

Part II: Perfecting Parliament

Chapter 7: A Digression on Popular Sovereignty and Good Constitutions

I. Accessing the Relative Merits of Constitutions

The first part of this book has used a broad range of public choice and economic theory to interpret Swedish constitutional experience. Although the analysis has made several modest extensions of core theories, it has generally used well-established tools, referred to well-established (if not always fully accepted) results, and focused on well-known constitutional events. CPE suggests that changes in the constitutional setting can have broad and enduring effects on national politics and thereby on public policies. Swedish economic and political experience provides many instances of such effects.

We now focus attention on the relative performance of alternative constitutions. The aim of the present chapter is to provide a contractarian framework based on popular sovereignty for evaluating alternative democratic constitutions. Subsequent chapters in part II of the book use that framework to discuss how democratic constitutions can be perfected. Not all democratic constitutions clearly are equally effective at advancing the broad interests of those who live under them. Part III of the book will apply the normative analysis developed in part II to the Swedish experience. If constitutions have different effects that can be systematically evaluated, we need to determine whether a good constitution can be improved.

It must be acknowledged that the positive analysis of constitutions that occupied the first part of the book is inherently less controversial than the normative one that occupies us for the remainder of the present volume. Positive analysis may be controversial, insofar as it strays from accepted methods, theories, or historical facts. However, positive controversy is often a good thing. 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.

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. Indeed, disagreement about the relative merits of alternative policies is one reason why institutional arrangements for collective choice are necessary and important. Even if everyone agreed about what good policies look like, disagreement would still exist on priorities. Moreover, disagreement on policies or institutions are not simply the result of applying different normative criteria. Policies and institutions are generally not ends in their own right, but rather are adopted because of their anticipated effects. Consequently, disagreements on positive policy consequences also have normative consequences.

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. This makes normative analysis of constitutional design inherently more controversial than the positive analysis of constitutional consequences. Nonetheless, normative analysis is clearly necessary if we are to appraise the relative performance of alternative constitutions.

The normative theory developed in part II of the book is built on the relatively uncontroversial notion of popular sovereignty that informs nearly all modern constitution design. 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 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. 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.

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. And, the rational choice perspective suggests that such an evaluation can be carried out in a systematic fashion. The aim of the normative discussion developed in part II of the book is to produce a series of normative rules of thumb that can readily be applied to assess alternative constitutions for parliamentary democracies. 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 book. The analytics underlying the discussion are briefly sketched out in various footnotes. Although much of the analysis will seem familiar to those working within the constitutional political economy tradition, a good deal of it is new.

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. The best known of the early efforts is Aristotle's *The Politics* (1600/330 B.C.), which is based on an extensive analysis of 158 constitutions of Greek city states. The wide range of historical, legal, and political analyses of constitutions in the intervening two millennia are too numerous to recount properly here. The rational choice-based analysis of constitutional design is relatively new, and the literature is relatively small. 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. They showed, for example, why the best voting rule tends to vary with the durability and urgency of policy choices at hand.

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. Several recent books have summarized those contributions, and extended the rational choice-based

analysis of alternative constitutions. 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. 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. That wider vision of rational choice allows them to analyze how norms may affect behavior inside and outside politics, but in the end they conclude that institutions should generally be designed to economize on virtue. 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.

What is new in part II of this 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. 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.

As will be shown below, history demonstrates that parliaments can be improved as instruments for advancing common aims. 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.

II. Constitutional Norms

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. All formal constitutions essentially include language that specifies legitimate procedures by which the current constitution may be amended. 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.

For example, a parliamentary democracy that allows any legislative majority to amend the constitution implicitly ranks constitutions according to the interests of the present majority of those elected to parliament. Insofar as the behavior of elected representatives tends to advance the interests of those who voted for them, it may be said that any constitutional reforms that come to be adopted, advance the interests of a majority of the present electorate. However, all that is formally required under such a process is that a simple majority of the present legislature prefers a new constitution to the previous one.¹

¹ Under plurality/majority selection of single district representatives, a majority of representatives may advance the interest of a bare majority of the voters in their districts. In the worst case, this implies that reforms adopted by a majority of a unicameral legislature may advance the interests of as few as 25 percent of the those who cast votes.

Under PR, votes in parliament are in proportion to voter support, so the only voters who

Many constitutions incorporate norms that use supermajority support to rank alternative constitutions. 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). 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.²

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.

However, all majority and qualified majority procedures for ranking constitutions implicitly discount the constitutional interests of minorities who oppose proposed constitutional reforms. 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.” Nonetheless, it is also clear that modern constitutional designs generally use broad electoral support as the constitutional norm for ranking alternative constitutions.

III. Popular Sovereignty and the Contractarian Perspective

To say more about the relative merits of alternative institutions than what is implied by rational decision making under a particular amendment procedure requires a more general methodology for appraising the merits of alternative constitutional designs. A general normative theory should, at least in principle, be independent of particular constitutional procedures. Otherwise, comparisons among alternative electoral institutions will be impossible, linked to a particular constitutional history, or at least muddled. 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. Moreover, the possibility of majority cycles implies that such a norm can yield confusing (intransitive) rankings of constitutional arrangements.³

are totally neglected are those voting for parties who fail to reach the participation threshold. However, to the extent that votes for unsuccessful parties are cast, but fail to generate representatives, the parties in the majoritarian coalition may represent fewer than 50 percent of those voting in national elections.

(Of course, it is rarely the case that all persons qualified to vote actually cast votes under either PR or plurality systems.)

² See <http://www.uni-wuerzburg.de/law/> for an extensive compilation of national constitutions.

³ 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

A broad range of general tools for consistently evaluating the effects of policies has been developed by economists, but relatively little attention has been directed to ranking alternative constitutional arrangements. 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. A smaller group of political theorists have used analytical normative theories, which are closer in spirit to those used by economists. They attempt to rank constitutions in a general way by analyzing the effects of constitutions on the well-being of individuals. This may be said of the familiar utilitarian and contractarian approaches to public policy and constitutional analysis.⁴

The analytical and intuitive approaches overlap to a greater extent than is often appreciated. Analytical norms have to have significant intuitive appeal to attract much attention. 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. Popular sovereignty is, of course, a normative intuition: that the legitimacy of the government emerges from “the will of the people.”⁵ The contractarian perspective regards constitutions as contracts designed to advance the interests of all who will live under them. Conversely, analytical normative analysis has to take account of the normative intuitions of the persons affected by alternative constitutions to properly rank constitutions.

The practical significance of the contractarian approach is clearly evidenced by the numerous constitutions that explicitly mention the connection between constitutions and popular sovereignty. 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.” The current Swedish constitution (Instrument of Government) begins with “All public power in Sweden proceeds from the people.” 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, 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.*

⁴ See for example Rawls (1971), Buchanan (1975), or Mueller (1996). Swedish precursors to modern contractarian analysis include Wicksell (1896) and Lindahl (1919)

⁵ Gordon (1999, ch. 1) attributes the idea of popular sovereignty to Rousseau.

this Constitution.” 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.⁶

Such interests will include the broad characteristics of the “good society” as well as narrow material interests. 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. 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.

A. Contractarian Analysis and Unanimity

The contractarian conception of popular sovereignty is, perhaps surprisingly, largely independent of the particulars of constitutional procedures. 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.⁷ 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. 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. 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.⁸ Consequently, there is no necessary connection

⁶ 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>.)

⁷ To consummate a social contract, it is clear that all signatories to the constitution have to anticipate being better off under its rules than under the alternative. The contractarian approach, thus, suggests that all constitutions and constitutional reforms should, at least in principle, advance the interests of all citizens who live under its rules.

between contractarian normative theory and the decision-making procedures used to select ordinary policies.

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.⁹ 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. 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*. Contractarian analysis begins with unanimous agreement, but it does not end there.

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. 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.¹⁰

⁸ 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.

⁹ The modern contractarian defense of majority rule was first developed in Buchanan and Tullock (1962). Of course, the idea of a social compact is much older than this, with post-enlightenment roots in the work of Thomas Hobbes and John Locke. Aristotle’s *Politics* provides a much earlier analysis of the properties and merits of alternative political constitutions, although his analysis is not a contractarian one.

The Swedish instrument of governance adopted in 1809 is surprisingly consistent with the contractarian perspective, insofar as it required constitutional revisions to be unanimously agreed to by the four estates and the King. (The individual estates generally used majority rules to pass on legislation.)

¹⁰ 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.

B. Contractarian Analysis and Constitutional Reform

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. 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.

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; for example, if no revisions to the constitution exist that can yield laws that make essentially all citizens better off. 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. 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.

IV. Constitutional Ends

Most day-to-day politics takes place at policy margins where both experts and ordinary citizens disagree about means and ends. Constitutional design needs to take such conflict into account, but it should begin with areas of shared interests, for which

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 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.

agreements can be broad. There are both constitutional ends and constitutional means to those ends.

A. Good Constitutions Promote Prosperity

One area of life in which shared interests can be advanced by government is material welfare. Essentially all citizens, even monks, prefer greater material wealth to lesser wealth. Material wealth contributes to human comfort and development in many ways that are well recognized. Other things being equal, a larger and more comfortable residence is preferred to a smaller one (be it a yurt, apartment, house, or monastery). More nourishing and tasty food is preferred to less nourishing and tasty food. 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.

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.

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.

Economic analysis of the law has resulted in a number of general and long-term legal or constitutional proscriptions for increasing prosperity. For example, prosperity tends to be increased as tradable property rights in real property and services are created and enforced. The development of long-term capital formation is enhanced by enforcement of long-term contracts and stable regulatory environments. Long-term development is also promoted by protecting entrepreneurs and others from confiscatory policies by governments (the takings clause in most constitutions). 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.

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. See, for example, Posner (1977) or North (1990); indeed, some evidence exists that nearly any stable constitution is better than the absence of a constitution. 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.

B. Good Constitutions Promote the “Good Society”

For most persons, especially in wealthy societies, a ranking of constitutions involves more than estimates of one's own material well-being. In addition to material welfare, most modern persons would also use broad procedural and equity norms to assess constitutional alternatives. 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. They would do so even if their material wealth was somewhat reduced by such equal protection of the law. Most persons also favor at least modest redistributive or social insurance programs. Such programs may increase the number of persons living in poverty and reduce average income, but make poverty less onerous and less ugly.

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. The embodiment in constitutional goals and public policy provide (subjective) benefits to citizens in much the same way that material goods do. 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.

Constitutions can clearly be ranked according to the extent to which they advance or undermine generally held norms about governance or society at large. 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.¹¹

The effects of philosophical and other broad methods of appraising constitutions have clearly been important historically. 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. (Although, as it turns out, Western

¹¹ 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.

However, it bears noting that such normative rhetoric can only be effective if at least a few persons are influenced by the normative arguments constructed.

Moreover, many general normative propositions about government 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.

democracies have done well at promoting and sustaining economic prosperity.) 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.¹²

To the extent that “general” 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. 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.¹³

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. 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.¹⁴

V. Tradeoffs among General Constitutional Ends

For a considerable range of constitutional design, little or no tradeoff exists between promoting prosperity and attractive societies. This partly reflects the fact that many norms have evolved through time as part of the overall system that makes up prosperous democratic societies. Essentially no conflict exists between the work ethic,

¹² For example, the first article of the Swedish constitution of 1975 states that “Swedish democracy is founded on the free formation of opinion and on universal and equal suffrage. It shall be realized through a representative and parliamentary polity and through local self-government. Public power is exercised under the law” (Holmberg and Stjernquist 1996, *The Swedish Constitution*).

¹³ This may be one reason why discussing distributional matters generally makes economists uncomfortable.

Yet, it is clear that distributional matters affect perceptions of personal welfare. Here one may point to evidence supporting the relative income hypothesis (Frank 1985) and to evidence noted above (Frey 1997) that some systems of governance are preferred to others, other things being equal.

¹⁴ The point here is that constitutions should advance the long-term interests of those who live under them, as those interests are presently understood. Mueller (1996) following Jefferson makes a case for revising constitutions once a generation. However, the modest reforms observed for relatively long periods in nations in which constitutions may be easily amended, as in Great Britain and Sweden, suggest that the long-term interests in fundamental parliamentary procedures are more durable than this.

honesty, duties to honor promises, duties to vote, and prosperous societies. As noted above, the Frey and Stutzer (2000) results 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.

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 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. Contractarian normative theories define efficiency by agreements to social compacts, which necessarily take some account of distributional implications of the fundamental rules governing society.

However, cases clearly exist in which assessments of the good society conflict with those of the prosperous society. 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.

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. The range of personal assessments of the good society and its importance relative to material well-being, along with economic and other constraints, largely determine what can be agreed on. Variation among communities and within communities through time makes a general analysis of such tradeoffs problematic and can be an important determinant of the proper scope of a constitution, insofar as it reduces prospects for agreement. Disagreements about the relative importance of generally accepted goals appear to be more commonplace than ones concerning the goals themselves. The desirability of prosperity and justice per se is widely accepted.¹⁵

The question at the constitutional level remains: would all the affected parties have agreed to a particular characterization of constitutional ends? 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*. In such policy areas, constitutional voters can only “agree to disagree” and leave such matters to be decided by ordinary politics under the constitution.¹⁶

¹⁵ For example, 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. Most would agree that a poor society in a barren wasteland is less attractive than a rich society with a thriving natural environment.

¹⁶ It is possible that material policy ends affect the selection of political theories. For example,

VI. The Necessity of Self-Enforcing Constitutions

The general ends that might be advanced by collective action provide a mutual interest rationale for undertaking collective action; formalizing agreements about such mutual interests may yield a written social contract. But a contract that specifies common goals and establishes an organization powerful enough to advance them is not generally sufficient to achieve them. 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.

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. 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.

A social contract has to do more than formally state the common ends to be advanced through collective action. It also has to specify procedural methods and constraints sufficient to assure that those ends are, in fact, likely to be promoted by government action.¹⁷

Fortunately, for the purposes of the present volume, 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.

some persons may be drawn to a particular philosophical theory because it provides a grand justification for behavior that they want to engage in as a method of advancing their own material interests. Here one may consider a poor person’s orientation toward egalitarianism, the attraction that a belief in fate for the winners of life’s many lotteries or the appeal that “marginal product”-based theories of justice hold for the talented or well paid.

Such material interests also may allow a political party to transform society gradually by changing its distributional norms or its distributional programs. That we all know of talented egalitarians and poorly paid proponents of marginal product distributional theories (or “just deserts”) suggests that these connections are far from automatic, but the issues are worthy of further research.

¹⁷ The agency problems faced by citizens have long been a topic of interest to political theorists as Gordon’s (1999) book recounts at some length. Analysis of those problems using the tools of microeconomics began with the Tullock (1965), Niskanen (1971), and Breton and Wintrobe (1975) analyses of bureaucracy. See Dixit (1998) for a readable, but penetrating overview of a variety of agency problems in governance.

However, political compacts differ fundamentally from incentive problems faced in ordinary private contracts, even self-enforcing ones. No outside legal system can be expected to enforce the terms of a constitution. Every social compact has to be completely self-enforcing if it is to advance the common ends that justify the governmental enterprise.

Chapter 8: Procedural Methods and Constraints for Parliament

Most contractarian analysis focuses on broad questions of the origins and legitimacy of governance and the proper scope for government as an agent of the people.¹⁸ The previous chapter provides a brief overview of normative methods of analysis and briefly explored broad constitutional issues to provide a systematic foundation for the present analysis. In this chapter, we use the contractarian normative framework to address issues regarding democratic government in general and parliamentary arrangements in particular.

Parliamentary government is one of the most widely used methods of organizing democratic governance and continues to be a broadly appealing institutional arrangement, as demonstrated by the large number of new parliamentary systems that have been established in recent decades. However, the parliamentary template has been evolving through time. Even long-standing parliamentary systems are often reformed as political opinions and circumstances change. The major Swedish constitutional reforms of the last two centuries involved substantial changes in parliamentary procedures and constraints. Many other European and non-European

¹⁸ Contractarian theorists often conduct their analysis in an imaginary setting in which no government exists. In this case, the alternative to a social contract is some hypothetical state of nature, often the unpleasant Hobbesian anarchy. (“Whatsoever, therefore, is consequent to time of Warre, where every man is Enemy to every man; the same is consequent to the time wherein men live without other security than what their own strength and invention shall furnish them withal. In such condition . . . the live of man [will be] solitary, poor, nasty, brutish, and short.”) It is clear that nearly any social contract, even Leviathan, may be an improvement if the initial state is so inhospitable.

The role of uncertainty in facilitating constitutional agreements is also stressed in contractarian normative theories (see, for example, Buchanan and Tullock [1962] or Rawls [1971]). If those making constitutional choices can better predict the average result of a constitutional reform than predict their own narrow self-interests, not only do the individual decisions become more encompassing in the Olson (1990, 2000) sense, but estimated advantages and disadvantages tend to become more similar, which itself facilitates broad agreement.

However, applied to modern democratic states, contractarian logic implies that amendments or constitutional revolutions should be judged relative to the existing constitutional setting, rather than anarchy. Rather than ask whether a constitution or social compact makes one better off than a state of anarchy, one should ask whether a new constitution (normally an amendment of the existing one) is generally expected to yield better policies and, therefore, private lives, than the existing one. See, for example, Buchanan (1975, ch. 5). This approach is taken throughout the present volume.

nations have also substantially revised their parliamentary procedures and constraints. For example, the British, Danish, and Dutch bicameral parliaments of the nineteenth century also extended suffrage and reduced the relative power of royal families substantially during the last two centuries in a manner broadly similar to that in Sweden.¹⁹ Interest in perfecting parliamentary systems clearly extends well beyond Sweden.

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

Once a governmental organization exists, it is clear that competition to control that organization will occur. Political control allows individuals to achieve fame and fortune as news coverage and material goods and services are drawn to those in power. Even without fame or fortune, many will devote significant energy to obtaining the power to make public policy. 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.

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. 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. History is filled with both fascinating and horrible stories of competition among bold, brave, and devious individuals who seek to rule nations. 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.

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.

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. Such reforms reduced the general deadweight loss from the competitive process of securing the power to govern. 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. 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. Dynasties have an interest in long-run economic development of their domains that short-term rulers do not.²⁰

¹⁹ See, for example, Conacher (1971) for an overview of major British parliamentary reforms in the nineteenth century, most of which involved significant extensions of suffrage. Brief histories of the last two centuries of Danish and Dutch constitutional reform can be found, respectively, at <http://www.um.dk/english/danmark/danmarksbog/kap1/1-9.asp> and <http://www.hri.ca/forthecord1997/documentation/coredocs/hri-core-1-add66.htm>.

²⁰ Tullock (1987), Olson (2000), and Wintrobe (1998) point out that kings and dictators have

The subsequent replacement of constitutional monarchies with parliamentary governments increased competition for high government office. 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.

Under a democratic parliamentary system of governance, the principal architect of policy is the prime minister, who is chosen indirectly by an elected parliament. Competition among rival persons and parties for membership and control of parliament assures that each party or member's interest is aligned to some extent with a large supporting group of individual voters. To continue in power, members of parliament have an incentive to replace a prime minister any time that his policies systematically reduce the welfare of their electoral supporters. A dysfunctional king cannot be so easily replaced. In this manner, a democratic parliamentary system aligns the interest of the principal policy maker with those of a broader public and allows for a relatively more speedy correction of policy mistakes generated by poor decisions than the constitutional systems that they replaced.

Although generally superior to constitutional monarchies, parliamentary systems by themselves do not guarantee that the broad interests that justify constitutional governments are advanced. 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). 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. Minority interests would only necessarily be advanced in policy areas in which their interests are essentially the same as that of the majority.

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. 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.²¹

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.

²¹ The contractarian rationale for ranking parliamentary democracy over dictatorship in these worse case scenarios can be developed as follows:

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

II. Improving Parliament through Constraints: the Rule of Law

Procedures for choosing public policies are often not sufficient by themselves to align the government's interests fully with those of the broader interests of its citizens. For example, most mechanisms of collective choice can be expected to neglect the interests of those not directly represented in the government's calculations. Such imperfect procedural methods can be made more broadly acceptable to a citizenry by constraining the domain in which those procedures may be applied. In this manner, contractarian logic implies that both a properly constrained monarchy and a properly constrained parliament are better forms of governance than their unconstrained counterparts.

The most general of these constraints requires government itself to abide by the law, that is, to follow the terms of the constitution.²² Constitutional governments cannot ignore the constitution by which they are formed, nor can they revise them, except as specified by the constitution. Only slightly less fundamental to constitutional governance is the principle that all laws be general in nature and uniformly applied to all within the polity. The "rule of law" implies that a specific activity is a crime whether it is performed by nobles or peasants or by Social Democrats or Conservatives. It also implies that governmental regulations apply to

their labor. (A less confident regime may find that reducing the income of some groups—especially that of likely opponent—is to its advantage.) It is quite possible that a king can retain power as long as the "elite" of the kingdom benefits from the "king's favor." In this case, the encompassing interest of the king extends only to the most powerful 1 percent of his subjects.

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.

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. 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. 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.

Of course, insofar as parliamentary democracies manage to increase national income over that of dictatorships, as those in the West have, or democratic ideology is broadly believed, 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).

²² Often getting a king to agree to follow the procedures set out in constitutional law is itself regarded to be the major accomplishment of a new constitution. This may be said, for example, of the English constitution of 1689, the Dutch constitution of 1815, the Swedish constitution of 1809, the French constitution of 1830, and the Japanese constitution of 1889.

those inside and outside government alike. A tax applies to all regardless of one's familial or political affiliation.

The contractarian case for the rule of law is based on a number of its properties, which advance constitutional ends. The rule of law tends to promote material welfare by generally reducing risks faced by prospective entrepreneurs. The rule of law tends to advance general norms favoring equal or equitable treatment of persons. The rule of law also makes it more difficult for a king or a majority to punish their opponents by legislating narrow laws that only apply to such persons or groups, which reduces the downside risk associated with all forms of government. Moreover, insofar as the government has to live under the rules created, the rule of law helps to align the interest of government with that of its subjects or citizens.

Overall, a government that abides by the rule of law will adopt laws that better advance the general interest and at the same time will be prevented from adopting laws that increase economic and political risks associated with monarchical and democratic governments. In this sense, contractarian analysis suggests that the law is an area in which no tradeoff will exist between egalitarian or equity norms and economic efficiency. Equal protection of the law is superior to unequal protection of the law, partly because *equality in this sense generally promotes material welfare*.

The merits of the rule of law have long been recognized by constitutional theorists and designers. For example, the right of due process under the laws is specified in both the British Magna Charta of 1215 and in the Swedish letter of privilege in 1319. More stringent limits on a government's ability to discriminate among its citizens have been adopted through time and are present in essentially all modern democratic constitutions, although they are not always followed.

Restrictions that laws be general and equally applied to all within a polity are especially important within democracies. In the absence of generality restrictions, ordinary electoral cycles in democratic governance would tend to be associated with radical changes in policy every time there was a change of government. The legal setting, the tax code, and the distribution of public services would tend to vary as successive majorities used the power of the state to advance their own narrow policy and material ends.

In extreme cases, a parliamentary majority might use its power to exploit legally or fiscally members of the opposition or all citizens not supporting the government. In such a worst case scenario, each majority would use the various powers of the state to transfer the minority's entire wealth to itself. In this respect, a parliament can behave in much the same way as an unrestricted monarch would, although the pool of those who potentially may be exploited is somewhat smaller. Such radical policy shifts associated with changes in governments would tend to reduce average prosperity by reducing incentives to work, save, and invest. In time, such policy shifts would undermine the appeal of democratic procedures, although each majority would secure a temporary advantage while in office.

The rule of law moderates such tendencies by making it more difficult for successive governments to use the power of the state to advance their own narrow interests.²³

Within such a democracy, all parties would agree to the adoption of the rule of law as a constitutional constraint, because all voters tend to benefit in the long run from restrictions that only general laws be written and applied. Of course, the rule of law does not eliminate the temporary advantage that a majority may realize in the short run by adopting discriminatory policies, it simply makes such policies more difficult to pursue by making many of them unconstitutional.²⁴

Chapter 9: Using Parliamentary Democracy to Advance the Majority's Interest

Majoritarian unicameral parliaments may be improved in a number of ways as political mechanisms for promoting the general interests of all who live under them. In this chapter, we explore how parliamentary procedures can be constrained in various ways to make it more likely that the policy choices made by parliament actually advance the interests of a majority of the citizens in the country of interest. For example, if majority voter interests are to be advanced, it is clearly important that elections for parliament be open, fair, and competitive. Beyond effective electoral oversight, parliamentary decision making can be improved through various constraints, such as the generality rule or direct referenda, which address policy-making dilemmas that can emerge in parliamentary systems elected through effective electoral competition.

In the next chapter, we analyze how parliamentary procedures and constraints can move governance beyond narrow majority rule. The contractarian interpretation of popular sovereignty suggests that broadening the interests advanced by government beyond those of a narrow majority often improves governance. Methods by which this may be accomplished include bicameralism, federalism, an

²³ From behind the veil, it is also clear that citizens would have an interest in avoiding unconstrained permanent majority coalitions or dynastic regimes. Although members of the majority benefit from the power to enact laws that favor their own interest, many such laws reduce average as well as minority wealth by undermining incentives for both the majority and minority to engage in wealth-increasing activities. (Both taxes and subsidies have deadweight losses associated with them.)

Insofar as individuals from behind the veil do not know whether they would be in the majority or minority, they would expect to benefit from rules that lower risks of “minority exploitation,” especially those that tend to increase average income. Contractarian logic, thus, supports governmental constraints, such as the rule of law and the generality principle, that increase average income while reducing its variance.

²⁴ For a more complete development of this line of reasoning, see Buchanan and Congleton (1998) or Congleton (1997). They demonstrate that “generality rules” tend to increase the stability of governmental policies based on majority rule within a wide range of policy areas.

independently constitutional review agency or court, and modifications of voting rules.

I. Assuring Open and Free Elections

Perhaps the most important problem to be addressed in a democracy is the fundamental tension between the general interest of a citizenry in open and free elections and the interest of those elected to office in using the powers of government to maximize their own chances of continuing in office.

On the one hand, the prospect of future elections can lead those elected to office to use the government's power in a manner that generates significant benefits for its electoral supporters. This beneficial effect of elections tends to align the interest of the government with that of a fairly broad constituency and is, of course, at the heart of the contractarian case for using elections to select governmental leaders. Candidates or parties should win election to office over less effective or less widely supported rivals, because they implement or are expected to implement policies that better advance the broad interests of the electorate—or at least a majority of that electorate.

On the other hand, the parties in power can also use state power to increase their chances for continuation in office without advancing the broad interests of the electorate or even necessarily a majority of the electorate. In the short run, open and fair elections are in the interest of the current elected government only if it expects to be safely reelected in such a contest. It is commonplace for the governments of poorly functioning “democracies” to postpone elections endlessly or adopt legislation that makes organizing an opposition party difficult. In extreme cases, a government may even outlaw such parties, while retaining other “democratic” procedures. Elections may take place, but no effective competition for elective office may occur.²⁵

Left to their own devices, many government officials would simply revise the electoral rules in a manner that allows the present government to retain power forever.²⁶ Consequently, an elected legislature or parliament requires *several* durable

²⁵ Such “electoral captures” have been commonplace in African and Asian polities for the past half century. Extreme examples in Europe include the “electoral captures” by Napoleon III in 1852 and the Fascist takeovers of Mussolini (1924) and Hitler (1933), all achieved within parliamentary systems. See, for example, Palmer and Colton (1965, pp. 477, 803, and 809.)

Any party that retains power for long periods of time—as in Mexico, Japan, and Sweden—may be suspected of using the power of the state to undermine the ability of the opposition to launch an effective campaign. Of course, such may occur from superior performance and trust, but methods such as gerrymandering, patronage jobs, and punishing regional opposition strongholds through reduced service levels have long been used by the legislatures of even relatively well-functioning democracies.

²⁶ The reader may recall that a great wave of democratization swept through Africa in the late 1950s and early 1960s as the colonial powers pulled out. In many cases, the colonial powers helped assure that the new governments were based on open and free elections. However, few of these constitutionally based “democratic” governments ever had a second election.

Although perhaps less blatant or harmful, similar efforts to manipulate electoral procedures are commonplace within “well-functioning” democracies as well.

constraints to assure that democratic procedures align the interests of government with those of a majority of its citizens.

For example, a democratic constitution might formally specify electoral procedures: an electoral cycle that can be changed only within narrow limits, the subset of national residents that are entitled to vote, and a voting rule by which governing candidates or parties are to be selected. In addition, a constitution should also specify a series of policy constraints designed to increase electoral competition. The constitution may guarantee rights of assembly, expression, and publication. Such constraints on the domain of legislation contribute to the effectiveness of democratic procedures by reducing the costs of organizing political parties and intensifying competition among candidates and parties for office by encouraging a free and open debate on relevant policy issues.

Such basic constraints on a government's ability to change or bias electoral procedures represent constitutional improvements from the contractarian perspective, insofar as they increase the long-run advantages that a nation's citizenry can achieve through parliamentary governance. Durable election laws and effective parliamentary procedures assure that governments have the informed support of a fairly broad portion of the electorate.

II. Transparency, Information Costs, and Voter Error

Once open elections are assured, it may be said that democratic policy making is ultimately grounded on voter estimates of the effects of policy alternatives on his or her own welfare—broadly interpreted to take account of both the voter's material interests and interest in the good society. Electoral rules determine the manner in which voters choose representatives and thereby the nature of electoral competition among candidates. Electoral competition pulls party platforms toward programs that a majority expects to advance their expected welfare.²⁷

Under plurality rule, the policies adopted tend to maximize the expected welfare of the median voter in the electorate as a whole. Under proportional representation, the policies adopted tend to reflect the interests of the median policy interests of the specific parties that control the government (recall figure 2). In cases in which the coalition spans the center of the left-right policy spectrum, those policies will also be fairly close to those preferred by the median voter.²⁸

²⁷ There is a theoretical question on whether or not any particular policy will emerge from an electoral system because of cycling problems associated with pure majority voting systems. Such problems are, of course, far less likely if candidates or parties may be mapped into a one-dimensional policy space—the left-right political spectrum. In Sweden, three of the five most durable parties name themselves after parts of the political spectrum, for example, the left, center, and moderate parties.

Even given a distribution of voter preferences on policies that tends to generate stable majoritarian electoral equilibria, the particular results that arise will vary by electoral system, as noted above, for PR and first-past-the-post systems.

²⁸ The explanatory power of relatively simple median voter models is striking. See for example Holcombe (1980), Congleton and Shughart (1990), or Congleton and Bennet (1995) for examples based on U.S. data.

It bears noting that appraising alternative policies is by no means an easy task. Some of this can be done fairly directly. Past experience with alternative policies allows voters to form expectations about the future effectiveness of alternative government policies and programs. This experience-based learning provides an electoral reward for good policies and for correcting policy mistakes based on the independent judgments of those in the electorate.

At the same time, a voter's direct experience is not generally sufficient to allow unbiased estimates of all the relative merits of many of the policy alternatives before the electorate. Only a few of the many possible policies that exist have recently been tried within a particular nation or even among similar nations. Appraising the merits of such alternatives will be difficult and take considerable time and energy on the part of voters (and policy experts). In such cases, voters are unlikely to have much direct information about the relative merits of alternative policies.

Rational ignorance is one consequence of the high costs of such policy information and the complexity of public policy. There are many policies and policy areas of which voters will choose to remain completely ignorant. Another is that even more- or less-informed voters will have to rely on indirect sources of information, not all of which are unbiased. For example, politicians and other policy advocates may strategically provide information to voters as a method of increasing the chances that their own preferred policy will be adopted or candidate be elected. It is commonplace for policy proponents to stress the benefits of their own preferred programs, while stressing the costs (and risks) associated with others.

Unfortunately, it is by no means clear that voters can properly filter out all the biases in the information provided. A wise and benevolent prime minister may be unable to persuade his voters of the merits of a wonderful public policy. A scoundrel with a gift for persuasion, but no talent for discerning effective public policy may do better in elections. Persuasiveness is clearly an important talent for all political leaders.

Just as a consumer's choice of an automobile is based on the broad outlines of the vehicle, rather than a deep understanding of the engineering that will actually determine its performance, voter choices of political parties are based on the broad outlines of policy, rather than an intimate knowledge of policy details. Competition among auto manufacturers keeps engineering standards high, and past reputation for delivering good products helps inform the choices of current consumers.

Competition among political parties is also intense and continuous. But consumers necessarily have less direct experience with alternative government

The organization of a legislature (cameral structure, importance of seniority, standing committees, and so on) may also have an effect on policy design and implementation. However, insofar as the party in power can determine how the parliament will be organized, those in power will tend to adopt an organizational structure that increases their chance of reelection. Even in cases in which the internal organization of the legislature matters, it may, thus, still be said that electoral competition ultimately determines policy if voters have access to good information about policies. Some of these questions are addressed in section C below.

policies than they have with alternative automobiles. “Test drives” are clearly more difficult, because only one policy can be implemented at a time. Relative performance, even in broad details, are more difficult to access than that of alternative automobiles. No readily observable track record exists for the policies not adopted. It is consequently more likely that voters (and policy makers) will make more mistakes regarding the merits of alternative public policies than regarding the merits of alternative private consumption decisions.²⁹

How well individual voters are able to understand the policy issues that are before them and to make sensible choices is partly a matter of their talent for information processing, partly a matter of the time available for such, and partly a matter of the cost and quality of information that they might gather and use.

It bears noting that public policies in a democracy are based on more than the average information possessed by voters at the time of the election. Many voters are likely to be well informed on a subset of policy issues, and it is only such informed voters who know enough to respond to variation in relevant candidate or party positions. Consequently, electoral outcomes are based on better information and are more responsive to voter interests than seems implied by the level of fiscal ignorance reported in surveys.³⁰

Institutional or other legal arrangements, such as freedom of the press, freedom of information laws, and requirements that all laws be published and broadly distributed can reduce the cost of obtaining unbiased (objective) information about

²⁹ The informational problem faced by voters is not entirely symmetric. To evaluate even the broad outlines of policy requires some general knowledge of the likely benefits and costs of alternative policies.

The benefits of alternative programs—a new train line, a new school, improved public health care, and such—are often easier to appraise than the cost of the program. The benefits are implicit in the services themselves; to understand the program is to understand what the typical benefits are. The costs of alternative programs are more difficult to assess, as these will work their way through the tax system to the individual voter's purse in a fairly indirect and complex manner. Such costs may be easily underaccessed, as many of them are essentially invisible. It can, thus, be said that, generally speaking, a natural predisposition favoring new public programs tends to occur, especially when times are good. See Buchanan (1966) or Congleton (2000) for more on the fiscal illusion hypothesis.

³⁰ However, it also bears noting that the voters with the greatest interest in candidate positions are those with a pecuniary interest in the details of government programs in addition to the more analyzed consumption interest. This form of pecuniary policy specialization by voters implies that *relatively* well-informed economic interest groups may determine the electoral process *without organized efforts* or implicit bargains struck on the provision of campaign contributions of the sort emphasized in the rent-seeking literature.

This characteristic of rational ignorance also suggests that models of policy formation, which focus on one or two fiscal services, rather than the entire fiscal menu have better microeconomic foundations than might have been thought. If voters are well informed about only a small subset of the issues before them, policy selections in many areas will be essentially independent of one another (see Congleton [2000] for an extended discussion of rational ignorance and fiscal illusion in democracies.)

current policies. This can potentially improve the performance of democratic governance by reducing policy mistakes.³¹

III. The Politicized Use and Interests of the Government Workforce

Elections that are free and open may still not be fair. Of special concern here are electoral advantages that potentially arise from incumbency. Incumbents generally have a much greater pool of resources at their disposal for use in elections as a consequence of their position at the head of government and, thus, are in a much better position to persuade voters of the merits of their own programs relative to others. Moreover, the resources of government can be used to purchase votes directly through hiring practices, targeted grants, and other narrow programs. These powers of incumbency tend to weaken electoral competition, thereby reducing the extent to which elections align the interests of policy maker with the broad electorate.

As noted above, the interest of every incumbent government differs somewhat from that of the common long-term interests of its citizenry. The interest of the party in power is largely in its own reelection. To the extent that reelection depends on the design and implementation of broad programs that advance the interest of the incumbent government's supporters, its interests may be said to be aligned with those of a majority of the electorate. However, to the extent that incumbents can use the various powers of government to manipulate information (or information costs) to improve its own organizational abilities or reduce the effectiveness of the political opposition, the interest of voters and the parties in power may differ.

The politicized use of the bureaucracy is one of the many vehicles by which an incumbent government may advance its electoral chances. Consequently, a government's direct interest in organizing or delegating authority to the bureaucracy is fundamentally based on what might be called political as opposed to administrative efficiency. The organizational question for an incumbent government is fundamentally, how might the bureaucracy be most effectively used to promote the government's own prospects for reelection? To the extent that the interests of the incumbent government are aligned with those of a majority of voters outside government, the bureaucracy will be organized to minimize the cost of delivering services broadly desired by the electorate. To the extent that interests are not aligned, the bureaucracy will be designed to increase the advantage of the incumbents relative to the opponents in a manner unrelated to the efficient delivery of public services.

It is clear that the bureaucracy provides incumbent parties with a number of opportunities for this sort of abuse of office. The self-contained nature of a bureaucracy makes it relatively more difficult for voters to monitor than parliament. This, in turn, allows the bureaucracy to be used to hide the special services provided to present and new party supporters, including jobs within the bureaucracy itself. For this reason, the government may organize the production of new services in a manner

³¹ The cost of policy-relevant information can be reduced by providing open access to as much policy information as possible by making policies and responsibilities completely transparent so that ordinary voters can make better policy assessment. This point is well developed by the so called "second Lindbeck report" (2000).

that creates many more jobs in the bureaucracy than necessary. Such services will not be provided at least cost, although “public support” may be broader than it would otherwise have been. Although the support garnered is clearly genuine, it is not based on the value of the public program to those served, but rather on the interest of government employees in their own income and job security.

The government may also use bureaucratic procedures or allocate personnel among regions to generate differentially better service for its supporters than for members of the public at large. It may reserve jobs within the bureaucracy for its supporters, both as a reward for past support and in exchange for promises of continued political support. It may attempt to expand programs in which supporters work and reduce those in which the persons favoring opposition policies tend to work.³²

Such employment practices also provide a means of ensuring that a government’s programs will continue in force after it leaves office to the extent that reshuffling the bureaucracy takes time. This is one instance of what has come to be called the time consistency problems (Glazer 1989). The parties in power may also encourage the bureaucracy to create specific kinds of information designed to make the government’s preferred policies look better.

Such methods of increasing the probability of reelection tend to conflict with the principle of popular sovereignty in that the politicized use of bureaucracy makes it possible for a government to retain power without necessarily providing significant government services to those outside government itself or beyond the party in power. That is to say, the government’s interests, rather than the general interest, tends to be advanced through such policies.³³

Preventing incumbent governments from using the bureaucracy to advance their own political agendas is not an easy task. Effective implementation of policy requires the incumbent government to exercise significant control over the bureaucracy. However, to the extent that politics can be removed from the bureaucracy while

³² Dahlberg and Johansson (1999) provide evidence that the Social Democrats used funds intended for environmental programs to build electoral support in marginal electoral districts. See Inman and Rubinfeld (1997) for a brief survey of additional evidence of this from U. S. studies.

³³ Popular sovereignty can also be undermined through an information bias that tends to emerge when government uses a single government agency to provide public services. The employees, whether political appointees or professionals, all share a common interest in higher salaries, greater opportunities for promotion, and accomplishment of agency goals. All these common interests tend to be advanced as the bureaucracy receives greater resources.

Consequently, the bureaucracy has an interest in program expansion that is independent of ideology or the bureaucracy itself or the particular political parties who control governance. To the extent that public agencies can use their monopoly position to lobby or insist on expanded programs, it is clear that the narrow interest of government employees may be advanced without necessarily providing services that advance the broad interests of the electorate. (Niskanen [1971] argues that in the end too many services are provided.)

preserving incentives for ordinary productive efficiency, the bureaucracy can be made a better agent of the common interest. In this manner, durable rules governing the use of the bureaucracy, as civil service reform, may improve democratic performance by constraining its use of government employees.

Constraining the politicized use of the bureaucracy can often be accomplished with little sacrifice of managerial control. For example, the easier it is for senior political figures or members of interest groups to secure bureaucratic posts because of their political affiliations and for bureaucrats generally to secure political posts within parties, the more politicized the bureaucracy tends to be. Those who work for government cannot be expected to be neutral on policies that affect future career prospects in political parties or within interest groups. Restricting the ability of politicians and bureaucrats to move between political parties and the bureaucracy reduces only slightly the pool of persons who may hold senior positions in both organizations, while breaking the strong political incentives that the “revolving door” creates.

Restricting a government’s ability to use bureaucracy as a narrow political organization tends to align the interests of incumbent parties and the electorate better by reducing the incumbent party’s advantage in electoral competition, and by encouraging the development of a bureaucracy that more uniformly provides services at least cost.

IV. Generality and Cost-Benefit Analysis: Avoiding the Fiscal Commons Problem

Given honest and fair elections, a well-informed electorate and a professional, efficient organization of bureaucracy, parliamentary government will function fairly well in the sense that its broad policies will tend to advance the interests of the voters who cast their votes for the parliamentary majority.

However, creating such a setting does not by itself guarantee that all the policies made by parliament will advance the interests of the voters supporting the majority government. The best of all legislatures may clearly be expected to make honest mistakes, because of the inherent uncertainty of policy analysis. In addition to such errors and of greater interest for the present purposes, policy errors may also be induced by the internal organization of the parliament itself.

Such problems may be regarded as constitutional in nature, insofar as they result from durable intraparlimentary decision-making procedures. For example, consider a setting in which all programs, including those with relatively narrow benefits, are to be funded from general government revenues. Suppose that programs to be funded are selected first and that tax revenues are then adjusted to support whatever programs are chosen. Under such a legislative system, many of the policies chosen will suffer from what has been called the “pork barrel dilemma” or the “fiscal commons” problem.³⁴

³⁴ A good cross-section of the fiscal commons literature is provided by Barry Weingast, Kenneth Shepsle, and Christopher Johnsen (1981); Thomas W. Gilligan and John G. Matsusaka (1995) and W. M. Crain (1999).

Table 7 below illustrates the basic logic of the fiscal commons dilemma. It depicts a choice between two regional projects, each of which generates net benefits for the region getting the project, because they are funded out of general revenues. For simplicity, the projects are assumed to be of equal aggregate value (3) and cost (4). Each region is also assumed to pay half of the cost of its project and to receive all the benefits; thus, each region gains 1 unit of value from its project and loses 2 units from the other. The table entries are the net benefits received by an average member of each region (A, B). Note that as long as region A is in a position to insist that its project be built, it benefits from doing so regardless of what region B does ($1 > 0$ and $-1 > -2$). Symmetry implies the same incentive for region B with respect to its local project.

Table 7
 Illustration of the Fiscal Commons Problem

		REGION B's Project	
		Don't Build	Build
REGION A's Project	Don't Build	(0, 0)	(-2, 1)
	Build	(1, -2)	(-1,-1)

Consequently, in political equilibrium, both projects or programs tend to be adopted. However, each would be better off if neither project were built because the total cost of the two projects together exceeds their benefits for each group ($1 - 2 = -1 < 0$).

It is important to note that the fiscal commons problem is not a problem that can be easily solved by electoral competition, especially when representatives are chosen by region (or party). Regional voters clearly want their own local projects as long as they are funded centrally. Voters in region A benefit if their own favored project is built and voters in region B benefit if theirs is built. No elected representative can refuse to pursue their own voters' preferred narrow programs if he or she wishes to be reelected in a setting with effective electoral competition.

However, although it is in the interest of each group to obtain their own project, it is clearly possible that the overall cost of all the narrow projects approved exceeds the benefits realized. In the case illustrated, all (the voters from both regions A and B) would benefit if none of the narrow programs were funded, although each would still rather have their own project funded than neither project funded—which is, of course, the reason for the dilemma. Magnified by thousands of projects, it is clear that significant policy mistakes can emerge from a legislative process in which projects are to be funded by general revenues and are to be selected using majority rule.³⁵

Escape from the fiscal commons problem requires either some form of constraint on the domain of majoritarian politics, as with the generality principle developed in Buchanan and Congleton (1998) or the application of an alternative decision-making procedure, such as cost-benefit analysis.³⁶ Without such constraints, majoritarian politics within parliament can fail to advance the interests of even its *own* supporters.

Chapter 10: Organizing Governance to Broaden Consensus: Beyond Majority Rule

The above refinements to parliamentary democracy can be regarded as constraints on the domain of policy choice that allow the electoral and legislative processes to function better as a method of aligning the interests of the government with the interests of a majority of electorate. We now analyze refinements to majoritarian parliamentary procedures and constraints that may broaden the appeal of representative democracy.

The contractarian case for constrained parliamentary democracy is not based on its “majoritarian” nature, but rather on the extent to which it may advance the broad interests of all those who live within the polity of interest. From a contractarian perspective, the advantage of majority governance over minority governments is simply that public policies will advance a broader range of interests. Other things being equal, essentially all parties would prefer majority rule to minority rule for a wide range of policy decisions, especially in cases in which some uncertainty exists about who would control government.³⁷ The question we now address is whether

³⁵ Borge and Rattsö (1999) provide evidence that the growth of local government spending was caused partly by a fiscal commons problem associated with minority governments.

The possibility of differentially benefiting from policy outcomes can also generate a deadweight loss, insofar as it attracts the energy and resources of regional interest groups. The cost of seeking special political favor, the rent-seeking cost, is present even in cases in which the lobbying efforts do *not affect policy*, but merely offset each other’s efforts. In such cases, all the resources devoted to the lobbying process may be regarded as a deadweight loss (Tullock 1967). All could potentially benefit from shifting resources from nonproductive (mutually offsetting) political activities into more productive public or private activities.

³⁶ For the benefit-cost analysis to work, some independent and objective organization is needed to estimate costs and benefits. Benefit-cost analysis requires a careful consideration of all program implications, but can be done in a manner that biases the results, especially regarding benefits. Often program costs are relatively easy to estimate and, therefore, more difficult to manipulate. In the United States, the Congress has created an independent agency, the Congressional Budget Office, to provide it with cost estimates for programs.

³⁷ The underlying contractarian logic favoring majority over minority rule can be illustrated analytically as follows. Consider the case in which 6 units of wealth is to be distributed through some voting procedure defined over three voters. If a minority of one can make the policy, the person in power might prefer (6, 0, 0) as an allocation. If a majority of 2 can make policy they might adopt (3, 3, 0). Both such divisions maximize the advantage of being in “government.” In the case in which the various majority and minority coalitions are all equally likely, the expected value of both decision-making methods would be 2 (e. g., $1/3 \cdot 6 = 2/3 \cdot 3$).

refinements to a well-functioning unicameral parliamentary democracy exist that would be broadly supported.

V. Protecting Minority Interests with Rights

Support for a constitutional framework can often be increased by providing explicit protection for minority interests. That is to say, given a choice between constitution R and constitution P, which have similar normative and material characteristics, constitution R will be widely preferred to constitution P, if the downside risk to minorities is smaller under R than under P in cases in which the advantages of being members of the majority are unaffected or reduced only modestly by R relative to P.

Many policy areas exist in which significant risks for minorities can be reduced at little or no cost to the majority. Modern examples include formal statements of individual rights to assemble, speak, and worship, as well as requirements that fair market prices be paid for all resources used in the production of public services. Given some uncertainty about whether one will be in a future majority or minority, broad support will tend to exist for rules that restrict the ability of the legislature to write laws in these areas, for example, for a “Bill of Rights.” Here, rights provide minority protections as a low-cost form of insurance that increases the expected welfare of essentially all those residing in the polity of interest. It is clear that both temporary and permanent minorities have an interest in constraining the policy choices of the majority.³⁸

The contractarian argument for a bill of rights is most general when voters are unsure about whether they will be in the majority or the minority, but also applies to some settings in which voters know exactly who will be in the minority at the time a bill of rights is being contemplated. For example, one case in which the contractarian case for rights that constrain majoritarian policies can be easily extended is that in which particular rights are widely believed to be features of *all* “good societies.” Modern examples of such rights appear to include universal suffrage, free speech, freedom of assembly and religion, and equal protection of the law—at least for those living in Western democracies. Such rights are widely regarded to be features of civilized society, in which “civilized” is used in its normative sense. In such a setting,

However, if voters are even slightly risk averse, they will prefer a 0.66 chance of 3 to a 0.33 chance of 6; thus, risk-averse voters who are uncertain about the makeup of majority and minority governments will prefer a well-functioning (and fair) majority rule to minority rule.

³⁸ The contractarian logic for minority protection is similar to that above. Note that if all majorities are equally likely and minorities are always guaranteed, some small share of the amount to be distributed, say 0.2, the feasible apportionments under majority rule become patterns such as (2.9, 2.9, 0.2) compared with (3, 3, 0) for the unconstrained majority. If the majority coalitions are equally likely, risk-averse voters would all prefer the more uniform distribution.

In cases in which protecting minority interests entails some cost—perhaps because of incentive effects, as is true for (2.8, 2.8, 0.2)—the extent of risk aversion becomes important. The less risk averse such voters are assumed to be, the less they would be prepared to extend costly forms of protection to minorities.

members of a permanent majority will agree to accept a small sacrifice of personal comfort or wealth to make society more attractive by protecting the “fundamental human rights” of its permanent minority.³⁹

VI. Federalism: a Better Majoritarian Procedure for Choosing Government Services

The procedures appraised to this point have been those that determined central government policies, and the constraints appraised have been ones that restricted the domain of central government policy making. This section analyzes the merits of a decentralized system of choosing public policies in which local and national governments are both able to choose public policies. This decentralized method of using majoritarian politics, which will be referred to as fiscal federalism or federalism, has the interesting feature that it tends to generate a pattern of government service levels that secures greater than majority support.

To see this, consider a constitution that called for local and national parliaments to be elected as above and specified areas of policy that would be entirely determined by the local parliaments. Such a “federal” system has several advantages of the previously analyzed unitary state. One advantage is that local electorates tend to be better informed about the effectiveness of local government programs and politicians than national ones, because they have more *direct experience* with both local programs and local administrators. Consequently, less research needs to be carried out by voters and results in local elections tend to be based on somewhat better voter information than those of national elections.

Other advantages of fiscal federalism over unitary governance follow from the fact that the cost of moving between local jurisdictions is generally lower than that of moving between national jurisdictions. Distances are smaller in both spatial and cultural terms. Consequently, voters tend to have a broader direct experience with alternative policies, which increases incentives to innovate and copy methods from relatively more effective rivals. Mobility also makes it easier for a minority to avoid bad outcomes from local governments than national governments. Moreover, mobility induces a bit of competition among local governments for residents and other mobile parts of the tax base. Mobility implies that “best practices” tend to become better through time.

³⁹ A contractarian case for creating rights or other minority protections can also be made for cases in which the minority is prepared actively to resist the policies adopted under the constitution in the absence of these protections. In such cases, the majority would offer constitutional protection as a means of reducing the deadweight loss that tends to emerge from such unproductive conflict. Protection of rights to freely worship in the church of one’s choice can be based on this logic in cases where there are large or numerous minority religions.

Other rights may also have a similar foundation. For example, some historians attribute the 1918/20 extension of the franchise to women and the elimination of the weighted voting system in Sweden to threats of widespread civil disobedience or even revolution by the Social Democrats, although this is discounted by Verney (1957, pp. 209-10).

See Mueller (1996, ch. 14) for another public choice-based discussion of the role of rights in a constitutional democracy.

Local electorates tend to be more homogeneous than national electorates for several reasons, including mobility among localities, differences in regional climate and geology, and shared history. The greater homogeneity of local demands for public services, regardless of origin, implies that more persons can get more nearly the exact balance of services in areas of local authority than is possible with uniform national provision of the same services. This feature of decentralized democracy tends to generate broad benefits for the electorate as a whole, including national minorities. A supermajority of the national electorate will prefer the pattern that emerges from decentralized policy making to any uniform level provided by the national government.⁴⁰

It also bears noting that local governments will find it more difficult to advance the interest of narrow special interest groups whose interests conflict with general local interest. Preferential policies are generally more difficult to hide at the local level, and mobility allows those disadvantaged by such policies to seek better treatment elsewhere. Moreover, the homogeneous makeup of smaller communities tends to provide fewer opportunities for preferential treatment (everyone cannot be treated better than everyone else).

Overall, these properties of fiscal federalism suggest that, in at least some policy areas, the interests of both “national minorities” and “national majorities” can be simultaneously advanced. Variation in service levels among communities, together with mobility and relatively lower information costs of policy information, encourage a better alignment of interests between the government and the population that is directly served at little or no cost. Federalism (or fiscal federalism), thus, provides a possible method of advancing the broad interests of the national electorate.⁴¹

In such policy areas, contractarian logic implies that fiscal federalism is clearly superior to centralized governance. Decentralization encourages a broader menu of services, which more perfectly serves the persons living in the communities served than any uniform national level of service can.

VII. Supramajority Decision Rules: Beyond Majoritarian Governance

The normative analysis to this point has focused exclusively on how a government that used majority rule to choose policies can be improved. The analysis to this point has provided a unified contractarian rationale for assuring that elections are fair and competitive, protecting minority rights, and decentralizing at least some decisions regarding local public services, and for depoliticizing the bureaucracy. The

⁴⁰ This is implied by Oates' (1972, ch. 2) proof of the decentralization theorem. His small book still provides one of the best overviews of the merits of federal systems of governance from an economic perspective.

⁴¹ Of course, not all government programs can be accomplished by local governments. Oates (1972) notes that broad macroeconomic policies and efforts to equalize incomes or opportunities for citizens within the nation as a whole cannot be easily done at a local level. Such truly nationwide policies would properly be decided by the central government. Any broad interest in equalizing incomes or opportunities across communities may be advanced with a system of equalizing block grants.

fundamental majoritarian decision-making procedures applied within parliament have been taken as given, that is to say, as a defining characteristic of (unicameral) parliamentary governance.

We now examine some nonmajoritarian procedures that may improve parliamentary democracy. This section reviews three alternative methods for selecting policies within parliament that elicit broader support than simple majority rule tends to do. In the next section we take up methods for assuring adherence to constitutional restraints.

A. The Contractarian Case for Supermajority Methods

One can clearly protect some minority interests and assure that broad interests are advanced by directly using voting rules that require 55 percent, 60 percent, or 90 percent approval (Wicksellian unanimity) for legislation to be adopted, rather than 50 percent as required under majority rule. A supermajority decision rule does not attempt to offset any other tendencies that popular elections may have or protect particular interests. Rather, such decision rules simply assure that whatever legislation is passed will have broader support than assured under majority rule.

In practice, supermajority rules are most often used in cases in which major policy decisions are to be made. Many major Swedish policy changes, including constitutional reforms, are informally adopted by supermajorities. This is done in part to prevent reversals after subsequent elections, but also to assure that new major programs (generally) advance the broad interests of the electorate. In the United States and many other countries, the constitution explicitly requires supermajorities for constitutional reforms and impeachment of the president.

The contractarian case for using supermajority procedures is similar to that favoring majority rule over minority rule. Broader support tends to reduce the downside risk of being outside of government—here by reducing the probability of being in the minority. As in the previous cases (illustrated in footnotes 98 and 99), any risk-averse electorate would agree to use supermajorities in such cases as long as no reduction in the expected value of the policies exists.

The use of supermajorities is not costless. Additional decision costs will generally be associated with more demanding decision rules, insofar as majority and supermajority coalitions are more difficult to assemble than minority coalitions, other things being equal. In addition to the additional coalitional costs, certain policies will be blocked under more demanding rules than would have been passed under less demanding ones; thus, as pointed out by Buchanan and Tullock (1962), the risk of being a member of an exploited minority is purchased at the price of additional direct decision-making costs and loss of opportunity to be in less-demanding majority coalitions. In cases in which voters are risk averse, voters will be prepared to accept some reduction in the overall expected value of government policies to avoid the risk of minority exploitation.⁴²

⁴² Buchanan and Tullock (1962) base a good deal of their analysis of optimal collective choice rules on variations in decision costs. They argue that decision costs tend to rise as majority size increases, whereas the marginal risk (expected cost) of being in the minority falls. They argue

B. Bicameralism

Several other procedures indirectly tend to generate supermajority outcomes without requiring settling on a particular size of majority. Federalism is one of these, insofar as the sum of a series of local majority elections will tend to imply an overall pattern of policies that has greater than majority support. Two others are explored below: bicameralism and approval voting.

Under bicameralism, new legislation has to receive majority approval in two independent chambers of a legislature. It is clear that the two chambers have to differ systematically in some way if bicameralism is to have a systematic effect on policy outcomes. That is to say, the impact of bicameralism is not a consequence of the existence of two chambers, but rather of differences in the two chambers. Two identical chambers would reach essentially identical conclusions with respect to policy issues and might provide a modest check on legislative errors, but would not otherwise be expected to affect public policy systematically. The greater the difference between the chambers, clearly, the greater is the expected effect of bicameralism on policy development, Tsebelis and Money, 1997.

Some, but not all forms of bicameralism tend implicitly to require supermajorities for legislation to be passed. For example, in cases in which two houses of the legislature are independently elected via different electorates or vote-counting methods, or serve under different terms of office, the overall result tends to yield more than a majority of the "joint vote." Moreover, the majorities of the two chambers of such a legislature represent different, although overlapping, subsets of voters. Consequently, the interests of more than a majority of legislators tend to imply that more than a majority of voters favor legislation passed by a bicameral parliament.

The bicameral method of requiring supermajority support differs from other methods of finding policies with supermajority support in that bicameral parliaments can be used to advance or protect particular interests. That is to say, bicameral parliaments can be used to offset biases that might otherwise be anticipated, such as a tendency toward excessive centralism, or can be used to create a particular bias to protect the interests of a particular minority group. The first chamber of the Swedish bicameral parliament of 1866 was designed to protect the interests of regional governments and, at least initially, the interests of wealthy industrialists and landowners. The Senate in the United States, the Bundesrat in Germany, and the Council of States in Switzerland were similarly designed initially to protect regional government interests. But other principles can be used.

For example, the electoral cycles of a two-chamber government can be designed to give explicit consideration of long- and short-run interests. In the original Swedish bicameral parliament, the term of office was 9 years for members of the first chamber and 3 years for members of the more directly elected second chamber. In the United

that the ideal decision rule tends to vary with the particular policy choices being considered, insofar as both the downside risk of being in the minority and the benefits from being in the majority tend to vary with tastes and, for example, the publicness or generality of the programs being decided.

States, the terms of office are 6 years for the Senate and 2 years for the House of Representatives. Members of the legislature with a longer term of office will naturally give greater consideration to long-term consequences of policy than those with more immediate electoral pressures—to the extent that voters tend to use recent results to assess incumbent party or candidate performance.

Bicameralism also allows various blends of electoral systems that may be able to secure the various advantages of alternative election methods, while avoiding some of their problems. For example, PR and plurality systems can be combined under bicameralism in a manner that assures representation of all significant interests, while assuring that local concerns are represented by more independently elected representatives. The power of party leadership would be diminished in the chamber using plurality rule over single-member districts or could be similarly reduced by using approval voting in multimember districts.

Varying the length of term of office and the size of the chambers can also be used to differentiate the interests and quality of the members in the two chambers. A longer election cycle for one chamber would tend to attract a more elite membership, insofar as the prize of office is larger. Similarly, election to a smaller chamber implies that each elected representative has relatively greater impact on legislation, which also tends to make the office more attractive and hence, increase the level of competition. In the end, only the most skilled or at least popular politicians would tend to seek positions in the relative small chamber with a longer election cycle. Combining these characteristics with direct majoritarian single-district elections would tend to generate a chamber with a more sophisticated and independent long-run perspective that could counterbalance the shorter, more partisan interests of the larger chamber.

Some empirical support exists for welfare-enhancing political properties of bicameralism. For example, two papers by Spindler and de Vanssay (1994, 2000) make this case. Their first paper suggests that national economic policies have a more direct effect on per capita income than national political institutions have. Once the degree of what they term “economic freedom” is taken into account, the particular structure of governance and array of guaranteed rights had no systematic effect on per capita income within their sample of 100 countries. (This should not be surprising in the context of the present analysis, because policies, after all, not institutions directly affect incentives for individual to work, save, and innovate.⁴³) Their second paper investigates whether institutions contribute to the development of economic policies

⁴³ De Vanssay and Spindler find that about 75 percent of the variation in per capita income within their sample can be explained by “economic freedom” and educational achievement (1994, p. 365). Within the OECD subsample, they find some evidence that political organization indirectly affects per capita income for a given regulatory environment and education level. Namely, they find that federal states within the OECD tend to have higher per capita income. This result provides empirical support for federalism that complements the theoretical case developed in the previous section.

De Vanssay and Spindler, of course, acknowledge that other rights and organizational features may contribute to voter welfare, even if they do not directly increase national income.

that promote economic development. One fairly robust empirical finding is that countries with bicameral legislatures have more economic freedom than ones that have unicameral parliamentary systems.⁴⁴

C. Approval Voting

Another relatively new method for choosing policies or candidates that have supermajority support is approval voting.⁴⁵ Unlike many refinements to majority voting, approval voting is easily understood and easy to apply. Under approval voting, every voter can cast a *vote for as many* or few policies, parties, or candidates as they wish. In cases in which a voter finds several of the available alternatives to be acceptable, he or she may cast a vote for each. Such voters can be said to find several of the alternatives to *be acceptable* or may be said to be essentially indifferent on several policy alternatives. Forcing such a person to cast only one vote clearly provides misinformation about his preferences over policies.

As under majority rule, every vote counts equally and the candidate with the most votes wins. When all voters cast only a single vote, approval voting becomes plurality voting. One of its advantages over ordinary majority rule is that elections concerning several alternatives are more likely to be decisive.

For example, within a legislature, approval voting can be used to select among several policy options at the same time. If most members of parliament find more than one policy option acceptable, approval voting allows the policies that have the broadest appeal to be directly identified. The more votes that a policy option receives, the broader is the base of support; the program with the broadest support is simply that with the most votes. In this sense, approval voting is more directly oriented toward consensus candidates than majority or plurality rule tend to be.

In cases in which no single candidate receives a majority or supermajority of the votes cast, a run-off election can be held between the two alternatives with the most votes. (In this manner, one guarantees that at least a majority's interests are advanced by the chosen candidate.) There is no guarantee or necessity that decisions made under approval voting will yield supermajorities; rather this voting method simply makes it more likely that such a candidate or policy will be found if they exist.⁴⁶

VIII. Constitutional Courts: Binding Democratic Government

⁴⁴ The bicameral effect was also present when de Vanssay and Spinderl included a ten-year lagged value of economic freedom in their regressions (see table 2). The latter specification clearly suggests that bicameralism per se generates a better economic environment in the long run, rather than the converse. Their results suggest in general that countries with significant political checks and balances have policies that generate significantly better environments for economic development and thereby higher per capita incomes than those that do not.

⁴⁵ See Brams and Fishburn (1983) for a more general discussion of the merits of approval voting.

⁴⁶ Approval voting is also a good method for selecting among several policies using a direct referendum. For example, it is clear that approval voting would have provided more information about voter preferences in Sweden on the three proposed pension reforms voted in 1958 and the three nuclear power options considered in 1980.

The past several sections of this and the previous chapter suggest that parliamentary democracy can be improved from a contractarian perspective by designing suitable constitutional constraints and procedures. Electoral competition has to be protected and encouraged. The domain of majoritarian policy making may be bounded by rights, and subsets of policy-making authority may be assigned to local governments. National policies may be restricted to general ones and policies that would undermine electoral competition may be ruled out. The problems addressed by such constraints are generally ones in which a majority government's immediate interest in policy and reelection may conflict with the common long-term interests of the national citizenry.

In such cases, it seems clear that parliamentary government cannot be expected to do a consistent or thorough job of monitoring and policing itself to assure that constitutional constraints are followed.

One possible solution to this problem is institutional: the creation of an agency or court with the power to review parliamentary actions to determine their constitutionality. For example, the United States has the Supreme Court, Germany has a Constitutional Court, and Sweden has a standing Constitutional Committee within the Riksdag and a Law Council, which previews legislative proposals.

Of course, to grant an independent agency the power to review legislation to determine whether it accords with the nation's constitution is one thing; to accord that agency an effective veto power over such legislation is another. Any panel of legal scholars can accomplish the first, but the latter requires some formal and informal constitutional support. It is the constitution that specifies the procedures for choosing legislation; adding another "veto player" clearly changes that procedure. A government founded on law should clearly rely on lawful procedures to select and reject new laws.

The problem with designing an independent constitutional review agency or constitutional court is that assigning veto power to an independent nonelective body can be problematic. It clearly will be important to align the interests of the court with the broad common interest in assuring adherence to the constitution. This can be partially done by carefully designing the process used to select members of the review agency or court. In principle, the selection process should attempt to identify those who can be trusted with the responsibilities of constitutional oversight, and should remove or punish those who fail in those duties.

The selection process could attempt to find persons with consistent and habitual patterns of writing and thinking that affirm the significance of "the constitution" and constitutional procedures. Broad support for each constitutional reviewer's expertise and temperament can be assured by using a supermajority decision rule for the final selection of judges or ombudsmen. External incentives for the persons selected to remain within constitutional bounds can be provided with effective (supermajority) procedures and clear criteria for assessing the performance of members of the constitutional review agency. The procedures for removal should not be so easy that they eliminate the independence of the review agency, but clearly should be easier to

apply than the final institutional alternative, namely amending the constitution to curtail abuse of review powers.⁴⁷

Some might argue that elections can serve the function of constitutional review. For example, widely publicized constitutional reviews would allow voters to punish the constitutional violations by the parties in power at the ballot box in the next election. It is clearly possible that at least some violations of the constitution would be punished by loss of office. However, casting votes nearly always involves more than constitutional issues. Many voters would find it impossible to vote against their preferred party, just because that party had violated the constitution on one or two matters—*especially in cases in which those violations advanced the voter's own policy interests*. At best, the electorate can only be expected to punish parties for major violations of the constitution. At worse, a majority of the electorate may be co-conspirators in violating the constitution.

Moreover, “electoral review” tends to be slower than review by a constitutional court or review agency, which allows unconstitutional policies to remain in place longer, undermining expectations that the constitution really binds legislative behavior. An independent constitutional agency with veto power has advantages over elections as a method of enforcing the constitution.

Of course, there are many methods for policing the constitutionality of legislative decision making. For example, an independent review agency might be empowered to submit a constitutional referendum to the electorate on the narrow constitutional issues at hand. Review of individual legislative decisions via referendum potentially, allows voters to focus on constitutional issues more or less independently of the wide range of ordinary policy matters in which they and their parties may have a personal interest. Constitutional referenda, thus, allow more targeted and faster response than possible with a general election and would create an additional electoral check on party malfeasance.

However, in cases in which the unconstitutional policies *are* consistent with majority interests, at least in the short run, the constitutional problem returns to the original one. The majority will often find it in its interest to violate the constitution. Changing election laws, taking away the rights of a minority, suppressing political debate could all have majority support, at least in the short run. In this respect, the value of a constitutional review agency is similar to that of a bill of rights. A constitutional review agency with veto power broadens support for the constitution

⁴⁷ It is clear that this threat can also undermine the court's independence, if the process of constitutional reform is too easy or rapid. A court that could be removed by majority vote would have a difficult time “vetoing” popular, but unconstitutional legislation. Although broad popular support for the constitutional review agency (if not its particular decisions) remains ultimately the foundation of the agency's power, the difficulty of amending the constitution also contributes to its independence and significance.

When constitutional reforms can be adopted by majority rule, as under the current British system, essentially any law may be regarded as a constitutional amendment—and, thus, “constitutional.” Here, constitutional courts would be reduced to assuring that voting procedures were properly carried out.

as a whole by protecting both the majority and minority from unconstitutional laws and policies that might advance the narrow interest of a legislature. By reducing this risk, an effective constitutional review mechanism tends to increase support for a nation's constitution.

The advantage of a constitutional court or independent review agency with veto power over other methods of enforcing constitutional procedures and constraints is essentially that such an agency can focus narrowly on new laws and subsections of laws that violate constitutional constraints, and act swiftly to protect minority interests. The problem of motivating such a powerful agency is not trivial, but it certainly has not proven so difficult that effective review agencies are impossible. Constitutional courts are widely used in many Western democracies.