

CONSTITUTIONALISM

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There are two contrary schools of constitutional theory. These ground constitutions in contracts, as in the long-standing contractarian tradition in political philosophy, or in convention or coordination. The former theories are almost all at the normative level; the latter are inherently explanatory or causal theories as well as, often, normative. I will canvass these two theoretical approaches and then I will turn to discussion of what constitutions do. In modern contexts, virtually all constitutions are ostensibly designed to secure democratic government. Arguably, the greatest failing of every such constitution is its seeming incapacity to make institutional sense of democracy. This is however, a failure of democratic theory and practice, and a failure of collective human capacities when acting in very large groups. Arguably the most important aspect of constitutionalism for modern nations, especially those that have had histories of autocracy, is in placing limits on the power of government.

Much of contemporary work on constitutionalism takes up prior debates and brings them into contemporary analytical frameworks, such as game theory, bargaining theory, theories of commitment, and so forth. Most of it is comparative and grounded very solidly in real-world examples. Some of it has been stimulated by recent constitutional changes in newly democratizing nations, such as those of eastern Europe, in re-democratizing nations, such as many in Latin America, and in South Africa with the enfranchisement of blacks after the end of apartheid. And some of it is now being stimulated by efforts to understand supra-state constitutions, especially that of the European Union.

In general, it is absurd to assess the normative qualities of a constitution from its

content alone. The whole point of a constitution is to organize politics and society in particular ways. For example, modern constitutions typically organize a state apparatus, provide for representative democracy, define certain rights for citizens, and sometimes provide for some degree of distributive justice (often through so-called economic and social rights, as distinct from the historical political rights of civil liberties). Hence, constitutions are inherently consequentialist devices. To judge a constitution normatively requires attention to its actual consequences. Since the consequences of a particular constitution are likely to depend to some extent on the nature of the society it is to govern, what would count as a good constitution for one society might be a disastrous constitution for another society. Purely abstract discussion of constitutions and constitutionalism is therefore pointless and misdirected. Constitutionalism without social science is an arid intellectual pastime.¹ For many theoretical enterprises, looking to specific examples is a necessary part of making sure the theory is polished and adequate. In the discussion of constitutionalism, looking at specific examples forces us to recognize that the theory is not unitary, but is fractured and contingent on circumstances.

Crossing or underlying all of these discussions is a background methodological and intentional theory: political economy (see Brennan and Hamlin 1995). The political economy approach to politics and institutions is based on economic motivations, somehow defined. Thomas Hobbes says that if mere consent to living in justice were sufficient, we would need no government “at all, because there would be peace without subjection” ([1651] 1994, chap. 17, [86] 107). This claim is wrong for the reason that undercuts others of Hobbes’s arguments; we would still need coordination on many purposes and we would need collective actions in many contexts in which spontaneous provision, even by those who consent to live in justice, would be unlikely. But Hobbes’s dismissal of the likelihood that people can be universally motivated by

commitment to justice is compelling. That dismissal and his arguments for the kinds of motivations that people actually have make him an early political economist.

Against the assumptions of political economy, some moves in contemporary political philosophy depend on attributing very strong motivations of fairness or public spiritedness to citizens. For example, Brian Barry supposes that if people have the right motivations, contractualism (as discussed below) will work. But there is no good reason to suppose that a population can be re-educated into having powerful motivations of — in Barry's hope — fairness rather than self-seeking. Constitutional political economy seems bound to deal with cases in which interests often enough trump that what we need are safeguards against each other. John Rawls supposes that once we establish a just regime, that regime will educate future generations to be just. Institutions “must be not only just but framed so as to encourage the virtue of justice” ([1971, 261] 1999, 231). He also says that once we have just institutions, the initial condition of self interest no longer applies and citizens and legislators have a duty to support such institutions ([1971, 334] 1999, 293-4). To design a constitutional order on the assumption that such motivations will generally trump self interest, family interest, and narrow group interests of various kinds runs against experience and against James Madison's ([1788] 2001b, 268-9) and David Hume's ([1742] 1985) view that we should design the institutions themselves to be proof against abuse by office holders. Madison and Hume see liberalism as inherently grounded in distrust of political office-holders, not in supposing that these leaders will generally work for the public interest (on liberal distrust, see further Hardin 2002). Madison's constitution is the pre-eminent constitutional response to liberal distrust.

The central claim that grounds constitutionalism in political economy is that, in general, it is to our *mutual advantage* to preserve social order because it is the interest of *each of*

us that it be preserved. There may, of course, be collective action problems in preserving it, so that its serving mutual advantage does not guarantee its survival. Indeed, mutual advantage can have more than one implication in cases of unequal coordination and very commonly in cases of multiple possible coordinations that are all more or less equally attractive, at least when viewed *ex ante*.

I will briefly discuss the two main schools of constitutional theorizing before turning to what constitutions can do for us. Then I focus on the two main problems of modern constitutional democracy: the nature of representative democracy and the problem of placing enforceable limits on government.

Contractarian Theories

The metaphorical claim that government is established by contract is one of the mainstays of traditional political theory. Against the metaphor, there are several objections to the claim that a constitution is analogous to an ordinary contract in any useful sense. These objections include the following. Contracts are typically enforceable by a third party (usually the state); constitutions are not. Contracts typically govern a fairly limited *quid pro quo* between the parties; it is hard even to define who might be the parties engaged in such an exchange when a constitution is drawn up. The exchanges governed by a contract typically get completed and the contracts cease to govern further; constitutions typically govern into the distant and unforeseeable future and they have no project for “completion” in sight. Contracts require genuine agreement to make them binding; constitutions require merely acquiescence to make them work. Finally, contracts govern exchanges, which have the strategic structure of a prisoner’s dilemma; constitutions govern coordination of a population on a particular form of

government and therefore have the strategic structure of coordination games.

Let us spell out the last of these points a bit further. In a two-person prisoner's dilemma, there is an outcome that would be best for one player and worst for the other player. In a coordination game, the best outcome for each player is also the best or near-best for the other player. It is implausible that the major groups involved in adopting the US or any other constitution could face an outcome that was best for one very important group and worst for another, as in a prisoner's dilemma.

The two most important groups in the US case were arguably the financial and shipping interests of the northeastern cities and the plantation interests of the southern states. Alexander Hamilton and other financiers could not have supposed they would be best off when Thomas Jefferson and other agrarians were worst off. Any regime that did not enable them to cooperate in managing the export of the southern crops and the import or manufacturing of farm implements would have harmed both groups. Any regime that enabled them to cooperate more efficiently in doing these things benefited both groups. The central issue of the constitution was to eliminate trade barriers between the thirteen states and to regularize tariffs with other nations. That was the issue that brought these two groups into the design and adoption of the constitution as a mutually beneficial arrangement. They faced a relatively straight forward coordination problem (Hardin 1999, chap. 3).

Contractarian theorists typically ignore all of these issues and use the metaphor of contract to ground a claim that citizens are somehow obligated to defer to government, as the parties to a real contract would be obligated. Traditional contractarian theorists do acknowledge one deep problem for their theories. Contractual obligation without actual personal agreement seems like nonsense, especially given that it is prior agreement that is supposed to make a

contractarian order binding. Yet it is hard to ground any claim that future generations agree to an extant contractarian order. Moreover, Hume ([1748] 1985) compellingly dismisses even the claim that there could ever have been a genuine agreement on political order in any modern society. He also argues that actual citizens do not believe their own legal or political obligations depend on their having agreed to their social order.

Hume's arguments and facts are so devastating to the idea of the social contract that one must wonder why it continues to be in discussion at all. Rawls essentially agrees with Hume's central conclusion. He says that, because citizens have not genuinely contracted for or agreed to any political obligation, they cannot have such obligations ([1971, 113-114] 1999, 97-8). Yet he still perversely classifies his theory as part of the contractarian tradition ([1971, 32-33] 1999, 28-30). There seems to be a sense that contractarianism is morally superior to utilitarianism, and Rawls poses his theory this way. This is a deeply odd view. A utilitarian acts on behalf of others. Those who enter contracts typically are concerned with their own benefits and do not care about the benefits to their partners in trade. The former is other-regarding; the latter is self-seeking. It is a saving grace of contemporary claims for contractarianism that they are not about contracts. Unfortunately, they are rather about rationalist agreement on what are the right principles to follow.

A huge part of the discussion of contractarian theories addresses how we are to understand the idea of contractual obligation when there cannot be an actual contract or agreement by the relevant parties (in this case, the citizens). The nearest thing we ever have to actual contracts is votes on the adoption or amendment of a constitution. But these votes typically require only some kind of majority, ranging from simple to super-majority. Unanimity is an impossible condition for a working constitution or amendment in a real society. But

unanimity is required for a legal contract to be binding. Hence, in a sense that is contrary to any plausible sense of “contractarian,” contractarian constitutions must be imposed on a significant fraction of the populace.

Traditional, straight contractarianism appears to be on the wane. Few people argue for it in principle, although many scholars continue to present contractarian arguments from John Locke ([1690] 1988), Hobbes ([1651] 1994), and others from the distant past. In part such contractarianism has simply been rejected, as by coordination theorists. In part it has been displaced by contractualist argument. Despite the growing flood of work on it, the latter program is not yet well defined. Traditional contractarianism is relatively well defined and therefore its deep flaws are clear. It is a peculiar but perhaps false advantage of the contractualist program that it is ill defined. Its vagueness means that debate over it will often thrive, even debate over what the program is.

Contractualism is supposed to resolve or sidestep the problem of fitting some degree of moral obligation to a regime to which one has not actually agreed. Thomas Scanlon’s original definition is: “An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement” (Scanlon 1982, 110). A further statement is often taken as definitive, although it is peculiar: “On this view what is fundamental to morality is the desire for reasonable agreement, not the pursuit of mutual advantage” (ibid., 115n). Why is it this desire that is fundamental rather than achieving moral action or outcomes? I will ignore the concern with this desire because it trivializes our concern. Scanlon himself has primarily been interested in applying the contractualist idea to moral theory (Scanlon 1998). The most extensive and articulate defense of the idea of reasonable agreement in political theory is

probably that of Brian Barry, who says, “I continue to believe in the possibility of putting forward a universally valid case in favour of liberal egalitarian principles” (Barry 1995, 3).

Unfortunately, Scanlon’s criterion of reasonableness is somewhat tortured and ill-defined. Its use has become unmoored from his original defense of it. As first presented, the term supposedly attested to the claim that moral theory is analogous to mathematics (Scanlon 1982, 104-105). Mathematicians know mathematical truths; moral theorists can similarly know moral truths. We do not know either of these by observation but only through some inner faculty of reasoning. That the analogy is not apt is suggested by the fact that there is no terminological analog of “reasonableness” in mathematics. Every mathematician knows that the square root of 2 is not a rational number (that is, a number that can be expressed as a fraction in the form of whole integers in both the numerator and the denominator). No one would say further that this claim is reasonable. It just is true mathematically. If you say this is false, mathematicians will say you are a crackpot or an ignoramus, not that you are unreasonable. One wonders what are the analogs of axioms and theorems in moral theory.

The claim that morality is analogous to mathematics is a perverse variant of intuitionism in ethics.² Intuitionists believe they can intuit whether, say, a particular action is right or wrong. Unfortunately, they do not agree with each other. If disagreement were similarly pervasive in mathematics, there would not be mathematics departments in great universities.

If all of us reject some principle, presumably no one would disagree with the conclusion that we should collectively reject applications of that principle in practice and, furthermore, that it is reasonable for us to do so, whatever “reasonable” might mean in this vernacular claim. Scanlon’s principle must, however, be stronger than this. If you think you are reasonable to reject some principle that the rest of us support, what can we say to you? We might

be quasi Kantian and suppose that we can deduce the true principle here and we can therefore say to you that you are simply wrong. That would surely violate the element of agreement that Scanlon and other contractualists want. They do not suppose that agreement on certain principles is incumbent on any and every one as a matter of moral or transcendental logic. They mean for agreement to be genuine, which is to say they mean that there must be a possibility of disagreement.

Rawls, on the contrary, sometimes seems to intend a quasi Kantian principle of rationalist agreement. He assumes that any single representative person behind his veil of ignorance would reach the principles of his system of justice ([1971, 139] 1999, 120). It is hard to imagine how that could be true unless those principles are somehow definitively correct in the sense that they are rationally deducible. One who does not agree with the deduction of his rules of justice has evidently failed to understand. There is rationally no possibility of disagreement. To my knowledge there is no major, serious constitutional theorist who has such a rationalist view of the design of constitutions. Because Rawls's purpose eventually is to design the institutions of justice for a society, one might suppose that he intends for his theory to produce a constitution. Although he grants that the design of institutions would have to deal with social constraints, thus making its content contingent, he nevertheless seems to think that the content of these institutions, and hence of his constitution, must be fully determinate once his theory and the relevant social contingencies are taken fully into account.³ If so, he holds a very strange — rationalist — position in the world of constitutional theory. No working constitutional lawyer could take that position seriously. General determinacy in constitutional theory is an implausible goal.

Note that in the coordination theories discussed below, you could well disagree with

some rule we have adopted, even think it an unreasonable rule, and yet you could still think it reasonable for yourself to abide by the rule. For example (a recently painful example for many Americans), the US constitution establishes an indirect device for electing presidents. The device is to count votes at the state level and then to count peculiarly weighted scores for the individual states at the level of the Electoral College, which finally chooses the president. On three occasions, that procedure has led to the election of the candidate who got the second largest number of citizens' votes, and the candidate with the highest number of such votes lost. Most recently, this was the result in the presidential election of 2000, in which Al Gore had a clear plurality of the national vote but lost the election to George Bush in the Electoral College — arguably with a bit of help from Bush's friends on the Supreme Court.

Many US citizens as well as many non-citizen observers think that the result of the election of 2000 was in some moral sense wrong or was a violation of democracy. But no citizen seems to have thought it right to oppose the result by taking action that would have made Gore the president. Indeed, one can imagine that a poll would show that Americans overwhelmingly agreed that the constitutional rule on election of the president should be followed even though they might also have agreed that the system was perverse and should be changed. It would take a relatively strained effort to argue that that rule could in some sense meet the contractualist criterion. But it is easy to show why the rule arose originally and why it continues to prevail despite the possibility of a constitutional amendment to block what many people think was a travesty of democracy on the two most recent occasions when the apparent loser in the national election became president.⁴

Hence, you might morally or even merely self-interestedly reject a constitutional rule or principle. And you might readily be able to think your rejection reasonable in any sense that

the contractualist would want. But still you would most likely conclude that it would be unreasonable for anyone in the system to act, in a particular election, against the application of the rule. That rule has the great force of a convention that can be altered only through the actions of large numbers in concert. The only powerful defense of it in a specific application of it, such as in 2000, is that *it is the rule* and that the rule is a convention that is not readily changeable even though presumably no one drafting a constitution today would include such a perverse institution as the Electoral College.⁵ This defense does not make the rule morally *right*, it only makes the rule *govern*. In this instance, the argument from convention trumps any argument from simple rightness or agreement unless the argument from agreement simply takes over the argument from convention. It would be unreasonable to reject a powerful convention in any specific application of it. This can, of course, be true even though it would be reasonable to change the convention before its next application.

The chief difficulty with the contractualist program for those who are not its advocates is that there is no definition of reasonableness and no clear account of how others can judge reasonableness in any context. The term reasonable has unfortunately been left as a residual notion that is not defined by the contractualists. Scanlon's definition is vacuously circular. We "desire to be able to justify [our] actions to others on grounds they could not reasonably reject." A footnote supposedly clarifies this: "Reasonably, that is, given the desire to find principles which others similarly motivated could not reasonably reject" (Scanlon 1982, 116 and 116n). The historical dodges of the fact that supposedly contractarian obligations that were never literally agreed to were somehow hypothetically or tacitly agreed seem much more compelling than this murky move to ground normative claims in their "reasonableness."

Advocates of the contractualist program seem to think they can spot reasonableness

when they see it. Hence, what they give us are examples of reasonableness or unreasonableness rather than elaborations of principles for assessing reasonableness. For example, Barry believes “that it would be widely acknowledged as a sign of an unjust arrangement that those who do badly under it could reasonably reject it” (Barry 1995, 7). But Rawls’s difference principle might leave us with a society in which the worst off class do badly relative to many others. This would be true if great productivity were motivated by substantial rewards to the most productive members of the society, so that they are very well off in comparison to the worst off groups. In that case, the worst off might suffer far worse misery if they did not suffer such inequality. It would be hard to argue — at least to a Rawlsian — that making the worst off citizens substantially better off is unjust. If Rawls’s theory of justice is reasonable, then even gross inequality might be seen as reasonable. We must look at the whole picture of the society if we are to understand and to judge its justice and reasonableness.

Part of the rationale of the difference principle is causal. There is, at least possibly, a causal trade-off between efficiency of production and equality of rewards. Rawls openly supposes that the causal chain is from greater equality to lesser production, so that some inequality is required if the worst off are not to be abjectly miserable. If this were not thought to be true, there would be no reason to have such a complicated theory as Rawls presents, because pure equality would be a credible theory. At some points, Barry very nearly equates reasonableness and equality.⁶ Once this move is made, there is little more needed to establish a theory of distributive justice merely by definition. It might still be very difficult to design institutions that would achieve extensive equality (Hume [1751] 1975, sect. 3, part 2, 193-4).

Coordination Theories

Before Hume there were three main theories of social order. These are based on theological views, contractarian agreement or consent, and draconian coercion by the state. Hume dismissively rejects all three. The theological views are simply false or at least beyond demonstration ([1748] 1985). Locke and others propose contractarian consent as an alternative justification for the state and an alternative ground for obligation to the state, but as noted above, Hume demolishes the claim for consent. Hobbes's argument from draconian force seems empirically wrong for many very orderly societies and Hume rejects it almost entirely, although he shares many social scientific views with Hobbes. Having demolished all of the then acceptable accounts of obedience to the state, Hume therefore has to propose a dramatically different, fourth vision.

In essence his theory is a dual-convention theory. Government derives its power (not its right) to rule by convention and the populace acquiesces in that rule by its own convention. Once empowered by these two conventions, the government has the capacity to do many things, including ancillary things unrelated to the purpose of maintaining social order. This dual-convention argument is compelling for most stable governments in our time. Moreover, for democratic governments the dual-convention theory virtually demands constitutional government for limiting the power of government to interfere in democratic processes. The earlier theories could make as good sense without constitutional provisions and the absolutist versions of the theological and draconian power visions virtually deny any role for a limiting constitution.

For both of the conventions in the dual-convention theory of government, acquiescence is the compelling fact. Hume argues, by example, that ten million British citizens

simply acquiesced in the succession of William and Mary to the English throne, all by act of “the majority of seven hundred” in the English and Scottish parliaments (Hume [1748] 1985, 472-3). Acquiescence is Hume’s term (*ibid.*, 469). We acquiesce because it would be very difficult of organize what would de facto have to be a collective action to topple a going convention or to organize a new one. While we can readily just happen into a convention, such as the driving conventions of driving left or right, we cannot so readily alter one once it is established. You might detest the convention we have and you might even discover that apparently most of us detest it. But you may not be able to mobilize the opposition that would be necessary to change it. The foolishness of the Electoral College has seemed perverse to many Americans ever since its first anomalous result in 1888. In the interim, a couple of elections came close to faltering in that system. And finally the election of 2000 was very nearly a destabilizing event that could have been very harmful if a national crisis had arisen during the period in which the result could have been in limbo. Yet there has been no substantial effort to change it.

On this account, a constitution does not commit us in the way that a contract does (Hardin 1989). It merely raises the costs of doing things some other way through its creation of a coordination convention that is itself an obstacle to recoordination. More often than not our interests are better served by acquiescing in the rules of that constitution than by attempting to change it. This is true not because we will be coerced to abide by those rules if we attempt not to but because it will be in our interest simply to acquiesce. The forms of commitment that are important for constitutional and even for conventional social choice in many forms are those that derive from the difficulties of collective action to re-coordinate on new rules. These are not simply problems of internal psychological motivation and they are not problems of sanctions that will be brought to bear. They are inherent in the social structure of the conventions themselves, a

structure that often exacts costs from anyone who runs against the conventions more or less automatically without anyone or any institution having to take action against a rule breaker.

Establishing a constitution is itself a massive act of coordination that, if it is stable for a while, 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 motivate us to abide by a constitution to which we have contracted, we should be glad that the problem we face is such that we have no need of a contract or its troublesome lack of enforcement devices. Moreover, the acquiescence that a successful constitution produces cannot meaningfully be called agreement. Some citizens might like extant constitutional arrangements better than they would any plausible alternative, but for those who do not, their obedience to the constitutional order has more the quality of surrender than of glad acceptance. Indeed, if our constitution is solidly ensconced, surrender or acquiescence gives us the best we can get given that almost everyone else is abiding by it — even if almost all of them are merely acquiescing or surrendering in abiding by it.

Hobbes is commonly invoked as one of the founders of the contractarian tradition in political thought. Ironically, he is even more clearly a founder of the coordination theory of government. He presents an argument from contract but finally dismisses it as having no likely historical precedent.⁷ He then goes on to defend the powers of a ruler — or, we might prefer to say, a state or a government — on the grounds that not abiding by the rule of a state would wreak havoc in our lives. Hence, for our own good, which is to say for our mutual advantage, we should abide by the laws of our state. This is an argument that carries even for a government that usurps the powers of an extant government. Once the usurper government is well established and is able to maintain order, it should then be obeyed.

The difference between Hobbes the contract theorist and Hobbes the power theorist is the difference between a political philosopher and a social scientist. His arguments from contract are about an imaginary and maybe even an ideal or desirable world. That world is a cute story, not a basis for philosophical argument. His arguments from power and coordination are about the actual worlds that he inhabited and that we inhabit. Although there are many discussions in his works on politics that have normative overtones, his most coherent and extensive discussions are arguments from political sociology. As already noted, constitutional content must be contingent on the conditions of the society that the constitution is to govern (see further, Dahl 1996). This is in the nature of coordination and convention. Rules on which we cannot be coordinated cannot become conventions of our constitutional regime.

What Constitutions Do

Hume generally supposes that the reason for the scheme of justice is to serve our interests. Society, through division of labor and cooperative endeavors, offers the best means of procuring and improving “transferable goods” (Hume [1739-40] 1978, 3.2.2, 488). Hume ([1748] 1985, 467-8) shares Hobbes’s (Hobbes [1651] 1994, chap. 13, [60] 74) view that all are relatively equal in the ability to harm each other or to take transferable property from each other. That is why we need justice to protect ownership of such transferable property as the food and other goods we can produce (Hume [1748] 1985, 3.2.2, 487).

In essence, having a system of justice in civil law is mutually advantageous. One might therefore suppose, in the style of much of twentieth century utilitarianism, perhaps especially as presented by its critics, that we could instruct people what to do merely by weighing the utilities that would follow from various actions. This might sometimes work in a

small-scale community governed by norms but it would not work in a complex society, which requires institutions of justice. Public benevolence cannot merely be the sum of actions of private benevolence, because these do not reach that far or trump concern with self or family. To achieve justice and social order we must design institutions or norms to bring about just resolutions (deliberately by design or by unintended consequence of various actions taken for other purposes). Hence, justice is inherently a two-stage concern. It will bring about mutual advantage but the actions we take within the justice system will not each by themselves necessarily bring about mutual advantage. It is the whole scheme of justice that is mutually advantageous, not its adjudications in specific cases.

We might object and say that the system ought to be corrected and overridden when it does not produce the more mutually advantageous outcome in a particular case. Rawls (1955) demolishes such views in his argument that we create an institution, whose design determines the roles of individuals within it, and these roles determine behavior. In the stage of institutional design, we should do our best to make the institution achieve results that are mutually advantageous overall. Our institution of justice depends on this two-stage argument: in one stage, role holders follow the rules of their roles as defined by the institution, and at the other stage the institution achieves welfare. This is, of course, the structure of constitutional government. The constitution stipulates institutions of government; those institutions make and implement policies. In a constitutional government we cannot simply decide at every turn what would be the best thing to do, even the mutually advantageously best thing to do, and then do it. We must do what can be accomplished within and by the constitutionally established institutions. It is common for citizens to miss this principle and to suppose we can do whatever they think best in this case right now. That would de facto eliminate the institutional devices that we have designed

to accomplish our mutual advantage goals. Acting as many citizens want would serve us very badly and would finally make government unlimited.

No matter what one's theory of constitutions is, one must grant that a large part of their impact, if any, is to coordinate the society in various ways. Contemporary constitutionalists want a constitutional regime to provide for social welfare and fairness and for individual opportunity and autonomy. They also want protections on treatment of individuals by both institutions and other individuals. Historically, claims for autonomy came from libertarians, such as Locke ([1690] 1988), John Stuart Mill ([1859] 1977), and Algernon Sidney ([1698] 1990). Claims for welfare are virtually universal. Fairness and opportunity are relatively more recent theoretical concerns.

Constitutions coordinate, but only if coordination is feasible. In a society that is too violently split, coordination of major groups behind a single regime may not work, so that the intended constitutional order breaks down. A constitution cannot motivate people who are grievously hostile to its provisions (Hardin 1999, chap. 7). A constitution is like democracy in the account of Robert Dahl. As Dahl (1957, 132-3) says, "In a sense, what we ordinarily describe as democratic 'politics' is merely the chaff. It is the surface manifestation, representing superficial conflicts. [These] disputes over policy alternatives are nearly always disputes over a set of alternatives that have already been winnowed down to those within the broad area of basic agreement." Constitutional democracy can manage the chaff of political conflict but it cannot manage really deep conflict between large groups that are hostile adversaries.⁸

Violently opposed groups are likely to want to seize the reins of government to serve themselves. This already happens in ordinary, more or less successfully working constitutional democracies such as the United States and the United Kingdom. The 2000 election in the United

States cannot possibly be seen as giving a mandate to the government of George Bush, but even his strong supporters must grant that he treated his accession to office as giving him opportunity to undo much of the welfare and tax structures of the past and to put in their place structures to serve the wealthiest members of the society and to end environmental and other regulations that have undercut business profits. His margin of victory in the election had little or no effect on what he was able to do. What mattered was seizing control of the government.

To give a moral defense of the flood of benefits to the wealthiest two percent of the American population, supporters of the Bush administration and its policies argue that these rewards to the wealthiest citizens will lead to economic growth that will benefit less wealthy citizens. This variant of the difference principle, often called the trickle down theory, is virtually a mantra that is stated often but backed up by little or no empirical analysis. Admittedly, it is unclear what data could be conclusive in either direction, in favor of or against the trickle down theory, but recent data on increasing poverty suggest that the trickle is not getting through. It is ironic that the principal group of people who defend some version of the difference principle in contemporary political practice are among the most anti-egalitarian politicians of the modern era.

Representative Democracy

The central problem of representative democracy is related to the central problem in a theory of distributive justice. What results is the product of the actions of large numbers of people. We cannot suppose that considerations of the goodness or rightness of those results drive the individuals whose actions taken collectively produce the results. For example, in distributive justice, what we have to distribute is the result of the contributions of all. If we stipulate that the distribution must be egalitarian, we thereby separate the incentive for individual productivity

from the reward or share of the production that goes to the individual. This fact makes the social product a vast instance of a collective action problem with likely millions of freeriders and poverty for all. If, however, we allow rewards to stimulate production, we wreck any chance for equality in the final distribution of what is produced. We could imagine a two-stage allocation. First, we reward people for their own productivity and we subtract the sum of all these rewards from what is left for egalitarian distribution. Rawls's theory of justice essentially resolves the problem of the likely conflict between efficiency of production and equity in distribution by allowing inequalities that raise the level of the fund left over for egalitarian distribution.

In the workings of representative democracy, we similarly can imagine that the best result of democratic procedures would be essentially equal participation by all in the determination of who is to govern for the next period. Unfortunately, this is again a collective action problem. From my own personal incentives, I have no reason to participate in elections beyond the extent to which my participation affects my own interests or the interests of any groups whose welfare I might wish to support.

From the very beginnings of its use, there has been debate on what representative democracy means and how it can work. In a society of large scale, direct democracy is not possible and some form of representative democracy is the best that we can do. Already at the time of its constitution, with only three million inhabitants, the US was far too large, both geographically and numerically, for direct democracy.

Almost all of the debate around the US constitution supposes that representatives are to represent their own communities. (The revolutionary war against England was prompted by the lack of representation of the colonies in the British Parliament.) Indeed, the major divide between Federalists and Anti-Federalists was over the question whether communities and

various kinds of groups could be adequately represented if the communities exceeded relatively small sizes. The constitution of Massachusetts provided one representative for a community of 120 citizens (Wood 1969, 186). With such representation, the national legislature would be huge and unworkable. In England this problem was addressed with the claim that many people received virtual representation, because all delegates to Parliament represented the entire nation, as especially argued by Algernon Sidney ([1698] 1990, section 44, 565) and Edmund Burke ([1774] 1908, 72-74). When the American colonists complained that they were taxed without any representation in the English government, Thomas Whateley replied that they were virtually represented, which was as good as any Englishman in the mother country got (for much of the debate see Beer 1993, 164-8; Hardin 1999, 178-181; Reid 1989, 50-62; Wood 1969, 173-181).

The problems of scale that riddled Federalist and Anti-Federalist debates have since been analyzed by political economists including Joseph Schumpeter ([1942] 1950) and Anthony Downs (1957). Their chief conclusions, which are very well known, are that citizens commonly lack incentive to vote in elections and that, even if they do vote, they lack even more the incentive to learn enough about candidates and issues to vote intelligently in their own interests. Institutionally, we can reduce the costs and tedium of voting by increasing the number of polling places, making absentee voting easy, and so forth. But we still cannot readily get voters to learn what they need to know. Indeed, this problem may be getting harder as the economic issues that once clearly separated liberal from conservative parties cease to be the dominant concern in elections. These problems have helped to spur changes in the electoral and therefore in the governmental process. Two of these have been analyzed as audience democracy and corporate democracy. To date, there are no institutional innovations in the works to deal with these problems.

Audience democracy is the term of Bernard Manin (1997). He argues that the nature of campaigning has changed in ways that reward performance on the stage more than stances on issues. The playwright Arthur Miller (2001) notes that successful politicians today tend to master performing before the camera and that, in fact, we the voters value them in part for their success in their acting. After a long lifetime in the theater, and some experience in the very different world of film, Miller's comments add great force to Manin's argument. He analyzes changes in performance style from Franklin Roosevelt to George W. Bush. Unfortunately, given the great difficulty of imparting any useful information to large numbers of voters, performance may be the best ticket many politicians have. Indeed, a great performer can be politically shallow and still triumph. Short of making politics intrinsically so interesting that potential voters actively want to read about it, there is no institutional reform that seems likely to overcome the impact of a good performance — other than putting an end to campaigning.

Contemporary government in the United States and many other nations can be characterized as “corporate democracy” in the following sense (Hardin 2004). Adolph Berle and Gardner Means note that the rise of the corporate form of organization of private firms breaks the link between ownership and management, thus opening the possibility of conflict of interest between owners and professional managers (Berle and Means 1932, 119-25 and *passim*). Among the legal forms that property in the corporate form might take as a result of such separation is analogous to what we have seen in many corporations historically, including many in recent years during the extraordinary stock bubble of the 1990s. This form creates “a new set of relationships, giving to the groups in control powers which are absolute and not limited by any implied obligation with respect to their use.” Seven decades before ENRON, Berle and Means argue that through their absolute control of a corporation the managers “can operate it in their

own interests, and can divert a portion of the [corporation's income and assets] to their own uses." We therefore face the potential for "corporate plundering" (354-5).

Alternatively, they supposed that the corporate form might develop into what would now be called a socially conscious institution. They quote Walter Rathenau's 1918 view that the private "enterprise becomes transformed into an institution which resembles the state in character" (Berle and Means 1932, 352). The reverse seems to have happened. The state has been transformed to resemble loosely controlled corporations. Elected officials act as "professional" managers on behalf of the citizenry who "own" the nation. The officials are co-owners along with the citizens, but their rewards from management often far transcend anything they can gain as their share of the general good produced by their contributions to government, just as the corporate managers of Tyco, WorldCom, and Enron gained far more from looting these firms than from the genuine increase in value of the stock they owned.

Limits on Government

For Hobbes the argument for coordination on a sovereign ruler is not an argument for a constitution or a constitutional order in any sense that these terms normally connote. A typical reason for having a constitution is to place limits on government. Indeed, "constitutional government" is commonly taken to mean limited government. Hobbes wants no limits on government sovereignty, in part because he cannot imagine how those limits could be imposed without opening up the possibility of over-riding the government more generally. That would mean that the government is not sovereign.

Hume ([1739-40] 1978, book 3) resolves such issues in social order with the introduction of the idea of conventions that are de facto self-regulating or endogenously self-

enforcing (see further, Hardin 1982, chapters 10-14; Hardin 1999, chapters 1 and 3).⁹

Understanding this possibility resolves some of Hobbes's problems. With the power of conventions to block actions of many kinds, government can be limited in many respects even while it can be powerful in those arenas in which its power would be beneficial to the populace.

Among the early advocates of limited government are Locke ([1690] 1988), Sidney ([1698] 1990), Hume, Adam Smith ([1776] 1976), Wilhelm von Humboldt ([1854] 1969), and Mill ([1859] 1977). Locke and Sidney argue against the theocratic theory of Robert Filmer ([1680] 1949), who advocates, with Hobbes, absolute power for the sovereign, although Filmer wants only monarchs as sovereigns and not bodies of aristocrats as Hobbes would allow. Hume and Smith especially argue against mercantilist economic policies that protect native industries against imports. In an argument against using government to achieve "perfect" equality, he also contends that this would empower government far too grievously (Hume [1751] 1975, sect. 3, part 2, 193). This is, of course, partially a straw-man argument because no one other than perhaps Gerrard Winstanley ([1652] 1973) and the Levelers of the seventeenth century in England seriously advocates perfect equality. Most theorists who argue for egalitarianism generally mean only to bring about substantially greater equality of distribution than typical wealthy societies achieve, as in the noteworthy cases of Rawls ([1971] 1999) with his difference principle and Barry (1995). The workings of Rawls's difference principle turn on social possibilities, so that it is conceivable that it would allow very substantial inequalities.

Hume's task therefore is largely to show that government officials can be constrained to act for the general good. Why? In part because they act on general principles that do not directly affect their own interests. The consequences of today's breach of equity are remote and cannot counterbalance any immediate advantage of better behavior ([1739-40] 1978, 3.2.7, 535).

When we consider actions in the distant future, all their minute distinctions vanish, and we give preference to the greater good (536). The trick is to change our circumstances to make us observe the laws of justice as our nearest interest. We appoint magistrates who have no interest in any act of injustice but an immediate interest in every execution of justice (537).

This last claim is perhaps too optimistic. Insofar as our magistrates have no interest in the injustices committed by others, we can generally expect them not to have a bias in favor of injustice. Indeed, through sympathy we can expect them to have at least a slight bias in favor of justice in any matter that does not concern themselves. All we need to do to constrain them from acting unjustly therefore is to block any actions that they might take on their own behalf or on behalf of their relatives and friends. We can do this to some degree by having different offices overseeing each other. This is not merely the separation of powers, which is typically intended to block institutions from acting on some institutional agenda rather than to block individual office holders from acting in their own personal interest against the public interest. It is rather more nearly James Madison's device of having ambition counter ambition, person to person ([1788] 2001b, 268). Montesquieu argues for separation of powers. Hume and Madison propose the monitoring of all by all, which is Hume's device for a small society regulated by norms (or conventions), so that such a society might not need constitutionally devised institutions of government.¹⁰

How does Madison's device work? It has more in common with competitors in a market than with Montesquieu's hiving off some duties to one agency and others to other agencies. I block your action because I think it is wrong, but I do so because I have a slight leaning toward the public interest through the influence of my concern for mutual advantage, which includes my own advantage as a likely minor part. My action against you is apt to be

costless to me and it might even be rewarded by other office holders or even by the citizens who, if they have no direct interest in the matter at issue, also have a slight leaning for the mutual advantage. I therefore have a motive from interest to block your illegitimate self-interested action.

Before too optimistically accepting Madison's device, recall the nature of corporate democracy as discussed above. It is not merely the individual elected officials but the class of them that is problematic. As John C. Calhoun says, "The advantages of possessing the control of the powers of the government, and thereby of its honors and emoluments, are, of themselves, exclusive of all other considerations, ample to divide ... a community into two great hostile parties" (Calhoun [1853] 1992, 16). The political class can be parasitic on the society that they ostensibly serve and that has the power of election over them. The supposedly powerful citizenry with its power of election over officials does not have the power to refuse to elect all of them; it can only turn out the occasional overtly bad apple. In the United States, it seldom has the temerity to overcome incumbents' advantage.¹¹ Government may be limited in many ways, but it can still be used by office holders and some of the more powerful interests to make government their special benefactor while it carries out its other tasks.

Concluding Remarks

To argue that a particular constitutional system is "necessary" or "right" is very hard, because there is commonly evidence that other possibilities are attractive, plausibly even superior in principle. Caesar (1787), writing during the debates over the adoption of the US constitution, put the case clearly: "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.” Caesar’s conclusion is a defining principle in the coordination theory of constitutionalism.

Still it may be clear that to change from a system which we already have in place to some in-principle more attractive alternative would be very difficult and plausibly too costly to justify the change. The more pervasive, articulated, and important the system is, the more likely this will be true. Swedes could change their convention of driving on the left to driving on the right at modest cost, as they did in 1967 (Hardin 1988, 51-3); they could not change their system of jurisprudence or the remnants of their judeo-christian moral system at low enough cost to justify serious thought to select superior systems. To this day, the people of the state of Louisiana, formerly part of colonial France, live under a legal system that is based on the Napoleonic Code, while the US Federal system and the systems of the other forty-nine states are based on the British common law.

The only thing that might make an extant system right is that it is extant. We could not expect to design an ideal or even a much better system because we could not be sure how it would work in the longer run. As Madison (*Federalist* 37 [1787] 2001a, 183) writes, “All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.” Hence, rationalist theories of morality and government are inherently irrelevant to our lives. At the margins, however, we might be able to revise our constitutional system by drawing on the experience of others.

Conventions do not have a normative valence per se. Some are beneficial and some

are harmful. Both beneficial and harmful conventions can be self-reinforcing even when their only backing is sensibly motivated individual actions. If we could easily redesign government, law, norms, practices, and so forth, we might immediately choose to do so. The very strong Chinese convention of foot-binding was horrendously harmful, and it was deliberately changed (Mackie 1996). The still surviving convention of female genital mutilation is similarly horrendously brutal and it is being eradicated in some parts of Africa. In the light of such harmful norms, we must grant in general that it is possible to contest whether some pervasive convention costs us more than it harms us; but successful major constitutional change is rare.

We face the fundamental problem that we need government to enable us to accomplish many things and to protect us from each other but that giving government the power to do all of this means giving it the power to do many other, often harmful, things as well. We depend on constitutional cleverness to design institutions that accomplish the former and block the latter. The cleverest person in this task historically was probably James Madison. But we have long since lived past the institutions he helped to design and the present government under his constitution would be unrecognizable to him.

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Notes

¹ Rawls shares this view (see [1971] 1999, section 42), as do most libertarians, as well as, of course, all political economists, including Hume and Smith.

² Although Scanlon (1982, 109) defends it against a particular sense of intuitionism.

³ For his views on determinacy, see Hardin 2002, chap. 7.

⁴ The first election that gave the presidency to the loser of the popular vote in a two-party split was that of Rutherford B. Hayes in 1876. But in that instance, there was a corrupt deal to distort the process. Such corruption is, of course, a travesty of democracy, but that is not an issue in the judgment of the American constitutional rules for election of presidents. The

availability of the Electoral College let the deal take the form it did, but one can imagine that the deal would have been made no matter what the system had been. The second case was the election of Benjamin Harrison in 1888. In that election, Grover Cleveland received more votes but Harrison nevertheless won in the Electoral College. In 1824 the election left four candidates without a clear winner, and selection was passed to the House of Representatives. In 1800 an ambiguity in the system forced the final decision into the House.

⁵ The College was designed to block pure democracy by using a forum of political elites to make the final choice of who would be president. Presumably, the architects of the College did not intend such undemocratic results as those of 1888 and 2000.

⁶ For example, Barry (1995, 7) says, “The criterion of reasonable acceptability of principles gives some substance to the idea of fundamental equality while at the same time flowing from it.”

⁷ “There is scarce a commonwealth in the world whose beginnings can in conscience be justified” (Hobbes [1651] 1994, “Review,” [392] 492), because they were generally established by conquest or usurpation, not by contract or agreement.

⁸ This is roughly Tocqueville’s (1945 [1835, 1840]) 1: 260) view as well: “When a community actually has a mixed government — that is to say, when it is equally divided between adverse principles — it must either experience a revolution or fall into anarchy.” We should qualify Dahl’s claim with the note that “the broad area of basic agreement” need only be an area in which the politically effective groups are in agreement (Hardin 1999, chapter 7).

⁹ See further Przeworski’s discussion of self-enforcing democracy, this volume.

¹⁰ Hume supposes that, although our present interest may blind us with respect to our

own actions, it does not with respect to the actions of others, so we can judge the latter from sympathy with the general effect of those actions (Hume, [1739-40] 1978, 3.2.8, 545) or, as we might prefer to say, out of concern for the mutual advantage. Most members of our small community therefore can be expected to sanction misbehavior that affects the interests of others. Government itself has more of the character of a small society than does the whole society that it governs. (This would have been far more true in Hume's and Madison's day than it is today, with our enormous government agencies whose total populations exceed the national populations of their day.)

¹¹ Consider the 2002 congressional elections in the United States. Only four incumbents in the House of Representatives (which has 435 members, all of whom are elected at two year intervals) lost to non-incumbent challengers (a few incumbents lost to other incumbents because their districts were changed to reflect demographic changes). Overall, ninety percent of all candidates won by margins of more than ten percent of the votes cast. When districts are redrawn by a state government after each decennial census (as for the 2002 election), they are often gerrymandered to insure election of the candidates in the state's dominant party. For data, see Richie 2002.