

*Improving Democracy  
Through Constitutional Reform  
Some Swedish Lessons*

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**Chapter 7**

**POPULAR SOVEREIGNTY AND  
CONSTITUTIONAL DESIGN**

**Assessing 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. Constitutional political economy (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.

The second part of this book develops a normative framework for evaluating the relative performance of alternative constitutions. The

framework is based on the contractarian interpretation of popular sovereignty developed by Rawls (1971) and Buchanan (1975). The present analysis differs somewhat from their original treatments in that the existence of a standing parliamentary government is taken as the point of departure and the question of interest is improvement rather than an idealized initial formulation of governance or escape from anarchy. Subsequent chapters use that framework to discuss how parliamentary systems can be improved by refining electoral procedures, constitutional constraints, and review. Not all democratic constitutions are equally effective at advancing the broad interests of those who live under them. The analysis developed in part II suggests several refinements that can improve democratic governance. Part III of the book will use the conclusions of part II to evaluate the Swedish constitutional experience.

It must be acknowledged that the positive analysis of constitutions that occupies the first part of the book is inherently less controversial than the normative one that occupies the second and third parts of the book. Positive analysis may be controversial, insofar as it strays from accepted methods, theories, or historical facts, but, in principle, consensus can often be generated by rigorously testing the theories at issue to disentangle what is known from what is not. Both tests for logical consistency and empirical tests of explanatory power allow new theories and ideas to challenge and supplant old ones or new proposals to be rejected because they provide less general or accurate explanations than provided by established theories. Indeed, controversy is nearly always associated with scientific progress.

In normative analysis, positive controversies are compounded with fundamental disagreements about the “proper” method for assessing alternative policies, processes, or societies. This makes normative analysis of the merits of constitutional design inherently more controversial than the positive analysis of the consequences of constitutional design. Nonetheless, normative analysis is unavoidable if one is to appraise the relative performance of alternative constitutions.

Perhaps surprisingly, normative theories, like positive theories, are susceptible to a variety of “tests,” and consequently, normative theories also tend to improve through time. Normative theories, like positive theories, can be discounted if they fail to be internally consistent or fail to be broadly applicable. Consequently, normative theories can be tested by applying them to a wider range of problems and comparing the results with those from alternative theories. The result of this rigorous “testing” of normative theories is that some theories—and some conclusions—are more widely accepted than others. Not all normative theories, nor all conclusions, are equally controversial. For example, normative theories that unfavorably evaluate random murder and theft are clearly less controversial than those

that favorably evaluate such behaviors, as with honor codes among terrorists and thieves. Moreover, in ordinary settings, the most widely applied normative theories reach very similar conclusions.

The contractarian normative theory developed in part II of the book is built on the relatively uncontroversial notion of popular sovereignty that informs nearly all modern constitutional design. Popular sovereignty suggests that the power of government is something delegated to government by a nation's citizenry, rather than by history, military prowess, or appeal to authority. A nation's constitution specifies the terms under which citizens delegate authority to the individuals who hold government offices and to the agencies in which they serve.

The contractarian interpretation of popular sovereignty considers a constitution to be a contract among a nation's citizens that, like other contracts, is consummated to advance the common interests of the signatories. This interpretation of constitutional government, as an instrument by which individuals attempt to advance shared goals, implies that a government, like any other instrument, can be evaluated by its performance. To advance shared goals, a constitution must induce government "rule makers" to exercise their authority in a manner that is consistent with citizen interests. The rational choice perspective used here allows that task to be analyzed 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 be applied to rank alternative constitutional forms of parliamentary democracies. The normative arguments developed are sufficiently rigorous that most of the results can be arrived at analytically for general political settings. 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 CPE tradition, a good deal of it is new.

A long-standing normative program exists, because constitutional designers, of necessity, have long considered the relative merits of alternative methods and mechanisms of governance. The most thorough of the early efforts is Aristotle's *The Politics* (160/330 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, however, 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 by many economists, political scientists, and legal scholars, who have attempted to explore in greater detail the implications of constitutional design for political and economic performance.

Several recent books summarize those contributions and have extended the rational choice–based analysis of alternative constitutions. For example, Mueller (1996) provides a thorough overview of the modern rational choice–based literature and also provides a fine 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 problem 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. Modern authors have widely neglected the latter.

What part II of this book offers that is new is the use of contractarian logic to demonstrate the merits of competitive elections, civil rights, federalism, and constitutional review in 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, both logic and history suggest that parliaments can be improved as instruments for advancing common aims. History, however, also suggests that parliamentary systems can become less effective through time as circumstances change or constitutional rules are undermined via amendment.

## **Constitutionalized Norms**

Constitutional designers all recognize the necessity of systematically ranking constitutional alternatives not only at the time a constitution is chosen, but also in the period following adoption. Essentially all formal constitutions include language that specifies legitimate procedures by which the current constitution may be amended. Consequently, every amendment procedure is implicitly a normative theory in that it specifies how alternative constitutions are to be ranked. That is, every amendment that is lawfully adopted creates a new constitution that has been *judged superior* to the old

one according to the norms embedded in the constitutional amendment process.

Legislative-based procedures for amending democratic constitutions generally rank constitutions according to their ability to advance the interests of a large subset of the national electorate. For example, the United Kingdom allows any legislative majority to amend the constitution and so implicitly ranks constitutions according to the interests of the present majority of those elected to Parliament. Others 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, a reformed constitution is judged superior to the existing constitution when it advances the interests of a majority or supermajority of the relevant legislature(s).<sup>1</sup>

These amendment procedures indirectly require constitutional reforms to advance the interests of a large subset of the present electorate insofar as the behavior of elected representatives advances the interests of those who voted for them. That is, in a well-functioning democracy, legislative approval is approximately the same as requiring approval by an equally broad subset of

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<sup>1</sup> See <[www.uni-wuerzburg.de/law/](http://www.uni-wuerzburg.de/law/)> for an extensive compilation of national constitutions.

the electorate.<sup>2</sup> Such indirect tests of broad popular support could be made direct by requiring constitutional referenda. For example, constitutional reforms are directly voted on by the electorate as in Switzerland and Denmark.

It also bears noting that all majority and qualified majority procedures for ranking constitutions implicitly discount the constitutional interests of minorities who oppose proposed constitutional reforms. To the extent that substantial minorities exist, constitutional reforms cannot be regarded as supported by “the people” or a result of the “popular will,” unless the amendment procedure itself has essentially universal support. Nonetheless, it is clear that modern constitutional designs generally use broad electoral support as the norm for ranking alternative constitutions.

### **Normative Theories for Constitutional Design**

To say more about the relative merits of alternative institutions than what is implied by a particular amendment procedure requires a more general methodology for appraising the merits of alternative constitutional designs. A

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<sup>2</sup> Under plurality/majority selection of single-district representatives, reforms adopted by majority rule may represent the interests of far less than a majority of the voters. Each representative 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 in a unicameral legislature may advance the interests of as few as 25 percent of those who cast votes.

Under PR, votes in parliament are in proportion to voter support, so the only voters who are totally neglected are those voting for parties that 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 somewhat less 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.)

general normative theory of constitutional design should, at least in principle, be independent of particular constitutional procedures. Otherwise, comparisons among alternative electoral institutions will be impossible or inconsistent, depending on a particular nation's constitutional history.

The majoritarian norm that attributes "better" to every majority-approved policy clearly fails this test, because it takes majority rule, a specific voting rule, as its core normative principle. Moreover, the possibility of majority cycles implies that the majoritarian norm can yield confusing (intransitive) rankings of constitutional arrangements.<sup>3</sup>

Economists have developed a broad range of general tools for consistently evaluating the effects of policies, but relatively little of their attention has been devoted to ranking alternative constitutional arrangements. Political theorists have used a variety of general normative theories to think

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<sup>3</sup> For example, one can imagine three groups with differing opinions concerning the relative merits of (a) unrestricted parliamentary systems, (b) parliamentary systems with a bill of rights, and (c) parliamentary systems with a bill of rights and effective constitutional review based on their own anticipated well-being under the three systems. Members of group 1 may generally prefer *a* to *b* to *c*, because they expect to be members of the ruling majority. Members of group 2 may prefer *c* to *b* to *a*, because they expect to be members of the minority. Members of group 3 may prefer *c* to *a* to *b*, because they regard a bill of rights without review as dishonest and ineffective, although fundamentally unnecessary. In this case, *c* secures a stable majority domination. It will also 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 such cases, majority rule cannot rank constitutions.*

about constitutional design. Most of these, however, rely on modern intuitive ideals, such as democracy, liberty, and justice in making a case for particular constitutional forms. Intuitive analyses use a “weight of the evidence” standard of argument and attempt to show that a given constitution (often democracy, broadly defined) has a variety of intuitively desirable properties. A smaller group of political theorists have applied analytical normative theories in the spirit of those used by economists to rank constitutions. These analyses are based on 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.<sup>4</sup>

It bears noting that the analytical and intuitive normative approaches overlap to a greater extent than is often appreciated. Analytical norms must 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, also a normative intuition: that the legitimacy of the government emerges from the “assent of the governed” or “the will of the people.”<sup>5</sup>

Moreover, analytical normative analysis has to take into account the normative intuitions of the persons affected by the constitutional designs under consideration, insofar as an individual’s normative intuitions affect his or her evaluation of alternative policies and institutions. Such intuitions may determine the broad characteristics of the “good society” as well as narrow private behaviors. If particular ideas and ideals are widely regarded to be “self-evident” by those represented in constitutional negotiations, the constitutions consummated will reflect those ideas and ideals. Because of this, the concerns of noncontractarian political philosophers will also affect the language of constitutional compacts and amendments.

### **Popular Sovereignty and the Contractarian Perspective**

*The relatively uncontroversial nature of the contractarian theory of constitutions* is clearly demonstrated by the numerous constitutions that

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

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

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, this Constitution.” Similar language can be found in many other constitutional documents.

Modern constitutional language formally defines the state as an organization to which its citizens have delegated authority to make various collective decisions. These political organizations are often described in considerable detail by the same constitutional documents.<sup>6</sup> The stated

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<sup>6</sup> 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”

purpose of these modern constitutional documents implies that the proper method of judging the success of a particular political organization is by its ability to advance the broad interests of “the people,” that is to say, those of the nation’s citizenry.

### ***Contractarian Analysis and Unanimity***

The contractarian conception of popular sovereignty is, perhaps surprisingly, largely independent of the details of constitutional procedures. Although there is a sense in which unanimity is *the only* decision rule that is completely compatible with the contractarian approach, it is also clearly possible for persons to agree unanimously to use other decision rules to select public policies. In their pioneering application of rational choice models to constitutional design, Buchanan and Tullock (1962) demonstrate that essentially all citizens may agree to accept a constitution that uses majority rule for choosing representatives and 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 voting rules of 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, foregone opportunities for collective action, and losses associated with being in the exploited

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(Thatcher 1907, p. 189). See

<<http://www.fordham.edu/halsall/mod/1581dutch.html>>.

minority.<sup>7</sup> Consequently, there is no necessary connection between contractarian normative theory and the decision-making procedures adopted for selecting ordinary policies.

The same logic also implies that the parties to a hypothetical constitutional convention might unanimously agree to require only majorities or supermajorities well short of unanimity for adopting constitutional reforms. Unanimity is widely recognized as a costly decision-making rule because of holdout problems, mistaken expectations, and ordinary human contrariness. For example, the Wicksellian decision rule 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 the unanimity rule. Contractarian analysis begins with unanimous agreement, but it does not end there.

The voluntary 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.<sup>8</sup> However,

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<sup>7</sup> 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. Suppose that 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 such as (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 all will voluntarily accept the risk.

<sup>8</sup> Of course, the idea of a social compact originates with post-enlightenment work of Thomas Hobbes and John Locke. Aristotle’s *Politics* provides a much earlier analysis of the properties and merits of

many decision rules, including majority rule, may secure unanimous 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 procedures and constraints for constitutional selection and reform.<sup>9</sup>

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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, in that 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 legislation.)

<sup>9</sup> 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 put in place.

Constitutional rules clearly affect the range of possibilities that individuals may realize 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. Both theories of fairness initially held by individuals and their own risk aversion would affect their evaluation of alternative constitutions. The more risk averse the constitutional decision maker is,

### ***Contractarian Analysis and Constitutional Reform***

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.<sup>10</sup> In somewhat formal language, the contractarian normative

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the more equal a distribution of anticipated outcomes he or she would demand.

Rawls' analysis (1971) represents an extreme example of the importance of risk aversion in contractarian analysis. Many of the conclusions of his theory of justice are deduced from the imagined thought process of 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 far fewer direct conflicts exist among "private" interests in the setting imagined. Because every person considers a wide range of possible positions within society, the veil of ignorance methodology effectively converts every private interest into a broad generalized interest, while retaining an individualistic perspective rather than an aggregate one.

<sup>10</sup> Contractarian theorists often begin 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

framework implies that one constitution is better than another *if and only if* it is generally *expected* that the policies adopted by the government, so defined, will increase the quality of life for all of its citizens in the long run relative to the other. Constitutional improvement does not require that every law adopted under the revised constitution accomplish this. Rather, it requires that the anticipated full range of legislation adopted tends to improve the lives of all present and future citizens relative to the constitution that it replaces.

A particular constitution would be the *best* possible organization of government, if no other constitution is widely believed to yield systematically better laws and policies for its citizens. This would be the case, for example, if all revisions to the constitution are believed systematically to make particular groups worse off.

Notice that this characterization of the ideal constitution implies that several ideal constitutions may exist. This parallels the conclusion of modern welfare economics, which demonstrates that many allocations of goods and services can be Pareto efficient. A distribution of goods and services is Pareto efficient if and only if it is not possible to reallocate the resources in a manner that makes at least one person better off and no one worse off. A constitutional design is efficient if and only if there is no other that is generally *expected* to make some parties better off and none worse off.

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strength and invention shall furnish them withal. In such condition . . . the life 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.

However, applied to modern democratic states, contractarian logic implies that amendments and constitutional revolutions should be judged relative to the existing constitutional setting, rather than anarchy. Rather than asking 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.

However, in contrast to the Pareto norm, the test of consensus allows the possibility that people are mistaken about the possibility of constitutional improvement insofar as expectations or beliefs are biased or inaccurate.

Technological progress in governance and experience imply that constitutional improvements are more likely in the long run than in the short 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. In the long run, 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.

### **Constitutional Ends**

Most day-to-day politics takes place at policy margins where both experts and ordinary citizens disagree about means and ends and their relative importance. Constitutional design needs to account for such conflict, but should begin with areas of shared interest, in which consensus can be very broad. There are both constitutional ends and constitutional means to advance those ends.

### ***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 to lesser material 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. Better access to effective medicine and education is preferred to less, and faster, more comfortable forms of transport are preferred to slower and less comfortable ones—other things being equal.

Individuals clearly disagree over the particular combinations of real goods and services that best advance their own private interests, but essentially all citizens would prefer constitution A to constitution B, if material welfare is universally improved by 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 tranquility is clearly an improvement. 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 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.<sup>11</sup>

Economic analysis of the law has resulted in a number of general and long-term legal and constitutional prescriptions 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 and increases the quality of final goods and services sold to consumers.

In general, uniform and consistent enforcement of modern civil law and constraints on confiscatory governmental policies can and has done much to

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<sup>11</sup> A person's endowment of tradable goods is clearly an important determinant of the size of what economists refer to as an individual's "opportunity set" and one that is especially relevant for the purposes of economics; however, for the purposes of constitutional analysis, other components of an individual's opportunity set are also important. Material wealth is only part of what might be called a person's "total wealth" or complete opportunity set. The size of an individual's opportunity set is clearly affected by a number of constitutional and cultural factors that cannot be "traded" by ordinary individuals. For example, rights of assembly, political speech, and religious affiliation clearly affect the range and risks of choices available to a resident of a particular polity. Ordinary and constitutional laws also determine what careers and contracts are possible or at least significantly affect the rewards and penalties associated with them. Other locally available "free goods" matter as well, as with the stock of ideas and norms readily available in one's national culture and also in one's natural setting, including such features as climate, air, and water quality.

promote material welfare by promoting economic growth and development (see, for example, Posner 1977 or North 1990).

There is also theory and evidence that a stable constitution is better for economic development than an unstable constitution. A stable political and legal environment allows long-term expectations to be more accurate, which allows long-term contracts to serve better both those directly involved and consumers who indirectly benefit from more specialized forms of production and exchange.

### ***Good Constitutions Promote the “Good Society”***

For most persons, especially in wealthy societies, a ranking of constitutions involves more than estimates of material well-being. In addition to material welfare, most modern persons 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 to a legal system in which the law is arbitrarily applied or special exceptions are explicitly made for the social elite. These citizens would prefer such a system even if their material wealth was somewhat reduced by equal protection of the law, although this turns out not to be the case. Most persons also favor at least modest social insurance programs. Such programs may increase the number of persons living in “poverty,” as defined by those programs—as tax rates increase, the work ethic declines, and average income falls—but make poverty less onerous to those who are poor and less ugly for those who are not.

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 many of the same reasons that prosperity should. The embodiment of widely held norms and aspirations in constitutional documents and public policies provide (subjective) benefits to citizens in much the same way that material goods do. For example, Frey and Stutzer (2001) provide statistical evidence that, other things being equal, citizens generally feel happier in Swiss cantons that extensively use the most direct forms of democracy.

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 D, which might be a democracy, is more just or attractive in some intangible way than constitutional system K, perhaps an absolute monarchy generating the same

distribution and level of income, the contractarian perspective implies that, D is a superior form of government than K.<sup>12</sup>

The effects of philosophical and other broad methods of appraising constitutions have clearly been historically important. 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 as a mechanism to increase personal material welfare. (As it turns out, Western democracies have also done well at promoting and sustaining economic prosperity.) Evidence of the importance of aesthetic or philosophical judgments can be found in constitutional documents, which, as noted above, often provide a general philosophical basis for governance and occasionally for the kind of society the constitution attempts to promote.<sup>13</sup>

These “general” intuitive appraisals of the relative merits of societies are largely transmitted through families, schools, churches, and the mass media and may change through time as circumstances and normative theories change. In this sense, a philosophical ranking of constitutions is more culturally and temporally specific than a material wealth-based ranking. The

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<sup>12</sup> It bears noting that one can also 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, such normative rhetoric can only be effective if at least a few persons are influenced by the normative arguments constructed.

<sup>13</sup> 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).

particulars of material welfare may also change through time, but additional tradable wealth always allows individuals to advance their material welfare broadly, because tradable wealth can be used to advance many different interests. New theories of the good society do not generally expand opportunities for other theories.

The importance of consensus in constitutional design allows the possibility that changes in the theories used to evaluate public policies may also affect constitutional design through time. That is to say, constitutional “fashions,” as well as constitutional “science,” may generate opportunities for new constitutional bargains, as widely held ideas about “proper governance,” “justice,” or “risks” change. Consider, for example, the historical succession of the royalist, liberal, progressive, socialist, and “green” visions of the good society.

Whenever a new constitutional consensus emerges, opportunities for mutually advantageous reforms tend to arise. In such cases, the contractarian perspective implies that constitutional reforms should be made even if our fundamental understanding of the political and economic properties of alternative institutions has not materially improved.<sup>14</sup>

### **Tradeoffs among General Constitutional Ends**

For a considerable range of constitutional designs, there is little or no tradeoff between promoting economic prosperity and democratic governance. This partly reflects the fact that many common norms have evolved through time as part of an overall system that makes prosperous

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<sup>14</sup> 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 in 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 one might expect.

societies viable.<sup>15</sup> Essentially no conflict exists between the work ethic, honesty, duties to honor promises, an appreciation of technological progress, and democratic governance. The estimates of Feld and Savioz (1997) complement those of Frey and Stutzer by suggesting that direct democracies tend to be 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 evolving philosophical and cultural normative theories. A society that regards marginal productivity or contribution as the proper basis for distributing income would not see a significant conflict between distributional justice and economic efficiency.<sup>16</sup> A society that widely regards voluntary exchange to be a proper form of conduct in many, perhaps most, areas of life would not be threatened as larger and more complex webs of exchange and contract emerge.

Cases clearly exist, however, 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 to the extent that egalitarian policies undermine the incentive structure that motivates production and innovation in market economies. The extent of this conflict varies both with the policies and normative theories of interest. The desirability of prosperity, equal treatment under the law, and an equitable distribution of income may be implied by several different normative theories, but these same theories may lead to different conclusions about the relative importance of those objectives.<sup>17</sup>

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<sup>15</sup> See, for example, Congleton 1989 and 1991c or Congleton and Vanberg 1992.

<sup>16</sup> 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 preferable to others, other things being equal.

<sup>17</sup> 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

Such tradeoffs are not a problem for contractarian analysis, because perceived “equity-efficiency” tradeoffs will necessarily be accounted for in the constitutional bargains reached. That is to say, any equity-efficiency tradeoffs that are widely believed to exist are bound to affect both constitutional design and subsequent public policies within polities grounded on popular sovereignty. 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, or reserve them as matters of individual choice by restricting the domain of governance.<sup>18</sup>

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

<sup>18</sup> It is possible that material policy ends affect the selection of political theories. People are not born with a political philosophy, but rather choose from among those immediately available. These choices are consequently affected by both culture and economic opportunities. For example, some persons may be drawn to a particular philosophical theory because it provides a grand justification for behavior that they want to engage in to advance their own material interests. Here one may consider a poor person’s orientation toward egalitarianism, the attraction that a belief in fate has for the winners of life’s many lotteries or the appeal that “marginal product”-based theories of justice hold for the talented and well paid. That we all know of talented egalitarians and poorly paid proponents of marginal product distributional theories (or “just deserts”) suggests that economic considerations are not decisive.

## The Necessity of Self-Enforcing Constitutions

The shared ends that might be advanced by collective action provide a mutual interest rationale for undertaking collective action, and agreements about such mutual interests may be formalized as a written social contract. Unfortunately, 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 fails to align the interests of governmental 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 dutiful servant.

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 the broad interests of those who will bear the consequences of public policies.

A social contract must do more than formally state the common ends to be advanced through collective action. It also must specify procedural methods and constraints sufficient to assure that those ends are, in fact, likely to be promoted by government action.<sup>19</sup>

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 constitutional design problems to be solved are

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Such material interests, however, may also allow a political party to transform society gradually by influencing distributional norms through its distributional policies. See Lindbeck, Nyberg and Weibull 1999.

<sup>19</sup> 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 analyses of bureaucracy by Tullock (1965), Niskanen (1971), and Breton and Wintrobe (1975). See Dixit (1998) for a readable, but penetrating overview of a variety of agency problems in governance.

general ones associated with political agency problems that have to be addressed in order to advance a broad range of alternative collective ends. 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 or policy aims.

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 successfully advance the common ends that justify the governmental enterprise.



## **Chapter 8**

### **ESSENTIAL PROCEDURAL METHODS AND CONSTRAINTS FOR PARLIAMENT**

The previous chapter provided a brief overview of the contractarian methods of analysis and briefly showed how contractarian logic can be used to assess broad issues in constitutional design. This chapter takes up the task of designing an effective parliamentary democracy. Parliamentary government is one of the most widely used methods of organizing democratic governance and continues to be a broadly appealing institutional arrangement, as evidenced by the large number of new parliamentary systems that have been established in recent decades.

It bears noting that parliamentary governance is not a single institutional design, but rather a template that provides the outlines of a broad range of alternative governmental designs. As noted above, parliamentary government has been changing through time. The major Swedish constitutional reforms discussed above demonstrate that a variety of institutional arrangements are possible within the parliamentary template, but many others are possible as well. The analysis of the present chapter explores some alternative implementations of the parliamentary template, not with an eye to history, but with respect to their relative merits as instruments for advancing the shared interests of a nation's citizenry.

#### **Electoral Competition: Aligning Government and Citizen Interests**

Once a governmental organization exists, it is clear that competition to secure control of 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 of 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'état and civil wars with formal rules governing royal succession. They also reduced incentives for such efforts by reducing the power of the monarch, as with restrictions over budgets and new taxes. 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.<sup>20</sup>

The subsequent replacement of constitutional monarchies with parliamentary governments increased competition for high government office. However, 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. Contractarian logic, thus, suggests that parliamentary democracy tends to be superior to hereditary monarchy.

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<sup>20</sup> Tullock (1987), Olson (2000), and Wintrobe (1998) point out that kings and dictators have an interest in their subjects to the extent that the tax base can be increased or probability of overthrow can be reduced by improving citizen welfare. In general, the more stable a dictatorial regime, the longer its planning horizon tends to be and the better its prospects for long-term economic growth are.

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 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. This provides members of parliament with an incentive to replace the present prime minister whenever 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 systems of governance 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 only assures that the interests of at least 25 percent of the electorate are advanced by parliament (0.5 of the voters in each district times 0.5 of the elected representatives required for a majority coalition). A well-functioning proportional representation system for selecting members of parliament does better than this, in that the party preferences of most voters are directly represented in parliament. Nonetheless, proportional representation only assures that a *majority* of the voters voting for qualifying parties considers the policies of the current government to be superior to those of the opposition. The interests of the minority are likely to be advanced only in policy areas in which their interests are essentially the same as those of the majority.

However, even in these worst case settings, contractarian normative theory implies that parliaments elected by open and fair elections are generally 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 hereditary monarchies or the violence-based ones of accession to unrestrained dictatorships, other things being equal.<sup>21</sup>

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<sup>21</sup> The contractarian rationale for ranking parliamentary democracy over dictatorship in these worst case scenarios can be developed as follows. The interest of 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

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enslavement of all those within his domain. A less confident regime may find that further reducing the income of some groups—especially that of likely opponents—is to its advantage. In either case, it is clear that such an “efficient” kingdom may be prosperous without most subjects enjoying significant fruits from their labor. History suggests that a king can retain power as long as the “elite” of the kingdom benefits from the king’s rule. In such cases, the encompassing interest of the king may extend only to his most powerful subjects.

In contrast, the government of a parliamentary democracy will need much broader support to retain power. To secure this minimal support, a parliamentary democracy normally advances the interests of between 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 from membership in a majority coalition to a very small chance of being a member of the elite and receiving a larger prize from the king. If a king-dominated government generates approximately the same income level as a parliamentary democracy, risk aversion implies that *parliamentary democracy would be unanimously preferred to monarchy* by self-interested, risk-averse citizens, because democracy generates higher expected utility, after accounting for risk. Of course, parliamentary democracies historically have generally increased national

**Improving Parliament through Constraints: the Rule of Law**

Although generally superior to dictatorship, majoritarian procedures for choosing public policies are not sufficient by themselves to align the government's interests fully with those of the broader interests of its citizens. As noted above, electoral methods of collective choice tend to yield policies that neglect the interests of those not directly represented in the government, especially in cases in which the minority's interest conflicts with those of the majority. This section demonstrates that electoral methods of choosing public policies can be made more broadly acceptable to a polity's citizenry by constraining the domain in which they may be applied. That is to say, contractarian logic implies that a properly constrained parliament is a better form of government than its unconstrained counterpart.

The most important constraint requires the government itself to abide by the law of the land, that is, to follow the terms of the constitution.<sup>22</sup> Constitutional governments cannot ignore the constitution by which they are formed, nor can they revise them, except as specified by constitutional procedures.

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 performed by nobles or peasants or by Social Democrats or Conservatives. The rule of law implies that governmental rules and regulations apply to those inside and outside government alike.

The contractarian case for the rule of law is based on a number of its properties that advance broadly shared ends. The rule of law makes it more

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income over that of dictatorships, which strengthens this lean contractarian case for parliamentary democracy.

See Congleton (1984 and 1997) and Olson (1993) for explanations of the superior economic performance of democracies.

<sup>22</sup> 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.

difficult for a king or a majority to punish their opponents by legislating narrow laws that apply only to such persons or groups; this reduces the downside risk associated with all forms of government and, consequently, tends to promote material welfare by generally reducing risks faced by prospective entrepreneurs. The rule of law also advances general norms favoring equal or equitable treatment of persons. Moreover, insofar as government officeholders must also live under the rules created, the rule of law helps to align the interests of government with those of its citizens.

Overall, a government that abides by the rule of law will adopt laws that better advance the general interest. Contractarian analysis, thus, suggests that the law is an area in which no tradeoff exists between egalitarian or equity norms and economic efficiency. Equal protection of the law is superior to unequal protection of the law, in part, because *equality in this sense generally promotes material welfare*.

Constitutional theorists and designers have long recognized the merits of the rule of law. For example, the right of due process under the law is specified in both the British Magna Carta 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 for democracies. In the absence of generality restrictions, the ordinary electoral cycles of democratic governance would tend to generate substantial and discriminatory changes in policy every time the government changed hands. Every parliamentary majority would be tempted to use its power to punish—legally or fiscally—members of the opposition for not supporting the present government. And the legal setting, tax code, and distribution of public services would tend to vary as successive majorities used the power of the state to advance their own narrow partisan ends. In extreme cases, a temporary majority could use the various powers of the state to transfer the minority's entire wealth to itself. (In this respect, a parliament not bound by the rule of law can behave in much the same way as an unrestricted monarch can, although the pool of those who potentially may be exploited is somewhat smaller.)

Radical policy shifts associated with changes in governments tends to reduce a nation's prosperity by increasing risks and 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. Of course, the rule

of law does not eliminate the 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.<sup>23</sup>

This logic suggests that all citizens would favor the adoption of the rule of law as a constitutional constraint, because all voters tend to benefit in the long run from the restriction that only general laws be written and applied.

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<sup>23</sup> 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 most policy areas.



## Chapter 9

# CONSTRAINING PARLIAMENTARY DEMOCRACY TO ADVANCE THE MAJORITY'S INTEREST

Chapter 8 suggested that essentially every citizen has an interest in popular elections insofar as elections align the interests of government with those of a large subset of its citizens. Unfortunately, not every government that is elected will, in fact, implement the policies preferred by its supporters, nor will every majority be inclined to turn over the reins of policymaking power to future majorities. There is often a conflict between the outcomes of majority rule and the contractarian defense of democratic politics. Chapter 9 demonstrates that an elected parliament should be constrained in several ways if its policies are consistently to advance the interests of a majority of its citizens, both in the present and in the long run.

Chapter 10 will then analyze how parliamentary procedures and constraints can move democratic 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 independently constitutional review agency or court, and modifications of voting rules.

Majoritarian procedures can be improved in a surprisingly large number of ways as a method for promoting the general interests of all who live under them.<sup>24</sup>

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<sup>24</sup> The underlying contractarian logic favoring majority over minority rule is as follows: Consider the case in which 6 units of wealth are 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 two can make policy, they might

### **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. The prospect of future electoral competition tends to align the interests of the present government with those of a 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, precisely 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. Given any uncertainty about winning the election, the current government would be inclined to revise the electoral rules in a manner that reduces its electoral risks.<sup>25</sup> It is commonplace for the governments of poorly functioning

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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.,  $1/3 \cdot 6 = 2/3 \cdot 3$ ).

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.

<sup>25</sup> 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

“democracies” to postpone elections endlessly and to adopt legislation that makes organizing opposition parties difficult, if not impossible. In extreme cases, a government may outlaw such parties, while retaining other “democratic” procedures. Elections may take place, but no effective competition for elective office may occur.<sup>26</sup>

Consequently, parliamentary democracies require *several* durable constraints to assure that democratic procedures continue in force and continue to align the interests of those selected for office with an ongoing majority of the citizenry. With this in mind, constitutional designers may formally specify an electoral cycle, the electoral method for selecting

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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.

<sup>26</sup> 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—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, continuing electoral success may reflect 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.

representatives, and the electorate entitled to cast votes, which can be changed only within narrow limits by a single parliament. In addition, a constitution may constrain the domain of policymaking in areas that might reduce electoral competition. The constitution may guarantee rights of assembly, expression, and the publication of news and commentary.

Such procedures and constraints represent constitutional improvements from the contractarian perspective, because they increase the breadth of voters whose preferences are likely to be advanced by parliamentary governance. Experience has demonstrated that no majority party's platform is ever truly permanent, nor is the breadth of a party's electoral support permanently greater than 50 percent. Without some constraints on the domain of legislation, there could be no presumption that a body elected in the past would advance the interests of a broad subset of the present and future electorate. Durable election laws and basic political rights, consequently, are in the interest of every potential majority in the near and long term. Reducing the costs of organizing political parties and intensifying electoral competition among candidates and parties for office clearly tend to improve the alignment of voter and government interests in both the present and the future.

### **Transparency, Information Costs, and Voter Error**

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 will advance their expected welfare.<sup>27</sup> Under plurality rule,

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<sup>27</sup> A theoretical question exists on whether or not any particular policy will emerge from a democratic polity because of cycling problems associated with pure majority voting systems. Such problems are, however, far less likely if candidates or parties can be mapped into a one-dimensional policy space—such as the left-right political spectrum. The relevance of this ideological spectrum is clear in Sweden, where three of the five most durable parties have named themselves after parts of the political spectrum, for example, the Left, Center, and Moderate parties (the former Communist, Farmer, and Conservative Parties).

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). When 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.<sup>28</sup>

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 own material interests and his or her interest in the good society. It bears noting, however, that appraising alternative policies is by no means an easy task.

Some of this can be done fairly directly. Experience with alternative policies allows voters to form expectations about the future effects of alternative government policies and programs. This experience-based evaluation of alternative policies and policy makers potentially provides an electoral reward for good policies and punishment for policy mistakes based on the shared conclusions of a majority of the electorate.

At the same time, a voter’s direct experience is not generally sufficient to allow unbiased estimates of all the effects, nor to assess the relative merits of all the policy alternatives debated by candidates and parties. Partly this is because a voter’s experience with policy alternatives is limited and

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

The particular results that arise will vary by electoral system, as noted above, for PR and first-past-the-post systems. 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, even when the internal organization of the legislature matters, it may be said that electoral competition ultimately determines policy if voters have access to good information about policies. Some of these questions are addressed in chapter 10.

necessarily so. Only a few of the many possible policies that exist have recently been tried within a particular nation or even within similar nations. Appraising the merits of policy alternatives necessarily takes considerable time and energy on the part of voters (and policy experts), and they have little incentive to invest heavily in knowledge that has only political applications. Time and attention are scarce goods for which all voters have other uses.

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 choose to remain completely ignorant. Moreover, even those who take time to understand the basic issues at hand generally economize by using indirect sources of information, not all of which will be unbiased. As a consequence, 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 will be elected. For example, it is commonplace for policy proponents to stress their own talents and experience as well as the benefits of their preferred programs, while exaggerating the costs (and risks) associated with other candidates and policies. 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 actually determines its performance, voter choices of political parties tend to be based on the broad outlines of policy, rather than an intimate knowledge of policy details and consequences. 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 in well-functioning democratic polities is also intense and continuous, but voters necessarily have less direct experience with alternative government policies than they have with alternative automobiles. "Test drives" are clearly more difficult, because only one policy can be implemented at a time. Although interest groups catalogue performance on a range of policies, it is difficult to assess the effectiveness of policy alternatives never adopted. It is consequently more likely that voters (and policy makers) will make mistakes regarding the merits of

alternative public policies than regarding the merits of alternative private automobiles and less likely to notice the errors made.<sup>29</sup>

How well individual voters understand the policy issues before them is partly a matter of their talent for information processing, partly a matter of the time available and their interest in public policy issues, and partly a matter of the cost and quality of information that they might gather and use. Only the latter is likely to be affected directly by constitutional design.

Institutional or other legal arrangements, such as freedom of the press, freedom of information laws, and the requirements that all laws be published and broadly distributed can reduce the cost of obtaining unbiased (objective) information about current policies. These constitutional restraints can potentially improve the performance of democratic governance by increasing the number and independence of information sources, which tends to reduce policy mistakes.<sup>30</sup>

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<sup>29</sup> The informational problem faced by voters is not entirely symmetric. For example, the benefits of alternative programs—a new train line, a new school, improved public health care, and so on—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 often 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 underassessed, as many of them are essentially invisible. It can, thus, be said that a natural predisposition favoring new public programs generally tends to occur, especially when times are good. See Buchanan (1966) or Congleton (2000) for more on the fiscal illusion hypothesis.

<sup>30</sup> 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

Fortunately, the same constitutional assurances that enhance electoral competition also tend to improve the informational base of election results and subsequent policy choices. Many voters become informed on a subset of policy issues because they affect private interests, and those voters know enough to respond to variation in relevant candidate or party positions on those matters. Consequently, parties and candidates tend to tailor their programs to the interests of these partly informed voters.<sup>31</sup> Moreover, the electoral process itself also tends to aggregate information in a manner that discounts extreme opinions. Median opinions are, by definition, not outliers and tend to be more accurate than one would anticipate based on the information available to most voters. This is not to say that mistakes are not made, but rather that fewer mistakes are made than might be expected based on voter survey data. In the end, electoral outcomes in an open democracy

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ordinary voters can make better policy assessments. This point is well developed in the second Lindbeck report (2000).

<sup>31</sup> Unfortunately, the voters with the greatest interest in candidate positions are often 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 that 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.)

are based on more complete information than is possessed by any single voter at the time of the election.

### **Patronage, the Politicized Implementation of Government Policy**

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 adopt policies that improve its electoral prospects without advancing those of a broad subset of the electorate, political agency problems exist. This, as noted above, is one reason why many electoral practices are provided special constitutional protection. Unfortunately, even in policy areas that do not directly affect electoral contests, incumbent governments may often increase their electoral prospects without advancing the long-term interest of the electoral majority.

Every government policy has to be implemented in some way. In some cases, this is a matter of purchasing services from independent private firms. In others, implementation requires the direct production of services by the governmental bureaucracy. In either case, a democratic government's direct interest in producing services, whether indirectly through contracts with the private sector or directly through the bureaucracy, is based on what might be called *political* efficiency rather than administrative efficiency. That is to say, administrative efficiency is only of interest insofar as it increases the government's prospects for reelection.

How might private contracts and 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, 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, both government contracts and the bureaucracy will be designed to increase the advantage of the incumbents relative to the opponents, which may have little to do with the efficient delivery of public services.

It is clear that both government contracts and the bureaucracy provide incumbent parties with a number of opportunities for political advantage. The self-contained nature of both contracts and the bureaucracy makes them relatively more difficult for voters to monitor than parliamentary debates. This, in turn, potentially allows the incumbent government to reserve both government contracts and jobs for its supporters as rewards for past support

and in exchange for promises of continued political support. In effect, contract and employment preferences allow incumbents to purchase votes from those producing government services.

The government may also allocate resources among regions to provide differentially better service for its own supporters or to influence electoral outcomes at the margin.<sup>32</sup> It may also expand programs in which supporters work and reduce those in which the persons favoring opposition policies tend to work. The parties in power may also encourage the bureaucracy to disseminate information that makes the government's policies look better than they really are. Such policies are in the interest of incumbent politicians whenever the "public support" induced by the partisan production of government services is greater than the loss in support generated by reduced efficiency and, consequently, higher taxes.

The constitutional problem here is not that overstaffing reduces economic efficiency or that partisan producers are necessarily less competent than others might have been, but rather that the interests that such policies advance are misaligned. Patronage-based support for incumbents is not based on the value of the public program produced, but rather on the interest of government contractors and employees in their own income and job security, which are largely independent of public policy per se. Partisan production methods also increase monitoring problems for those outside government and often allow incumbents to assure that their programs remain in force well after they leave office. The latter is an instance of what has come to be called the time consistency problem (Glazer 1989).

These methods of increasing the probability of reelection conflict with the principle of popular sovereignty, because the politicized use of government contracts and the bureaucracy makes it possible for a government to retain power without necessarily providing significant government services to those outside of government or beyond the party in power. That is, the partisan production of public services advances the incumbent government's interests rather than the shared interests of the electorate.

Preventing incumbent governments from using partisan production methods to advance their narrow partisan interests in reelection is not an easy task. Effective implementation of policy clearly requires the incumbent government to negotiate contracts and to exercise significant control over the

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<sup>32</sup> 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.

bureaucracy. However, to the extent that partisan politics can be removed from the implementation of policy, while preserving incentives for productive efficiency, the government can be made a better agent of the common interest.

Constraining the politicized use of the bureaucracy can usually be accomplished with little sacrifice of managerial control. In the absence of constraints, it clearly is easier for senior political figures or members of interest groups to secure bureaucratic posts because of their political affiliation, and easier for senior bureaucrats to secure political posts within parties. This clearly leads to a highly politicized bureaucracy. 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. Reforms that restrict the ability of politicians and bureaucrats to move between political parties and the bureaucracy only slightly reduce the pool of persons who may hold senior positions in both organizations, while breaking the strong partisan incentives that the “revolving door” creates. Partisan government contracting can be reduced by requiring open and public open bidding for all significant contracts.<sup>33</sup>

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<sup>33</sup> Competition for government contracts should also take place within governments as well. In the absence of competitive bidding, there is a strong bias toward ever expanding programs. The shared interests of employees *within* monopoly contractors and bureaus tend to be advanced as their enterprise receives greater resources. Competition, in contrast, implies that firms and bureaucracy can prosper by *reducing* their demand for resources relative to other producers, that is to say by increasing their efficiency (Breton and Wintrobe 1975). In the absence of competition, it is clear that the narrow interest of government agencies may be advanced by securing additional resources without providing new services that advance the broad interests of the electorate. (Niskanen [1971] argues, however, that too many services tend to be provided in cases in which the agency’s output can be more easily evaluated than its alternative production methods.)

Such reforms tend to improve the efficiency of government production, insofar as partisan production methods are overly labor intensive, or rule out contracts with efficient producers. Every member of the polity has a long-term interest in the cost-minimizing production of government services, because efficient production allows taxes to be reduced in a manner that tends to promote long-term economic growth.

However, the constitutional problem of interest here exists whether partisan production is more or less costly than politically neutral production. Restricting a government's ability to use the bureaucracy and government contracts to advance narrow partisan interests reduces the incumbent advantage in electoral contests and encourages electoral competition. Rules that restrict opportunities for partisan production improve democratic governance by better aligning the interests of incumbents with the shared interests of the electorate.

### **Generality and Cost-Benefit Analysis: Avoiding the Fiscal Commons**

Given honest and fair elections, a well-informed electorate and a professional and efficient organization of the 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. In this sense, all the above constraints may be said to improve democracy. They cannot, however, guarantee that all the policies made by parliament will advance the interests of the voters supporting the government. The best of all legislatures will make honest mistakes because of the inherent uncertainty of policy analysis.

Policy errors, however, may also be induced by the decision-making procedures of the parliament itself. These errors should be regarded as constitutional in nature, whenever they result from durable intraparlimentary institutions.

Consider, for example, a budgetary setting in which all programs, including those with relatively narrow benefits, are funded from general government revenues. Suppose that programs to be funded are selected first and that tax revenues are then simply 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.<sup>34</sup>

Table 7 below illustrates the basic logic of the fiscal commons problem. 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 million units) and cost (4 million units), and each region is assumed to pay half of the cost of its project and to receive all the benefits. Each region, thus, gains 1 million units of value from its project and loses 2 million units from the other. The remainder of project costs, consequently, is paid by the other region(s). The table entries are the net benefits received by an average member of each region (A, B).

Table 1. 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)

Note: The numbers in parentheses are net of tax benefits received by average members of each regional coalition.

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. Consequently, in political equilibrium, both projects are adopted. However, the average voter in both regions would be better off if neither project was built, because the total cost of the two projects together exceeds their total benefits for each region ( $3 - [2 + 2] = -1 < 0$ ). A Pareto-superior move exists at the Nash equilibrium of the fiscal commons game.

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

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<sup>34</sup> A good cross-section of the fiscal commons literature is provided by Weingast, Shepsle, and Johnsen (1981); Gilligan and Matsusaka (1995); and Crain (1999).

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. Magnified by thousands of projects, it is clear that significant policy mistakes can emerge from a budgetary process in which regional projects are funded by general revenues and are selected using majority rule.<sup>35</sup>

There are potentially large benefits from avoiding such unattractive programs for essentially all voters. Escape from the fiscal commons problem requires some form of constraint on the domain of majoritarian politics, as with the generality principle developed in Buchanan and Congleton (1998) or the use of an alternative decision-making procedure, such as cost-benefit

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<sup>35</sup> 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, in that 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.

analysis.<sup>36</sup> The generality principle requires that government programs provide benefits to essentially all citizens and, therefore, rules out most targeted programs and regional projects. Cost-benefit analysis does not rule out such programs per se, but does require them to generate benefits greater than their overall costs. Without such constraints, majoritarian politics *within* parliament may fail to advance the interests of the government's *own* supporters.

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<sup>36</sup> 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 both new and ongoing programs.

## **Chapter 10**

# **ORGANIZING GOVERNANCE TO BROADEN CONSENSUS: BEYOND MAJORITY RULE**

The contractarian case for constrained parliamentary democracy is not based on its “majoritarian” nature, but rather on the conclusion that such governments are more likely to advance the broad interests of those who live within the polity than are many other constitutional arrangements. From a contractarian perspective, the advantage of majority governance over minority governments is simply that the public policies selected will advance a broader range of interests. Similarly, constrained forms of democracy are superior to their unconstrained counterparts, because they more faithfully advance a broader range of interests. Chapter 9 demonstrated that a variety of institutional features can better align the interests of a parliamentary government with those of a majority of the electorate. Such institutional refinements may be expected to improve parliamentary outcomes.

This chapter now explores further refinements of parliamentary democracy that tend to promote, or at least protect, interests beyond those of a temporary majority.

### **Protecting Minority Interests with a Bill of Rights**

Another constitutional constraint that tends to broaden support for constitutional democracy is a bill of rights. Many policy areas exist in which significant political risks for minorities can be reduced at little 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 are paid for all resources used in the production of public services. Constitutional rules that restrict the ability of the legislature to write laws to regulate particular areas of life provide minorities with a low-cost form of protection that increases their expected welfare by assuring that especially valuable and especially private spheres of life will not be subject to regulation by a present or future majority.

Broad support will exist for a “Bill of Rights” whenever uncertainty exists about who will be members of the majority coalition and minority interests can be protected at relatively small cost. Such constitutional guarantees would benefit all members of the polity in the long run as membership in the majority coalition varies through time. Recall that given a choice between constitution R and constitution D, constitution R will be widely preferred to constitution D, if the downside risk to minorities is smaller

under R than under D, especially when the advantage of being in the majority is unaffected or reduced only slightly by constitution R relative to D.<sup>37</sup>

This contractarian argument for a bill of rights is clearly most general when voters cannot predict the membership of future minorities, however, it also applies in some settings in which voters know exactly who will be in the minority if more than “narrow” interests are widely believed to be at stake. For example, if particular liberties are universally believed to be features of “good societies,” it is clear that contractarian logic requires those liberties to be protected or guaranteed. Contemporary examples include universal suffrage and equal protection of the law, as well as freedom to engage in peaceful political and theological debates. Such rights are widely regarded to be features of civilized society, in which “civilized” is used in its normative sense. In such polities, even members of a permanent majority will agree to accept a small sacrifice of personal comfort or wealth to make their society more attractive by protecting the “civil liberties” of their permanent minority.<sup>38</sup>

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<sup>37</sup> The contractarian logic for constitutional protection of minorities is similar to that used above to support majority rule. Minority protections are clearly warranted if all majorities are equally likely and majorities normally gain less than the minority loses. In this case, the feasible apportionments under constrained majority rule become patterns such as (A, B, C) with  $A, B, C > 0$ , as compared with (M, M, 0) where  $2M < A+B+C$ . If the “identities” of A, B, C, and M, M, 0 are not known beforehand, the expected result with minority protection is necessarily greater than that under unconstrained majority rule, because  $(A+B+C)/3 > (2/3)M + (1/3)(0)$ .

In cases in which protecting minority interests entails some cost—perhaps because of incentive effects or administrative costs, G, it remains possible that  $(A + B + C) / 3 - G > 2M$ . If not, the extent of risk aversion becomes important. The more risk averse such voters are assumed to be, the more they would be prepared to sacrifice to protect minority interests.

<sup>38</sup> A contractarian case for creating rights or other minority protections can also be made for cases in which the minority is prepared to resist actively the policies adopted under the constitution in the absence of these protections. In that case, 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 practice the religion of one’s choice can be based on this logic where large or numerous minority religions exist.

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.

## Supermajority Decision Rules: Beyond Majoritarian Governance

The normative analysis to this point has investigated several methods by which a majoritarian government can be induced to choose policies that advance the broad interests of a polity's citizenry. Contractarian logic implies that democratic constitutions should assure that elections are fair and competitive, fundamental civil liberties are protected, policy making is decentralized, and the bureaucracy is restricted from partisan politics. These constraints improve democratic outcomes under majoritarian decision rules.

There are also several nonmajoritarian procedures that can improve parliamentary democracy. This section reviews three general methods for selecting policies that tend to elicit broader support than simple majority rule does.

### *The Contractarian Advanced Case for Supermajority Methods*

The contractarian case for using supermajority procedures is similar to that favoring majority rule over minority rule. Supermajority rules increase the breadth of interests advanced by every new public policy. Moreover, broader support also tends to reduce the downside risk of being outside government. Supermajority decision rules allow minorities to protect themselves against unfavorable changes in the status quo by vetoing any new policy that makes them worse off. The purpose of supermajoritarian decision rules is simply to assure that public policies have broader than majority support. A century ago, Knut Wicksell proposed that qualified unanimity, rather than majority rule, be used to adopt all policies.

Unfortunately, the use of supermajority decision rules is not costless. Supermajority coalitions tend to be more difficult to assemble than majority or minority coalitions. In addition, many policies will be blocked that would have been passed under less demanding decision rules. 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 reduced opportunities for adopting new legislation.

If voters are risk averse, they will be prepared to accept some reduction in the overall expected value of government policies to avoid the risk of minority exploitation.<sup>39</sup> In polities where changes to the status quo are widely believed to be risky, supermajority decision rules will, consequently, command broad support for reasons similar to those developed above for political and civil liberties. If not, supermajority rules would be broadly preferred to majority rule only in policy areas where advancing broader interests tends to improve public policy systematically (on average) or in areas where it is widely anticipated that major policy mistakes can be avoided by biasing decisions in favor of the status quo, as tends to be true of proposals for constitutional reform.

In practice, supermajority rules are most often used to make constitutional or quasi-constitutional decisions. For example, many major Swedish policy changes, including constitutional reforms, are informally adopted by supermajorities. This informal constitutional norm helps to prevent reversals after subsequent elections, but also helps to assure that new major programs generally advance the broad interests of the electorate. In the United States, the constitution explicitly requires supermajorities for constitutional reform and impeachment of the president. In the European Union, major policies are adopted by a variety of supermajority procedures, up to and including unanimity.

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<sup>39</sup> Buchanan and Tullock (1962) base a good deal of their analysis of voting rules on variations in decision costs. They argue that the ideal decision rule tends to vary with the particular policy choices being considered, in that both the downside risk of being in the minority and the benefits from being in the majority tend to vary with political circumstances and with the policy at issue.

### ***Approval Voting***

Fortunately, not every voting method that identifies policies with supermajority support requires an explicit supermajority threshold. For example, consider approval voting.<sup>40</sup> Under approval voting, every voter can cast a vote *for as many or few* policies, parties, or candidates as they wish. As under majority rule, every vote counts equally and the candidate with the most votes wins. If a voter finds several of the available alternatives to be acceptable, he or she may cast a vote for each. Approval voting, thus, allows voters explicitly to address cases in which a wide range of the alternatives are considered *acceptable, rather than forcing them to make an arbitrary choice among* essentially indifferent policy alternatives. Restricting a person to cast only one vote in such cases clearly provides misinformation about his or her preferences over policies.<sup>41</sup> Clearly, the more votes that a candidate or party receives, the broader is its base of support.

Within a legislature, approval voting can be used to select among several policy options at the same time. If members of parliament consider more than one policy alternative to be acceptable, they can simultaneously support several policies by voting for all those that are acceptable. This allows the policy with the broadest appeal to be identified in a single vote. In this manner, approval voting allows consensus policies or candidates to be identified more directly and more reliably than majority or plurality rule do. Only a single vote is required, whereas majority rule requires a series of votes between many pairs of the policy alternatives.

There is no guarantee or necessity that approval voting will yield outcomes with supermajority support; rather, approval voting makes it far more likely that such candidates or policies will be identified if they exist. In cases in which no policy receives a majority or supermajority of the votes cast, a run-off election can be held between the two alternatives with the most votes, as is also the case under conventional elections. (Run-off referenda guarantee that at least a majority's interests are advanced by the policies chosen.)

### ***Bicameralism***

Several other procedures for selecting policies also tend to advance the interests of supermajorities without biasing policy decisions in favor of the status quo. Fiscal federalism is one of these, insofar as the overall pattern of policies that emerges tends to have greater than majority support. (In ideal cases, every local voter gets his or her ideal policy.) Bicameralism is another.

Under bicameralism, new legislation must receive majority approval in two independent chambers of a legislature. The requirement that a bill (or government) secure majority approval in both chambers implies that two somewhat different majorities will be assembled rather than one. Consequently, bicameral parliamentary decisions tend to be more thoroughly debated and tend to have broader support than required in unicameral parliament and also tend to have broader support than a majority of both chambers voting together in a "joint vote."

This effect is most obvious in cases in which the two chambers differ systematically in some way. The greater the difference between the chambers, the greater is the expected effect of bicameralism on the

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<sup>40</sup> See Brams and Fishburn (1983) for a more complete analysis of approval voting.

<sup>41</sup> There have been several times in Swedish history when several variations of the same policy were voted on simultaneously in a series of advisory referenda. Three proposed pension reforms were voted on in 1958, and three nuclear power options were considered in 1980. In each case, the "winner" had less than majority support. In such cases, it seems clear that approval voting would provide more information about voter preferences than plurality voting.

average policies adopted (Tsebelis and Money 1997). For example, the interests of a popularly elected chamber and chamber representing local governments or the nobility may differ substantially on a variety of economic and regulatory issues. The necessity of compromise would tend to generate policies that are substantially different from those that either chamber would have chosen on its own.

However, such differences are not necessary for bicameralism to affect the course of public policy. Even when the chambers are chosen through similar electoral methods, variance in turnout and personalities implies that the interests represented by the two chambers will be slightly different. And again bicameral support will require the approval of members representing different, although overlapping, subsets of voters. Consequently, somewhat more than a majority of voters tend to favor legislation that is independently passed by two very similar chambers. Moreover such “unbiased” forms of bicameralism may generate very similar cameral conclusions with respect to policy issues, yet tend to stabilize policies by reducing legislative errors, without affecting the average public policy adopted (Congleton 2003). That is to say, bicameralism can identify super majorities without necessarily biasing policies toward the status quo.

Nonetheless, bicameral parliaments have often been adopted with that in mind. 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 to protect regional government interests against central government encroachment. Bicameral parliaments can be designed to advance or protect particular interests, such as a tendency toward excessive centralism or to create a particular bias to protect the interests of a particular minority group.

Another common practice in bicameral design is to focus one chamber on the long-run interests of the polity and the other on its 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 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 members with more immediate electoral pressures can afford to—to the extent that voters use past results to assess incumbent party or candidate performance.

Bicameralism also allows various electoral systems to be combined in a manner that secures the advantages of two 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, while party leadership would continue to dominate the other chamber.

Varying the length of term of office and the size of the chambers can also be used to differentiate the “quality” of the members in the two chambers. Election to a smaller chamber implies that each elected representative has relatively greater impact on legislation. A longer term of office reduces partisan and campaign pressures on elected members. These features make elected office in the smaller chamber more attractive and, hence, increases the level of competition for those positions. In the end, only the most skilled or at least popular politicians would obtain positions in the first chamber. 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.

The welfare-enhancing properties of bicameralism are evident in the Swedish experience, as developed below in chapter 12, and more broadly in European data. For example, two papers by de Vanssay and Spindler (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 it is policies not institutions, after all, that directly affect incentives for individuals to work, save, and innovate.<sup>42</sup>) Their second paper investigates whether institutions contribute to the development of economic policies that promote economic development. That paper finds that countries with bicameral legislatures tend to have more economic freedom than those with unicameral parliamentary systems.<sup>43</sup>

### **Fiscal Federalism: Decentralized Governance**

The procedures and constraints appraised to this point have been those that determine central government policies. This section analyzes the extent to which local governments should possess policy-making power.

Much of the previous analysis will also apply to the decision-making procedures of local governments. Local governance will generally better advance the interests of their citizens if policy decisions are made by agents selected in competitive electoral contests and are prevented from undermining electoral competition or basic civil liberties.

What is different about decentralized governance is that policies are independently chosen by local governments and, therefore, tend to vary among regions. A “federal” system, consequently, has several advantages over a unitary state. One advantage is that local electorates tend to be better informed about the effectiveness of local government programs and politicians than their national counterparts, because voters have more *direct experience* with local programs. Local highways, mass transit, parks, schools, libraries, and health services are directly experienced in a manner that most national programs cannot be. Consequently, results in local elections tend to be based on somewhat better voter information than those of national elections. Local electorates also 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 implies that more persons

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<sup>42</sup> 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 above.

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.

<sup>43</sup> The bicameral effect was also present when de Vanssay and Spindler included a 10-year lagged value of economic freedom in their regressions (see table 2). The latter specification clearly suggests that bicameralism in itself 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.

can get more nearly their ideal balance of services in areas of local authority than is possible with any uniform national provision of the same services.<sup>44</sup>

Another advantage is that local governments are subject to somewhat more intense competitive pressures than national governments. Distances are smaller in both spatial and cultural terms. Consequently, voters tend to have direct experience with local policies in other jurisdictions as well as their own, which allows them to assess directly the relative performance of local governments. This “yardstick” competition provides local governments with electoral incentives to innovate and copy methods from relatively more effective rivals. Shorter distances also imply that the cost of moving between local jurisdictions is smaller than that of moving across national borders. Mobility thereby induces competition among local governments for residents and for other mobile parts of their tax base. Together, yardstick and tax-base competition imply that “best practices” tend to become widely adopted and rapidly improved through time.

Mobility also tends to protect minority interests. Minorities can avoid unfavorable or ineffective local governments by relocating to districts where services are better. Not only are preferential policies generally more difficult to hide at the local level, but lower moving and search costs allow those adversely affected by local policies to seek better treatment elsewhere more easily. The relatively homogeneous makeup of smaller communities also provides fewer opportunities for preferential treatment (everyone cannot be treated better than everyone else). Local governments will, consequently, find it more difficult than national governments to exploit minority interests within their territory.

Overall, decentralized governance allows the interests of both “national minorities” and “national majorities” to 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. These features of decentralized democracy tend to generate broad benefits for the citizenry as a whole, including national minorities. In many policy areas, 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.

Unfortunately, the independent selection of some policies by local governments can generate national problems, as with environmental regulation or national defense. Decentralized governance works best in policy areas where services affect only residents of the locality or region of interest.<sup>45</sup> In these policy areas, contractarian logic implies that fiscal federalism is clearly superior to centralized governance. Decentralization encourages a broader menu of services that more perfectly suits the persons living in the communities served than any uniform national level of service can.

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<sup>44</sup> This is implied by Oates’ proof (1972, ch. 2) 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.

<sup>45</sup> Oates (1972) also argues that broad macroeconomic policies and efforts to equalize incomes or opportunities for citizens within the nation as a whole cannot be easily implemented at a local level. Such truly nationwide policies would properly be decided by the central government. However, a role for local administration of national policies may remain. For example, programs to equalize incomes or opportunities across communities can often be advanced with a system of block grants administered by community governments.

## Constitutional Courts: Binding Democratic Government

The analysis to this point suggests that parliamentary democracy can be improved from a contractarian perspective by designing suitable constitutional constraints and procedures. Electoral competition must 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. Policy decisions may be made by bicameral rather than unicameral legislatures.

Several of the problems addressed by these constraints and procedures are 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. Consequently, it is clear that a democratic government cannot be expected to do a consistent or thorough job of monitoring and policing itself to assure that constitutional constraints are followed when a majority of its office holders—or voters—favors violating the constitution.

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 that previews legislative proposals. A government founded on law should clearly rely on lawful procedures to evaluate the constitutionality of new laws and to reject those deemed unconstitutional.

Of course, to grant an independent agency the power to review legislation to determine whether new laws accord with the nation's constitution is one thing; to provide that agency with an effective veto power over legislation deemed unconstitutional is another. Any panel of legal scholars can accomplish the first, but the latter requires formal and informal constitutional support. Adding another "veto player" or process by which policies can be overturned once adopted by a majority of the legislature clearly changes parliamentary procedures.

Granting an independent agency or constitutional court the power to reject laws deemed unconstitutional is clearly problematic from the contractarian perspective developed above. How does one assure that the agency or court will, in fact, protect the constitution, rather than use its power to subvert it? To avoid this problem, clearly the interests of those participating in the review have to be aligned with the common long-term interest that constitutional procedures and constraints promote. This is no small task.

One common practice is to attempt to find persons with consistent and habitual patterns of writing and thinking that affirm the significance of "the constitution" and constitutional procedures. That is, it may be possible to find people whose "self-interest" is already aligned with the task of constitutional review. That such persons exist is clear in history. Many persons have devoted themselves to protecting constitutional practices, and many others would willingly do so. However, no foolproof method of identifying such persons exists.

The importance of "hiring" mistakes makes constitutional review an area in which any veto power granted should clearly be shared among several people rather than vested in a single person. Voting procedures tend to identify widely shared opinions, which reduce the losses associated with selecting one or two errant reviewers. Every majority decision on the constitutionality of a law will necessarily include the assent of the median reviewer, and the median opinion, by definition, cannot be an extreme. This makes extreme theories and legal mistakes unlikely to determine outcomes (Condorcet's jury theorem). Moreover, constitutional decisions are clearly an area in which supermajorities or approval voting can be used to reduce further the effect of hiring mistakes or to bias the review process somewhat in favor of the legislature.

Because the selection of reviewers cannot be perfect; provisions for removing errant members of the constitutional agency may also help improve the long-run performance of the review agency. The procedures for removal should not be so easy that they eliminate the independence of the review agency,

but, rather, should be nearly as demanding as the alternative of amending the constitution. Packing or unpacking the review agency should not be an alternative to amending the constitution.

It bears noting that constitutional review does not necessarily require establishment of an agency with veto power. An independent review agency might instead be empowered to submit “unconstitutional” legislation to a special referendum 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 that they must take account of in ordinary elections. Constitutional review by referenda, as in Switzerland, allows more targeted and faster electoral oversight than possible with a general election and also avoids many of the incentive problems of granting veto power to an unelected constitutional review agency.<sup>46</sup>

Review by referenda, however, fails to address the problematic cases of interest here, in which *unconstitutional* policies are consistent with the current majority’s interests, at least in the short run. Changing election laws, taking away the rights of a minority, suppressing political debate might all have majority support in the short run. It is in such cases that the value of a constitutional review agency is most evident. Only a well-designed constitutional review process, with veto power, can protect both the majority and minority from unconstitutional laws and policies.

The problem of motivating such a powerful agency is not trivial, but it certainly has not proved so difficult that effective review agencies are impossible. Constitutional courts are widely used in many Western democracies. A proper constitutional court will necessarily make controversial decisions, including ones that run counter to the majority’s immediate interests. By overturning such laws, an effective constitutional review agency tends to broaden support for a nation’s constitution for the same reasons that a bill of rights does. An effective constitutional review agency can broaden support by reducing the private risk of collective action, even in cases in which it is understood that the court’s decisions will be less than perfect.

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<sup>46</sup> If constitutional reforms can be adopted by majority rule, as under the current British system, essentially all legislation may be regarded as constitutional amendments and, consequently, “constitutional.” In such polities, constitutional courts can do little more than assure that voting and legislative procedures are properly carried out.