

## I. Introduction: Aggregate Welfare and Contractarian Theories of the Constitutional Design

- A. Shortly, after the end of World War II, a new strand of positive political research emerged that used rational choice models of behavior to construct models of democratic and non-democratic governance.
- i. These theories eventually were used to analyze the relative merits of constitutional designs (Buchanan and Tullock, 1962, Mueller, 2000, Persson and Tabellini, 2003).
  - ii. The breadth and depth of comparative work on constitutional design dwarfs that undertaken by Aristotle and Montesquieu as the depth and breadth of the historical record has increased substantially over the past two centuries, and as the new statistical methods have been added to the long-standing historical method in the past several decades.
    - Consequently, modern positive work is clearly well beyond that of the enlightenment and the classic Greek efforts.
    - Within the modern rational choice research program in politics there are a variety of answers to the positive questions about the properties of alternative governments, although generally speaking there is broad agreement that institutions matter (Congleton and Swedenborg, 2006), as there were among both Enlightenment and Greek scholars.
- B. However, on fundamental normative questions of constitutional design, progress is less impressive.
- i. On the one hand, modern analyses tend to be narrower, insofar as they retain static models of individual welfare.
  - ii. On the other hand, the normative methods employed by rational-choice based analysis are sharper and more logically self-consistent.
- C. This tends to be true of both the aggregate welfare maximization line of research and of the modern contractarian line of research.
- i. Both modern aggregate welfare theories and contractarian theories allow us to go a bit beyond the Pareto criteria.
  - ii. Both are fundamentally individual-based theories, insofar as the welfare of every person matters.
  - iii. Both use analytical representations of individual welfare, utility functions, to assess individual welfare.
  - iv. Both agree about some of the formal properties of an ideal governance, insofar as ideal governments will adopt policies that will reach Pareto efficient states of the world, or at least have constellations of governmental procedures and constraints that maximize the likelihood of such states.
  - v. And both approaches allow researchers to assess the relative merits of alternative Pareto efficient states of the world, at least to the extent that researchers are willing to assume

parameters of individual utility functions and the "weights" assigned to individual members of the society of interest.

- D. These broad points of agreement, however, mask significant differences in the philosophical foundations of these normative methodologies.
- i. The "aggregate welfare" approach considers society's welfare to be an increasing function of individual welfare, but their interest is "welfare as a whole," as in Plato and utilitarian research.
    - Modern aggregate welfare theorists generally prefer to explore results that can be obtained with general classes of social welfare functions that require no commitment to weights; but if pressed to adopt a particular welfare function, they will generally adopt the "Benthamite" social functions in which individual utilities are simply added up.
    - As indicated by this terminology, its philosophical foundations are most obviously rooted in Bentham's (1776) utilitarian philosophy developed in the late eighteenth and nineteenth century.  $W = \sum U_i(x_1, x_2, \dots, x_N)$ . [Draw a diagram of the two-person version of W]
  - ii. Insofar as solutions to aggregate welfare maximization functions characterize particular constellations of social welfare maximizing public policies, these procedures imply that the *optimal state consists only of an executive branch* that implements the optimal policies.
    - As in Plato's analysis, there is no need of a legislature, because the best possible decisions are made via aggregate welfare analysis rather than by a process of negotiation and agreement of the citizenry.
- E. Modern contractarian theories of social welfare (a term many contractarians would resist), Rawls (1971) and Buchanan (1976), stress the importance of a hypothetical social contract directly negotiated by the citizens themselves.
- i. In modern contract theories of the state, voluntary agreement by the participants is the measure of relative quality of political institutions, not aggregate welfare per se.
    - In principle, the contractarian approach tends to suffer from the same weaknesses as the Pareto criteria, insofar as strong differences in private interest or normative theories might imply that agreements to depart from a preexisting state may be impossible, and thus a huge range of political institutions might be "optimal."
  - ii. To avoid this methodological dead end, modern contractarians either appeal to a fictional "veil of ignorance" (Rawls, 1971) or suggest that the durable nature of constitutions implies that there is a considerable "veil of uncertainty" about the future, which tends to facilitate constitutional agreements.
    - Uncertainty, whether real or assumed, tends to facilitate agreement among participants at a hypothetical constitutional convention, because it divorces negotiation of constitutional designs from short term personal interests and induces individuals to take account of a

broad range of possibilities. In this, individuals tend to have in Olson's terms, and encompassing interest in the performance of a new constitution.

- The consummation of a successful contract implies that the signatories anticipate being better off after the social contract is adopted than in the preexisting circumstances.
  - The end of negotiation implies that the contract terms have reached the point at which no further mutually advantageous arrangement can be found.
- iii. In mathematical analyses of social contracts, the implicit weights are subjective probabilities of alternative circumstances that a person might find themselves in the future after a contract is adopted, rather than weights deduced from some overarching theory of distributive justice.

$$U_i^e = \sum p_j U_j$$

( $U_i^e$  is Mr. or Ms. "i's" expected utility given probability  $P_j$  of realizing  $U_j$ ,  $j = 1 \dots M$  are the "M" possible "positions in society" associated with a particular social contract)

- In Rawls the uncertainty is used to characterize an imaginary initial state from which just institutions may be adopted.
  - In Buchanan the uncertainty is a consequence of the difficulty that real person have in predicting the long term effects of a social contract.
    - The same uncertainty about the future that facilitates agreement in Buchanan's model implies that procedures of legislation, as well as execution, are important in contractarian analyses, because not all future public policies can be imbedded in the social contract.
    - Rawls [1985] does not discuss in much detail the kind of institutions that might be adopted from behind the veil, but does assume political institutions will be democratic and that the political culture will also be democratic.
- iv. The philosophical roots of normative social contract theory are found in the enlightenment theories of Locke (1689) and Hobbes (1651).
- The new contractarian theories differ from the enlightenment theories in their emphasis on agreement rather than popular sovereignty (which is now taken for granted, although it could not be in 1700).
  - They also differ in their use of mathematical representations of individual preferences (and common interests) that allow for sharper analytical conclusions--albeit under somewhat restrictive modeling assumptions.
  - They differ from the classical theories because they are normative rather than positive theories of the state.
- F. The parallels between the conclusions reached by modern aggregate welfare theorists and contractarians and those of Plato and Aristotle are striking.
- i. For example, a role for legislation tends to exist in contractarian theories but tends not to exist within aggregate welfare maximizing theories of the constitutional design. The latter often require only Plato's well-behaved executive branch (a benevolent dictator).

- ii. There are also differences in the roles that may be played by expert public policy analysts in assessing the relative merits of alternative governments and alternative policies.
- Again, these conclusions parallel those developed those implicitly developed in Plato and Aristotle.
  - In the welfare aggregation approach, both the "measure" of the quality of government and the ideal policies are the products of expert philosopher-economists rather than the individual-citizens participating in governance.
    - Better governments can be distinguished from worse ones by comparing the levels of aggregate welfare obtained.
    - Failure to adopt ideal policies implies that *governments have failed*.
  - In the contractarian approach, the point of reference is the voluntary nature of the social contract, negotiated by the signatories, themselves, rather than expert philosophers.
    - In this context, the expert philosopher-economists can attempt to deduce the kind of agreements that rational individuals might plausibly agreed to.
  - However, the observation that existing policies differ from those predictions allows economic models does not allow sharp conclusions to be drawn.
    - Such results are consistent with both analytical errors--the models used to characterize the social contracts may be incorrect--as well as institutional failure--the institutions may deviate from those which would have been agreed to.
    - Only in cases where the analytical representation of the contract reasonably accurate, can the results be used to evaluate the relative merits of institutions and public policies.
    - The appropriate normative test for contractarians is not philosophical or mathematical representation of aggregate welfare, but whether actual institutions and policies are consistent with (real or imagined) agreement.

G. The anticipated properties of the executive and legislature affect the kinds of institutions that would maximize social welfare and the kinds of institutions that would be adopted by constitutional agreements.

- i. The "proper" scope of public policy within both social welfare maximizing and contractarian theories of the state, thus, *expand* as institutional solutions to anticipated agency problems are worked out, and *shrink* as new problems are discovered.
- ii. However, political agency-problems are rarely addressed in aggregate social welfare maximizing models, which often seem to imply that "permanent policies" can be put in place, both to deal with agency problems and regarding the policies that will produce societies that maximize social welfare.
- (In this respect, the modern aggregate welfare maximizers fail to appreciate what Plato understood to be a serious problem.)

- iii. Economists that reject the measurability of utility and/or that insist that utility is subjective and at best ordinal and transitive, conclude that social welfare functions are a fantasy.
  - In this, contractarians have found a counterattack to Bentham's essentially similar criticism of social contract-based normative theories.
- iv. [In addition to these contract and aggregate welfare theories, there are a number of modern and enlightenment "natural rights" theories of the state, which are neglected here because most lack careful foundations--taking "natural rights" to be obvious.]

## II. John Rawls [*Theory of Justice*, 1971]

- A. The most influential of the modern contractarians is John Rawls, who published a path breaking work on political philosophy in 1971, the *Theory of Justice*.
- B. That book refocused contractarian analysis on "agreement" rather than on popular sovereignty. That is to say, a good society is grounded on agreement, at least in principle.
- C. Moreover, Rawls argues that the agreement of interest is that which would have emerged from behind a "veil of ignorance."
  - i. Social contracts made from behind a veil of ignorance take account of the effects of the contract on all persons in the society of interest, because individuals do not (by assumption) know their place in the society that follows.
    - For example, if the payoffs are (1,3,0,4,1) under one contract and (1,2,2,2,1) under another, the individual participants in at the "constitutional convention" do not know whether they will receive 1, 4, or 0 under the first contract, or 1 or 2 under the second.
    - They have to choose the contract with only knowledge of the general results of the contract but not the direct results on themselves as individuals.
    - The "veil" implies that people do not know "who" they will be in the new society.
- D. Rawls provocative analysis suggests that people in such circumstances will be *very risk averse*, and will chose the society that has the highest minimal payoff--the maximin social contract.
  - i. Thus (1,1,1,1,1) is preferred to (0.9,20,20,20,20) because the lowest payoff of the first (1) is larger than the lowest payoff of the second (0.9)--regardless of the size of the other payoffs.
  - ii. (Note that people who are less risk averse would in most cases prefer the second game, because the average payoff is much higher than in the first.)

- E. Rawls has since "backed off" from some of his most provocative conclusions and now insists that *political distributive equity* is the main concern of his book--rather than economic distributive equity.
  - i. "One thing that I failed to say in *A Theory of Justice*, or failed to stress sufficiently, is that justice as fairness is intended as a political conception of justice. While a political conception of justice is, of course, a moral conception, it is a moral conception worked out for a specific kind of subject, namely for political, social and economic institutions. In particular justice as fairness is framed to apply to what I have called the "basic structure" of a modern constitutional democracy." [Rawls 1985]
  - ii. "I would now understand as a reasonably systematic and practicable conception of justice for a constitutional democracy, a conception that offers an alternative to the dominant utilitarianism of our tradition of political thought" [Rawls 1985]
  - iii. "What must be shown is that a certain arrangement of the basic structure, certain institutional forms, are more appropriate for realizing the values of liberty and equality when citizens are conceived as such persons, that is (very briefly) as having the requisite powers of moral personality that enable them to participate in society viewed as a system of fair cooperation for mutual advantage. So to continue, the two principles of justice read as follows:
    - Each person has an equal right to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with a similar scheme for all.
    - Social and economic inequalities are to satisfy two conditions: first, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society." [Rawls, 1985:227]

## III. James Buchanan (1976, *Limits of Liberty*)

- A. James Buchanan is the most influential of the economist-contractarians. His most complete analysis of the social contract was published in 1976, although he continues to write on this area to the present day.
  - The *Limits of Liberty* is available on the web A link is provided at the class website.
- B. Buchanan is an "honest" subjectivist:
  - i. Those who seek specific descriptions of the "good society" will not find them here.
    - A listing of my own private preferences would be both unproductive and uninteresting.
    - I claim no rights to impose these preferences on others, even within the limits of persuasion.

- In these introductory sentences, I have by implication expressed my disagreement with those who retain a Platonic faith that there is "truth" in politics, remaining only to be discovered and, once discovered, capable of being explained to reasonable men.
- ii. We live together because social organization provides the efficient means of achieving our individual objectives and not because society offers us a means of arriving at some transcendental common bliss.
- iii. Politics is a process of compromising our differences, and we differ as to desired collective objectives just as we do over baskets of ordinary consumption goods.
  - In a truth-judgment conception of politics, there might be some merit in an attempt to lay down precepts for the good society.
  - Some professional search for quasi-objective standards might be legitimate. In sharp contrast, when we view politics as process, as means through which group differences are reconciled, any attempt to lay down standards becomes effort largely wasted at best and pernicious at worst, even for the man who qualifies himself as expert.
- iv. My approach is profoundly individualistic, in an ontological-methodological sense, although consistent adherence to this norm is almost as difficult as it is different.
  - This does not imply that the approach is personal, and the methodological individualist is necessarily precluded from the projection of his own values.
  - His role must remain more circumscribed than that of the collectivist-cum-elitist who is required to specify objectives for social action that are independent from individual values other than his own and those of his cohorts.
  - By contrast, the individualist is forced to acknowledge the mutual existence of fellow men, who also have values, and he violates his precepts at the outset when and if he begins to assign men differential weights.
  - He simply cannot play at being God, no matter how joyful the pretense; hubris cannot be descriptive of his attitude.
- C. These limits offer the individualist a distinct comparative advantage in a positive analysis of social interaction.
  - i. Accepting a self-imposed inability to suggest explicit criteria for social policy, the individualist tends to devote relatively more intellectual energy to analysis of what he observes and relatively less to suggestions about what might be.
  - ii. He cannot stop the world and get off, but the important realization that he is one among many men itself generates the humility demanded by science.
    - The neutrality of his analytics lends credence to his predictions.
    - The wholly detached role of social ecologist is important and praiseworthy, and perhaps there should be more rather than less analysis without commitment, analysis that accepts the morality of the scientist and shuns that of the social reformer.

- Thomas Hardy in *The Dynasts*, the aging Pareto in search of social uniformities—these men exemplify the attitude involved, that of the disinterested observer who watches the absurdities of men and stands bemused at the comedy made tragedy by his own necessary participation.
- D. To the individualist, the ideal or utopian world is necessarily anarchistic in some basic philosophical sense.
  - i. This world is peopled exclusively by persons who respect the minimal set of behavioral norms dictated by mutual tolerance and respect.
    - Individuals remain free to "do their own things" within such limits, and cooperative ventures are exclusively voluntary.
    - Persons retain the freedom to opt out of any sharing arrangements which they might join.
    - No man holds coercive power over any other man, and there is no impersonal bureaucracy, military or civil, that imposes external constraint.
  - ii. The state does indeed wither away in this utopia, and any recrudescence of governmental forms becomes iniquitous.
  - iii. Essentially and emphatically, this utopia is not communist, even in an idealized meaning of this historically tortured word.
    - There are no predetermined sharing precepts.
    - Communes may exist, but hermits may also abound and they may or may not be misers.
  - iv. **Cooperative relationships are necessarily contractual**, and these must reflect mutual gain to all participants, at least in some ex ante or anticipated stage.
- E. The anarchist utopia must be acknowledged to hold a lingering if ultimately spurious attractiveness.
  - i. Little more than casual reflection is required, however, to suggest that the whole idea is a conceptual mirage.
    - What are to be the defining limits on individual freedom of behavior?
    - At the outset, allowing each man to do his own thing seems practicable.
  - ii. But what happens when mutual agreement on the boundaries of propriety does not exist?
    - What if one person is disturbed by long-hairs while others choose to allow their hair to grow?
    - Even for such a simple example, the anarchist utopia is threatened, and to shore it up something about limits must be said.
    - At this point, a value norm may be injected to the effect that overt external interference with personal dress or hair style should not be countenanced.

- But this norm would require enforcement, unless there should be some natural and universal agreement on its desirability, in which case there would have arisen no need to inject it in the first place.
  - If there is even one person who thinks it appropriate to constrain others' freedom to their own lifestyles, no anarchistic order can survive in the strict sense of the term.
- F. There are countless activities that require persons to adhere to fundamental rules for mutual tolerance, activities that may be observed to go on apace day by day and without formal rules.
- i. They go on because participants accept the standards of conduct that are minimally demanded for order to be established and maintained.
  - ii. Consider ordinary conversation in a multiperson group. Communication does take place through some generalized acceptance of the rule that only one person speaks at a time.
  - iii. Anarchy works. It fails to work when and if individuals refuse to accept the minimal rule for mutual tolerance.
    - Communication on the Tower of Babel would have ceased if all men should have tried to speak at once, quite apart from the distortion in tongues.
    - It is paradoxical to note that modern-day radicals often call themselves anarchists when their behavior in heckling speakers and in disrupting meetings insures nothing more than a collapse of what are remaining elements of viable anarchy.