Turnbull, 1972).

6. Kennedy and Mehr (1977) present evidence of greater efficiency for private over public auto insurance in Canada. Finsinger (1983), on the other hand, finds no significant difference between public and private liability and life insurance firms in Germany.

7. Another argument for government provision of insurance is that it is a "merit good" (Musgrave, 1959, pp. 13–14; Head, 1966, 1990). The government ought to provide certain kinds of insurance like health and old age survivor insurance because many individuals are too myopic or similarly irrational to purchase the proper amount. This argument is very difficult to reconcile with the perspective of this book in which rational self-interested individuals form a government. Indeed, it is very hard to reconcile with any normative theory of democracy. Should the myopic be allowed to vote? If not, how do we identify who is myopic? If they can be identified, how can we be sure they are in the minority? For further critique, see McLure (1968).

8. We also have a merit-good argument of the type criticized in the previous footnote. The poor cannot afford many things. A liberal who trusted the poor's judgment would transfer money to them and let them buy what *they think* they need. If the rich prefer instead to subsidize the poor by providing insurance, they do so presumably because they feel that the poor would not buy *enough* insurance if they were just given the money.

9. For a discussion of welfare rights that bears some resemblance to the argument put forward here, see Lomasky (1987, pp. 85–100). Kavka (1986, pp. 210–24) argues persuasively that minimum guarantees enter logically into a Hobbesian social contract. On placing redistribution in the constitution, see Wessels (1993).

10. On the relationship between uncertainty and the form and existence of contracts, see FitzRoy and Mueller (1984). A second argument for including certain economic rights into the constitution can be constructed on transaction costs grounds if one posits a modest degree of altruism in all individuals. Given modest altruism, a proposal to fund a lifesaving operation for someone too poor to pay for it would pass under the majority rule. If the constitution framers anticipate that they would rarely, if ever, vote to deny a citizen funds for lifesaving medical care, the community can economize on future collective decision-making costs by providing citizens with a constitutional guarantee to medical attention of this type.

11. As mentioned above, Buchanan and Tullock (1962, Chap. 8) argue that the uncertainties inherent in the setting in which the constitution is written *will* lead individuals acting in their own self interest to include redistributional provisions in the contract. Rawls (1971), Gauthier (1986), and Kavka (1986) argue that individuals *ought* to assume that they are uncertain about what their future economic positions will be when choosing redistributional principles to include in a hypothetical social contract. Any society persuaded by these normative arguments of a hypothetical social contract, or analogous arguments like those of Harsanyi (1955), would include certain economic guarantees in the constitution for ethical reasons.

12. Let $U_i = U_i(Y_i, Y_j)$, $\partial U_i/\partial Y_j > 0$, $\partial^2 U_i/\partial Y^2_j < 0$, where Y_i and Y_j are *i*'s and *j*'s incomes, respectively.

13. This figure is based on reasonable assumptions regarding tax rates, effort elasticities, etc. For other equally alarming estimates, see Browning and Johnson (1984) and Horowitz (1990).

14. Kavka (1986, pp. 210–24) argues for a minimum level of support approach to redistribution as a part of a hypothetical Hobbesian social contract.

15. Samuel Brittan (1975) sees the preoccupation of interest groups with zero-sum and negative sum redistributional government policies as a major threat to the survival of Great Britain's liberal democracy. Similar arguments might be made in other countries. An extreme example of the destructive consequences of an almost exclusive preoccupation of politics with redistribution is the Indian state of Bihar, which has been brought to levels of political and civil instability bordering on anarchy (Kohli, 1990).

17

The Executive Branch

> A most important principle of good government in a popular constitution is that no executive functionaries should be appointed by popular election, neither by the votes of the people themselves nor by those of their representatives. The entire business of government is skilled employment; the qualifications for the discharge of it are of that special and professional kind which cannot be properly judged of except by persons who have themselves some share of those qualifications, or some practical experience of them.
>
> JOHN STUART MILL

There exist two fundamentally different views regarding the function of the executive in a republican form of government.[1] One sees the executive as agent of the legislature, the administrators who expeditiously carry out the policies enacted by the legislature. The other sees the executive as a balance to the legislature, a separate location of legitimate authority that acts as a check on the legislature. In their extreme form these two views of the proper role of the executive are diametrically opposed. The U.S. Constitution is generally cited as the embodiment of the checks and balance view, although a good argument can be made that the original intent of the Founding Fathers in defining the executive branch was to promote the efficient execution of the work of the Congress (Fisher, 1972, pp. 15–16, 26). We begin by developing the efficiency view of the executive, and take up the checks and balances rationale later in the chapter.

In Chapters 8 through 10 we discussed two alternative procedures for choosing representatives: One produces two-party government, the other multiparty representation. Each has the potential for ensuring that the preferences of *all* voters are either weighed in the legislative outcomes, or at least are represented in the legislative assembly. Each has defensible normative properties. Having chosen one of these two systems of representation with an eye on their respective normative properties, the constitution framers will want to ensure that the institutions of government are capable of carrying out the future decisions of parliament. If parliament decides that a bridge should be built, then it should be—and in an expeditious and cost-effective manner. If the normative properties of either parliamentary system are to be achieved, then neither the bureaucracy that implements a policy nor the opposition in parliament against it must be capable of reversing, delaying, or somehow subverting outcomes of the legislative process.

The simplest way to prevent a bureaucracy from subverting the parliament is, of course, not to create one. The parliament might contract directly with a construction firm to build the bridge. Although such a solution may be available in situations as this one, it will not be available in all. The tax revenue to pay for the bridge must be

collected and this function is difficult to contract out.[2] Other activities also cannot be contracted out (e.g., the preparation of an adequate defense against foreign invasion). Even when contracting is possible, certain administrative functions may be required (e.g., soliciting bids for the contract, monitoring its execution) that, if needed in great number, might overwhelm a parliament whose primary responsibility should be to decide what is to be done, not to see that it is done. Thus, administrative institutions are needed to carry out the policies that parliament decides should be undertaken. Although one might dispute that the Founding Fathers of the United States sought *only* efficient execution of the actions of Congress in defining the executive branch, there is no doubt that it was a primary concern of many.[3]

Administrators are people with their own personal goals and ideologies, however.[4] The creation of administrative agencies to execute policies enacted by parliament creates a principal-agent problem. Parliamentary actions may be delayed or diverted by the bureaucracies entrusted to implement them. The need for an administrative agency to implement them gives rise to a second danger: The losing party(ies) in parliament and interest groups out of it may pressure the administrative agencies, reversing in part or in toto their defeat in the parliament (Moe, 1990; Lowi, 1979). With enough delays and cost overruns, the bridge that the parliament voted to construct never gets built. Knowing of this danger, supporters of a measure both within and outside of the parliament exert influence on the administrative agencies to see that they do that which the parliament enacted. Even if this process does result in the parliament's policies more or less being carried out, the existence of a second stage clash of interests on issues *after the parliament has resolved them* raises the transaction costs of the collective decision process. Once parliamentary institutions that best represent and advance the interests of *all* people have been chosen, the policies of parliament should be carried out as passed.

The distinction in the U.S. Constitution between the legislative and executive branches comes to mind here. The Congress enacts legislation, and the executive branch executes what Congress enacts. The American system also suggests a possible remedy for the problems caused by the discretionary authority of the executive agencies. A chief executive supervises the executive branch to ensure that it performs its administrative tasks efficiently. Once again the U.S. system suggests that this may not be the only role to assign to a chief executive, and American history demonstrates that chief executives may be able to expand the scope of any role assigned to them. We shall in this chapter, therefore, explore the issue of the proper role of a chief executive in a constitutional democracy. Should there be one? If so, how is the chief executive to be chosen? What are the chief executive's duties? How can the chief executive be constrained from expanding the definition of the office beyond that intended in the constitution? The question of how to constrain the chief executive, or any other person, from taking over all governmental authority—i.e., of avoiding dictatorship—is taken up in the following chapter.

We begin to explore these issues with the simplest case, that of two-party democracy.

The Executive in a Two-Party Democracy

The normative rationale for two-party government is that the competing parties offer the voters platforms of policies that they promise to implement upon being elected. Voters

make their choices on the basis of these platforms and the anticipated competencies (or willingness) of the competing parties to implement the platforms promised. An incumbent majority party is judged in an election in part by how well it did in providing the policies promised in the past election. The majority party has a strong interest in seeing that the program it passes in the legislature gets implemented.

To the extent that the two parties do compete on the basis of their platforms, an election is not so much about which party will best *represent* the voters, but about which party is best able to carry out the proposed platforms and the platforms themselves. The voters are to a degree choosing the outcomes; the task of the winning party is to produce the policy outcomes which it promised. The *execution* of the policies is an important part of the winning party's charge. The legislative and executive functions of government merge.

Although the promises of parties in two-party systems are by no means sufficiently explicit to argue that the legislative function disappears entirely, it is reasonable to argue that the executive capacity of the competing parties is an important consideration in the voter's choice, just as it is in the United States in voting for the president.

One way of combining the executive and legislative branches is, as in the British parliamentary system, to have the majority party select some of its members to head the various administrative agencies that carry out its policies—e.g., the treasury, the ministries of defense, health, education, etc.[5] An important advantage of this approach is that the principal-agent problem, as it pertains to the head of an agency, is eliminated.[6] An agency head, being a member of parliament, can both convey the intent of parliament to the agency and information from the agency to the parliament about the costs and constraints of pursuing different policies. As a member of the majority party, the agency head has a strong incentive to shield the agency from pressures from the minority party(-ies) or outside interest groups that would thwart the majority party's objectives. Parliament members also have an extra incentive to monitor and control the agencies they lead so as to ensure that they pursue the agenda legislated by the parliament (i.e., the majority party), and not its own.

A second advantage of having administrative agencies led by members of the majority party is that, as such, they are more directly accountable to both their own party and the opposition. The latter possibility in particular helps ensure diligence and careful monitoring of an agency by its parliamentary member head.

The major disadvantage of selecting agency leaders from parliament is that they may lack expertise in the activities undertaken by the agencies they are assigned to lead, or administrative capabilities, or both. Individuals rise to the top of a party because of their parliamentary skills, loyalty to the party, ability to formulate party policies, effectiveness as campaigners, etc. None of these assets may prove very useful when it comes to directing a bureaucracy. None of them guarantees knowledge of the mission of the bureaucracy. These liabilities are likely to become more severe as the size and complexity of an agency grows. For some agencies, the job of managing them may be so great that it is impossible for one person to handle it *and* perform as a leader of the party and member of parliament.

To avoid these problems, agency heads can be selected from outside of parliament. People are chosen on the basis of their knowledge of an agency's mission and their administrative skills. Cabinet members in the United States are more or less chosen in this way. Indeed, given the potential that the other party has to block a president's program, it can have a majority in one or both houses of Congress. U.S. presidents

often feel compelled to appoint as cabinet heads some individuals who are not members of their party or perhaps do not fully share their ideology. In a two-party parliamentary system, this need does not arise. The logic of the system dictates that the majority party be capable of carrying out its policies. If the constitution specifies how cabinet ministers are selected, it should, in a two-party system, grant the majority party authority to appoint people who are competent administrators, knowledgeable of the area of their agency, *and* loyal to the objectives and ideology of the majority party.

The chief disadvantage of ministry heads not being members of parliament is that they are less closely tied to the parliamentary majority, and less accountable to it. The danger of "capture" by the agency's staff and/or clients is also greater, however. A third alternative is a compromise between the two—i.e., some agency heads are members of parliament, others are not. The French cabinet system functions somewhat in this way.

In a two-party system, the chief executive is de facto the head of the majority party, the prime minister. The election of a second chief executive, to lead the executive bureaucracy, would not only be redundant, but probably counterproductive for it would create the potential of the executive agency's chief promoting his own goals rather than those of the majority party. In a two-party system the legislative and executive branches of government logically collapse into one, and the leader of that branch is the leader of the majority party.

The Executive in a Multiparty System

Under a multiparty system, voters choose representatives, and representatives choose policies. Because no single party may have the votes to pass all legislation by itself and no single coalition the stability to pass all legislation, no single party or coalition of parties is an obvious choice to select a cabinet either from its own ranks or outside of them. Indeed, most objections to multiparty forms of government emphasize the potential instability that arises from having the tenure of the membership of the executive (i.e., of the cabinet) linked to the stability of a majority coalition of the parties in the parliament. If this potential disadvantage is to be overcome without destroying the representational advantages of multiparty government, the stability of the executive must not hinge on the stability of a single coalition of parties in the parliament. There are several options in this regard.

While no coalition may be able to agree on *all* cabinet ministries, one coalition may form and select a person to head this ministry, another to select a person for that one. Once appointed, an individual could remain as ministry head until (1) the next parliament was elected, (2) the parliament selected someone else to replace her (note that this procedure could be used to replace cabinet members at any time and thus could be combined with the appointment of cabinet ministers for indefinite terms), or (3) she chose to resign. Cabinet ministers selected in this way could be chosen from either elected members of parliament (as in Germany and Italy), or from outside of parliament (as in Norway, the Netherlands and Luxembourg), or a combination of the two (as in France). Regardless of where a minister was chosen from, this option would ensure stability of the executive branch between elections, while at the same time allowing the parliament to replace individual ministers, *if it can agree on a replacement.* Provision 2 above is the same as the one in the German Constitution for replacing the chancellor.

It is the key provision for guaranteeing stability of the cabinet. One or all members of the cabinet are removed only when parliament can agree on their replacements.

In a badly divided parliament it may be difficult to form coalitions to make the initial selection of cabinet ministers. This danger can be avoided by creating a chief executive who is not a member of the parliament. The selection of a cabinet is an obvious task for the chief executive.

The chief executive is responsible for the efficient operation of the bureaucratic agencies that carry out the program passed by the parliament. The chief executive has the authority to nominate individuals to head the various government agencies. As the agencies are supposed to implement the parliament's policies, parliament has the power to turn down a person proposed by the chief executive if it does not believe that this person would or could implement its policies as head of the agency. Two options exist: (1) The chief executive proposes nominees to head each agency. If a nominee fails to secure the required majority for ordinary legislation (two-thirds, . . .), the chief executive withdraws the nominee and proposes a new one. (2) The chief executive proposes a nominee for each ministerial post, and this nominee automatically takes office after a certain interval, say three months, *unless* parliament turns her down with the required majority *and* substitutes by the same majority another person.The first procedure resembles that used in the United States The second again resembles the procedure for removing a German chancellor.

Both systems will work equally well if the parliament is not deeply divided over the kind of person needed to head an agency. The chief executive will then know what type of person will be approved and will propose only those types of individuals. A mistake in this regard by the chief executive will produce only one iteration. Similarly, under the second procedure a misjudgment by the chief executive simply results in parliament substituting its preferred person.

If the parliament is badly split, however, it may not be able to concur on a nominee for the executive branch. The former system then poses the danger that the chief executive cannot get nominees approved, and ministries remain leaderless for prolonged periods. The second alternative avoids this danger, and it is therefore perhaps to be preferred. But under it, a divided parliament could create a powerful chief executive for she will be able to fill top administrative positions without parliament being capable of substituting its choices. Division in the parliament would not produce paralysis in the executive branch under the second procedure, but if it lasted long, ministries under the chief executive's authority could evolve into agencies with considerable independence from parliament. Given the obvious attraction of the second alternative for a country that anticipates that it might have many parties which are unable to agree on nominees for executive appointments, we must examine further the nature of the chief executive post.

The Position of Chief Executive

In a multiparty system each voter is represented by a political party that takes a position reasonably close to that favored by the voter. The parliamentary voting rule selects the best outcome given this mode of representation. Additional input into *what* should be done is not required. The role of the executive branch is to see that what was voted to

be done gets done. The chief executive monitors bureaus in the executive branch to ensure that they carry out their tasks efficiently and do not place their own objectives over those of the parliament. Under this interpretation, the chief executive is an agent of parliament and logically should be chosen by it.

There are any number of ways in which the chief executive could be elected. I describe but two. Since the chief executive provides a sort of public good for the parliament—good management of the executive branch—it is logical that it chooses the person to fill this position. The president is elected by the parliament in several countries today (e.g., Italy), and a proposal to have the House of Representatives elect the president of the United States was almost adopted at the Philadelphia convention (Sundquist, 1986, p. 25). Given the public-good nature of the president's administrative role, if a supramajority (two-thirds, three-fourths) of the parliament is required to pass public-goods issues, then the same majority should be required to elect the president.[7] Such a rule would require the agreement of two or more parties in most instances, and thus favors the election of nonpartisan candidates, or at least individuals known to be fair and even-handed. The chief executive under this alternative would be selected on the basis of her administrative competence, not her politics.

It could arise under this first procedure that no candidate can achieve the required majority. The chief executive's office remains open with parliament locked in a struggle to find a consensus candidate. This possibility can be avoided by requiring only a simple majority of votes in parliament for election, and a runoff if no candidate receives an absolute majority on a first ballot. Each party might be allowed to nominate a candidate, and a runoff held between the top two vote-getters should no candidate receive an absolute majority on the first ballot. If one party has a majority of seats, it could under this alternative choose one of its own members to be president. As always, the simple majority rule enhances the danger of redistribution in some form to the party or coalition of parties in the majority, while reducing decision-making costs. With a majority party in the legislature, it could strengthen its ability to achieve its goals by choosing a chief executive to supervise the implementation of the legislature's decisions and who shares the majority party's objectives.

The parliament is an agent of the people. The chief executive is an agent of the parliament. Why not "eliminate the middleman" and have the people elect the chief executive directly? Although there is nothing wrong with this alternative in principle, it is not clear how it would work out in practice, if the chief executive serves only as an administrator-manager. Pure administrative skills are difficult to evaluate. A campaign focusing upon the comparative administrative abilities of the candidates does not excite the imagination. Although proven incompetence or corruption in the executive branch might assure a chief executive's defeat in an election, skill and integrity might not guarantee reelection. A danger in the era of television would be that candidates claim that they will accomplish more than their post allows them to do and then, to make good on their campaign promises, they strive to expand the scope of the chief executive's office. If the chief executive is to be solely an administrator, an agent for parliament, then the best structure would appear to have parliament choose the chief executive.[8]

Of course, in some systems, notably the United States and France, the chief executive is much more than a mere administrator. As the authority of the chief executive expands, the executive branch begins to rival the legislative branch as the locus of *legitimate* authority, and the political system becomes one of checks and balances.

Checks and Balances

The distinguishing feature of the United States Constitution is often viewed as the separation of the powers of government into three branches. But a more accurate characterization is that each branch jointly exercises the powers of government. Together they *share* these powers (Neustadt, 1960; Huntington, 1968, pp. 109–21). The president and both houses of Congress are now popularly elected. Each can claim with some legitimacy to represent "the will of the people." When running for office presidential candidates promise policies that they intend to implement if elected. They often campaign as if they could, by themselves, produce the policies they advocate. The president can and does propose legislation, and exercises some of the power of an agenda setter. By exercising his veto authority the president often forces modifications of a bill or its defeat. Thus, the president of the United States does not merely execute the policies mandated by the legislature, but rather shares in their development and enactment.

Government as a system of checks and balances evolved during the fourteenth through the sixteenth centuries in Europe. The monarch was the representative of *all* of the people in Tudor England, and a member of the British Parliament represented purely local or corporate interests (Huntington, 1968, Chap. 2). Although by the end of the eighteenth century Europeans were well on their way to replacing this system with one in which governmental authority was vested in a single body—e.g., the parliament—it was the Tudorial system of divided authority that the Founding Fathers of the United States chose to enshrine in the U.S. Constitution. The checks and balances built into the Constitution reflect deep-seated fears of the potential excesses of a democratically elected legislature,[9] and of a powerful chief executive who might assume the arbitrary authority of a king. Ironically and illogically, as the system has evolved it has worked admirably to prevent the legislative assembly from acting rashly, while at the same time granting the president ample authority for unilateral action in the areas of foreign affairs and war-making powers.[10]

The president has considerable latitude when it comes to committing the nation to war and in foreign affairs, but he can implement his domestic program only with the concurrence of both houses of Congress. Those bills that do become law are a compromise between the broad national interests represented by the president and the more narrow geographic interests represented in the two houses of Congress. There is no theoretical reason to presume that these compromises are the best outcomes a political system could produce. The record of the United States in recent years on crime, education, health care, and other important domestic issues suggests that the richest country in the world has not achieved its potential.

Each ideal system of representation has built-in checks that potentially are capable of avoiding the dangers of representative democracy that concerned the Founding Fathers. Under the two-party system, the opposition stands ever ready to inform the public of any excesses or errors of the government. Should the threat of defeat in the next election not sufficiently constrain a governing party, its actual defeat will. The more fearful the constitutional convention is of an elected legislature's actions, the shorter the interval between elections it will wish to stipulate.[11] James Madison, often cited as a champion of checks and balances, regarded frequent popular elections as "no doubt the primary constraint on the government."[12]

Even though no political party of any size is likely to be totally eliminated (defeated) under a multiparty system, the threat of a loss of seats is always there. An important

additional check on democratic excesses in a multiparty system would be the requirement that legislation receive a supramajority vote. An alternative to a separate branch of government that can veto actions of the legislative assembly is to require a substantial consensus in the legislature to pass legislation.[13]

A constitution can offer additional protection. Parliament can be prevented from passing a variety of forms of legislation by including definitions of individual rights, and by raising still further the majorities required to interfere with the market process, to intervene in lower levels of government, to engage in redistribution, etc. (See Chapters 6, 15, and 16.) Adequate options to guard against possible excesses of parliament without placing the executive branch as a major obstruction in front of it are available in a multiparty system.

Although the above arguments weaken considerably the case for granting the chief executive a veto over legislative acts, the chief executive might still be allowed or even required to propose budgets and programs for governmental agencies. Arguments in favor of this option are two. First, information about both needs and costs may be gathered directly by the agency (e.g., defense, health care). Second, in a multiparty system in which the parties are widely divided and some form of qualified majority rule is used, the legislature may find it difficult to draft and pass legislation.[14] The proposals of the executive branch then can serve as the initial motion upon which the legislature focuses.

Should it be likely that the legislature is so badly split that it cannot agree on either the motions from the executive branch or substitute proposals of its own, the executive branch could be strengthened even further. A proposal of the executive branch could become law after a set number of months *unless* the legislative body passed a substitute motion. The higher the required majority to pass legislation, the more power the chief executive and his party would hold. For example, a party with 34 percent or more of the votes in parliament *and* one of its members as chief executive could, with a two-thirds majority required in parliament, block any substitutes for proposals of the chief executive.[15] The chief executive and his party's representatives in parliament would be an unstoppable coalition. Should this danger strike the framers of the constitution as more worrisome than that of a parliament deadlocked on legislation, it will want to specify a more limited role for the chief executive, like that of only making the initial budget and legislative proposals.

Control over the Executive Branch and the Bureaucracy

Information is power. A military commander who knows the strengths and weaknesses of his own forces and those of the enemy can play on the ignorance and fear of the general public and their representatives to secure greater resources. He can ensure that his sponsors remain ignorant by concealing intelligence reports about the enemy and internal evaluations of his own capabilities. Information that would allow his claims to be verified and evaluated becomes "top secret." All bureaucracies have discretionary power to the extent that they have information about their operations that the principals they serve do not have.[16] If the bureaucrats know their own costs, but their sponsors do not, they can inflate these costs or expand their bureau to their benefit and their sponsor's loss. Bureaucrats may secretly be able to channel programs to interest groups which reward the bureaucrats by offering them bribes, promises of high paying jobs when they leave government, or simply by keeping "off their backs."

A bureau and its sponsors (the parliament that approves its funding, the taxpayers who ultimately pay for it) are joined in a principal-agent relationship. As principals, taxpayers want the quantity and quality of road construction that maximizes net of cost public-benefit. Bureaucrats, like everyone else, prefer high incomes to low, more leisure to less, etc. These goals can be achieved by hiring more staff than are needed, by paying higher salaries than required, by expanding the bureau's size to justify greater staff and higher salaries, by awarding construction contracts to the bidder who offers the highest bribe or future salary rather than the one offering the lowest price. Discretionary bureaucratic power manifests itself as higher costs per unit of output, and/or greater output than is socially optimal.[17]

The principal-agent problem arises because agents have goals that conflict with those of the principals and the discretion to pursue these goals because the principals cannot monitor all of the activities of the agents. Reducing the principal-agent problem's consequences requires tying agent rewards to the goals of the principals, or better monitoring of agents. Six options are discussed in this section.[18]

Control the Bureaucracy's Leaders

We have already discussed having the legislature or chief executive appoint heads of the major ministries in the executive branch. The intent here is in part to get someone who shares the objectives of parliament inside the bureaucracy where she can come to understand its operations, and thereby better monitor it. This intent is more likely to be fulfilled the more expertise the appointed official has in the area of the bureau's operations and the longer she remains as its head. Both of these considerations favor the appointment of individuals who are not members of parliament at the same time. On the other hand, it is perhaps more difficult for a bureau to capture a member of parliament and the probability of being captured undoubtedly rises with the length of service as a bureau's head.

The staff, which the appointed agency head supervises, is composed of career bureaucrats who often have long tenure in the bureau. To the extent that they pursue objectives that conflict with those of the sponsor, they have an incentive to conceal relevant information from their appointed leader. This may not be difficult in a large and complex bureau.

A demoralized and rebellious agency staff may produce even less output of the type the parliament requested than one which is happy, in part due to the rewards it is able to garner without the parliament's knowledge. The appointed agency head may thus find that it is best for her, given her short tenure as an agency head and the time required for fundamental reforms to curb inefficiency and corruption, "to play ball" with her bureau's permanent staff. It is better to win the war with some, even considerable, waste than to lose it in a cost-effective manner. Even well-intentioned and competent appointed administrators may find it best to be "captured" by their agency to some degree.

A Government Agency Watchdog

One way to avoid "capture" is to have an independent agency of government monitor all other agencies. The Government Accounting Office (GAO) in the United States performs this role. The goals of a watchdog agency are to gather information on other

government agencies and expose inefficiency and corruption. Its staff should be rewarded with bonuses and promotions to the extent that it achieves this goal.

As always, there is a question of who monitors the monitors. With the authority to demand information from any bureau, and the goal of exposing inefficiency and corruption, a watchdog agency becomes a prime target for bribes and other sources of interest-group pressure itself. To encourage its staff to resist these temptations and pressures, it should be well rewarded for the cost reductions it brings about. As a watchdog for all of government, this agency may also be feared and hated to a degree by the rest of government. Thus, all other agencies may be inclined to monitor the watchdog agency, thereby mitigating its discretionary power. The American experience certainly suggests that a watchdog agency can be a useful adjunct to the legislature's efforts to control the bureaucracy, however.

Access to Information and a Free Press

Information is power, and thus the most effective control of the discretionary power of bureaucrats is to make the information they have generally available to the public. The bids of all contractors can be reviewed after the bidding; the cost and benefits study that is used to justify the new highway is available for public scrutiny. If government exists to provide goods and services citizens want, then citizens should be able to learn whether they are getting the goods and services their representatives promised and authorized at the lowest possible price. In the United States, "free access" to the information of government bureaus is guaranteed by the Freedom of Information Act. This act was passed by Congress, but one could guarantee this access by giving citizens a constitutional right to information held by government. Just as the citizen has a constitutional right to know why he has been placed in jail, he has a right to know why the entrance to the bridge must be on his property.[19]

Of course, the public interest is served by secrecy in some instances, but the authority to remove information from public scrutiny to protect the public's interests can also be used to protect a bureaucracy's interests. And, given a conflict between the public and the bureaucracy's interests, it is the latter that generally dominate. As Erwin Griswold, former Solicitor General of the United States who prosecuted the government's case *against* publication of the "Pentagon Papers," later reflected, "It quickly becomes apparent to any person who has had considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not national security, but rather with governmental embarrassment of one sort or another" (Schlesinger, 1989, p. 448). An important factor in the growth of the defense establishment since World War II, and in America's unfortunate experiences in Southeast Asia, has been the increasing extent to which U.S. presidents have used executive privilege to conceal administration actions from Congress, and the Defense Department has used its authority to classify "sensitive information" to the same end. Moreover, once it becomes accepted that concealment is a legitimate tactic to protect a bureaucracy, falsification becomes more acceptable and it too becomes part of "the secrecy system" (Schlesinger, 1989, Chap. 10). The "Pentagon Papers," Watergate, and Irangate are only the most spectacular examples of a large and continuing process in which members of the executive branch—from the president on down—have used secrecy to protect themselves and their actions from the disapproving eye of Congress and the public.

How can the public be protected from the abuses of authority that so often accompany secrecy, while at the same time allowing the executive branch and the bureaucra-

cies it controls to conceal certain facts whose revelation could seriously harm the public interest? The impartial balancing required obviously cannot be entrusted to the agencies and officials who produce and gather the information. A quasi-judicial decision must be made, and this will require a quasi-judicial body. The legislature could appoint administrative judges to a special agency that would review all documents that were proposed for classification—i.e., that would not be made available to the public upon request. Although the bulk of these would presumably come from the defense and foreign affairs ministries, in principle all ministries could request that certain documents be so classified. Only documents approved by this administrative court could be legally withheld from the public. Given the importance of knowledge and free discussion to the healthy functioning of a free and democratic society, the administrative court's charge would presumably be to allow information to be classified only when its release promised a significant and lasting adverse effect on the public interest.

There are several possible drawbacks to such a procedure, although none seems insurmountable. The value of keeping information secret generally declines rapidly with time, either because the circumstances that made secrecy valuable change or the information becomes public anyway. Thus, the general rule should be that any classifided information is automatically released after a limited period, say five or at most ten years. The judgment and honesty of judges could then be monitored by reviewing the information they classified at the time it becomes public.

In rare circumstances it might be desirable to renew the classified status of a given document or piece of information. Such renewals might be submitted to a panel of judges to help ensure the integrity of the system. Although administrative judges might be given indefinite or even lifetime appointments to encourage impartiality (see Chapter 19), they could be made subject to removal if, upon review of their past decisions, they were found to be seriously deficient.

It is one thing to make information available to the public, another for the public to acquire information and use it to monitor the executive branch and its agencies effectively. Information gathering for the public interest is a public good and, like all public goods, is likely to be underprovided as a result of free riding. Although no individual has an incentive to spend days in the corridors of a government bureaucracy to discover gross misuse of public funds and inefficiencies, he may choose to acquire this information along with the other news of the day in the morning newspaper. The public-good nature of information gives newspapers an incentive to make an up-front investment to gather it, and then to sell it to large numbers of buyers at a small fee. The press to a considerable degree solves the free-rider problem by gathering information and disseminating it to large numbers of citizens at low cost. Citizens' rights to the information held by government bureaucracies—and the press's right to publish this information—serve as important potential constraints on bureaucratic discretion. Their importance is underscored by the gross corruption, inefficiency, and abuse of position by bureaucrats in those countries in which citizens do not have these rights. It is further illustrated by the inefficiencies and abuses of power in the United States by the few agencies that are allowed to classify information and thereby prevent citizens from obtaining it on the grounds that such secrecy serves the *public* interest.

Competition Among Bureaus

In markets for private goods, competition among firms is relied upon to induce efficiency. Information as to which companies are more efficient is provided by the price

mechanism. Quality and service are ensured by the desire of corporations to develop and maintain reputations. The efficient provision of a pure public good requires a single supplier, however. Thus, monopoly seems like the "natural" market structure for government-provided goods and services with the concomitant loss of efficiency and gain in bureaucratic power.

All goods and services that government provides are not *pure* public goods, however. Moreover, even when a good must be provided by a single agency, competition among different agencies for the right to supply it may secure some, perhaps all, of the benefits from competition (Demsetz, 1968). Introducing competition wherever possible in the provision of government goods and services is a fourth way to curb bureaucratic discretion and increase governmental efficiency (Niskanen, 1971, Chap. 18).

There are at least three ways in which competition can be enhanced in the provision of government goods and services. First and most simply, one can use private firms either as the actual suppliers of services, or as checks on government bureaus. Many governmentally provided goods and services (trash collection, fire protection, education, housing) are also provided by private companies. Cost comparisons almost invariably reveal that private firms supply the same services as do public firms at substantially lower costs (Borcherding, Pommerehne, & Schneider, 1982). Government provision of a service on average roughly doubles its costs. Switching, to private provision where possible, or employing the threat of switching, can eliminate the power that public bureaucracies have over the polity.

Even when the government supplies a given service like education, efficiency can be enhanced by introducing competitive bidding for construction projects and other components of the service. School buildings can be built by private construction firms; the books bought from private publishers; the lunches prepared by private caterers. Such competitive bidding can both reduce the costs of government services and provide citizens and their representatives with information to form judgments about bureaucratic efficiency. Bidding for government contracts often attracts little public attention, however. Consequently, bid rigging is a favorite way in which bureaucrats exercise their discretionary power. For competition among private government contractors to be effective it must be complemented by other institutions discussed in this section, namely (1) parliamentary appointment of ministers, (2) a watchdog agency, (3) freedom-of-information rights and an inquisitive public or press, and/or (4) an effective meritocracy system as described in the next subsection.

Finally, competition can be engendered among public bureaus. A large metropolitan area might, for example, establish four school districts instead of one. The performance of each in terms of test scores and costs could then be compared. Over time, schools and resources could be transferred from the less to the more efficient district(s). Fire and police departments could be similarly organized. Niskanen (1971, Chap. 18) has discussed the efficiency gains from different branches of the military competing for assignments.

Each of these suggestions introduces some "wasteful duplication" into the government process. Why have four school districts and four school superintendents instead of one? Why have all branches of the military with air capabilities? All competitive markets involve duplication, however, and many probably involve some wasteful repetition of investment. Such duplication also spurs competition. When average costs do not fall steeply, it is arguably a reasonable price to pay.[20]

Professionalism and Meritocracy in the Government Bureaucracy

When I first lived in the Washington, D.C., area in 1966, I earned $12,000 a year in salary; the governor of the State of Maryland earned $15,000. I considered the differential rather modest, as I was but one year out of graduate school. The man who was governor of Maryland at that time went on to be vice president of the United States, but he had to resign because he had taken bribes while governor. Spiro Agnew was neither the first nor the last American governor involved in bribery and corruption scandals. Bribery scandals are commonplace in politics, and they have been so dramatic in Japan and Italy in the early 1990s that they have led to demands for constitutional reform.

In the United States, politicians and government officials have traditionally been held in low esteem and been paid low salaries. Not surprisingly, government has often attracted individuals of dubious character who have supplemented their salaries by taking advantage of the opportunities their positions in government provide. With official salaries far below the incomes that individuals can earn in similar jobs outside of government, only the wealthy or the corrupt can afford to be in the government.

An alternative way to reward government service is to make status and income in government commensurate with responsibility. To promote efficiency and curb bureaucratic power, reward competence and efficiency with bonuses and promotions, and penalize incompetence and inefficiency with dismissal. Make government jobs sought after, so that competition among members of the meritocracy can help to police bureaucratic power.

Such reward systems are most easy to administer when the desired output of a government agency can be readily measured, and agency budgets and individual compensation formulae tied to output. If the goal of a penal correction system, for example, is to prevent released prisoners from committing another crime, then prison budgets and individual salaries and bonuses can be tied to the fraction of released prisoners who do not get rearrested. High school administrator and teacher salaries could be linked to the fraction of graduates entering or graduating from college. Where feasible, compensation formulae such as these can mitigate the principal-agent problem by tying the goals of bureaucrat-agents to the objectives of taxpayer-citizen principals.

Procedural Constraints

Finally, the legislative body can establish procedures each bureau must follow that effectively tie the bureaucracy's hands. These could include (1) holding public hearings so that all points of view are aired, (2) conducting independent cost-benefit studies, (3) using legislature-defined discount rates in calculating future benefits from public investments, and so on.[21] Procedures such as these can systematize the dissemination of information about bureau actions, thereby reducing bureaucratic discretion indirectly, as well as directly forcing bureaus to take certain actions. Procedural constraints also are likely to raise the administrative costs of implementing programs. But they still may be the cheapest way to control bureaucratic discretion.

Conclusions

To advance the interests of citizens, political institutions must accurately reveal what actions citizens wish to undertake and then carry them out effectively. These two tasks

correspond to the legislative and executive functions of government. If modes of representation to the legislative assembly allow it to choose the "best policies" for the nation, then the executive function can be limited to the purely administrative tasks of seeing that these policies are faithfully and efficiently implemented. Those in the executive branch, including the chief executive—if there is one—need possess only administrative skills.

Administration implies bureaucracy, and with bureaucracy comes the danger that the citizens' interests, as articulated by the legislature, are subservient to the interests of the bureaucrats employed to implement the government. The information that bureaucrats possess and the authority of their positions give them the power to advance their own interests at the expense of other citizens. The challenge is to design institutions that limit if not eliminate entirely the scope that bureaucrats have to distort legislative objectives while ostensibly carrying them out.

We have discussed several institutions for controlling administrators in government bureaucracies. Not all of them would require action at the constitutional level. Citizen access to information in government could be implemented as a constitutional right, however. Information is the source of bureaucratic power. Presidents Johnson and Nixon were able to lead the United States through the military disasters of Vietnam and Cambodia in large part because they concealed their intent and their actions from the American public (Schlesinger, 1989, Chap. 7). The growth of the "imperial presidency" in the United States since World War II has been fostered to an important degree by the growth of secrecy in the executive branch of government (Schlesinger, 1989, pp. 445–56). In addition to protecting the right to speak what one knows, the constitution makers could protect the right of the citizen to know that which those in *his* government know and do. Although some limitations on this right are desirable, the general presumption should be that the citizen has the right to review all information and actions of the government that can affect his welfare. As a further guarantee of this right, the constitution could establish independent administrative courts to review the classification of government information. The responsibility of these courts would be to see that information was withheld from the public only when its release would be likely to do serious damage to the public interest. Constitutional provisions guaranteeing citizens access to information within government are one of the most important possible checks on government's power over the citizenry.

The central constitutional issue with which this chapter is concerned is the definition of the executive branch and enumeration of its functions. If a single chief executive outside of the legislature is created, his or her duties and constraints must be delineated.

Under a two-party system the executive and legislative functions are combined, but if a multiparty system is chosen, the issue of the division of power between the two branches must be defined. One reason to limit executive authority under a multiparty system is to avoid a stalemate between the executive and legislative branches. Such stalemates have occurred in Latin American democracies in which multiparty parliamentary systems have been coupled with strong presidential authority, and have often led to paralysis and governmental collapse.[22] Stalemate has characterized the U.S. government in recent years, particularly on domestic issues.[23] A second reason to limit executive authority is to avoid the danger that the chief executive can become a dictator and abolish the country's democratic institutions.

Finally, in delimiting the powers of the legislative and executive branches, the framers of a constitution must consider the possibility that some person might occupy the

position of chief executive in the future who will seek to convert it into a dictatorship. We take up this issue in the following chapter.

Notes

1. Gwyn (1986) lists *five* different theses justifying a separation of powers, of which these are two. The other three are compatible with one or both of the two theses discussed in the text. One also encompasses a separate judiciary, taken up in Chapter 19.

2. Private tax collectors have been used by governments in the past, but this system is subject to its own abuses. Local governments often contract out tax collection to higher governmental units. A bridge can be financed by bonds with tolls charged to pay for it. This solution might still require a toll *authority* to gather the tolls.

3. Gwyn (1986, p. 70) cites John Adams, John Jay, Thomas Jefferson, James Madison, George Washington, and James Wilson as expressing concern about efficient execution of policy. See also Arendt (1963, pp. 146–53), and Fisher (1972, Chap. 1).

4. On these, see Simon (1957), Downs (1967), and Breton and Wintrobe (1982).

5. Gwyn (1986, pp. 78–83) argues that executive and legislative functions remain separated even in the British parliamentary system. He admits, however, that the separation is weakened to the extent that party discipline is strong, and he cites observers to the effect that the British Parliament in recent years has merely "rubber-stamped" cabinet decisions. The logic of the two-party system implies that this development is desirable. The function of the *party* in a two-party system is to recruit and develop future party leaders, and to maintain channels for information flows between the government and the citizens.

6. Should the same member of parliament remain the head of an agency for a prolonged period, she might eventually be "captured" by the agency. This danger can be avoided by moving the minister to another agency, or from an executive role entirely, although this solution in turn raises the costs of agency heads lacking expertise.

7. Voting by veto and the probabilistic majority rule can also be easily adapted to elect a president.

8. Gwyn (1986, pp. 76–77) describes this alternative as the assembly method, since all authority lies essentially with the assembly and speaks somewhat disparagingly of it, citing both Marx and Lenin as its champions. But with strong parties and party leadership in the parliament, it need not function like a herd of buffalo ready to be stampeded by the first demagogue who comes along.

9. Recall that this same fear originally led to the Senate not being popularly elected.

10. See Schlesinger (1989).

11. The fear of democracy at the end of the eighteenth century is also apparent in state constitutions that sometimes required that governors be elected biannually if not annually.

12. As quoted in Gwyn (1986, p. 71).

13. Both voting by veto and the probabilistic majority rule are designed to induce agreement on compromise types of proposals. See Chapter 11.

14. Point voting, voting by veto, and the probabilistic majority rule force parties to reveal positions on issues and ensure that decisions are made.

15. Of course, if the constitution framers anticipate that it will be difficult to form coalitions in the parliament, they are less likely to require a supramajority of parliament to pass legislation.

16. All bureaucratic discretion models give the bureaucrat important information. For example, in Niskanen's (1971) well-known model the bureaucracy knows both its own cost structure and the sponsor's demand. The sponsor knows only its own demand. A now classic discussion of the power-information-uncertainty relationship is by Crozier (1964). See my review and citations (Mueller, 1989a, pp. 248–50).

17. See discussion and references in Mueller (1989a, Chap. 14).

18. For a survey of the literature on bureaucracy that emphasizes the principal-agent problem, see Moe (forthcoming).

19. Note that this right to information is likely to fit the criteria for establishing rights set out in Chapter 14. Preventing citizens from exercising this right can impose large costs upon them—expensive projects that should not have been undertaken, bridges that collapse because bribes were accepted, wars that were entered that should not have been. The benefits to government bureaucrats from secrecy on the other hand seem small—avoiding embarrassment, receiving bribes.

20. For many public services supplied by local governments the average costs appear to be close to constant. See Borcherding and Deacon (1972), Bergstrom and Goodman (1973), and Borcherding, Bush and Spann (1977).

21. For accounts of the U.S. Congress' use of procedure to constrain public bureaucracy, see McCubbins, Noll, and Weingast (1987, 1989).

22. See, for example, Lamounier's (1990) discussion of Brazil, and Valenzuela's (1990, pp. 50–51, 62–66) discussion of Chile. More generally, see Huntington (1968, pp. 1–32, 93–139) and Mainwaring (1992).

23. Stalemates have generally not occurred on foreign-policy issues because Congress has relinquished its role to the president in this area. Apparent exceptions, like disagreements over defense budget items, are generally based on the *domestic* issue of where the money gets spent rather than on an effort by members of Congress to influence the country's defense strategy. On the issue of stalemate between Congress and the presidency, see Cutler (1986), C. Hardin (1989), Sundquist (1986, Chap. 1), and McIlwain (1940).

18

Dictatorship

> *Voluntary agreement gives . . . Political Power to Governours* for the benefit of their Subjects, to secure them in the Possession and Use of their Properties. And *Forfeiture gives . . . Despotical power to Lords* for their own Benefit, over those who are stripp'd of all property. (italics in original)
>
> JOHN LOCKE

One of the great challenges a constitutional democracy faces is to protect itself from those who would impose an authoritarian regime on the polity. The first observation to be made is that no set of institutions is "dictatorship proof." A constitution is a set of rules written on a piece of paper, or perhaps written into the political history of a nation. It is words and ideas. Words and ideas do not stop bullets. Whether a constitutional democracy survives may depend on whether a general obeys a president's order to incarcerate the duly elected parliament; whether someone challenges a violation of the constitution by a president or general seeking to create a dictatorship; whether the courts decide such a challenge on its merits or succumb to threats from the would-be dictator; whether the police enforce an order by the courts against the would-be dictator. Human actions, often exhibiting extreme courage in the face of grave risks, are needed to preserve democratic institutions when challenges such as these arise. No constitution can guarantee human bravery. At best, a constitution can reduce the probabilities that such bravery is needed.

Much has been written about the social conditions under which democracy is more or less likely to thrive (e.g., Huntington, 1968, pp. 24–59). In part, these conditions also predict the likelihood that dictatorship will be tried, and if tried whether it will be perpetuated. Constitutional democracy has a better chance of succeeding in a country with a developed industrialized economy, a fairly uniform distribution of income, and one that lacks significant ethnic and religious divisions.

Nevertheless, political institutions can constrain the demand for dictatorship on the part of citizens and the supply of those willing to run the risks of trying to seize dictatorial power. We explore some constitutional options in this chapter.

Constraining the Demand for Dictatorship

The Economic Environment That Fosters Dictatorship

Dictatorships do not typically arise in democratic countries that are well governed. They occur most frequently in "crisis" situations, which the democratic government seems

incapable of resolving. Adolf Hitler's rise to power in Depression-plagued Germany is an obvious example.[1] Citizens of a democracy are unlikely to support the overthrow of institutions that are serving them well.[2] To avoid dictatorship the constitution should seek to avoid the crises that precipitate it or, to the extent that this is not possible, reduce the likelihood that the citizens hold an elected government responsible for a crisis it did not cause.

In Latin America, where the displacement of democratic institutions with dictatorships has been a common occurrence, the *crisis* precipitating this event has been typically of macroeconomic origin (Dean, 1970; Wiarda, 1990, Chap. 7). In some instances the crisis has been precipitated by an exogenous shock that slowed economic growth, in others by the slowing of the economy caused by the down phase of a normal business cycle. Often the government is striving to respond to the demands of some groups for redistribution. These demands become more intense when the economy slows (Hirschman, 1979, p. 94), increasing pressure on the government to raise the incomes of some groups. The government responds to these pressures by increasing expenditures and/or cutting taxes, and covers the ensuing deficit by printing money. Inflation soars, the domestic currency collapses, credit disappears, and the economy grinds to a halt. Then the military steps in claiming that it, and only it, can bring about the tough economic reforms that are needed (O'Donnell, 1973; G. Smith, 1989, Chap. 2). We first briefly review the histories of a few Latin American countries, and then discuss the implications with respect to constitutional provisions.

ARGENTINA

Democratic institutions in Argentina[3] gradually evolved from the middle of the nineteenth century, receiving a strong boost in 1912 when all males above the age of 18 obtained universal secret suffrage. Democracy's evolution in Argentina was halted by a coup on September 6, 1930, however. The coup was precipitated by the stock market crash in New York in the previous October, the subsequent collapse of Argentina's export sector, and the government's inept handling of the crisis. The government first attempted to counter the rising unemployment caused by the loss of exports by running a deficit. It then sought to stem the inflation caused by the deficit by cutting government expenditures. Within a year it had alienated enough groups so that little protest was offered against the coup. A pattern had been established that would often be repeated.

The next reasonably free election took place in October 1945. Juan Domingo Peron, a colonel in the junta that governed Argentina since a coup in 1943, was elected president. Peron was a populist who built his political support on redistributive programs that strongly favored the urban working class. The quotation that opens Chapter 2 is taken from a letter Juan Peron wrote to the president of Chile in 1953 advising him how to succeed in politics. His assessment of an economy's ability to absorb large wage increases and retain its health proved to be overly optimistic, however. The Argentine economy slowed in the early 1950s, and when it did the Peron government was caught between the political necessity of maintaining its high wage policies to retain labor's support and the economic necessity of cutting wages and the budget deficit to restore the business sector's confidence and stimulate investment. The government's quandary was resolved by a military coup in September 1955.

Although Peron went into exile following the coup, the mass political movement that he created—Peronism—continued to be a major factor in Argentine politics. In 1958 Arturo Frondizi won the presidency with Peronist support, having secretly prom-

ised to legalize Peronism if elected. He kept his promise and Peronist candidates won the midterm elections in 1962. To avoid the danger of a Peronist victory in the next election, Frondizi was removed from office amidst a recession in 1963 with yet another coup.

The pattern of replacing one civilian government with yet another following a coup was broken in 1966 when the military decided to take its hand at ruling. It sought to undo the damage to the economy brought about under Peronism, but was hampered by protests and strikes by the Peronists. Democracy returned to Argentina in 1973 as did Juan Peron, reelected president at the age of 78. He died the next year, however. His widow took over the presidency, but the Perons' last government succumbed to a military coup in 1976 having failed to achieve either economic or social stability.

In 1929 Argentina's GNP per capita was 0.47 of that of European industrial countries and it ranked 18th among the world's nations by this criterion. It was blessed with a bountiful agricultural sector, and a Westernized and literate population. It had witnessed the steady strengthening of its democratic institutions for nearly 70 years. By the end of the Falkland Islands War in 1983, when democracy was once again restored to Argentina, its GNP per capita had fallen to 0.18 of the European industrial countries and it ranked 25th in the world. Neither the economic nor the political promise of 1929 had been realized (G. Smith, 1989, p. 17).

Instead of being concerned with the positive-sum-game aspects of industrialization and economic development during this period, Argentina was preoccupied with the zero- and negative-sum games of redistribution. Each slowdown of the economy intensified the vigor with which the different factions in Argentina played the redistributional game to the detriment of both economic growth and political stability. Perhaps this was an inevitable consequence of the "praetorianism" of Argentine society, of the lack of a sense of the common good and public authority among the Argentineans, so that each group pursued its own ends to the ultimate without regard for the consequences for society (Huntington, 1968, pp. 78–92). But perhaps a different set of political institutions would have served the Argentine society better.

BRAZIL

Brazilian politics from 1930 to 1954[4] was dominated by Getulio Vargas, like Peron a populist, but one who also included the peasants from the agricultural sector in his political coalition, and who used patronage to cement his political support. By the early 1960s demands by the populist groups, which had been favored by Vargas and his immediate successor, Kubitschek, and of the opposing propertied groups had escalated to the point where they could not both be satisfied. Attempts at land reform and the elimination of patronage and political corruption by Janio Quadros and Joao Goulart during a recession led to a military coup and the installation of a military government that lasted from 1964 to 1985. At the beginning of 1995 Brazil is again a democracy, but one whose politics continues to be colored by corruption.

CHILE

In 1968 Samuel Huntington (1968, pp. 222–25) was able to attribute the lack of intervention of the military into Chilean politics[5] to the size of its middle class, large by Latin American standards, and the moderating role it played in the development of political institutions and mass participation in Chile. A scant 5 years later a military coup would bring Chile's 40 years of constitutional democracy to an end, and begin 15 years of uninterrupted military dictatorship.

Chile is one of the Latin American countries that patterned its constitution after the United States. The president is elected separately from the Chilean Parliament, and the president must win Parliament's approval to get his program enacted. Unlike under the U.S. system, however, the Parliament is elected under a proportional representation formula, so that the president's party may have a minority in the Parliament. When a lack of consensus between the president and the leading parties in the Parliament exists over government policies, an impasse can result. It was such an impasse that led to the fall of democracy in Chile in 1973.

From 1958 through 1970, votes in Chilean elections were split among three parties or coalitions of parties—Conservatives on the right, Christian Democrats in the middle, the Popular Action Front (Communists and Socialists) on the left. The Conservative Jorge Alessandri was elected president in 1958, and in 1964 a center-right coalition formed to ensure that the Popular Action Front's candidate, Salvador Allende, was not elected. The coalition elected Christian Democrat Eduardo Frei as president. Frei attempted some reforms (land redistribution, progressive taxation, liberal wage increases), but he lacked the support in the Chilean Parliament to carry them out effectively. His policies did succeed in creating inflation and alienating his conservative backers, however. In the 1970 election the conservatives failed to support the Christian Democratic candidate and Allende won.

Allende's program involved the nationalization of both foreign- and domestically owned enterprises (some without compensation to their owners), accelerated redistribution of land holdings, and large wage increases. The program created economic uncertainty as well as opposition from the losers under the redistribution policies. A dramatic decline in investment followed coupled with a rise in both the balance-of-payments deficit and the government's deficit. To cover the latter Allende expanded the money supply by 100 percent in 1971 and attempted to control prices through price controls. When these were lifted at the end of 1972, the price level nearly tripled in less than nine months.

Allende's own parties were split over tactics and lacked a majority in Parliament in any event. With inflation soaring in 1973, strikes ensued, the most serious by independent truckers who had been threatened with nationalization. The military took over in September 1973.

Despite a large middle class, and the longest and most stable history of democracy in Latin America, Chile's democracy could not withstand the intense polarization and strife caused by the radical program of redistribution the Allende government sought to implement. As so often has occurred in Argentina and Brazil, the coup took place during a period of rapid inflation and macroeconomic instability, but in Chile's case these too were in large part caused by the redistributional program attempted.

PERU

Peru's democratic history, like that of most of its neighbors, has oscillated between attempts at democracy and military rule.[6] The democratic government of centralist Fernando Belaunde Terry attempted to implement agrarian and other reforms in the 1960s, but was frustrated in these efforts, as was Frei in Chile, by opposition from both the left and the right. It was replaced by a military dictatorship in 1968 amidst a foreign-exchange crisis. The pattern looks very familiar *except* that the leaders of the military coup were *left-wing* officers, who took action in part out of frustration with the moderate nature of the Belaunde reforms, particularly with respect to the multinationals. The

military government led by General Juan Velasco Alvardo expropriated the assets of several multinationals, introduced laws to create worker participation in all enterprises, and initated land reforms. It succumbed to a coup by right-wing military commanders in 1975. Civilian rule was reestablished in 1980 when the military handed back the reigns of government to Belaunde. Democracy survived in Peru until 1992, when its president disbanded the Parliament out of exasperation over its inability to implement a coherent program in a country racked by terrorism and economic problems.

VENEZUELA

Venezuela's political history[7] differs from that of most other Latin American countries in two important respects: (1) It has not bounced back and forth between democratic and military rule, and (2) a consensus has existed among its major political parties over the policies that should be undertaken.

As in Chile and Peru, Venezuela has a legislature in which parties take seats in proportion to the votes they receive, and it has a separate presidency. In the elections of 1959 that followed 11 years of military rule, Accion Democratica received 49.2 percent of the popular vote, the Republican Democratic Union 34.6 percent, and the Christian Democratic party 16.2 percent. The elected president, Romulo Betancourt, might have faced the same obstacles to introducing a package of reforms to stimulate economic development as Frei and Belaunde did. But he invited the other two political parties into a grand coalition, and together they quickly implemented a program to stimulate industrialization, give Venezuela greater control over its petroleum industry, and redistribute agricultural land. The coalition subsequently came apart, and Accion Democratica lost the 1968 election to the Christian Democrats. But the major parties and interest groups have remained in agreement over the broad outlines of the policies that Venezuela should follow, and this has prevented the country from falling prey to the fierce distributional struggles that have plagued other Latin American countries. Democracy has persisted in Venezuela ever since the grand coalition of 1959 that launched its modern democratic era.

This consensus has been greatly aided by the bountiful supply of oil the country possesses, and the foreign exchange this resource generates. Thus, unlike in Chile and in other Latin American countries, when the Venezuelan government redistributed land as part of its agrarian reforms, it compensated owners at the land's market value, thereby muting opposition. Such prudence was undoubtedly aided by the revenue generated from petroleum exports. On the other hand, the growth that successful economic development produces can benefit all members of a society. If economic development would be enhanced by avoiding the strident distributional struggles in which other countries have engaged, then they might have been better off in the long run had they too reached a consensus regarding a development strategy, and proceeded ahead with all groups sharing the gains from development.

The economic slowdown of the early 1990s coupled with low oil prices has generated weak economic performance in Venezuela and widespread discontent. Several abortive coups suggest that even in a country like Venezuela democratic institutions may not survive when important groups (like the military) experience income declines (*Economist*. Dec. 4, 1993, p. 47).

DISCUSSION

In all democratic systems in which political parties compete for votes, and citizens are not fully rational, or more accurately are rationally ignorant, the temptation exists to

benefit voters today and delay the costs until tomorrow. Expenditures make some if not all citizens better off; taxes make them worse off. Thus, parties are more willing to promise things during an election and then to deliver, once in office, tax-expenditure combinations that lead to deficits (Buchanan & Wagner, 1977). Deficits require issuing debt or printing money and result in high interest rates and/or inflation. Although all democracies are vulnerable to such myopia, Latin American governments have exhibited a particularly "low propensity. . .to defer to *normal* economic constraints" (Hirschman, 1979, p. 68, italics in original).

Unemployment is an important measure of the government's performance running the economy. No government wishes to go into an election with unemployment high or rising. When unemployment is high before an election, those in government who are deemed responsible for the macro performance of the economy—the majority party, the president—have an incentive to stimulate the economy by running deficits and/or printing money.[8] Once again the short-term interests of politicians can lead them to introduce policies that produce long-term macro-instability.

Pressures for expenditure increases and tax cuts that lead to deficits are very often demands by particular groups for redistribution. One explanation for the frequency of shifts to dictatorship in Latin America since World War II has been the dominance of redistributional issues on the political agendas of most Latin American nations. Income is much more unevenly distributed in Latin America than in North America or Western Europe (Hartlyn & Morley, 1986, pp. 34–35). Asymmetries between large and small landowners in the agricultural sector, between the agricultural and industrial sectors, and between the indigenous Indian population and the descendants of Europeans have all contributed to the intensity of the distributional struggle in Latin America.[9]

Immediately after World War II, the emphasis in Latin American politics was on industrialization, however. Although all groups do not necessarily benefit from industrialization, this process does hold out the promise of rapid economic growth and substantial gains for most members of society. But after only a decade, the focus of political debate in Latin America shifted to distributional issues. This shift was particularly strong in Chile, Argentina, and Brazil, countries in which democracy has had a very unstable recent history (Hirschman, 1979, pp. 90–93; see also O'Donnell, 1973, pp. 106 ff; G. Smith, 1989, Chap. 2; Valenzuela, 1990; and Lamounier, 1990).

Not surprisingly, perhaps, demands for redistribution become most intense when the economy slows (Hirschman, 1979, p. 94). Thus, redistributional and macroeconomic policies can interact. In some cases redistributional strife can have adverse effects on the macroeconomy (Chile in the early 1970s), in others a slowdown in the economy generates greater demands for redistribution. Government attempts to satisfy these demands by increasing expenditures, by cutting taxes, and by raising wages. These actions in turn produce budget deficits, inflation, and foreign-exchange crises. Democracy gives way to dictatorship.

Implications for Constitutional Design

There are two ways to reduce the likelihood that democratic governments adopt redistributional and macroeconomic policies that produce long-term political and macroeconomic instability: (1) Eliminate the demands by citizen (interest) groups for expenditure increases, tax reductions, and other destabilizing policies; and (2) eliminate the government's power to respond to such demands.

Citizen pressure for redistribution can be constrained by (1) taking redistribution out of the hands of the legislature, and (2) avoiding the crises that induce such pressures. In Chapter 16 we discussed the rationale behind including the basic vertical redistribution programs of government in the constitution. Both unemployment insurance and a minimum income program could be established in the constitution, funded by earmarked taxes (payroll, income, value added), and administered by agencies independent of the legislature. Tax rates could be set so that the unemployment and minimum income funds ran surpluses during periods of prosperity and low unemployment, and deficits in recessions when unemployment is high and more incomes fall below the income floor. These programs would serve as automatic stabilizers and relieve the pressure on the legislature to respond to cyclical downturns by running deficits.

This pressure can be further relieved by tying the legislature's hands in responding to economic downturns. The constitution can require that the budget passed by the legislature be balanced. With major redistribution programs funded by earmarked taxes, and administered by separate, autonomous agencies, the main responsibility of the legislative body is to decide levels of government consumption activities that lead to allocative efficiency. To require that these consumption activities be paid for out of current tax revenue ensures that one generation of taxpayers does not shift the burden of paying for its collective consumption onto another.[10]

The issue of a constitutionally mandated balanced budget has been much discussed, and I shall not review this literature here (but see Buchanan & Wagner, 1977; Brennan & Buchanan, 1980, pp. 154–55, 202–3; Buchanan, 1986a, pp. 195–221). Two questions need to be addressed, however, if only briefly. Is such a requirement desirable? If so, is it feasible?

The temptation to consume today and pay for this consumption tomorrow confronts everyone. At the individual level it may be resisted because of the knowledge that one must pay more tomorrow (principal plus interest) than one has to pay today for today's consumption. But the attraction of current consumption often seems to overcome this knowledge and lead individuals to incur debts that they later regret. In addition, those who will not see tomorrow have a rational reason to incur as much debt as the market allows. The elderly should, if they are rational, take out as many unsecured loans as they can.

To avoid such temptations, individuals often place constraints upon themselves. By joining Christmas clubs[11] and following maxims like "never buy anything on credit," individuals attempt to reduce the temptation to consume more in the short run than is optimal. Credit institutions curb the rational proclivity to take out loans that will not have to be repaid by not lending to individuals where repayment is unlikely.

The same temptations and incentives to borrow for current consumption exist at the collective level. The argument that government deficits and debt tax future generations should not carry much weight with elderly voters, if they are rational and self-interested (Cuckierman & Meltzer, 1986). If the myopic or rational demands for more government spending by voters are more vehement than those demanding fiscal prudence, vote-maximizing politicians concerned with the outcome of the next election will satisfy the myopic demands.

Those writing the constitution should have as long-term a perspective as any group of citizens have. Thus, account should be taken of the constitution's impact not only on the current generation of citizens but also on those that follow. Just as individuals may commit themselves to the constraint of weekly payments into a Christmas or Holiday

club to remove the temptation not to save each week, the constitution might constrain future legislatures so that they will not succumb to short-term demands for greater expenditures and lower taxes in an attempt to make one group of future citizens better off at the expense of another.

The history of Latin America provides a second justification for denying parliaments the ability to run deficits. To the extent that these deficits lead to inflation and economic instability, they threaten the long-term viability of democratic institutions. A balanced-budget constraint could protect the democratic institutions from the shortsighted interests of future groups of voters and politicians.

Granting that a balanced-budget constraint would be desirable, is it feasible? Both opinion and evidence on this question are mixed. The experience of the United States with the Gramm-Rudman balanced-budget bill demonstrates that a legislature may not be able to pass a *law* to constrain *its* deficit-running propensities.[12] But constitutional constraints on budget deficits have effectively forced many state and county governments in the United States to curb expenditures or raise taxes when a deficit looms.

The most difficult aspect of implementing a balanced-budget constraint arises because both expenditures and taxes must be *projected* when determining whether the constraint has been met. Politicians with a propensity to run deficits tend to make optimistic forecasts of expenditures and taxes that produce low deficit estimates. Through 1993 actual deficits exceeded projected deficits in every year following introduction of the Gramm-Rudman bill.

There are at least two ways in which this danger could be avoided. First, expenditure and tax projections could be made by an independent agency, like the central bank if it is independent, with this agency having the authority to reduce (increase) all discretionary expenditures (taxes) by a flat percentage to eliminate any forecasted deficit. Second, the constitution could require that all taxes be increased by the same percentage as the previous year's budget deficit *plus* any percentage increase in expenditures proposed in this year's budget.

Even in the absence of a budget deficit, incumbent politicians may be tempted to expand the money supply to stimulate the economy prior to an election. A strong correlation exists across developed countries between the degree of independence of the central bank and the rate of inflation (Table 18.1). The Swiss and West German central banks had the most independence and the lowest inflation rates between 1973 and 1986. The three countries with the highest inflation rates over this period (Italy, Spain, and New Zealand) were among the four countries whose central banks had the least independence from the elected government. As part of the reforms to improve its economic performance, New Zealand made its central bank independent of the elected government at the beginning of the 1990s. An important protection against inflation and the economic and eventually political instability it can produce would be to make the central bank independent from the parliament and, if there is one, from the elected chief executive.[13]

These constitutional provisions would reduce the demand for dictatorship by removing the legislature's authority to respond to pressures by different groups for higher incomes by introducing zero-sum redistribution measures and/or by running government deficits and printing money. By reducing government deficits and inflation these provisions would avoid the economic crises that precipitate widespread dissatisfaction with elected governments. In the absence of such dissatisfaction, would-be dictators may not step forward, and the citizenry may not tolerate a grab for power if they do. Thus, by

Table 18.1. Inflation and Central Bank Independence (1973–86)

Country	Average Annual Inflation (%)	Index of Central Bank Independence[a]
Italy	13.7	1/2
Spain	13.6	1
New Zealand	12.0	1
United Kingdom	10.7	2
Finland	9.8	2
Australia	9.7	1
France	9.2	2
Denmark	8.8	2
Sweden	8.7	2
Norway	8.4	2
Canada	7.8	2
Belgium	6.9	2
United States	6.9	3
Japan	6.4	3
Netherlands	5.5	2
Switzerland	4.1	4
Germany	4.1	4

[a]An index of 4 implies the greatest degree of independence, 1 the least. Italy's Central Bank independence is rated as midway between 1 and 2.

Source: Alesina (1989, Table 9).

reducing the demand for governmental change (dictatorship) these provisions might also reduce the supply of dictators. There are additional measures to limit the supply of dictators, however, and it is to these that we now turn.

Constraining the Supply of Dictators

Multiparty Systems

To avoid the possibility of government paralysis because a stable coalition that endorses a particular configuration of cabinet posts cannot form, the executive and legislative functions must be separated in a multiparty system. The responsibilities and authority assigned to the executive can vary over a wide spectrum; so too, therefore, can the potential for dictatorship.

Someone contemplating a dictatorial overthrow must anticipate that his commands will be followed by key members of the executive, the military, and the police. Such anticipations are more likely to arise in individuals who already possess a wide latitude of authority and are used to giving directives on important matters and having them obeyed. If the chief executive has the constitutional authority to dissolve the legislature, to declare a national emergency and suspend an election, to declare martial law and suspend various civil liberties protected by the constitution, and if the chief executive is also commander in chief of the military, then the danger of his usurping full dictatorial power will be greater than when he has none of these privileges.

Of course, crises arise in every polity's life. Riots by an ethnic or religious group, a threat to secede by a lower-level government from a particular region, a military attack from another country, even a natural disaster like a major flood can require quick and

decisive action by the government. Vested authority to commit government resources, to mobilize units of the military, etc., ensures that quick action can be taken when necessary. Abraham Lincoln's response to the attack on Fort Sumter is the kind of decisive action in a national emergency of which only a chief executive may be capable.

But granting such powers to a single person also creates the danger that a "man of action" exercises such powers when no real crisis exists, and fails to relinquish them once he has taken dictatorial control. The inability of Germany's multiparty government to deal with the severe economic crisis of the early 1930s, with Communists pulling one way and the Nazis the other, is just the kind of paralysis that many fear of multiparty parliamentary democracy. Germany's president, Paul von Hindenburg, responding to pressure to resolve the crisis, named Adolf Hitler chancellor. Hitler did act decisively to the ultimate destruction of both himself and his country. Authority to take drastic actions in time of crisis, particularly when the latitude to define a crisis situation is left with the chief executive, opens the door to both the nation-saving actions of a Lincoln and the nation-destroying actions of a Hitler. If the drafters of the constitution are uncertain about whether future crises will produce an Abraham Lincoln or an Adolf Hitler to fill the chief executive office, they may wish to delimit that office's powers severely, while trying to craft institutions that would make parliamentary decision making more effective.

Although it did not create a multiparty parliamentary system, the U.S. Constitution did create separate branches, and thus its drafters were forced to wrestle with the power-division issue. It was the Founding Fathers' intention in writing the U.S. Constitution to assign the authority to declare war to Congress, while giving the president, as commander in chief of the armed forces, the authority to respond to surprise attacks. In the course of the next 200 years one American president after another has expanded this authority so that today decisions to go to war are essentially the prerogative of the executive branch, and the office of chief executive has been converted into the "imperial presidency" (Schlesinger, 1989). The objective behind a separation of powers was to prevent an impassioned Congress from making rash decisions like an ill-advised declaration of war. As American political institutions have evolved, however, the president, although lacking the constitutional authority to declare war, can in fact send U.S. military forces into combat without Congress's ever declaring war, as evidenced in Korea, Vietnam, and Iraq (Sidak, 1991). The checks and balances in the U.S. Constitution have proved ineffective as constraints on rash foreign policy actions of the president.

A powerful chief executive need not be all bad, of course, particularly as in the United States when the chief executive is elected by the citizens, or even if he were elected by the Congress. Lincoln came as close to being a dictator as the United States has ever experienced, and yet most Americans today applaud the outcome of his presidency and regard him as one of the country's greatest heroes. The debacles in Vietnam and Cambodia must be set against the triumphs in Grenada and Iraq. Had Congress played a much greater role in shaping U.S. foreign policy in the history of this country than it did, the results would not necessarily have been better.

The danger of dictatorship can be reduced by spreading the power to act in crises across the executive branch, or retaining some or all of it with the legislature. The latter represents the best safeguard against a dictator emerging from the executive branch. In a true crisis, when, say, the nation's very life is threatened by an external attack, a legislature can be expected to act expeditiously. Can one really envisage lengthy parlia-

mentary debates and delays to send relief to a region devastated by flood? Delays might arise, if the capital itself was hit by flood, or under aerial attack precluding the parliament's convening. To avoid such a danger, an executive committee composed of the heads of all parties represented in the legislature (or all parties holding more than a certain fraction of seats, like 3 percent) can be empowered to act in certain crisis situations, when it is impossible to convene the full legislative body. The suspension of normal parliamentary procedures is in itself such a threat to democracy that one would wish to require that any actions taken by the executive committee acting in place of the full legislature must secure a near unanimous agreement (e.g., the votes of the leaders of parties with at least 90 percent of the seats). Once again, in a severe crisis securing such a majority should not be difficult.

An alternative procedure would be to vest such authority in the executive branch, but divide it among different officials. For example, the minister of defense has authority to commit troops when the country is under external attack; the minister of the interior to commit the national guard to suppress an internal rebellion. The ministry of defense might itself be divided into the army, navy, and air force, each with its own separate executive head with sole authority to commit the forces under his command in an emergency. Such divisions do not preclude the seizure of dictatorial control, but they increase the uncertainty of success by increasing the number of individuals who might effectively challenge a grab for power. More effective than dividing authority in the military is to abolish it entirely, an action taken by the framers of Costa Rica's Constitution in 1949, which helps to explain that country's stable, democratic history over the last 40-plus years.

For many the great danger of multiparty government is its potential inability to act. But the history of multiparty governments in, for example, the Scandinavian countries or the Netherlands indicates that this incapacity is by no means endemic to multiparty representative democracy. Representative government in Switzerland functions successfully with a multiparty parliament and essentially *no chief executive*. These and many other multiparty democracies seem to be able to provide public goods and services to their citizens adequately.

The inability of the president to push his program through a divided parliament has increased frustration with democratic government in some Latin American countries and has contributed to military overthrows, as for example in Brazil in the mid-1960s.[14] But, even if true, this need not be regarded as a failure of multiparty democracy as such, but rather of the inefficiency of combining the U.S. style system of checks and balances with a multiparty system. If it is multiparty representation that is sought, then the stalemates that arise from a system of checks and balances can be avoided by having a weak presidency—e.g., the president cannot veto acts of the parliament. If it is feared that such a system would be ineffective because the parties in the parliament could not agree on the policies that would benefit the country, then the constitution could contain procedures that produce two-party government. The crises that have resulted in dictatorial takeovers have come about because *neither the president nor the parliament* was capable of implementing an effective program.

The history of European systems gives no reason to believe that a multiparty parliament would fail to take quick and decisive action should a major challenge to the welfare of the country require it. The history of Latin America suggests that those who seek to take quick and decisive action do so mainly *against the country and its elected*

parliament. The greatest threats to democracy in Latin American countries have come from within their borders. The surest way to protect democracy from dictatorship is to retain authority in the parliament, where all citizens are represented, and to employ a voting rule that encourages consensus. Constitutionally defined citizen rights and a judiciary to protect them are further safeguards against the few who wish to tyrannize the many.

Avoiding Dictatorship in a Two-Party Democracy

In a two-party system the winning party is "dictator" for the interval between elections. If the party's leader can impose his will on the rest of the party, the leader can pursue any agenda he chooses subject to the constraints of the constitution. Under the Argentine Constitution the party receiving the most votes in the election, even when it is not a majority of the votes, obtains both a majority of seats in the parliament and elects the president. This system allowed Juan Peron to introduce radical changes in Argentina that led to both the temporary demise of democracy and to that country's subsequent history of economic decline and political instability. It is a prime example of the dangers of authoritarian rule emerging from a two-party system.

Under the procedures proposed in Chapter 9 to create a two-party system, the party with a majority of seats in the parliament would always have obtained a majority of the votes cast, at least in the runoff election. Thus, a minority party could not capture the legislative and executive functions as in Argentina, and the party that formed the government could be expected to be rather broadly based.

Although a party that wins a majority of seats in "two-party" systems as in the U.K. often does not have a majority of the votes, it generally does have a reasonable amount of popular support. The leader of a broad-based political party who proposes an agenda that advances his own peculiar conception of the public good, or more narrowly his own personal interests, should encounter opposition within his own party. Even if that does not occur or is not effective, the party is dictator only until the next election. If it does not choose policies that benefit at least a majority of the citizens, its "dictatorship" will likely end after one term. As long as the parties continue to obey the constitution and step down from office after losing an election, dictatorship need not be a paramount concern under a two-party system. Two-party government does, of course, always pose the inherent danger of a "tyranny of the majority," but this need not degenerate into a minority tyranny or one-man dictatorial rule.

An ambitious and charismatic party leader in a two-party system might be tempted to go beyond the bounds set by the constitution, however, or even to ignore it entirely and not relinquish office following a defeat in an election. Adolf Hitler was leader of the National Socialist German Workers' party in Germany and Saddam Hussein of the Bathist party in Iraq, although neither came to power as the head of a duly elected majority party in a two-party system.[15] No dictatorships have emerged in the English speaking two-party democracies. Margaret Thatcher had the longest reign as prime minister of Great Britain in the twentieth century, and she is not a person lacking in either ambition or charisma. But when her party thought it was in its interest to scuttle her, it did. Although two-party democracies are probably more prone to dictatorship than are multiparty systems with a weak or nonexistent executive, they are not necessarily more likely to produce dictatorship than is a multiparty system with a strong executive.

Checks and Balances Once More

The objective behind the system of checks and balances in the United States was arguably to protect against the system becoming either a conventional dictatorship or a majority tyranny. If the former was a goal it has so far been accomplished. But out of "the struggle for the privilege of directing American foreign policy" the executive branch has emerged the clear winner so that today the decision to attack countries like Cambodia, Grenada, or Iraq rests on one man's judgment. Moreover, in times of real war and national crisis the country has been effectively converted into a dictatorship. Abraham Lincoln delayed convening Congress for 12 weeks following the firing upon Fort Sumter, and he used the time to violate one law and constitutional provision after another to create what some contemporary observers, even those sympathetic to the antislavery cause, called "a military despotism" (Schlesinger, 1989, pp. 58–60). He did so under an expansive interpretation of the powers that the U.S. Constitution grants to the president as commander-in-chief when the nation experiences armed rebellion. What course would American history have taken following the North's victory in the Civil War had Lincoln chosen not to relinquish the dictatorial powers he assumed during the conflict and an assassin's bullet had not intervened? The more legitimate authority that a constitution grants to the chief executive's office, the greater the capacity its holder will have to extend this authority illegitimately.

Conclusions

We have described constitutional institutions for limiting both the demand and the supply of dictator candidates. The institutions we describe, particularly with respect to a multiparty system, resemble those Richard Musgrave outlined as the three branches of government in his classic text on public finance in 1959. The parliament's responsibility is deciding quantities of public goods, optimal levels of activities with externalities, and constraints on individual behavior in prisoners' dilemma-type situations. When government expenditures are called for, it combines these with taxes on those who benefit from the expenditures, taxes sufficient to cover the proposal's costs. The parliament is responsible for achieving allocative efficiency; it runs the Allocation Branch in Musgrave's schema.

The primary redistribution programs that make up Musgrave's Redistribution Branch would be run by autonomous administrative agencies following rules set down in the constitution. These programs would be insurance-type programs. Individuals would be *entitled* to their benefits by meeting certain criteria—e.g., their incomes fall below a specific level, they are unemployed. The bureaucrats running these programs would have little discretion, and legal safeguards would help to ensure efficiency and honesty in administration.

Built in stabilizers in these social insurance programs would constitute the fiscal side of Musgrave's Stabilization Branch. An independent central bank would attempt to control inflation and avoid unemployment through its money supply and interest-rate policies. Parliament would be constrained to maintain a balanced budget in its Allocative Branch activities.

This system would remove, largely if not entirely, both redistribution and stabiliza-

tion policies from the parliament's jurisdiction. Many will find this feature extreme. But these policies are potentially the most divisive issues a polity faces. By removing them from the parliamentary agenda one removes the issues that often lead to strife and stalemate, issues that in extreme cases produce governmental crisis and the displacement of the polity's democratic institutions by a dictator. By removing them from the parliamentary agenda, the parliament is freed to concentrate on those government activities on which consensus is possible, on those activities that are the *raison d'être* of government in the first place. If by limiting the parliament's agenda to allocative efficiency issues, the quality of these choices is improved; these limitations will increase citizen satisfaction with the work of parliament, and thereby the strength of their support for the polity's democratic institutions.

But what of citizen demands for redistribution? What of the legitimate demands to control inflation and unemployment? If the parliament's hands are tied in responding to these demands, will citizen frustration not arise and democracy be threatened?

In the United States the bulk of *vertical* redistribution (i.e., redistribution from rich to poor) is accounted for by insurance-type systems like Social Security and unemployment compensation (Mueller, 1989a, Chap. 23). These programs are administered by agencies with considerable independence. Little would change by shifting their authorization to the Constitution except that Congress would not be able to tinker with them. Social insurance programs are a part of the Swiss Constitution and are altered by amendments passed by national referenda. There is no reason to expect that redistribution through insurance programs that enjoy widespread popular support would be any less if redistribution were authorized by the constitution, as long as the procedures for including such programs in the constitution are not unduly restrictive. What would be jeopardized by constraints on the redistribution activities of the parliament, as from a supramajority requirement, are the kinds of redistribution programs that arise from interest group or class pressures. Some will regard this as an unacceptable deference to the status quo. But when fundamental redistribution programs are pressed upon a country in the absence of a consensus in their favor, it is more often than not the country's democratic institutions that pay the price, not social injustice.

The belief that democratically elected governments should be responsible for macroeconomic stability *and* that they are capable of doing something positive about it arose in the post–World War II era. It reached its apex in the United States during the Kennedy administration in the early 1960s. Since the early 1960s, inflation rates, unemployment, and government deficits have *all* grown across the developed countries (Mueller, 1989a, pp. 301–6). The two countries with the most independent central banks, West Germany and Switzerland, have had lower inflation rates, unemployment, and government deficits than has the average developed country throughout this period.[16] There is no reason to expect that a combination of the built in stabilizers of social insurance programs and an independent central bank could not do at least as well in achieving macro-stability as a parliament or chief executive who tries to manage both the business cycle and the electoral cycle at the same time.

Under this tripartite division of government, the citizen would look to her *elected* government—i.e., the parliament—only to satisfy those public good-type wants that she holds in common with her fellow citizens. She would have to rely on the wisdom of the central bank to control inflation and unemployment. Should she lose her job, she could exercise her right to unemployment compensation, or to a minimum level of income, or perhaps other insurance-type policies like job retraining. But she would be unlikely to

be able to secure special protection from the parliament in the form of tariff increases, industry subsidies, a guaranteed job or wage. The cost of controlling the potential harm that government can do to citizens is the elimination of some of the potential good it can do. The benefit and cost of constraining the scope of government activity is that citizens can and must assume greater responsibility for their own welfare.

Notes

1. Frey and Weck (1983) attribute much of the rise in German voter support for the Nazi party to the rise in unemployment from 14 percent in 1930 to 52 percent in 1933.

2. Of course, in newly formed democracies the citizens have limited experience with this form of government. Lacking knowledge of both the benefits and the liabilities of democratic institutions, they may not put up much objection to their disappearance. Democratic institutions may have been less viable in Latin America than in Europe and North America, because Latin Americans place a lower value on the preservation of democracy (Wiarda, 1990, pp. 39–46).

3. My discussion of Argentina draws on the work of O'Donnell (1973), G. Smith (1989), and Wynia (1990, Chap. 10).

4. Material in this section is taken from Wynia (1990, Chap. 9).

5. Material in this section is from Garreton (1986), Wynia (1990, Chap. 7), and Valenzuela (1990).

6. This section draws upon Schydlowsky (1986) and Wynia (1990, pp. 275–80).

7. This section draws upon Wynia (1990, Chap. 8).

8. See Nordhaus, 1975; Lindbeck, 1976; MacRae, 1977; Fair, 1978, 1982; Tufte, 1978. For contradictory evidence, however, see McCallam, 1978; Paldam, 1979, 1981; Beck, 1982; Hibbs, 1987, Chap. 8.

9. Hannah Arendt (1963, p. 155) has argued that the American Revolution led to successful experiment with democracy, while France's did not, because America had a fairly homogeneous distribution of population and little abject poverty, in stark contrast to the situation in France at the end of the eighteenth century, or in much of Latin America today.

10. Some government expenditures are of an investment nature and could (should) be financed by issuing debt. Suppose, for example, that a bridge costs $500 million, and that with $40 million maintenance per year it lasts indefinitely. To spread the burden of paying for the bridge across all generations benefiting from it, its construction could be funded by a $500 million bond issue, and the $40 million maintenance expenditures plus the interest on the debt raised annually by taxes. The existence of government-investment activities argues for separate consumption and capital components to the government's budget, with capital depreciation and interest on debt included in the consumption component.

11. Christmas clubs began as savings plans that forced individuals to save by imposing penalties if weekly deposits were not made. For this service, thrift institutions received no fees and paid no interest.

12. Bennett and DiLorenzo (1983) describe the many ingenious ways that governments in the United States avoid constitutional constraints on their budgetary decisions.

13. Although independence protects the central bank from short-term political pressures, it does not ensure that the central bank pursues policies in the long-term interests of the nation. What incentives do fully independent central bankers have to do good? There is no obvious answer to this question. As with the judiciary, one mostly needs to trust that both the prestige and the responsibility of the office induce conscientious exercise of duties, with procedures in place to remove central bankers in extreme cases of incompetence or corruption (see Chap. 19). For a discussion of this and related issues of political control of economic policies in the context of the United States, see Keech (1994).

14. On Brazil, see Lamounier (1990) and on Chile see Valenzuela (1990). For general discussions of this point, see Huntington (1968, pp. 1–32, 93–139), and Mainwaring (1992).

15. Hitler's rise to power can be interpreted as an example of the dangers of combining the executive and legislative branches in a *multi*party system. In a multiparty system, extremist parties can win seats and, if the cabinet is formed in the parliament, may hold cabinet positions. In rare circumstances, like Germany in the early 1930s, a member of an extremist party might even become prime minister (chancellor). This can *never* happen under a two-party system, since a majority party is by definition not extremist. If leadership of the executive branch is determined in separate elections or by consensus vote of the parliament, it need not happen under a multiparty system.

16. Reunification brought unemployment, inflation, and large government deficits to Germany for the first time since its recovery from World War II. These problems arose because reunification was not approached as an action that would benefit citizens in both West and East Germany with taxes and expenditures set accordingly, but as a program involving a large redistribution from the West to the East. Much of this redistribution—for example, the one-for-one exchange of East marks for West marks when the true economic value of the East mark was much lower, rapid increases in wages in the East to achieve parity with the West despite persistent large differences in productivity—took place without the pain of increased taxes on the West. Rather (and predictably), the pain came in the form of budget deficits, inflation, and unemployment.

19

The Judiciary

A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

ALEXANDER HAMILTON

The peace, the prosperity and the very existence of the Union, are invested in the hands of the. . . . judges. Without their active cooperation the constitution would be a dead letter: the executive appeals to them for assistance against the encroachments of the legislative powers; the legislature demands their protection from the designs of the executive; they defend the Union from the disobedience of the states, the states from the exaggerated claims of the Union, the public interest against the interests of private citizens. . . .

ALEXIS DE TOCQUEVILLE

We think of a constitution as a contract joined by all citizens of a country to advance their common interests. Like all contracts the constitution may be vulnerable to the opportunistic behavior of the parties to it. Institutions are needed to enforce the constitutional contract and to arbitrate disputes among the citizens over its content.

To advance the common interests of the citizens, institutions must be established to reveal what the common interests are, and to carry out the actions required to advance them—a legislature and an executive. But in so doing the citizens create agents, who will seek to advance their own interests; thus the citizens create the Sorcerer's apprentice problem. A second possible role for the judiciary is as agent of the citizens to protect them from the actions of their agents in the other two "more dangerous" branches.[1] In this chapter we develop the rationale for a separate *and independent* judicial branch of the government, and we discuss how it might best be designed, along with various other sundry matters concerning the judiciary.[2] In contemplating the proper role of the judi-

ciary in a constitutional democracy, it is useful to begin by drawing an analogy between the problem faced by those writing the constitutional contract and the problem everyone faces when joining any contract.

The Selection of Arbitrators in Private Contracting

Individuals join contracts voluntarily to reduce uncertainty or to reduce uncertainty's effects. In particular, a contract can reduce or eliminate uncertainty over the future behavior of the other individuals who are party to it. To achieve this potential, however, the behavior of the parties must conform to that stipulated in the contract. To prevent the opportunistic breaking of the contract when it is to someone's advantage, individuals when joining can specify penalties for breaking it and procedures and institutions for policing it. Because policing is required owing to the potential opportunism of the parties to the contract it will generally not be optimal to select one of the parties to the contract to police it. Instead, a third party will be selected whose sole responsibility is to judge whether the terms of the contract have been carried out and, if not, to mete out the required penalties.[3]

In the absence of a governmental judicial system to enforce contracts, individuals could be expected to resort to private judges. Parties to a contract might, for example, agree on a particular person who would arbitrate any disagreement over compliance with the contract, and would be in a position to enforce his decision (e.g., each party might deposit a bond with the arbitrator). Although each party to a contract might wish to have a judge who was prejudiced on her behalf, no one would consciously join a contract that would be arbitrated by someone who is biased against her. In private contracting, the impartiality of the judge would be ensured by the necessity of agreeing on the judge's identity, by the unanimous agreement between the contracting parties on the identity of the arbitrator.[4]

The Judiciary as Agent

On Behalf of the Citizens Against the Other Branches

In creating a legislature and perhaps an executive, the citizens create agents who in the pursuit of their own goals may turn against the citizens. One way this might happen is that an interest group "captures" the legislature or executive and induces it to undertake an action that harms a majority of the citizens.

In Chapter 14 we discussed a class of actions involving externalities and extreme asymmetries in effects, where citizens at the constitutional stage wish to protect future minorities from the actions of a majority of citizens, usually effectuated through the legislature and the executive, by defining constitutional rights. An institution or agent is needed to protect the citizens should their "duly elected" representatives in the legislature or agents in the executive choose to undertake actions that harm a majority of citizens to benefit a few, or violate the constitutional rights of all. This agent *must logically* be empowered with the authority to arbitrate future conficts over the constitution and to overturn any actions of the legislature or the executive that violate it.[5]

On Behalf of the Citizens Between the Other Branches

When the constitution creates separate legislative and executive branches, as it would with a multiparty parliamentary structure (see Chapters 8 and 17), it must anticipate conflict between the two branches. Each will be staffed with individuals seeking to advance their own interests. If the chief executive is elected, she will consider the interests of her constituency, as will the members of the parliament. Each branch can be expected to try to expand the scope of its domain at the expense of the other. An arbitrator for conflicts between these two branches will be needed. In establishing an institution for arbitrating such disputes, the constitution framers will wish not only to ensure that the disputes get resolved but that they also get resolved in such a way as to preserve the basic structure for revealing citizen preferences for collective action and carrying it out in an optimal way.

Under the two-party form of government as we have described it, conflict between the legislative and executive branches is impossible (or at least highly unlikely) as they are joined within the majority party. Conflicts between the government and the judiciary are nevertheless possible in a two-party system if the system is part of a constitutional democracy, and thus the parliament is subject to the higher authority of the constitution. Conflict between the judiciary and either the executive or the legislative branch can obviously arise when the latter two branches are separate. Thus, an arbitrator will also be needed to settle disputes between the judiciary and either of the two other branches. If the judiciary is assigned the responsibility for arbitrating constitutional disputes, then the judiciary will have to arbitrate disputes in which it is one of the parties in conflict. Obvious incentive problems arise to which we now turn.

The Selection of Judges

In private contracting, the impartiality of the judge who arbitrates disagreements comes about because *all* parties agree on the identity of the person who will act as judge, before the contract is signed. To secure the impartiality of the judiciary, ideally *all* citizens would concur in the selection of judges. As a practical matter this solution is impossible. All citizens, even by referendum, will not agree on which persons should be judges.

The most obvious alternative to the citizens selecting judges themselves is to have their representatives do it—i.e., the parliament. To ensure impartiality the optimal voting rule in the selection of judges by the parliament would be the unanimity rule, or a very high supermajority rule. When a majority can pass legislation, the possibility exists for it to tyrannize the dissenting minority. If the same majority has the authority to choose those who, among other things, will judge the merits of appeals to the courts by the minority, the possibility of the minority being further tyrannized increases. The requirement that the minority concur in the selection of judges is a safeguard against the minority's inevitable defeat in both the parliament and the courts.[6]

The higher the majority required to appoint a judge, however, the greater the likelihood that the parliament is unable to agree on any person, and that judgeships remain vacant to the entire community's loss. This danger should not be exaggerated. At issue is the impartiality and intelligence of a candidate for a judgeship. Although individuals

and their representatives may disagree on substantive issues, this will not necessarily prevent them from agreeing that a particular person can be expected to interpret the law fairly. Lawyers representing a plaintiff and a defendant may disagree on the merits of a case, but this does not prevent them from agreeing on the identities of the members of a jury.

Nevertheless, the writers of the constitution may regard the danger of deadlock on the appointment of judges as sufficiently grave as to warrant some institutional safeguad to avoid it. One way to accomplish this is to invest some person or group with the authority to nominate candidates for judgeships, and stipulate that the nominees assume their posts after a specified interval of time, say six months, *unless* the parliament agrees by the required supramajority to substitute another identified person in the nominee's place. This procedure would ensure that judgeships do not remain vacant should the parliament not be able to agree on any individual to fill a judgeship, but allows the people's representatives to substitute a person they deem to be better suited to be a judge than the one nominated when they can agree on a substitute.

Under this procedure should those doing the nominations be in the legislative, the executive, or the judicial branches? Rather obviously, they cannot be in the legislative branch, as say a judiciary appointments committee of the parliament. To ensure impartiality, this committee would have to contain representatives from all parties so that all citizens were represented, and use the same supramajority rule as the whole parliament uses to approve judicial appointments. But then this committee would be vulnerable to the same danger of deadlock as the parliament as a whole.

If the chief executive is elected by a supramajority of the parliament, and one of the chief executive's assigned tasks is to nominate persons for the judiciary, then the impartiality of a person would be one of the factors that all members of parliament would consider when electing a chief executive. The use of a supramajority rule to elect the chief executive would help guarantee this person's impartiality in the same way that the use of a supramajority rule to appoint judges helps guarantee their impartiality. Thus, the framers of the constitution could ensure the impartiality of the judiciary and avoid the possibility of deadlock by authorizing the chief executive to nominate candidates for judgeships, when the chief executive is elected by a supramajority vote of the parliament. The supramajority requirement in the election of the chief executive would help to ensure the chief executive's impartiality, and the supramajority requirement would induce an impartial selection of any person whom the parliament chose to substitute for the chief executive's nominee.

When the chief executive is elected by plurality or majority vote, she is almost certainly a member and quite likely the leader of one of the parties. She is likely to nominate candidates with ideological positions supportive or sympathetic to that party's ideology, and if a supramajority of the parliament is required to replace the nominee with another person, the chief executive will be nearly free to appoint all members of the judiciary. Impartiality is lost.

One of the complaints lodged against England in the Declaration of Independence concerned the impartiality of judges in the colonies who were appointed by the British king. The early constitutions of the individual states often authorized the governor to appoint judges and governors were accused of having produced a "spoils system" by reformers in the Jacksonian Era (Dubois, 1980, p. 3). The nomination of federal judges, including those to the Supreme Court, by a popularly elected president coupled with the requirement that only a simple majority in the Senate approve a nomination has had the

predictable result that the selection of "judges in America is a political process with a political result" (Corsi, 1984, pp. 122–61). If the goal of the drafters of a constitution is to ensure the impartiality of the judiciary, they will not entrust the nomination or appointment of judges to a popularly elected chief executive.

The third possible location of a nominator of judicial candidates is in the judiciary itself. Suppose that the usual type of hierarchical judiciary exists. Cases are tried at the lowest level of courts, appealed to one or more intermediate levels, with a superior court of last appeal at the top. The career pattern for a typical judge is to be appointed from private practice to a judgeship at the lowest level of courts, and perhaps from there to be nominated to judgeships at higher levels. Those in the best position to observe which trial lawyers have the potential to be good judges are the judges at the lowest court level—i.e., those hearing the cases prepared by the trial lawyers. Similarly, the people in the best position to appraise the talents of a lower court judge are the judges at the next higher level, who must review the opinions of the lower-court judges on appeal. These considerations suggest that the best place to locate the nominators of judges is in the judiciary itself.[7] Vacancies at a particular level of the judiciary could be filled by nominees of the judges in office at that level at the time the vacancies occur, *unless* the parliament voted by the constitutionally required supramajority to substitute some other person.[8]

The reader might object that such a system would present the danger that the judiciary would become a self-selecting and self-perpetuating institution. With the judiciary having the authority to veto actions of the other branches, as a self-perpetuating, independent agency it could come to dominate all governmental institutions. Abraham Lincoln posed the question most poignantly: "If the policy of the government, upon the vital questions affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court the moment they are made, as in ordinary cases between parties in personal actions, the people will have ceased to be their own masters, having to that extent resigned their government into the hands of that eminent tribunal."[9] If the judiciary ever became populated by individuals who were incompetent or corrupt, it might prove difficult to displace them and reform the system. I have two responses to this charge.

First, note that there are incentives built into the system to encourage competency. The work at any level of the judicial hierarchy is likely to be lighter and more enjoyable for a given judge if his colleagues at that level are industrious and intelligent rather than slothful and dull. Thus, the judges at a given level do have a selfish interest in seeing the most competent of the possible candidates join them, as well as a social reponsibility to nominate those persons who will best serve the interests of the community. Individuals ambitious to move to higher levels in the judicial hierarchy will carry out their judicial responsibilities to the best of their abilities so as to impress their superiors.

The second line of defense is the authority the parliament would possess to substitute its own nominees for those of the judiciary. If an incompetent or corrupt judiciary were to devolve under such a system, the parliament would possess the capability to reform the judiciary by substituting its own preferred candidates for those nominated by the judiciary. If the judiciary came into need of reform, the citizens through their elected representatives could replace the existing cadre of judges.[10, 11]

The system just described resembles in mnay respects those used in Europe to select judges. In some countries like Germany, judges pursue separate courses of study and effectively serve as apprentices in lower courts as they work their way up to higher

levels. The selection of judges at all levels except the very highest, where appointment is by a supramajority vote of the parliament, is from within the judiciary.[12]

Some of the best judges who have served on the highest courts in the United States have come from outside of the system. A purely technocratic judiciary would deny the highest level courts the opportunity to appoint distinguished members who had not served on lower courts. Thus, although one would expect many nominees to come from within the judiciary, there would be no need to limit them to this group.

The Incentives of the Judiciary

In establishing government, the constitutional convention confronts an imposing principal-agent problem. It must design institutions—executive, legislative, judiciary—whose future members will have incentives to act, not in their own self-interest, but in that of the citizenry at large. The most important check on the legislative branch is, of course, the necessity of its members to get reelected. The chief executive must also win the votes of either the parliament or the populace at large. Additional protection against the injurious actions of the citizenry's agents in the executive and legislative branches is provided through constitutional authority granted the judiciary to overturn actions by either of the other two branches should they violate provisions of the constitution.

But judges are also agents of the citizens with interests and ideologies that may run counter to those of the citizens. What incentives will force them to act on the citizens' behalf? What institutional device checks the avaricious appetitie of the judges? These are among the most difficult questions that the creators of a constitutional democracy must face. It puzzled the founders of the United States, and has troubled thoughtful observers ever since.

The solution the founders of the American Republic decided upon was (1) to have judges nominated by the president and approved by the Senate, (2) to have appointments last for life, subject to good behavior, and (3) to deny both branches the power to reduce a judge's salary. The nomination procedures have failed to keep the nomination and approval process from becoming politicized, but the second two have arguably freed judges to act independently regardless of any political obligations they have accumulated on their way to office.

The institutions of lifetime tenure and financial security[13] induce impartiality in the judiciary only in a negative way, however. They allow members of the judiciary to act in the citizenry's behalf even when that requires blocking actions by the legislative or the executive branches, but these provisions do not ensure that the judiciary always will act in the interests of the citizens.[14] They remove temptation to act partially without providing incentives for impartiality.

For these, one has to rely on "the culture of the judiciary" and the great status (and possibly financial rewards) that surround it.[15] If each judge swears upon taking office to uphold the constitution and the rights of all citizens, self-integrity, peer pressure, and public scrutiny might combine to induce judges, at least at the highest level, to abide by their oath. By setting these standards for promotion, they can help foster the same behavior in their future peers and at all lower levels.

Beyond these "subjective rewards" as incentives, the incentive to act in the citizens' interests would have to come, as with the other branches, in the threat of failure to

obtain a desired office, or in extreme cases the removal from a presently held one. The opportunity to substitute someone nominated for a judgeship by the members of the judiciary at that level, if the substitute can secure a substantial fraction of the votes of the parliament, also allows the citizens through their representatves to keep a check on the judiciary. Impeachment is another, more severe option. Finally, if the citizens are "to remain their own masters" ultimately they must be prepared to remove their agents if the need arises. Under the judicial structure described here, the first constitutional convention would appoint the first highest-level court, which in turn could fill the lower levels. The ultimate check on the judiciary would be the possibility to reconvene a constitutional convention and appoint a new court.

The Popular Election of Judges

We have been considering the judiciary as an impartial arbitrator of the constitutional contract. In analogy with private contracting, we have argued that the impartiality of the judiciary could be ensured if the citizens unanimously agreed upon the identity of the judges. Unanimous or even near unanimous agreement on a candidate for the judiciary is impossible in a popular election. In the United States, judges are popularly elected at state and local levels using majoritarian procedures, however, and thus one might wonder whether the popular election of judges under a majoritarian or plurality system might achieve the kind of impartiality sought. We explore this question in the next section.

Popular Election of Impartial Arbitrators

The first movement to reform the process of selecting judges in the United States occurred along with other political reforms during the era of Jacksonian democracy. The hope was to remove the selection of judges from the spoils system that characterized partisan politics at that time by having the judges chosen by popular election. Thus, the Jacksonian reforms might be regarded as efforts to make the judiciary more impartial.

Justification for the popular election of judges to achieve this goal can be obtained by slightly modifying the arguments the Marquis de Condorcet first used to defend the simple majority rule over 200 years ago. All law-abiding citizens benefit from the vigorous and impartial enforcement of the laws. Let us assume that all voters are and expect to continue to be law-abiding citizens. Then all voters have the same objective when selecting judges—to pick the most competent and impartial person that they can so as to create the best judicial system possible.[16] Of course, at some future time a particular citizen might find herself in court charged with speeding, and then wish that the judge assigned to her case is lenient toward fast drivers. But at the time she votes she does not know that this will occur, and she votes for the candidate for a judgeship who seems most competent and impartial.

If we now assume that the probability that a given voter opts for the *best* of two candidates for a judgeship is greater than the probability that she votes for the worst one, where all voters judge a candidate's quality by the same criterion of competence and impartiality, then the probability that the candidate receiving the most votes is the best of the two is greater than 0.5, and increases with the size of the absolute majority

in favor of the winner.[17] The citizens themselves can be relied upon to choose the best persons to be judges, if one can assume that they possess even a modest capability to assess the relative qualities of candidates.

Judges as Policymakers

The usual argument advanced to defend the popular election of judges in the United States is *not,* however, that this method of selection produces the most impartial arbitrators of disputes. Quite the contrary; it is argued that judges, like the citizens' representatives in the legislature and the chief executive, should be *accountable* to the people. Coupled with a plurality or majority election rule, the accountability argument becomes another defense of majoritarian democracy. The people have an interest not only in what laws are enacted, but also in how they are interpreted. To ensure that the laws are interpreted consistently with the people's interests, they must select and replace the laws' interpreters. The people's interests are best expressed through majority rule in popular elections.

This justification for the popular election of judges in a constitutional democracy can be defended by invoking the arguments in favor of majority rule put forward by Kenneth May (1952) and Douglas Rae (1969) (see also Chapter 11 above). Rae sees citizens choosing a voting rule at the constitutional convention uncertain of their future positions on issues. Each citizen at the convention assumes that he has an equal probability to be on either side of any future binary choice, and his gain if he wins on the vote is expected to equal his loss if he loses.[18]

Translated into a defense of the popular election of judges, this argument would run somewhat as follows: In the future, numerous unpredictable issues will arise—e.g., laws against driving above a certain speed. When one does arise, I could be on either side. I could favor low speed limits or high ones. Given the assumption of equal intensity of gain for those who favor low speed limits and those favoring high limits, the majority rule is the optimal rule for making such a binary choice by the Rae and May theorems. By the same logic, the choice between a judge who will be "tough" on speeders versus a lenient judge should be made by majority rule.[19]

Critiques

Arguments for the popular election of judges rest on the existence of uncertainty. The role that uncertainty plays in each is quite different, however. Under the majoritarian defense, individuals at any time are assumed to differ in their views as to what makes for a good judge (should he be tough or compassionate?). At the constitutional stage, however, individuals are uncertain as to which issues of this sort will arise in the future and their stance on them, and it is this uncertainty that makes the popular election of judges using the plurality or majority rules the best selection procedure. Under the modified Condorcet argument, when individuals vote for a judge they use the *same* criterion to compare the candidates. If they choose different candidates it is because they have different information about the candidates and make mistakes. Under this rationale for popular elections of judges, all citizens would vote for the same candidate if they all had the same information. Under the majoritarian rationale, they would not.

These differences in the assumed criteria by which voters evaluate judicial candidates allow us to assess the merits of each argument according to how well the presumed

behavior of voters under each corresponds to their actual behavior. If the interests and ideologies of voters affect how they vote for judges, the presumptions of the majoritarian defense are supported, but not the Condorcet defense. If voters are generally only concerned with the impartiality and competence (e.g., knowledge of the law) of judicial candidates, the Condorcet argument becomes more persuasive.

Evidence on voting in state elections in the United States indicates rather clearly that the ideology of a judicial candidate, as measured by his party affiliation, or the affiliation of the group that nominated him, is an important factor in a voter's choice. Voters are, if anything, less well informed about judicial candidates than they are about other candidates for public office. When information about a judicial candidate's party affiliation is available, however, voters use it and vote along party lines (Dubois, 1980, Chap. 3). This behavior is rational since a judge's party affiliation does predict how he will vote in future cases (Dubois, 1980, pp. 156–241). Neither of these facts is what one anticipates if judges decide cases impartially rather than on the basis of their own personal ideology or the ideology and interests of those who elect them. Neither implies that voters seek to elect the most impartial and competent of the candidates.

The importance of interests and ideology in the election of judges is further illustrated by recent challenges by black interest groups to the methods used to elect judges in some states. (See, e.g., *Chisom v. Roemer* [1991], and *Houston Lawyers v. Texas Attorney General,* [1991].) In these cases black groups charged that at-large methods for electing judges in Louisiana and Texas were in violation of the Voting Rights Act of 1965, as amended in 1982. The black groups argued successfully that the methods used in Louisiana and Texas violated the rights of black voters because they resulted in the *underrepresentation* of blacks on the bench.[20] The proportion of black judges elected in these states has been significantly less than the proportion of blacks in the population. This experience is attributed to white voters voting overwhelmingly for white candidates for judgeships. By shifting to single-member-district representation of judges in the courts, voters in predominantly black districts will be able to elect black judges in rough proportion to their numbers, *assuming that black voters vote predominantly for black candidates for judgeships.*

Now it is difficult for anyone who has grown up in the United States to believe that whites vote predominantly for white judicial candidates and blacks for blacks, solely because each group perceives that members of their respective races will be the most impartial and competent judges. Presumably, voters believe that members of their own race share some common ideology or interest with them, perhaps even a bias for them, and it is this commonality that produces the racially segregated pattern of voting. In any case one cannot reconcile the arguments put forward by blacks against the limited voting systems used in Texas and Louisiana with a general view that all voters judge judicial candidates by the same criteria of impartiality and competence. Condorcet's defense of majority rule cannot be used to defend the popular election of judges if race is a litmus test for who will be a good judge.[21]

The challenges to at-large voting methods for selecting judges brought by blacks also seriously undercut the rationale for the popular election of judges based on the Rae/May type of reasoning. Rae sees individuals choosing a voting rule from behind a veil of ignorance that conceals their future positions on issues. But if the color of a judge's skin is deemed an important factor in determining how he will decide cases, can a citizen at the constitutional stage really ignore the color of her own skin when choosing a procedure to select judges? Is she able to choose voting rules and other political

institutions as though she had an equal chance of being black or white in the future? Can a member of the minority race not recognize that she will be in the minority in the postconstitutional stage and thus favor a rule for selecting judges that is more protective of minority interests? Both arguments in favor of majoritarian procedures for electing judges presume a form of impartiality on the part of citizens when they vote for a judge—or when they vote for a rule to elect judges—that is belied by the way individuals actually do vote and the criteria that they think are relevant in the selection of judges.

While the normative rationale for the majority rule can justify the popular election of judges as policymakers when they interpret ordinary legislation, this justification cannot sustain the popular election of those judges who must arbitrate the constitutional contract. Because an important component of that contract is its provisions to protect minorities against the majority, it would be logically inconsistent for the constitution framers to allow the majority to fill judicial offices with individuals partial to its interests. For those parts of the judiciary that deal with constitutional matters, the constitutional convention must favor selection procedures that ensure the impartiality of the judiciary.

Judicial Hierarchy and Specialization

Most judicial systems have a similar hierarchical structure (Posner, 1985, Chap. 1). Trials are heard by a single trial judge; first appeals are heard by panels of judges (usually three) drawn at random from a common pool; final appeal is to a panel of seven to nine judges that hears cases *en banc* (sitting as one panel). The rationale for such systems is as follows: Having one judge per case at the trial level is the most economical structure, since this is the most time-consuming step in the process. Heterogeneity in the outcomes of the process is introduced, but this can be removed (reduced) by the appeals process. The use of panels in the appellate courts helps bring uniformity in outcomes across jurisdictions. Having a single court review cases on final appeal ensures that there is but one final judgment for the entire polity on all legal issues.

Such a system can be easily expanded at the bottom and middle levels to accommodate population growth and increases in crime or in the propensity to litigate. But the capacity of the court of final appeals to hear cases is not readily enlarged. As the workload of the judicial system expands, this constraint results in fewer and fewer cases being accepted for review by the highest court, and thus more and more heterogeneity in judicial outcomes and uncertainty as to what the law is (Posner, 1985; Meador, 1989).

While it is desirable that there be one court of final appeal for a particular type of case, it is not necessary that there be one court that handles all types of cases. The overload problem can be reduced or eliminated entirely by introducing specialization into the judicial system. Antitrust cases are heard in one set of courts with a vertical hierarchy leading to a final court of appeals that deals only with antitrust matters; criminal cases are heard by a different set of courts; and so on.

This type of specialized judicial system is quite compatible with the kind of selection system described above. The constitution framers would only need to create different highest courts for each special area. The kind of technocratic judicial system used in Europe is also amendable to specialization.

Judicial Federalism

We have described a possible institutional structure for a single governmental unit like a nation-state. In a federalist state, judicial structures could exist at several different levels, paralleling the levels of government, each adjudicating conflicts involving the laws at their respective levels. The arguments regarding a judicial hierarchy presented above carry over directly to any other political unit. In a federalist state one should observe both a hierarchy of levels of government and separate hierarchies of courts at each level of government.

In a federalist state several additional forms of judicial conflict can arise beyond the adjudication of cases tried at one level of government by the courts associated with that level. These include: (1) a legal conflict between two or more governments in the federation; (2) a law passed by the parliament of one governmental unit that conflicts with an existing law of either a higher governmental unit of which it is a part, or a lower governmental unit which is a part of it; and (3) a law passed by the parliament of one governmental unit that conflicts with a right guaranteed in the constitution of either a higher level of government of which it is a part, or a lower government which is a part of it. The third of these possibilities raises some particularly knotty issues. Although we offer some suggestions for dealing with these issues, our main purpose here is really to illustrate the issues and indicate the need to address them at the constitutional stage.

The obvious place to resolve conflicts between two political units is at the next highest unit of which they are a part. Two cities within the same regional state argue their cases before the courts of that state. Two cities that are located in different regional states argue their cases before the courts at the national level. A conflict between the national government and any lower governmental unit is resolved by the national level's judicial system.

In Chapter 6 we discussed the desirability of establishing a separate court or quasi-judicial agency to screen legislation in a federalist system to avoid one governmental unit passing legislation that is more appropriately dealt with by another level. We suggested that a bill should come up at a given level of government only if it promised benefits for at least 50 percent of the citizens at that level. Such a criterion would lead to city streets that are used mostly by its residents being maintained by the city; the roads between cities that are used mainly by citizens of a region being maintained by the regional government; and interregional superhighways that are heavily used for interregional travel being built and maintained by the national government. A similar division of responsibility regarding laws for use of the roads would be appropriate. The city government sets the speed limits for city streets; the regional government sets them for the regional highways; and the national government sets them for the interregional highways. When a conflict over jurisdiction arises—does the region or the city set the speed limit for that portion of a regional highway that passes through a city?—the obvious judicial body to review the case is the court or agency that screens legislation to maintain the appropriate division of political responsibilities in the federalist system. Conflicts over legislation passed at one level of government and constitutional rights defined at another might also be brought before this special federalist court.

If the federalist political system is created by citizens of the nation-state writing a constitution in which lower levels of government are created, or in which at least a process for creating lower levels of government is defined, then it would seem that the

citizens—in agreeing to define a particular right in the national constitution—seek to protect individuals from both a majority of citizens at the national level voting to curtail the protected action, and a majority of citizens at any lower-level political jurisdiction. A right defined in the constitution at the highest level of government is protected from infringement by actions taken by the national and all lower-level legislative bodies.

In principle, any action not protected as a right by the constitution of the nation could be abrogated or protected as a right by the constitution of a lower level of government. Consider, for example, the option of purchasing birth control devices. Suppose that the national constitution neither prohibits nor protects this action. The citizens of a region would then be free to protect or prohibit the sale of these devices in their region as part of their constitution.

The option of defining constitutional rights at both the national and lower levels of government can serve as a safety valve for a nation, a way to diffuse issues that would otherwise be highly contentious, if they all had to be resolved at the highest level. A nation that finds it impossible to agree unanimously on issues like birth control and abortion can accommodate the different groups that feel strongly on both sides through a regional structure that allows individuals of similar conviction to group together.

A different situation arises when the lower levels of government and their constitutions precede the higher level, and the higher level is formed as a *confederation* of the lower levels. In this case the lower levels may wish to retain some or all of the rights defined in their existing constitutions. This goal can be accomplished by either defining explicitly the areas in which the confederation's parliament has jurisdiction, or stipulating which rights the citizens at the lower level retain.

Other Issues Involving the Judiciary

Several other issues exist that the constitution framers will wish to consider: the role of juries in the judicial system, the voting rule used by juries, whether to establish an adversarial system as in the United Kingdom and the United States or an inquisitorial system as in continental Europe. These are important issues in the design of a judicial system. To treat them adequately would require a treatise in itself. We shall not attempt this here, therefore, but merely mention the necessity to take them up in the constitutional process.[22]

Summary and Conclusions

A constitution is a contract among the citizens establishing the institutions of government. As with all contracts this one is vulnerable to the opportunistic behavior of those both in and outside of government. When drafting the constitutional contract, citizens need to specify procedures by which they can ensure that its provisions and the laws subsequently enacted under its authority are impartially enforced.

To some extent the ordinary citizen at any given time is in much the same position with respect to the law and its enforcement as is the citizen at the constitutional stage. The ordinary citizen is uncertain over whether she will come before the bench, and if she does which type of bias she would like the judge to exhibit, just as the citizen at the constitutional stage is uncertain to a degree over his future positions under the con-

stitution. If this uncertainty over future positions is strong enough, the constitutional convention could entrust the selection of judges to the citizens by popular elections, since all citizens would have the same general interest in seeing the most impartial and competent people selected as judges. In communities in which interests are sharply divided, however, the popular election of judges can introduce partisan politics into this process. If the goal is to select impartial arbitrators of the constitutional contract and parliamentary laws of the nation, then popular elections of judges are unlikely to be the best procedure for achieving this goal.

Impartiality in the judiciary is likely if its members are selected by a consensus vote of the citizens. No candidate who a minority suspected of prejudice would be chosen under such a system. Given the practical difficulties of having the citizens directly choose judges by consensual or even supramajority votes, a supramajority of the votes of the citizens' representatives in the parliament becomes the simplest way of ensuring the impartiality of the judges selected.

In communities with strong minority or interest group divisions, it may be very difficult for a supramajority of the parliament to agree on judicial candidates. To avoid deadlocks that could cripple the judiciary by starving it of new members, the judiciary itself could nominate candidates for new membership, with these candidates assuming office following a set time interval unless substitute nominees were approved by the required supramajority in the parliament. This procedure should produce a judiciary that under normal circumstances chooses its own membership from among the best available candidates. The lack of total independence, however, would protect the citizenry from the possibility that the judiciary could somehow degenerate over time into a wholly incompetent or corrupt institution.

The system proposed here would have built-in incentives for judges to perform their duties competently and in accordance with the standards of judiciary practice held by the highest court. Each court from the highest down has an incentive to promote judges who are competent and fulfill the standards; each judge seeking promotion will strive to meet the standards and perform her duties competently. Just as the danger of dismissal or defeat in an election provides the ultimate incentive to act in the citizens' interests in the other branches, the possibility of removal by a united legislature, or by a united citizenry at a constitutional convention, would provide an additional incentive for the judiciary. Lifetime contracts in the absence of extreme malfeasance, and attractive and secure financial rewards, would remove incentives to act against the citizens' best interests. The status and culture of the judiciary would have to provide the incentives to act on the citizenry's behalf.

Appendix: On the "Fair" Representation of Minorities in the Election of Judges

The remedy sought by black interest groups in *Chisom v. Roemer, 1991*, and *Houston Lawyers v. Texas Attorney General, 1991* to eliminate the underrepresentation of blacks in the judiciary was to elect judges from single member districts with the boundaries drawn to ensure that black majorities exist in enough districts to elect members of their own race in proportion to their number in the population at large. When such proportionality is achieved blacks are *fairly* represented among the set of elected judges according to prevailing judicial opinion.

Presumably the reasoning behind such suits is that blacks should be proportionately represented in the judiciary so that a black going to court has a fair probability of drawing a judge of the same race as herself.[23] This latter justification would in turn imply an expectation that blacks get better treatment before black judges than before white ones.

Even if the changes sought in the election laws succeed in bringing about a proportionate representation of blacks on the bench, however, this outcome does not ensure that blacks and whites have equal prospects when they step before the bench. Full equality before the law would seem to require that a member of a minority has the same probability of getting a fair trial as a member of the majority. If an individual can only get a fair trial if she is tried by a member of her own race—the presumption underlying the lawsuits—then fair treatment before the law requires that the probability that a case involving a black is tried before a black judge is the same as the probability that cases involving whites are heard by white judges. But these probabilities are not equated by merely ensuring that black judges are the same fraction of all judges as black citizens are of all citizens. If blacks make up 25 percent of the population of a given community, and 25 percent of all judges are black, then a black going to trial has only a 1 in 4 chance of having her case heard by a member of her race, while the chances for a white citizen are 3 in 4. If equality before the law requires that each citizen who goes before the bench is judged by a person of her own race, then more drastic reforms are needed than merely electing judges from separate geographic jurisdictions with boundaries drawn so that blacks can elect a proportionate number of their race by voting only for members of their race. The judges elected from a given district will have to be assigned to cases involving citizens from that district. When this is done, geographic segregation will lead to judicial segregation as well, and a member of a minority group can be assured of a trial before a judge of her race.[24] Naturally, the same logic applied to juries requires that they be chosen by race if fairness is to be achieved, and this argument has, not surprisingly, also been pressed (Isikoff, 1993).

Race is the most divisive individual attribute in the United States. In Belgium and Canada it is language and cultural background. In India it is religion. In almost every country there are some religious, ethnic, racial, or linguistic differences that have in the past led to social clashes and might again in the future. When such differences exist, the popular election of judges using the simple majority or plurality rules runs the danger of the majority group dominating the selection of judges. Any resentment or animosity that a minority feels toward the majority is likely to be enhanced by this process, as the minority perceives rightly or wrongly that it cannot expect justice even from the courts. Moreover, as just explained, these problems cannot be avoided merely by assuring that minorities are proportionately represented in the judiciary. Procedures must be established that ensure the impartiality of the judiciary.

The danger of bias in the selection of judges is likely to be greater if judges are elected for fixed terms and then must stand for reelection. If a judge had to stand for election only once, and then remained on the bench until retirement, unless impeached for gross improprieties, an elected judge could treat members of minorities and of the majority impartially if he so chose. (The judge would be even more likely to do so if his appointment to higher levels of the judiciary was based on his impartiality, as would quite possibly be the case under the procedure described in the section dealing with selection of judges.) But a judge who must stand for reelection periodically based on

his record in a country in which voters expect members of their "own kind" to be biased in their favor may well find it expedient to exhibit such a bias.

We conclude that the popular election of judges in a community in which ethnic, religious, or other divisions are strong might well not result in the selection of impartial judges. Even if elected judges, despite the incentives to favor their supporters, were impartial, members of minority groups might perceive injustice in a system in which they were commonly judged by members of groups toward which there is much animosity. Anticipating this, the drafters of the constitution are unlikely to reach a consensus in favor the popular election of judges by the plurality rule. In a community with strong group divisions, minorities will wish to ensure the impartiality of the judiciary by maintaining a veto over the choice of judges. This effective veto for minorities can be obtained by adopting the procedure described in the section on selection of judges in which a supramajority of the parliament is required to approve a nominee for a judgeship, or to substitute for the nominee of the judiciary.[25]

Notes

1. Alexander Bickel (1962) adopted *The Federalist*'s characterization of the judiciary as "the least dangerous branch" as the title for a most interesting book on the subject.

2. Landes and Posner (1975) posit that the legislature will wish to create an independent judiciary to increase the permanence of its legislation and thereby its value to interest groups that wish to buy legislation from the legislature. That long-lived legislation is more valuable than short-lived is obvious. Thus, it is easy to understand why a sitting legislature would wish to create an independent judiciary that would ratify *its* sales of legislation to interest groups. But it is difficult to see how this argument accounts for the independence of the judiciary in the United States. Its Constitution was not written by a sitting legislature, and many participants in the Constitutional Convention (e.g., octagenarian Benjamin Franklin) do not appear likely to have envisaged a future career as members of Congress. Nor could they have asssumed that the judiciary, once given its freedom from legislative control, would consciously and willingly enforce the bargains between Congress and its interest-group supporters. The relevance of Landes and Posner's positive analysis of the independent judiciary is that it, inadvertently, gives another argument for *not* having an elected legislative body write a constitution (see discussion in Chap. 21). In this chapter we explore reasons why the citizens would wish to establish an independent judiciary in a constitution that they wrote.

3. The salient characteristic of the firm in transaction-costs theory is the complex nature of the contract joining its factor owners (labor, capital, and land). The complexity of these contracts necessitates the use of implicit contracts monitiored by the parties themselves (Williamson, 1975). Under ideal conditions a single factor owner, e.g., the manager, can be induced to fulfill the monitor-policeman role optimally by giving him the residual claim on revenues (Alchian & Demsetz, 1972). Under realistic conditions, the internal monitoring and policing of the contract is a constant source of conflict among the factor owners in the firm (FitzRoy & Mueller, 1984).

The same transaction cost-logic explains the existence of government (Chap. 4); the same potential conflicts arise if one party to the contract is chosen or chooses herself to arbitrate disagreement over the contract's content.

4. Once selected, an opportunistic judge might not choose to act impartially, say if he were offered a bribe. But such behavior would reduce the future demand for his services. A person who wished to make a living as a private judge would want to cultivate a reputation for impartiality.

5. The principle that the judiciary must be empowered to nullify acts of the legislature that

violate a constitution goes back at least as far as the seventeenth century and the work of the British jurist Coke Lyttleton. The U.S. Constitution did not explicitly assign this authority to the Supreme Court, but the Court claimed the authority for itself in 1803 in *Marbury v. Madison*. For an account of the principle's evolution in Great Britainn and the United States, see Corwin (1910).

6. Although requiring that a supramajority of the parliament approve any nominees for a judgeship should produce judges who are impartial with respect to the religious, ethnic, and ideological interests represented in the parliament, it will not necessarily produce a judiciary that is impartial with respect to questions involving legislative and executive-branch authority. Experience in the American state judical systems reveals that, when state legislatures choose state judges, these judges tend to be former members of the state legislature to a greater degree than when other selection procedures are employed (Jacob, 1964). This consideration favors the option of having the judiciary nominate its own membership.

7. One of the reforms tried in several American states has been to vest judical nominations in a commission composed of lawyers selected by the local state bar association. This system, often called "merit selection," is obviously similar in spirit to the proposal in the text. In practice, however, it has not generally succeeded in removing partisan politics from the judicial selection process (Watson & Downing, 1969; Dubois, 1980, pp. 4–20; Marshall, 1977).

8. Article II of the U.S. Constitution provides that the president nominate candidates for the Supreme Court. However, it further stipulates that "Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Should judges beneath the Supreme Court be deemed "inferior Officers," then the U.S. Constitution would allow a procedure like that described in the text at all judicial levels other than that of the Supreme Court.

9. Statement is from Lincoln's First Inaugural Address, as quoted by Corwin (1906, p. 40).

10. The requirement that a supramajority (say three-fourths) of the parliament agree on a substitute for a nominee of the judiciary would allow an organization like the Mafia to sustain a corrupt judiciary by "buying" the vote of only one-quarter of the parliament. To curb corruption at this level the citizens would have to be sufficiently fired up to defeat the members of parliament who had been bought, and thereby force the parliament to reform the judiciary.

11. Although placing impeachment powers and authority to substitute for judicial nominees in the hands of a supramajority of the parliament would protect against the judiciary becoming corrupt or incompetent, it would create the danger that a spiteful parliament, angered by the judiciary's rejection of one of its actions, strikes out against it. Provisions to reconvene a constitutional convention, reconstitute the judicary, and redefine the powers of parliament would protect against this development.

12. For an account of the German system, see Langbein (1985).

13. Real financial security requires that judicial salaries be automatically adjusted for inflation and geographic cost of living differences.

14. Considerable work in recent years has attempted a *positive* analysis of the judiciary's interaction with the other branches and administrative agencies (e.g., Spiller & Gely, 1990; Salzberger, 1991; Spiller & Spitzer, 1991; Ferejohn & Weingast, 1992; Eskridge & Ferejohn, 1994). The judiciary is assumed to have a "position on the issues" just as the legislature, executive, and administrative agencies have. Without exception, however, the position of the judiciary is treated as totally exogenous. An explanation for the objectives of the judiciary remains one of the great lacunae in the public choice–rational choice literature. This lacunae hampers greatly the development of incentives to induce the judiciary to pursue *normative* goals like advancing citizen interests.

15. Eskridge and Ferejohn (1994) emphasize the place that "conventions" can have in defining the role of the judiciary and other actors in government.

16. The issue of what characterizes a good judge and how one would recognize these charac-

teristics in a candidate is a difficult one. See, for example, the discussion in Dubois (1980, pp. 13–14).

17. We follow Black's (1958, pp. 160–5) explication of Condorcet's work with appropriate modifications.

Let p be the probability that the candidate receiving the most votes is the best candidate,

v be the probability that a voter votes for the best candidate,

e be the probability that a voter votes for the other candidate,

h be the number of voters voting for the winning candidate,

k be the number of voters voting for the other candidate, and

$z = h - k$ be the winning candidate's absolute majority,

then

$$p = \frac{v^z}{v^z + e^z} = \frac{v^z}{D}$$

$$\frac{\partial p}{\partial z} = \frac{v^z \ln v}{D} - \frac{v^z(v^z \ln v - e^z \ln e)}{D^2}$$

$$\frac{\partial p}{\partial z} = \frac{(v^z)^2 \ln v + v^z e^z \ln v - (v^z)^2 \ln v - v^z e^z \ln e}{D^2}$$

$$\frac{\partial p}{\partial z} = \frac{v^z e^z (\ln v - \ln e)}{D^2} > 0, \quad \text{if } v > e.$$

Thus, p grows with z—i.e. with the size of the absolute majority in favor of the winning candidate. Hence, in a very large electorate even a narrow percentage victory provides a high probability that the best candidate wins. With more than one candidate, the probability that the best candidate wins under the plurality rule may fall below 0.5—i.e., the probability that *some* other candidate is the best one is greater than 0.5. However, the probability that the winner is better than a *particular* other candidate is greater than 0.5, and grows with the size of the winner's vote advantage.

18. These properties are captured in May's theorem by the *anonymity* and *neutrality* axioms.

19. The equal-intensity assumption suffices to justify the majority rule on utilitarian grounds even without uncertainty over future positions. Without uncertainty, however, unanimous agreement on the simple majority rule at the constitutional stage is not forthcoming. Taken to the extreme, an equal intensity–utilitarian defense of majority rule is inconsistent with the kind of contractarian constitutional democracy described here. Taken to the extreme, the logic of majoritarian democracy requires that the legislative, executive, and judicial functions of government are *all* carried out by a popularly elected parliament that employs the simple majority rule.

20. These states employ the *limited* voting rule described in Chapter 10 with each voter able to cast a number of votes equal to the number of judgeships that are vacant. Thus, if seven judges are to be elected in Texas, for example, each voter would vote for seven candidates from a common list available to all voters in Texas. Because a majority of the voters in Texas are white, white voters can elect seven white judges, *if* they concentrate their votes on the same seven white candidates.

21. These cases raise more general issues about achieving fairness in judicial proceedings, which are briefly discussed in the Appendix at the end of this chapter.

22. Hamilton discusses the pros and cons of jury trials in *The Federalist* (No. 83). Tullock (1980) has expounded on several issues regarding the design of judicial systems including the relative merits of adversarial and inquisitorial systems.

23. Alternatively, it might be an effort to open up another occupation to full integration. Lawrence Bose, president of the Houston Lawyers Association, predicted a "domino effect" from the case his association successfully brought against the attorney general of Texas. Establishment

law firms would hire more black lawyers, black lawyers would be assigned better cases, *and* the expectations of black clients that they would obtain fair treatment in the courtroom would rise (Marcus, 1991, p. A6).

24. When two members of different races are involved in a legal confrontation, both obviously cannot have their cases heard by members of their race. Thus, under the assumption that fairness requires a racial matching of judge and litigant, one party must experience a lack of judicial fairness in such cases.

25. One could imagine candidates for a judgeship being nominated, say by their would-be peers in the judiciary, and then presented to the electorate in referendum fashion with a supramajority required to approve nominees. In a polity with deep intergroup antagonisms, however, such a procedure might easily lead to the rejection of most nominees and many judgeships remaining vacant. The constitution framers would certainly want to avoid this by requiring that a nominee could only be rejected if a substitute received the required supramajority. But it will be nearly impossible for the citizens themselves to find a person that will receive the required supramajority against the nominee, and thus this procedure would grant the judiciary authority to name its own replacements without any effective check. Such a check is possible if the power to substitute for a nominee is vested in the parliament.

V

GETTING STARTED

20

Citizenship

> Our citizens attend both to public and to private duties, and do not allow absorption in their own various affairs to interfere with their knowledge of the city's. We differ from other states in regarding the man who holds aloof from public life not as "quiet" but as useless . . .
>
> PERICLES

> The natural tendency of representative government, as of modern civilization, is toward collective mediocrity; and this tendency is increased by all reductions and extensions of the franchise, their effect being to place the principal power in the hands of classes more and more below the highest level of instruction in the community.
>
> JOHN STUART MILL

We have proceeded as if the boundaries of the polity and the identities of its citizens were both known. For a given polity at a particular point in time these are reasonable assumptions. But over time a polity must decide whether to grant citizenship status to those who request it, and perhaps whether to take it away from some who do not. At a polity's inception both its boundaries and the identities of its original set of citizens must be defined. In this chapter we explore some of the issues connected with choosing these definitions, including the possibility of multiple categories of citizenship.

Citizenship in the Primordial Polity

The polity is formed to advance the interests of its founding members. Given the importance of proximity of one citizen to another to achieve the benefits from the joint consumption of public goods, and the necessity of proximity to the generation of externalities, the most natural way to conceptualize a polity's first formation is that some groups living in proximity of one another agree to create a government.

For historical reasons those living near one another often have a common ethnicity or religion or language, or perhaps all three. These commonalities in turn may generate common interests that are best served by collective action. Thus, where natural boundaries do not make the dimensions of the polity obvious, as in Australia, they may best be drawn to encompass a group with a common cultural heritage.

When history is kind and nature creates well-defined boundaries within which all individuals share a common cultural background, the definitional tasks of drawing the boundaries of the polity and designating its citizenry are simple. Nature has taken care

Previous Page Next

of the first job, history the second. All individuals in the space formed by natural boundaries are the obvious candidates for citizenship in this newly founded state. An isolated island-state like Iceland might be an example.

So, too, would New Zealand and Australia *prior* to the arrival of the British settlers. After their arrival, one finds two quite different cultures sharing the same territory. And this in varying degrees is what is also observed elsewhere. Individuals of Turkish background and language are found in what is now Greece, Cypress, Bulgaria, and what was until recently the Soviet Union. Greeks reside in Albania, Kurds in Turkey. Switzerland has four distinct language groups; Germany is divided into two major religious zones. The Basques in Spain, Corsicans in France, and Laps in Sweden are peoples with cultures distinct from that of the larger group in whose nation they reside. As these examples call to mind, political tensions often arise in such situations. Would these tensions be relieved if separate boundaries and citizenship status were established for the minority groups? If these countries were formed anew today, would such an outcome occur? Could they in fact be formed anew today by unanimous consent of their inhabitants?[1]

To put these questions into perspective, assume that two groups, the A's and the B's, occupy the same island. The A's share a common ethnic background and religion that differs from that of the B's. These differences in turn lead to differences in interests regarding collective action, including preferences for those goods which the two groups must consume jointly. Let x be a characteristic of one of these public goods, e.g., the maximum speed allowed on the commonly used highways. The B's unanimously prefer the quantity x_B, the A's x_A, $x_B > x_A$. If the collective decision process brings about a compromise on some quantity of x, x_C, such that $x_A < x_C < x_B$, then both the A's and the B's are worse off having to compromise on the quantity of x than they would be in the absence of the other group. Moreover, the farther x_B is from x_A and the bigger group B is relative to the A's, the worse off the A's are likely to be in union with the B's.[2] It is also likely that the costs of reaching agreement, measured by the time and energy of the participants, rise as the differences between the two groups grow. Thus, the A's would be best off, if they alone could determine the level of x, as would occur if the B's were not accorded voting rights in a polity formed by the A's.

Things become more complicated if the public-good's provision requires taxes on the community—the construction costs of the roads must be covered. If excluding the B's from consuming the public good is impossible or very costly, as in the roads example, the A's will be forced to allow the B's to consume the good and will naturally want them to contribute to covering the good's costs. But the B's may resent and resist paying for a good whose characteristics they cannot determine. The B's may, if not granted citizenship, become alienated, and respond by trying to evade taxes, committing acts of vandalism and, in the extreme, acts of sedition and revolution. Thus, there may also be significant costs in *not* granting the B's citizenship in a polity in which they reside.

In some cases it may be virtually impossible for two culturally dissimilar groups to form a polity. Suppose that the culture in A has evolved from that of ancient Greece and Rome and the European Enlightenment. The A's seek to create a constitutional government of the type described in this book. The B's, on the other hand, are a tribal community that has found itself surrounded by the migration and population growth of the A's. The behavior of the B's is governed by tribal custom; its government is a form of hierarchy centered around a chief. The number of A's and their technological superiority would make them an easy victor in a war with the B's. What account of the B's

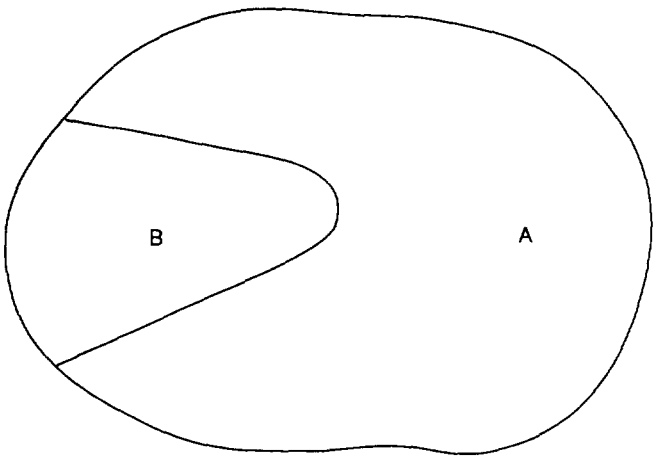


Figure 20.1. The Territorial Distribution of Two Homogeneous Groups

should the *A*'s take as they write their constitution? Should the *B*'s be granted citizenship automatically because they reside alongside of the *A*'s? Should they be treated as a foreign nation?

Often groups with different cultural backgrounds reside in separate areas. If the *A*'s and the *B*s live in separate regions of the island, as depicted in Figure 20.1, it may be possible for them to form a federation. The *A*'s are responsible for building roads and setting speed limits in their region; the *B*'s are responsible for their region. While federalism can avoid conflicts between the two groups over the provision of some public goods, it is unlikely to be a solution for all. Air quality, air traffic control, ocean fishing rights, and defense against foreign nations are but a few of the issues that may affect both groups on the island even if they live in separate parts of it. Optimal resolution of these issues requires joint decision-making procedures, and if these take the form of a common government, the question of citizenship arises.

If *A* and *B* are parts of a single federalist polity, still other conflicts can arise. Suppose that *A*'s religion forbids the drinking of alcohol and requires that all businesses and shops be closed on its sabbath, Tuesday. However, *B*'s religion forbids the use of tobacco and requires businesses and shops to close on a Thursday sabbath. Now the joining of *A* and *B* into a single polity imposes costs on both sides, with compromise much more difficult. Agreeing to make Wednesday the sabbath will satisfy neither *A* nor *B*, and allowing each group to keep its own sabbath imposes costs upon the other to the extent that there is any contact between them at all. The same is true of alcohol and tobacco prohibitions, particularly if what is forbidden in one part is readily available (produced) in the other.

A state is like a club formed to fulfill certain common interests of its members. Like other clubs it will be better able to fulfill these interests the closer they are in common. Just as the optimal membership of a club is unlikely to include every person who could possibly be a member, the optimal membership (citizenry) of a polity does not necessarily include every person who could possibly be a citizen.

A state is a peculiar kind of club in that its dimensions are (generally) defined geographically. Its potential membership is rather obviously defined as the people living within its borders. But when the interests and backgrounds of these people differ sig-

nificantly, one group may be better able to achieve its ends by excluding the other from citizenship.

If we think of the constitution as a social contract that lifts its signatories out of Hobbesian anarchy, then a constitutional democracy formed by only the *A*'s leaves the *B*'s in anarchy. Even if the *B*'s form their own constitutional democracy they remain in anarchy with respect to the *A*'s. Being in a state of anarchy with respect to one another, the danger of violent skirmishes or outright war between the two groups exists. In writing their constitution the *A*'s must take into account these costs of excluding the *B*'s from citizenship. A trade-off exists between the costs from combining *A* and *B* into a single state (i.e., the costs of compromising on public-good quantities and other public policies and the decision-making costs of reaching these compromises), and the costs in violence and civil disorder from the *A*'s and *B*'s remaining in quasi-anarchy while living in close proximity. Although this danger will make the formation of a single state with common citizenship attractive to both the *A*'s and the *B*'s, it will not necessarily outweigh the costs of collective action when the collective would be composed of heterogeneous groups.

The presence of groups of great heterogeneity with respect to their views about government and civil society within the area of a potential constitutional democracy makes its formation and future stability more difficult. Australia, New Zealand, South Africa, and virtually all of the countries of the New World have faced this question of citizenship at their founding, and virtually all have experienced the costs of excluding some groups within their borders from citizenship as well as the frictions that arise when they are included. Most continue to experience these costs today.[3]

New Citizenship in an Existing Polity

Geographically Based Citizenship

Consider a polity that contains only people from the single cultural group, *A*. A rather obvious rule regarding new citizens is that any child born to citizens is, or becomes at some specific age, a citizen of the polity.

More complicated issues arise regarding the status of immigrants from *C* and their children, and of emigrants from *A* and their children. If the cultural background or values regarding democracy of *C*'s are alien to those of the *A*'s, the relationship between the *A*'s and *C*'s is like that between the *A*'s and *B*'s just described, and the *A*'s will not wish to grant automatic citizenship to a *C* upon arrival. On the other hand, if country *A* welcomed many immigrants, but granted neither them nor their children citizenship status, an *A*–*B* situation as described above in which the *B*'s were not citizens and were alienated could develop where none existed at the country's inception. To avoid the costs of such a situation, the *A*'s could establish procedures by which immigrants can become citizens and stipulate that immigrants *must* meet the citizenship requirements within a fixed number of years or return to their home country. Given the costs of forming a polity with heterogeneous groups, criteria for citizenship in *A* would try to determine whether immigrants had (1) adopted the culture of *A* sufficiently to contain the collective decision-making costs of heterogeneous preferences for public policies, (2) knowledge of the political institutions of the country, and (3) a willingness to participate in the political process and abide by its outcomes. These objectives might be

achieved by requiring that immigrants (1) reside within *A* for a minimum period before they can become citizens, (2) educate their children in schools that seek to transmit the culture of *A*, (3) pass a test indicating that the potential citizen understands the democratic institutions of *A*, and (4) attest to their willingness to uphold them by taking an oath. By requirements such as these, *A* could allow immigration and yet contain the costs of both a culturally heterogeneous citizenry and of having an alienated group of noncitizens residing in the country.

A somewhat different issue arises when two culturally different groups, like our *A*'s and *B*'s, exist both within a country and outside of it. If both groups have full citizenship, each has an incentive to favor the immigration of members of its group, since public policies are likely to be closer to a group's ideal preferences when this group is larger than the other. When the constitution is first written, therefore, each group has an incentive to ensure that the process for admitting immigrants and granting them citizenship remains impartial with respect to the two groups. This consideration suggests establishing an independent, quasi-judicial immigration agency. If the criteria for admitting immigrants and granting citizenship are left to the parliament, then the constitutional convention will want to require that representatives of both groups approve these policies—e.g., by requiring that they receive a supramajority in the parliament.

The constitution framers are unlikely to inhibit citizen freedom to travel outside of the country, and thus allow travel and work abroad without loss of citizenship. The interests of a citizen of *A* living abroad regarding tax and expenditure policies on programs in *A* are likely to differ from those of citizens residing in *A*, however. Even if all *A*'s are alike, an *A*–*B* heterogeneity will develop between *A*'s living in the country and those living abroad. If *A* is thought of as a geographically defined club for advancing the interests of those within its borders, then former residents living abroad are in an important sense not club members. With this in mind, the right of a citizen to vote in elections in *A* along with the obligation to pay taxes to *A* might both be suspended after a citizen has resided a certain number of consecutive years abroad.[4] Similar reasoning implies that taking out citizenship in another country *where citizenship is geographically based* is prima facie evidence of greater interest in the affairs of the other country, and would automatically result in the loss of citizenship in *A*. Polities with geographically based citizenship would not logically allow dual citizenship.

Culturally Based Citizenship

The spatial characteristics of public goods and externalities make geography the salient factor for determining the dimensions of most polities, and location the primary criterion defining citizenship. But some clubs have many of the characteristics of polities, and yet supply public goods with nonspatial characteristics. A religion comes to mind. To have the main characteristics of a state, a seat of authority must exist with the ability to levy taxes or to raise revenue in some other manner. One can imagine a religious state with geographic dimensions as with any state, but whose citizens are free to live anywhere in the world. The public good that everyone consumes is the maintenance or expansion of the religion. Citizens of the state in every part of the world might contribute to the provision of this public good, while only those living within the geographic boundaries of the religious state contribute to the more conventional public goods like roads and local police.

There would be nothing inconsistent with a person being a citizen of a culturally

defined state of this type and of another geographically defined state at the same time. Such a person would pay taxes to the "Caesar" of each state for the respective public goods they provide. Obviously, a cultural state has a limited ability to tax citizens living outside of its geographic borders. But if the value of citizenship in the cultural state, even to those living abroad, is sufficiently great, a cultural state could effectively tax its citizens abroad by withdrawing their citizenship should they fail to pay their taxes.

Although new citizenship in a geographically defined state can be based on *location* of birth, this option does not make sense, at least as the sole criterion for citizenship, for the culturally defined state. Passing a test demonstrating knowledge of the most important characteristics of the culture and taking an oath of allegiance are, if anything, more appropriate requirements for citizenship in a culturally based state than in one geographically based. For cultures based on ethnicity, being the child of citizens could substitute for location of birth as the salient characteristic when tests and oaths are not employed.

Israel today comes perhaps closest to being a culturally defined state, although it relies more on voluntary contributions from its "citizens" abroad than from its ability to tax them. The Catholic Church's control of Rome for many years is another example, and even today it remains a sort of religious state with the Vatican, a mini-geographic state, as the seat of authority. Germany, following its defeat and dismemberment at the end of World War II, became a kind of cultural state, with its former citizens in East Germany, Poland, and Czechoslovakia accorded a form of citizen's status in the newly created West Germany. Today, citizens in many Western European countries feel that their national cultures are threatened by the growth of the number of immigrants. The notion that culture is a public good that needs preserving is widespread, with some people advocating a shift from a geographically defined citizenship to something resembling one based on ethnic culture.

Differential Citizenship

Most of us think of citizenship as an either/or status. One is a citizen of France or one is not. But if citizenship consists of a set of rights and obligations assigned to each individual, then citizenship can potentially consist of several gradations, each associated with a particular set of rights and obligations. In fact, such gradations do exist in every democracy. Upon being found guilty of certain crimes, the citizen typically loses his right to vote until he has served his sentence, but retains certain civil rights even while in jail. The tourist is obligated to obey the same laws as the citizen, and usually has the same rights regarding legal council or judicial procedure as a citizen. He does not have the right to vote, however.

The reasons why convicted criminals and tourists are not allowed to vote are rather obvious. By committing a serious crime, an individual reveals that his interests clash with those of the rest of the community. To allow this individual to participate in collective decision making would endanger the rest of the community's chances of making those choices that advance their common interests. A tourist has but few interests in common with permanent residents and lacks the knowledge to make intelligent choices. To allow her to vote would add only "white noise" to the collective-decision process.

The same two criteria should be considered when defining the conditions for new citizenship. The wider the span of citizen interests, the smaller the potential gains from

satisfying them, and the greater the likely costs in reaching a decision.[5] The poorer the citizen's knowledge and capacity to make choices, the less successful will the community's democratic institutions be at advancing its common interests. Thus, founders of a polity may wish to limit the rights and corresponding obligations of those individuals whose interests are likely to diverge most from those of the rest of the community, and of people with a circumscribed capacity for effective democratic participation. Accordingly, in most countries immigrants are granted citizenship, including the right to vote, only after they have met certain qualifications as enumerated above.[6]

While it is obvious why requirements might be imposed on an immigrant before granting her the privilege of participating in the political life of the community, it is less obvious why similar criteria are *not* desirable for those born into it. Indeed, in a situation as described in the opening section, in which the *A*'s create a polity and exclude the *B*'s from citizenship, allowing the *B*'s to acquire citizenship status on terms such as these could avoid both the civil disorder that comes when the *B*'s are not granted citizenship, and the collective-decision costs that occur when they are. If civil strife between the *A*'s and the *B*'s arises from time to time, in part because the *B*'s cannot express their disagreement with the *A*'s through the political process, then the danger of this strife should fall as *B*'s are assimilated into the political culture of *A*. Moreover, with the option of acquiring citizenship available, political assimilation becomes possible and potentially attractive for *B*'s who are unhappy with their noncitizen status.

In a community with a homogeneous culture and high literacy rate, the fraction of the population that could pass a test on the country's political institutions and would swear to support them may be so large that little is gained from requiring these actions of those born into the community. When a community is composed of several groups with diverse cultural, ethnic, and religious backgrounds, and/or it has wide ranging income and educational levels, however, the presumptions that a common political culture exists, that most could pass an examination covering the country's political institutions, and that most would take an oath of allegiance to them, are likely to be false. If restrictions on immigrants' voting can be justified to protect the quality of the democratic process, then so too can restrictions on the privilege to vote of those born in the polity, if the probability is great enough that these individuals cannot participate effectively in the democratic process, or that their participation threatens the health of that process, or threatens the interests of the rest of the community.

Similar arguments can be put forward with respect to restrictions on other rights of citizenship, as, for example, "free speech." The founders of a religious state may regard respect for the teachings of their religion as so important to the welfare of the state that they limit the rights of nonmembers of the religion[7] to write and speak out on the religion, or limit the right of anyone to speak out against the religion.[8]

The right to be charged with a specific crime soon after being arrested and brought to a speedy trial will be included in the constitution, if at the time it is drafted citizens regard the probable gain from holding someone in jail for long periods to be less than the large expected loss to those so incarcerated. But if the *A*'s draft a constitution for a country which includes a group *B* with which there is a history of violence, the *A*'s may deny the *B*'s this right explicitly. Naturally, if the *B*'s took part in the constitutional convention they would want the same protection as the *A*'s, or being a minority even a stronger habeas corpus protection. They may be able to get such protection, if the constitutional convention functions under the unanimity rule, but they may not. The options are not simply a constitution with the *A*'s and *B*'s having identical citizenship

or no constitution at all and total anarchy. A third option is that the *A*'s create their own state and leave the *B*'s out entirely, so that the *B*'s and *A*'s remain in mutual anarchy. Given the dangers inherent in this option, the *B*'s might join a constitution that grants them some citizens' rights, even if it discriminated against them with respect to habeas corpus, rather than be totally excluded from the political institutions surrounding them.

When deciding if and how to define the gradations of citizenship, there are additional costs to consider. Numerous gradations of citizenship could impose costs on *all* future citizens, not only those whose rights are restricted. A newspaper editor would presumably have to check the religion of someone writing a letter to be published in the paper if the right of free speech for some religions was limited. In the extreme, each individual might have to carry a card listing the rights he is allowed to exercise, as voters generally do when they go to the polls. Such a requirement would impose both transaction costs and psychological costs and could lead to the further alienation of "second-class citizens," thereby intensifying tensions among different groups. Although such arguments suggest limiting the number of citizenship categories, they do not necessarily imply eliminating all but one.[9]

Situations in which a *B* group is contained within an *A* polity and the *B*'s do not have full citizenship have generally arisen where the *A*'s have invaded or conquered a territory once "belonging" to the *B*'s (e.g., Australia, New Zealand, the New World democracies, South Africa, and Israel). A typical pattern is for the *B*'s to have no or very limited citizenship status at first and later make a jump to full citizen status. If several gradations of citizenship existed, each associated with a different bundle of rights, individual *B*'s on their own, or the entire group, could advance to full citizenship by steps. Such a process might involve lowering the tensions between the groups over time, and producing a final state of equality more quickly.

Requirements for Citizenship as an Instrument of Discrimination

The development of democratic institutions in modern societies has been characterized by an ever broader definition of suffrage. When the United States was born, in every state except Pennsylvania only white males who owned property were allowed to vote.[10] Today, anyone born on American soil who has reached the age of 18 and is currently out of jail is potentially eligible to vote. Given this evolution, the notion that a society might consider more severe constraints on suffrage will strike some as archaic.[11] Others will suspect more sinister motives.

But we began this book by describing attributes of outcomes in the United States, Europe, Japan, and Latin America that seem less than optimal. If a set of institutions yields undesirable outputs, one assumes that the institutions are imperfect. That is indeed the assumption upon which this book rests. But another cause of poor outputs may be the quality of inputs.

Literacy-type tests to determine voter eligibility were abolished in the United States because it was believed that they had been used for the specific purpose of preventing blacks from voting. But that some tests have been used with discriminatory intent does not imply that all tests must be. Skills at designing, administering, and grading standardized tests have developed to the point that one could design a national test, at, say, the level of a high school civics course examination, that could be administered fairly. Of

course, to the extent that a particular group had lower probabilities of reaching high school and learning civics, it would do less well on this test. But this is no more discriminatory than the rule that criminals cannot vote, where some groups have higher probabilities to commit crimes and land in jail.

It is standard practice in every developed country to require that a person applying for a driver's license pass a written test to demonstrate knowledge of traffic laws and a road test to demonstrate certain minimum coordination, judgment, and experience in handling a motor vehicle. Like all tests, a driving test discriminates against those lacking the knowledge or skills to pass it. If such knowledge and skills are unevenly distributed across different groups of the society it discriminates against any group whose members cannot read and understand the rules of the road or are physically incapable of operating a motor vehicle. Denying someone the "right" to drive almost certainly has a far greater adverse impact on that person's welfare than denying the person the right to vote. Yet most people regard the costs imposed upon those who fail driving tests and are not allowed to drive to be justified by the benefits to the community from increased highway safety.

In the state of Maryland, students must demonstrate knowledge of American governmental institutions by passing a test—the kind of test that might be required to determine eligibility to vote—before they are allowed to graduate from high school. It is rather obvious why a person who knows nothing about politics and government might impose costs on the rest of the community by voting. It is not obvious why, because of this lack of knowledge, the community is harmed by the person getting a high school diploma. As with a driving license, the cost in terms of lost job opportunities, income, and status from not getting a high school diploma is likely to be far greater for most individuals than from not voting. If such tests are discriminatory, they are far more harmful to those discriminated against if they prevent them from getting a high school degree than they would be if they only prevented them from voting.

If the ultimate sovereign in a democracy is the citizenry, and citizens are more capable at exercising their sovereign function if they possess knowledge concerning the polity's democratic institutions, then any citizen who lacks such knowledge and yet participates in the democratic process imposes costs on the rest of the community. A community that values the quality of the political process might well place constraints upon those who can participate in it.

In this book we have described various institutions (direct democracy in town meetings or through referenda, point voting, single-transferable-vote, PR) that have significant potential advantages over simpler democratic institutions but that presume greater knowledge, intelligence, and dedication on the part of voters than most democratic systems demand. If one wanted to improve the quality of the outputs of the political process, one would certainly want to consider some of these options. To do so without considering the quality of the inputs of the process would make no sense. The history of literacy tests and race relations in the United States stands in the way of that country testing for a minimum knowledge of political institutions before granting individuals the privilege of voting. But where this history is lacking, such tests may improve the quality of the political process directly by improving its inputs, and indirectly by facilitating other reforms.

Pledging a willingness to abide by the provisions of the constitution may also strike some as a potentially dangerous way through which citizens of one political persuasion "go after those of another." It should be remembered, however, that the suggestion is

not being made that a person would lose any rights of citizenship *other than that of voting* for failing to take such an oath. Free speech, habeas corpus, and all other civil rights could still be granted on the basis of birth and residency criteria. Requiring an oath in support of the constitution has the advantage of forcing (tempting) the individual to think about the principles embedded in the constitution, and to inquire whether better ones are possible. Having done so a person might perform her citizenship duties (gathering information, voting) better, and/or work to change those parts of the constitution that need changing. The value of requiring an oath to the constitution thus increases, if the constitution can, with reasonable effort, be changed should citizens find it lacking.

The Greek Conception of Citizenship

No people have ever taken citizenship more seriously than the ancient Greeks.[12] The same word in Greek, *politeia,* stood for citizenship, the body of all citizens, and the constitution. The state and its citizens were synonymous; the quality of the state (polis) depended on the quality of its citizens. This symbiosis between citizenship and constitution was to Isocrates the *soul* of the polis.[13]

Given its importance, citizenship was not conferred lightly, at least during the rise and zenith of the Greek state, and could be withdrawn in toto or only in part by taking away some of a citizen's rights. This practice led to the existence of several levels of citizenship depending upon which rights of citizenship an individual possessed. At the pinnacle was the right to participate in the public assembly and to hold public office.

Although sons of Greek citizens would generally become citizens in time, this was not automatic, and foreigners could acquire citizenship by service to the state. Even slaves were sometimes granted citizenship in exchange for fighting in a war. In Sparta it was *only* service to the state, not birth, that determined citizenship. The link between citizenship and the state is further illustrated by the requirement that a citizen would and could defend the state in time of war. When the tactics of war required that a soldier be atop a horse, only those who could afford to keep a horse became citizens. When the tactics of war changed so that armies consisted of phalanxes of foot soldiers, a citizen had to be rich enough to equip himself fully with armor. In the ancient Greek state, soldier and citizen were one.[14]

The concept of the geographically defined state fits naturally with the economist's concepts of public goods and externalities with their spatial connotations. But for the Greeks the state was more than just a factory for providing goods with special characteristics. To the Greek citizen the polis was a combination of geographic and cultural polity. Hannah Arendt (1958, p. 198) illustrates these dual aspects of Greek citizenship by quoting Pericles. "Wherever you go, you [the Athenian citizen] will be a *polis.*" The same idea appears in the following passage attributed to Pericles by Thucydides (1943, II, par. 37).

> For our government is not copied from those of our neighbors: we are an example to them rather than they to us. Our constitution is named a democracy, because it is in the hands not of the few but of the many. But our laws secure equal justice for all in their private disputes, and our public opinion welcomes and honours talent in every branch of achievement, not for any sectional reason but on grounds of excellence alone. And as we give free play to all in our public life, so we carry the same spirit into our daily relations with one another. We have no black looks or angry words for our neighbour if he enjoys himself in his own way, and we abstain from

> the little acts of churlishness which, though they leave no mark, yet cause annoyance to whoso notes them. Open and friendly in our private intercourse, in our public acts we keep strictly within the control of law. We acknowledge the restraint of reverence; we are obedient to whomsoever is set in authority, and to the laws, more especially to those which offer protection to the oppressed and those unwritten ordinances whose transgression brings admitted shame.

Notice how in this paragraph Pericles intertwines a description of the democratic institutions of Athens and the cultural traits that, by implication, foster and are fostered by them. He goes on to describe the beautiful public buildings, education system, and other "public goods" Athenian democracy produced, but he again links these directly to the Athenian character. "We are lovers of beauty without extravagance, and lovers of wisdom without unmanliness" (II, par. 40), suggesting again a dual causation between characteristics of Athenian democracy and the character traits of its citizens.

To enjoy life fully the Greek citizen had to participate in the public life of the polis. The Athenian who did not participate in public life was, as Pericles put it in the quote that begins this chapter, not merely aloof but *useless*. Banishment was a severe penalty, however well off materially one might be in exile. This love for the state is illustrated in Socrates' choice of hemlock over exile.[15]

It is easy to disparage the Greek state using the values of today. Women could not become full citizens. Slavery did exist. But one must also recognize its achievements. It invented democracy and developed it to its fullest form. To do so, great demands were placed upon a citizen. He had to be soldier, juror, voter, and officeholder. Yet despite what today seem like onerous duties, no citizen of Athens in 500 B.C. would have willingly relinquished his citizenship, and those who lived in Athens and were not citizens envied those who were. That the Greeks imposed strict requirements for citizenship, given the demands placed on citizens, is not surprising. Nor is it surprising that the decline of the Greek state occurred as the criteria for citizenship were diffused and debased.

No modern democracy has stricter standards for citizenship than Switzerland. Just as a man had to be voted citizenship by his *deme* (local parish) to become a citizen in ancient Greece, an individual must be accepted into a local Swiss community to obtain citizenship in the larger one. As with the Greeks, the Swiss tie the obligation to defend Switzerland to the rights of Swiss citizenship. In no other country are the institutions of direct democracy that the Greeks invented more actively employed than in Switzerland. In no country are the demands for active participation by citizens greater than in Switzerland. As with ancient Greece, it is easy to apply the moral standards of today and heap criticism on the Swiss. They were the last of the developed-country democracies to extend suffrage to women. The rights afforded guest workers in Switzerland are minimal. The Swiss would no more consider a foreigner who has resided in Switzerland a long time as Swiss than would the Athenians bestow citizenship on an alien simply because he had lived a long time in Athens. Yet, which country today has stronger democratic institutions than Switzerland? Which country's political outcomes better serve the interests of its citizens than Switzerland's?[16]

Conclusions

The Greek conception of citizenship is recalled in John F. Kennedy's request of the American people: "Ask not what your country can do for you, ask what you can do for

your country." Milton Friedman (1962, p. 1) used this statement as an example of what was wrong with mid-twentieth-century democracy in America. Instead of government being servant to the people, the people were expected to be subservient to government.

Friedman is certainly correct in pointing out the danger of presuming a one-way obligation of citizens to make sacrifices for the state. For the modern state is not merely the embodiment of the citizenry, as to a large extent it was in Athens; it is a collection of bureaucracies and committees filled with people striving to advance their own interests, and these do not inevitably coincide with those of the body of citizens. The Soviet Union from World War I until 1991; East European countries from World War II to 1989; and Cuba, China, North Korea, and Vietnam still today—all illustrate just how great the people's sacrifices for the state, which its leaders demand in the name of the people, may be.

On the other hand, both the Greeks and President Kennedy were also correct in assuming that a democracy cannot function, cannot even survive, without the support of its citizens. As Schumpeter (1950, pp. 256–64), Downs (1957, pp. 207–76), and many others have pointed out, the rational and narrowly self-interested citizen does not bother to become informed about public issues; indeed, does not even bother to vote (Tullock, 1967, pp. 110–14). But if democracy is that form of political system in which sovereignty ultimately is in the hands of the citizens, then this sovereignty can be exercised responsibly and wisely only if rational individuals make some sacrifices to fulfill their obligations as good citizens. The political culture of the community must induce individual participation in the political process that improves the quality of that process. On an everyday basis in a modern democracy, the voluntary sacrifices required of individuals consist of time spent gathering information, voting, going to meetings, and, for a few, holding political office. On those hopefully rare occasions when the life of the polity is at stake, greater sacrifices may be demanded. Pericles' description of the qualities of Athenian democracy was purposefully offered at a state funeral for those who had died defending Athens from its enemies.

Thucydides, from whom we have an account of Pericles' oration, recognized that humans were largely motivated by the pursuit of personal gain, and that this passion had to be constrained for democracy to function well. Pericles and some of the other leaders of early Athenian democracy realized this and sought, largely successfully, to forge these constraints. The deterioration of Athenian democracy is accompanied by a continual weakening of these constraints, a shift from what Thucydides described as policy-making to politics (what we might describe as a shift from positive-sum to zero-sum politics), and an increasing cynicism on the part of citizens with regard to the motives and veracity of their leaders.[17]

Similar cynicism can be found in Japan, Italy, Great Britain, Australia, the United States, and many other countries today. In the United States, at least, a certain devolution in the sense of citizenship can also be traced. In the late eighteenth century, individuals were willing to put down their plows and pick up their muskets to win their democratic freedom. Men like Washington and Jefferson abandoned the quiet life of a country gentleman to serve their country in war and/or politics. Today in the United States, one often hears talk of a dearth in the quality of leadership in politics. Is that because, despite a population almost 100 fold greater, no one with the talents of a Washington or a Jefferson is alive today, or because those who potentially have this greatness choose not to enter into politics?

The institutional analysis in this book builds on the assumption that all individuals

are motivated in large part to advance their own interests. The presumption is that democratic institutions are the best for achieving this goal. If this presumption is correct, then the democratic institutions of a community are a kind of public good. The more effort each citizen puts into the democratic process, the better this process advances the common interests of the community. Like all voluntarily provided public goods, this one is likely to be underprovided. But unlike for all other public goods, this "market failure" *cannot* be eliminated by government action. Good *democratic* government can only arise through voluntary contributions of time and effort on the part of the citizens.

As in other prisoners' dilemma-type situations, voluntary cooperation can be induced by instilling in individuals a sense of obligation or duty to the community. The norms and mores of the democratic community must emphasize the importance of fulfilling one's civic and political obligations. Individuals must feel that citizenship carries with it obligations as well as rights.

Because democracy is at its foundation a prisoners' dilemma, as with all prisoners' dilemmas any joint cooperative solution is always in danger of unraveling. The less effort individuals devote to the political process, the less successful it is likely to be satisfying citizens' interests. The less successful democratic institutions are at advancing individual interests, the less effort individuals make to strengthen and protect them. With this in mind the founders of the polity must give careful thought to what the rights and obligations of citizenship are to be, and to whom they are to be entrusted. The more casually citizenship is defined and granted, the more casually it is likely to be exercised and defended, and the more likely an unraveling of the democratic process is. This is one, and perhaps the most important, of the many lessons we should have learned from those who first experimented with democracy.

Notes

1. McCarty (1992) finds that ethnic and religious diversity leads to smaller government expenditures, and in extreme cases to *no government at all.*

2. Let the levels of utility for the A's and the B's be $U_A = K_A - (x_A - x_C)^2$ and $U_B = K_B - (x_B - x_C)^2$. Now if the voting rule used results in a compromise on x, which is a weighted mean of the quantities favored by the two groups, as could occur, for example, under the probabilistic majority rule, then

$$X_C = \frac{N_B}{N_A + N_B}(X_B - X_A) + X_A$$

and the loss in utility to the A's from the compromise is

$$L_A = \left(\frac{N_B}{N_A + N_B}(X_B - X_A) + X_A - X_A\right)^2 = \left(\frac{N_B}{N_A + N_B}\right)^2 (X_B - X_A)^2.$$

3. For discussions of the difficulties caused by the large disparities between the European and Indian cultures and income levels in Brazil, Peru, and Mexico, see Lamounier (1990), Palmer (1990), and Levy (1990). Costa Rica's success as a democracy can be attributed in part to its not having a significant native population (Ameringer, 1982; Seligson, 1990). The Los Angeles riots of 1992 were characterized by violent actions of ethnic groups and gangs against people of different ethnic origin.

4. Under the assumption "once an A always an A," these rights and obligations could be automatically reestablished upon a citizen's return.

5. These costs are a combination of the time required to make a decision, and the loss from the decision that is made deviating from that one most prefers (Buchanan & Tullock, 1962, pp. 63–91; Ch. 11 above).

6. For the same reasons, the founders may choose to place similar or more stringent requirements on those seeking to hold office. Three levels of French citizenship with respect to holding office were proposed at the Constituent Assembly in August 1791; both James Madison and Gouverneur Morris favored multiple categories of citizenship for the United States (Elster, 1991, pp. 68–69).

7. Of course, individuals who are not members of the religion might also be denied the right to vote. But if people who are members of other religions are a small minority, denying them the right to criticize the state religion may be more important than denying them the right to vote. All people that meet age, birth, and similar criteria might be allowed to vote regardless of their religion, even though free speech was not guaranteed.

8. Elster (1991, p. 11) mentions a provision in the new Romanian Constitution restricting the freedom to engage in religious practices that go *against* public morality, inserted with specific religious sects in mind that practice sexual behavior considered to be licentious.

9. Ackerman (1991, Chap. 11) recognizes the existence of different levels of citizenship and stresses the need for significant numbers of "higher" (more committed) citizens. He appears to hope that this higher commitment will come from the exhortations of well-intentioned scholars like himself. Alternatively, the constitution might define institutions that encourage or require more commitment from the citizens.

10. Pennsylvania required that a man must have paid public taxes to be allowed to vote, so that it too limited the franchise to those with some financial wherewithal (Porter, 1918, p. 13). Canadian provinces introduced property requirements in the 1830s, when land was no longer given away (Garner, 1969, pp. 3–4).

11. Canada, the United States, and the United Kingdom have recently reinstituted a kind of property qualification for citizenship, however, by granting foreigners almost immediate citizenship, if they invest a sufficient sum of money in their "new country."

12. The discussion in this section draws heavily from Ehrenberg (1969, pp. 38–48), and MacDowell (1978, pp. 67–83). See also Kitto (1957).

13. "And yet we all know that success does not visit and abide with those who have collected the greatest population in one place, but rather with those who most nobly and wisely govern their state. For the soul of a state is nothing else than its polity [i.e., body of citizens], having as much power over it as does the mind over the body; for it is this which deliberates upon all questions, seeking to preserve what is good and to ward off what is disastrous; and it is this which of necessity assimilates to its own nature the laws, the public orators and the private citizens; and all the members of the state must fare well or ill according to the kind of polity under which they live" (Isocrates, 1929, VII at 13, 14).

14. Benjamin Franklin argued in favor of extending suffrage to males too poor to own land on the grounds that it increased their loyalty to the country when asked to defend it in time of war (Farrand, 1911, vol. 2, p. 210). Clemont-Tonnere argued on the same grounds that Jews should not be excluded from citizenship by the French Constitution of 1789 (both are discussed in Elster, 1991, p. 55).

The relationship between citizenship and military service has also surfaced recently in the Netherlands. Having granted foreign residents in Holland the privilege of voting, the question has arisen as to whether they should not be accorded full citizenship status with the attendant military obligations, or if instead there should merely be different categories of citizens (Vis, 1988, pp. 355–60).

15. The image of the ideal citizen as an active participant in community and political affairs reappears, perhaps unsurprisingly, with the rebirth of the city-state in Renaissance Italy (Black, 1988, pp. 605–6; Canning, 1988, pp. 354–56).

16. Swiss democracy may be following the path of its Greek ancestor, however. Voter turn-

outs have been falling in recent years; abandoning compulsory military service has been under discussion, along with entry into the European Union (EU) and a total overhaul of the Swiss constitution (Hughes, 1988, p. 286). The most recent referendum in Switzerland rejected EU membership, however.

17. Cynthia Farrar (1988, Chap. 5), relying on Thucydides' historical account, traces this devolution.

21

The Constitutional Convention

> The assembly which accepted the task of composing the second Constitution was small, but George Washington was its President, and it contained the finest minds and the noblest characters that had ever appeared in the New World.
>
> ALEXIS DE TOCQUEVILLE

> It is this negative power,—the power of preventing or arresting the action of the government,—be it called by what term it may,—veto, interposition, nullification, check, or balance of power,—which, in fact, forms the constitution.
>
> JOHN C. CALHOUN

Logically, this chapter might have been the first of the set on constitutional design. One first describes how a constitutional convention is assembled and its operation, and then goes on to discuss the outcomes of its deliberations. But this has in a way been the most difficult chapter to write, and I have chosen to save the most difficult for the last. There is also a pedagogic justification for this choice. It is somewhat easier to contemplate how the convention should be convened and how it should function after considering the tasks it must accomplish.

One difficulty in analyzing a constitutional convention is that the past is a less accurate predictor of the future than in other areas. Constitutional conventions are rare events occurring under unusual circumstances. Given their rarity one cannot readily apply Darwinian selection arguments to separate good formats from bad. Given that they often occur after a revolution, civil war, coup d'etat, or the collapse of an ancien régime, constitutional conventions often occur when man's "animal spirits" are most unconstrained. The participants in the convention may also be "chosen" not for their judgment and knowledge of political institutions, but as a result of the part they played in the preceding events. The assumption that individuals are rational actors may be much less descriptive of the participants of at least some constitutional conventions than it is in other areas. Nevertheless, we continue to employ the perspective of rational actors joining in contract.

There are essentially three questions to be addressed concerning a constitutional convention. How are the delegates chosen? What is the voting rule employed? What is the agenda? In the first three sections below, we take up these questions in turn under the assumption that a constitution is a contract among the individuals who will become citizens under it. Following that, we discuss the constitution as a contract among states—i.e., a contract to create a confederation.

The Selection of Delegates

If the constitution is a pact among all future citizens, then all future citizens should be represented at the constitutional convention. There are three main alternatives for accomplishing this end.

The Separate Election of Delegates

The most straightforward procedure for choosing delegates to a constitutional convention is through an election with the entire nation designated a single electoral district. Defining the entire nation as a single district is desirable under the assumption that people with particular interests or particular views about the proposed constitution might be found anywhere in the country. If this is not a good assumption, if people with particular interests are clustered together in separate geographic areas, then representation by geographic district is obviously more appropriate. In this case the polity being formed is more of a confederation, however, and is taken up in a later section below.

Given the special nature of a constitutional convention, desirable candidates might include individuals who have not been and/or may not become candidates for public office (e.g., noted scholars with expertise in law or political science, former jurists and elected officials, members of the press, television personalities, etc.). They may, therefore, not be members of a political party, or at least not closely associated with one. A method of electing delegates in which the citizens vote for individuals rather than for parties is thus most appropriate as, for example, the single-transferable-vote procedure. Indeed, the outcome of the convention becomes likely to be better if its delegates are *not* viewed as members of a particular party whose life before *and after* the convention is tied to the fortunes of that party. If the constitution is to advance the interests of *all* future citizens, then it must be written by people who are willing to encompass the interests of others along with their own. Representatives of particular interests who anticipate having to win the votes of these "constituents" in the future will be less inclined to compromise these interests and thus may jeopardize the success of the convention. More on this below.

A danger of a special election procedure, particularly in this age of television and mass-media dominance, is that the convention becomes filled with pop singers and athletes who, among other deficiencies, lack expertise on constitutional matters. If such were to occur, there would be nothing to stop the convention from consulting experts and even making them members of its various committees.[1] More optimistically, one can hope that the electorate recognizes the importance of electing some delegates with knowledge of constitutional and political matters. Ex-presidents and ex-congressmen in the United States, and ex-prime ministers and ex-cabinet members in parliamentary systems would be plausible choices.[2]

The Constitutional Convention as a Jury

The most democratic method for choosing members of a constitutional convention would be by some random-selection procedure for which all citizens were eligible. Such a selection procedure would have two major advantages. First, as is the intent with a jury, it is the procedure most likely to produce impartial delegates, delegates who do not have to run for reelection, have not been selected to represent a particular set of

interests, and whose interests are probably unknown to most of the electorate. These delegates are the most likely to take into account the long-term interests of all future citizens and agree to a compromise. Although they are not selected because they represent particular interests, they would by the nature of the selection process be representative of all citizens. The random selection of representatives in fifteenth-century Florence appears to have made all citizens feel that they were a part of the government, and that their interests were represented. It also appears to have led representatives to identify with the common interests of Florence (Schwartz, 1988, Chap. 7). Random selection of delegates to a constitutional convention could have the same effects, and thereby enhance the likelihood that citizens accept the constitution as theirs.

A convention composed of average citizens would lack expertise, of course, but this deficiency could be remedied, as with an elected set of delegates, by appointing experts as consultants or as additional members.

It is difficult to imagine a constitutional convention being formed by random selection following a revolution or the collapse of a dictatorial regime. Time is of the essence in such situations, and a convention that is more clearly representative and in possession of the necessary competence would be favored. If, on the other hand, the adopted constitution required periodic new constitutional conventions empowered to amend or replace the existing constitution, the delegates to these subsequent conventions could be randomly selected. The pressure of time would not be severe in this case, nor would the cost of failure. A convention might meet for a full year,[3] with the existing constitution as a status quo. If a convention agreed to amendments or an entirely new constitution, these would be adopted; otherwise the existing constitution would continue in effect.

The Parliament as a Constitutional Convention

When an elected parliament exists, it, or a subset of it, becomes an obvious body to serve as a constitutional convention. Historically, most constitutional conventions have been constituted from an existing parliament. In some cases, as in Eastern Europe after the collapse of Communism, parliaments are chosen[4] and charged with both running the country and writing its constitution at the same time. In others, an existing parliament may be asked (say, by the chief executive) or feel compelled to write a new constitution by the circumstances of the moment.

Having an existing parliament also serve as a constitutional convention has the great advantage of saving time. When a country is in the throes of anarchy, or faces the real threat of anarchy, both the short-term tax and expenditure decisions a polity makes, and the long-term choice of its rules, have to be made. If a body with a legitimate claim to represent all of the people exists, why not use it to handle both sets of questions? The parliament is also quite likely to contain some of the expertise needed to write the constitution.

There are severe dangers in a parliament also serving as a constitutional convention, however. First, having two important tasks to fulfill it may do one or both badly. To the extent that the nation faces a crisis following a revolution or regime collapse, short-term problems are likely to be severe and draw the bulk of the energies of the parliament with constitutional questions getting short shrift. Such has been the case in Eastern Europe following the regime changes of 1989.

Second, as elected representatives, and ones who hope to be elected again, members

of parliament may be less willing to compromise by sacrificing the interests of their constituents.

For example, delegates from Delaware to the Philadelphia Constitutional Convention that drafted the U.S. Constitution had been instructed not to compromise on the issue of the proportional representation of cities (by area) in the legislature. This proved to be an effective stratagem to bring about the "Great Compromise" of each state having the same number of representatives (two) in the upper house of Congress. But had a greater consensus been required for approval of the Constitution, the Delaware delegation's intransigence could have stood in the way of obtaining the final objective (Berns, 1988, pp. 136–37). More generally, the voting patterns at the Philadelphia Convention reveal that delegates voted a combination of their own personal interests and those of their constituents (McGuire, 1988).

In addition, some delegates to the *Assemblée Constituante* to draft a new constitution for France in 1789 were also given specific instructions on how to vote on certain issues by the états they represented. In the interests of compromise some French delegates reinterpreted their mission as that of representing the entire nation (Elster, 1991, p. 27). If delegates adhere rigidly to the interests of their constituents, the exercise is doomed to failure if these interests cannot be made to coincide.[5]

The third danger is that a member of parliament chooses to advance neither the interests of the whole nation nor of his constituents but only those of himself. In particular, parties and their members may opt for constitutional rules that favor their chances for reelection once the constitution is implemented. The largest party favors a two-party system, smaller parties a multiparty system. Large and medium-sized parties favor high minimum cutoffs on the fraction of the vote a party must win before it can claim seats; tiny parties want low cutoffs. Well-known and popular politicians favor allowing voters to vote for specific individuals, as with the single-transferable-vote procedure. Uncolorful or disliked leaders of major parties favor party-list procedures in which voters only choose among the parties. This motivation is the simplest to understand and appears closest to the truth based on the historical evidence.[6]

The 1974 Constitution of Sweden, although drafted by a commission, was a compromise between the until then dominant Social Democratic party and the leading opposition parties. Olaf Ruin (1988, pp. 320–21) argues that "the agreement. . .hammered out [did not] rest on any version of the right constitutional framework for an advanced welfare society of the Swedish type. Rather, the agreement was characterized by calculations from different quarters of what maximally favored and disfavored their own political party. The Swedish version of constitutional politics appeared as the interest politics of political parties *par excellence*."

Members of the different parties in Italy that existed prior to Mussolini's takeover met after World War II and drafted a constitution designed to protect incumbent parties (e.g., by allowing them to reward their supporters with patronage of various sorts). It served the parties' interests well, particularly those of the Christian Democrats, who were in every government until 1994. How well it has served the Italian citizens is another matter (Spotts & Wieser, 1986, esp. pp. 4–8). Out of frustration with the performance of the Italian political system, several attempts at constitutional reform have been made. In one of these, the Bozzi Commission, appointed in November 1983, proposed reforms were defeated by a constellation of party interests that feared the parties would be weakened by the changes (Hine, 1988, pp. 218–23).[7]

Although the West German, post–World War II Constitution has probably served

its citizens better than Italy's citizens have been served by theirs, the same kind of jockeying for postconstitutional advantage was visible at the convention in Bonn (Merkl, 1963, pp. 90–103).

The Spanish Constitution of 1978 was drafted by a committee composed of representatives from both houses of the Spanish legislature, with all parties represented except the Basque National party. Although consensus was a primary objective from the start, and one that was largely obtained (Leorente, 1988), the different parties did have an eye on their likely positions in the postconstitutional government. The two largest parties (the Union of the Democratic Center and the Spanish Socialist Workers party) favored and succeeded in getting a constructive motion of censure into the constitution over the vigorous opposition of the smaller parties (Bonime-Blanc, 1987, p. 77). This rule stipulates that the prime minister cannot be voted out of office unless a replacement is agreed upon. In favoring the rule, the two largest parties in Spain were increasing the likelihood that the governments, of which they expected to be a part, would not easily fall.

All of the constitutions that established democracy in the major Latin American countries have been written by standing parliaments or conventions dominated by the major political parties and/or political interests of the participants (Geddes, 1990). All reflect these interests. For example, proportional representation (PR) has generally been adopted at times of significant political transition, when larger parties fear significant future declines in their strength and small ones expect to benefit from such a shift.

Even more conspicuous illustrations of crass political self-interest occur when the parliament can choose the electoral rules. In France, the National Assembly has the authority to select the electoral rules. The French have routinely shifted from single- to multimember-district representation according to the expectations of the parties controlling a particular seating of parliament as to which formula will best serve their interest in the next election (Carstairs, 1980, pp. 176, 185; Knapp, 1987).

The absence of a written constitution gives the British Parliament the authority to choose electoral rules by default. The proposal to switch to PR has surfaced on several occasions during the last century in Great Britain. These proposals have inevitably met with a cool reception by the party that was or expected to be the largest in the next election (and thus the beneficiary of a disproportionate allocation of seats under the single-member-per-district representation formula). With opposition from the largest one or two parties in the British Parliament almost a certainty, proposals for PR are doomed to fail. As A. V. Dicey observed long ago, in Great Britain constitutional issues and party politics are intertwined.[8]

Even more blatant examples of raw self-interest are evidenced when dictators lend a hand to the process. When the relatively young Gamal Abdel Nasser took over as dictator of Egypt in 1956 he had the Constitution Writing Committee set the minimum age for the president at 35. When the somewhat older Mohammed Anwar al-Sadat became president in 1971, he had his Constitution Writing Committee raise the minimum age to 40, but had the committee drop the requirement that the president's grandparents be Egyptian, since his were not (Saleh, 1988, pp. 290–91). Having disbanded the elected Congress in April 1992, President Alberto Fujimori of Peru has pressed for constitutional changes that include repeal of the prohibition on a Peruvian president's being reelected. President Carlos Menem of Argentina has succeeded in obtaining the same constitutional change.[9]

As a final example of self-serving behavior in the constitutional sphere, one must

recall how on two occasions (1959 and 1968) Ireland's largest party, the Fiana Fail, attempted to cement its numerical advantage by transforming Ireland from a multiparty PR system into a two-party system. The constitutional changes required voter approval in a national referendum, however, and Fiana Fail was foiled as the voters rejected the change to a two-party system both times (Butler & Ranney, 1978, pp. 201–7).[10]

Conclusions

For politicians, as for Vince Lombardi's football teams, "winning is the only thing." A politician who strives after victory can also produce desirable outcomes for the citizenry. In a two-party system, each party tries to put forward a platform that is preferred by a majority of voters to the opposing party's platform. In a multiparty system a party must take positions that a given voting bloc finds superior to those of all other parties. The necessity to run for reelection constrains individual candidates and their parties to take positions that appeal to at least some groups of voters.

But the incentives of a person elected to parliament are quite different, if he finds himself in a constitutional convention. The constitutional convention is a one-time occurrence. The views of those who elected a representative to parliament regarding provisions in the constitution may not be homogeneous, and in any event are probably unknown to the member of parliament. Indeed, they may be unknown to the citizens themselves, since constitutional conventions are such rare events. Thus, an elected member of parliament, whose long-term political career is, he hopes, in parliament, may ignore the interests of both those who elected him and the citizenry at large when making his constitutional choices, at least as these choices pertain to parliamentary elections and the chief executive. Thus, a career politician attending a constitutional convention for one time may choose simply to advance his future political prospects.

This likelihood is enhanced when one considers the decision calculus of the voter. She has voted for someone (or some party) now in the parliament. The person(s) she voted for are now part of a constitutional convention that votes to establish a system of representation that the citizen believes is not in her best long-term interests. The next parliamentary elections are held under the new set of rules. Does the voter vote against the person (party) she formerly supported, because of their actions in the constitutional convention, or does she treat those actions as sunk costs and vote for the person or party that will best represent her interests in the next parliament? The latter is clearly the rational thing to do, and if she does it and if her representative knows she will do it, he has complete discretion to write the constitutional rules to maximize his long-term prospects in the parliament. And that is what the record indicates he has done.

These considerations suggest that it is better to elect a separate group of people to the constitutional convention than to have the constitutional convention formed by those elected to serve in the parliament.[11] The rational voter realizes that a different set of issues is to be decided at a constitutional convention, and thus that a different type of person should be chosen to participate. Given the one-shot nature of the convention, the voter knows that, once elected, her representative will be free to vote as he pleases at the convention. The citizen wants, therefore, to elect individuals noted for their integrity as well as their honesty and judgment—qualities not always found in those who choose politics for a career. Beyond this, the voter can only trust and hope that the magnitude of the task that the convention takes on induces its members to discharge their duties responsibly.

Voting Rules

How Many?

If the constitution is a contract among *all* the people, then the voting rule used to approve the final document should be the unanimity rule. Even if one backs off from requiring full unanimity on grounds of practicality, the contractarian logic requires that the constitution should be approved with a substantial fraction of the votes cast. Wicksell's (1896, p. 92) five-sixths majority comes to mind; three-fourths and two-thirds are obvious alternatives. To drop much below two-thirds, however, is to abandon the logic of consensus in favor of that of majority rule.

Contractarians emphasize consensus because it fosters compliance.[12] If *A* agrees to the constitutional compromise, then *A* agrees to honor the rights of *B* as defined in the constitution, just as *B* in agreeing promises to honor those of *A*. In expressing agreement, both *A* and *B* commit to cooperate in the many social prisoners' dilemmas that the constitution and the government it creates attempt to resolve. To the extent that individuals espouse a contractarian morality, they are obliged to honor their contractual commitments, to keep their promises. Overt agreement to the constitution enhances compliance with its provisions,[13] enhancing both its effectiveness and its durability.

Consensus on the constitution can be reached for three compatible reasons. First, agreement avoids the necessary costs of nonagreement. The higher these costs, the more willing individuals will be to compromise. If true anarchy threatens, then all forms of constitutional government must promise benefits, and agreement on one form must be possible. Even self-interested individuals with divergent views will compromise on a particular constitutional contract rather than haggle endlessly.

The second reason to believe that consensus can be reached stems from the long-term nature of constitutional choice and the uncertainty over the future this brings. The group that today favors imprisoning members of a particular minority for long periods without trial may tomorrow find itself a minority facing imprisonment under similar terms. Today's minority party may become tomorrow's majority. Realizing this, individuals and groups, even if they think only of their own self-interest narrowly defined, may agree to provisions that protect and advance the interests of all individuals and groups out of a genuine uncertainty over what the future will bring.[14]

Finally, individuals may impose upon themselves uncertainty over future positions of the type that Rawls (1971) and, more recently, Gauthier (1986) have discussed. Participants at a constitutional convention do not anticipate that they or their descendants will be slaves, but believe when considering the constitutional status of slavery that one *ought* to imagine that one could be a slave. If individuals imagine that they might occupy all future positions in the polity, the likelihood of obtaining a consensus on the articles of the constitution would be greatly enhanced.

This Rawlsian view of uncertainty's role stands furthest from the rational-self-interest motivation of individuals that is presumed to govern their behavior in this book. Although flashes of impartiality were present in some arguments of the delegates who drafted the U.S. Constitution in Philadelphia, many did not appear to approach the issue of slavery in a Rawlsian frame of mind.

On the other hand, the willingness of whites in the North to support a war against the South in 1861 cannot be explained without taking into account the moral beliefs of many northern citizens at the time of the American Civil War. Some people on at least

some occasions act as their moral beliefs dictate. If morality is ever a factor in how people make political choices, it is most likely to be one at a constitutional convention where the basic political rights of individuals are defined and the institutions that will determine their future welfare are crafted. The potentially important role that uncertainty plays in inducing individuals to agree on a constitution is further reason not to have the elected members of the parliament draft a polity's new constitution. Both natural uncertainty over future position, and the willingness to accept Rawlsian-type arguments for impartiality, are less likely for those whose political life hangs on the outcome of the next parliamentary election.

Whose Votes Count?

If the constitution is a contract among the citizens, then logically the citizens must cast the final vote for the constitution. If the constitution is a contract among *all* citizens, then all must approve the constitution before it can take effect. Although the logic of the argument is straightforward, to require a substantial majority of both the constitutional convention *and* the electorate to ratify a constitution is to risk having no constitution at all.

For the reasons given in the previous subsection, agreement among a substantial fraction of the participants in the convention is not improbable. But these participants have heard the arguments on all sides of each issue; they will have confronted the areas in which compromise is necessary and made the best compromise they could; their willingness to compromise has been watered by endless hours of debate. When the final vote is taken, each delegate voting yea believes that this wording is the best one could have gotten. The citizenry, on the other hand, is not likely to have followed each segment of the proceedings, not contemplated each possible proposal and counterproposal, is not equally as exhausted as the actual participants. Many citizens may reject a wording of the constitution that they would have accepted had they participated fully in the constitution-drafting process.

The situation is not unlike that of a jury. The rationale behind having trials by jury is that randomly selected citizens somehow carry with them the interests of all other citizens in seeing justice brought about, just as the rationale of selecting a constitutional convention should be that its members choose a constitution that advances the interests of all citizens. The belief is that the members of the jury, after hearing all the evidence, and perhaps engaging in much debate, reach the decision that is in the community's best interests. In the United States, this must be a unanimous decision. The system would collapse if the jury's decision were treated as a recommendation to the public, who then had to endorse it unanimously for it to take effect. Without hearing all of the evidence and without engaging in the subsequent debate, the general public is unlikely to reach the same decision unanimously. This same logic applies to the constitutional process.

Thus, one option for ratification of the constitution is to establish a procedure for selecting delegates to the convention that ensures the impartial representation of all views regarding the constitution, and require that the members of the convention ratify it by a substantial majority for it to take effect. If all citizens believe that their interests have been fairly represented in the constitutional assembly, then its vote in favor of the constitution by a substantial majority should convince citizens that this is the best constitution that could be agreed to. The U.S. Constitution has endured so long, in part

because each generation thinks of it as *its* constitution, as if it is party to the contract. This identification stems in turn not, I believe, from the fact that the original Constitution was ratified by a handful of voters in nine states, but because the men who wrote it were among the best America has ever produced. The U.S. Constitution endures because most Americans doubt that they, or anyone else, could produce a better one.

The situation is quite different if the citizenry does not respect or trust the judgment of the constitutional convention. Suppose that a parliament has been selected after the collapse of a dictatorial regime and that it decides to write a new constitution. Perhaps because many in the parliament are likely to be most concerned with their own political careers, or perhaps because the parliament contains members of the former deposed government, the citizens are skeptical as to whether this assembly will draft a constitution that will serve them best in the long run. In this situation, the requirement that the constitution be ratified by a substantial majority in a national referendum will help protect citizens from the opportunistic actions of the parliament.

We thus see that there are two quite different ways of thinking about the constitution-drafting process, each of which is consistent with the view that the constitution is a contract among all citizens. In the one, delegates are selected to the constitutional convention by a process in which all citizens' interests are fairly represented. We suggested either a special election of delegates using a proportional representation technique or a random-jury-like selection process. A substantial majority of this convention is required to place the constitution into effect. The members of the convention are induced to agree because they know there will be no constitution or no new constitution until they do. The citizens accept the constitution approved by the convention as theirs because of the way the convention was constituted and the size of the consensus it reached.

In the other alternative, a more expedient method of obtaining a constitutional convention is chosen: an existing parliament or committee thereof, a commission appointed by the parliament, by the president, by the retiring dictator. Regardless of how this convention is formed, if the document it produces can go into effect only if it is ratified by a substantial majority of the population, then the convention has to take into account the preferences of the citizens. Should the constitution include provisions that are clearly motivated to advance the narrow interests of the members of the convention, the citizens will turn it down, just as Irish voters twice rejected Fiana Fail's efforts to change the Irish Constitution to its own advantage.

Which alternative is best for a given country depends on the characteristics of that country. How pressing is the need to have a constitution? How large is the pool of potential candidates for a parliament *and* a separate constitutional convention? How wise and engaged are the citizens? The quality of the final product under each alternative depends ultimately on the answer to this last question. Under the first alternative, the citizens must either choose representatives with the judgment and knowledge to draft a good constitution, or be capable of acquiring these traits themselves. Under the second option, the citizens must have sufficient knowledge and judgment to reject any proposed constitution that is inferior and accept one that is not. If authority in a constitutional democracy rests ultimately on the citizens joined by the constitutional contract, then the quality of a constitutional democracy's institutions rests on the capabilities of its citizens to forge them.

Agenda and Procedures

Types of Issues

Given the Herculean nature of the task of drafting a constitution, it will be natural to subdivide it. Three broad divisions come to mind: delineation of the institutions of government, definitions of rights, and procedures for amending or replacing the constitution.

Whether to create a two-party or multiparty parliament, one that is unicameral or bicameral, etc., are the types of questions that will most concern members of an elected parliament should they make up the constitutional convention. In this case, agreement will be difficult, and compromise surely necessary for a consensus to be reached.

William Riker (1987) highlighted how lucky America was that the Antifederalists chose to boycott the Philadelphia Constitutional Convention. The convention was thus composed almost entirely of Federalists with similar views as to what the structure of government for the United States should be. The Federalists were able to reach a near consensus on a coherent set of institutions that allowed the country to grow and prosper over the next 200 years. Had the Antifederalists been present, no consensus might have been reached, or if one had it might have involved compromises that produced an unworkable governmental structure.

The lesson to be learned from the American experience is not to exclude all who do not share a single view of optimum government structure. The lesson is that delegates have to choose among alternative governmental structures (two-party or multiparty, centralized or federation) and, having made these basic choices, design institutions that function well together. It would be better to pick by lot one from among three or four logically consistent government structures than to choose a compromise that is an unworkable hodgepodge.[15]

In Chapter 14, we analyzed the characteristics of constitutional rights under the assumption that each individual at the constitutional stage is uncertain of her future position and assumes that she has an equal probability of being all future citizens. This uncertainty-equal-probability assumption at the constitutional stage seems most justified with respect to rights. (Who can be sure that some group will not seek to ban a book that she or her granddaughter will wish to read?) Even if a parliament drafts the constitution, the kind of partisan issues that arise when the rules for electing parliament are written, are not raised regarding rights.[16] Consensus on a proposed bill of rights should be much easier to obtain than on the particulars of government structure.

More room for compromise also exists in choosing a set of rights than for government structure. An article regarding slavery can be written independently of one concerning free speech. Such logical independence opens up avenues for compromise. *A* feels strongly about free speech, *B* about abortion. *A* gives in to *B* on abortion in exchange for *B*'s support for a strong article on free speech.

Last of all, the convention must decide how the constitution is to be amended or perhaps even replaced in toto. There are several options here that we have discussed already.

1. Provision is made for the periodic convening of a constitutional assembly with the authority to amend or replace the existing constitution. This assembly could be governed by the same rules as the first, or by new rules.

2. Provision is made for calling a new convention upon some fraction of the citizens or parliament or states demanding it. Once convened it has the same powers to amend or replace the existing constitution.
3. The constitution can be amended by referendum.
4. The constitution can never be changed, and all ambiguities and boundary disputes are settled by the judiciary.

The same issues regarding selection of delegates and voting rules arise under options 1 and 2 above as for the original constitution. The case against the parliament serving as a constitutional convention is even stronger when the convention is called under an existing working constitution. Time and the threat of anarchy should not be pressing concerns, and the polity can afford the luxury of convening an assembly that functions independently of the parliament.

If the consensual nature of the constitution rests on the size of the majority that ratifies it, the same supramajority should be required to amend it as was originally required to ratify it.[17] This requirement, coupled with the inability to amend a referendum proposal once made, makes amendment by referendum an unlikely occurrence.

Another potential disadvantage of amendment by referendum arises from the likelihood that the original set of rights obtained their supramajority as a package—i.e., as a result of vote trades. If *B* traded her vote on free speech for *A*'s vote on abortion, and the article on abortion is subsequently amended to *B*'s disapproval, *B* will have given *A* her vote rather than traded it. If *B* anticipates such a successful referendum effort, she will not trade her vote in the constitutional convention, and the likelihood of obtaining the required majority on a package of rights falls. This consideration favors reconvening a full convention to amend the constitution rather than piecemeal amendments by referendum,[18] so that whole packages of changes involving new trades replace previous packages.[19]

Entrusting all changes to their agents in the judiciary is the simplest and potentially quickest procedure the citizens can adopt to keep the constitution up to date. It suffers from two main defects. First, the court with final authority to settle constitutional disputes must consist of but a handful of individuals, and is thus a very small sample of the population. Its judgment may diverge from that of the larger population, just as the mean of any small sample can diverge from the population mean.

Second, even if a decision made by the court is exactly the decision that a newly convened convention, or citizens' referendum, would have made, there may be an advantage in reaching this decision by one of the more circuitous routes. If the constitutional convention is properly constituted, citizens *know* that they have been fairly represented. They can observe and consider the arguments on all sides of the issue as it is debated; debates among members of a court are never observed. The citizen knows, and presumably accepts, that the original constitution was ratified by a substantial majority and that any changes in it require the same majority. Changes cannot be made by simple majorities as is generally true of courts of last resort. In a referendum the citizen participates directly and is exposed to arguments on all sides of the issue. The more time-consuming amendment procedures should generate a better understanding of the decisions made, and thereby conviction that the correct decision has been made. In so doing, they are more likely to maintain citizen consensus on the provisions of the constitution and compliance with its provisions.[20]

In the end, the convention must consider all elements of the constitution as a package. Final approval is of the total package. It has been a theme of this book that the

choice of one part of the constitution depends on the other parts. Rights protecting a citizen against the state are more important in systems in which minorities are poorly represented in the parliament and the parliament uses the simple majority rule than where supramajorities are required in a fully proportional representation system. Rights can be defined more precisely the easier it is to amend the constitution. Although the initial work of a constitutional convention can be expected to involve dividing the task into subsets of issues, to obtain a coherent whole, some consideration for how each part looks must go into the crafting of the other parts. A reconciliation of the different parts must occur before final ratification.

The Question of Timing

If the constitution provides that new conventions be called at set intervals, it must stipulate these intervals. Tension arises between the long-term nature of the constitutional contract and the desirability of its adaptation to the changing circumstances, knowledge, and interests of citizens. The only example of such a provision in a constitution of which I am aware is the stipulation in the Polish Constitution of 1791 to reconvene every 25 years. This interval would satisfy Jefferson's recommendation that each generation be allowed to write its own constitution (see quote at beginning of this book). For the constitution to be a contract among living citizens, a citizen should have the opportunity to observe and participate in the process once in his lifetime. An interval somewhere between 25 and 50 years would satisfy these requirements.

The issue of timing arises in yet another way. We have stressed how uncertainty over future position can facilitate consensus. By introducing impartiality of a sort, it can also add normative content to the constitutional contract (Rawls, 1971; Gauthier, 1986). Uncertainty is greater the further into the future an action occurs. Both the normative content of a constitution and the likelihood of its achieving a substantial majority should be enhanced if its provisions take effect sometime in the future. This option is not likely to be optimal with respect to *all* provisions of the original constitution, but it might be an attractive option for some of them.[21] Both its feasibility and attractiveness are greater in conventions established to modify or replace an existing constitution.

For example, suppose that a newly formed country had adopted a two-party system because its founders wanted an "effective government," given the many serious and urgent problems the country faced. Some years later, when the survival of the nation is no longer threatened, many citizens feel that the two-party system generates alienation and civil strife, owing to the lack of direct representation of minority views.[22] If a constitutional convention proposes that the required institutional changes go into effect in one year, vigorous opposition from the current majority party and their supporters, and perhaps also from the second largest party, is likely. If the changes are to take place after ten years, many current members of parliament will have retired, others will have had time to adjust. Introducing delays in implementation might make agreement on change more likely, leading to a more rapid updating than would otherwise occur.

The Question of Secrecy

The final procedural issue to touch upon is whether the convention's deliberations are to be secret or open.[23] This question arose at the Philadelphia Convention and it opted for secrecy. It did so to encourage frankness, to inhibit "grandstanding," and to allow

delegates to change their minds without being criticized (Berns, 1988, pp. 134–35). With the exception of grandstanding, these dangers of open discussion seem likely to be most acute when delegates to the convention are or expect to become elected representatives of one form or another. Representatives of this sort must always be concerned about how what they say "plays back home." But a delegate chosen by lot or election solely to participate in a constitutional convention can stand to "win" as much as she "loses" by being frank or changing her mind. She need fear no retaliation at the polls. Any costs she bears from what she says are likely to be her own "psychological costs," and these might even arise in a secret session.

The advantage of an open convention is that the entire nation can follow the discussion, learn the arguments on all sides of the issues, and understand why the sequence of circumstances led to the particular compromises reached. In following the course of a convention, the citizens may be led to the same conclusion as the convention—that the proposed constitution is the best to be gotten. With a closed session, the process of educating the citizenry must begin after the constitution is completed. In the case of the U. S. Constitution, this occurred through the published exchanges between the Federalists and Antifederalists in the months during which each state considered ratification. In the European Union new "constitutions" have been presented to voters without their participation in the drafting process or much national debate. With no Jays, Madisons, or Hamiltons to plead for their adoption they sometimes, as with the Maastricht Treaty, have met with a cool reception.

Thus, the answer to the secrecy question hinges on the nature of the ratification process. If the convention is composed of delegates elected for the sole purpose of writing the constitution, and its vote is final, an open convention is desirable so that citizens can follow the arguments and debate leading up to the document that is eventually approved by the convention. Candor and a willingness to compromise on the part of delegates can be hoped for, since their future careers do not rest directly on their actions at the convention. Should they so rest, as when the constitution is drafted by a sitting parliament, its deliberations should be secret to encourage candor and compromise. Public debate must then come after the convention has finished its work in the interval leading up to the ratification of the constitution by a referendum vote of the citizens.

When States Are Delegates

This book builds on the assumption that the constitutional contract is joined by individuals. But it sometimes happens that a state forms by several smaller states (nations) joining. The United States and, in its political attire, the European Union are examples. Ultimately, whatever constitutional contract joins a group of states joins their peoples, but a convention in which citizens are represented by states raises some different issues.

The Contract and the Convention

Let us suppose that there are five areas, each separated from one another by natural boundaries formed by rivers (see Figure 21.1). No government exists that includes the people from all five areas, but residents of each area feel that such a government to handle transportation and environmental issues related to the river boundaries might be

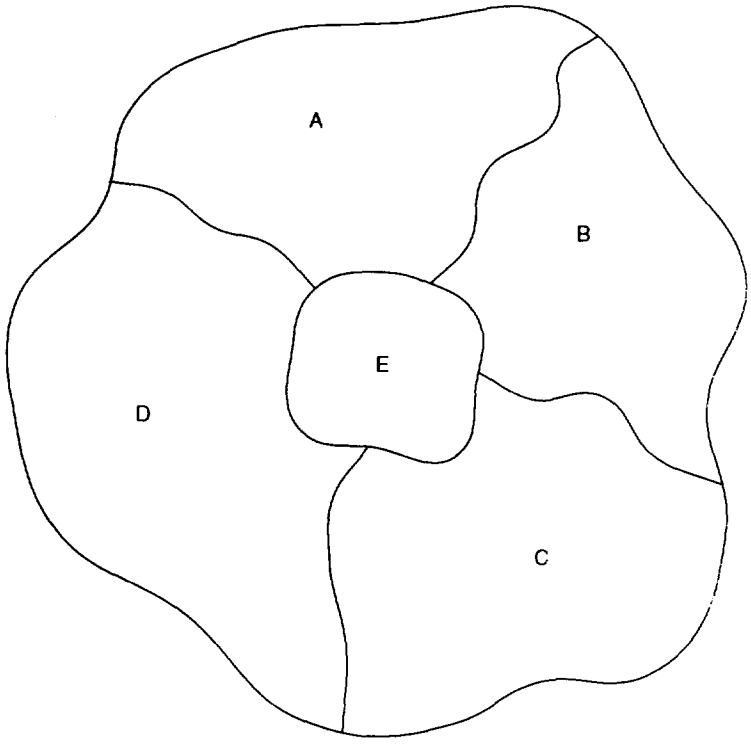


Figure 21.1. The Territorial Distribution of Five Homogeneous Groups

collectively beneficial. A convention is called to consider drawing up a constitution for a new state in which the residents of all five areas are members.

Two quite different circumstances consistent with these facts can be envisaged. First, suppose that *A, B, C, D,* and *E* together form a landmass surrounded by water. The different areas have been occupied by settlers from another country. They all speak the same language and share the same culture and religion. Mobility from one area to another is high and most people have relatives in other areas. No existing governments in *A, B, C, D,* and *E* exist. More importantly, the viability of each of the areas as a separate political unit in the long run is in doubt.

Under these assumptions it is reasonable to think of the entire landmass as the potential state, the constitution a contract joining all individuals on it. The considerations discussed above apply. An election with the entire landmass as a single district, and individuals represented proportionally, is optimal. Unanimity is the ideal voting rule, a supramajority rule the practical alternative.

Contrast the above situation with one in which *A–E* are autonomous states, each with its own independently functioning government. Each is inhabited by a different ethnic group speaking a different language, and religious differences also exist. Each could survive as a separate state with common issues involving rivers resolved by mutually beneficial bargaining à la Coase (1960) between the states. A superstate joining all five becomes optimal only if it reduces the costs of making their mutually beneficial collective agreements. Under these circumstances a constitutional agreement involving all states is reached only if representation is by state and the unanimity rule is used. No

rule other than unanimity is an option, since each state can survive alone should agreement on a superstate not be forthcoming. Each state might as well get one vote, regardless of size, since the superstate cannot form without even the smallest state's consent.

The crucial difference between these two situations is the viability of a geographic area as a fully autonomous political unit. The prior existence of an autonomous government in an area is prima facie evidence that this area can survive as an independent political unit should no superstate be created. The people from this area will not join with those of the other areas if they do not expect to be better off as a result. Their vote—i.e., the vote of their state—is essential for the superstate to form. Should no area be viable as an independent political unit, however, the constitutional convention might under a supramajority voting rule decide to form the superstate over the *unanimous* opposition of the representatives from one of the five areas. Because this area cannot survive as a state on its own, it would have no alternative but to join the superstate.

Once formed, both superstates might look very similar, if the institutions of government are designed in an optimal way. Only issues that affect people in all five areas would be resolved by the central government. If the rivers that create *A*, *B*, *C*, *D*, and *E* lead to large sets of public goods common to the people of a given area, then separate state governments will be created in the five areas. If separate cultures, languages, etc., have evolved in the five autonomous states of the second case, the natural boundaries are evidently substantial and would make the retention of many government functions in these states optimal.

It is customary to define the former type of superstate a *federation* and the latter a *confederation*. But the important point to recognize is that the optimal distribution of governmental structures across the different levels of government should be essentially the same. Note, too, that for decision-cost reasons, both structures of government may choose to require less than unanimous consent to implement decisions at the central governmental level. The key differences between the two types of government are (1) that a confederation of independent states must use the unanimity rule as applied to states at the constitutional convention,[24] whereas the constitutional convention in which individuals are represented geographically can use a supramajority rule applied to individual representatives, and (2) that a convention in which autonomous states are represented has more reason to adopt constitutional provisions to protect the individual states. We discuss three of them.[25]

A Nullification Clause

When independent states sacrifice their autonomy to form a superstate, the danger arises that the superstate undertakes actions that make the citizens of the individual states worse off. For example, suppose that the citizens in *C* belong to one religion whose sabbath is Tuesday, the citizens of *A*, *B*, *D*, and *E* belong to a different religion, which has a Thursday sabbath. The superstate's parliament votes to have Thursday be the sabbath in all parts of the superstate (stores and schools must close, etc.). A proposal, to declare Tuesday as a sabbath also, is defeated.

Such actions might impose obvious costs on citizens in *C*. They could protect themselves from such discriminatory legislation by agreeing to the superstate's constitution only if it contains a nullification clause. This clause might read as follows:

> *Nullification Clause:* The force of any action by the Parliament of the Superstate as it pertains to the citizens of any individual state shall be nullified throughout the territory of the individual state should a motion of nullification receive at least three-fourths of the votes of the representatives to said state's parliament.

As always, the choice of a three-fourths majority as opposed to a two-thirds or four-fifths is somewhat arbitrary. But one suspects that a supramajority would be required for nullification, even if a simple majority was required for all other legislation, to ensure that the superstate's actions were not routinely nullified. When an action was clearly discriminatory with respect to all or nearly all of a state's citizens, achieving the required supramajority in its parliament would not be a major obstacle. Such a clause in the superstate's constitution would protect against the discriminatory legislation described in the example.[26]

State Veto Authority

A nullification clause protects a state from certain kinds of harmful legislation, but not from others. Suppose now that the religious composition of the individual states was as just described—i.e., *A, B, D,* and *E* are of one religion, *C* of another, and suppose that a neighboring state, *F,* is of the same religion as *C* (see Figure 21.2). Border clashes occur between *B* and *F* and escalate to the point where the superstate declares war on *F*. A nullification clause would allow *C* to stay out of the war officially, but given its location would not be likely to keep it from being damaged by the war or perhaps even brought into it. Moreover, *C* might not wish merely to stay out of the war, but to

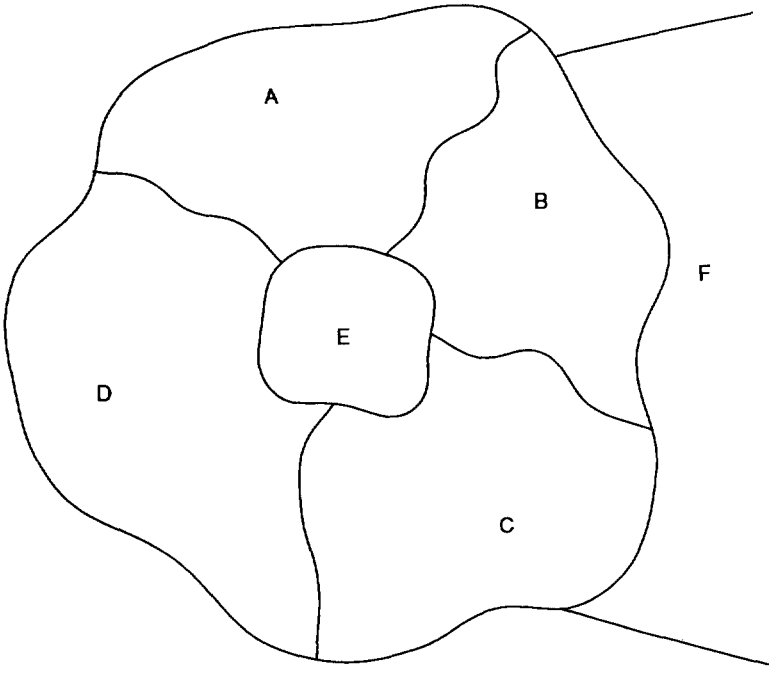


Figure 21.2. A Confederation of Five Groups with an Adjacent Foreign State

prevent it altogether. To allow *C* to accomplish this objective a different form of constitutional protection is required, a state veto clause.[27]

> Veto Clause: Any action of the Parliament of the Superstate can be nullified across the entire area of the Superstate by a three-fourths vote of a parliament of any one of the member states.

A Right to Secede

Autonomous democratic states will voluntarily contract to form a superstate if the expected welfare of their citizens in the superstate exceeds what they expect to achieve going it alone. However, although contracts are written to reduce uncertainty, they do not eliminate it entirely. The people of some state may find themselves worse off in the superstate than they think they would have been had they stayed out. Anticipating this possibility, they may demand conditions in the contract forming the superstate stipulating how they can peacefully withdraw from it. Since all joining states may be uncertain of their long-term benefits from being in the superstate, all may have an interest in delineating procedures for the withdrawal of individual states or the complete dissolution of the whole. Such protection would be provided by a secession clause.

> *Secession Clause:* Any state can secede from the confederation of superstates, if it satisfies the following *x* conditions: . . .

The conditions under which secession should be allowed take several forms. Clearly all states would wish to allow a member to exit if all were going to benefit from its doing so. Secession should be allowed when the parliaments of every state approve—by the constitutionally required majority—the secession of a particular state. Often the exit of one state will impose costs on the remaining members of the superstate. Secession can be allowed in this case if the exiting state compensates the others. For example, secession could be allowed if the exiting state assumed its share of the fixed costs that were incurred under the assumption that the exiting state would remain a part it. At least three options exist: (1) Require that the exiting state pay the present value of its share of the debt amortization when it exits, (2) assume its share of the debt when it exits, or (3) allow states to exit only after an interval has passed from the time they announce an intent to withdraw. The logic of option 3 would be, since all capital depreciates, to run down the level of superstate capital while requiring the departing state to pay its share of the costs of the investments already made.

If no part of a federation could ever stand alone as a viable state, then no provision for secession need be included in its constitution, because no group of individuals occupying a particular area would ever choose to secede. A threat of secession would not be credible.

But viability is probably not a 0/1 variable. If Hong Kong can survive, indeed thrive, as an independent quasi-state, almost any territory large enough to become a city could conceivably survive as a separate state *at some level of welfare*. If the constitution allows collective decisions to be made for the whole state by a rule that requires less than a full consensus, the danger always exists that some permanent coalition forms and tyrannizes over a permanent minority. Geography is one basis upon which coalitions form. By allowing the people in a contiguous area to secede, under some conditions, the constitution could protect against such future tyranny. A secession clause is desirable

even in a constitution written by citizens if they fear the formation of permanent geographically based coalitions.[28]

Thus, a secession clause might be an optimal part of any constitution. Nevertheless, it seems more likely to be valuable in constitutions that join states than in those that join citizens. Ethnicity, religion, language, and culture have historically been powerful catalysts for coalition formation, which results in one group tyrannizing another. When these characteristics are related to geography as they typically are when states are the building blocks of a superstate, the danger of geographically based tyrannous majorities is much greater, and so too therefore the advantage of a secession clause to protect previously autonomous states from tyrannization.

Although a secession clause may be desirable in a constitution written by citizens, the nature of any geographically based coalitions will be harder to predict and thus the wording for the clause more difficult to agree upon. Most countries are criss-crossed by rivers, mountain ranges, lakes, deserts, and the like. Which geographic features can over time isolate a minority, and lead it to be tyrannized by the rest of the country, will be unpredictable when the constitution is first written. If someone from Mars were to look at a topographical map of the United States and be asked to predict which two regions would have engaged in a Civil War, the visitor would probably predict the area east of the Mississippi against the area west of it, or the areas east of the Rocky (Appalachian) Mountains against the areas west of them. That the Potomac River would have divided the country into warring factions would be hard to predict.

Strategic Veto

A veto clause would extend the state-unanimity rule that effectively operates at the constitutional stage to the parliamentary stage. No legislation enacted by the superstate's parliament could go into effect if a single state was opposed. All of the potential disadvantages of the unanimity rule would thus exist with respect to a veto clause. In particular, the danger of a strategic veto would arise. For example, state C threatens to veto the defense appropriations bill unless its share of the costs are reduced. State B does likewise with respect to expenditures to protect the environment, and so on. These potential problems might be mitigated by delimiting the types of issues for which the veto could be invoked. But such restrictions would also reduce the potential for the clause to protect states from discriminatory actions by the other states through the superstate's parliament. The potential decision-making and strategic bargaining costs induced by a state veto clause must be weighed against the benefits of protecting individual states from discriminatory actions considering a state veto clause.

Strategic Secession

Consider an area composed of a people with a common culture. A river runs through the area and one can define an A and B side, but no one thinks in those terms. The people decide to form a government. In its absence the welfare levels (utilities) each A and B obtain are assumed to be zero. If all of the gains from cooperation go to the A's, their utilities would be raised to a level of one; the same is true for the B's (see Figure 21.3). The people choose political institutions that lead to an equal sharing of the gains from government (the Nash [1950] bargaining solution), and move from point S without government to point X with it.

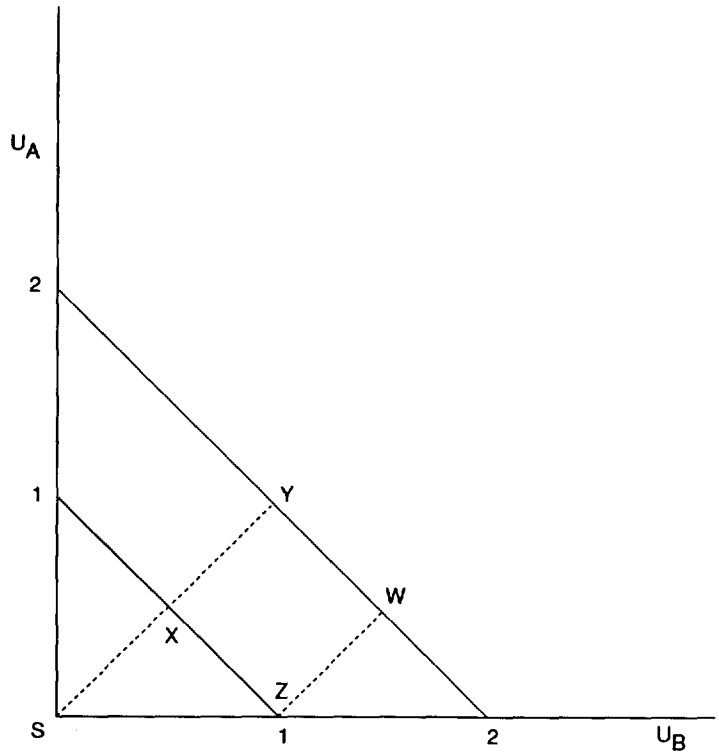


Figure 21.3. Possible Outcomes with Constitutional Bargaining

Now suppose that oil is discovered under the area occupied by the *B*'s. The income from this oil allows the utilities of everyone in the country to double. The governmental expenditure and tax structure that existed prior to oil's discovery results in a shift from *X* to *Y*. The discovery of oil awakens a sense of "*B*ness" among those on the side of the river where the oil was discovered, however. They point out that the sun sets on their side of the country and other important characteristics that make *B*'s different from *A*'s. They announce the intention to exercise their inalienable right to secede. Should the *B*'s secede, the social outcome would shift from *Y* to *Z* as the gains from cooperation are lost. Realizing this, the *A*'s offer to renegotiate the constitutional contract assuming that *Z* rather than *S* is the status quo. The *B*'s agree, the union is saved, and the new social outcome is at *W*. The *B*'s have gotten what they wanted.[29]

We shall not delve into the normative issue of whether the *B*'s ought to be allowed to secede.[30] Our concern is with the ramifications of the possibility of strategic secession for the original contract.

As emphasized in Chapters 5 and 16, the constitutional contract may have attributes that resemble an insurance contract. Risk-averse individuals may include provisions in the constitution that mitigate the effects of commonly shared risks. Provisions for sharing the costs of a natural disaster that strikes a particular area, or the gains from a windfall to an area, have this property. Implicitly, such provisions do exist in most if not all constitutional contracts. An earthquake, flood, or avalanche that devastates an area brings an immediate reaction from the president or the parliament to send relief, paid for by the rest of the country. Such responses do not seem to engender much if

any opposition. This behavior may reflect altruism in the other citizens, or the existence of an implicit insurance component in the social-constitutional contract that joins them. People in each part of the country realize that disaster could strike their area and expect their fellow citizens to respond as they do should it happen.

To reinforce the insurance provisions of the constitutional contract, the framers could make strategic secession of the type described more difficult—i.e., to make it difficult for an area that has experienced a large positive windfall to secede from the country, and for the rest of the country to secede from an area struck by disaster.

At the same time, the constitution framers may wish to establish institutions to reward and encourage effort, investment, risk-taking, and other market activities with positive spillovers. To the extent that finding oil requires investments in education, capital equipment, and risk-taking, those finding it should be rewarded. Once the efforts and investments have been made and the oil discovered, self-interested individuals in other areas have an incentive to change tax laws and property rights to obtain a bigger share of the income generated from the oil. The use of a qualified majority voting rule that falls short of requiring a consensus may allow them to do so. The option of seceding can protect an area from tyrannous majorities seeking to engage in such *ex post* redefinitions of property rights (Buchanan & Faith, 1987).

Ex post it may be difficult to distinguish strategic threats of secession stemming from a chance change in the status quo, from threats to protect the legitimate gains from effort from an *ex post* recontracting by a tyrannous majority. Suppose the income of the *B*'s is higher because they work harder and longer hours than do the *A*'s. The *A*'s attribute their disadvantage to its being hotter and more humid on their side of the river. The *B*'s complain that the *A*'s are lazy and have too many children. The *A*'s use their numerical advantage to vote for measures that redistribute income from *B* to *A*. Is this the kind of chance outcome that the constitutional contract should ensure against, or is it an example of a tyrannous majority?

General answers to questions such as this are difficult if not impossible to deduce. What one can say is that the case for including a secession clause in a constitution joined by autonomous states, and the nature of such a clause, is far stronger and easier to conceptualize than for a constitution joining a community with a common culture.[31] If *A* and *B* are autonomous states before they join, and oil is subsequently found in *B*, the *B*'s may argue (1) that the oil would have been theirs alone without question had the superstate with *A* not been formed, (2) that the superstate was formed to engage in a limited set of collective activities implicit if not explicit in the constitution, and (3) that insurance-type risk and windfall spreading was not one of them. And the *A*'s might reluctantly agree. Certainly, the kind of put-oneself-in-the-other-fellow's-shoes experiments that lead to impartiality and insurance-like social contracts are more readily accepted by individuals who share a common culture than by those who do not. But in both situations the potential for desired redistribution for insurance purposes and undesired redistribution is present. When deciding whether to include a secession clause, the constitution framers need to consider the functions that government is intended to serve, and how best to ensure that it is these functions, and only these, that it undertakes.

The Secession of the American Southern States: An Aside

Nothing in the U.S. Constitution specifies an unconditional right to secede held by each state, or a right to secede under certain conditions. In this context the Articles of

Confederation were much more precise than the Constitution that replaced them in stating that "each state retains its sovereignty, freedom and independence," which might be interpreted as allowing immediate secession from the union or the existence of no real union whatsoever.[32] If a right to secession is in the U.S. Constitution, it appears as one of those *implicit* rights that owes its presence to the absence of any explicit statement to the contrary.

The above discussion suggests that the citizens of each American state would have felt that their state and every other had a right to secede to the extent that they were autonomous and viable political units at the time they joined and could remain so had no superstate formed. In favor of their being a perception of such a right are the facts that (1) the states had functioned as essentially autonomous political units since the Revolutionary War's end, (2) voting was by state and not by individual representatives at the Constitutional Convention (a proposal for the latter made by Benjamin Franklin was defeated), and (3) language in the Constitution and the Declaration of Independence referred to sovereign states and the union thereof.

Against this perception are the facts that (1) the states shared a common history as *colonies* of Great Britain; (2) they thus also shared a common culture;[33] (3) they had *seceded collectively* from Britain and had been joined in battle against the British, actions which must have engendered feelings of common bonds as Americans; (4) although the delegations voted as states rather than as individuals, they did not employ the unanimity rule (the final vote by the dozen states present was unanimous, however); and (5) despite strong opposition to the federal structure created in the Constitution, no state chose to stand outside the union, suggesting that no state felt sufficiently viable as an independent political unit to go it alone, as, for example, Switzerland has in Europe.

Even if one accepts the position that the states, at the time the Constitution was written, thought of themselves (and in fact were) as viable, separate entities, one might argue that by 1860 the conception that the United States was a single unified country had so taken root that the nation could not be redivided into its constituent parts. James Wilson of Pennsylvania suggested that this meltdown of state sovereignty occurred as soon as the Constitution came into being. "Among the first sentiments expressed in the first Congress was that Virginia is no more. That Massachusetts is no [more], that Pennsylvania is no more, etc. We are now one nation of brethren" (quoted by Berns, 1988, p. 140).

Merit exists on both sides of the issue. If there is one simple lesson to learn from the unfortunate experience of the United States regarding secession, it is that any autonomous nation joining in constitutional contract with other nations should, if it has any reason to fear that this contract may at some point prove to be to its disadvantage, require the precise stipulation in the contract of the conditions under which secession is possible.

Conclusions

A constitutional convention is an episodic event that typically occurs following a revolution, defeat in a war, collapse of a dictatorial regime, or paralysis of a democratically elected one. It takes place immediately following, during, or in anticipation of a national crisis. It is designed by the leader(s) of the revolution, remnants of the collapsed or collapsing regime, a parliament elected under the rules of the old constitution or an

improvised new one. "The contract that joins all citizens" is often handed down to them by a group whose legitimacy as representatives of the people may be questionable, or whose motives may be suspect, or whose attention was occupied by pressing short-term matters. It is no wonder that so few constitutions seem to play an important role in the political life of the societies they supposedly shape.

For a constitution to play this role its rules must be honored by citizens and public officials, its values shared by the community. An article in the constitution protecting "free speech" implies more than a legal ground upon which to challenge a town ordinance banning a book. It implies a shared value in the community for toleration with respect to the views, writings, films, etc., of those whose opinions and tastes are not shared. Such shared values and willingness to abide by a common set of rules is more likely to be found among those who share a common culture. But over time it can also become a part of the culture. Constitutional process and constitutional protection have become a part of the political culture of the United States, of Switzerland, increasingly so of Germany, and in a few other countries.

There is no better time to start the development of citizen awareness and allegiance to a constitution than at the time it is drafted. The more citizens are involved in the selection of delegates to the constitutional convention, as observers to its proceedings, as actual participants, as ratifiers of the final product, the more the constitution will reflect their ideas and values, and the more likely it is to be a positive and effective political institution. There is no single optimal blueprint for a constitutional convention, just as there is no optimal blueprint for the constitution itself. But there are better and worse alternatives.

Notes

1. The question arises here, of course, as to how the rules governing the constitutional convention are chosen. Similarly, if the constitution will define citizenship, how can one know before it is written who is eligible to vote for delegates? Infinite regress problems of this type are inherently insoluble, and I shall not take space grappling with them. The presumption is that the likely composition of the citizenry is known to all prior to the writing of the constitution. The first item on the convention's agenda must be to determine the rules under which it will operate, and at this time it can add experts to its membership, conceivably even giving them a vote. Bruce Ackerman (1991, Chap. 7) makes the point that constitutional conventions are almost inherently illegitimate in that they occur in environments in which legitimate political institutions do not exist, or the legitimacy of extant institutions is at question.

2. These people would be associated with particular parties and ideologies. The fact that they were no longer holding office, suggesting that they may be past their active professional life, would tend to produce a more detached perspective on constitutional issues, the kind of perspective needed to reach a consensus.

3. Thus, a person randomly chosen as a delegate would be asked to take a full year out of her life to participate in the constitutional convention. The hardship of this could be compensated for financially. In a country in which democracy and citizenship were prized, most would presumably relish the opportunity to participate in a national event that occurs only once, twice, or at most three times in their lifetime—the chartering of their country's political future.

4. The original selection of parliaments in Eastern Europe after 1989 did not always result in all parliamentary seats being filled by popular vote.

5. In Philadelphia, Delegate Gorham of Massachusetts, arguing for ratification of the U.S. Constitution by separately elected state conventions, clearly recognized the relative advantage of

separately elected constitutional conventions. "Men chosen by the people for the particular purpose will discuss the subject more candidly than members of the Legislature who are to lose power which is to be given up to the Genl. Govt." (quoted by Riker, 1987, p. 18).

6. See Elster's (1993) discussion.

7. In the spring of 1992, Italians voted for outsider parties on both the left and the right (e.g., the Lombard League, the Greens) in an obvious rebuke of the Christian Democrats and other mainstream parties that had formed the chain of governments since World War II. The election was widely interpreted as a new demand for constitutional reform. In the spring 1994 election, following changes in the electoral laws, Italian voters abandoned all of the former mainstream parties in favor of extremist parties on the right and left.

8. Bogdanor (1988b, pp. 70–71). See also Carstairs (1980, pp. 195–96).

9. Podesta (1994). Both Peru and Argentina have benefited from the actions of Fujimori and Menem as presidents, and there are good reasons for allowing presidents to serve for more than one term. But such constitutional changes cannot be objectively considered by those who stand most to gain from them.

10. The American reader may wonder whether the framers of the U.S. Constitution were equally cynical (self-interested). Unfortunately, it is more difficult to say in the case of the United States since the delegations were chosen by state legislatures (with the exception of South Carolina, whose governor appointed it), and were not members of an existing legislature. Nor could they jockey for the advantage of their party in the postconstitutional era, for there were none. Thus, it does not seem possible to accuse the delegates of focusing mainly on their future political careers when writing the Constitution. On the other hand, the hypothesis that delegate voting was consistent with their constituents' interests finds some support (McGuire & Ohsfeldt, 1986; Wood, 1987; Jillson, 1988, p. 16; McGuire, 1988). McGuire also offers evidence for Beard's (1968 [1913]) thesis that it was the Constitution's impact on the framers' personal wealth that most concerned them. Eavey and Miller (1989) extend the argument to the state ratification level. In this environment the legitimacy of the product of a constitutional convention must derive from the participation of the citizens in its creation (Ackerman, 1991, Chap. 8).

11. Moreover, it would be wise to prohibit a delegate from holding public office for a fixed interval after the convention.

12. See Gauthier (1986, Chap. 6) and Beran (1987). North and Weingast (1989) emphasize the role constitutional-type arrangements played in fostering commitment in seventeenth-century England.

13. Such compliance may also be fostered in those who could not vote for the original constitution by having them agree to its provisions to secure the right to vote when they come of age (see Chap. 20). On contractarian morality, see Rawls (1971), Gauthier (1986), and Mueller (1989c).

14. Buchanan and Tullock (1962, pp. 77–80) stress the role of actual uncertainty in reaching consensus on the constitutional contract. Elster (1991, pp. 40–41) quotes arguments by both George Mason and Gouverneur Morris at the Philadelphia Convention in which they appealed to genuine uncertainty to win support for their position.

15. As examples of unworkable compromises one can point to virtually all Latin American constitutions, which combine European-style proportional representation in the parliament and an American-style strong presidency to produce ineffective and hence unstable government.

16. Calvin Jillson (1988, p. 16) claims that the delegates at the Philadelphia Convention did "base their decisions on impressions regarding the more diffuse and general interests of the community" when they could not "see clearly what differences [their] choices. . .would make to them as individuals, or to their states and regions." Definitions of rights are the types of issues, in most cases, that are related to diffuse any general interests.

17. Charlotte Twight (1992) demonstrates that constitutional revisions in practice are seldom consensual.

18. The Swiss hold the record for constitutional amendments (89 through 1980, Schweizer-

ischen Bundeskanzlei, 1987) and as a consequence the Swiss Constitution gets "longer, more chaotic, in places more ridiculous each year," according to Christopher Hughes (1988, p. 279). The Swiss amendment procedure requires a majority of voters *and* a majority of cantons to approve an amendment before it passes. Although this rule is stronger than a straight simple majority requirement, it is considerably weaker than the 75 percent or so required majority envisaged here, and thus leads to more successful amendment efforts.

19. An interesting example of how compromise can and does occur in the writing of a constitution is presented by Przeworski's (1988) account of Sweden's first constitution.

20. Bruce Ackerman (1991) argues that the Supreme Court has amended the U.S. Constitution fundamentally in the 1860s and the 1930s by changing its interpretation of the Constitution's language. The "amendments" have been precipitated by significant shifts in the thinking of large majorities of Americans at these two junctures of American history as to what the Constitution should be. As a positive analysis of U.S. history, Ackerman's interpretation is most convincing. But it raises serious normative questions. How large a majority of the popular vote in Presidential elections suffices for the Supreme Court to amend the Constitution? What should be done if the Court fails to heed the majority? To what extent does a minority remain party to the constitutional contract, if the contract can be amended whenever a substantial majority so chooses?

21. The Philadelphia Convention used it to achieve agreement by stipulating that no restrictions on the importation of slaves could occur for 20 years.

22. The kind of situation that led Switzerland and Belgium to switch from a two-party to a multiparty structure in the nineteenth century (Lakeman, 1974, pp. 192–202).

23. We set aside the question of whether, in an age of inadvertent and strategic leaks and a relentless press, the deliberations of a large group meeting over many weeks if not months could be feasibly held in secret, and merely assume that they could.

24. It may be that views regarding confederation, the structure of central government, etc., are not perfectly homogeneous within each area. When the areas are autonomous states, they may then choose not to send a single delegate who speaks for the entire state, but instead a delegation that first votes separately by some rule to determine the state's position, and then casts the vote of the state. The votes of the state delegations to the Philadelphia Convention were counted in this way.

A similar procedure could be used if the areas are not autonomous political units; but because it is citizens with like interests (views) (regardless of where they are) who should be represented now, straight proportional representation across the entire superstate is better than representation by area. With proportional representation, Federalists, Antifederalists, and other factions can join with their natural coalition partners across the entire landmass.

25. The normative properties of these three options are also contrasted by Allen Buchanan (1991, pp. 37–45, 143–48).

26. James Madison was, of course, most concerned with the fate of minority factions in a democracy functioning under the majority rule. He thus sought to protect local minorities by including in the U.S. Constitution a provision that would allow the federal legislature to nullify acts of state legislatures—the exact converse of Calhoun's concurrent majorities. His proposal was not adopted (Nedelsky, 1990, pp. 61–62).

27. State veto power was advocated by John Calhoun (1854, 1947) in what he termed the principle of "the concurrent majority." One of the recent proposals for a new constitution in Canada sought to win Quebec's support by including a veto clause over national legislation dealing with issues regarding the French language and culture (*Economist*, July 18, 1992, pp. 19–20).

28. See discussions of secession by Buchanan and Faith (1987), and Lowenberg and Yu (1992).

29. In this example, the utility the B's can achieve going it alone equals what they obtain cooperating with the A's. Although the credibility of the threat of secession is greater if the B's can achieve at least this level, any significant shift in the underlying status quo could induce secession threats to rewrite the constitutional contract. See Buchanan (1975, pp. 77–82).

30. On this see Allen Buchanan (1991) and Coleman (1991).

31. Jules Coleman (1991) emphasizes the role of cultural background in developing a *normative* case for secession. See also discussion in Allen Buchanan (1991, pp. 52–64).

32. Quotation taken from Berns (1988, p. 125). This subsection borrows heavily from Berns (pp. 124–40).

33. On this see Berns's (1988, pp. 127–28) quotation from de Tocqueville's *Democracy in America* albeit based on observations made almost 50 years after the colonies had been joined by the Constitution.

VI

COMING TO AN END

22

Epilogue

> For really I think that the poorest he that is in England hath a life to live, as the greatest he; and therefore . . .that every man that is to live under a government ought first by his own consent to put himself under that government; and I do think that the poorest man in England is not bound in a strict sense to that government that he hath not had a voice to put himself under.
>
> COL. THOMAS RAINSBOROUGH
> Member of British Parliament, 1647[1]

> For 'tis not every Compact that puts an end to the State of Nature between Men, but only this one of agreeing together mutually to enter into one community, and make one Body Politick.
>
> JOHN LOCKE

This book began with a list of problems faced by different countries. Some, like budget deficits, are present in varying degrees in most countries. Others, like recurring lapses into dictatorship, are more localized. This book has not presented detailed solutions for these problems. However, included in the constitutional options discussed are at least partial solutions for many or all of these problems. We begin by illustrating some of these.

Constitutional Solutions

Common Problems

Every developed country in the world subsidizes and protects agriculture to the loss of consumers and taxpayers alike. These policies raise food prices, imposing a highly regressive tax on consumers, and transfer income to the wealthiest farmers in each country. A set of "economic rights" establishing an income floor for all citizens would ensure that farmers and all other citizens were protected from the worst hardships imposed by the market and nature (Chap. 16). With these in place, citizens could in good conscience constrain their parliament to providing those goods and laws that potentially benefit all. This constraint could be imposed by requiring supramajorities of the parliament to pass all legislation (Chap. 11), or, more modestly, by requiring a supramajority to pass legislation that interferes with the market process (Chap. 15).

Switzerland's experience with referenda suggests that referenda do check the politi-

cian's proclivity to spend on projects that do not have wide popular support and to spend more than the state takes in when citizens have the power to do so (Chap. 12). Switzerland has one of the smallest public sectors and lowest budget deficits of all developed countries. Constitutional authority to initiate referenda and to reverse acts of parliament is an important protection against government waste and budget deficits. Constitutionally required balanced budgets with independent judicial review can further constrain governmental irresponsibility (Chap. 17).

The United States

Crime in the United States has several causes. The alienation of minorities, drugs, and easy access to guns are prominent among them. A system of proportional representation would increase minority representation in national, state, and local politics and remove this source of alienation (Chaps. 8 and 10). With more extremists from both the left and the right represented, radical solutions to the crime problem would be advanced sooner. With greater ideological heterogeneity in government, radical solutions to the crime problem, like the legalization of drugs, might be tried on an experimental basis more readily. If constitutional amendments were easier to pass, a constitutional anachronism that protects "the right to carry a gun" could more readily be removed.

The United States is far too large in both area and population to have many of its collective problems solved in Washington. Any reforms to make government in the United States more effective must include a revitalization of its federalist structure. Constitutional constraints on the issues that can come up at each level of government, combined with a federalist court to enforce the constraints, would accomplish this end (Chap. 6). As part of a revitalized federalist structure, direct democracy could be established as the lowest level of government with control of the elementary schools returned to the local community (Chap. 7). Such reforms might not only improve the quality of the democratic process but also that of the schools.

The decentralization of a reconstituted federalist system could be further protected by abolishing geographic representation at all levels of government. This change could be and should be undertaken regardless of whether a two-party or a multiparty proportional system of representation is adopted (Chaps. 8 through 10). If the legislature meeting in Washington D.C., restricts its attention to only those issues that are of national concern, then citizens of like views on these national issues regardless of where they live will be most effectively represented, if they choose their representatives from the same set of parties or persons. With parties competing for votes across the entire nation, they are less likely to try to win votes by promising special favors for a particular community or region. With local and regional issues removed from the national legislature's agenda, it would have more time and resources to come up with effective solutions for those problems that are common to the entire nation. The same logic applies to each lower level of government.

Abolishing geographic representation in favor of either the two-party or the multiparty system described in Chapters 8 through 10 would also eliminate the potential for deadlock under the present arrangement with its checks and balances. Both systems would lead to disciplined political parties, with the legislative assembly having the authority to implement any legislation it passes that does not violate constitutionally imposed constraints.

Europe

An important difference between crime in the United States and crime in Europe is that in Europe it is often perpetrated by organized groups and takes the form of terrorist activities, while in the United States it is undertaken by one or two individuals for personal pleasure or profit. Terrorist groups in Europe are typically ethnic, religious, or geographically based cultural minorities. Their actions raise issues of optimal federalist structure (Chap. 6), or, more fundamentally, issues involving rights (Chap. 14), citizenship (Chap. 20), and the properties of the constitutional contract (Chap. 21). These same questions have arisen, in less strident form, in the European Union's political evolution.

Another problem encountered in Europe that has not existed in the United States is the political instability that can arise in multiparty parliamentary systems, when unstable coalitions of parties lead to frequent turnover in the cabinet and prime minister's office. The simple solution for this problem is to separate the executive and legislative functions (Chaps. 8, 10, 17) as in the United States and France.

Other Parts of the World

Most of the governmental failures in other parts of the world have their analogues in Europe or the United States, and so we need not spend a great deal of time repeating the points just made.

Japan has important elements of geographic representation coupled with gerrymandering in its political system, and it evidences some of the same problems as in the United States. Geographic representation makes money an important ingredient in successful campaigns in Japan as in the United States. Indeed, the importance of money in Japan is enhanced by constitutional prohibitions on using the most efficient means of campaigning—television and radio. Japanese politicians must bribe voters to come to political rallies to hear their messages. To obtain the money needed to "buy votes" in this way, Japanese politicians sell legislation. Abolishing both geographic representation and the constitutional limitations on the use of media for campaigning would do much to eliminate political corruption in Japan.

The most conspicuous political failure in Latin America is the inability of most countries to avoid lapsing into dictatorship, or in some cases, like Mexico, to ever emerge from it. These lapses seem to occur in part because of the difficulty Latin American democracies have accommodating the distributional demands of competing groups, and in part because the presidential systems of most Latin American countries produce deadlocks between the executive and legislative branches and ineffective government (Chap. 18). Constitutional reforms to strengthen Latin America's democratic institutions would replace existing presidential systems with two-party or multiparty parliamentary systems, and constrain the parliaments to focus upon the many opportunities that exist to introduce programs that can benefit all citizens.

Similar reforms that emphasize positive-sum politics are needed in Africa. These reforms involve a combination of federalism, constraints on the kinds of issues that can come before the parliament, supramajority votes on some types of issues, and separate institutions for handling distributional questions (Chaps. 6, 11, 15 and 16).

The political histories of Africa, Latin America, Israel, Yugoslavia, and even Canada warn us that positive-sum politics of the kind that we regard as the foundation of

constitutional democracy may not be possible in all parts of the world for all mixes of people. The liberal ideal assumes that rational individuals must recognize the mutual gains from cooperative behavior, and reach contractual agreements on institutions that benefit all. But long-standing tribal, ethnic, and religious hatreds may make the kinds of "amicable agreements" the heterogeneous Swiss were eventually able to reach impossible. One solution to the crime and political instability that often afflicts countries with significant group heterogeneities is to break up the state. A constitutional convention in which the different groups are fairly represented should reveal whether the commonalities among the diverse groups are strong enough to make a common set of political institutions to their mutual benefit (Chap. 21). The success of a constitutional democracy hinges on matching the right set of political institutions to the right set of people (Chap. 20).

Constitutional Packages

We have emphasized at several junctures the interrelationships between various constitutional provisions. In this section we underline these interrelationships by describing combinations that fit together well.

The Involved Citizen Model

Let us assume first that citizens are intelligent, educated, and responsible. They are willing to devote reasonable amounts of time to advancing their collective as well as their private interests. A market economy is the best institution for advancing people's private interests, and so maximum use is made of it. Strong safeguards against both private and public interference with the market process are inscribed in the constitution (Chap. 15). Considerable latitude for choice and error is allowed the individual in her roles both as consumer and factor owner.

Political institutions are most likely to advance the interests of a community when their dimensions correspond to the scope of the community they serve. A citizen's preferences for public policies are most likely to be satisfied in a strong federalist system (Chap. 6), with an independent federalist court to protect the integrity of the federalist structure. Citizens participate directly at the neighborhood or town level of government (Chap. 7), and can have a direct effect on outcomes at higher levels of government by calling referenda (Chap. 12).

To ensure accurate representation of citizen preferences for public policies at higher levels of government, a proportional representation (PR) mechanism is employed (Chaps. 8, 10). The form of PR that places the greatest demands on the citizens and allows them the greatest scope to express their preferences is the single-transferable vote. With STV, the voter reveals both the political party and the persons within the party whom the voter wants to be represented by. The accuracy with which preferences are revealed can be further strengthened by adopting one of the parliamentary voting rules that elicits more information about voter (representative) preferences (e.g., point voting or voting by veto, Chap. 11). These voting rules place *slightly* greater burdens on citizens by offering them more information about how their representatives voted. Consequently, they also can achieve a better correspondence between governmental outcomes and citizen preferences.

A final burden and opportunity for the involved citizen to control her destiny would be to require periodic review and revision of the constitution, with maximum citizen involvement afforded by selecting citizens by lot to participate in the constitutional conventions (Chap. 21).

The Passive-Citizen Model

In the model outlined in the previous subsection, citizens are in control of their private lives and have maximum scope to influence collective decisions that impact on them. Their agents in government are on a rather tight leash. At the other pole of the principal-agent relationship in a democracy, the citizens' agents are given considerable discretion to act. Citizens are presumed to be rather passive and "rationally ignorant" about the work of their agents. The advantages of two-party democracy are enhanced as the citizen need only compare the programs of two major parties and their leaders. In smaller countries a weak or nonexistent federalism further lightens the citizen's burden, allowing the citizen to hold the party in office at the national level responsible for the collective decisions that affect the citizenry at all levels. Referenda and all other forms of direct democracy are out. Revising and updating the constitution is left to the citizen's agents in the judiciary.

The superiority of market processes is so great that even fairly passive individuals are unlikely to entrust the allocation of most private goods to agents as in a Soviet-style planned economy. But the passive-citizen model is more likely to be complemented by government regulation of prices, product quality, entry, and the like for some goods that the market can, in principle, allocate efficiently. If such regulation has the objective of advancing *all* citizens' interests, and not as a way of protecting producers or factor owners in the regulated industries from competition, then the products regulated are ones that uninformed or myopic consumers might purchase in the "wrong" quantities (e.g., cigarettes, health insurance). The passive-citizen model is also more compatible with corporatist institutions in which the citizen's interests in full employment, inflation, income security, and the like are represented by agents from her occupational group (Chap. 13).

The passive citizen is more vulnerable to exploitation by her bureaucratic agents in government or the majority party in parliament. Protection against such exploitation is more important under a two-party system, with weak federalism and limited or nonexistent direct citizen control of government, than when the institutions described under the involved-citizen model are in place. Well-defined constitutional rights and an independent judiciary to enforce them are essential for protecting the passive citizen from the agents she so weakly controls (Chaps. 14, 19).

Mixed Cases

The models outlined in the two previous subsections are obviously polar cases. A wide variety of combinations falling in between is possible. For example, a strong federalist structure with involved citizen participation at the lower levels might be combined with two-party government at the highest level in a large country in which most of the issues of significance to the citizens are decided at lower levels of government. Economic rights of some sort are likely to be attractive in all types of constitutional democracies. In choosing the proper mix of political institutions, the constitution framers must trade-

off the future burdens on citizens as monitors of their governmental agents against the burdens these agents can impose on the citizens by taking advantage of the discretion afforded them by the principal-agent relationship. No two societies need view this trade-off identically.

From Here to There

Legend has it that Rome was founded by Romulus and Remus, twin brothers suckled and raised by a she-wolf in the surrounding hills. Strife arose between the two adult brothers over who would rule the newly founded city. Romulus settled the question by killing his brother. Many years later, during the fifteenth century, Mehmed II, upon assuming leadership of the Ottoman Empire, had his infant brother strangled to avoid any possible future misunderstandings over the identity of the Empire's ruler. Conflict over this issue was so common among the Ottomans that Mehmed II later had the practice of fratricide codified.

If the lure of political power is strong enough to induce a man to murder his brother, what measures would he undertake to obtain power against those who are not of his blood? History suggests that there are no bounds. The assumption that individuals pursue their narrow materialistic ends, which economists employ to explain individual behavior in the marketplace, pales in innocence alongside the actions those who seek political power have taken to achieve their ends. The challenge in designing political institutions that will advance the interests of all citizens is to channel the selfish desires for power and wealth of each individual so that they benefit all. To many, this has seemed to be an insurmountable task, but the constitutional perspective underlying this book assumes that it is not an impossible one.

If by democracy we mean rule by the people—all of the people—then the only certain and stable form of democracy is a constitutional democracy for which the citizens themselves write the rules. To trust someone else to write the rules, or to wait for history blindly to evolve them, is to profess an even more naive optimism than to think that the individual members of a society could write the rules for themselves.[2]

The notion that the individuals of a society could and should write their own rules began to develop during the Renaissance in Europe. The humanistic thinking of this period shifted attention from God and the wonders He could do to man and his potential accomplishments (Bradshaw, 1990, pp. 101–6). Humanistic concentration on mankind, combined with Christianity's continued emphasis on the individual nature of the soul of *a* man or a woman and individual responsibility for that soul, led directly to the development of individualism. *Political* individualism appears most conspicuously in the contractarian writings of John Locke.[3] Although considered today to be a primary proponent of conservative philosophy, during Great Britain's revolutionary seventeenth century Locke was himself somewhat of a revolutionary who risked his life by proposing that government ought to be formed out of a compact among the individuals of a society.

Locke's thinking was influenced by the Levellers, who can be credited with having proposed the first written constitution in 1647 (Wootton, 1990). It was a most remarkable document, modern by today's standards, radical by those of its day. It consisted of three main elements:[4]

1. No property qualifications for citizenship.
2. Political authority rests with a representative assembly of the people, not with the king.

3. The powers of government are limited.
   a. All laws apply to all persons, even those in government.
   b. No monopolies.
   c. Freedom of conscience (religion).
   d. No conscription.
   e. All laws must be for the safety and well-being of the people.

In keeping with the public-good–allocative-efficiency role defined for government in item 3.e, the Levellers favored the rule of consensus for making collective decisions. Thus, in many respects the constitution proposed by the Levellers was consistent with the arguments of this book.

The Levellers were too radical and idealistic to make the compromises necessary to be effective in politics (Wootton, 1990, pp. 414–24), but they were influential nonetheless. Many were members of Protestant sects that broke away from the Catholic Church and established themselves through covenants. Some of these groups migrated to North America to escape religious persecution, taking with them the practice of founding their religious-political communities by contract. As Hannah Arendt (1963, pp. 164–78) has emphasized, in founding their country and their states on the basis of constitutional contracts, the American colonists were not putting into practice an untried theoretical construct, but rather were applying procedures they had usefully employed to establish their "political societies" for more than a century. Both directly through the social compacts brought from England by various religious groups, and indirectly through the writings of Locke,[5] the thinking of the Levellers on constitutions had an influence upon the thinking of those who led the American Revolution and founded its constitutional democracy. The latter would in turn affect the revolutionary movements for democracy that swept across Europe in the nineteenth century.

Thus, the idea that government could and should be established by a constitutional contract among the individuals who would live under it has from its inception been radical and literally revolutionary. It remains so today. The suggestion that the political failings of the United States might be corrected by a new set of political institutions, and that a new constitutional convention should be called to craft these institutions, would be opposed by many political scientists and other political observers on the grounds that more harm than good would be likely to come out of such a convention. Not only would present-day American citizens not be capable of incorporating the accumulated knowledge of the last 200 years into a constitution that improved on the present one, they could not even duplicate the success of the Founding Fathers.

Constitution making in Europe today is characterized by the same conservatism that exists in the United States. Major steps toward economic and political unification of Europe in recent years might have occasioned an active debate concerning the common interests of all Europeans and the best institutional procedures for advancing those interests—i.e., a constitutional debate. But so far they have not. The Maastricht Treaty is a kind of "Constitution for Europe," but it was drafted neither by the citizens themselves nor by representatives chosen for this purpose. It is the creation of Ministers sent to Brussels by their respective governments to manage the affairs of the European Union. Not surprisingly, they have chosen to retain considerable authority for collective decision making for themselves. As a consequence of the lack of participation and debate over the provisions of this "European Constitution," many Europeans do not appear to understand how it might improve their welfare, and the protection it contains against making them worse off. They do not think of it as "their" constitution. The consequence

is that the opportunity to create a "United States of Europe" may have been lost. Whether the latter would have been a desirable political development we may never know.

That developed countries like the United States and those in Western Europe would not risk adopting new political institutions, and would not risk obtaining substantial citizen input if they did, is to be expected. Contentment breeds conservatism. But all countries are not as well off as these, and revolutions still do happen. Indeed, even in relatively prosperous Italy and Japan, crime and corruption have reached levels that exceed the citizenry's capacity for tolerance. Meaningful constitutional reforms in these two countries have been much discussed, and some first steps have been taken.

The most fertile soil for new experiments in constitutional democracy is in Eastern Europe, the former Soviet Union, and the developing countries elsewhere. These countries are or will be in transition from dictatorship to democracy in the upcoming years. Some of these nations will make the transition more than once. Although virtually all of them will adopt new constitutions as a part of this transition, in most cases citizens will play only token roles in their drafting and ratification—and perhaps none at all. A revolution that successfully overthrows a totalitarian regime, the abdication of a dictator in favor of a democratically elected government, and similar events often are the result of, or coincide with, the active participation of large numbers of citizens in what are essentially voluntary provisions of public goods. At these times, the suggestion that the citizens should participate in the creation of the institutions of government that will determine their future welfare seems less radical. The possibility that they would be successful will seem less unlikely. If a few leaders step forward and propose that a truly democratic constitution be drafted, and that citizens participate in the drafting process, it might just happen. Such events occurred in Athens in the sixth century B.C., in North America at the end of the eighteenth century, and in Europe at the middle of the nineteenth century. Where and when they will occur again I cannot say, but occur they will.

Notes

1. Woodhouse (1974, p. 53), also quoted By Wootton (1990, p. 429).

2. Exceptions may, of course, exist. Cleisthenes appears to have presented the Greeks with the world's first set of democratic institutions. Great Britain's "constitution" might be regarded as an example of the blind workings of evolution, although Yoram Barzel (1993) argues that the transfer of political power away from the monarchy was a result of its conscious efforts to induce the nobility and later commoners to help protect the Crown's property.

3. The first edition of Locke's *Two Treatises of Government* appeared in 1690. See discussion by Tully (1990).

4. See discussion in Wootton (1990, pp. 412–16).

5. Hannah Arendt (1963, p. 168) suggests that Locke may have learned more from watching the success of the early North American religious communities founded on compacts, than the Founding Fathers of the United States learned from the writings of Locke.

Glossary

allocative efficiency. Economists usually define allocative efficiency in terms of Pareto optimality. An economy has obtained allocative efficency when it is not possible to reallocate resources and make one person better off without making another person worse off. Alternatively, one can define an efficient allocation of resources as one that maximizes a particular social-welfare function like the Benthamite welfare function. Adam Smith's "invisible hand" theorem states that competitive markets achieve an efficient allocation of private goods.

average cost. The average cost of a good is the total cost of producing it divided by the number of units produced. Under perfect competition the price of a good in the long run equals its average total cost.

externality. An externality occurs whenever the action of one individual has an unintended consequence on another. Externalities result in market failures when they are *Pareto relevant,* i.e., when an action of one individual changes the welfare of another on the margin. For example, the education of B's children makes them better citizens and improves the welfare of A. This type of externality does not require government action taxing A to pay for the education of B's children, however, if B would pay for all of the education her children need to become good citizens without the help of A.

ideal point. Let x and y be quantities of two goods supplied by the government, like education and police protection. Then an individual's ideal point is that combination of x and y, i.e., that point in the x-y plane, that the individual most prefers. Implicit in the construction of ideal points is the assumption that individuals are taxed to pay for x and y, and thus do not favor unlimited quantities of each. It is also assumed that an individual's welfare or utility is lower the further away from his ideal point the chosen quantity of x and y is.

indifference curve. This is the set of all points that represents the same level of utility for an individual. Indifference curves are typically assumed for convenience to be concentric circles around an individual's ideal point in a two-dimensional issue space. The further the indifference curve is from the ideal point, the lower the level of utility it represents.

marginal cost. The cost of producing the last unit of a good. For the resources in a society to be allocated efficiently, the price of a private good should equal its marginal cost.

Pareto optimal. An allocation of resources is Pareto optimal when it is not possible to reallocate them and make one person better off without at the same time making at least one other person worse off.

private good. This is defined as a good whose consumption by one individual does not affect indirectly the welfare of any other; a good not subject to externalities. Adam Smith's "invisible hand" theorem about the market's efficient allocation of goods applies to the allocation of private goods.

public good. Defined as a good whose consumption by one individual allows (necessitates) the same consumption by others. For some public goods like bridges, exclusion is possible, but

inefficient in the sense of Pareto optimality, if the person excluded from the bridge would obtain any utility from using it. For other public goods, like reducing air pollution, exclusion is infeasible. In general, markets allocate public goods less well than private goods, and it is for these that government intervention has the greatest potential for increasing allocative efficiency.

social welfare function. A mathematical representation of the welfare of society. Specific forms of this representation are the Benthamite social-welfare function, which is the sum of the utilities of all members of the society, and the Nash social-welfare function, which is the product. Inquiring whether a set of institutions, *perhaps implicitly,* maximizes a particular social-welfare function is an alternative way to evaluate the normative properties of these institutions from inquiring whether they achieve a Pareto optimal allocation of resources.

utility. This is an index of the welfare of an individual. An individual's utility is often assumed to be some mathematical function of the goods he or she consumes. An ideal point then becomes the combination of x and y, which maximizes this utility function. An indifference curve is the set of all combinations of x and y that give the utility function the same value. Rational individuals are defined as those who consciously choose combinations of x and y to maximize their utility functions.

Bibliography

Ackerman, Bruce A. "The Storrs Lectures: Discovering the Constitution," *Yale Law Journal,* 1984, 93, pp. 1013–72.

———. *We the People.* Cambridge; Mass.: Belknap Press, 1991.

Aitkin, Don. "Australia," in Butler and Ranney (1978), pp. 123–37.

Alchian, Armen A., and Demsetz, Harold. "Production, Information Costs, and Economic Organization," *American Economic Review,* December 1972, 62, pp. 777–95.

Alesina, Alberto. "Politics and Business Cycles in Industrial Democracies," *Economic Policy,* April 1989, 8, pp. 57–98.

Almond, Gabriel A., and Powell, G. Bingham Jr. *Comparative Politics,* 2nd ed. Boston: Little, Brown, 1978.

Ameringer, Charles D. *Democracy in Costa Rica.* New York: Praeger, 1982.

Ames, Barry. *Political Survival.* Berkeley: University of California Press, 1987.

Amy, Douglas J. *Real Choices/New Choices.* New York: Columbia University Press, 1993.

Aranson, Peter H. "Federalism and the Economic Order," *Cato Journal,* Spring 1990, 10, pp. 17–38.

———. "Federalism at Founding," mimeo, Emory University, Atlanta, 1992a.

———. "Federalism: Doctrine against Balance," mimeo, Emory University, Atlanta, 1992b.

———, and Ordeshook, Peter C. "Spatial Strategies for Sequential Elections," *Decision-Making.* Columbus, Ohio: Merrill, 1972.

———, and Ordeshook, Peter C. "Regulation, Redistribution, and Public Choice," *Public Choice,* 1981, 37(1), pp. 69–100.

Arendt, Hannah. *The Human Condition.* Chicago: University of Chicago Press, 1958.

———. *On Revolution* New York: Viking Press, 1963.

Arnold, R. Douglas. "Legislators, Bureaucrats, and Locational Decisions," *Public Choice,* 1981, 37(1), pp. 107–32.

Arrow, K.J. *Social Choice and Individual Values* New York: John Wiley & Sons, 1951, rev. ed. 1963.

Arrow, Kenneth J., and Lind, Robert C. "Uncertainty and the Evaluation of Public Investment," *American Economic Review,* June 1970, 60, pp. 364–78.

Ashenfelter, O., and Kelley, S. Jr. "Determinants of Participation in Presidential Elections," *Journal of Law and Economics,* December 1975, 18, pp. 695–733.

Aubert, Jean-Francois. "Switzerland," in Butler and Ranney (1978), pp. 39–66.

Axelrod, Robert. *The Evolution of Cooperation.* New York: Basic Books, 1984.

Azzi, Assard E. "Group Representation and Procedural Justice in Multigroup Decision-Making Bodies," *Social Justice Research,* June 1993, 6, pp. 195–218.

Bailey, Martin J. "Toward a New Constitution," mimeo, Emory University, Atlanta, 1994.

Bain, Joe. *Barriers to New Competition.* Cambridge, Mass.: Harvard University Press, 1956.

Balz, Dan, and Morin, Richard. "A Tide of Pessimism and Political Powerlessness Rises," *The Washington Post,* November 3, 1991, p. A1.

Barry, B. *Political Argument*. London: Routledge & Kegan Paul, 1965.

Barzel, Yoram. *Economic Analysis of Property Rights* Cambridge: Cambridge University Press, 1989.

———. "Property Rights and the Evolution of the State," mimeo, University of Washington, Seattle, 1993.

Bates, Robert H. *Beyond the Miracle of the Market*. Cambridge: Cambridge University Press, 1989.

Baumol, William J., Panzar, John C., and Willig, Robert D. *Contestable Markets and the Theory of Industry Structure*. New York: Harcourt Brace Jovanovich, 1982.

Beard, Charles A. *An Economic Interpretation of the Constitution of the United States*. New York: Macmillan, 1968 (orig. pub. 1913).

Beck, N. "Does There Exist a Business Cycle: A Box-Tiao Analysis," *Public Choice*, 1982, 38(2), pp. 205–9.

Beer, Samuel H., et al., eds. *Patterns of Government, 3rd ed.* New York: Random House, 1973.

Bell, D. *Coming of Post-Industrial Society*. New York: Basic Books, 1973.

Bennett, James T., and DiLorenzo, Thomas J. *Underground Government*. Washington, D.C.: Cato Institute, 1983.

Beran, Harry. *The Consent Theory of Political Obligation*. New York: Croom Helm, 1987.

Berger, Suzanne. "The French Political System," in Beer et al. (1973), pp. 333–470.

Bergstrom, T.C., and Goodman, R.P. "Private Demands for Public Goods," *American Economic Review*, June 1973, 63, pp. 280–96.

Bernholz, Peter. "Logrolling, Arrow Paradox and Cyclical Majorities," *Public Choice*, Summer 1973, 15, pp. 87–95.

———. "Logrolling, Arrow Paradox and Decision Rules—A Generalization," *Kyklos*, 1974, 27, pp. 49–61.

———. *The International Game of Power*. Berlin: Mouton, 1985.

Berns, Walter. "The Writing of the Constitution of the United States," in Goldwin and Kaufman (1988), pp. 119–53.

Bickel, Alexander. *The Least Dangerous Branch*. Indianapolis: Bobbs-Merrill, 1962.

Black, Antony. "The Individual and Society," in Burns (1988), pp. 588–606.

Black, D. *The Theory of Committees and Elections*. Cambridge: Cambridge University Press, 1958.

Blais, Andre. "The Debate Over Electoral Systems," *International Political Science Review*, 1991, 12, pp. 239–60.

Blais, Andre, and Carty, R.K. "Does Proportional Representation Foster Voter Turnout?" *European Journal of Political Research*, 1990, 18, pp. 167–81.

Bogdanor, Vernon. *The People and the Party System*. Cambridge: Cambridge University Press, 1981.

———, ed. *Constitutions in Democratic Politics*. Aldershot, Eng.: Gower, 1988a.

———. "Britain: The Political Constitution," 1988b, in Bogdanor (1988a), pp. 53–72.

Bonime-Blanc, Andrea. *Spain's Transition to Democracy*. Boulder, Colo.: Westview Press, 1987.

Borcherding, T.E., Bush, W.C., and Spann, R.M. "The Effects of Public Spending on the Divisibility of Public Outputs in Consumption, Bureaucratic Power, and the Size of the Tax-Sharing Group," in T.E. Borcherding, ed., *Budgets and Bureaucrats: The Sources of Government Growth*. Durham, N.C.: Duke University Press, 1977, pp. 211–28.

———, and Deacon, R.T. "The Demand for the Services of Non-Federal Governments," *American Economic Review*, December 1972, 62, pp. 891–901.

———, Pommerehne, W.W., and Schneider, F. "Comparing the Efficiency of Private and Public Production: The Evidence from Five Countries," *Zeitschrift fur Nationalokonomie*, 1982, 89, pp. 127–56.

Bork, Robert H. *The Antitrust Paradox*. New York: Basic Books, 1978.

Borooah, V., and van der Ploeg, F. *Political Aspects of the Economy*. Cambridge: Cambridge University Press, 1983.

Bovard, James. "Lock the Barn! The Farm Bill's Coming," *The Washington Post*, January 21, 1990, p. B5.

Bradshaw, Brendan. "Transalpine Humanism," in Burns (1990), pp. 95–131.

Brass, Paul R. *The Politics of India Since Independence*. Cambridge: Cambridge University Press, 1990.

Brennan, G., and Buchanan, J.M. *The Power to Tax: Analytical Foundations of a Fiscal Constitution*. Cambridge: Cambridge University Press, 1980.

———, and Buchanan, James C. *The Reason of Rules*. Cambridge: Cambridge University Press, 1985.

———, and Hamlin, A. "Bicameralism and Majoritarian Equilibrium," *Public Choice*, September 1992, 74, pp. 169–79.

Bresnahan, Timothy F. "Duopoly Models with Consistent Conjectures," *American Economic Review*, December 1981, 71, pp. 934–45.

Breton, Albert, and Galeotti, Gianluigi. "Is Proportional Representation Always the Best Electoral Rule?" *Public Finance*, 1985, 40(1), pp. 1–16.

———, and Scott, A. *The Economic Constitution of Federal States*. Toronto: University of Toronto Press, 1978.

———, and Wintrobe, R. *The Logic of Bureaucratic Control*. Cambridge: Cambridge University Press, 1982.

Brittan, Samuel. "The Economic Contradictions of Democracy," *British Journal of Political Science*, April 1975, 5, pp. 129–59.

Browning, Edgar K. "Inequality and Poverty," *Southern Economic Journal*, April 1989, 55, pp. 819–30.

———, and Johnson, William R. "The Trade-Off between Equality and Efficiency," *Journal of Political Economy*, April 1984, 92, pp. 175–203.

Brunner, K. "Reflections on the Political Economy of Government: The Persistent Growth of Government," *Schweizerische Zeitschrift fur Volkswirtschaft und Statistik*, September 1978, 114, pp. 649–80.

Buchanan, Allen. *Secession*. Boulder, Colo.: Westview Press, 1991.

Buchanan, James M. "Social Choice Democracy, and Free Markets' " *Journal of Political Economy*, April 1954, 62, pp. 114–23.

———. "Ethical Rules, Expected Values, and Large Numbers," *Ethics*, October 1965, 76, pp. 1–13.

———. *The Limits of Liberty: Between Anarchy and Leviathan*. Chicago: University of Chicago Press, 1975.

———. *Liberty, Market and State*. New York: New York University Press, 1986a.

———. "Better Than Plowing," *Banca Nazionale del Lavoro Quarterly Review*, 1986b, 159, pp. 359–75.

———. *The Economics and the Ethics of Constitutional Order*. Ann Arbor: University of Michigan Press, 1991.

———, and Faith, Roger L. "Secession and the Limits of Taxation: Toward a Theory of Internal Exit," *American Economic Review*, December 1987, 77, pp. 1023–31.

———, and Goetz, C.J. "Efficiency Limits of Fiscal Mobility: An Assessment of the Tiebout Model," *Journal of Public Economics*, April 1972, 1, pp. 25–43.

———, and Lee, D.R. "Cartels, Coalitions and Constitutional Politics," *Constitutional Political Economy*, Spring/Summer 1991, 2, pp. 139–61.

———, and Tullock, G. *The Calculus of Consent*. Ann Arbor: The University of Michigan Press, 1962.

———, and Tullock, G. "Polluters' Profits and Political Response: Direct Controls Versus Taxes," *American Economic Review*, March 1975, 65, pp. 139–47.

———, and Wagner, R.E. "An Efficiency Basis for Federal Fiscal Equalization," in J. Margolis, ed., *The Analysis of Public Output*. New York: National Bureau of Economic Research, 1970.

———, and Wagner, R.E. *Democracy in Deficit*. New York: Academic Press, 1977.

Burg, Steven L. *Conflict and Cohesion in Socialist Yugoslavia: Political Decision Making Since 1966*. Princeton, N.J.: Princeton University Press, 1983.

Burnham, Walter Dean. "The Turnout Problem," in Reichley (1987), pp. 97–133.

Burns, J.H., ed. *The Cambridge History of Medieval Political Thought*. Cambridge: Cambridge University Press, 1988.

———, ed. *The Cambridge History of Political Thought, 1450–1700*. Cambridge: Cambridge University Press, 1990.

Butler, David, and Ranney, Austin. *Referendums*. Washington, D.C.: American Enterprise Institute, 1978.

Calhoun, John C. *A Disquisition on Government*. New York: D. Appleton, 1854, reprinted New York: Political Science Classics, 1947.

Canning, J.P. "Introduction: Politics, Institutions and Ideas," in Burns (1988), pp. 341–66.

Caplin, Andrew, and Nalebuff, Barry. "On 64%-Majority Rule," *Econometrica*, July 1988, 56, pp. 787–814.

Carstairs, Andrew McLaren. *A Short History of Electoral Systems in Western Europe*. London: Allen & Unwin, 1980.

Cassel, Carol A. "The Nonpartisan Ballot in the United States," in Grofman and Lijphart (1986), pp. 226–41.

Castles, Francis G. "Scandinavia: The Politics of Stability," in Macridis (1978a), pp. 427–79.

Cawson, Alan. *Corporatism and Political Theory*. Oxford: Basil Blackwell, 1986.

Chen, Yan, and Ordeshook, Peter C. "Veto Games: Spatial Committees Under Unanimity Rule," mimeo, California Institute of Technology, Pasadena, 1993.

Childs, David. *Germany Since 1918*. New York: St Martin's Press, 1980.

Chubb, John E., and Moe, Terry M. *Politics, Markets, and America's Schools*. Washington, D.C.: Brookings Institution, 1990.

Clarke, Edward H. "Multipart Pricing of Public Goods," *Public Choice*, Fall 1971, 11, pp. 17–33.

Clutterbuck, Richard. *Terrorism, Drugs and Crime in Europe After 1992*. London: Routledge, 1990.

Coase, R.H. "The Problem of Social Cost," *Journal of Law and Economics*, October 1960, 3, pp. 1–44.

Cohen, R. "Altruism: Human, Cultural, or What?" in L. Wispe, ed., *Altruism, Sympathy, and Helping*. New York: Academic Press, 1978, pp. 79–98.

Coleman, James S. "Internal Processes Governing Party Positions in Elections," *Public Choice*, Fall 1971, 11, pp. 35–60.

———. "The Positions of Political Parties in Elections," in R.G. Niemi and H.F. Weisberg., eds, *Probability Models of Collective Decision-Making*. Columbus, Ohio: Merrill, 1972.

———. *Mathematics of Collective Action*. Chicago: Aldine, 1973.

———. *Foundations of Social Theory*. Cambridge, Mass.: Harvard University Press, 1990.

Coleman, Jules L. *Markets, Morals and the Law*. Cambridge: Cambridge University Press, 1988.

———. "Secession, Self-Determination and the Idea of a Political Community," mimeo, Georgetown University Law Center, Washington, D.C.: 1991.

———, and Ferejohn, John A. "Democracy and Social Choice," *Ethics*, 1986, 97, pp. 6–25, reprinted in Coleman (1988), pp. 290–310.

de Condorcet, M. *Essai sur l"Application de L"Analyse a' la Probabilite des Decisions Rendues a' la Pluraliste des Voix*. Paris, 1785.

Cornes, R., and Sandler, T. *The Theory of Externalities, Public Goods and Club Goods*. Cambridge: Cambridge University Press, 1986.

Corsi, Jerome L. *Judicial Politics*. Englewood Cliffs, N.J.: Prentice-Hall, 1984.

Corwin, Edward S., "The Supreme Court and Unconstitutional Acts of Congress," *Michigan Law Review*, 1906, 4, pp. 616–30, reprinted in Loss (1981), pp. 27–40.

———. "The Establishment of Judicial Review," *Michigan Law Review*, 1910, 9, pp. 102–25, and 1911, 10, pp. 283–316, reprinted in Loss (1981), pp. 41–90.

———. "The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention," *American Historical Review*, April 1925, 30, pp. 511–36, reprinted in J.M. Smith (1971), pp. 93–116.

Coughlin, P. "Majority Rule and Election Models," *Journal of Economic Surveys*, 1990, 4, pp. 157–88.

———, Mueller, D.C., and Murrell, P. "Electoral Politics, Interest Groups, and the Size of Government," *Economic Inquiry*, October 1990, 28, pp. 682–705.

———, and Nitzan, Shmuel. "Electoral Outcomes with Probabilistic Voting and Nash Social Welfare Maxima," *Journal of Public Economics*, 1981, 15, pp. 113–22.

Council of Economic Advisers. *Annual Report*. Washington, D.C.: Government Printing Office, 1992.

Cronin, Thomas E. *Direct Democracy*. Cambridge, Mass.: Harvard University Press, 1989.

Crozier, M. *The Bureaucratic Phenomenon*. Chicago: University of Chicago Press, 1964.

Cukierman, A., and Meltzer, A.H. "A Positive Theory of Discretionary Policy, the Cost of a Democratic Government, and the Benefits of a Constitution," *Economic Inquiry*, July 1986, 24, pp. 367–88.

Curtis, Gerald L. *The Japanese Way of Politics*. New York: Columbia University Press, 1988.

Cutler, Lloyd N. "To Form a Government," in Goldwin and Kaufman (1986), pp. 1–17.

Dahl, Robert A. "The City in the Future of Democracy," *American Political Science Review*, December 1967, 61, pp. 953–69, reprinted in T.E. Cook and P. M. Morgan, eds., *Participatory Democracy*, San Francisco: Canfield Press, 1972, pp. 85–114.

Dahlman, Carl J. "The Problem of Externality," *Journal of Law and Economics*, April 1979, 22, pp. 141–62.

———. *The Open Field System and Beyond: A Property Rights Analysis of an Economic Institution*. Cambridge: Cambridge University Press, 1980.

Dante, Alighieri. *On World Government (De Monarchia)*, trans. by Herbert W. Schneider. Indianapolis: Liberty Arts Press, 1957.

Davis, O.A., Hinich, M.J., and Ordeshook, P.C. "An Expository Development of a Mathematical Model of the Electoral Process," *American Political Science Review*, June 1970, 64, pp. 426–48.

Dean, Warren. "Latin American Golpes and Economic Fluctuations, 1823–1966," *Social Science Quarterly*, June 1970, 51, pp. 70–80.

Demsetz, Harold. "Toward a Theory of Property Rights," *American Economic Review*, May 1967, 57, pp. 347–59.

———. "Why Regulate Utilities?" *Journal of Law and Economics*, April 1968, 11, pp. 55–66.

Deutsch, Karl W., and Smith, D. Brent. "The German Federal Republic: West Germany," in Macridis (1978a), pp. 175–293.

Dewey, John. "Democracy as a Way of Life" (originally published in 1939) in Kariel (1970), pp. 13–16.

Diamond, Larry, Linz, J.J., and Lipset, S.M., eds. *Politics in Developing Countries*. Boulder, Colo.: L. Rienner, 1990.

Downs, A. *An Economic Theory of Democracy*. New York: Harper & Row, 1957.

———. *Inside Bureaucracy*. Boston: Little, Brown, 1967.

Drozdiak, William. "Italians Vote Changes in Electoral System," *Washington Post*, April 20, 1993, p. A15.

Dryzek, John, and Goodin, Robert E. "Risk-Sharing and Social Justice: The Motivational Foundations of the Post-War Welfare State," *British Journal of Political Science*, January 1986, 16, pp. 1–34.

Dubois, Philip L. *From Ballot to Bench*. Austin: University of Texas Press, 1980.

Duverger, M. *Les Partis Politique*. Bordeaux: University of Bordeaux, 1946.

———. *Political Parties: Their Organization and Activity in the Modern State*. New York: John Wiley & Sons, 1954.

Dworkin, Ronald. *Taking Rights Seriously*. Cambridge, Mass.: Harvard University Press, 1977.

Eavey, Cheryl L., and Miller, Gary J. "Constitutional Conflict in State and Nation," in B. Grofman and D. Wittman, eds., *The Federalist Papers and the New Institutionalism*. New York: Agathon Press, 1989, pp. 205–19.

Eckstein, Harry. "Introduction: The Impact of Electoral Systems on Representative Government," in Eckstein and Apter (1963), pp. 247–54.

———, and Apter, David E. *Comparative Politics*. New York: Free Press, 1963.

Ehrenberg, Victor. *The Greek State*. London: Methuen, 1969.

Eisner, Robert. *How Real Is the Federal Deficit?* London: Collier Macmillan, 1986.

Elazar, Daniel J. *American Federalism: A View from the States*. New York: Crowell, 1966.

Ellickson, Robert C. *Order Without Law: How Neighbors Settle Disputes*. Cambridge, Mass.: Harvard University Press, 1991.

Elster, Jon. *Arguing and Bargaining in Two Constituent Assemblies*. Storrs Lectures, Yale Law School, 1991 (mimeo 1993a).

———. "Constitution-Making in Eastern Europe: Building the Boat in the Open Sea," *Public Administration*, Spring/Summer 1993, 71, pp. 169–217.

———, and Slagstad, Rune. *Constitutionalism and Democracy*. Cambridge: Cambridge University Press, 1988.

Enelow, J.M., and Hinich, M.J. *The Spatial Theory of Voting*. Cambridge: Cambridge University Press, 1984.

Engstrom, Richard L., and McDonald, Michael D. "The Effect of At-Large Versus District Elections on Racial Representation in U.S. Municipalities," in Grofman and Lijphart (1986), pp. 203–25.

Eskridge, William N. Jr., and Ferejohn, John. "Politics, Interpretation, and the Rule of Law," in Ian Shapiro, ed., *The Rule of Law*. New York: New York University Press, 1994, pp. 265–94.

Etzioni, Amitai. *The Moral Dimension*. New York: Free Press, 1988.

Eyck, Erich. *A History of the Weimar Republic*, Vol. 1. Cambridge, Mass.: Harvard University Press, 1962; vol. 2, 1963.

Fair, R.C. "The Effect of Economic Events on Votes for President," *Review of Economics and Statistics*, May 1978, 60, pp. 159–73.

———. "The Effect of Economic Events on Votes for President: 1980 Results," *Review of Economics and Statistics*, May 1982, 64, pp. 322–25.

Farquharson, R. *Theory of Voting*. New Haven: Yale University Press, 1969.

Farrand, Max. *The Records of the Federal Convention of 1787*. New Haven: Yale University Press, 1911 (3 vols.).

Farrar, Cynthia. *The Origins of Democratic Thinking*. Cambridge: Cambridge University Press, 1988.

Feenstra, Robert C. "How Costly Is Protectionism?" *Economic Perspectives*, Summer 1992, 6, pp. 159–78.

Feldman, Elliot J. *Concorde and Dissent*. Cambridge: Cambridge University Press, 1985.

Ferejohn, John, and Weingast, Barry. "Limitation of Statute: Strategic Statutory Interpretation, *Georgetown Law Journal*, 1992, 80.

Finer, Samuel E., and Steed, Michael. "Politics of Great Britain," in Macridis (1978a), pp. 27–92.

Finsinger, J. "Competition, Ownership and Control in Markets with Imperfect Information," in Jörg Finsinger, ed., *Economic Analysis of Regulated Markets*. London and Basingstoke: Macmillan and St. Martin's Press, 1983, pp. 111–33.

Fiorina, M.P. *Congress: Keystone of the Washington Establishment*. New Haven: Yale University Press, 1977.

Fishburn, Peter C., and Gehrlein, William V. "Towards a Theory of Elections with Probabilistic Voting," *Econometrica*, November 1977, 45, pp. 1907–23.

Fisher, Louis. *President and Congress*, New York: Free Press, 1972.

Fitzgerald, Randall, and Lipson, Gerald. *Porkbarrel*, Washington, D.C.: Cato Institute, 1984.

FitzRoy, F.R., and Mueller, D.C. "Cooperation and Contract in Contractual Organizations," *Quarterly Review of Economics and Business*, Winter 1984, 24, pp. 24–49.

Frey, Bruno S. "Efficiency and Democratic Political Organization: The Case for the Referendum," *Journal of Public Policy*, 1992, 12, pp. 209–22.

———. "The Role of Direct Referenda in Institutional Reform." Paper presented at a conference at Universita degli Studi 'La Sapienza,' Rome, 1993.

———, and Pommerehne, Werner W. "On the Fairness of Pricing—An Empirical Survey Among the General Population," *Journal of Economic Behavior and Organization*, 1993, 20, pp. 295–307.

———, and Schneider, F. "An Empirical Study of Politico-Economic Interaction in the U.S.," *Review of Economics and Statistics*, May 1978a, 60, pp. 174–83.

———, and Schneider, F. "A Politico-Economic Model of the United Kingdom," *Economic Journal*, June 1978b, 88, pp. 243–53.

———, and Schneider, F. "An Econometric Model with an Endogenous Government Sector," *Public Choice*, 1979, 34(1), pp. 29–43.

———, and Schneider, F. "A Politico-Economic Model of the U.K.: New Estimates and Predictions," *Economic Journal*. September 1981, 91, pp. 737–40.

———, and Weck, Hannelore "A Statistical Study of the Effect of the Great Depression on Elections: The Weimar Republic, 1930–1933," *Political Behavior*, 1983, 5, pp. 403–20.

Frieden, Jeffrey A. *Debt, Development and Democracy*. Princeton, N.J.: Princeton University Press, 1991.

Friedman, David D. "Comments on Peltzman," *Journal of Law and Economics*, April 1993, 36, pp. 371–78.

Friedman, James W. *Oligopoly Theory*. Cambridge: Cambridge University Press, 1983.

Friedman, Milton. *Capitalism and Freedom*. Chicago: University of Chicago Press, 1962.

Friedrich, Carl J. *Constitutional Government and Democracy*. Boston: Ginn, 1946.

———. *Trends of Federation in Theory and Practice*, New York: Prager, 1968.

Frohlich, Norman, and Oppenheimer, Joe A. *Choosing Justice: An Experimental Approach to Ethical Theory*. Berkeley: University of California Press, 1992.

von Furstenberg, G.M., and Mueller, D.C. "The Pareto Optimal Approach to Income Redistribution: A Fiscal Application," *American Economic Review*, September 1971, 61, pp. 628–37.

Gardner, Bruce L. "The United States," in Sanderson (1990), pp. 19–63.

Garner, John. *The Franchise and Politics in British North America 1755–1867*. Toronto: University of Toronto Press, 1969.

Garreton, Manuel Antonio. "Chile: In Search of Lost Democracy," in Hartlyn and Morley (1986), pp. 197–216.

Gauthier, David. *Morals by Agreement*. Oxford: Oxford University Press, 1986.

Geddes, Barbara. "Democratic Institutions as Bargains Among Self-Interested Politicians," mimeo, UCLA, 1990.

George, Henry. *Progress and Poverty*. New York: Robert Schalkenbach Foundation, 1979 (originally published in 1879).

Gibbard, A. "Manipulation of Voting Schemes: A General Result," *Econometrica*, July 1973, 41, pp. 587–602.

Goldman, Guido. "The German Political System," in Beer et al. (1973), pp. 473–589.

Goldwin, Robert A., and Kaufman, Art, eds. *Separation of Powers—Does It Still Work?* Washington, D.C.: American Enterprise Institute, 1986.

———, and Kaufman, Art, eds. *Constitution Makers and Constitution Making.* Washington, D.C.: American Enterprise Institute, 1988.

———, and Schambra, William A., eds. *How Does the Constitution Secure Rights?* Washington, D.C.: American Enterprise Institute, 1985.

Greenberg, J. "Consistent Majority Rule Over Compact Sets of Alternatives," *Econometrica,* 1979, 47, pp. 627–36.

Grofman, Bernard, and Lijphart, Arend, eds. *Electoral Laws and Their Political Consequences,* New York: Agathon Press, 1986.

Groves, Theodore, and Ledyard, John. "Optimal Allocation of Public Goods: A Solution to the 'Free Rider' Problem," *Econometrica,* May 1977, 45, pp. 783–809.

Gugliotta, Guy. "Unusual House Coalition to Challenge Farm-Support Programs," *The Washington Post,* May 20, 1990, p. A4.

Gwyn, William B. "The Separation of Powers and Modern Forms of Democratic Government," in Goldwin and Kaufman (1986), pp. 65–89.

Haas, J. *The Evolution of the Prehistoric State.* New York: Columbia University Press, 1982.

Hadley, Eleanor. "The Secret of Japanese Success," *Challenge,* May-June 1983, pp. 4–10.

Haefele, E.T. "A Utility Theory of Representative Government," *American Economic Review,* June 1971, 61, pp. 350–67.

Hallett, George H. Jr. "Proportional Representation with the Single Transferable Vote: A Basic Requirement for Legislative Elections," in Lijphart and Grofman (1984), pp. 113–25.

Hamlin, Alan P. *Ethics, Economics and the State.* New York: St. Martin's Press, 1986.

Hammond, T.H., and Miller, G.J., "The Core and the Constitution," *American Political Science Review,* 1987, 81, pp. 1155–74.

Hardin, Charles M. *Constitutional Reform in America.* Ames: Iowa State University Press, 1989.

Hardin, R. *Collective Action.* Baltimore: Johns Hopkins University Press, 1982.

———. "Why a Constitution?" in B. Grofman and D. Wittman, eds., *The Federalist Papers and the New Institutionalism.* New York: Agathon Press, 1989.

Harris, Louis. *Inside America.* New York: Vintage Books, 1987.

Harsanyi, J.C. "Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility," *Journal of Political Economics,* August 1955, 63, pp. 309–21.

———. *Rational Behavior and Bargaining Equilibrium in Games and Social Situations.* Cambridge: Cambridge University Press, 1977.

Hart, H.L.A. *The Concept of Law.* Oxford: Clarendon Press, 1961.

Hartlyn, Jonathan, and Morley, Samuel A. eds. *Latin American Political Economy.* Boulder, Colo.: Westview Press, 1986.

Hayami, Yujiro. "Japan," in Sanderson (1990), pp. 181–218.

Hayek, Friedrich A. *The Constitution of Liberty.* Chicago: University of Chicago Press, 1960.

———. *Law, Legislation and Liberty,* 3 vols., Chicago: University of Chicago Press, 1973–79.

Head, John G. "On Merit Goods," *Finanzarchiv,* 1966, 25, pp. 1–29.

———. "On Merit Wants: Reflections on the Evolution, Normative Status and Policy Relevance of a Controversial Public Finance Concept," in G. Brennan and C. Walsh, eds., *Rationality, Individualism and Public Policy.* Canberra: Australian National University, 1990, pp. 211–44.

Hermens, Ferdinand A. *Demokratie und Wahlrecht.* Paderborn, Germany: Schöning, 1933.

———. "The Dynamics of Proportional Representation," in Eckstein and Apter (1963), pp. 254–80, reprinted from *Democracy or Anarchy?* South Bend, Ind.: University of Notre Dame Press, 1938, pp. 15–74.

———. *Democracy or Anarchy?* Notre Dame: University of Notre Dame Press, 1941.

———. *Europe Between Democracy and Anarchy*. Notre Dame, Ind.: University of Notre Dame Press, 1951.

Hibbs, D.A. Jr. *The Political Economy of Industrial Democracies*. Cambridge, Mass.: Harvard University Press, 1987.

Hicks, Granville. *Small Town*. New York: Macmillan, 1946.

Higgs, Robert. "Hard Coals Make Bad Law: Congressional Parochialism versus National Defense," *Cato Journal*, Spring/Summer 1988, 8, pp. 79–106.

———. "Beware the Pork-Hawk," *Reason*, June 1989, 21, pp. 28–34.

———, ed. *Arms, Politics, and the Economy*. New York: Holmes & Meier, 1990.

Hine, David. "Italy (1948): Condemned by Its Constitution?" in Bogdanor (1988a), pp. 206–28.

Hinich, M.J. "Equilibrium in Spatial Voting: The Median Voter Result Is An Artifact," *Journal of Economic Theory*, December 1977, 16, pp. 208–19.

Hirschman, A.O. *Exit, Voice and Loyalty*. Cambridge, Mass.: Harvard University Press, 1971.

———. "The Turn to Authoritarianism in Latin America and the Search for Its Economic Determinants," in David Collier, ed., *The New Authoritarianism in Latin America*. Princeton, N.J.: Princeton University Press, 1979, pp. 61–98.

Hobbes, T. *Leviathan*. London, 1651. Reprinted in *The English Philosophers*. New York: Modern Library, 1939, pp. 129–234.

Hochman, H.M., and Rodgers, J.D. "Pareto Optimal Redistribution," *American Economic Review*, September 1969, 59, pp. 542–57.

Hodder-Williams, Richard. "The Constitution (1787) and Modern American Government," in Bogdanor (1988a), pp. 73–104.

Hoffman, David. "As World Changes, U.S. Leaders Paralyzed," *The Washington Post*, September 24, 1989, p. A1.

Hofstadter, Richard. *The Age of Reform*. New York: Knopf, 1955.

Hoover, Kevin, D., and Sheffrin, Steven M. "Causation, Spending and Taxes: Sand in the Sandbox or Tax Collector for the Welfare State?" mimeo, University of California, Davis, 1992.

Horowitz, John B. "The Marginal Cost of Redistribution: Lifetime and Annual Perspectives," *Southern Economic Journal*, January 1990, 56, pp. 664–75.

Horwitz, Sari. "D.C. Students Lose Lunch-Time Freedom," *The Washington Post*, June 20, 1992, pp. A1,7.

Hotelling, H. "Stability in Competition," *Economic Journal*, March 1929, 39, pp. 41–57.

Hughes, Christopher. "Switzerland (1875): Constitutionalism and Democracy," in Bogdanor (1988a), pp. 277–89.

von Humbolt, Wilhelm. *The Limits of State Action* (originally published in 1854). Indianapolis: Liberty Fund, 1993.

Humes, Samuel, and Martin, Eileen. *The Structure of Local Government*. The Hague: International Union of Local Authorities, 1969.

Huntington, Samuel P. *Political Order in Changing Societies*, New Haven: Yale University Press, 1968.

Hylland, A., and Zeckhauser, R. "A Mechanism for Selecting Public Goods When Preferences Must Be Elicited," KSG Discussion Paper 70D, Harvard University, August 1979.

Inman, R.P. "Markets, Governments, and the 'New' Political Economy," in A.J. Auerbach and M. Feldstein, eds., *Handbook of Public Economics*. Amsterdam: North Holland, 1987, pp. 647–777.

———, and Rubinfeld, Daniel L. "Federalism in an Imperfect World: An Economic Perspective," mimeo, Georgetown University Law Center, Washington, D.C., 1992.

Isikoff, Michael. "Judge Denies U.S. Request to Dismiss Ford Jury," *Washington Post*, February 23, 1993, p. A1.

Isocrates. *Isocrates*. New York: W. Heinemann, 1929.

Jackman, Robert W. "Political Institutions and Voter Turnout in the Industrial Democracies," *American Political Science Review*, June 1987, 81, pp. 405–23.

Jacob, Herbert. "The Effects of Institutional Differences in the Recruitment Process: The Case of State Judges," *Journal of Public Law*, 1964, 13, pp. 104–19.

Jacobs, Jane. *The Death and Life of Great American Cities*. New York: Vintage Books, 1961.

Jefferson, Thomas. "Letter to Samuel Kercheval," July 12, 1816, reprinted in A. Koch and W. Peden, eds., *The Life and Selected Writings of Thomas Jefferson*. New York: Modern Library, 1944, pp. 673–76.

Jillson, Calvin C. *Constitution Making: Conflict and Consensus in the Federal Constitution of 1787*. New York: Agathon Press, 1988.

Johnston, R.J. "Seats, Votes, Redistricting, and the Allocation of Power in Electoral Systems," in Lijphart and Grofman (1984), pp. 59–69.

Kaase, Max. "Personalized Proportional Representation: The 'Model' of the West German Electoral System," in Lijphart and Grofman (1984), pp. 155–64.

Kahn, Alfred E. *The Economics of Regulation*, Vol. I, New York: John Wiley & Sons, 1970.

Kant, Immanuel. "Eternal Peace" (originally published in 1795), in Carl J. Friedrich, ed., *The Philosophy of Kant*. New York: Random House, 1949, pp. 430–76.

Kariel, Henry S., ed. *Frontiers of Democratic Theory*. New York: Random House, 1970.

Karring, A.K., and Welch, S. "Electoral Structure and Black Representation on City Councils," *Social Science Quarterly*, 1982, 63, pp. 99–114.

Katz, Richard S. "The Single Transferable Vote and Proportional Representation," in Lijphart and Grofman (1984), pp. 135–45.

Katzenstein, Peter J. *Corporatism and Change*. Ithaca, N.Y.: Cornell University Press, 1984.

Kavka, Gregory S. *Hobbesian Moral and Political Theory*. Princeton, N.J.: Princeton University Press, 1986.

Keech, William R. *Economic Politics: The Costs of Democracy*. Cambridge,: Cambridge University Press, 1994.

Kendall, W. *John Locke and the Doctrine of Majority Rule*. Urbana: University of Illinois Press, 1941.

Kendrick, M.S. *A Century and a Half of Federal Expenditures*. New York: National Bureau of Economic Research, 1955.

Kennedy, Kenneth F., and Mehr, Robert I. "A Case Study in Private v. Public Enterprise: The Manitoba Experience with Automobile Insurance," *Journal of Risk and Insurance*, December 1977, 44, pp. 595–621.

Kindleberger, Charles P. *International Economics, 6th ed.* Homewood, Ill.: Irwin, 1978.

Kitto, H.D.F. *The Greeks*. Baltimore: Penguin Books, 1957.

Klein, Benjamin, and Leffler, Keith B. "The Role of Market Forces in Assuring Contractual Performance," *Journal of Political Economy*, August 1981, 89, pp. 615–41.

Kline, Harvey F. "Columbia: The Struggle Between Traditional 'Stability' and New Visions," in Wiarda and Kline (1990), pp. 231–257.

Knapp, Andrew. "Proportional But Bipolar: France's Electoral System in 1986," *West European Politics*, January 1987, 10, pp. 89–114.

Koester, Ulrich, and Stefan Tangermann. "The European Community," in Sanderson (1990), pp. 64–111.

Koford, K.J. "Centralized Vote-Trading," *Public Choice*, 1982, 39(2), pp. 245–68.

———. "Dimensions in Congressional Voting," *American Political Science Review*, September 1989, 83, pp. 949–62.

———. "Dimensions, Transactions Costs and Coalitions in Legislative Voting," *Economics and Politics*, March 1990, 2, pp. 59–82.

Kohli, Atul. *Democracy and Discontent*. Cambridge: Cambridge University Press, 1990.

Krauss, Ellis S. "Politics and the Policymaking Process," in Takeshi Ishida and Ellis S. Krauss, eds., *Democracy in Japan*. Pittsburgh: University of Pittsburgh Press, 1989, pp. 39–64.

Kriesi, Hanspeter. "The Structure of the Swiss Political System," in G. Lehmbruch and P.C. Schmitter, eds., *Patterns of Corporatist Policy-Making*. London: Sage, 1982, pp. 133–61.

Lakeman, Enid. *How Democracies Vote*, 4th ed. London: Faber & Faber, 1974.

Lamounier, Bolivar. "Brazil: Inequality Against Democracy," in Diamond et al. (1990), pp. 87–134.

Landes, William M., and Posner, Richard A. "The Independent Judiciary in an Interest-Group Perspective," *Journal of Law and Economics*, December 1975, 18, pp. 875–901.

Langbein, John H. "The German Advantage in Civil Procedure," *University of Chicago Law Review*, Fall 1985, 52, pp. 823–66.

Ledyard, J.O. "The Pure Theory of Large Two-Candidate Elections," *Public Choice*, 1984, 44(1), pp. 7–41.

Lee, Eugene C. "California," in Butler and Ranney (1978), pp. 87–122.

Lehmbruch, Gerhard. "Constitutional Democracy, Class Conflict and the New Corporatism" (1979a), in Schmitter and Lembruch (1979), pp. 53–61.

———. "Liberal Corporatism and Party Government," in Schmitter and Lehmbruch (1979b), pp. 147–83.

Leorente, Francisco Rubio. "The Writing of the Constitution of Spain," in Goldwin and Kaufman (1988), pp. 239–65.

Lepsius, M. Rainer. "From Fragmented Party Democracy to Government by Emergency Decree and National Socialist Takeover: Germany," in J.L. Linz and A. Stepan, eds., *The Breakdown of Democratic Regimes*. Baltimore: Johns Hopkins University Press, 1978, Part II, pp. 34–79.

Levy, Daniel C. "Mexico: Sustained Civilian Rule Without Democracy," in Diamond et al. (1990), pp. 135–173.

Lewis, H. Gregg. "Union Relative Wage Effects," in O. Ashenfelter and R. Ledyard, eds., *Handbook of Labor Economics*, Vol. II, Amsterdam: North Holland, 1986, pp. 1139–81.

Lewis, W. Arthur. "Beyond African Dictatorship," *Encounter*, August 1965, pp. 3–18.

Libecap, Gary D. "The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust," *Economic Inquiry*, April 1992, 30, pp. 242–62.

Liedl, Mark B. "Congress's Busywork," *The Washington Post*, January 28, 1990, p. C1.

Lijphart, Arend. *Democracies*. New Haven: Yale University Press, 1984.

———. "Degrees of Proportionality of Proportional Representation Formulas," in Grofman and Lijphart (1986), pp. 170–79.

———. "The Political Consequences of Electoral Laws, 1945–85," *American Political Science Review*, June 1990, 84, pp. 481–96.

Lijphart, Arend, ed. *Parliamentary Versus Presidential Government*. Oxford: Oxford University Press, 1992.

———, and Grofman, Bernard, eds. *Choosing an Electoral System: Issues and Alternatives*. New York: Praeger, 1984.

———, Lopez, Pintor Rafeal, and Sone, Yasunori. "The Limited Vote and the Single Nontransferable Vote: Lessons from the Japanese and Spanish Examples," in Grofman and Lijphart (1986), pp. 154–69.

Lindbeck, A. "Stabilization Policy in Open Economies with Endogenous Politicians," *American Economic Review*, May 1976, 66, pp. 1–19.

Linz, Juan, and Stepan, Alfred, eds., *The Breakdown of Democratic Regimes*, Baltimore: Johns Hopkins University Press, 1978.

Locke, John. *Two Treatises of Government*, ed. Peter Laslett. Cambridge: Cambridge University Press, 1988 (originally published in 1690).

Lomasky, Loren E. *Persons, Rights, and the Moral Community*. Oxford: Oxford University Press, 1987.

Loss, Richard, ed. *Corwin on the Constitution*, Vol. II. Ithaca, N.Y.: Cornell University Press, 1981.

Lowenberg, Anton D., and Yu, Ben T. "Efficient Constitution Formation and Maintenance: The Role of 'Exit'," *Constitutional Political Economy*, Winter 1992, 3, pp. 51–72.

Lowi, Theodore J. *The End of Liberalism,* 2nd ed. New York: Norton, 1979.

Lucas, Robert F. "Principles of Fiscal and Monetary Policy," *Journal of Monetary Economics,* January 1986, 17, pp. 117–34.

Luce, R. Duncan, and Raiffa, Howard. *Games and Decisions.* New York: John Wiley & Sons, 1957.

Lynd, Staughton. *Class Conflict, Slavery, and the United States Constitution.* New York: Bobbs-Merrill, 1967.

Lyons, David. "Utility and Rights," *Nomos,* 1982, 24, pp. 107–38.

MacDowell, Douglas M. *The Law in Classical Athens.* Ithaca, N.Y.: Cornell University Press, 1978.

Mackie, Thomas T., and Rose, Richard. *International Almanac of Electoral History,* 3rd ed. Washington, D.C.: Congressional Quarterly, 1991.

MacRae, D.C. "A Political Model of the Business Cycle," *Journal of Political Economics,* April 1977, 85, pp. 239–63.

Macridis, Roy C., ed. *Modern Political Systems: Europe,* 4th ed., Englewood Cliffs, N.J.: Prentice-Hall, 1978a.

———. "Politics of France," 1978b, in Macridis et al. (1978a), pp. 93–174.

———, Allen, Christopher S., and Anselem, Winston L. "The Mediterranean: The Politics of Stability—An Overview," in Macridis (1978a), pp. 481–517.

Magee, Stephan P., Brock, William A., and Young, Leslie. *Black Hole Tariffs and Endogenous Policy Theory.* Cambridge: Cambridge University Press, 1989.

Maier, Charles S. *In Search of Stability.* Cambridge: Cambridge University Press, 1987.

Mainwaring, Scott. "Presidentialism in Latin America," in Lijphart (1992), pp. 111–17.

Mandelbaum, Seymour J. *Boss Tweed's New York.* New York: John Wiley & Sons, 1965.

Manning, Maurice. "Ireland," in Butler and Ranney (1978), pp. 193–210.

Mansbridge, Jane J., ed. *Beyond Self-Interest.* Chicago: University of Chicago Press, 1990.

Marcus, Ruth. "Does Voting Rights Law Cover Judicial Elections?" *The Washington Post,* April 21, 1991, p. A4.

Margolis, Howard. *Selfishness, Altruism, and Rationality.* Cambridge: Cambridge University Press, 1982.

Marin, Bernd. "Austria—The Paradigm Case of Liberal Corporatism?" in Wyn Grant, ed., *The Political Economy of Corporatism.* New York: St. Martin's Press, 1985, pp. 89–125.

Marlow, Michael L. "Intergovernmental Competition, Voice and Exit Options and the Design of Fiscal Structure," *Constitutional Political Economy,* Winter 1992, 3, pp. 73–88.

Marsh, Michael, and Sinnott, Richard. "How the Voters Decided," in M. Gallagher and R. Sinnott, eds., *How Ireland Voted, 1989.* Galway: University College, 1990, pp. 94–130.

Marshall, Thurgood. "Mr. Justice Marshall Comments on the Missouri Plan." Remarks by Justice Marshall before American College of Trial Lawyers, Coronado, Calf., March 14, 1977, in Murphy and Pritchett (1979), pp. 155–59.

Mathews, Jay. "Californians Take Law into Their Own Hands," *Washington Post,* July 17, 1988, p. A8.

Matsusaka, John G. "Economics of Direct Legislation," *Quarterly Journal of Economics,* May 1992, 107, pp. 541–71.

Mayer, Kenneth R. *The Political Economy of Defense Contracting.* New Haven: Yale University Press, 1991.

May, K.O. "A Set of Independent, Necessary and Sufficient Conditions for Simple Majority Decision," *Econometrica,* October 1952, 20, pp. 680–84.

Mayhew, D.R. *Congress: The Electoral Connection,* New Haven: Yale University Press, 1974.

McCallam, B.T. "The Political Cycle: An Empirical Test," *Southern Economic Journal,* January 1978, 44, pp. 504–15.

McCarty, Theresa A. "Demographic Diversity and the Size of the Public Sector," mimeo, Union College, Schenectady, N.Y., 1992.

McCubbins, Mathew D., Noll, Roger G., and Weingast, Barry R. "Administrative Procedures as Instruments of Political Control," *Journal of Law, Economics, and Organization*, Fall 1987, 3, pp. 243–77.

———, Noll, Roger G., and Weingast, Barry R. "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies," *Virgina Law Review*, 1989, 75, pp. 705–42.

McDonald, Ronald H. "Uruguay: Democratic Regeneration and Realignment," in Wiarda and Kline (1990), pp. 321–34.

McGuire, M. "Private Good Clubs and Public Good Clubs: Economic Models of Group Formation," *Swedish Journal of Economics*, March 1972, 74, pp. 84–99.

McGuire, Robert A. "Constitution Making: A Rational Choice Model of the Federal Convention of 1787," *American Journal of Political Science*, May 1988, 32, pp. 483–522.

———, and Ohsfeldt, Robert L. "An Economic Model of Voting Behavior Over Specific Issues at the Constitutional Convention of 1787," *Journal of Economic History*, March 1986, 46, pp. 79–111.

McIlwain, Charles M. *Constitutionalism, Ancient and Modern*, Ithaca, N.Y.: Cornell University Press, 1940.

McKelvey, R.D. "Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control," *Journal of Economic Theory*, June 1976, 12, pp. 472–82.

McLure, Charles E. Jr. "Merit Wants: A Normatively Empty Box," *Finanzarchiv*, 1968, 27, pp. 474–83.

Meador, Daniel J. "A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals," *University of Chicago Law Review*, Spring 1989, 56, pp. 603–42.

Meier, Christian. *The Greek Discovery of Democracy*. Cambridge, Mass.: Harvard University Press, 1990.

Merkl, Peter H. *The Origin of the West German Republic*. New York: Oxford University Press, 1963.

Mill, J.S. *Considerations on Representative Government*. New York: Bobbs-Merrill, 1958 (originally published in 1861).

Miller, Gary J. *Cities by Contract*. Cambridge, Mass.: MIT Press, 1981.

Miller, J.C. III, Shughart, W.F., and Tollison, R.D. "A Note on Centralized Regulatory Review," *Public Choice*, 1984, 43(1), pp. 83–88.

Miller, Nickolas R. "Logrolling, Vote Trading, and the Paradox Voting: A Game Theoretical Overview," *Public Choice*, Summer 1977, 30, pp. 51–75.

Moe, Terry M. "The Politics of Structural Choice: Toward a Theory of Public Bureaucracy," in O.E. Williamson, ed., *Organization Theory: From Chester Barnard to the Present and Beyond*. Oxford: Oxford University Press, 1990, p. 214.

———. "The Positive Theory of Public Bureaucracy," in D.C. Mueller, ed., *Perspectives on Cambridge: Public Choice*. Cambridge University Press. (in press).

Moore, Thomas Gale. "The Beneficiaries of Trucking Regulation," *Journal of Law and Economics*, October 1978, 21, pp. 327–43.

Morgan, Dan. "Select Few in Congress Decide How the Money Will Be Spent," *The Washington Post*, May 30, 1989a, p. A1.

———. "Geography Shoves Ideology Aside in Money Fight," *The Washington Post*, August 13, 1989b, p. A1.

Moulin, H. "Dominance Solvable Voting Schemes," *Econometrica*, November 1979, 47, pp. 1337–51.

———. "The Proportional Veto Principle," *Review of Economic Studies*, July 1981a, 48, pp. 407–16.

———. "Prudence versus Sophistication in Voting Strategy," *Journal of Economic Theory*, June 1981b, 24, pp. 398–412.

———. "Voting with Proportional Veto Power," *Econometrica*, January 1982, 50, pp. 145–62.

Mueller, D.C. "Voting by Veto," *Journal of Public Economics*, 1978, 10(1), pp. 57–75.

———. "Voting by Veto and Majority Rule," in Horst Hanusch, ed., *Public Finance and the Quest for Efficiency*. Detroit: Wayne State University Press, 1984, pp. 69–86.

———. "Rational Egoism Versus Adaptive Egoism as Fundamental Postulate for a Descriptive Theory of Human Behavior," *Public Choice*, 51, 1986, pp. 3–23.

———. *Public Choice II*. Cambridge: Cambridge University Press, 1989a.

———. "Probabilistic Majority Rule," *Kyklos*, 1989b, 42, pp. 151–70.

———. "Individualism, Contractarianism, and Morality," *Social Justice Research*, March 1989c, 3, pp. 1–19.

———. "James M. Buchanan: Economist Cum Contractarian," *Constitutional Political Economy*, Spring/Summer 1990, 1, pp. 169–96.

———, Tollison, Robert D., and Willett, Thomas D. "Representative Democracy via Random Selection," *Public Choice*, Spring 1972, 12, pp. 57–68.

———, Tollison, Robert D., and Willett, Thomas D. "Solving the Intensity Problem in a Representative Democracy," in R.D. Leiter and G. Sirkin, eds., *Economics of Public Choice*. New York: Cyro Press, 1975, pp. 54–94, reprinted in R. Amacher, R. Tollison, and T. Willett, *Political Economy and Public Policy*. Ithaca, N.Y.: Cornell University Press, 1976, pp. 444–73.

Murphy, Walter E., and Pritchett, C. Herman, eds. *Courts, Judges, and Politics*, 3rd ed. New York: Random House, 1979.

Musgrave, R.A. *The Theory of Public Finance*. New York: McGraw-Hill, 1959.

Nash, J.F. "The Bargaining Problem," *Econometrica*, April 1950, 18, pp. 155–62.

National Commission on Excellence in Education. *A Nation at Risk*. Washington, D.C.: U.S. Department of Education, 1983.

Nedelsky, Jennifer. *Private Property and the Limits of American Constitutionalism*. Chicago: University of Chicago Press, 1990.

Neustadt, Richard E. *Presidential Power: The Politics of Leadership*. New York: John Wiley & Sons, 1960.

Niemi, R.G. "Majority Decision Making with Partial Unidimensionality," *American Political Science Review*, June 1969, 63, pp. 488–97.

Niskanen, W.A. Jr. *Bureaucracy and Representative Government*. Chicago: Aldine-Atherton, 1971.

———. "The Case for a New Fiscal Constitution," *The Journal of Economic Perspectives*, Spring 1992a, 6, pp. 13–24.

———. "Autocratic, Democratic and Optimal Government," mimeo, Cato Institute, 1992b.

Nordhaus, W.D. "The Political Business Cycle," *Review of Economic Studies*, April 1975, 42, pp. 1969–90.

North, Douglass C. *Structure and Change in Economic History*. New York: Norton, 1981.

———, and Weingast, Barry M. "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in 17th-Century England," mimeo, Washington University, St. Louis, 1989.

Nozick, R. *Anarchy, State, and Utopia*. New York: Basic Books, 1974.

Oates, W.E. *Fiscal Federalism*. London: Harcourt Brace, 1972.

Odagiri, Hiroyuki "Industrial Policy in Theory and Reality," in H.W. de Jong and W.G. Shepherd, eds., *Mainstreams in Industrial Organization, II*. Dordrecht: Kluwer Academic Publishers, 1986, pp. 387–412.

O'Donnell, Guillermo. *Modernization and Bureaucratic-Authoritarianism*. Berkeley: Institute of International Studies, Univesity of California, 1973.

Olson, M. Jr. *The Logic of Collective Action*. Cambridge, Mass.: Harvard University Press, 1965.

———. *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities.* New Haven: Yale University Press, 1982.

Olson, Mancur. "Autocracy, Democracy, and Prosperity," in R.J. Zeckhauser, ed., *Strategy and Choice.* Cambridge, Mass.: MIT Press, 1991, pp. 131–57.

Ordeshook, P.C. *Game Theory and Political Theory.* Cambridge: Cambridge University Press, 1986.

———. "Constitutional Stability," *Constitutional Political Economy,* Spring/Summer 1992, 3, pp. 137–75.

———. "Some Rules of Constitutional Design," in E.F. Paul, F.D. Miller, Jr., and J. Paul, eds., *Liberalism and the Economic Order.* Cambridge: Cambridge University Press, 1993, pp. 198–232.

———, and Shoetsova, Olga V. "Ethnic Heterogeneity, District Magnitude, and the Number of Parties," Working Paper No. 50, IRIS, College Park, Md., 1993.

OECD. *Economic Outlook: Historical Statistics, 1960–1987.* Paris, 1989.

Ostrom, Elinor. *Governing the Commons.* Cambridge: Cambridge University Press, 1990.

Ostrom, V. *The Political Theory of a Compound Republic.* Blacksburg, Va.: Public Choice Society, 1971.

Page, Benjamin I. *Who Gets What from Government.* Berkeley: University of California Press, 1983.

Paldam, M. "Is There an Electional Cycle? A Comparative Study of National Accounts," *Scandinavian Journal of Economics,* 1979, 81(2), pp. 323–42.

———. "An Essay on the Rationality of Economic Policy: The Test-Case of the Electional Cycle," *Public Choice,* 1981, 37(2), pp. 287–305.

Palmer, David Scott. "Peru: Democratic Interlude, Authoritarian Heritage, Uncertain Future," in Wiarda and Kline (1990), pp. 258–282.

Palmer, Robert F. "The People as Constituent Power," excerpt from *The Age of Democratic Revolution,* Vol. 1, Princeton, N.J.: Princeton University Press, 1959, in J.M. Smith (1971), pp. 75–92.

Pateman, C. *Participation and Democratic Theory.* Cambridge: Cambridge University Press, 1970.

Peltzman, Sam. "The Political Economy of the Decline of American Public Education," *Journal of Law and Economics,* April 1993, 36, pp. 331–70.

Pennock, J. Roland. *Democratic Political Theory.* Princton, N.J.: Princeton University Press, 1979.

Pestieau, P. "The Optimality Limits of the Tiebout Model," in W.E. Oates, ed., *The Political Economy of Fiscal Federalism.* Lexington, Mass.: Lexington Books, 1977, pp. 173–86.

Peukert, Detlev J.K. *The Weimar Republic.* London: Penguin Press, 1991.

Pianin, Eric. "Hill Conferees Retain Most 'Pork' Programs," *The Washington Post,* May 21, 1992, p. A4.

Plott, Charles R. "Axiomatic Social Choice Theory: An Overview and Interpretation," *American Journal of Political Science,* August 1976, 20, pp. 511–96.

Podesta, Don. "S. American Democracy Takes Hold Even as Rulers Try to Stay On," *Washington Post,* January 1, 1994, p. A20.

Pommerehne, W.W. "Institutional Approaches to Public Expenditures: Empirical Evidence From Swiss Municipalities," *Journal of Public Economics,* April 1978, 9, pp. 163–201.

———, and Schneider, F. "Unbalanced Growth Between Public and Private Sectors: An Empirical Examination," in Robert H. Haveman, ed., *Public Finance and Public Employment.* Detroit: Wayne State University Press, 1982, pp. 309–26.

———, and Schneider, Friedrich. "Does Government in a Representative Democracy Follow a Majority of Voters' Preferences? An Empirical Examination," in Horst Hanusch, ed., *Anatomy of Government Deficiencies.* Berlin: Springer, 1983, pp. 61–84.

Poole, K.T., and Romer, T. "Patterns of Political Action Committee Contributions to the 1980 Campaigns for the United States House of Representatives," *Public Choice*, 1985, 47(1), pp. 63–111.

Porter, Kirk Harold. *A History of the Franchise in the United States*. Ph.D. Dissertation, University of Chicago, 1918, published by AMS Press, New York, 1971.

Posner, Richard A. *The Federal Courts*. Cambridge, Mass.: Harvard University Press, 1985.

Powell, G. Bingham. *Contemporary Democracies*. Cambridge, Mass.: Harvard University Press, 1982.

Przeworski, Adam. "Democracy as a Contingent Outcome of Conflicts," in Elster and Slagstad (1988), pp. 59–80.

Rae, D.W. "Decision-Rules and Individual Values in Constitutional Choice," *American Political Science Review*, March 1969, 63, pp. 40–56.

———. *The Political Consequences of Electoral Laws*, rev. ed. New Haven: Yale University Press, 1971.

———. "The Limits of Consensual Decision," *American Political Science Review*, December 1975, 69, pp. 1270–94.

Rausser, Gordon C. "Predatory Versus Productive Government: The Case of U.S. Agricultural Policies," *Economic Perspectives*, Summer 1992, 6, pp. 133–57.

Rawls, J.A. *A Theory of Justice*, Cambridge, Mass.: The Belknap Press of Harvard University Press, 1971.

Reichley, A. James, ed. *Elections American Style*. Washington, D.C.: Brookings Institution, 1987.

Reid, T.R. "Japanese Media Disparage Acquittal in 'Freeze Case'," *Washington Post*, May 25, 1993, p. A14.

Reimer, M. "The Case for Bare Majority Rule," *Ethics*, October 1951, 62, pp. 16–32.

Riker, William H. "Voting and the Summation of Preferences: An Interpretative Bibliographical Review of Selected Developments During the Last Decade," *American Political Science Review*, December 1961, 55, pp. 900–911.

———. *Federalism: Origins, Operation, Significance*. Boston: Little, Brown, 1964.

———. "The Two-Party System and Duverger's Law: An Essay on the History of Political Science," *American Political Science Review*, December 1982a, 76, pp. 753–66.

———. *Liberalism Against Populism*. San Francisco: W.H. Freeman, 1982b.

———. "The Lessons of 1787," *Public Choice*, September 1987,1 55, pp. 5–34.

———, and Ordeshook, P.C. *Introduction to Positive Political Theory*. Englewood Cliffs, N.J.: Prentice-Hall, 1973.

Roett, Riordan, and Sacks, Richard S. "Authoritarian Paraguay: The Personalist Tradition," in Wiarda and Kline (1990), pp. 335–358.

Romer, T., and Rosenthal, H. "Political Resource Allocation, Controlled Agendas, and the Status Quo," *Public Choice*, Winter 1978, 33(4), pp. 27–43.

———, and Rosenthal, H. "Bureaucrats Versus Voters: On the Political Economy of Resource Allocation by Direct Democracy," *Quarterly Journal of Economics*, November 1979, 93, pp. 563–87.

———, and Rosenthal, H. "Median Voters or Budget Maximizers: Evidence from School Expenditure Referenda," *Economic Inquiry*, October 1982, 20, pp. 556–78.

Rose, Richard. "Electoral Systems: A Question of Degree or of Principle?" in Lijphart and Grofman (1984), pp. 73–81.

Rothschild, M., and Stiglitz, J.E. "Increasing Risk 1: A Definition," *Journal of Economic Theory*, 1970, 2, pp. 225–43.

Ruin, Olaf. "Sweden: The New Constitution (1974) and the Tradition of Consensual Politics," in Bogdanor (1988a), pp. 309–27.

Rutland, Robert A. "How the Constitution Protects Rights: A Look at the Seminal Years," in Goldwin and Schambra (1985), pp. 1–14.

Saleh, Ibrahim. "The Writing of the 1971 Egyptian Constitution," in Goldwin and Kaufman (1988), pp. 288–331.

Salzberger, Eli. "Why Do We Have an Independent Judiciary?" mimeo, University of California, Berkeley, 1991.

Samuelson, L. "Electoral Equilibria with Restricted Strategies," *Public Choice,* 1984, 43(3), pp. 307–27.

Samuelson, P.A. "Pure Theory of Public Expenditure and Taxation," in J. Margolis, and H. Guitton, eds., *Public Economics.* New York: St. Martin's Press, 1969, pp. 98–123.

Sanderson, Fred H., ed. *Agricultural Protectionism in the Industrial World.* Washington, D.C.: Resources for the Future, 1990.

Sandler, T., and Tschirhart, J.T. "The Economic Theory of Clubs: An Evaluation Survey," *Journal of Economic Literature,* December 1980, 18, pp. 1481–1521.

Sartori, Giovani. *Parties and Party Systems.* Cambridge: Cambridge University Press, 1976.

Satterthwaite, M.A. "Strategy-Proofness and Arrow's Conditions: Existence and Correspondence Theorems for Voting Procedures and Social Welfare Functions," *Journal of Economic Theory,* April 1975, 10, pp. 187–217.

Scherer, F.M., and Ross, David. *Industrial Market Structure and Economic Performance,* 3rd ed. Boston: Houghton Mifflin, 1990.

Schlesinger, Arthur M. Jr. *The Imperial Presidency.* Boston: Houghton Mifflin, 1989.

Schmidt, Manfred G. "Does Corporatism Matter? Economic Crisis, Politics and Rates of Unemployment in Capitalist Democracies in the 1970s," in G. Lehmbruch and P.C. Schmitter, eds., *Patterns of Corporatist Policy-Making.* London: Sage, 1982, pp. 237–58.

Schmitter, Philippe C. "Still the Century of Corporatism?" *Review of Politics,* 1974, 36, pp. 85–31; reprinted in Schmitter and Lehmbruch (1979), pp. 7–52.

———. "Interest Intermediation and Regime Governability in Contemporary Western Europe and North America," in S. Berger, ed. *Organizing Interests in Western Europe,* Cambridge: Cambridge University Press, 1981, pp. 287–327.

———. "Reflections on Where the Theory of Neo-Corporatism Has Gone and Where the Praxis of Neo-Corporatism May be Going," in G. Lehmbruch and P.C. Schmitter, eds., *Patterns of Corporatist Policy-Making.* London: Sage, 1982, pp. 259–79.

———, and Lehmbruch, Gerhard, eds. *Trends Toward Corporatist Intermediation.* London: Sage, 1979.

Schneider, Friedrich. "The Federal and Fiscal Structures of Representative and Direct Democracies as Models for a European Federal Union," mimeo, Linz, Austria, 1992.

———, and Pommerehne, Werner W. "Politico-Economic Interactions in Australia: Some Empirical Evidence," *Economic Record,* June 1980, 56, pp. 113–31.

Schofield, Norman. "The Relationship Between Voting and Political Stability in an Electoral System," in Manfred J. Holler, ed., *Power, Voting and Voting Power.* Wurzburg, Germany: Physica Verlag, 1981.

———. "Coalitions in West European Democracies: 1945–1986," mimeo, Washington University, St. Louis, 1987.

Schultze, Charles L. "Is There a Bias Toward Excess in U.S. Government Budgets or Deficits?" *The Journal of Economic Perspectives,* Spring 1992, 6, pp. 25–43.

Schumpeter, J.A. *Capitalism, Socialism and Democracy,* 3rd. ed. New York: Harper & Row, 1950.

Schwartz, Nancy L. *The Blue Guitar,* Chicago: University of Chicago Press, 1988.

Schweizerischen Bundeskanzlei. *Referendumsvorlagen, Dringliche Bundesbeschlüsse, Volksinitiativen, Volksabstimmungen, 1848–1974* (with Nachtrag, May 1, 1974–Oct. 15, 1980), Bern, 1987.

Schydlowsky, Daniel M. "The Tragedy of Lost Opportunity in Peru," in Hartlyn and Morley (1986), pp. 217–42.

Seligson, Mitchell A. "Costa Rica," in Wiarda and Kline (1990), pp. 455–66.

Sen, A.K. *Collective Choice and Social Welfare*. San Francisco: Holden-Day, 1970a.

———. "The Impossibility of a Paretian Liberal," *Journal of Political Economics*, January/February 1970b, 78, pp. 152–57.

———. "Social Choice Theory: A Re-examination," *Econometrica*, January 1977, 45, pp. 53–89.

———. *Choice, Welfare and Measurement*. Cambridge, Mass.: MIT Press, 1982.

Shapiro, Carl. "Premiums for High Quality Products as Returns for Reputation," *Quarterly Journal of Economics*. November 1983, 98, pp. 615–41.

Shepsle, K.A. "Institutional Arrangements and Equilibrium in Multi-dimensional Voting Models," *American Journal of Political Science*, February 1979, 23, pp. 27–59.

———, and Weingast, B.R. "Structure-Induced Equilibrium and Legislative Choice," *Public Choice*, 1981, 37(3), pp. 503–19.

Shue, Henry. "Subsistence Rights: Shall We Secure *These* Rights?" in Goldwin and Schambra (1985), pp. 74–100.

Sidak, J. Gregory. "To Declare War," *Duke Law Journal*, 1991, 41, pp. 27–121.

Sigmund, Paul W. "Chile," in Wiarda and Kline (1990), pp. 201–30.

Silver, M. "A Demand Analysis of Voting Costs and Voting Participation," *Social Science Research*, August 1973, 2, pp. 111–24.

Simon, H.A. *Models of Man: Social and Rational*, New York: John Wiley & Sons, 1957.

Smith, Denny. "Big-Show, No-Go Weapons," *The Washington Post*, July 31, 1989, p. C2.

Smith, Gordon. *Politics in Western Europe*, 5th ed., New York: Holmes & Meier, 1989.

Smith, James Morton, ed. *The Constitution*. New York: Harper & Row, 1971.

Smith, Vernon. "The Principle of Unanimity and Voluntary Consent in Social Choice," *Journal of Political Economy*, December 1977, 85, pp. 1125–39.

Snow, Peter G., and Wynia, Gary W. "Argentina: Politics in a Conflict Society," in Wiarda and Kline (1990), pp. 129–66.

Spiller, Pablo T., and Gely, Rafael. "A Rational Choice Theory of Supreme Court Statutory Decisions with Application to the *State Farm* and *Grove City* Cases," *Journal of Law, Economics, and Organization*, 1990, 6, pp. 263–300.

———, and Spitzer, Matthew L. "Judicial Choice of Legal Doctrines," mimeo, University of Illinois, Urbana-Champaign, 1991.

Spinney Franklin C. "Look What $2 Trillion Didn't Buy for Defense," *The Washington Post*, October 30, 1988, p. C1.

Spotts, Friedrich, and Wieser, Theodore. *Italy: A Difficult Democracy*, Cambridge: Cambridge University Press, 1986.

Starrett, David A. *Foundations of Public Economics*. Cambridge: Cambridge University Press, 1988.

Steiner, Juerg. *Amicable Agreement Versus Majority Rule*. Chapel Hill: University of North Carolina Press, 1974.

Stigler, George J. "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science*, Spring 1971, 2, pp. 3–21.

Stockman, David A. *The Triumph of Politics*. New York: Harper & Row, 1986.

Storing, Herbert J. "The Constitution and the Bill of Rights," in Goldwin and Schambra (1985), pp. 15–35.

Stratmann, Thomas. "Instability in Collective Decisions? Testing for Cyclical Majorities," mimeo, Montana State University, Bozeman, 1993.

Sundquist, James L. *Constitutional Reform and Effective Government*. Washington, D.C.: Brookings Institution, 1986.

Sunstein, Cass R. "Constitutionalism, Prosperity, Democracy: Transition in Eastern Europe," *Constitutional Political Economy*, Fall 1991, 2, pp. 371–94.

Tarcov, Nathan. "American Constitutionalism and Individual Rights," in Goldwin and Schambra (1985), pp. 101–25.

Taylor, M.J. "Review Article: Mathematical Political Theory," *British Journal of Political Science*, July 1971, 1, pp. 339–82.

———. *Anarchy and Cooperation*, rev. ed. Cambridge: Cambridge University Press, 1987.

Taylor, Paul. "For Disconnected Americans, Citizenship Fades," *The Washington Post*, May 6, 1990, p. A1.

Thucydides. *The History of the Peloponnesian War* (trans. Richard Livingstone). Oxford: Oxford University Press, 1943.

Thurow, Lester C. "The Income Distribution as a Pure Public Good," *Quarterly Journal of Economics*, May 1971, 85, pp. 327–36.

Tideman, T. Nicolaus, and Tullock, Gordon. "A New and Superior Process for Making Social Choices," *Journal of Political Economics*, December 1976, 84, pp. 1145–59.

Tiebout, C.M. "A Pure Theory of Local Expenditures," *Journal of Political Economics*, October 1956, 64, pp. 416–24.

de Tocqueville, Alexis. *Democracy in America*, vol. 1, New York: Vintage Books, 1945 (originally published, 1835).

Trezise, Philip H. "Industrial Policy Is Not the Major Reason for Japan's Success," *Brookings Review*, Spring 1983, 1, pp. 13–18.

Tufte, E.R. *Political Control of the Economy*. Princeton, N.J.: Princeton University Press, 1978.

Tullock, G. *Toward a Mathematics of Politics*, Ann Arbor: University of Michigan Press, 1967a.

———. "Federalism: Problems of Scale," *Public Choice*, Spring 1969, 6, pp. 19–30.

———. *Logic of the Law*. New York: Basic Books, 1971.

———. *Trials on Trial*. New York: Columbia University Press, 1980.

———. *Economics of Income Distribution*. Boston: Kluwer, 1983.

———. "The New Federalism," mimeo, University of Arizona, Tucson, Ariz, 1991.

Tully, James. "Locke," in Burns (1990), pp. 616–52.

Turnbull, Colin M. *The Mountain People*. New York: Simon & Schuster, 1972.

Tussman, Joseph. "The Citizen as Public Agent" (originally published in 1960), in Kariel (1970), pp. 16–28.

Twight, Charlotte. "Constitutional Renegotiation: Impediments to Consensual Revision," *Constitutional Political Economy*, Winter 1992, 3, pp. 89–112.

U.S. Department of Commerce. *Statistical Abstract*, Washington, D.C. 1991.

Usher, Dan. *The Welfare Economics of Markets, Voting and Predation*. Ann Arbor: University of Michigan Press, 1992.

Valenzuela, Arturo. "Chile: Origins, Consolidation, and Breakdown of a Democratic Regime," in Diamond et al. (1990), pp. 39–86.

Van Wolferen, Karel. *The Enigma of Japanese Power*. New York: Vintage Books, 1989.

Vis, Jan. "The Netherlands (1983): The Failure of Constitutional Reform," in Bogdanor (1988a), pp. 342–63.

Walras, Leon. *Elements of Pure Economics*. London: Allen & Unwin, 1954 (French edition, 1889).

Warren, Roland L. *The Community in America*. Chicago: Rand McNally, 1963.

Watson, Richard A., and Downing, Rondal C. *The Politics of the Bench and the Bar*. New York: John Wiley & Sons, 1969.

Weida, William J., and Gertcher, Frank L. *The Political Economy of National Defense*. Boulder, Colo.: Westview Press, 1987.

Weingast, Barry R. "Federalism and the Political Commitment to Sustain Markets," mimeo, Hoover Institute, Stanford, Calif., 1992.

von Weizsäcker, C.C. *Barriers to Entry*. Berlin: Springer, 1980.

Wessels, Joachim H. "Redistribution from a Constitutional Perspective," *Constitutional Political Economy*, Fall 1993, 4, pp. 425–48.

Wiarda, Howard J., and Kline, Harvey F., eds. *Latin American Politics and Development*, 3rd. ed. Boulder, Colo.: Westview Press, 1990.

Wiarda, Ieda Siqueira. "Brazil: The Politics of Order and Progress?" in Wiarda and Kline (1990), pp. 167–200.

Wicksell, K. "A New Principle of Just Taxation," *Finanztheoretische Untersuchungen,* Jena, 1896, reprinted in R.A. Musgrave and A.T. Peacook, eds., *Classics in the Theory of Public Finance,* New York: St. Martin's Press, 1958, pp. 72–118.

Wildavsky, Aaron. *The New Politics of the Budgetary Process.* Glenview, Ill.: Scott, Foresman, 1986.

Wilensky, H.L. *The New Corporatism, Centralization and the Welfare State.* London: Sage, 1976.

Williamson, Oliver E. *Markets and Hierarchies.* New York: Free Press, 1975.

Williamson, Peter J. *Corporatism in Perspective.* London: Sage, 1989.

Wilson, Frank L. *European Politics Today.* Englewood Cliffs, N.J.: Prentice-Hall, 1990.

Wispe, Lauren, ed. *Altruism, Sympathy, and Helping.* New York: Academic Press, 1978.

Wood, Gordon S. "Interests and Disinterestedness in the Making of the Constitution," in R. Beeman, S. Botein, and E.C. Carter II, eds., *Beyond Confederation.* Chapel Hill: University of North Carolina Press, 1987, pp. 69–109.

Wooders, Myrna. "The Tiebout Hypothesis: Near Optimality in Local Public Good Economies," *Econometrica,* September 1980, 48, pp. 1467–85.

Woodhouse, A.S.P., ed. *Puritanism and Liberty.* Chicago: University of Chicago Press, 1974.

Wootton, David. "Leveller Democracy and the Puritan Revolution," in Burns (1990), pp. 412–42.

Woronoff, Jon. *Politics the Japanese Way.* London: Macmillan, 1986.

Wright, Vincent. "France," in Butler and Ranney (1978), pp. 139–67.

Wynia, Gary W. *The Politics of Latin American Development,* 3rd ed. Cambridge: Cambridge University Press, 1990.

Zimmerman, Joseph F. *Participatory Democracy.* New York: Praeger, 1986.

Zisk, Betty H. *Money, Media, and the Grass Roots.* Newbury Park, Calif.: Sage, 1987.

Name Index

Ackerman, Bruce A., 223n, 224, 313, 335n, 336, 337
Adams, John, 59–60
Aitkin, Don, 189
Alchian, Armen A., 293
Alesina, Alberto, 38, 271n
Allen, Christopher S., 130
Almond, Gabriel A., 150
Ameringer, Charles D., 36, 311n
Ames, Barry, 34
Amy, Douglas J., 112, 125n, 144, 150, 151
Anselem, Winston L., 130
Aranson, Peter H., 57n, 93n, 94, 125n
Arendt, Hannah, 49, 261, 277, 308, 347, 348n
Arnold, R. Douglas, 19
Arrow, Kenenth J., 57n, 112, 150, 169, 239
Ashenfelter, Orley, 92
Aubert, Jean-Francois, 191
Axelrod, Robert, 52
Azzi, Assard E., 174

Bagehot, Walter, 114
Bailey, Martin J., 111n
Bain, Joe, 235n
Balz, Dan, 12
Barry B., 94, 109, 153
Barzel, Yoram, 226, 348n
Bates, Robert H., 36–37
Baumol, William J., 235n, 236
Beard, Charles A., 72, 336
Beck, N., 277
Bell, D., 112
Bennett, James T., 277
Bentham, Jeremy, 205
Beran, Harry, 336
Berger, Suzanne, 191
Bergstrom, Theodore C., 262
Bernholz, Peter, 93n, 172
Berns, Walter, 317, 326, 334, 338
Bickel, Alexander, 223n, 293n
Black, Antony, 312
Black, D., 109, 153, 295
Blackstone, William, 60
Blais, Andre, 112, 130, 139, 150
Bogdanor, Vernon, 187, 190n, 336
Bonime-Blanc, Andrea, 318
Borcherding, Thomas E., 98, 258, 262
Bork, Robert H., 235n
Borooah, V., 125n
Bovard, James, 11, 19
Bradshaw, Brendan, 346
Brass, Paul R., 32–33, 39
Brennan, Geoffrey, 72, 195, 269
Bresnahan, Timothy F., 235n, 238
Breton, Albert, 87, 93n, 112, 261
Brittan, Samuel, 24–25, 26, 246
Brock, William A., 236
Browning, Edgar K., 19, 243, 246
Brunner, K., 57n
Buchanan, Allen, 337, 338
Buchanan, James M., 19, 49, 57n, 63–66, 72, 73, 94, 109, 153–56, 172, 194, 216, 217, 222, 223n, 224, 240, 245, 268, 269, 312, 333, 336, 337
Burg, Steven L., 94
Burnham, Walter Dean, 13
Burrow, J. W., 19
Bush, W. C., 262
Butler, David, 180–81, 183, 186, 190n, 319

Calhoun, John C., 314, 337, 338
Canning, J.P., 312
Caplin, Andrew, 109, 129, 157
Carstairs, Andrew McLaren, 46, 106, 112, 123, 126, 139, 142, 144, 147, 150, 318, 336
Carty, R.K., 150
Cassel, Carol A., 151
Castles, Francis G., 147
Cawson, Alan, 201, 207
Chen, Yan, 174
Childs, David, 49
Chubb, John E., 5

Clarke, Edward H., 174
Clutterbuck, Richard, 22, 23, 38
Coase, R.H., 53, 81, 327
Cohen, R., 100, 245
Coleman, James S., 57n, 125n, 173
Coleman, Jules L., 153, 170, 337, 338
de Condorcet, M., 158–59, 207, 285–88
Cornes, R., 57n
Corsi, Jerome L., 283
Corwin, Jerome L., 283
Corwin, Edward S., 47, 294
Coughlin, Peter, 125n, 126
Council of Economic Advisors, 5–7
Cronin, Thomas E., 189, 190, 190n, 191
Crozier, M., 261
Cukierman, A., 269
Curtis, Gerald L., 30, 31, 126
Cutler, Lloyd N., 262

Dahl, Robert, 93n, 97
Dahlman, Carl J., 54, 226
Danforth, John C., 3
Dante, Alighieri, 93n
Davis, O.A., 125n
Deacon, R.T., 262
Dean, Warren, 264
Delors, Jacques, 43
Demsetz, Harold, 226, 258, 293n
Deutsch, Karl W., 147, 199
Dewey, John, 100, 177
Dicey, A.V., 318
DiLorenzo, Thomas J., 277
Downing, Rondal C., 294
Downs, A., 13, 57n, 96, 125n, 261, 310
Drozdiak, William, 27
Dryzek, John, 243
Dubois, Philip L., 282, 287, 294, 295
Duverger, M., 150
Dworkin, Ronald, 223n

Eavey, Cheryl L., 71, 336
Eckstein, Harry, 138
Economist, 11, 19, 20, 23, 24, 28, 29, 30, 31, 32, 33, 34, 37, 38, 39, 112, 267, 337
Ehrenberg, Victor, 96, 97, 100, 111n, 312
Eisner, Robert, 8
Elazer, Daniel J., 94
Ellickson, Robert C., 57n
Elster, Jon, 62, 207, 312, 317, 336
Enelow, James M., 120, 125n, 150, 195
Engstrom, Richard L., 145
Eskridge, William N. Jr., 294
Etzioni, Amitai, 57n
Eyck, Erich, 45–46

Fair, R.C., 277
Faith, Roger L., 333, 337
Farquharson, R., 171n
Farrand, Max, 312
Farrar, Cynthia, 49, 313
Federalist, The, 192, 207, 208, 295
Feenstra, Robert C., 231, 236
Feldman, Eliot J., 24, 38
Ferejohn, John, 170, 294
Finer, Samuel E., 123, 193
Finsinger, Jörg, 245
Fiorina, Morris P., 13, 14, 20
Fishburn, Peter C., 173
Fisher, Louis, 247. 261
Fitzgerald, Randall, 13, 19, 20
FitzRoy, F.R., 245, 293n
Frey, Bruno S., 38, 187, 189, 190n, 277
Frieden, Jeffrey A., 34
Friedman, David D., 98–99
Friedman, James W., 235n
Friedman, Milton, 236, 310
Friedrich, Carl J., 94, 205–06, 208
Frohlich, Norman, 190n, 241–42, 243
von Furstenberg, George M., 57n, 242

Galeotti, Gianluigi, 112
Gardner, Bruce L., 10–11
Garner, John, 312
Garreton, Manuel Antonio, 277
Gauthier, David, 235, 320, 325, 336
Geddes, Barbara, 318
Gehrlein, William V., 173
Gely, Rafael, 294
George, Henry, 88
Gertcher, Frank L., 19
Gibbard, A., 150, 169
Goetz, C.J., 94
Goldman, Guido, 85
Goodin, Robert E., 243
Goodman, R.P., 262
Greenberg, J., 155
Groves, Theodore, 174
Gugliotta, Guy, 11
Gwyn, William B., 261

Haas, J., 57n
Hadley, Eleanor, 38
Haefele, E.T., 190n
Hallett, George H. Jr., 136, 142, 150
Hamilton, Alexander, 279, 295
Hamlin, Alan P., 195, 224
Hammond, T.H., 195
Hardin, Charles M., 262
Hardin, Russell, 57n, 67–68
Harris, Louis, 12

Harsanyi, J.C., 58, 63–66, 172, 245
Hart, H.L.A., 224
Hartlyn, Jonathan, 268
Hayami, Yujiro, 30–31
Hayek, Friedrich A., 59–60, 224
Head, John G., 245
Hermens, Ferdinand A., 45, 112, 113, 130
Hibbs, D.A. Jr., 277
Hicks, Granville, 94
Higgs, Robert, 19
Hine, David, 206, 317
Hinich, Melvin J., 120, 125n, 150, 195
Hirschman, Albert O., 21, 94, 264, 268
Hobbes, T., 50, 56, 67
Hochman, H.M., 57n, 171n, 244n
Hodder-Williams, Richard, 224
Hoffman, David, 12
Hofstadter, Richard, 190n
Hoover, Kevin D., 19
Horowitz, John B., 246
Horwitz, Sari, 4
Hotelling, H., 125n
Hughes, Christopher, 313, 337
von Humbolt, Wilhelm, 4, 19
Humes, Samuel, 98, 100
Huntington, Samuel P., 146, 253, 262, 263, 265, 278
Hylland, A., 169, 172

IMF. *See* International Monetary Fund
Inman, Robert P., 81, 93n, 94, 236
International Monetary Fund, 25n, 26n
Isikoff, Michael, 292
Isocrates, 312

Jackman, Robert W., 150, 208
Jacob, Herbert, 294
Jacobs, Jane, 94
Jefferson, Thomas, ix, 50, 77, 114, 209, 224, 225
Jillson, Calvin C., 72, 336
Johnson, William R., 246
Johnston, R.J., 147

Kaase, Max, 147
Kahn, Alfred E., 10
Kant, Immanuel, 93n, 237
Karring, A.K., 145
Katz, Richard S., 150
Katzenstein, Peter J., 38, 153, 171n
Kavka, Gregory S., 223n, 245, 246
Keech, William R., 277
Kelley, S. Jr., 92
Kendall, W., 172
Kendrick, M.S., 7
Kennedy, Kenneth F., 245
Kindleberger, Charles P., 236
Kitto, H.D.F., 45, 312
Klein, Benjamin, 236
Kline, Harvey F., 34
Knapp, Andrew, 139, 318
Koester, Ulrich, 24, 38
Koford, Kenneth J., 125n, 190n
Kohli, Atul, 33, 39, 174, 246
Krauss, Ellis S., 31
Kriesi, Hanspeter, 207

Lakeman, Enid, 45, 106, 112, 125n, 142, 144, 147, 337
Lamounier, Bolivar, 34, 35, 262, 268, 311n
Landes, William M., 293n
Langbein, John H., 125n, 294
Ledyard, John O., 174
Lee, D.R., 235n
Lee, Eugene C., 191
Leffler, Keith B., 236
Lehmbruch, Gerhard, 201, 207
Leorente, Francisco Rubio, 318
Lepsius, M. Rainer, 46
Levy, Daniel C., 35, 311n
Lewis, H. Gregg, 228
Lewis, W. Arthur, 36–37, 171n
Libecap, Gary D., 235n
Liedl, Mark B., 14
Lijphart, Arend, 110, 112, 135, 137–38, 142, 143n, 150, 151
Lind, Robert C., 57n, 239
Lindbeck, Assar, 277
Linz, J.J., 46
Lipson, Gerald, 13, 19, 20
Locke, John, 263, 341, 346, 348n
Lomasky, Loren E., 224, 245
Lopez, Pintor Rafael, 150
Lowenberg, Anton D., 337
Lowi, Theodore J., 248
Lucas, Robert F., 19
Luce, R. Duncan, 72
Lynd, Staughton, 72
Lyons, David, 220, 224

MacDowell, Douglas M., 312
Mackie, Thomas T., 131, 141
MacRae, Douglas C., 277
Macridis, Roy C., 112, 126, 130, 144
Madison, James, 17–18, 49, 337
Magee, Stephen P., 236
Maier, Charles S., 39
Mainwaring, Scott, 262, 278
Mandelbaum, Seymour J., 20
Manning, Maurice, 190n

Mansbridge, Jane J., 57n
Marcus, Ruth, 296
Margolis, Howard, 57n
Marin, Bernd, 171n, 203, 204
Marlow, Michael L., 94
Marsh, Michael, 150
Marshall, John, 224
Marshall, Thurgood, 294
Martin, Eileen, 98, 100
Mathews, Jay, 13
Matsusaka, John G., 186, 190n, 191
May, K.O., 159–60, 169–70, 172, 187, 286–88, 295
Mayer, Kenneth R., 19
Mayhew, D.R., 13, 57n
McCallam, B.T., 277
McCarty, Theresa A., 311n
McCubbins, Mathew D., 262
McDonald, Michael D., 145
McDonald, Ronald H., 35
McGuire, M., 94
McGurie, Robert A., 62, 71, 72, 317, 336
McIlwain, Charles M., 262
McKelvey, Richard D., 171
McLure, Charles E. Jr., 245
Meador, Daniel J., 288
Mehr, Robert I., 245
Meier, Christian, 44, 49
Meltzer, A.H., 269
Merkl, Peter H., 318
Mill, J.S., 59–60, 77, 93n, 96, 101, 127, 192, 247, 299
Miller, Gary J., 71, 88, 94, 336
Miller, J.C. III, 94
Miller, Nickolas R., 172
Moe, Terry M., 5, 248, 262
Moi, Daniel, 21, 37
Moore, Thomas Gale, 236
Morgan, Dan, 14, 19
Morin, Richard, 12
Morley, Samuel A., 268
Moulin, Herve, 173
Mueller, Dennis C., 49, 57n, 72, 94, 100, 111n, 112, 125n, 126, 150, 151, 170, 171n, 172, 173, 190n, 191, 202n, 224, 242, 245, 261, 262, 276, 293n, 336
Murrell, P., 126
Musgrave, Richard A., 206, 245, 275–76

Nalebuff, Barry, 109, 129, 157
Nash, John F., 66, 331
National Commission on Excellence in Education, 5
Nedelsky, Jennifer, 96, 198, 233–34, 337
Neustadt, Richard E., 253
Niemi, Richard G., 112
Niskanen, William A., 20, 83, 243, 258, 261
Nitzan, Shmuel, 125n
Noll, Roger G., 262
Nordhaus, William D., 277
North, Douglass C., 57n, 68, 336
Nozick, Robert, 51

Oates, Wallace E., 87, 93n, 94
Odagiri, Hiroyuki, 38
O'Donnell, Guillermo, 264, 268, 277
OECD. *See* Organization for Economic Cooperation and Development
Ohsfeldt, Robert L., 62, 71, 72, 336
Olson, Mancur, 39, 44, 53, 68, 112, 204
Oppenheimer, Joe A., 190n, 241–42, 243
Ordeshook, Peter C., 47, 57n, 67–68, 72–73, 83, 111, 112, 120, 125n, 151, 174, 207
Organization for Economic Cooperation and Development, 25n, 171n
Ostrom, Elinor, 57n
Ostrom, Vincent, 83

Page, Benjamin I., 19
Paldam, Martin, 277
Palmer, David Scott, 34, 311n
Palmer, Robert F., 60
Panzar, John C., 235n, 236
Pateman, C., 97, 100
Peltzman, Sam, 98
Pennock, J. Roland, 87, 95, 97, 130, 207, 208
Pericles, 299, 308–09
Peron, Juan, 21, 35, 264–65
Pestieau, P., 94
Peukert, Detlev J.K., 46
Pianin, Eric, 10
van der Ploeg, F., 125n
Plott, Charles R., 112
Podesta, Don S., 336
Pommerehne, Werner W., 38, 98, 99, 184, 185, 258
Poole, K.T., 125n
Porter, Kirk Harold, 312
Posner, Richard A., 288
Powell, G. Bingham, 147, 150
Proudhon, Pierre, 225
Przeworski, Adam, 337

Rae, Douglas W., 94, 112, 150, 153, 167, 172, 223n, 286–88
Raiffa, Howard, 72
Rainsborough, Thomas, 341
Ranney, Austin, 180–81, 183, 186, 190n, 319
Rausser, Gordon C., 11
Rawls, J.A., 58, 63–64, 66, 73, 224, 245, 320, 325, 336

Reid, T.R., 32
Reimer, M., 211
Riker, William H., 8, 47, 90–91, 112, 120, 150, 169–70, 235, 323, 336
Rodgers, J.D., 57n, 171n, 244n
Roett, Riordan, 35
Romer, T., 125n, 191
Rosenthal, H., 191
Rose, Richard, 131, 141, 150
Ross, David, 235n, 236
Rothschild, Michael, 173
Rousseau, Jean Jacques, 50, 96
Rubinfeld, Daniel L., 81, 93n, 94
Ruin, Olaf, 317
Rutland, Robert A., 214

Sacks, Richard S., 35
Saleh, Ibrahim, 318
Salzberger, Eli, 295
Samuelson, L., 121
Samuelson, Paul A., 109, 153
Sandler, Todd, 57n, 94
Sartori, Giovani, 38, 112, 150
Satterthwaite, Mark A., 150, 169
Scherer, F.M., 235n, 236
Schlesinger, Arthur M. Jr., 16, 193, 256, 260, 272, 275
Schmidt, Manfred G., 201–03, 207
Schmitter, Philippe C., 200–04, 207, 208
Schneider, Friedrich, 38, 93n, 98, 99, 184, 191, 258
Schofield, Norman, 112
Schultze, Charles L., 8n, 20
Schumpeter, Joseph A., 310
Schwartz, Nancy L., 139–40, 151, 316
Schweizerische Bundeskanzlei, 336–37
Schydlowsky, Daniel M., 277
Scott, A., 87, 93n
Seligson, Mitchell A., 36, 311n
Sen, Amartya K., 106, 112, 150, 223n
Shapiro, Carl, 236
Sheffrin, Steven M., 19
Shepsle, Kenneth A., 107, 155
Shoetsova, Olga V., 151
Shue, Henry, 240
Shughart, William F., 94
Sidak, J. Gregory, 272
Sigmund, Paul W., 35
Silver, M., 92
Simon, H.A., 261
Sinnott, Richard, 150
Smith, D. Brent, 147, 199
Smith, Denny, 10
Smith, Gordon, 85, 264, 265, 268, 277
Smith, James Morton, 70n
Smith, Vernon, 174
Snow, Peter G., 35, 236
Sone, Yasunori, 150
Spann, R.M., 262
Spiller, Pablo T., 294
Spinney, Franklin C., 9–10
Spitzer, Matthew L., 294
Spotts, Friedrich, 27, 317
Starrett, David A., 93n, 94
Steed, Michael, 123, 193
Steiner, Juerg, 153, 207
Stepan, Alfred, 46
Stigler, George J., 10
Stiglitz, Joseph E., 173
Stockman, David A., 20
Storing, Herbert J., 214
Stratmann, Thomas, 112
Sundquist, James L., 20, 198, 252, 262
Sunstein, Cass R., 236

Tangermann, Stefan, 24, 38
Tarcov, Nathan, 224
Taylor, Michael J., 52, 57n, 120
Taylor, Paul, 13
Thucydides, 308–10
Thurow, Lester C., 57n
Tideman, T. Nicolaus, 174
Tiebout, C.M., 92, 94
de Tocqueville, Alexis, 3–4, 93, 100, 279, 314, 338
Tollison, Robert D., 94, 111n, 151
Trezise, Philip H., 38
Tschirhart, J.T., 94
Tufte, E.R., 38, 277
Tullock, Gordon, 57n, 63–66, 72, 93n, 94, 109, 153–56, 172, 174, 194, 223n, 224, 236, 240, 244n, 245, 295, 310, 312, 336
Tully, James, 348n
Turnbull, Colin M., 245
Tussman, Joseph, 100
Twight, Charlotte, 336

Usher, Dan, 151
U.S. Department of Commerce, 4

Valenzuela, Arturo, 35, 267, 268
Van Wolferen, Karel, 30, 31, 38, 126
Vis, Jan, 312

Wagner, R.E., 19, 94, 268, 269
Walras, Leon, 226
Warren, Roland L., 94
Washington, George, 47
Washington Post, 5, 12, 13, 15, 17

Watson, Richard A., 294
Weck, Hannelore, 277
Weida, William J., 19
Weingast, Barry R., 83, 107, 155, 262, 294, 336
von Weizsäcker, C.C., 235n
Welch, S., 145
Wessels, Joachim H., 245
White, E.B., 152
Wiarda, Ieda Siqueira, 34, 264, 277
Wicksell, Knut, 153, 207, 320
Wieser, Theodore, 27, 317
Wildavsky, Aaron, 19
Wilensky, H.L., 208
Willett, Thoms D., 111n, 151
Williamson, Oliver E., 293n
Williamson, Peter J., 207, 208
Willig, Robert D., 235n, 236
Wilson, Frank L., 27, 29, 85
Wilson, Woodrow, 43–44
Wintrobe, Ronald, 261
Wood, Gordon S., 17, 72, 336
Wooders, Myrna, 94
Woodhouse, A.S.P., 384n
Wootton, David, 346–47, 348n
Woronoff, Jon, 30, 37
Wright, Vincent, 183
Wynia, Gary W., 35, 236, 277

Young, Leslie, 236
Yu, Ben T., 337

Zeckhauser, R., 169, 172
Zimmerman, Joseph F., 98, 190, 191
Zisk, Betty H., 190, 191n, 191

Subject Index

Africa, 36–37
Agricultural programs, waste of, 11–12, 24, 30–31
Alienation of voters
  due to constitution, 221–23
  of noncitizens, 300–03, 305–06
  in two-party systems, 117–18, 128, 131, 149
  in United States, 12–13, 342
Allocative efficiency
  defined, 349
  and probabilistic majority rule, 164–66
  as reason for government, 51–55, 81–83
Antitrust, 228–30
Argentina, 34–35, 264–65, 268
Arrow theorem, 169–70
Athens. *See* Greece, ancient
Australia
  referenda in, 189
  representation in, 122–23, 137
Austria
  corporatism in, 201–02, 203
  proportional representation in, 142, 144
Average cost, definition of, 349

Balanced budget amendment, 269–70
Belgium, representation in, 142
Bicameralism
  arguments against, 196–98, 205–06
  arguments for, 192–96
  and corporatism, 200–05
  and cycling, 195
  and decision-making costs, 192–93, 197–98
  and economic class interests, 198–99
  and federalism, 85, 199–200
Bolivia, 35
Brazil, 34, 265, 268
Bureaucracy
  control of, 254–59
  power of, 254–57
  self-interest of members, 248

California, referenda in, 189
Canada, two-party system in, 122–23, 137, 141–42
Central bank independence, 270–71, 276
Chile, 35, 265–66, 268
Chisom *v.* Roemer, 287, 291–93
Costa Rica, 36
Citizenship
  in Ancient Greece, 44–45, 308–10
  costs of, 299–302
  culturally defined, 303–04
  and decision-making costs, 299–303
  definition of, 28–29
  and democratic process, 309–11
  differential, 304–06
  geographically defined, 302–03
  in Germany, 304
  in Israel, 304
  as a prisoner's dilemma, 310–11
  requirements for obtaining, 306–08
  in Switzerland, 309–10
  in the United States, 306–07
Columbia, 34
Competition policy, 228–30
Condorcet jury theorem, 158–59, 285–88, 295
Confederation
  decision-making costs in, 327–28, 331–33
  protection within, 328–31
  reason for, 326–28
  strategic behavior in, 331–33
Consensus over democratic process, 130–32
Consensus, rule of. *See* Unanimity rule
Constitution of United States
  amendment of, 222–23
  Commerce Clause, 234
  and executive efficiency, 247–48
  and Founding Fathers, 47–48, 247–48, 272
  and government's role, 8, 16–18
  as higher law, 43–44
  and judiciary, 284
  longevity of, 321–22
  Philadelphia Convention, 62–63, 235, 252, 317, 320, 323, 325–26, 334, 336

Constitution of United States (*continued*)
rights under, 214
and separation of powers, 247, 272
Constitution of Weimar Republic, 45–46
Constitutional approach
premises behind, 47–48, 56–57, 61–63, 67–70
unanimity, importance of, 65–67, 89–90, 221–22
Constitutional convention
agenda of, 323–25
and decision-making costs, 316, 323–24
incentives at, 315–19, 336
Italy, 317
procedures of, 325–26
selection of delegates, 36, 315–19
self-interest at, 317–20
Spain, 318
states as delegates, 326–28
Sweden, 317
United States, 62–63, 235, 252, 317, 320, 323, 325–26, 334, 336
voting rule, 321–22
Constitutions
and alienation of citizens, 221–23
amendments of, 181–82, 218–21, 323–24
and balanced budget clause, 269–70
as contracts, 59–73, 326–28, 346–48
as conventions, 67–68
definition of, 43
dictatorship, protection against, 268–71, 275–77
as evolved institutions, 59–60
federalist, 83–84
ratification of, 180
as social-welfare functions, 63–67
written, 59–61, 346–48
Constructive vote of no confidence, 147, 318
Contractarian approach, advantages of, 68–70, 346–48
Contracts. *See also* Constitutions
definition of, 61
and uncertainty, 61, 227
Corporatism, 153, 170, 200–05
Costa Rica, 36, 273
Cycling, 106–09, 119–20, 156–57, 195
Czechoslovakia, bicameralism proposal, 199

Deadlock problem. *See also* Separation of powers
in Latin America, 35–36, 264–68, 273–74
in United States, 11–12, 342
in Weimar Republic, 45–46
Decision-making costs
and bicameralism, 192–93, 197–98
and citizenship, 299–303
at constitutional convention, 316, 323–24
in a confederation, 327–28, 331–33
and executive branch, 248
and externalities, 233
and federalism, 77–83
and government's existence, 53–54
and markets, 227
and redistribution, 156, 239
referenda, 185–86
and rights, 212–15, 217–19, 222–23
and voting rule, 153–57, 209–11
Deficits
in Europe, 26–27
in Japan, 31
in Latin America, 264–68
protection against, 270–71
and redistribution, 267–68
in United States, 6–8
Denmark, corporatism in, 201–02
Dictatorship
in Africa, 36–37
constraining demand for, 268–71
constraining supply of, 271–74
in Latin America, 34–35, 264–68
and two-party systems, 123–24, 271–74
Direct democracy, 95–100. *See also* Referenda
Droop quota, 135, 138. *See also* Proportional representation

Europe
crime in, 21–23, 343
deficits, 26–27
governmental waste in, 23–24
macroeconomic instability, 24–26
political instability, 27, 343
European Union
agricultural programs, 24
citizenship in, 28–29
constitution of, 326, 347–48
representation in, 28
Executive branch
as agent, 251–52, 259–61
as constraint on legislature, 253–54
constraints upon, 254–59
and decision-making costs, 248
in multiparty system, 250–51
in two-party system, 248–50
External costs of collective decision making, 154–57, 194–95, 300–06
Externalities
correction of, 232–33
and decision-making costs, 227
definition of, 349
and federalism, 80–83, 301
and government, 53–54
and rights, 213–15

Federalism
decision-making costs under, 77–83
externalities within, 80–82

in judiciary, 289–90
preservation of, 83–85
reasons for, 77–83
rights under, 89–91
voting rule choice, 84
Finland
corporatism in, 201–02
parliamentary voting rule, 27, 157, 235
First-past-the-post system. *See* Plurality system
France
cabinet selection in, 250
constitution of, 110
crime in, 22–23
electoral rule selection in, 318
political instability in, 27
presidential system of, 27, 110–11, 121–22, 147
referenda in, 180
representation in, 110, 112–13, 137–39, 143–44, 147, 318
Free rider problem
and government, 53–54, 226
and information gathering, 257

Geographic representation. *See* Single-member-district representation
Germany
bicameralism in, 85, 199
and cabinet selection, 250
central bank independence, 270–71, 276
chancellor, selection of, 147
citizenship in, 304
constitutional convention of, 317–18
crime in, 22–23
representation in, 147
Weimar Republic, 45–46, 106, 130, 272
Government. *See also* Bureaucracy; Two-party systems
centralization of, 11–15, 33, 83–85, 93
reasons for, 51–55, 81–83
Great Britain
bicameralism in, 193, 198–99
constitution of, 29, 43, 60, 139
dictatorship possibility, 274
electoral rule selection in, 317
governmental waste in, 23–24
macroeconomic instability, 24–26
representation in, 27–28
rights in, 29
two-party government in, 122–24, 131, 137–39, 142
Greece, ancient
citizenship, 44–45, 308–10
constitution of, 44–45
direct democracy in, 96, 97
Gridlock problem. *See* Deadlock problem

Hare quotient, 133, 135, 138. *See also* Proportional representation
d'Hondt quotient, 135, 138. *See also* Proportional representation
Houston Lawyers *v.* Texas Attorney General, 287, 291–93

Iceland, referendum in, 181
Ideal point, definition of, 349
Imperiali quota, 135, 138
India, 32–33
Indifference curve, definition of, 349
Infinite regress problem, 68–69, 72–73
Interest groups, 204. *See also* Corporatism; Rent-seeking
Ireland, Northern
crime in, 22–23
representation in, 135, 142
Ireland, Republic of
constitution of, 318–19
referenda in, 180
representation in, 135
Israel
citizenship in, 304
representation in, 105, 132
Italy
bicameralism in, 206
constitution of, 317
crime in, 22–23
geographic redistribution in, 244
political instability in, 27

Japan
agricultural programs, 30–31
crime in, 31–32
deficits, 31
governmental waste in, 29–31
Liberal Democratic party, 30–31, 118
political corruption in, 30
representation in, 29, 137, 144, 343
Judiciary
as agent of citizens, 218–19, 280–81, 290–91
as arbitrator, 280, 285–88
federalism of, 289–90
hierarchy of, 288
incentives of, 284–85, 291
and legislative branch, 281
and minority interests, 287–88, 291–93
as policymaker, 286–88
selection of members, 281–84, 285
and separation of powers, 280–81

Kenya, 36–37

Latin America, 34–36, 264–68, 318, 343
Legislative branch. *See also* Proportional representation; Two-party systems
  and executive branch, 247–51
  and judiciary, 281
Levellers, 346–47
Licensing restrictions, 230
Luxembourg, cabinet selection in, 250

Majority rule, qualified, 129, 153–57, 209–11, 253–54
Majority rule, simple
  and Condorcet jury theorem, 158–59, 285–88, 295
  and decision-making costs, 155–57
  fairness of, 159–60
  and May's theorem, 159–60, 286–88
Malta, representation in, 135
Marginal cost, definition of, 349
Markets
  advantages of, 225–27
  protection of, 228–31, 233–35
May's theorem, 159–60, 286–88
Mexico, 35
Multimember-district representation. *See also* Proportional representation
  and number of parties, 140–44
  systems of, 133–38
Multiparty systems. *See* Proportional representation

Netherlands
  cabinet selection in, 250
  representation in, 105, 132
New Zealand
  central bank independence, 270–71
  economic performance of, 234
  two-party system in, 122–23, 137
Norfolk *v.* Collins, 144–45
Norway
  cabinet selection in, 250
  corporatism in, 201–02
  representation in, 147
Numbers equivalent of parties and seats, 142–44

Paraguaya, 35
Pareto optimal, definition of, 349
Peru, 34, 266–67
Plurality system, 27–28, 103
Point voting, 129, 160–61, 169
Presidential systems. *See also* Executive branch
  in France, 27, 110–11, 121–22, 147
  in Latin America, 35–36
  in United States, 15–16, 110–11, 122, 124, 253–54
  Weimar Republic, 45–46

Principal-agent problem
  between citizens and bureaucracy, 255–59
  between citizens and government, 56, 148–49, 206, 346
  between citizens and judiciary, 218–19, 280–81, 290–91
  between citizens and representatives, 148–49
  between legislature and executive, 247, 250–52, 259–61
Prisoners' dilemma
  and charity, 238–39
  citizenship as, 310–11
  and common property, 225–26
  and government intervention, 51–54
Private good, definition of, 349
Probabilistic majority rule, 129–30, 164–67, 169–71
Probabilistic voting model, 120–21, 125–26
Property rights, 225–27, 233–35
  and the probabilistic majority rule, 166–67
Proportional representation. *See also* individual country entries
  and dictatorship, 271–74
  limited voting, 136–37, 144–45
  list systems, 105–06, 133–36
  means for attaining, 102–04
  and minority interests, 144–45
  normative properties of, 101–02, 110–11, 128–32, 148–49, 344–45
  single-nontransferable-vote systems, 137
  single-transferable-vote systems, 135–36, 315
  stability of, 27, 45, 106–11, 146–47
  and voting rule choice, 153–71
  in Weimar Republic, 45
Public choice
  and outcomes from democracy, 47–48
  and self-interest postulate, 50–51
Public goods
  consumption with heterogeneous groups, 300–03
  culture as, 303–04
  definition of, 349–50
  democracy as, 311
  and federalism, 81–83
  and government, 53–54
  redistribution via provision, 88–89

Redistribution. *See also* Rent-seeking
  as altruism, 238–39
  deadweight losses from, 243
  and decision-making costs, 156, 239
  and deficits, 267–68
  as economic right, 229, 240–44, 276
  geographic, 195, 199
  as insurance, 55, 239–44, 276
  and political instability, 32–36, 44–46, 264–68

and probabilistic majority rule, 166–67
as a public good, 54–55
via public good provision, 88–89
self-interest and, 238–41
uncertainty and, 239–41, 243–44
from voting-with-the-feet, 88–89
and voting rule, 200
zero-sum, 55–56
Referenda
arguments against, 179, 187–90
arguments for, 178–79, 187–90
on constitutional issues, 179–82
decision-making costs and, 185–86
federalism, protection of, 85
with multiparty systems, 185–86
with two-party systems, 183–85
types of, 177–78
Rent-seeking. *See also* Redistribution
in Ancient Greece, 44
and governmental waste, 8–12, 23–24, 29–31
and macroeconomic instability, 24–26, 31, 264–68
politics as, 170
and single-member-district representation, 13, 107, 140, 195, 342, 343
Representatives. *See also* Proportional representation; Two-party government
to constitutional convention, 315–19, 326–28
parties as, 104–06, 123–25, 147–48
persons as, 102–04, 123–25, 147–48
Rights, constitutional, 29
changes in, 217–23
choice of, 215–16
and decision-making costs, 212–15, 217–19, 222–23
definition of, 212
economic, 229, 240–44
and externalities, 213–15
federalist, 89–91
and majoritarian democracy, 215
moral rights, contrast with, 219–20
natural rights, contrast with, 219–20
property, 225–27, 233–34
reason for, 212–15
relative nature of, 216–17

Sainte-Lagué, quotient, 135, 138. *See also* Proportional representation
Secession, 81, 330–34
Self-interest of individuals
in bureaucracy, 248
and citizen involvement, 310–11
at constitutional stage, 315–19, 336
and contractarian approach, 50–51, 61–63
and democratic institutions, 47, 346
and public choice, 95–96
and redistribution, 238–41
at U.S. Constitutional Convention, 62–64
Separation of powers. *See also* Deadlock problem
executive and legislative, 259–51, 253–54, 260–61, 343
judiciary and other branches, 280–81
in Latin America, 35–36
in United States, 15–16, 272, 275
in Weimar Republic, 45–46
Separation of responsibilities, 206, 275–77
Single-member-district representation. *See also* Two-party government
and centralization of government, 13–15, 342
and cycling, 107
examples of, 137–38
and federalism, 84
and judgeship elections, 287, 291–93
justification for, 138–40
and number of parties, 140–44
and rent seeking, 13, 107, 140, 195, 199, 342, 343
Social choice. *See* Public choice
Social dilemma. *See* Prisoners' dilemma
Social-welfare functions
Benthamite, 64, 120–21, 161
definition of, 350
Harsanyi's, 63–64
Nash's, 66–67, 120–21
Sorcerer's apprentice problem. *See* Principal-agent problem
Spain
crime in, 22–23
constitution of, 318
geographic redistribution in, 244
representation in, 136
Supreme Court, U.S. *See* United States Supreme Court
Sweden
constitution of, 317
representation in, 106
Social Democratic party, 118
Switzerland
bicameralism in, 85
central bank independence, 270–71, 276
chief executive of, 273
citizenship in, 309–10
consensus in, 153
constitution of, 241
corporatism in, 201–02
direct democracy in, 98–99
and proportional representation, 142
referenda in, 85, 184–85, 189, 341–42
social insurance in, 276

Thornburg *v.* Gingles, 144–45
Tonkin Gulf Resolution, 193, 197

Trade, free, 228–30
Transaction costs. *See* Decision-making costs
Two-party systems. *See also* individual country entries
  alienation of voters in, 117–18, 128, 131, 149
  and dictatorship, 123–24, 271–74
  means for attaining, 115–16
  normative properties of, 120–21, 128–32, 148–49, 345
  and positions of candidates, 116–21
  and redistribution, 237–38
  stability of, 119–21

Unanimity rule
  and compliance with constitution, 69
  in a confederation, 83
  at constitutional stage, 65–67, 89–90, 221–22
  and corporatism, 201, 203–04
  and federalism, 84
  and infinite regress problem, 68–69
  at parliamentary stage, 153
  and rights, 221–22
  and uncertainty at constitutional stage, 58, 61–64, 242, 320–21, 325
  Yugoslavia, use in, 94n
Uncertainty
  and contracts, 61, 227, 241
  and election of judges, 285–88
  and redistribution, 55, 239–44, 276
  and rights, 215–16
  and unanimous agreement, 58, 61–64, 221, 242, 320–21, 325
  and voting rule choice, 210–11
Unicameralism, 196–98
United States. *See also* Constitution of United States
  agriculture programs, 10–11
  alienation of voters in, 12–13
  antitrust laws, 228–29
  bicameralism in, 192–93, 199
  centralization of government, 11–15, 342
  Civil War, 141, 333–34
  citizen disenchantment, 12–13
  citizenship in, 306–07
  constitutional convention, 62–63, 252, 317, 323, 325–26, 336
  crime in, 4
  deadlock problem, 11–12, 342
  defense expenditures, 9–10
  deficits in, 6–8
  education in, 4–5
  judge selection in, 282–83, 285–87
  pork barrel programs, 8–12
  poverty in, 5, 7
  presidential system of, 15–16, 110–11, 122, 124, 253–54
  separation of powers, 15–16, 272, 275
  single-member-district representation, 13–15, 137, 141, 342
  social insurance in, 241, 276
United States Supreme Court
  and the Constitution, 337
  and federalism, 17–18, 94n
United States *v.* Butler, 17–18
Uruguay, 35
Utility, definition of, 350

Venezuela, 266–68
Voting by veto, 161–64, 169–71
Voting rule, parliamentary, 152–71. *See also* Majority rule, qualified; Majority rule, simple; Point voting; Probabilistic majority rule; Unanimity rule; Voting by veto
Voting-with-the-feet, 86–89, 91–92

Zero-sum games. *See also* Redistribution; Rent-seeking, politics as

About the Author

Dennis C. Mueller is Professor of Economics at the University of Vienna. He has taught at Simon Fraser University, Cornell University, and the University of Maryland, as well as holding research positions at the Brookings Institution and the Science Center Berlin. His most recent works include *The Public Choice Approach to Politics* and the forthcoming *Perspectives on Public Choice*.

Jacket design by Joy Taylor