

I. Constitutional Design and Public Policy

- A. There is a long-standing tradition of constitutional analysis in political science and law that extends back to Aristotle's *Politics*.
- i. It is for this reason that constitutional design may be said to be one of the oldest areas of social science--even if it has been largely neglected by modern academics in political science and economics in the decades after WWII.
 - ii. For the most part, that older tradition stresses the importance institutions as sources of public policy and culture.
 - The older tradition is largely inductive insofar as scholars attempt to induce general principles from historical case studies.
 - (An early exception to this rule is *Plato's Republic*.)
 - iii. The contemporary **constitutional political economy** (CPE) literature addresses many of the same issues and problems, but has deductive rather than inductive foundations.
- B. The CPE literature uses rational choice models to analyze the long-standing issues of constitutional design, but also addresses new research questions that arise in rational choice analysis, but not historical work.
- i. The new results do not necessarily overturn the conclusions of historical analysis or earlier studies, but extend our understanding of political institutions by applying more rigorous models and testing sharper hypotheses using modern statistical techniques.
 - The CPE research program can be said to have begun with Buchanan and Tullock's (1962) *Calculus of Consent*.
 - The pace of constitutional research accelerated during the 1990s, in part because the effects of institutions on economic development began to be taken seriously and in part because new data sets became available for testing both old and new hypotheses.
 - Congleton and Swedenborg (2006) provides a very useful and broad survey of the main results of the empirical literature that emerged in the period after 1990.
 - ii. As noted at the beginning of the course, constitutional analysis can be regarded as the **third main strand of public choice research**.

- iii. A good deal of that research is independent of the elections and interest group strands of research, but contemporary constitutional analysis draws from the tools and conclusions of those literatures.
 - iv. It also includes analysis of many issues that are largely independent of the elections and interest group literatures.
 - a. The origins of governance
 - b. The effects of the structure of governance on public policies:
 - federalism, bicameralism, PR and presidential systems etc
 - c. The evolution of the structure of governance
 - d. Normative theories for evaluating constitutional designs
- C. Today's lecture covers (i) the nature of a constitution and (ii) surveys some of the earliest work on constitutional issues.

II. Finding the Constitution

- A. A nation's political constitution consists of durable procedures and constraints that define the procedures and limits of lawful governance.
- The procedural aspects of a constitution include the general architecture of the government: the legislature, executive, court system, and power relationships among those parts of government.
 - The constraints include political, economic and legal factors that reduce "the government's" freedom of action.
- i. Constitutional procedures specify, at least in a general way, how persons are to be selected for important official positions within government and what their general responsibilities are.
 - For example, the durable procedures of a democracy include explicit electoral rules and methods for selecting representatives and for making policy within the elected government.
 - ii. A constitution may also specify the proper domain of governance by assigning specific policy responsibilities to government and also by defining policy areas in which government policies cannot be made.
 - The latter areas are often characterized by a "bill of rights," which stipulates areas in which private decisions or those of other levels of government are to be protected from central government intrusion.

B. Together, these procedures and constraints define the procedures for making policy decisions and policy areas in which a national government may lawfully adopt new laws and implement them.

- **It is in this sense that a constitution may be regarded as the highest law of the land.**
- **A constitution is the law for making laws.**
- A constitution describes (is) the core procedures for making public policies
- [Discuss Swedish illustration of the difference between legal and CPE definitions.]
- [Buchanan prefers the “rules of the political game.” Is there a difference?]

III. Constitutions versus Social Contracts

- A. It bears noting that **not every constitution can be regarded as a social contract** in the sense that it is broadly acceptable to all residents of a the country of interest.
- i. Stable procedures for enacting new laws (and stable constraints on what rules can lawfully be adopted) are normally used by durable authoritarian regimes as well as by durable democracies.
 - ii. Even in cases in which all procedures for making laws are codified in formal documents that bind the sovereign, the formal documents may have been agreed to by a relatively small portion of the society of interest and have relatively narrow support.
- B. Thus the existence of a constitution does not by itself have normative significance, although it may still have political significance.
- That is to say, the standing procedures of policy making may makes some policies more likely and others less likely.
- C. These are many common features of modern democratic constitutions--the use of elections to select representatives and voting by representatives to select policies--although the details vary quite a bit from country to county, and from time to time.
- balance of authority between the executive and parliament
 - type of election procedure: PR, first past the post, etc.
 - structure of parliament: bicameral, unicameral, etc.
 - extent of decentralization

- Non electoral constraints on public policy or not
- Supreme court or not
- etc

IV. Written and Unwritten Constitutions

- A. The most obvious part of a nation’s political constitution is that which is explicitly written down in its fundamental laws of governance.
- i. The US Constitution is fairly well known, because it was the first more or less complete description of a national government in a single document.
 - ii. Prior to 1800, however, it was common for national constitutions to consist of several written documents.
 - For example the Swedish constitution could be said to consist of three documents: one describing the architecture of government, one describing the parliament, and one describing election laws.
 - To that list, a third and could be added concerning the freedom of press and religion.
 - To that a fifth could be listed: Swedish civil law.
 - iii. Indeed, this multiplicity of constitutional documents also tends to be true of the US constitution, if election law is taken to be part of the standing procedures of governance.
- B. In addition to the formal procedures outlined by a nation’s written constitution are the **durable procedures and constraints of the unwritten constitution**.
- i. The unwritten constitution is often implicit in the actual conduct of parliament and other branches of government.
 - For example, the degree of centralization in political decision-making procedures is largely determined by legislation and custom—even in cases in which constitutions make explicit reference to the autonomy of local governments, interest groups, and individuals.
 - ii. Such informal constitutional constraints are often supported by legislation that has informal quasi-constitutional status.
 - For example, in practice, much of the actual drafting of rules and regulations is delegated to commissions, government committees, local governments, party elites, and the bureaucracy in which unelected government officials and

members of interest groups develop new laws that are never seen by members of the parliament.

- The English Constitution consists (nearly) entirely of such quasi-constitutional laws.
- iii. The informal procedures for making laws have significant impacts on individuals, businesses, and other organizations, but are not specified by the written constitution.
 - In many cases, the standing procedures could not be fully specified by a written constitution, although they are fairly well understood by policy makers.
- iv. **The relationship between the written and unwritten constitutions is itself largely unwritten.**

V. Evolutionary Nature of Real-World Constitutions

- A. **It is clear that both the formal and informal parts of a nation's constitution are largely evolutionary products of trial and error.**
- A good deal of what is written in new constitutional documents consists of procedures and constraints already contained in previous written documents.
- B. Most constitutional changes assume the continuation of most of the informal practices and constraints associated with the previous unwritten constitution. .
- i. This is, of course, what is meant by a constitutional amendment.
 - Such piece-wise changes allow the gradual accumulation of constitutional knowledge and practice over the centuries.
 - And, in this sense, a long-standing parliamentary democracy may be said to have a constitution that is substantially older than the government defined by its current constitution.
 - ii. Many parts of a nation's constitution are influenced by customs, procedures, and norms that have evolved over the centuries.
 - iii. None the less, **every change in a nation's written constitution explicitly creates a new combination of procedures and constraints for the development of new law and every newly written constitution** that legally supersedes both the written and unwritten parts of the previous constitution.

- a. Moreover, changes in the formal written procedures and constraints tend to induce changes in both the unwritten practices and procedures of governance, especially in areas directly affected by the new formal procedures.
- b. In this sense, at least, major constitutional reforms can be thought of as revolutionary (discrete), rather than evolutionary (continuous) in nature.

VI. Constitutions are important because they influence the course of public policy, which in turn, has direct effects on people both inside and outside the country of interest.

- A. The reason most persons prefer democracies to dictatorship is not because they prefer to watch parliamentary debates to royal processions, which most do not, but because the anticipated policies produced by democratic governments are considered superior to those produced by dictators and kings.
- i. There are several reasons to believe that constitutions "matter" in this sense.
 - a. First, there are various theories of governance, both the intuitive theories of the "democratic polemicists" and the more carefully reasoned theories of philosophers and modern political economists.
 - b. Second, there is a good deal of empirical evidence that constitutions have affected public policy broadly around the world.
 - See for example, Congleton and Swedenborg (2006)
- B. If "people" spoke with a "single voice," it is possible that the institutional details of democratic governance would matter little.
- i. The same representatives would be chosen and their policy choices would tend to be similar under a variety of election laws and constitutional architectures.
 - ii. However, the people rarely speak with a single voice and elected representatives do not always faithfully represent the interests of their supporters.
 - iii. Consequently, differences in constitutional procedures and constraints are very likely to affect public policy.
- C. Although citizens may or may not have preferences about political processes, they most certainly have preferences regarding policy outcomes, which in turn may affect their personal rankings of alternative constitutions.

VII. Early Rational-Choice-Based Research on Constitutional Political Economy

- A. Although the *Calculus of Consent* can be said to have initiated the CPE research program, there were a few other rational-choice based papers and books that were written in the decade before *the Calculus* was written.
- B. Among the most influential of these early pieces was a piece written by Tiebout (1956) to challenge Samuelson's (1954, 1955) claim that decentralized procedures could not solve public goods problems.
- C. Charles Tiebout (1956) pointed out that intergovernmental competition between local governments can be very similar to competition between firms in competitive markets.
- That is to say, intergovernmental competition can generate patterns of local public services and taxes that are Pareto efficient.
- i. Tiebout uses migration and changes in local tax bases to characterize a perfectly competitive version of intergovernmental competition at state and local levels.
- a. He assumes that moving from one community to another is costless and motivated entirely by differences in local public services and taxes.
 - b. Voters are assumed to take their part of the tax base with them when they move.
 - c. Local governments compete to attract residents and/or tax base.
 - d. There are assumed to be a wide range of alternative local governments that residents can choose from.
- ii. In the limit, "voting with one's feet" produces a competitive equilibrium among communities in which:
- a. Each community provides its bundle of public services at least cost.
 - b. Every community is ideally sized to produce its bundle of services.
 - c. Each community's residents are "homogeneous" in their demand for local public services.
 - d. Each voter-resident pays the marginal cost of his own services.
 - e. In this model, "tax and service competition" can be very similar to "price and quality competition" in private competitive markets.
- iii. Such tax and service combinations meet the Lindahl conditions for efficient provision of public services (as well as the Samuelsonian ones).
- Thus the outcome is Pareto efficient.
- iv. Note that this process does not require an effective political system to achieve Pareto efficient results, only very mobile tax payers who can take their part of the tax base with them and governmental interests in maximizing the number of their residents or tax base.
- In order to attract residents, communities (towns, states, and countries) have to provide services at least cost and the benefits have to be commensurate with their tax costs.
 - Otherwise "public consumers" will vote with their feet and move to other places that provide better value for their tax dollars (taking "their tax bases" with them).
 - Intergovernmental competition does not always work as well as Tiebout suggests, but his analysis has informed a good deal of discussion about the desirability of decentralizing the provision of services.
- D. Although Tiebout may be a reasonable first approximation for competition between local governments (and condo associations) within a metropolitan area.
- E. However, **there are clearly limits to its applicability--just as there are limits to the applicability of his theory of perfect competition in ordinary markets.**
- i. For example, the cost of moving between governments is not trivial, and tends to vary with the level of government.
 - a. Does this imply that none of the predictions will hold up?
 - b. Or is there enough mobility into and out of communities within many regions to put competitive pressure on local governments?
 - A large number of persons are always moving for other reasons and may choose communities in large part for the combination of services and taxes offered.
 - ii. Economies of scale or networks may reduce the number of competing "town-firms" that can be sustained in a "Tiebout world" in a manner that reduces the range of choice available to voter-taxpayer-consumers.
 - The menu of government services that voter-taxpayer-consumers can choose from may be more limited than the Tiebout model implies.

- iii. The effect of economies of scale parallel those in the microeconomic analysis of perfect competition vs. monopolistic competition, oligopoly, and monopoly.
- iv. The existence of intergovernmental externalities may also imply that some services are under provided locally and others are over provided.
 - a. The logic closely parallels the analysis of externalities between individuals and/or firms.
 - NIMBY problems may emerge.
 - Transfer programs may be underprovided.
 - b. Solving externality and public goods problems may require "treaties-Coasian contracts" or "interventions by other levels of government."

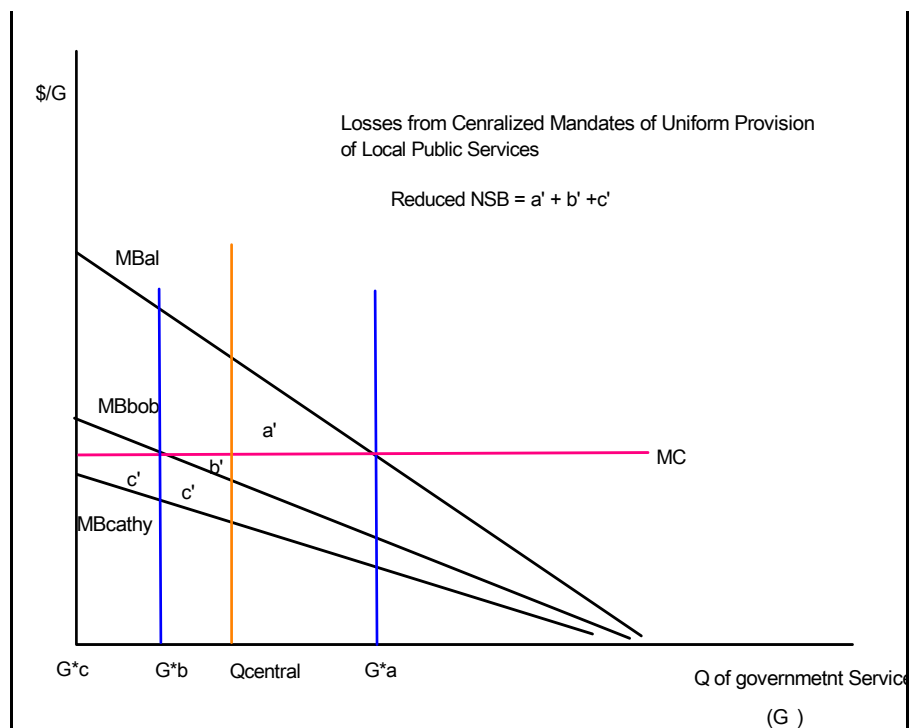
F. The existence of economies of scale and externalities provide an economic rationale for federal systems with several "levels" of government with responsibilities for providing services in different sized jurisdictions.

- If Tiebout worked perfectly, it would imply that an efficient federal government would be composed largely of local governments with a very small central government with the sole task of guaranteeing citizen mobility among communities.
- (Explain why)

- G. The Tiebout case for decentralization suggests that services should be provide by government's with the smallest jurisdictions (territories) sufficient to realize all economies of scale for the service of interest.
- Oates (1972) develops this point more formally with his decentralization theorem.
 - The EU adopts this idea with its "subsidiarity principle."
- i. The optimal size of governmental that provide particular services can be analyzed by studying economies of scale in producing the services of interest..
 - a. Services with global economies of scale should be provided by the national government (national defense, macroeconomic policy, redistribution)
 - b. Services with that require relatively large service areas or numbers of customers should be produced by state governments. (regional highways, higher education, etc.)
 - c. And services that can be effectively provided in relatively small service areas or for relatively small customer bases should be provided by local governments.

(police and fire protection, elementary education, local roads, sanitation services etc.)

- (Note that the simple production-based arguments imply that particular services should be provided by only a single level of government.)
 - ii. Addressing problems of intergovernmental externalities and economies of scale will require governments with larger jurisdictions than those that provide local fire protection.
- H. An important generalization of the Tiebout model was developed by Oates (1972), who among other conclusions, derives a decentralization theorem.



- i. The decentralization theorem implies that control over public services should be vested in the smallest government that is large enough to realize all economies of scale in production and/or to regulate externality problems.

- That is to say, if policy or service X has an effect on region Z, then the region Z should be managed by one government.
 - a. For example, some forms of education, police services, and environmental regulation have only local effects and do not exhibit great economies of scale. The Oates-Tiebout analysis suggests that responsibilities for those services should be local rather than state or national.
 - Variety is good according to the Oates-Tiebout framework.
 - Other services tend to have regional effects as with commuter networks, other forms of air and water pollution, and some forms of police authority.
 - There are also services which have broad economies of scale, as with military force, which suggest that national governments should have responsibility for such services.
 - Similarly, insofar as the advantages of free trade zones increase with size, so the national government should have responsibility for maintaining free trade within the nation.
 - b. Similarly, it can be argued that the "service district" (regional governed) should be large enough to realize all economies of scale in producing the service of interest.
 - Large--but not national--externality problems, such as lake or river water pollution can be best addressed by state government or regional consortiums of states.
 - Oates' vision of the ideal federal system is a layer cake with each level of government having its own areas of policy control.
 - c. The economic benefits of jurisdictional scale, however, sometimes come at the cost of reduced political efficiency.
 - Monitoring costs often increase as the district size increases.
 - These political costs have to taken account of when dividing responsibilities among levels of government.
 - [If monitoring costs increase with scale, then the ideal jurisdictional size will be somewhat smaller than implied by Oates' analysis.]
 - ii. There are also political costs associated with merging quite different areas into a single metropolitan area.
 - The community becomes more heterogeneous and each voter has a smaller effect on service levels through his locational choice and voting behavior.
 - (Some "community mergers" may be just cartelizing behavior by local politicians who attempt to escape from competitive pressures.)
 - iii. Moreover, carefully assigning fiscal responsibilities to specific levels of government is only one method of addressing these kinds of problems.
 - One can also use mandates and Pigovian subsidies and taxes (conditional grants) to address intergovernmental externality and public goods problems.
 - The federal structure can also be left a bit open ended so that communities and states can form "consortiums" or "regional authorities" to address regional interests. (Treaties or Coasian Contracts).
 - iv. [The federalism and fiscal federalism strands of research continue through to the present day. See Mueller (2006) for a useful overview of this literature.]
- VIII. *Another Slice of the Calculus of Consent***
- A. The Calculus of Consent was a pioneering book that used the rational choice model to analyze a variety of issues associated with constitutional design from the perspective of persons participating in constitutional convention or attempting to create a club charter of some kind.
- Many of the diagrams and conclusions can be given a utilitarian interpretation by assuming that all persons are the same or that the curves represent social costs rather than individual ones.
- B. The book covers decision the choice of decision rules, groups, size, and explore the effects of other institutions such as bicameralism.
- We have already discussed some of their work on collective decisionmaking (chapter 6).
 - The remainder of this lecture will focus on their analysis of bicameralism, an important feature of many contemporary parliaments, especially in federal systems of government.
- C. Chapter 16: Bicameralism (mostly by Gordon Tullock)**
- i. Chapter 16 uses models worked out in earlier chapters to analyze bicameral legislatures.
 - a. The chapter assumes that bicameralism works more or less as in the United States, where majority support in both chambers is necessary for a public policy to be adopted.
 - b. It demonstrates that the minimum support from voters sufficient to induce policy decisions in bicameral governments vary with the distribution of voter preferences among the electoral districts used to elect representatives in the two chambers.

- The minimum range of implicit electoral support for the policies adopted by bicameral systems varies from $\frac{1}{4}$ to near unanimity in the case in which majority rule is used to select representatives and subsequently to make decisions in each chamber.
 - The $\frac{1}{4}$ case is similar to that developed earlier for a single member chamber.
 - It takes $\frac{1}{2}$ of the votes in each district to elect representatives. If voters are distributed uniformly among districts, it takes only $\frac{1}{2}$ of the members in each chamber to pass a bill, so $\frac{1}{2} \times \frac{1}{2}$ equals $\frac{1}{4}$ of all voters.
- c. If, however, voter interests tend to differ substantially among districts, there are cases in which bicameralism can limit policy choices to those with unanimous support among voters.
- For example, if there are three types of voters and two share control of the first chamber and the other group dominates the second chamber, then only bills that advance the interests of all three groups can be adopted.
- d. Given the results, in practice bicameralism seems likely to require support levels greater than $\frac{1}{4}$ of the electorate in cases in which voters are not uniformly distributed.
- The less uniformly voters are distributed, the more likely it is that bicameral legislatures produce policies with supermajority support.
 - The chapter also notes, almost in passing, that **Riker's famous minimum winning coalition** tends not to be an efficiently-sized coalition, because every coalition member can threaten to end the coalition, which drives up bargaining costs. Instead, coalitions should be larger than that minimal coalition.
 - They suggest that marginal bargaining costs fall faster than member coalitional rewards do. The chapter also makes a distinction between veto power and agenda control, ideas that would play a role in the social choice and the institutionally induced equilibrium literatures in the 1970s and 1980s.
- ii. This analysis, in turn, implies that decision costs within bicameral systems can vary from a little above those associated with single-chamber legislatures to much greater levels depending upon the extent to which common interests are represented in the two chambers.
- D. Together with chapter 15, chapter 16 can be used to both explain, rationalize, and defend the American system of governance.
- i. Their analysis can be used to characterize a typical individual's choice (ideal) of electoral rules, basis of representation, degree of representation, and rule used within the representative assembly for making decisions in terms of minimizing decision costs.¹
 - Many of the institutions analyzed resemble American ones and the results suggest that those institutions can be justified as results of individual assent at a constitutional convention.
 - Many features of the formal and informal US constitution are compatible with their analysis.
 - ii. Overall, however, chapter 16 makes few universal claims, but rather demonstrates that bicameralism is likely to have direct effects on policy outcomes that are relevant for those choosing among constitutional designs.
 - The constitutional choice analyzed is, implicitly between unicameral and bicameral systems, although the analysis could be extended to analyze other multiple chamber systems of government, as in the various "estate-based" parliaments in Europe prior to 1800.
 - Insofar as those systems represented quite different interests, the Buchanan and Tullock analysis would predict very high decision costs, which would tend to favor royal authority.
 - It is also noted briefly toward the end of the chapter that a directly elected president can be thought of as a **third chamber of government**.
- E. The *Calculus* ends with this rather **philosophical assessment by James Buchanan**:
- It is not surprising that our conception of the "good" political society should resemble that held by the philosophers of the Enlightenment.
- Our analysis marks a return to an integration of the political and the economic problems of social organization, and constitutional democracy in its modern sense was born as a twin of the market economy. With the philosophers of the Enlightenment we share

the faith that man can rationally organize his own society, that existing organization can always be perfected, and that nothing in the social order should remain exempt from rational, critical, and intelligent discussion.

Man's reason is the slave to his passions, and recognizing this about himself, man can organize his own association with his fellows in such a manner that the mutual benefits from social interdependence can be effectively maximized.

[For those interested in a tight discussion of JMB's philosophical perspective, one should read his appendix to *the Calculus*.]

- F. Next week we have no class because of Thanksgiving break. The following week we will take up more contemporary research. This is not because no interesting work on CPE was undertaken between 1962 and 2000, but simply because of time limits.