

Part II: Perfecting Parliament

A Digression on Popular Sovereignty and Good Constitutions

I. Positive versus Normative Controversy

A. It must be acknowledged that the positive analysis of constitutions is inherently less controversial than normative analysis.

- i. Positive analysis may be controversial, insofar as it strays from accepted methods, theories, or historical facts.
 - a. However, positive controversy is often a good thing.
 - b. Such controversy is always associated with scientific progress as some new theories and ideas challenge and supplant old ones or as new proposals are found to provide less powerful or general explanations of phenomena than provided by established theories.
- ii. In normative analysis, controversy on the “proper” method of assessing alternative policies, processes, or societies may be generally less productive than scientific controversy, but is generally unavoidable.
 - a. Disagreement about the relative merits of alternative policies is one reason why institutional arrangements for collective choice are necessary and important.
 - b. Even if everyone agreed about what good policies look like, disagreement would still exist on priorities.
 - c. Moreover, disagreement on policies or institutions are not simply the result of applying different normative criteria.
 - d. Policies and institutions are generally not ends in their own right, but rather are adopted because of their anticipated effects.
 - e. Consequently, disagreements on positive policy consequences also have political consequences.

- iii. Disagreement about the relative merits of policy arise partly because of fundamental disagreements on proper methods of ranking alternatives and partly because of disagreements on anticipated outcomes.
 - a. This makes normative analysis of constitutional design inherently more controversial than the positive analysis of constitutional consequences.
 - b. Nonetheless, normative analysis is clearly necessary if we are to appraise the relative performance of alternative constitutions.

B. The normative theory developed in the remainder of this class is built on the relatively uncontroversial notion of popular sovereignty.

- i. Popular sovereignty suggests that the power of government is something delegated to government by a nation’s citizenry, rather than an institution assembled by forceful leaders and inherited by their children.
 - a. From the perspective of popular sovereignty, a constitution is a form of contract that attempts to induce the rule makers to exercise their authority in a manner that will advance the common interests of the citizenry.
 - b. A nation’s constitution specifies the terms of that transfer of power from the citizenry to the individuals and agencies granted the powers to tax, provide services, and write and enforce the law.

C. The interpretation of constitutional government as an instrument by which individuals are able to advance shared goals implies that government, like any other instrument, can be evaluated by its performance.

- i. And, the rational choice perspective suggests that such an evaluation can be carried out in a systematic fashion.
- ii. The aim of the normative analysis is to produce a series of normative rules of thumb that can readily be applied to assess alternative constitutions for parliamentary democracies.
- iii. The normative arguments developed are sufficiently rigorous that most of the results can be arrived at analytically for fairly general political

settings, although this seem inappropriately pedantic for the purposes of this class.

- iv. The analytics underlying the discussion are briefly sketched out in various footnotes.

D. There is, of course, a long-standing normative program in constitutional theory that has considered the relative merits of alternative methods and mechanisms for governance.

- i. The best known of the early efforts is Aristotle's *The Politics* (1960/330 b.c.), which is based on an extensive analysis of 158 constitutions of Greek city states.
- ii. The wide range of historical, legal, and political analyses of constitutions in the intervening two millennia are too numerous to recount properly here.
- iii. The rational choice-based analysis of constitutional design is relatively new, and the literature is relatively small.
 - a. It begins with Buchanan and Tullock (1962), who showed how constitutional features, especially alternative voting rules, can be analyzed using positive and normative ideas from economics.
 - b. They showed, for example, why the best voting rule tends to vary with the durability and urgency of policy choices at hand.
- iv. The work of Buchanan and Tullock has been extended in many ways in the decades that follow, as scholars attempted to explore in greater detail the implications of constitutional design for political and economic performance.
 - a. Several recent books have summarized those contributions, and extended the rational choice-based analysis of alternative constitutions.
 - b. For example, Mueller (1996) provides a good overview of the modern rational choice-based literature and also provides a fine constitutional political economy (CPE) examination of the problem of democratic constitutional design, although he does not focus much attention on parliamentary systems.

- c. Brennan and Hamlin (2000) examine the logic of constitutional design using a broader model of rational choice than is generally used in CPE-based analysis.
- d. Gordon (1999) provides an insightful historical analysis of the importance of diffuse power centers in assuring democratic or pluralistic governance and points out the difficulty of generating a self-sustaining democratic political system. The latter is widely neglected by modern authors.
- v. What is new in part II of my "Improving Democracy" book is the effort to systematically use contractarian ideas to demonstrate the normative appeal of voting, rights, federalism, and constitutional review within the context of parliamentary democracy.
 - a. Previous rational choice based analyses have not focused much attention on the problem of assessing the relative merits of alternative forms of parliamentary democracy, nor have they analyzed the problem of ongoing constitutional reform in much detail.
 - b. As will be shown below, history demonstrates that parliaments can be improved as instruments for advancing common aims.
 - c. History, however, also suggests that well-functioning parliamentary systems can become less functional through time as circumstances change or constitutional rules are undermined via amendment.

Constitutional Norms

- A. Constitutional designers all recognize the necessity of systematically ranking constitutional alternatives not only at the time a constitution is chosen, but in the whole period following adoption.**
- i. Essentially all formal constitutions include language that specifies legitimate procedures by which the current constitution may be amended.
 - ii. And, every amendment that is lawfully adopted creates a new constitution that has been judged superior to the old one according to the norm embedded in the constitutional amendment process.
 - iii. Many constitutions incorporate norms that use supermajority support to rank alternative constitutions.

- a. For example, constitutions may require amendments to be approved by a supermajority in the legislature (United States, Germany, Netherlands, and Finland), passed by multiple chambers of a legislature (Germany, United States, and Netherlands), approved by successive legislatures after an intervening election (Denmark, Netherlands, Sweden, and Finland), and/or require a popular referendum (Denmark).
 - b. Under such amendment procedures, an alternative constitution is judged superior to the existing constitution when it advances the interest of more than a majority of the legislature.
 - c. To the extent that significant electoral competition exists within the polity, the legislative-based methods for amending constitutions implicitly rank constitutions according to their ability to advance the interests of a large subset of the national electorate.
- iv. All majority and qualified majority procedures for ranking constitutions **implicitly discount the constitutional interests of minorities who oppose proposed constitutional reforms.**
- a. The minority interests that can be neglected clearly vary with the specific procedures applied, but, to the extent that such minorities exist, constitutional reforms cannot be regarded as supported by “the people” or a result of the “popular will.”
 - b. Nonetheless, it is also clear that modern constitutional designs generally use broad electoral support as the constitutional norm for ranking alternative constitutions.

B. Popular Sovereignty and the Contractarian Perspective

- i. To say more about the relative merits of alternative institutions than what is implied by rational decision making under a particular amendment

¹ For example, one can imagine three groups with differing opinions concerning the relative merits of (a) unrestricted parliamentary systems, (b) parliamentary systems with a bill of rights, and (c) parliamentary systems with a bill of rights and effective constitutional review based on their own anticipated well-being under the three systems. Members of group 1 may generally prefer a to b to c, because they expect to be members of the ruling majority. Members of group 2 may prefer c to b to a, because they expect to be members of the minority. Members of group 3 may prefer c to a to b, because they regard a bill of rights without review as dishonest and ineffective, although fundamentally unnecessary. In this case, c secures a stable majority domination. It will secure majority approval over a or b and is sometimes called the Condorcet winner.

Now suppose that group 2 prefers b to c to a, because it believes that a bill of rights is important, but that review is not necessary to protect minority rights. In this case, b loses to a, and a loses to c, as before, but now b can beat c. *In this case, majority rule cannot rank constitutions.*

- procedure requires a more general methodology for appraising the merits of alternative constitutional designs.
- ii. A general normative theory should, at least in principle, be independent of particular constitutional procedures.
 - a. Otherwise, comparisons among alternative electoral institutions will be impossible, linked to a particular constitutional history, or at least muddled.
 - b. The majoritarian norm that attributes “better” to every majority-approved policy clearly fails this test, because it takes majority rule, a specific form of election, as the core normative principle.
 - c. Moreover, the possibility of majority cycles implies that such a norm can yield confusing (intransitive) rankings of constitutional arrangements.¹
- iii. A broad range of general tools for consistently evaluating the effects of policies has been developed by philosophers, political scientists, and economists, but relatively little attention has been directed to ranking alternative constitutional arrangements.
 - a. Political theorists have used a variety of norms to think about constitutional design, but most of these appeal to grand intuitive ideals, such as democracy, liberty, and justice in making a case for particular constitutional forms. Most such analyses use a “weight of the evidence” standard of analysis and attempt to show that a given constitution (often democracy, broadly defined) has broadly desirable properties.
 - b. A smaller group of political theorists have used analytical normative theories, which are closer in spirit to those used by economists.
 - c. They attempt to rank constitutions in a general way by analyzing the effects of constitutions on the well-being or of individuals.

- d. This may be said of the familiar utilitarian and contractarian approaches to public policy and constitutional analysis.²

C. The analytical and intuitive approaches overlap to a greater extent than is often appreciated.

- i. Analytical norms have to have significant intuitive appeal to attract much attention.
- a. For example, the logic of the contractarian approach can be defended intuitively as the most natural method for appraising constitutional arrangements designed to implement the ideals of popular sovereignty.
 - b. Popular sovereignty is, of course, a normative intuition: that the legitimacy of the government emerges from “the will of the people.”
 - c. The contractarian perspective regards constitutions as contracts designed to advance the interests of all who will live under them.
 - d. Conversely, analytical normative analysis has to take account of the normative intuitions of the persons affected by alternative constitutions to properly rank constitutions.
- ii. **The practical significance of the contractarian approach** is clearly evidenced by the numerous constitutions that explicitly mention the connection between constitutions and popular sovereignty.
- a. The constitution of the United States begins with “We the People of the United States, in Order to form a more perfect Union . . . establish this Constitution.”

- b. The current Swedish constitution (Instrument of Government) begins with “All public power in Sweden proceeds from the people.”
 - c. The German constitution begins with the declaration: “Conscious of their responsibility before God and men, . . . the German People have adopted, by virtue of their constituent power, this Constitution.”
 - d. Similar language can be found in many other constitutional documents. Such constitutional language formally defines the state as a contract by which the people have delegated sovereignty to a specific political organizations described in the same constitutional documents to advance their common interests.³
- iii. Such interests will include the broad characteristics of the “good society” as well as narrow material interests.
- a. Because of this, the various broad concerns of noncontractarian political philosophers will also affect the language of constitutional compacts and amendments, insofar as their ideas and ideals are widely shared by those involved in the constitutional negotiations.
 - b. The stated purpose of such documents suggests that the quality of a constitution can be assessed by its ability to advance the interests of the parties to the contract, that is to say, the nation’s citizenry.

D. Contractarian Analysis and Unanimity

- i. The contractarian conception of popular sovereignty is, perhaps surprisingly, largely independent of the particulars of constitutional procedures.

² See for example Rawls (1971), Buchanan (1975), or Mueller (1996). Swedish precursors to modern contractarian analysis include Wicksell (1896) and Lindahl (1919)

³ One of the earliest modern statements of popular sovereignty is found in the Dutch Declaration of Independence of 1581.

“As it is apparent to all that a prince is constituted by God to be ruler of a people, to defend them from oppression and violence as the shepherd his sheep; and whereas God did not create the people slaves to their prince, to obey his commands, whether right or wrong, but rather the prince for the sake of the subjects (without which he could be no prince), to govern them according to equity, to love and support them as a father his children or a shepherd his flock, and even at the hazard of life to defend and preserve them. And when he does not behave thus, but, on the contrary, oppresses them, seeking opportunities to infringe their ancient customs and privileges, exacting from them slavish compliance, then he is no longer a prince, but a tyrant, and the subjects are to consider him in no other view. And particularly when this is done deliberately, unauthorized by the states, they may not only disallow his authority, but legally proceed to the choice of another prince for their defense.” (Thatcher 1907, p. 189. See also <http://www.fordham.edu/halsall/mod/1581dutch.html>.)

- ii. Although there is a sense in which unanimity is the only decision rule that is compatible with the contractarian approach, it is also clearly possible for persons to agree unanimously to use other decision rules to select policies.
 - a. In their pioneering effort to apply rational choice analysis to constitutional analysis, Buchanan and Tullock (1962) demonstrate that essentially all citizens may agree to accept a constitution that uses majority rule for choosing representatives or for making day-to-day political decisions as a method of optimally economizing on the costs of collective decision making.
 - b. Their argument is based on an analysis of the costs and benefits of alternative decision-making rules under which majority rule is just one of many possible collective decision-making procedures.
- iii. **Majority rule is superior** to other rules when it is generally agreed that majority rule is a less costly procedure for making day-to-day policy than other rules would be, when the relevant costs include both decision costs and those associated with being in the exploited minority.⁴
- iv. Consequently, there is no necessary connection between contractarian normative theory and the decision-making procedures used to select ordinary policies.
- v. The same logic, surprisingly, implies that the parties to a hypothetical constitutional convention might also unanimously agree to require only

majorities or supermajorities well short of unanimity for adopting constitutional reforms.

- a. In reality, unanimity is widely recognized as difficult to achieve because of holdout problems, mistaken expectations, and plain contrariness. As a practical matter, citizens may prefer amendment procedures that require less than unanimous consent for reasons worked out by Wicksell.
 - b. For example, the Wicksellian criteria of qualified unanimity is likely to improve the well-being of all citizens over complete unanimity by reducing expected decision costs, and, thus, it may be said to be superior to a procedure that requires complete unanimous agreement.
 - c. Contractarian analysis begins with unanimous agreement, but it does not end there.
- vi. Although the contractual foundation of contractarian normative analysis requires that essentially all citizens should approve of the fundamental procedures and constraints of governance, not simply a majority of them, many decision rules including majority rule may secure such approval for use in day-to-day politics.
 - vii. Unanimity is only required at what might be called the preconstitutional stage, at which decisions are made regarding the long-term procedures and constraints of governance.⁵

⁴ The Buchanan and Tullock reasoning can be illustrated with a “dividing the pie” example. Suppose that 6 units of wealth are to be divided by some collective choice mechanism among three persons or homogeneous groups. Collective choice method A (Unanimity) uses 3 units of wealth to reach a decision and achieves an allocation of (1, 1, 1). Collective choice method B (Majority Rule) consumes only 2 units of wealth and yields allocations like (2, 2, 0), (0, 2, 2) and (2, 0, 2). If citizens are equally likely to be in the majority coalition (0.66 of the time in this example), the expected benefits of method B exceed those of method A (1.33 > 1). Although method B involves the risk of being occasionally exploited by the majority, it may be sufficiently less costly that such a risk will be voluntarily accepted by all.

⁵ Contractarian theorists often use the “veil of ignorance” or “veil of uncertainty” as an analytical device to facilitate normative analysis and as a core notion of fairness within their normative theories. Classic work includes Harsanyi (1955), Buchanan and Tullock (1962), and Rawls (1971).

Individuals behind the veil of ignorance are to imagine what fundamental rules they would consider ideal or at least acceptable, if they did not know their position in the society that emerged after the rules were in place. They might be king or peasant, member of parliament or blue collar worker, male or female, immigrant or noble, entrepreneur or ward of the state.

The constitutional rules adopted clearly affect the range of possibilities that will emerge and how likely they are to be realized. There can be just one king, but millions of peasants under a constitutional monarchy. There can be several hundred members of parliament and thousands of entrepreneurs under a parliamentary system with

E. Contractarian Analysis and Constitutional Reform

- i. With respect to alternative political constitutions, the contractarian normative framework implies that one constitution or constitutional amendment is better than another only if it is generally expected that the laws and other policies that will be adopted by the government, so defined, will directly or indirectly increase the quality of life for all of its citizens in the long run.
- ii. An acceptable constitution does not require that every law accomplish this.
 - ♦ Rather, it requires that the anticipated full range of legislation adopted with time should improve the lives of all the citizens living under those laws relative to the status quo.
- iii. A particular constitution would be the best possible organization of government, if no other constitution is widely expected systematically to yield "better" laws and policies for its citizens
 - a. For example, if no revisions to the constitution exist that can yield laws that make essentially all citizens better off.
 - b. There may, of course, be several such ideal constitutions in the same sense that several allocations of goods and services can be Pareto efficient.
 - ♦ Technological progress in governance suggests that constitutional improvements will always be possible in the very long run.
 - ♦ As circumstances and people change and as knowledge about the properties of alternative political constitutions improves, assessment of the relative merits of constitutional alternatives will also change.

competitive markets. Consequently, both theories of fairness held by the individual and their own risk aversion would play a role in this calculus. For example, the more risk averse the decision maker is, the more equal a distribution of anticipated outcomes one would demand. Rawls' (1971) analysis represents an extreme example of the importance of risk aversion in contractarian analysis insofar as his theory of justice is based on a very risk-averse person who worries (perhaps excessively) about the possibility of being the least well-off person in the society that follows. Such a person would want the position of the least well off person maximized and would veto agreements by less risk-averse persons.

Regardless of the degree of risk aversion assumed, it is clear that unanimous agreements are more likely to be achieved behind "the veil," because there are far fewer direct conflicts among "private" interests in the setting imagined. Insofar as every person must consider the possibility that he or she might occupy a wide range of possible positions in society, the veil of ignorance converts every private interest into a broad generalized interest.

- c. Consequently, none of our present constitutions is likely to be the best that can be devised, although much that has been learned in the past has already been explicitly and implicitly built into constitutional procedures and constraints.

F. Agreed Constitutional Ends

- i. Most day-to-day politics takes place at policy margins where both experts and ordinary citizens disagree about means and ends.
 - a. Constitutional design needs to take such conflict into account, but it should begin with areas of shared interests, for which agreements can be broad.
 - b. There are both constitutional ends and constitutional means to those ends.

Good Constitutions Promote Prosperity

A. One area of life in which shared interests can be advanced by government is material welfare.

- i. Essentially all citizens, even monks, prefer greater material wealth to lesser wealth.
- ii. Material wealth contributes to human comfort and development in many ways that are well recognized.
 - a. Other things being equal, a larger and more comfortable residence is preferred to a smaller one (be it a yurt, apartment, house, or monastery).
 - b. More nourishing and tasty food is preferred to less nourishing and tasty food.
 - c. Better access to effective medicine and education is preferred to less access, and faster more comfortable forms of transport are preferred to slower ones—other things being equal.

iii. Individuals clearly disagree over the particular combinations of real goods and services that best advance their private interests, but essentially all citizens would prefer Constitution A to Constitution B, if material welfare is universally improved in A relative to B, other things being equal.

- ♦ In other words, any change in constitutional arrangements that increases economic prosperity without reducing perceptions of justice or domestic tranquillity are clearly improvements.

iv. This is not to say that material welfare—what economists largely mean by the term wealth—is the principal aim of human activity.

- ♦ Wealth is generally a means rather than an end, but improving material well-being is a substantial human activity and one that clearly contributes to human contentment, development, and longevity.

B. Economic analysis of the law has resulted in a number of general and long-term legal or constitutional proscriptions for increasing prosperity.

- i. For example, prosperity tends to be increased as tradable property rights in real property and services are created and enforced.
 - a. The development of long-term capital formation is enhanced by enforcement of long-term contracts and stable regulatory environments.
 - b. Long-term development is also promoted by protecting entrepreneurs and others from confiscatory policies by governments (the takings clause in most constitutions).
 - c. Laws that allow easy entry and exit from product markets promote average material welfare by increasing competition in a manner that reduces the prices of final goods and services to consumers.
- ii. In general, consistent enforcement of modern civil law and constraints on confiscatory governmental policies can and has done much to promote material welfare by promoting economic growth and development.
 - a. See, for example, Posner (1977) or North (1990)
 - b. Indeed, some argue that nearly any stable constitution is better than the absence of a constitution.

- c. A stable political and legal environment allows long-term expectations to be more accurate, which allows long-term contracts to better serve both those directly involved and consumers who indirectly benefit from more roundabout forms of production and exchange.

C. Good Constitutions Also Promote the “Good Society”

- i. For most persons, especially in wealthy societies, a ranking of constitutions involves more than estimates of one’s own material well-being.
- ii. In addition to material welfare, most modern persons would also use broad procedural and equity norms to assess constitutional alternatives.
 - a. For example, most citizens of modern western democracies prefer a legal system that applies its laws uniformly across all citizens over a legal system in which the law is arbitrarily applied or special exceptions are explicitly made for the social elite.
 - b. They would do so even if their material wealth was somewhat reduced by such equal protection of the law.
 - c. Most persons also favor at least modest redistributive or social insurance programs.
 - d. Such programs may increase the number of persons living in poverty and reduce average income, but make poverty less onerous and less ugly.
- iii. Aesthetic or philosophical judgments about the relative merits of alternative constitution-based societies are less universal than interests in general material welfare, but clearly ideas about the nature of good governance and the good society should play a role in constitutional design for much the same reason that prosperity should.
 - a. The embodiment in constitutional goals and public policy provide (subjective) benefits to citizens in much the same way that material goods do.
 - b. For example, Frey and Stutzer (2000) provide statistical evidence that, other things being equal, citizens generally feel happier in Swiss cantons that use the most direct forms of democracy extensively.

- iv. Constitutions can clearly be ranked according to the extent to which they advance or undermine generally held norms about governance or society at large.
 - a. If a citizenry universally believes that constitutional system A, which might be a democracy, is more just or more attractive in some intangible way than system C, perhaps a constitutional monarchy generating the same distribution of income, clearly from the contractarian perspective, A is a superior form of government relative to C, other things being equal.⁶
 - b. The effects of philosophical and other broad methods of appraising constitutions have clearly been important historically.
- v. Many historians attribute the great waves of democratization observed in nineteenth century Europe to widespread demands for democracy per se as an essential property of “good societies,” rather than a mechanism to increase personal material welfare.
 - a. Although, as it turns out, Western democracies have also done well at promoting and sustaining economic prosperity.
 - b. It also turns out that economic interests were being advanced by similar reforms during the periods when many democratic reforms were taking place.
- vi. Evidence of the importance of aesthetic or philosophical judgments can be found in constitutional documents, which often begin by providing a general philosophical basis for governance or by stating the kind of society the constitution attempts to promote.
- vii. To the extent that “philosophical appraisals of the relative merits of societies is largely transmitted through families, schools, churches, and the mass media, a philosophical ranking of constitutions is clearly **more culturally and temporally specific** than a material wealth-based ranking.

- a. Although the particulars of material welfare also change through time, additional income or tradable wealth always help to advance material welfare broadly, because additional wealth can be used to advance many interests. Refinements in one theory of the good society do not generally expand opportunities for other theories.
- b. The importance of culture in constitutional design allows the possibility that broad variations in assessments of alternative constitutions may affect constitutional design at a given moment in time.
- c. Variation through time allows the possibility that “constitutional fashions” may influence the design of real and ideal constitutions as conceptions of “proper governance” change for a generation or two.
 - ♦ (Consider, for example, the impact of the liberal, progressive, socialist, and green visions of the good society).
 - ♦ The evolution of social norms is one reason why constitutions tend to change and should change given a contractarian perspective, even if no significant technical improvements have occurred in constitutional design or understanding per se.

II. Tradeoffs among General Constitutional Ends

For a considerable range of constitutional design, little or no tradeoff exists between promoting prosperity and attractive societies.

A. Many norms have evolved through time as part of the overall system that makes up prosperous democratic societies.

- i. Essentially no conflict exists between the work ethic, honesty, duties to honor promises, duties to vote, and prosperous societies.

⁶ It bears noting that one can easily **overestimate** the importance of broad norms in policy and constitutional decisions, if one simply takes account of the extent to which such norms are used in public debate. Many arguments based on “equity” considerations are used by individuals who expect to *benefit materially* from greater equity. In such cases, there may be a difference between what is said and the true motivation for a political agenda. Many general normative propositions about governance can be based on self interest. For example, Congleton (1997) points out that the principle of equal protection of the law may be based on self-interest grounds in a setting in which considerable uncertainty exists about whether one will be in the majority or not. However, normative rhetoric can only be effective if at least a few persons are influenced by the normative arguments constructed.

- ii. Frey and Stutzer (2000) suggest that, adjusted for income, citizens are happier under direct democracy.
 - ♦ The estimates of Feld, Savioz, and Marcel (1997) complement those of Frey and Stutzer by suggesting that direct democracies are more prosperous than indirect ones.
- iii. In other cases, tradeoffs may be smaller than one might have expected. It bears noting that the tension between distributional justice and prosperity is not inherent in nature, but rather a consequence of philosophical or cultural norms.
 - a. A society that regarded marginal productivity or contribution as the proper basis for distributing income would not see a significant conflict between distributional justice and economic efficiency.
 - b. Contractarian normative theories define efficiency by agreements to social compacts, which necessarily take some account of distributional implications of the fundamental rules governing society.
- iv. However, cases clearly exist in which assessments of the good society conflict with those of the prosperous society.
 - a. For example, egalitarian theories of distributional justice conflict with the production of wealth, because the implementation of egalitarian ends tends to undermine the incentive structure, which motivates material production.
 - b. Most modern policy debates about environmental quality are not really about the desirability of environmental quality, but rather about the proper tradeoff between environmental quality and prosperity--and the nature of those tradeoffs.
 - ♦ Most would agree that a poor society in a barren wasteland is less attractive than a rich society with a thriving natural environment.
 - c. In a society in which normative intuitions favoring equality conflict with a general interest in prosperity, the tradeoff between the good and the prosperous society will naturally be addressed constitutionally or through public policy in the ensuing polity.
 - ♦ That is to say, any **perceived** equity efficiency tradeoffs that exist are bound to affect policy and institutional choices.

B. The question at the constitutional level remains: would all the affected parties have agreed to a particular characterization of constitutional ends?

- i. The contractarian interpretation of popular sovereignty implies that in areas in which no durable consensus exists—whether on the characteristics of the good society, on the extent to which particular legal arrangements facilitate economic prosperity, or with respect to tradeoffs between them—no constitutional decisions should be made.
- ii. In such policy areas, constitutional voters can only “agree to disagree” and leave such matters to be decided by ordinary politics under the constitution.

III. The Necessity of Self-Enforcing Constitutions

A. A contract that specifies common goals and establishes an organization powerful enough to advance them is not generally sufficient to achieve them.

- i. A constitution that establishes a powerful government, but that fails to align the interests of policy makers with the common interests of the citizenry can easily create a ruling body, rather than a public agency, a Leviathan, rather than a good government.
 - a. The danger of creating a powerful organization to advance collective ends is clear. As an organization with the power to create and enforce laws, every government, even constitutional ones, is in a position to enslave as well as to empower the citizens that it is supposed to serve.
 - b. The large number of poorly functioning governments around the world, many of them formally “constitutional,” clearly demonstrates the risk associated with failures to align the interests of those charged with making policy with those who will bear the consequences of those policies.

B. Fortunately, for the purposes of the present class, the effectiveness of constitutional means can be analyzed and appraised more easily than the ends themselves.

- ♦ Many of the procedural problems to be solved are general ones associated with political agency problems common to a broad range of alternative collective ends and tradeoffs.
- ♦ Just as the incentives created by contracts can be analyzed without substantial knowledge of specific contract details, the extent to which constitutional procedures are incentive compatible can be analyzed without knowing much about the details of particular constitutional aims.

Chapter 8: Procedural Methods and Constraints for Parliament

A. Electoral Competition as a Method of Aligning Government and Citizen Interests

- a. Once a governmental organization exists, it is clear that competition to control that organization will occur.
- b. Political control allows individuals to achieve fame and fortune as news coverage and material goods and services are drawn to those in power.
- c. Even without fame or fortune, many will devote significant energy to obtaining the power to make public policy.
- d. That is to say, political power is a scarce economic good valued both for its own sake as a means for advancing one's own interest in personal wealth and the good society.
- i. The greater the prize, the greater will be the willingness of contestants to invest resources and make other sacrifices in pursuit of posts at the top of the political hierarchy.
- ii. Once power is obtained, it can be used to reduce the effectiveness of the efforts of potential competitors in many ways, although ruling parties can never completely eliminate potential competitors.

- a. History is filled with both fascinating and horrible stories of competition among bold, brave, and devious individuals who seek to rule nations.
- b. Competition is often intense as family, fortune, and life itself have often been risked and lost in the pursuit and defense of positions of power within governments.
- iii. Constitutional design cannot eliminate this intense competition for positions of public power, but it can encourage specific kinds of competition that broadly align the interests of the political rivals with those of the common interest.
 - a. For example, early European constitutional documents replaced the unrestricted accession to top positions through coups d'etat and civil wars with formal rules governing royal succession and with constitutional monarchy.
 - b. Such reforms reduced the general deadweight loss from the competitive process of securing the power to govern.
 - c. Because threats from other family members were only a subset of those previously faced, constitutional monarchies also tended to be more stable than the regimes they replaced.
 - d. Increased stability made a longer planning horizon worthwhile for rulers and their supporters. This tended to improve somewhat the alignment of the interests of the rulers and their subjects.
 - e. Dynasties have an interest in long-run economic development of their domains that short-term rulers do not.⁷
- iv. The subsequent replacement of constitutional monarchies with parliamentary governments increased competition for high government office.
 - a. The specific form of competition encouraged, namely electoral competition, tended to align the interests of rule makers more broadly with those affected by the rules, its citizens.

⁷ Tullock (1987), Olson (2000), and Wintrobe (1998) point out that kings and dictators have an interest in their subjects to the extent that the tax base can be increased or probability of overthrow can be reduced by improving citizen welfare. They also agree that the more stable a dictatorial regime is and the longer its planning horizon is, the better are prospects for long-term economic growth within a dictatorship.

- b. Although generally superior to constitutional monarchies, parliamentary systems by themselves do not guarantee that the broad interests that justify constitutional governments are advanced.
- c. For example, a first-past-the-post majoritarian system for selecting members of parliament assures that the interests of at least 25 percent of the electorate are advanced by parliament (0.5 in each district times 0.5 of the districts as required for a majority coalition).
- d. A well-functioning PR system for selecting members of parliament does better than this, insofar as the party preferences of most voters are directly represented in parliament, but still only assures that a majority of the voters voting for qualifying parties necessarily considers the policies of the current government to be superior to those of the opposition.
- e. Minority interests would only necessarily be advanced in policy areas in which their interests are essentially the same as that of the majority.
- v. However, even in these worst case settings, contractarian normative theory generally implies that parliaments elected by open and fair elections are superior to otherwise similar constitutional monarchies and to unrestricted dictatorships.
- vi. Essentially all citizens can expect to do better under electoral procedures for selecting policy makers than under the genetically based ones of constitutional monarchies or the violence-based ones of accession to unrestrained dictatorships, other things being equal.

B. The contractarian rationale for ranking parliamentary democracy over dictatorship in these worse case scenarios can be developed as follows:

- i. The interest of even a secure dictator or king in the welfare of all his subjects is not great.
 - a. Within the Olson, Tullock, and Wintrobe models, the dictator's most preferred outcome is the complete subjugation or enslavement all those within his domain.
 - b. It is clear that such an "efficient" kingdom may be prosperous without most subjects enjoying significant fruits from their labor. (A less confident regime

- may find that reducing the income of some groups—especially that of likely opponent—is to its advantage.)
 - c. It is quite possible that a king can retain power as long as the "elite" of the kingdom benefits from the "king's favor."
 - d. **In this case, the encompassing interest of the king extends only to the most powerful 1 percent of his subjects.**
 - ii. In contrast, the government of a parliamentary democracy will need much broader support to retain power.
 - ♦ In order to secure this minimal support, a parliamentary democracy normally advances the interests of at least 25-50 percent of the electorate—depending on election laws, as developed above.
 - iii. From behind a veil of ignorance, a person who does not know whether he or she would have the king's favor or be a member of the majority coalition is in a position similar to a person buying a lottery ticket.
 - a. An even moderately risk-averse voter would prefer a 25 percent chance of receiving the fruits of membership in a majority coalition to a 1 percent chance of receiving a prize twenty-five times as large from the king.
 - b. Consequently, in the case where a king-dominated government generates the same income level as a parliamentary democracy, risk aversion implies that *parliamentary democracy is unanimously preferred to monarchy* by self-interested risk-averse citizens, because it generates higher expected utility, after accounting for risk.
 - iv. Of course, other things are not equal. Insofar as parliamentary democracies manage to increase national income and provide stronger civil liberties over those of dictatorships, as those in the West have, or democratic ideology is broadly believed by a nation's citizenry, this lean contractarian case for parliamentary democracy **can be further strengthened.**
 - ♦ (See Congleton [1992, 1997] and Olson [1993] for an explanation of the superior economic performance of democracies).