The Federalist Papers and the New Institutionalism

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CHAPTER SEVEN

Why a Constitution?

Russell Hardin

One of the oldest and most honored traditions in political philosophy is the odd claim that a constitution or the very act of forming a government is metaphorically a big contract. There are at least two kinds of force that proponents of "contractarianism" in political theory seem to expect to gain from this persuasive definition. First, there is the descriptive and explanatory force one might get from relating the creation of a constitution to an act of contracting as implied in the commonplace but largely wrong term social contract. Second, there is the normative force of using contract theory in the analysis of social institutions to give a justification for them. If we can say that people agreed to certain constitutional arrangements, as they generally do to contracts under which they are obligated, we supposedly can go further and say that they are obligated to abide by these arrangements. I wish here to argue against the first of these theses to show that constitutions are not, even metaphorically speaking, sensibly seen as contracts. I think both these theses are false, but if one can first show that constitutional arrangements are not the simple product of agreement in the sense in which contracts are, even hypothetically, the normative thesis loses most of its interest. I will attempt to establish the first thesis through consideration of the U.S. Constitution and of the understandings of its rationale and role at the time of its writing and adoption, with special reference to The Federalist Papers of Alexander Hamilton, James Madison, and John Jay, writing jointly as "Publius." 

What is the difference between a contract and a constitution in political life? The latter is prior, in the following sense. We all coordinate in having a practice of promising and a law of contract that make life better for us. A typical contract resolves a prisoner's dilemma, or exchange, problem. But the commonplace view that creating a constitution or establishing a government is equivalent to contracting to cooperate or to live at peace, as though this were similarly an exchange problem, is generally wrongheaded. A constitution does not resolve a particular prisoner's dilemma interaction. It regulates a long-term pattern of interactions. It establishes conventions, in the sociological or strategic sense, that make it easier for us to cooperate and to coordinate in particular moments. Creating a constitution is itself primarily an act of coordination on one of many possible ways of ordering our lives together, not an act of cooperating in a prisoner's dilemma or exchange. In the general case over the long term, roughly speaking, we must have one regime, for example, general enforcement of contracts or no enforcement, general protection of property or no protection. Many of us have an easy choice in this general case: we prefer coordination on a regime of enforcement of contracts and protection of property to coordination on a regime of no enforcement or protection.

It is important to keep clear what is the issue here. One can renge on any given contract and plausibly still keep open the opportunity for mutually beneficial contractual relations with other potential partners. But one cannot will away the whole institution of enforcing contracts and then still expect mutually beneficial contractual exchanges with anyone to work. A constitution is not a contract; indeed, it creates the institution of contracting. Hence, again, its function is to resolve a problem that is prior to contracting. This is the general thesis I wish to explore here.

There are at least three major ways in which a constitution differs fundamentally from a contract. I wish briefly to discuss each below. First, the strategic structures of the modal interactions governed by contracts and constitutions are different: contracts typically govern prisoner's dilemma interactions, and constitutions typically govern coordination interactions. Second, constitutions have a far less significant element of agreement behind them than do contracts. This problem has given rise to a remarkably obtuse and unenlightening literature on tacit consent, hypothetical consent, implied consent, and so forth. In practice, acquiescence is more important than agreement for the working of a constitution, while agreement is crucial if the obligations under a contract are to make sense. Finally, the sources of
support for a contract and for a constitution differ radically. Contracts are generally backed by external sanctions; constitutions are more nearly backed by default, by the difficulty of re-coordinating on an alternative arrangement. As Caesar, a pseudonymous colleague of Publius, bluntly put it, what is required of most people is that they "proceed without mutiny." The first of these three claims is simply that the strategic structure of the problem resolved by a constitution is not the prisoner's dilemma. The other two claims follow from this fact, but they are of interest in their own right, and their establishment further shows that the interaction at issue is not a prisoner's dilemma.

Despite the differences here, one might still suppose that the contract metaphor is not entirely wrong for constitutions. If constitutions are not strictly analogous to contracts, they might seem to be analogous to contracts by convention, in which a pattern of prisoner's dilemma interactions gets resolved cooperatively through the rise of a convention that regulates behavior. Again, there are elements in common here, but in general, a constitution can be distinctively different from contracts by convention, not least in that it may more typically be created out of whole cloth rather than retrospectively (although the English "constitution" might reasonably be described as a collection of contracts by convention). The most important element that a formal constitution and a contract by convention have in common is that both depend not on sanctions from some external power, as legal contracts typically do, but on sanctions and incentives internal to the group governed by them. Moreover, a constitution may work and be interpreted conventionally, with its content changing over time.

Once we are clear on what a constitution is not, we may then wonder why we want one. I will conclude with a brief discussion of what one might call the strategic functions of a formal constitution.

**The Strategic Structure of a Constitution**

We may characterize all strategic interactions as being of three types. If preference orderings over outcomes are strictly opposing, a two-party interaction is "pure conflict." If preference orderings over outcomes are identical, an interaction is "pure coordination." All other interactions involve a mixture of both conflict and coordination, with some outcomes in opposing orders and some in identical orders. The prisoner's dilemma is the most studied and discussed of all mixed interactions, largely, no doubt, because it represents the strategic structure of an exchange interaction (Hardin, 1982a).

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**Game 1. Prisoner's dilemma or exchange.**

The modal purpose of a traditional contract is to regulate an exchange and hence to resolve a prisoner's dilemma interaction. The modal purpose of a constitution is to resolve a coordination interaction. Two-person versions of these two kinds of interaction are represented in Games 1 and 2. In these games, the payoffs to each player are strictly ordinal. That is, the outcome with a payoff of 1 is the player's first choice, or most preferred outcome, that with a payoff of 2 is the player's second choice, and so forth. The resolution of a prisoner's dilemma inherently requires the creation of relevant incentives, usually in the form of threatened sanctions, to get both players to choose their "cooperate" rather than their "defect" strategies. The resolution of a coordination game typically requires little more than signalling, for example, to get both players in Game 2 to choose their strategies 1 or their strategies II.

It would be wrong to say that there are no similarities between the two kinds of interaction. Obviously, the reason that a prisoner's dilemma is worthy of joint cooperative resolution is that it has a large element of coordination within it: all parties to it prefer the all-cooperate to the all-defect outcome. If we analytically define all games for some number of players, we will generally find that most of them include elements both of coordination and of conflict. Moreover, in a time of constitutional creation or revision, one might generally expect to find genuine conflicts of interest over the form of certain of the constitutional provisions. For example, Hamilton objected to the U.S. Constitution that it did not provide for life terms for the Senators and for the chief executive. His opponents, such as Thomas Jefferson, accused him of wanting to impose an aristocracy and a monarchy. Hamilton might have answered that they were right, but that an aristocracy and a monarchy would produce better government than would a relatively free-wheeling democracy with a rapid turnover in the higher offices. But he might also have supposed that, while any strong national government was preferable to a weak national government, still, an aristocracy with a monarchy would better serve his
interests than would a more open democracy. Hence, there was perhaps, in part, merely a disagreement over the facts of how different forms of government would work. But in part, there may also have been a partial conflict of interest, as there is in a prisoner’s dilemma.

To the extent that there was a genuine conflict of interest, as between possible coordination outcomes, the interaction was more nearly analogous to that of Game 3 than to that of Game 2. In Game 3, there are two outcomes that both of us prefer to both of the other outcomes. But I prefer one of these, say, (1,2), to the other, (2,1), while you prefer (2,1) to (1,2). Whether we should now see our interaction as essentially one of coordination rather than of conflict turns on how, in our estimations, the differences between 1 and 2 compare with those between 2 and 3. If 1 and 2 are negligibly different while 2 and 3 are radically different for each of us, ours is clearly a coordination interaction. If the converse is true, ours is essentially a conflict interaction. Even if 1 and 2 are substantially different, 2 may still be radically better than 3. In this case we may face a problem of persistent disadvantage for one party if we successfully coordinate one way rather than the other, so that our final coordination may seem exploitative.

Some degree of conflict of interests is inherent in a constitutional arrangement just because the arrangement establishes institutions that can be used for narrow purposes, such as assisting me in securing my interests against you. As Hamilton noted of the U. S. Constitution, it affected many “particular interests” (Federalist no. 1). Whether such conflicts are so great as to make the original problem one of a prisoner’s dilemma is therefore a factual question, in part. If it is fundamentally a prisoner’s dilemma—rather than a coordination interaction with several coordination outcomes, some of which you slightly prefer, others of which I slightly prefer, and so on—then it must be true that some outcomes that are best for some of us are worst for others. There must be outcomes analogous to the (1,4) and the (4,1) outcomes in Game 1 in the view of major groups. If it is fundamentally a coordination interaction, this is not true.

The factual question here for 1787 in the thirteen states is one that The Federalist Papers suppose admitted of none but the simple answer that no one could sensibly have thought it better to have no union rather than some moderately powerful government. (Of course, many of the anti-Federalists disagreed.) Madison argues that even a strong faction must want the protection of all parties (Federalist no. 51). Some people clearly preferred a weaker government to the one promised by the Constitution, and perhaps some preferred strategically to block the Constitution in order to get a new negotiation for some other form of government, whether weaker or stronger. Hamilton, perhaps with some exaggeration, argued in the opening Federalist that the choice was of “an adoption of the new Constitution or a disembemder of the Union” (Federalist no. 1, final paragraph). There was no general incentive to anyone to enter the agreement in the hope of later cheating and refusing to cooperate, as one might well do with a contract or a promise to resolve a prisoner’s dilemma. All of these points would follow from the supposition that the payoff from coordination swamped all other possibilities, a supposition that must have seemed compelling to the Federalists. Although there were different plausible coordination outcomes, with some perhaps preferring one and others preferring another, there was not very likely any major group that could seriously suppose that some outcome was the analogue of the (1,4) outcome of Game 1, with itself getting the most preferred payoff and some other group getting the least preferred payoff instead of both getting some intermediate compromise. For example, Hamilton and other financiers could not have supposed that they would be best off when Jefferson and other agrarians were worst off. Rather, both must have supposed that for either to prosper, the other would also have to prosper. If either were very badly off, the other would also be badly off. The same would be
true of Madison’s other pairings of conflicting interests in *Federalist* no. 10.

Let us consider this last point at greater length. A contract generally regulates an exchange. What is at stake in an exchange between us is the trading to me of something you have that I value more than I value what I have, and to you of something that I have that you value more than you value what you have. That is a clumsy but full statement. One could say we increase value when we make the exchange, but it is more perspicious simply to say that we both are made better off. What a stable government that backs contracts, property, various kinds of cooperative organizations, collective decision-making capacity, and other arrangements does is give us the stable expectations to justify longer term efforts to create values, to specialize in ways that would not benefit us except for the strong expectation of being able to trade what we produce for other things that we could not so readily or efficiently produce. It may also create so-called public goods that make virtually all of us more productive, as when it dredges harbors and rivers, maintains roads, or builds bridges, to cite the mundane examples of Adam Smith. Perhaps the most important very early effects of the U. S. Constitution were to eliminate military insecurity between the states (*Federalist* no. 9) and to increase the scale of the market in which entrepreneurs in the states could trade (*Federalist* nos. 11, 23). The Constitution was, in Clinton Rossiter’s words, seen as “an open door to prosperity, and a shield to independence” (1965, p. 296). The problem of insecurity was not as idle as it now seems, not least because the states were in severe competition for the control of new territories to the west. Union under a strong national government took away most of the point of such competition and eased the way to development without conflict. The Commerce Clause of the Constitution, whose object had been the early impetus to the Philadelphia Convention, prohibited taxes on interstate commerce, and the national government generally brought about uniformity in certain laws that made trade and other activities easier and more beneficial.

Why then do Hobbes and others seem to think that the problem to be resolved by the creation of government is like that of the prisoner’s dilemma, so that its resolution requires something like a contract? At times, Hobbes and many others seem to view our problem as one of merely maintaining what we have, as though it were virtually a problem of pure conflict: I want everything I have plus everything you have—and you do, too. They also clearly enough sometimes see that there are, in a sense, mutual gains to be had (or mutual benefits to be maintained) by securing one allocation rather than another. The combination of these views of the issue makes it appear to be a prisoner’s dilemma. What makes the problem of coordination rise above the conflict in my wanting everything and your wanting everything is the tremendous prospect for production and mutual gain when each of us is allowed to keep some of what we have and produce. As Henry Ford is supposed to have recognized, he could profit more if his workers earned enough to buy his cars, so that his well-being depended on theirs.

Thinking of the so-called state of nature is grossly misleading in this respect because it tends to focus our attention on what we already have rather than on what we may produce under the relevant regime of coordination. The central value of government that makes it easy to assent to is that it enables us to coordinate in the production of great gains (also see Hardin, 1988). If government’s chief value were to block our conflicts over what we already have from turning violent, its rise would be the mystery that Hobbes tries to solve.

Finally, note that there were plausibly two groups in 1787–88 who saw their interests as essentially opposed to those of the Federalists. Many of the anti-Federalists seemed to prefer the breakup of the union to strong government. And the slaves, who were not party to the constitutional decision, may similarly have seen it in their interest not to have union under a constitution that perpetuated their condition. Hence, both these groups may clearly have preferred the status quo, even if it entailed a collapse of the union, to creation of a strong national government under the Constitution. If this is a correct view of their interests, it follows, of course, that, from their perspective, the issue of the Constitution was essentially one of pure conflict with the Federalists. They were in neither a prisoner’s dilemma nor a coordination interaction with the latter. This must be an accurate account of the position of the relatively anarchistic opponents of the Constitution and of those, like Brutus and Cato, who thought no republic of such size as the thirteen states together could be anything but despotic. Whether it also represents the interests of the slaves turns on what one would have expected to issue from the failure of the Constitution. It is also plausible that some of the anti-Federalists opposed a national government that would diminish their own, local power, and that others merely misunderstood their interests through “the honest errors of minds led astray by preconceived jealousies and fears,” as Hamilton supposed (*Federalist* no. 1). Both these classes of opponents must then also have seen themselves as being in simple conflict with the Federalists.
Did the Federalists see their problem in resolving the weakness of government under the Articles of Confederation as essentially one of coordination? I think that commonly they did. The Federalist Papers are laced with this view, as in Hamilton’s opening and closing comments that the issue was union under the Constitution or dismemberment, “the very existence of the nation” (Federalist nos. 1 and 85). George Washington strongly advocated a convention to revise the Articles of Confederation and, further, advocated expeditious rather than ideal change. “Otherwise,” he wrote, “like a house on fire, whilst the most regular mode of extinguishing it is contended for, the building is reduced to ashes.” Caesar wrote explicitly that “Ingenious men will give every plausible, and, it may be, pretty substantial reasons, for the adoption of two plans of Government, which shall be fundamentally different in their construction, and not less so in their operation; yet both, if honestly administered, might operate with safety and advantage” (number 2 in Kurland and Lerner, Vol. 1, pp. 60–61). There might have been other constitutions that could have been defended as cogently as that which the Philadelphia convention proposed. Under the circumstances, however, once many of the most important political leaders of the thirteen states spent a few hot months in Philadelphia hammering out a rescue of the union, they effectively selected one from all plausible points of coordination.

Agreement and a Constitution

Agreement to a contract and to a constitution differ in two important respects: whether one agrees at all and, if one does, what one agrees to. A constitution, to come into being or to be effective, does not require universal or even widespread agreement. Indeed, one of the appeals of proposing a new constitution in 1787 rather than proposing amendments to the Articles of Confederation was that the former could be done without the destructive “absurdity” of the unanimity required by the latter, especially when unanimity could be blocked by tiny but obstinate Rhode Island (Federalist no. 40). In many contexts, a constitution does not even require majority “support,” it merely needs lack of sufficient opposition.

The U. S. Constitution was adopted in the most grudging of ways. Two of the eventual states first rejected it and only later accepted it after it had taken effect as the result of the ratifications of enough other states. Although Rhode Island’s license plates do not proudly proclaim it the last holdout, Rhode Island voters rejected the Constitution in a statewide referendum by the resounding margin of 2,711 to 239; more than two years passed before a Rhode Island state convention ratified the Constitution—after Washington had already been the first President of the new nation for more than a year. North Carolina’s first constitutional convention refused to ratify the Constitution; a second convention ratified it more than a year later—again, after Washington entered office as President. Some states ratified the Constitution by large majorities, Delaware, New Jersey, and Georgia even by unanimous consent of their constitutional conventions. But several others voted for it by narrow margins. Of the three crucial large states in the middle of the proposed union—New York, Pennsylvania, and Virginia—only Pennsylvania ratified by a comfortable margin.

Despite this grudging acceptance, the U. S. Constitution has had extraordinary impact on social and political relations in North America. In this respect, a constitution is clearly like a convention in the strategic sense: it may not give you the best of all results, but it gives you the best you can expect given that almost everyone else is following it. Can one imagine in a like fashion a contract that bound those who had in no sense agreed to it?

Geoffrey Brennan and James M. Buchanan (1985) say that “The rules of political order . . . can be legitimately derived only from the agreement among individuals as members of the polity” (p. 26). The word legitimately suggests that this is intended as a normative claim. I do not wish to discuss the normative claim here except insofar as agreement cannot be binding if it is not feasible. It is the implicit feasibility claim that I wish to consider. Or perhaps one should speak of the implicit claim of the meaning of agreement. How do we derive the rules of political order from the agreement among individual members of the polity? For a trivial example, consider the rules that govern debate and voting in Congress. These are spelled out in the popularly available version for use in other deliberative bodies in Robert’s Rules of Order (1951). Robert’s Rules stipulate that the parliamentarian, whose task is to invoke the relevant rule, should not be elected but appointed by the president of the group: “It is absurd and also embarrassing to elect an advisory officer, when that adviser may know less about the subject than the officer he is supposed to advise” (see inside back cover). What the parliamentarian must know is merely the distillation of past precedents, many of which do not flow from any evident principles and might therefore have been otherwise. That distillation fills about three hundred pages.

Robert’s Rules are like the common law. They have grown without a lot of guidance and certainly without a lot of popular control. The polity lets the rules prevail, but it does not often, in any stronger sense,
express its agreement to them. If academic deliberative bodies, such as departmental meetings, are typical of the larger society in this respect, many members of the polity must find many of Robert's Rules peculiar, unfamiliar, and even quite disagreeable. It is therefore possible for those who master the rules of order, as the late Senator James B. Allen did, to shrewdly manipulate legislative deliberations to their advantage. We let these and many other rules prevail largely because we cannot easily act collectively to influence them. General Robert coordinated us on his version of the congressional system of rules, and we are stuck. We might spontaneously or collectively overturn them, but we can be fairly confident that we will not, as students of the free-rider problem and the logic of collective action know all too well. That we do not is no proof of our agreement with these rules.

Perhaps one could simply alter the terms for what counts as agreement in the case of a collective institution that has to govern all of us at once. It is not necessary for all to agree in any meaningful sense; it is only necessary for enough to agree or even merely to acquiesce for us to move ahead with our collective arrangements. Clearly, this is what is done under a constitution in most cases: some fraction of those qualified to vote on an issue is all that is required to decide the issue. Those who lose in the vote might be said to suffer an externality. Many who are not signatories to ordinary contracts similarly suffer externalities from the result of others' reaching agreement. But there is much more at stake than this in the formal creation of a constitution. We virtually all benefit from having constitutional regulation of our interactions in a sense that could not plausibly apply to any ordinary contract. Many of the people of Rhode Island presumably only wanted a constitution that would have been more advantageous to themselves than that put to them for a vote. They presumably did not want to refuse union altogether. Hence, after voting against the Constitution relatively early, Rhode Island voted for it when the union was a fait accompli that Rhode Island could either join or not join. The vote of the convention of Virginia came after eight of the required nine states had ratified. In the last speech of the Virginia convention on ratification, Edmund Randolph, who had refused to sign the Constitution when it was proposed at the Philadelphia convention, observed that "the accession of eight states reduced our deliberations to the single question of Union or no Union" (quoted in Rossiter, 1965, p. 292). Randolph voted for in Richmond what he had refused to sign in Philadelphia. There was no point in not coordinating on what was, by then, the best of likely outcomes. (In fact, in a vote three days before Virginia's, New Hampshire became the ninth state to ratify.)

Eloquent testimony to how little a people must agree to a constitution for it to prevail is the fact that the deliberations of the Constitutional Convention of 1787 were essentially secret and that the secret was maintained until after the death of all the conventioneers (Madison was the last to go, in 1836). It is, as Rossiter (1965) remarks, "one of the intriguing facts of American constitutional history that the people in whose name and by whose power the great charter of 1787 was proclaimed should have had to wait more than half a century to learn how it came to be written" (p. 332). In fact, of course, virtually all of these people had also died by then, so that those by whose power the government was established had little idea how it had been done.

Three centuries of talk about tacit consent and hypothetical agreement notwithstanding, many cannot plausibly be thought to have agreed to the U. S. Constitution on any meaningful account. What is it that they did not agree to that others did? Geoffrey Brennan and James Buchanan (1985, especially ch. 2) claim that a constitution is a social contract that creates rules to commit one's later selves and later generations to various specific things, for example, to the payment of agreed-upon taxes. Clearly, this is the wrong way to put the issue. A constitution does not commit the way a contract does. Rather, it merely raises the cost of trying to do things some other way through its creation of a coordination convention. Moreover, what it commits to is open to evolution and change in a far more expansive way than is the expectation of action under a contract. Signing a contract similarly raises the cost of then going against the agreement, but it does so in a relatively clearly specified, well understood, and predictable way. Typically, in a contract, enforcement and the costs of enforcement come from outside parties, not from the parties to the agreement. And the scope of the sanction that can be applied to one who reneges from fulfillment of a contract is generally well defined.

A constitution involves a much broader gamble than this, as both the advocates and the opponents of the U. S. Constitution recognized (Federalist no. 85, final paragraph). One of the major debates of the time was whether the presidency would evolve into a virtual monarchy and the Senate into a virtual aristocracy. Even the president as created was "a bad edition of a Polish king," according to Jefferson (quoted in Rossiter, 1965, p. 284). It is only the hubris of retrospect that makes such debates seem misplaced.

Ironically, one of the more grievous issues in the Constitutional Convention in Philadelphia was the supposed conflict between the interests of small states and those of large states. Indeed, Madison
wrote that this conflict "created more embarrassment, and a greater alarm for the issue of the Convention than all the rest put together." Rhode Island, the last holdout, was one of the small states fearful of dominance by such states as Massachusetts, New York, Pennsylvania, and Virginia, as was Delaware, the first state to ratify the Constitution. There has not been any significant conflict between small and large states as such since the ratification of the Constitution. One might therefore conclude that either this widely perceived conflict was, in fact, of little or no concern or that the structure of the Constitution resolved the conflict. For example, one might suppose that the constitutional allotment of two Senators to each state, irrespective of population, and the preclusion of ever changing this provision by amendment secured the interests of the small states. It seems more plausible, however, that it was the very general fact of the Constitution that protected the interests of the small states. National union meant that head-to-head conflict between two states ceased to be a major issue, so that inequalities in resources, especially in population, ceased to matter for security. The successful creation of a national government was the best safeguard of the interests of small states. The gamble that the constitutionalists and their opponents thought they were taking on this issue was, in fact, evidently no gamble at all.

We speak of the intentions of parties to a contract and of the intention of a law. Indeed, as in the secrecy of the debates of the 1787 conventioners, Lon Fuller (1946/1969) argues that the intentions of the law makers are of little or no interest after the law has been in effect for a while (p. 86). Madison agreed, writing in 1821 that, "As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character." The generations that have followed Madison and the other constitutionalists of 1787 have not rewritten much of the original text of the Constitution, but they have surely redefined many of its meanings. Jefferson presciently said of his own time that he feared tyranny not from the presidency but from the legislature, and that the day of presidential tyranny would come in the distant future as the nation grew and its government flourished. Perhaps he was drawing on the analogy of Roman history rather than on keen insight. But either way, he clearly enough sensed that the document would not govern (elected officials would), and that the content of the document would be determined by the electorate and by the people elected to its offices—some of whom these days are blacks and women, contrary to the original intent and words of the conventioners in 1787. "All new laws," Madison wrote in Federalist no. 37, "are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." How much more must this be true of a new constitution.

The Incentives to Abide by a Constitution

A final crucial difference that shows that the constitutional problem is not generally a prisoner's dilemma is that, once we have settled on a constitutional arrangement, it is not likely to be in the interest of some of us then to try to renege on the arrangement. Our interests will be better served by living with the arrangement. And this is generally true not because we will be coerced to abide if we choose not to but because we generally cannot do better than to abide. To do better, we would have to carry enough others with us to set up an alternative, and that will typically be too costly to be worth the effort.

We abide by a contract, in large part, because there is the shadow of sanctions to be brought against us if we do not, and indeed, we often choose not to abide by a contract when the sanctions are likely to be less costly than fulfillment would be. The sources of the costs of defection in the constitutional and the contract cases are strategically very different. For the contract case, the ultimate source is sanctions from an external body; for the constitutional case, the ultimate source is the internal costs of collective action for recoordination or, in Caesar's word, mutiny.

The generally coordinative aspect of the Constitution may be lost in certain fundamentally conflictual contexts, as in that between some of the anti-Federalists and the Federalists and between slave-owning southerners and antislavery northerners in the mid-nineteenth century. An effect of successful coordination can be the creation of great power. Successful coordination of the United States under the Constitution has led to extraordinary power of a kind and a scale that one could not expect in North America without union. This was, of course, a major issue for the anti-Federalists. That their fears were justified, even though their hopes without union may not have been, is suggested by the use of the power that came from coordination to resolve a major conflict through military force in the Civil War. In this instance, the costs of Caesar's mutiny were initially overcome. The tilting of the Congress and the presidency toward a relatively mild antislavery position finally convinced many southerners that their benefits from further coordination with the North were outweighed by the potential costs of conflict. Hence, they saw the interaction as no longer essentially one of coordination but one of conflict, as
though the differences in the 1 and 2 preferences in Game 3 far outweighed those between the 2 and 3 preferences. This made the interaction not more nearly like a prisoner's dilemma, but more nearly like a pure conflict. Many Federalists shared the fear that such conflicts could arise and would be settled forcibly, even tyrannically, but saw the balance in favor of coordination nevertheless.

Contract by Convention and a Constitution

Note that the establishment of a constitution, as in the United States in the two years 1787-1788, is a relatively singular act in the way that the establishment of a convention often is not. Much of its import is, of course, open to interpretation over time, but there is a certain fixedness in the creation itself. When we are involved in a repeated interaction of the form of the prisoner's dilemma, we commonly discover a convention for cooperation that resolves the instances of the interaction well rather than letting them all, one after the other, end in a failure of cooperation. It makes sense to call this process the emergence of a convention a contract by convention because it resolves prisoner's dilemma interactions, as contracts do, but it does so by the happenstance creation of a convention, that is, by coordination on a pattern for resolving the interactions, rather than by a literal contract that is externally enforceable (Hardin, 1982b, chaps. 10–14). This process can be spontaneous and not regulated. Deliberate creation of a constitution is clearly different from this and yet, in some ways, strategically similar. It is neither a formal contract nor a spontaneous convention.

A major difference between contract by convention and the creation of a constitution is this: The latter is a very general move made very much in ignorance about the future range of choices that it will help to govern. It is, as noted above, a large gamble. A contract by convention grows piecemeal out of a very clear class of interactions. It is unlikely to gain anything approaching general scope, although it may serve as an example that will influence the way other, similar patterns of interaction get resolved. By contrast, a constitution is little more than a commitment to go on to resolve various interactions that involve some conflict as well as some that perhaps do not, that are virtually pure coordination problems in which little more than centralized signaling is required for successful coordination.

This is the truth in the common view that we can often agree on the procedure for deciding an issue even when we cannot so readily agree on what decision to make on the issue itself. This view is even more compelling for establishing a procedure well in advance of addressing any specific issues. Indeed, one of the most compelling considerations in defense of a particular procedure is merely that it has been in use for a while already. This is often the persuasive force of, say, Robert's Rules of Order, which may be invoked to settle debate in some peculiar circumstance. People who strongly disagree on how to proceed typically desist from debate immediately when shown some arcane rule in this tedious book born of long experience.

In formally adopting a constitution, we can agree to coordinate one way rather than another. But we may still not have full control over what happens because we may steadily fall into doing what works instead of what we agreed to do. This is one of the beauties of conventions as devices for social regulation: they need not be constrained by mistaken ideal conceptions; they can accommodate a far wider input of understanding and experience than would be available to a particular group of constitution drafters such as that in the State House (now Independence Hall) in Philadelphia in 1787. The range of likely uncertainty in most contracts is therefore radically less than that in what one should expect from a new constitution. Taking a gamble on such uncertainty will seem worthwhile if we suppose that the gains from coordination that we might achieve will outweigh the stakes in the conflicts that we might face. One may sensibly read as the lesson of economic progress that this is commonly true.

So Why a Written Constitution?

It would be wrong to think of constitutional procedures as simply devices for conflict resolution. They are far more profoundly devices for enabling us to act. This is also true of the devices that make contracting useful. What I do when I contract is to bind myself in certain ways, but I bind myself in order to be free to accomplish certain things. More generally, what it means to commit oneself to action a is to block oneself from taking actions b, c, d, . . . . It is through constraint that we are enabled in our strategic interactions with others to achieve outcomes that require joint action. (Indeed, it is trivially true that even in order to act alone, one must forgo other actions.) The point of a constitution is to tie our hands in certain ways in order to discipline them to more productive use. This point was considered "paradoxical" by no less an authority than Publius in The Federalist no. 63. There, it was argued that too quick a response of elected officials to changes of view among the electorate would lead to inefficient changes in policy. Therefore, legislators should not have too short
terms in office because short terms, not to speak of constant referenda, would not be in the interest of the electorate.

This view is sometimes supposed to imply that Publius, in this case apparently Madison, distrusted the electorate and was somewhat antidemocratic. On the contrary, the view seems merely to reflect common sense. Even in one’s individual decision-making, the power to make a decision and then to get on with life rather than to keep the issue permanently open is beneficial. Decision costs can be made so high as to leave no benefit from deciding. Hence, that constraints are enabling is not a logical paradox even though it may seem odd on first statement. Anyone who has come to understand the modern economist’s view that virtually everything is a matter of trade-offs should no longer view it as odd or paradoxical; it is the heart of learned good sense. To put it negatively, the point of establishing a constitution and of creating particular institutions is to put obstacles in our way in order to force us to move along certain paths and not others. It enables us the more readily to organize ourselves for progress, rather than to dissipate our energies in random directions.

Suppose one grants the central claims in the previous sections above. Still, one may wonder: Why go to the trouble of creating a constitution if there were not something vaguely like a contractual purpose? Clearly, we can live by conventions for which no one has ever voted. Indeed, one might say that the English Constitution is only a constitution so-called: it is really a set of conventions that have developed over time and that now seemingly prevail, just as the peculiar rules of the English road prevailed in England before they were made the law of the road. Moreover, the law of contracts and their enforcement preceded the U.S. Constitution through the conventions of common-law courts. So why a written constitution? Obviously, in order to hasten the establishment of relevant conventions and to direct them in certain ways rather than others by getting people to commit themselves immediately rather than bumbling through to a result, a result that might have been the rise of a tyrant by force.

But one cannot simply commit oneself and then have it stick. This is the whole point of Hobbes’s ridiculing the possibility that a sovereign can be governed by the laws that the sovereign passes and enforces. One cannot bootstrap oneself into doing what, when the time comes, one would not want to do. Contract works not because I say today that I will pay tomorrow but because I submit today to an authority who can force me to pay tomorrow. The sovereign cannot submit to the sovereign in the same external sense but must bootstrap future action from present commitment. Neither can one’s signature on a document or one’s vote for it thereby generally make stick one’s commitments under or to it.

Is Hobbes’s argument somehow beside the point here? Yes. What one can do is commit oneself and then arrange to have it stick. That is what Ulysses did when he wished to hear the sirens and yet survive, and that is what we all do frequently. Indeed, many—most—of us arrange to have some of our commitments stick in just the way the precitizens of the United States arranged to have their commitments stick. We set ourselves up in public to be made fools or worse if we do not follow through on our supposed commitments. If enough of the states had not ratified the Constitution two centuries ago, conventions and perhaps other formal arrangements would still have regulated their relations, or life in the states would have become nastier and shorter. Once enough of them did ratify, however, reneging became difficult—and increasingly difficult as time passed and the convention of coming under the governance of the Constitution became stronger. Eventually, the southern states discovered during the Civil War just how difficult reneging might be. Today, one need not “love it,” but if one wishes to renege, one must “leave it” or become criminal.

Arguments about commitment in this context are often framed as though they were individual problems, as in the problem of Hobbes’s sovereign, who supposedly cannot self-commit. Pascal wrote of devices that one could individually use to bring about one’s commitment through a kind of psychological habituation. Ulysses used external, nonpsychological devices in having himself tied to the mast. The forms of commitment that are especially important for constitutional and even for conventional social choice, however, are those that derive from the difficulties of collective action and of recordation from one coordination outcome to another. These are not merely problems of internal psychological discipline, and they can be powerfully effective in securing a system because they typically make the costs of changing the system radically higher than the costs of simply abiding by or even submitting to it. They may occasionally be overcome, as they were in 1787–1788 when the Constitution was substituted for the Articles of Confederation in the United States and as they have been in many revolutionary contexts. But they can be a grand block to taking certain roads rather than others. Moreover, they can apply to one whom Hobbes might have thought sovereign in his sense of being able to change one’s mind at a whim and to have the power to back the whim (Hardin, 1985).

The Constitution of 1787 worked in the end because enough of the relevant people worked within its confines long enough to get it
established in everyone’s expectations that there was no point in not working within its confines. The agreement of certain people to it may have been important for those people to work within the Constitution, but agreement was not the only motivator. Many must have worked within the Constitution simply because it was the most useful thing for them to do in their own interests. They might as soon have continued to work within the Articles of Confederation and their respective state constitutions. There were frequent efforts to undermine the Constitution in minor ways from the very beginning, and such efforts seem likely to continue so long as some group has interests that could be furthered somewhat better by a slightly different constitutional order. There have even been what one could reasonably call unconstitutional efforts to strengthen the reach of that Constitution, as when Thomas Jefferson, avowedly one of the most democratic of the early constitutionalists, so democratic that he was ill at ease at the adoption of the Constitution, chose autocratically to overreach his authority as President to purchase the Louisiana Territory. No group of serious political consequence today appears to think its interests better served by a radical overthrow of the order that has grown out of the Constitution of 1787, although the southern states after the election of 1860 and various other groups at other times have wanted and even attempted such an overthrow, and there may be others to come.

One could easily give a normative justification or criticism of the Constitution or of other constitutions from the perspective of various moral theories. One cannot sensibly give such a justification from the supposed agreement of people to such a constitutional order, however, without grossly simplifying away the problems of coordination and collective action that make for an acquiescence that cannot meaningfully be called agreement. That fact does not make the Constitution bad, but neither would agreement make it good. For most of us in the United States most of the time, the order that the Constitution brings about is a part of the necessity of the world in which we live. Benjamin Franklin remarked that “Our Constitution is in actual operation; everything appears to promise that it will last; but in this world nothing is certain but death and taxes.” It has since lasted two centuries, and to some extent, that fact makes it seem virtually certain in our lives. But the more impressive implication of that survival is its role in explaining our incentives under the Constitution. The long survival of the Constitution gives force to the expectations we have that it will continue to survive, and the strength of those expectations is perhaps the chief of the reasons that it probably will continue to survive. Hence, it generally makes sense for us individually to coordinate on the order that the Constitution has helped to bring about. This suggests the strategic basis for the conservative dogma that what is is good, at least sometimes and to some extent (Hardin, 1987).

It is the failure to grasp the self-enforcing quality of a successful constitution that makes the vision of the constitution of government as a contract—as though our fundamental problem were to overcome a prisoner’s dilemma—so exasperating to those who hold to that vision. Because it is not a contract but a convention, a constitution does not depend for its enforcement on external sanctions or bootstrapping commitments founded in nothing but supposed or hypothetical agreement. Establishing a constitution is a massive act of coordination that creates a convention that depends for its maintenance on its self-generating incentives and expectations. Given that it is a mystery how contracting could work to resolve our constitutional problem, we should be glad that the problem is such that we have no need of a social contract.

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Notes
1. One might wish to argue, as some contractarian moral theorists do, that we are bound by those morals that we rationally would asssent to. See, for example, David Gauthier (1986).
2. References to The Federalist Papers will be by number in the text. Any standard edition should suffice for reference.
4. One should beware of generalization from two-person games to the interactions of whole societies or even larger groups. I will generally be concerned with interactions between large groups, so that the two-person analogy should not be misleading.
6. The Annapolis Convention of September 1786 was called by several states to consider ways to regulate trade and commerce more harmoniously. Attended by too few states, the convention merely recommended a further convention to consider the broader range of problems with the Articles of Confederation (Kurland and Lerner, Vol. 1, pp. 185–187; also see accompanying documents, chapter 6 in ibid.) It may be unfair to note that two of the twelve commissioners in Annapolis were Hamilton and Madison and unfailier still to recall Madison’s claim that the Commerce Clause of the new Constitution was really the only new power that that document gave to the new government (Federalist no. 45).
Part III

Power: Checks and Balances

Introduction

There are two standard power indices, that of Shapley and Shubik (1954) and that of Banzhaf (1965; see also, Coleman, 1971). Each makes similar assumptions about the equiprobability of certain coalitions: one assumes all coalitional permutations to be equiprobable, and the other assumes all coalitional combinations to be equiprobable. Calculations performed by Brams involving the Banzhaf index support the assertion that the House will be advantaged relative to the Senate. Calculations using the Shapley–Shubik index lead to the opposite conclusion, but Brams argues that the coalition formation model underlying this index seems less plausible than the coalition-disintegration model underlying Banzhaf. Moreover, Brams shows that empirical evidence confirms the superiority of the House "in getting bills, veto override attempts, and amendments that it initiates accepted more frequently by the Senate than vice versa," thus suggesting that of the two indices, in the legislative context, Banzhaf comes closer to corresponding to other indices of relative influence. Brams also explores the power of the President vis-à-vis Congress using the Banzhaf measure.

Of course, as Brams is careful to point out, the analysis he offers is only preliminary. It is "a first attempt to wed a rigorous formal analysis of . . . power and empirical evidence on the effectiveness of actors in getting their way." Future work might well make use of power calculations based on more realistic coalitional probabilities, for example, those which recognize the existence of partisanship and