

On the Priority of Democracy: A Pragmatist Approach to Political-Economic Institutions and the Burden of Justification¹

Jack Knight
Department of Political Science,
Washington University

James Johnson
Department of Political Science,
University of Rochester

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Introduction: Politics, Institutions and the Tasks of Political Theory

Politics, as we understand it, reflects what seems an incontrovertible condition – any imaginable human population is diverse across multiple, overlapping dimensions including material interests, moral and ethical commitments, and cultural attachments. Such diversity means, in turn, that disagreement and conflict are unavoidable. This, in part, is because the individuals and groups who constitute any population not only are diverse in the ways just suggested but their diversity is irreducible. There simply is no neutral institutional arrangement that will accommodate competing demands without remainder. But the inevitability of disagreement and conflict also partly reflects the fact that, precisely as members of a relevant population, those individuals and groups are, as it were, stuck with one another. Their fates are highly, irrevocably interdependent. Thus, despite their diversity and the discord to which it gives rise, they require some means of coordinating their ongoing social and economic interactions.² In

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² The view we sketch here clearly converges with the way others portray “the circumstances of politics” (Waldron 1999, 102-8; Weale 1999, 8-13). And in this sense we depart from the views of others who hope to distance themselves from the sort of “political

particular they require a set of institutional arrangements consisting of everything from decentralized, informal norms, practices, and conventions to markets and on to centralized, formal institutions. Under these circumstances of discord and interdependence, then, politics largely consists in contests over the contours and distributive implications of shared institutional arrangements.³

Institutions are sets of rules (e.g., roles, procedures, offices) that emerge from and subsequently structure social and political interaction. They represent persistent means of coordinating ongoing social, economic and political interactions. And typically they have a systemic quality such that in any particular circumstances what we call an institutional arrangement will hang together in a more or less coherent, if more or less arbitrary, and more or less contested fashion. Institutional rules often demand that individuals act in ways that run counter to their immediate or even longer term interests, commitments and attachments. They therefore must specify not simply such things as what can be done, by and to whom, for what purposes, and when, but also what happens when the rules are breached and who decides when they are.⁴

theory that presumes conflict and competition as characteristic modes of interaction" (Young 1990, 228). That said, parties confronting the "circumstances of politics" on our view share a judgement or recognition or assessment that, even as they loom in the background of politics, violence, coercion, and force do not afford effective means of coordinating ongoing interactions.

³ Here then, we are indebted to Rawls who insists that political theorists focus on the systematic features of encompassing institutional arrangements and, in particular, on their distributive implications (e.g., Rawls 1993, 258). That said we differ from the project Rawls inspired in several important ways including (at least) the following. First, we assume what he calls "the fact of pluralism" and do not premise our argument as do Rawls and some of his students on the less demanding "fact of *reasonable* pluralism" (Rawls 1993, 36). For reasons why this constraint on the sorts of views that are admissible to democratic decision-making is inadvisable see Johnson (1998). Second, we are concerned with sorts of criteria that might guide the actual politics of institutional creation and reform rather than with running a thought experiment that might clarify our views about justice. Finally, while we argue that democratic politics can generate outcomes that are "better" than those available otherwise, we in no way wish to identify these as necessarily just.

⁴ In this sense institutions differ from bare behavioral regularities. This is true even of simple rules of specific as opposed to generalized (or norm governed) reciprocity. Here see Taylor (1987), Knight (1992), and Calvert (1995b, 61-2).

On the account we sketch institutions ultimately must be self-enforcing - that is, they must rest on the mutual expectations of relevant participants. Moreover, since there typically will be several, perhaps many, feasible, alternative ways of institutionalizing social and political interaction any given institution and the larger arrangements of which it is a component represent large-scale coordination equilibria in the game theoretic sense (Calvert 1995a,b). And here it is possible to discern further unavoidable sources of disagreement. Institutional arrangements are indeterminate in at least two ways. They are indeterminate in the sense that they represent arbitrary outcomes of strategic interactions. Given that there are alternative ways of institutionalizing social and economic affairs relevant individuals will endorse arrangements that they expect to operate in ways that favor their own interests, commitments, and attachments. They also are indeterminate in their operation insofar as the individuals and groups for whom they are relevant will differ over time about what the rules mean, whether and when they are being followed or breached, who is to decide such matters, and so on. Here again involved parties will seek to resolve such interpretive disputes to their own advantage.

This brief sketch of politics and institutions poses three distinct but interrelated tasks for political theorists.⁵ The first task is *analytical* and demands that we examine the features of various equilibrium institutions, identify the sorts of consequences we can expect different equilibria to generate and delineate the conditions necessary for those consequences to emerge. Notice that for analytical purposes we are unconcerned with the question of how or under what conditions a given institutional arrangement emerged. That constitutes our second, properly *explanatory*, task and it is pressed upon us by the first of the indeterminacies we just mentioned. For if there are multiple feasible ways to institutionalize ongoing social interaction we need to account for how and why in any given circumstances actors arrive at the particular institutional arrangement at which they in fact eventually arrive.

⁵ Here we are indebted to Schelling (1978, 25-7)

A good part of our argument in what follows involves identifying the substantive consequences that follow when, as is often the case, political theorists fail to properly distinguish their analytical and explanatory tasks. This is complicated further still when we turn to our third, *normative*, task which arises directly from the demands of analysis and explanation even if political theorists fail or refuse to acknowledge it in an explicit way. What is at issue here is what we call the “burden of justification.” It will help to understand how this burden arises if we think back to the circumstances of politics as we sketched them earlier. We presume that individuals are better off coordinating than not. And we aim to analyze the conditions under which coordination is possible as well as the properties of the resulting equilibrium institutions. We hope thereby to establish expectations about when such institutional arrangements will operate in normatively attractive ways. And we hope to be able to discriminate among the normative features of competing equilibrium institutions. But notice the plural here. It allows the intrusion of distributive considerations. Given that there almost always are different ways to institutionalize social coordination and given that these will sustain divergent, often dramatically divergent, distributive outcomes we must confront the demand to explain why a relevant population arrives at one among the possible set of institutional arrangements. This difficulty arises as we will show because the different explanatory accounts on offer invoke different causal mechanisms some of which increase the burden of justification while others diminish it. But we will only appreciate this difficulty and be able to accurately assess whether we surmount it by attending explicitly to normative demands.

Institutional Pluralism and the Burden of Justification

Any institutional arrangement consists of a complex combination of components drawn from an array of possible forms, including markets, common law, authority, hierarchy, decentralized bargaining, democratic decision-making, and so forth. Given this plurality no specific means of coordinating interaction has presumptive warrant in all cases. Conversely, the decision to rely on a given institutional form or arrangement in any particular domain must be defended. On our account the “priority” of democracy stems from unique characteristics, namely

its reflexive qualities, that distinguish it from other institutional forms. This reflexive quality lends democracy presumptive priority of a quite particular sort in any effort to negotiate unavoidable social disagreement over institutional arrangements precisely because it operates in ways that potentially meet a heavy burden of justification.

This claim will seem somewhat startling to many contributors to the burgeoning literature on social institutions. As we will demonstrate, much of that literature tacitly privileges a quite different component of our institutional arrangements, namely markets. We also will show that once one clarifies the premises and argumentative strategies common to the institutionalist literature, it simply is not possible to sustain the privilege it regularly accords to markets. In fact, we argue that the analytical models institutionalists deploy and the explanatory strategies to which they are committed actually sustain the case for the priority of democracy.

At this point a caveat is in order. Several brands of “institutionalism” have emerged in recent years (Hall and Taylor 1996). We focus on rational choice models of institutions. This, in part, is because these models allow us to keep distinct the three tasks of institutional analysis. It also in part is because both critics and supporters of rational choice analysis commonly and mistakenly suppose that it sustains substantive political conclusions quite divergent from those we defend.

We present our argument in six sections. First, we sketch a version of pragmatism and briefly discuss its implications for the burden of justification. Rational choice explanations of institutional emergence raise suspicions about any strategy that grounds justification in the processes of institutional genesis. This suggests that we might rather adopt a pragmatist approach that seeks justification in a brand of consequentialism that is constrained or tempered by awareness of the conditions under which consequences are produced.

In section two, we present an analysis of micro-economic models of markets. This may seem a counter-intuitive point of departure for an argument that aims to defend the priority of democracy. However, there are two reasons for starting where we do. First, as we have noted, the institutionalist theories on which we draw commonly accord priority not to democracy but to

markets. And by examining analytical models of market exchange we can begin to displace that privilege. This is because, second, standard micro-economic accounts establish quite clearly that markets operate in effective, justifiable ways only under quite restrictive conditions. In this sense, textbook accounts of markets provide an exemplar of the analytical task of social and political theory. They also highlight why it is crucial to properly differentiate the three theoretical tasks we identify above.

In the third section we turn to explanatory issues. Here we hope to complete the task of displacing markets from the privilege they commonly are accorded. For once we address explanatory questions it becomes clear not only that competitive markets presuppose a set of restrictive initial conditions but that on the most robust rational choice account of how institutions emerge, it is highly unlikely that rational actors will intentionally establish and sustain those conditions. Here our discussion of markets highlights the more general and rather daunting burden of justification that institutional theorists confront. For it is one thing to displace markets, or any other institutional form, from a privileged theoretical position. But insofar as alternative institutional forms also presuppose identifiable, restrictive initial conditions - as we insist that they do - we must wonder about the prospects that rational actors might intentionally establish and sustain *those* conditions. And the answer remains the same - highly unlikely. This underscores just how acute the normative burden that institutional theories face actually is.

We turn to this task in the remaining sections of the paper. We first offer an account of the distinctive priority of democracy that highlights the institutional features that make it most appropriate for undertaking the tasks of monitoring and assessing institutional conditions and outcomes. In doing so, we discuss the specific mechanisms that characterize democratic decision-making and the conditions under which they work most effectively. After making this case, we defend it against a predictable challenge, that there is an alternative institutional form, the court, which is better suited to accomplish these tasks. We conclude with some final thoughts about the practical plausibility of our proposal.

Pragmatism and the Implications for Institutional Analysis

We advance a pragmatist argument. It thus will help if we sketch what we mean by “pragmatist.” This is no easy task insofar as pragmatists disagree quite vigorously among themselves about various philosophical and political issues (Bernstein 1992; XXXX). This is not the place to adjudicate such disputes. We consequently distinguish between pragmatism as an overly inclusive *concept* and the particular *conception* of pragmatism that we endorse.⁶ In so doing we try to adhere to what Dewey calls “the pragmatic rule” which holds that “in order to discover the meaning of [an] idea ask for its consequences” (Dewey 1948, 163). As we formulate and defend our conception of pragmatism we are especially concerned to highlight its consequences for thinking about the political-economic institutions that govern contemporary societies.

Three features are central to pragmatism as we understand it. First, pragmatists are committed to *anti-skepticism*. As Peirce insists “complete doubt” of the Cartesian sort is impossible, a mere philosophical pretension. Peirce did, however, countenance the sort of “real and living doubt” that we experience in the face of problematic situations and which prompts us to seek to settle our beliefs. This is “real doubt” precisely insofar as we have reason to question

⁶ Our characterization of pragmatism explicitly is *reconstructive*. We do not claim that this or that classical or contemporary pragmatist actually makes an argument of the sort we are making. We do, however, draw upon the resources that those classical and contemporary pragmatists offer to formulate our own pragmatist position. Our enterprise is distinctive in large part because other pragmatists either have not made the sorts of argument we advance, have derived different implications from arguments we might share, or would resist the more general position that we reconstruct from particular arguments. We are, in any case, interested here less in engaging in a full scale debate with these writers than in relying upon them as warrant for the conception that we reconstruct.

That said, our conception of pragmatism discriminates in ways that views that consider it merely an attitude or “mood” do not (e.g., Posner 2003). We think such indiscriminate views are of dubious usefulness. Not *everyone* is a pragmatist. Although since our aim is to explore democratic institutional arrangements and the possibilities they hold rather than to “make the case for contemporary American democracy” (Posner 2003, 2) ...

our beliefs (Peirce 1958, 40,98-101). For pragmatists, then, it is not just belief but also doubt that stands in need of justification (Putnam 1995, 20-21). Second, pragmatists embrace *fallibilism*. This means that pragmatists acknowledge that even those beliefs or commitments that we hold most confidently may turn out to be false or confused. It means too that whatever certainty we may attain requires that we actively organize experience in such a way that our beliefs are subject to challenge (Putnam 1995, 20-21,71).

Arguably, these first two characteristics, in combination, are what makes pragmatism a distinctive intellectual position (Putnam XXXX). Anti-skepticism and fallibilism combine to sustain an instrumentalist or problem solving approach to ideas and institutions.⁷ On a pragmatist view, our ideas, principles, practices and institutions and so forth simply are tools for navigating a social and political world that is shot through with indeterminacy. Roughly, one can say that pragmatists treat those tools that prove most reliable over time as “true.” But all tools - even our most reliable ones - can fail or prove inadequate or inappropriate. Real doubt arises in just such problematic situations, in circumstances, that is, where some of our extant beliefs or practices or policies or institutions encounter significant, usually unforeseen difficulties. Such circumstances, though, are unlikely to leave us wholly bereft of resources - not all of our beliefs and practices and institutions will fail simultaneously. Moreover, a pragmatist stance encourages us to place pressure on our cherished beliefs, institutions and so forth. It encourages a broadly experimental approach both to inquiry and, more importantly for present purposes, to politics.

This last point will seem controversial to many contemporary pragmatists insofar as they portray their position in a rather narrow, philosophical way as "a set of arguments about knowledge, meaning and truth" and claim, somewhat surprisingly, that those arguments have “no determinate moral and political implications" (Westbrook 1993, 1).⁸ We clearly cannot dispute

⁷ “The various contributors to the pragmatist tradition ... would all agree ... that science, like politics, is problem-solving” (Rorty 1999, xxi).

⁸ For variations on this view that are both more recent and more sweeping see Richard Posner (2003, 44,55) who claims that pragmatism "has no inherent political valence" and

the characterization of pragmatism as a philosophical view. But we do find the inference regarding politics unpersuasive. Here we take our cue from Dewey who observed that if “the pragmatic idea of truth has itself any pragmatic worth, it is because it stands for carrying the experimental notion of truth that reigns among the sciences ... over into political and moral practices ...” (Dewey 1998:2, 110). That said, however, we need to be clear that pragmatism in fact has no “determinate” political implications if this is taken to mean that pragmatists are not committed in advance to any specific moral stance, political action, or social policy.⁹ Yet, for reasons that will become clear momentarily, pragmatism verges on incoherence if it entails literally *nothing* politically.

Here we arrive at the third commitment that pragmatists make, namely to *consequentialism*. This comes through clearly in the "pragmatic rule" mentioned earlier. There Dewey distills the advice of Charles Peirce who urges pragmatists to "consider what effects, which might conceivably have practical bearings, we conceive our conception to have. Then, our conception of these effects is the whole of our conception of the object" (Peirce 1958, 124,192). We take this recommendation to be general in the sense that it applies, for example, to theoretical and ethical concepts, to public policies, and to social and political and economic institutions and, most especially, to broad intellectual positions such as pragmatism itself. It is easy enough to see that Dewey's assessment of the *political* worth of properly philosophical commitments that pragmatists make is simply a reflexive application of this consequentialist impulse. And it is only by neglecting their own consequentialist commitments that contemporary pragmatists can deny the political implications of their views.

Our mention of consequentialism might be taken as an invitation to reduce pragmatism to some version of utilitarianism. This would be a mistake. In fact, pragmatists and utilitarians

Richard Rorty (1998, 228-43) who suggests that it sustains only a "banal" politics. By contrast, Richard Bernstein (1992, 815) and Knight and Johnson (1996a) insist that pragmatists are committed to a robust form of democratic politics.

⁹ Here too we take our cue from Dewey who insists that in the sort of social inquiry that pragmatists endorse is open ended in the sense that "no particular end is set up in advance so as to shut in the activities of observation, forming of ideas, and application" (Dewey 1948, 146).

adopt quite different approaches to problems of judgment and justification. Pragmatists are non-foundationalists and so deny that some non-political vantage point exists from which we might render and assess political judgments. Utilitarians indicate by their very label that utility provides just such a foundation. This is not the place to explore this broad issue of intellectual strategy. It is enough to indicate that on their own terms, utilitarians encounter grave difficulties once they acknowledge that there are broad expanses of politics in which interpersonal comparisons of utility are unreliable or impossible. For in such circumstances endorsing utility maximization simply amounts to endorsing democratic processes and attending to the conditions necessary to render the outcomes that such processes produce justifiable (Riley 1990).

This last point is important. Some contemporary pragmatists take the problems with utilitarianism (or other views that presume a neutral metric such as “wealth maximization”) as warrant for endorsing a “truncated form of consequentialism.” By this they hope to claim that pragmatists are consequentialist only up to a certain point but then subscribe to some standard of “reasonableness” (Posner 2003, 65-7,74-5). But here such pragmatists might learn from utilitarians themselves who insist that, once we despair about the reliability or possibility of interpersonal comparisons of utility, and thereby of the existence of some neutral metric by which to assess consequences, we must both identify the conditions necessary for democratic processes to operate properly and insist that those conditions be met. As we shall see, this is a considerable but not impossible task. And it is one that does not differ in kind from the effort to identify and implement the conditions presupposed for the operation of other common institutional forms, say efficient markets.¹⁰ Pragmatist consequentialism, then, is not

¹⁰ Posner dismisses those who invoke principles such as freedom and equality as purveyors of “goody-goody slogans” and “pious words and phrases.” But even if we might suspect that his own claims to “reasonableness” simply afford a pretext for capitulating to the unconstrained “force of public opinion” in problematic situations the difficulties with his view would not stop there (Posner, 2003, 55,65,67). For, “reasonableness” is no more easily defined and defended than the competing principles Posner dismisses. And, more importantly, as we show in what follows any decision to use markets as a mechanism for coordinating social interactions in some domain - and this is the sort of decision Posner regularly promotes - presumptively rests on establishing that the commonly recognized conditions presupposed for the efficient operation of

“truncated” by a commitment to “reasonableness.” It is constrained or tempered, though, in particular applications by the need to identify and assess the conditions presupposed by an awareness that consequences can be assessed only in light of some set of, in principle identifiable, initial conditions. In any given instance a major component of a pragmatist’s assessment of theories or politics or institutions or practices will consist in an inquiry into what those conditions are and whether they obtain.

Privileging Markets I: The Textbook Account

Markets are institutions in just the sense we have in mind - mechanisms for coordinating ongoing social interactions (Kreps 1990 5-6, 187-98; Lindblom 2001). This is a truism. Yet markets occupy an unusual, indeed an unusually and unjustifiably privileged place in extant theories of how institutions emerge, operate, and change. This becomes clear when we inquire what it might mean to claim that markets are institutions. We address this issue in this section and the next.

In the introduction we depict institutions as sets of rules that more or less persistently and systematically coordinate ongoing social, economic and political interactions. We suggest that since institutions often require individuals to act in counter- preferential ways they must establish both first-order and second-order expectations. They must, in other words, not simply establish mutual expectations concerning individual behavior but also expectations about what will occur if some individual or group deviates from those expectations. By this we mean simply that institutional rules establish a generalized expectation that third parties will react to the non-cooperative behavior of the parties directly involved in an interaction."¹¹

It is important to distinguish at the outset among three concepts that economic and political theorists too often conflate. These are exchange, competition and markets. Exchange is

markets are met. And there we need to talk precisely about freedom and equality. On Posner’s unwarranted propensity to defer to social convention see Knight and Johnson (1996a).

¹¹ It is of course a crucial part of any institution to identify these third parties. Informal social norms may require all or most members of a community to react to non cooperation. More formal, centralized institutions, by contrast, typically will assign this task to particular officials. This is unimportant for present purposes.

pervasive in social life. It occurs whenever two or more individuals transfer goods and/or services among themselves. Exchange, however, does not automatically imply market interactions. The latter emerge from the need to predictably coordinate exchange in multilateral, increasingly impersonal settings (Lindblom 2001, 37). Only once exchange starts to occur under certain specifiable conditions do we observe the institutionalized interactions characteristic of markets. These conditions operate in various ways to establish and sustain varying degrees of competition among parties to exchange relations.¹² One virtue of standard micro-economic analysis is that it clearly identifies these conditions.

In standard textbook versions micro-economic analysis can in general show that, under specifiable conditions, [i] an equilibrium generated by market competition always yields a Pareto efficient allocation, and [ii] that any such allocation constitutes an equilibrium.¹³ These results, roughly speaking, are the fundamental theorems of welfare economics (Kreps 1990, 199-202, 286-9). They establish the existence and attractiveness of market equilibrium. This is a remarkable convergence. As Kreps remarks: "You should now be hearing choirs of angels and choruses of trumpets. The 'invisible hand' of the price mechanism produces equilibria that cannot be improved upon" (Kreps 1990, 200). But Kreps also prompts us to ask what it actually means to say economists can establish these things? Here it is helpful to raise two subsidiary questions. What, more precisely, are economists doing? And how robust are the conditions under which their analyses hold? By raising these questions we can highlight why each of the three tasks of institutional analysis is important.

¹² Here we have in mind something like what economists take as the "the natural meaning of 'competition,' that each participant in the market is so small that he will have no effect on the behavior of others" (Stiglitz 2002, 467). Put otherwise, to the extent they exist the conditions of *competitive* exchange operate to mitigate asymmetries of power.

¹³ For present purposes we rely almost exclusively on a single recent textbook account (Kreps 1990). This textbook is especially valuable for our purposes because it is both written by an a highly esteemed economist and is admittedly "chatty" (Kreps 1990, xvi). It consequently is more explicit on matters that concern us here than are many texts. For another clear presentation of these issues see Myles (1995).

Consider the first question. What economists offer is an analysis of the existence and qualities of equilibrium outcomes that does not explain how markets actually generate such nice equilibria. In other words this demonstration "doesn't provide . . . any sense of how markets operate. There is no model here of who sets prices, or what gets exchanged for what, when, and where" (Kreps 1990, 195-8). This is because what economists offer "is a reduced form solution" that "describes what we imagine will be the outcome of some underlying and unmodeled process" (Kreps 1990, 195,187). Standard microeconomic accounts offer little understanding of precisely how "market/exchange mechanisms" actually operate (Kreps, 195, 190).¹⁴ Kreps thus admits that the claim that economic agents will find their way to equilibrium in a decentralized process is a "rather heroic assertion." He suggests that it "seems natural to think that we could increase (or decrease) our faith in the concept of Walrasian equilibrium if we had some sense of how markets really do operate." Progress on this task can be made "only if we are more specific about the institutional mechanisms involved" in market interactions (Kreps 1990, 187,190).

It is not that economists have not generated some good work on that score. Quite the contrary. But the "exploration of more realistic models of markets is in relative infancy" (Kreps, 1990 190,195,197). And, moreover, that work encounters difficulties both in actually explaining how the price mechanism generates equilibrium outcomes and in persuasively demonstrating how equilibria attained in particular settings retain the attractive normative properties of competitive equilibria that economists can establish in the general case.¹⁵ In order to appreciate the difficulties here we need to turn to our second question.

¹⁴ In other words, "why the economy should actually reach the equilibrium is not entirely clear" (Myles, 25-26). While this is true for standard micro-economics it clearly is not the case for recent work by sociologists (Swedberg 1994) or economic historians (Greif 1997).

¹⁵ It is important, in other words, not to presume that the demand for realistic models is satisfied simply by a move from general to partial equilibrium analysis. The latter simply recapitulates both the explanatory shortcomings and normative character of more general approaches.

What if we want to try to explain how the price mechanism generates an equilibrium in particular cases? First, moving to "partial" equilibrium analysis is not terribly helpful insofar as it too neglects underlying institutional mechanisms (Kreps 1990, 263-4,286). In essence it simply amounts to shifting the markets surrounding those under scrutiny into the same domain as what

Economists can establish the existence of normatively attractive equilibria only under reasonably restrictive conditions. Some of these conditions are purely technical and we set them aside.¹⁶ Others revolve around questions about the adequacy of efficiency as a normative criterion.¹⁷ While efficiency is a rather anemic normative criterion we grant for purposes of present argument that market institutions can be justified in terms of their efficiency enhancing effects. We thus set these conditions aside as well.

What we do care about at the moment are several further conditions necessary to the argument that market interactions generate normatively attractive equilibria. These conditions essentially are meant to insure that no producer's or consumer's choice exerts significant influence on the choices of other agents. In other words, standard micro economic models are populated by agents who are free and equal. The conditions necessary to insure this are significantly less easy to relax than those we have mentioned thus far (Myles 1995, 48-9). They fall into two categories.

Kreps (1990, 263-4) identifies as the "larger social and political environment which general equilibrium takes as given." Second, we cannot *assume* that the particular case will have the attractive normative properties that the general equilibrium argument establishes. That however is pretty much what partial equilibrium analysis does. Since it focuses on some particular realm of exchange it takes all others as given. It thus allows the analyst to assume that the interactions under consideration in fact meet the restrictive conditions presupposed by "nice" equilibrium outcomes and to not ask one way or the other about all the other interactions that a general equilibrium argument would encompass (Kreps 1990, 279-84). But from the vantage point of general equilibrium analysis this process of extraction clearly is artificial and thus is a theoretical move for which the analyst must offer a plausible defense. Otherwise there is no reason to expect that whatever equilibrium emerges in particular cases is normatively attractive in even efficiency terms.

¹⁶ For instance, the general equilibrium results presume a set of technical assumptions about consumer preferences - they are "convex, continuous, nondecreasing, and locally insatiable" (Kreps 1990, 199-200,287).

¹⁷ The second welfare theorem is sensitive to the initial distribution of endowments. Depending on how endowments are distributed (or redistributed) at the outset, market exchange can generate efficient but highly inequitable outcomes. This observation often generates "normative" arguments about the degree and feasibility of establishing such initial equity (Kreps 1990, 200). We want to avoid debating the relative importance of equity and efficiency as normative criteria.

The first category concerns the role of information and time in market exchange (Kreps 1990, 193-5). These conditions can of course be relaxed with some strain if we incorporate futures markets and increasingly clairvoyant agents (Kreps 1990, 216f; Myles 1995, 48-9).¹⁸ Awareness of the constraints that information and time impose on economic exchange prompt economists to focus on the "transaction costs" involved in processes of search and monitoring. This in turn provided the impetus for a large literature on economic institutions.¹⁹ This literature largely is concerned with the ways that information and time constraints produce inefficiencies. What is less often noted is that while transaction costs affect all parties to economic exchange, their burdens typically are distributed unequally. For example information imperfections typically confer advantage on one party to an exchange in ways that clearly subvert their equal status and thereby threaten the normative attractiveness of the resulting outcomes. As we establish in subsequent sections, the way that the literature on institutions typically approaches its explanatory tasks imply that institutions function to mitigate such asymmetries. To the extent that it does so this literature tacitly but systematically intermingles its normative and explanatory tasks.

The second category of conditions that concern us are meant to establish the sort of competitive environment needed to insure that individuals choose independently and so to preclude such things as externalities, monopolies and public goods. These conditions, in other

¹⁸ The extent of the strain is the subject of disagreement among economists. Some, like Stiglitz (2002), claim that even small amount of imperfect information derail standard micro-economic arguments. As he says, even if we acknowledge accommodate the fact that information is costly "economies with information imperfections would not be Pareto efficient" and there will always be feasible government "interventions in the market that could make all parties better off (Stiglitz 2002, 477-8). In this regard two points are important. First, in one sense this argument clearly sustains our own case against the priority of markets. But, second, it is not as radical as the case we advance in the next section, for Stiglitz clearly conceives what he calls "the economic role of the state" as market enhancing and so tacitly retains the presumption we seek to displace.

¹⁹ See Williamson (1985), North (1990), Eggertsson (1990), and so forth. Kreps (1990) clearly traces the connections between standard micro-economic analysis and the transaction cost economics that underlies much of the recent rational choice literature on institutions.

words, are meant to insure that agents who populate these models are parametric in the sense that they all are more or less equally situated price takers (Kreps 1990, 202,264-5; Myles 1995, 20). The difficulty is that absent such conditions not only will market competition potentially generate an inequitable distribution along the efficiency frontier (the normative problem we set aside above) but it generally cannot be relied upon to generate efficient outcomes at all (Kreps 1990, 202-4, 288-92).

Both categories of conditions are necessary for the effective operation of markets as presented in the textbook account. Thus we do not question whether these conditions must hold in order for economists to generate their analytical results. We simply wish to highlight the highly conditional nature of those results and to suggest how awareness of those conditions prompt us to ask how they are embodied in actual economic institutions and whether and, if so how, those institutions operate to shape economic exchange into competitive markets. Likewise when we question whether these conditions obtain, we are not challenging the economist's preferred normative criterion - efficiency - with some other criterion - e.g., equity - but rather questioning whether the economists' normative claims are warranted on their own terms. We then, of course, also need to ask whether there exist alternative means of coordinating ongoing interactions that are preferable in normative terms - whether those be terms of efficiency or otherwise.

Here we return to the claim that micro-economic analysis presumes further inquiry into the "institutional framework" of market interaction (Kreps 1990, 190). It is important to notice an ambiguity in this claim. On the one hand standard accounts readily acknowledge that the proper operation of markets presupposes an exogenous institutional framework including well-defined property rights and enforceable contracts (Kreps 1990, 263; Myles 1995, 20,48-9). On the other hand, it less commonly is acknowledged that because they offer only reduced form analyses, micro-economic accounts do not properly address the task of explaining how an informal institutional framework of roles, norms and prerogatives defines the scope and operation of markets. It is a truism that markets cannot themselves produce institutional arrangements of the

first sort. And as we argue in what follows it is highly unlikely that they can generate institutions of the second sort. But we cannot understand how markets in fact operate without specifying how informal institutions and decentralized exchange interpenetrate to establish the sort of "trading environment" that allows us to treat markets as institutions (Swedberg 1994).

At this point a skeptical reader might well object. Such a reader might suggest that what we really have established is a *virtue* of standard micro-economic analysis. For such analysis prompts us to seriously and systematically consider the role institutions of various sorts play in structuring economic exchange into more or less competitive markets. In one sense such a skeptical reader would be correct. Standard micro economic accounts privilege markets in a relatively benign sense insofar as they treat other institutional forms primarily as responses to imperfections in or failures of markets. On this view markets serve as the default mechanism for coordinating social interactions while various alternative institutional mechanisms represent "means of achieving the benefits of collective action in situations where the price mechanism fails" (Arrow 1974, 33).²⁰ The problem arises when theorists unselfconsciously transport this relatively benign privilege from its native analytical environment into their properly explanatory and normative enterprises. This is clearest when theorists characterize a range of social and political institutions - families, the rule of law generally or enforceable contracts and property rights in particular, various constitutional provisions such as federal arrangements or separation of powers, and even democracy - as "market preserving" (Weingast 1995) or "market supporting" (McMillan 2002, 11). For this characterization sustains efforts to explain and, tacitly, to justify institutions primarily in terms of how they contribute functionally to the operation of markets. It is *this* way of privileging markets that we find objectionable. That is the topic to which we now turn.

²⁰ Arrow actually refers to "organizations" but in fact also uses the term "institutions" more or less interchangeably. For an effort to differentiate institutions and organizations see North (1990a, 4-5). Most importantly for present purposes Arrow explicitly refers to just the sorts of entity - such things as governments, business firms, moral norms, and markets - that we consider institutions.

Privileging Markets II: Accounting for Institutional Emergence

Consider Calvert's (1995a,b) abstract game theoretic treatment of institutions. Calvert views an institution as a set of rules that is sustained as an equilibrium in an underlying repeated game (Calvert 1995a, 228-33; 1995b). He understands the basic underlying game as an indefinitely repeated, N-person prisoner's dilemma in which players are randomly matched for pairwise interactions. He then models a set of increasingly complex versions of this game in each of which he identifies threshold values for the discount parameters of players, the size of N and, eventually, the costs of communication that sustain a variety of cooperative equilibrium outcomes, both non-institutional and institutional. These outcomes all involve some more or less elaborate variation on conditional cooperation. They range from what we might call specific reciprocity in which mutual cooperation remains non-institutional through the sorts of generalized reciprocity characteristic of informal social norms and on through increasingly formalized institutions that incorporate first multilateral communication, then centralized communication, and finally centralized communication coupled with protections against higher order malfeasance.

This is in many ways a remarkable demonstration. But notice that, as he himself acknowledges, he does not actually explain the emergence of any social or political institutions. His analytical exercise generates an existence result that, by identifying the conditions under which they can emerge, establishes the possibility of equilibrium institutions. The difficulty, of course, is that as with nearly any repeated game in which players discount the future, the games Calvert examines generate multiple equilibria. This unavoidable coordination problem sets the basic explanatory task for institutional analysis. Which, if any, of the available equilibrium institutions actually will emerge from social and political interaction? How might we best explain the way institutions are generated? And under what conditions will such institutions most likely persist and operate over time? These are crucial questions if we aspire to fulfill the explanatory ambitions of institutional analysis (Calvert 1995a, 228). They are questions that Calvert explicitly leaves unanswered (1995b, 70, 80-2). For present purposes these questions are

important because they highlight the way that various rational choice accounts of institutional emergence privilege markets.

Rational choice theories of institutional genesis offer a number of different answers to the explanatory question. The main differences in these competing explanations lie in (1) the ways in which the theorists conceive and model the basic social interactions that produce institutions and (2) the features of the social context which they invoke in order to resolve the strategic problems inherent in these interactions (where the institutions are the product of repeated efforts to resolve these problems).

We can distinguish three distinct accounts of the decentralized genesis of social institutions: a theory of arbitrary coordination on social conventions (i.e., Schotter 1981), a market-based theory of exchange and selection through competition (i.e., North 1990) and a bargaining theory which explains the emergence of institutions in terms of the asymmetries of power in a society (i.e., Knight 1992). On each of these accounts social institutions resolve the strategic problems inherent in social interactions characterized by multiple equilibria: any of the available equilibria could coordinate the social interaction, but the actors need to identify a common equilibrium to pursue. The three theories build their explanations from the micro-level, arguing that social institutions emerge from repeated interactions among small numbers of social actors. The process of institutional development culminates when one set of rules is established as the common institutional form in a community. Over time the maintenance and stability of that institution is a function of the continued persistence of the conditions under which it was originally created. While the three approaches share the view that social institutions can emerge out of a decentralized process, they identify very different mechanisms to explain institutional emergence, maintenance and change.

The first approach, the logic of social conventions, builds on the basic idea that institutions coordinate beliefs on mutually beneficial outcomes and characterizes institutional rules as social conventions. This explanation of institutional genesis rests on an account of how the convention is recognized and coordination is achieved. It builds on Schelling's (1960)

conception of salience. The causal mechanism central to the conventional account is the existence of focal points that coordinate social expectations. Some feature of the social context in which the relevant interaction occurs establishes the salience of a particular cooperative outcome. Convergence on the focal point leads to the establishment of a convention among members of the group that coordinates their ongoing interactions. The key explanatory point is that institutional rules evolve arbitrarily. The coordination process is unconsciously driven by whatever salient factor focuses the attention of the actors. The interests of any particular actor or group of actors do not determine the nature of the final institutional arrangement and so the distributional differences produced by different rules will not be invoked in the explanation.

The second approach, contract and selection, like the convention approach, is grounded in the logic of mutual benefit. When any two social actors perceive that they can achieve benefit from mutual exchange, they must agree on the terms of that exchange. Among these terms are the rules governing the actions of the parties during the course of the exchange relationship. In the context of the theory, these contracts constitute the social institutions produced by social actors to facilitate the achievement of socially beneficial outcomes. But these contracts can take many forms and serve merely as the set of possible institutional forms in a society. Market-like competition serves as the dynamic selection mechanism that determines the survival of various institutional forms on grounds of reproductive fitness. This is the logic behind the Alchian (1950) model of evolutionary competition employed by most economic analyses of institutional genesis. On this account, competition selects the institutional form that maximizes the aggregate benefits of the exchange. In doing so, it neutralizes arbitrary asymmetries of power among the actors, asymmetries that some actors might use to alter the institutional selection process in the direction of alternative, more distributionally biased outcomes.

The third approach, the logic of bargaining, explains genesis primarily in terms of distributional consequences. On this account, social institutions are a by-product of strategic conflict over substantive social outcomes. The mechanism of selection among the possible institutional alternatives is bargaining among the actors over the various alternatives.

Institutional development is a contest among actors to establish rules that structure outcomes to those equilibria most favorable for them. As in any bargaining situation, there are some factors that distinguish the actors and thus influence the bargaining outcome in favor of one of the parties. Knight (1992) develops a theory that identified the asymmetries of resource ownership in a society as the main factor explaining the resolution of bargaining over social institutions. The main thrust of the argument is that asymmetries in resource ownership affect the willingness of rational self-interested actors to accept the bargaining demands of other actors. In explaining the establishment of particular social institutions, bargaining demands become claims about commitments to particular rules of behavior and resource asymmetries affect the credibility of those commitments. On this account social actors who have fewer resources will be more inclined to respect the commitments of those who have more. In this way, the existence of resource asymmetries in a society can significantly influence the choice of equilibrium alternatives.

If we compare these three approaches, we can see that the plausibility of the explanation each offers will, in large part, depend on whether the underlying conditions assumed by the respective models actually obtain. The more that these conditions are empirically realized, the greater the explanatory power of the proposed account. This leads to the following assessment of how well the three approaches explain institutional emergence and change. The coordination approach will do best when the benefits derived from the institutional rule are equal for all actors. The contract and selection approach will offer the best explanation when the conditions of competition hold. The bargaining approach will produce the best account when the actual empirical conditions are such that there are distributional differences in the benefits derived from the institution and asymmetries in the bargaining power among the actors. What is distinctive about the bargaining account is that it is more robust than the other two approaches (Knight 1995.) By this we mean that it accommodates the assumption of rational, self-interested behavior for a broader and less restrictive range of conditions.

The relative robustness of the bargaining account has important implications for both explanatory and normative claims about the priority of the market as an institution of social coordination. To see this we need to maintain a clear distinction between the two different ways in which market institutions enter into the analysis. Markets, or market like mechanisms, enter into the analysis as part of the explanation, as the competitive pressure that selects among the institutional alternatives. Here it is important to note that the conditions presupposed by the contract and selection approach (and implicitly by the convention approach) closely resemble the conditions presumed by theories of efficient operation of markets. Markets also enter into the analysis as part of the explanandum, as one of the range of possible institutional alternatives for coordinating social interactions. Arguments about the normative priority of the market presuppose that the following positive claims about these two features of the explanation actually hold. First, the conditions for the existence of market-like competitive pressure are generally prevalent and readily reproducible in a decentralized social environment. Second, impartial market institutions that neutralize the effects of power asymmetries are the types most likely to be produced by a decentralized process of institutional emergence and change.

The robustness of the bargaining account calls both of these positive claims into question. Indeed, comparison of the alternative accounts of decentralized institutional emergence suggests that the conditions necessary for the existence of market like competitive pressure are highly restrictive and thus unlikely to govern the decentralized emergence of social institutions. From this it also follows that the types of institutions most likely to emerge from such a decentralized process are those that systematically favor the distributional interests of dominant social groups and not those that would neutralize the effects of power asymmetries and thus facilitate effective market competition.

In the last section we highlighted the fact that markets generate normatively attractive outcomes only under highly restrictive conditions. Our confidence in markets as a means of coordinating social interaction rests therefore on our estimation of the extent to which those conditions actually obtain or might be brought about in particular circumstances. We also argued

there that micro-economic analysis of how markets operate naturally leads us to take up the task of explaining how institutions emerge. In this section we have demonstrated that the most robust account of institutional emergence actually undermines just the sort of confidence we require in order to sustain market privilege. In fact we expect that in most cases the institutions, including market institutions, that emerge from decentralized social interaction will embody sorts of asymmetries that are quite at variance with conditions of free and equal participation that the efficient operation of markets presupposes.

The Burden of Justification and the Priority of Democracy

There is, despite common practice, no compelling reason to privilege markets in the explanation or normative assessment of institutional arrangements. Yet our argument against the priority economic and political theorists commonly accord to markets raises clear and especially vexing difficulties for the task of justifying social institutions more generally and democratic institutions in particular. If actually existing social and political institutions typically are by-products of strategic interactions characterized by asymmetries of power, they are morally arbitrary. How, then, can we ever hope to justify any given or proposed institutional arrangement?

This is a heavy burden of justification. We see two general strategies that one might adopt in hopes of meeting it. One might argue that some alternative institutional form should receive default priority. Alternatively, one might reject the idea that any institutional form properly enjoys default priority and embrace more fully and explicitly the plurality of institutional mechanisms. We opt for the latter strategy. In doing so we acknowledge that the burden of justification, extending to the full array of available institutional forms, is an unavoidable implication of our "realist" explanation of institutional development. Moreover, we acknowledge that that account imposes rather tight constraints on the possible ways we might approach our normative task. In particular it undermines confidence in strategies that seek to derive justification for any institutional arrangement from the purportedly attractive processes by which it emerged. Conversely, it prompts us to focus our justificatory strategy in broadly

pragmatist fashion on the consequences we anticipate different institutional forms to produce and the conditions under which we can expect them to do so. In this sense we endorse what might be called a constrained or tempered consequentialism.

There exists a plurality or range of feasible institutional forms. In addition to markets and democratic decision-making procedures it includes, but is not limited to, bureaucracy, adjudication through courts, private associations, economic hierarchies and social norms. Once we recognize this plurality the task of persuasively ascribing priority to any institutional form appears quite daunting. This in turn raises the difficult ask of discerning how, in particular circumstances, any heterogenous constituency might determine which institutional forms to use to coordinate ongoing interactions across various domains. Such decisions will raise difficult political questions to which we return below. Here it is important to reiterate two claims that underscore just how arduous this task actually is. First, as standard textbook accounts make clear in the case of markets, any available institutional form will generate normatively attractive outcomes only under particular (and in principle specifiable) conditions.²¹ Second, as the realist implications of the bargaining approach to explanation suggests, in any given circumstance these conditions are unlikely to either govern the processes by which institutions actually emerge or characterize the arrangements that those processes generate. The central perplexity of institutional reform is whether any among the available institutional forms provides the sorts of resources necessary to address this acute, systemic discrepancy. In other words, the task of institutional reform highlights the normative problem of identifying a decision-making mechanism capable of allowing relevant constituencies to both assess the extent to which, in particular settings, actual conditions approximate those that various institutional forms presuppose if we expect them to generate normatively attractive outcomes and, crucially,

²¹ For analogous if less formal analyses of common law and of democratic deliberation, see Johnson (1998) and Knight and Johnson (1994;1996;1997).

reflexively monitor the extent to which the conditions of its own effective operation actually obtain.²²

Democratic institutional arrangements differ from other available political and economic institutional forms precisely to the extent that they are capable of performing these tasks. And it is on just this basis that we rest our case for the priority of democracy. This is a rather breathless conclusion and we do not fully explore it here. We do, however, wish to address briefly several matters that it raises.

The distinctiveness of democratic arrangements stems from the two basic mechanisms - voting and argument or debate - through which they operate. Voting generates normatively attractive outcomes just insofar as it is constrained by commonly recognized conditions of freedom and equality. Unfortunately, the results of social choice theory make us painfully aware of the difficulties - in the form of unstable or cyclical aggregate outcomes - that emerge when we impose a set of minimal and apparently unobjectionable normative conditions of voting procedures. Here is where argument or debate plays a crucial role in democratic institutions. Political argument too generates normatively attractive outcomes only insofar as it is underwritten by conditions of freedom and equality. When it operates in circumstances that approximate these conditions argument or debate constitutes what now commonly is called democratic deliberation. This clearly is not the place to offer a full-fledged discussion of democratic deliberation.²³ The important point is that, quite felicitously, political debate can operate to mitigate qualms about democracy commonly expressed by theorists who focus too

²² The actual problem is more complex than this. For example, in any given case, we will be interested not only in whether actual conditions approach those presupposed by various institutional ideals but, if they do not or if they do so only imperfectly, whether and how the degree of approximation might be improved.

²³ In a recent review of the large and growing literature on the topic, however, Freeman (2000, 395) rightly stresses the importance of specifying "how substantive liberties, opportunities and resources are a condition of deliberative democracy." For examples see Bohman (1997) and Knight and Johnson (1997). This approach stands at some variance to competing defenses of deliberation that insist that it embodies "endogenous mechanisms" that filter the terms of political interaction (e.g., Dryzek 2000). For skepticism about such claims see Johnson (1998).

exclusively on mechanisms of voting. This occurs in at least two ways. - democratic arrangements facilitate outcomes that are "better" than those that might emerge from alternative institutional forms and they do so in a reflexive manner.²⁴ In this sense we justify democratic arrangements in broadly pragmatist fashion in terms of the consequences they produce under specifiable constraints.

What might it mean to say that one way of resolving such a political problem is "better" than another? From our pragmatist perspective democratic arrangements accomplish this in two senses. As a way of eliciting information regarding the provision of public goods democratic institutions afford comparative advantage over either markets or technocratic, market-mimicking institutional forms of the sort depicted in the literature on mechanism design.²⁵ Viewed on their own terms, democratic arrangements also generate outcomes that are better in a broadly cognitive or epistemological sense.²⁶ In a polity whose members unavoidably hold an irreducible diversity of interests, commitments and attachments, processes of political argument - especially under initial conditions that approximate those required to characterize such debate as democratic deliberation - provide the sort of competitive environment in which, minimally, participants can convey information about proposals and counter-proposals that might otherwise remain unavailable.

What might it mean to say that democratic institutions operate in a reflexive manner? The reflexivity of democratic arrangements derives from the fact that political argument - again, increasingly so to the extent that it transpires under conditions of freedom and equality -

²⁴ Note that democracy has additional virtues that we set aside here. In particular it embodies a level of transparency that alternative institutions explicitly lack (at least in the ideal). And it embodies (again in the ideal) a level of access that is crucial to the responsible acceptance of social and political experimentation. On the logic of and preconditions for effective democratic deliberation see Johnson (1998) and Knight and Johnson (1994; 1997; 1999).

²⁵ We have discussed markets in earlier sections. For a discussion of the literature on mechanism design that supports our claim here see Miller & Hammond (1994) and Knight and Johnson (1999).

²⁶ The position we endorse thus resembles the view set out by Putnam (1991) and elaborated in various direct and indirect ways by Knight and Johnson (1996; 1999), Knight (2001) and Westbrook (1998).

requires relevant parties to assert, defend and revise their own views and to entertain, challenge or accept those of others. It derives, in other words, from ongoing disagreement and conflict. In this respect democratic institutions clearly differ from market interactions where, in the case of disagreement, parties simply "exit" and in cases of agreement they simply trade without concern for the efficiency or distributive features of aggregate outcomes. And in this sense it resembles judicial decision-making where (in the ideal) arguments are exchanged under established, fair conditions. But in legal settings too the parties - judges, juries, litigants - typically are concerned solely with settling the case at hand and not with either "the law" as an entity or structure writ large or with the way established rules will impact the outcome of future cases.

The key here is that market interaction and legal decision-making are decentralized in the sense that no party is charged with reviewing or monitoring in an ongoing way the conditions under which institutions of exchange and legal disputation themselves operate or with assessing the consequences of how broader institutional arrangements operate. This hopefully is clear from our discussion of markets. We argue in the next section that it is equally true of judicial decision-making. And it is just here that democratic institutions enable a level of reflexivity other institutional forms lack. For political argument not only allows members of a democratic polity to collectively revisit past substantive decisions but to collectively reconsider and revise the terms of their ongoing interactions. Moreover, because democratic arrangements structure political argument so as to encourage the emergence of new ideas, perspectives and interests and, thereby, new constituencies and oppositions, this reflexivity has an endogenous, dynamic dimension.

This propensity to inclusiveness is an attractive normative feature of democratic arrangements. But it raises a potential problem when we recall the practical effects that political theorists commonly ascribe to political argument, namely that it can mitigate the sort of instability that social choice theorists show threatens outcomes generated by voting. More precisely, under democratic conditions political argument might induce just the sort of common or shared understanding of what is at issue in particular circumstances that makes coherent (i.e.,

non-cyclical) aggregate outcomes possible.²⁷ Given this, an apparent tension emerges within democratic institutions between their normatively attractive inclusiveness and their hoped for practical effect of inducing stable outcomes (Knight and Johnson 1994). This tension, however, is much less acute than it might at first appear. In practical terms it is less useful to characterize political debate as inducing agreement than to see it as structuring disagreement.

In order to mitigate the instability that plagues voting, political debate must impose restrictions on the structure of individual preferences. It need not always succeed in so doing but, when successful, this amounts to establishing an agreement among the relevant population regarding the dimensions of political conflict. It is a mistake, though, to focus on the agreement here. Instead we must keep our eye on the conflict. That is because political argument in democracies leaves plenty of room for at least two sorts of persistent disagreement. In the first place, the fact that members of some population agree on dimensionality in no way entails that they agree about the substance of the issue. So, for instance, the fact that a population might agree that what is at stake is a matter of national defense rather than, say, facilitating interstate commerce (e.g., as in the argument over the U.S. interstate highway system) does not mean that they agree about how much to spend on that issue. Indeed, it is entirely possible that clarifying the dimensions of conflict will sharpen disagreement along that dimension. But, second, the persistence of substantive disagreement does not exhaust the room for conflict in democratic arrangements. That is because we have for some time known that aggregate stability presupposes significantly less than consensus over even the dimensions of conflict. As many as twenty-five to

²⁷ Most commonly this involves the claim that argument induces “single-peaked” preference structures in the population. However, there are other sorts of structure that might also operate in much the same way (Sen, 1967). We set this technical matter aside here. For what is crucial is that imposing a common structure on preferences violates one of the minimal normative conditions (universal domain) that accounts for the famous Arrow impossibility theorem. Insofar as political argument occurs under conditions of free, equal participation and so qualifies as democratic deliberation, that violation will be justifiable. It is important to see too that this common understanding is reflected in the structure of individual orderings and does not entail that individuals share substantive views or that there exists “consensus” among the population. On these points see Arrow (1963, 74-86), Riker (1982, 122,126,128), Miller (1992), Knight and Johnson (1994), Johnson (1998), and List (2002).

thirty percent of a population can dissent from a commonly held view about what is at stake in any political conflict without subverting the possibility that voting on the matter will generate a non-cyclical collective outcome (Niemi 1969).

The grounds for our claim that democracy is reflexive, then, emerge when we see the way that it can foster and structure disagreement and conflict. The irreducible diversity of interests, commitments and attachments that gives rise to politics in the first place makes it likely that members of a population will have an interest in monitoring the institutions that coordinate their ongoing interactions. But because democratic institutions in particular afford the space for the two kinds of disagreement we have identified, they provide the agents who populate them with ample opportunity to challenge the terms of their ongoing interactions as well.

Several important things follow on this view. First, in many domains this reflexivity will make democracy inappropriate - in the sense of being cumbersome and ineffective - as a first-order mechanism for coordinating ongoing social interaction. Conversely, it is a virtue of competing institutional forms such as markets and common law adjudication that precisely because they are not reflexive in the sense we indicate they allow us to coordinate social interaction more effectively. So, democracy has no more presumptive privilege as a first-order mechanism for coordinating social interactions than other institutional alternatives.²⁸ However, it nevertheless enjoys a second-order priority precisely because it allows constituencies to monitor and maintain the conditions presupposed by effective operation of prevailing institutional arrangements.

It also follows that the process by which constituencies must decide which institutional forms they will rely on and for what purposes is unavoidably political. Here there is room, at least, for disagreement over both outcomes and initial conditions. With markets, for example, efficiency competes with equity, freedom and other considerations, as defensible criteria for assessing aggregate outcomes. Likewise, since actual conditions on the ground will only ever

²⁸ By way of contrast see Dryzek (1996; 2000).

approximate the ideal conditions presupposed by the effective operation of markets, legitimate disagreement will persist over whether particular goods or services - say, sex or reproductive capacity - ought to be available on markets in the first place.²⁹ And markets are hardly unique in these respects. The same issues will arise with alternative, including democratic, institutional forms. So social actors cannot expect a neutral, apolitical metric that might be applied to such decisions. Even under ideal conditions there is no reason to expect consensus on such matters as how to weight competing normative criteria or how to judge whether empirical conditions sufficiently approach those necessary to insure normatively attractive outcomes. The fact of pluralism that we recognized in the introduction suggests that there will always be space for legitimate disagreement about such matters.³⁰

Finally, the predictable persistence of such legitimate disagreement recommends an experimental posture toward competing institutional forms.³¹ This in turn supports our specific claim about the priority of democracy. A crucial feature of experimental procedures is reflexivity. We trust or value experimental outcomes only insofar as they emerge under proper conditions and we expend much effort in monitoring those conditions. The priority of democratic institutional arrangements emerges because they embody the sorts of reflexivity needed to monitor the conditions under which alternative institutions and practices, including democratic procedures themselves, generate normatively attractive outcomes. But, in keeping with our commitment to a plurality of institutional forms, it is important to highlight one, hopefully obvious implication of our discussion to this point: the reflexivity of democratic decision-making

²⁹ Debra Satz (1992; 1995) advances powerful arguments that markets in women's sexual labor and reproductive capacities should be proscribed precisely because the initial conditions of parties are marked by highly unequal gender relations.

³⁰ We do not mean to suggest that social and political actors never are motivated by myopic, venal or otherwise ideological considerations. We only wish to stress that political disagreement will persist even if they are not.

³¹ Experimentation may seem at first glance an unrealistic approach to problems of institutional choice. But such experimentation serves as a primary justification of a common form of governmental organization, namely federalism. One of the arguments in support of federalism is that it provides the context in which different institutional forms can be tested to see which does the better job of coordinating social interaction over time.

will often allow constituencies to decide to coordinate their ongoing social interactions across expansive domains through non-democratic institutional forms.

Is Judicial Decision-Making a Better Alternative?

Our argument for the second-order priority of democracy rests on the comparative claim that democratic decision-making has properties that other institutional forms either lack or possess to a lesser degree. Thus, one predictable challenge to the argument would be a proposal for an alternative institutional mechanism to undertake the monitoring and assessment functions of institutional maintenance. We have already addressed and rejected one potential alternative, the market. Here we briefly consider the alternative argument for the court: to what extent can the courts adequately undertake the tasks of monitoring conditions and assessing consequences in the ongoing process of effective institutional maintenance? To fairly answer this question we must assess the courts, as we do with the market and democracy, as characterized in their most favorable, yet plausible, justification.³² H. L. A. Hart (1994) offers such an account, a positive conception of the rule of law that highlights the importance of the distinctive institutional features of judicial decision-making.

On his account the definition of the role of the courts, as well as the standards of effectiveness, are derived from what Hart calls the rules of recognition, the set of secondary rules that dictate how the primary rules, the laws, are to be implemented, administered and changed. (1994, 94-96) The rules of recognition distribute authority among various legal and political institutions over the different tasks involved in maintaining the legal system. Within this

³² Pragmatists will make initial institutional comparisons in terms of effective performance. This requires us to assess the alternatives as characterized in their most ideal form. This leads us to make the following distinction between two types of criticisms. One type, empirical criticism, challenges the proffered justification on the grounds that the facts of actual practice differ from the institutional practice as characterized by the theoretical justification. As with other institutional forms the actual practice of judicial decision-making has often deviated from such justifications (Epstein and Knight 1998.) A second type, institutional criticism, challenges the appropriateness of an institution for a particular task on the grounds that the institution, when performing optimally, is not the best mechanism for undertaking the task. While both types of criticism are relevant to pragmatist considerations, it is the second type that we emphasize here because it is more decisive for institutional choice.

distribution the courts are primarily responsible for adjudicating controversies over how law is to be applied in particular cases. Central to Hart's understanding of these rules of recognition is that they are effective as long as they garner the voluntary acceptance of the members of the community (Hart 1994, 114-115). In this way Hart ties effective institutional performance to shared views about the legitimacy of the various institutions.

For Hart the court, more often than not in the form of unelected judges, derives its legitimacy from the particular nature of its most common form of decision-making, the application of primary rules to new fact situations. While acknowledging that there is always room for discretion in the application of rules, Hart insists on the importance of rules even in such cases: "these activities ... must not disguise the fact that both the framework within which they take place and their chief end-product is one of general rules. These are rules the application of which individuals can see for themselves in case after case, without further recourse to official direction or discretion." (1994, 136)

It is important to note the way in which Hart emphasizes the "framework" in which judges' make their decisions, highlighting the importance of institutional procedures as a precondition for effective performance. Although the courts are characterized by a number of unique procedures vis-à-vis other institutional forms, those that are most important for our purposes are those that define (1) the scope of the judicial process and (2) the nature of acceptable judicial argument. Both are intended to maintain the rule-application focus of judicial decision-making.

On the dimension of scope judicial procedures limit decision-making in at least important ways. First, the agenda-setting power of the court rests in large part outside the purview of judges. While judges are often authorized to refuse to hear various kinds of cases, they are prevented from initiating causes of action. They are left to rely on interested parties to bring controversies before the court. Second, participation in the process is limited in most jurisdictions to those actors who satisfy restricted definitions of who constitutes an interested party. Rules of standing limit participation to those who can demonstrate that they are directly

affected by the controversy at hand. Although the definition of direct effect may differ across jurisdictions, the accessibility of participation in even the most expansive jurisdictions restrict the scope of relevant interests.

On the dimension of acceptable argument judicial procedures seek to restrict the types of arguments that will influence judicial decisions. Hart's justification of the court as an institution rests on the idea that judges will make their decisions in an impartial way (1994, 207). The criteria of impartiality, when applied, serves to restrict the types of arguments that parties can effectively employ as well as restrict the ways in which judges can justify their decisions. According to Hart, in an ideal situation, an impartial judge will justify her decision in terms of predetermined rules. In response to the criticism that precedent citation is merely rhetoric to justify decisions that are made on other grounds, Hart insists that "[some judicial decisions may be like this, but it is surely evident that for the most part decisions, like the chess-player's moves, are reached either by genuine effort to conform to rules consciously taken as guiding standards of decision or, if intuitively reached, are justified by rules which the judge was antecedently disposed to observe and whose relevance to the case in hand would generally be acknowledged]" (Hart 1994, 141).

While this characterization of the court as an institution is obviously incomplete, it is sufficient for our limited purpose of assessing the effectiveness of the court as a guarantor of effective institutional performance. In doing so it is useful to distinguish three features of this task. The first two would involve judicial oversight of other institutional mechanisms, specifically monitoring conditions of effective performance and assessing the ongoing consequences of institutional choice. The third is the task of self-assessment, monitoring conditions and assessing outcomes related to their own performance. We take these up in turn.

The task of monitoring conditions for other institutions is the task for which the courts might be most appropriate, for this is what constitutional courts normally do when they address questions of constitutional rights. Rights can be readily conceptualized as institutional protections governing individual participation in various institutional contexts. Rights claims

then take the form of individual or group claims that their participation is being infringed in some important way. The relevant task is to assess whether or not effective participation, as defined by the constitution, is being adversely affected in the particular case.

To the extent that the rules defining effective participation are clear, courts can normally do an adequate job of monitoring such conditions. As Hart suggests, courts are best at applying predetermined rules to particular sets of facts. However courts may not be the best or only mechanism for monitoring conditions. Waldron (199?) argues that the protection of basic rights are too important to be left to unelected judges for protection. He argues that when there are issues of rights to be considered in a democratic society, the right to participate in the resolution of the controversy is of prime importance. The merit of Waldron's claim seems to rest on the question of how we define who is affected by the infringement of the constitutional right. If we define it narrowly to include only those who are directly affected by the infringement under question, the scope restraints on judicial decision-making should allow for the adequate resolution of the particular case. If, on the other hand, we define rights controversies broadly, arguing that such claims are always challenges to the basic definition of effective participation, then the scope of the effect of the challenge is much more expansive and the courts will likely, for reasons we discuss below, be inadequate to the task.

When we move to a consideration of how courts would handle the task of assessing institutional outcomes, we see the real weakness in the proposal that courts can satisfy the requirements of institutional effectiveness. While courts might be able to do an adequate job of monitoring conditions, they are not well suited to assess the consequences of institutional choice. The relevant questions in an assessment of effective performance are: to what extent is the institution satisfying its intended goals? and would another institutional form do a more effective job? These are general questions the answers to which involve basic considerations of institutional goals as well as criteria of effectiveness. The institutional restrictions on judicial decision-making render courts inadequate for the effective consideration of these questions.

Institutional assessment involves an ongoing process of experimentation that requires that institutional performance be tested in the context of the full array of societal interests. Any arbitrary restriction on these tests undermines the effectiveness of the assessment process. The restriction on types of judicial arguments (requiring reference to predetermined rules) precludes the consideration of many issues that will be relevant to the assessment of institutional consequences. To apply these restrictions in the process of institutional experimentation would be to further the trend towards the juridicalization, or constitutionalization, of political argument that has gained force in recent years (Stone-Sweet; Pildes). Pragmatist arguments about information aggregation and collective decision-making suggest that this trend is an unhealthy one. Similarly, restrictions on accessibility to judicial procedures prevent the participation of relevant actors. Unlike controversies over rights violations that may be conceptualized in terms of the specifics of a particular case, assessment questions generally affect broad segments, if not all members, of the community. Therefore, constraints on participation will tend to overly restrict the range of relevant interests taken into account as institutional consequences are assessed.

Most importantly, courts are restricted in the types of remedies that they can invoke to implement and enforce their decisions. Their available remedies normally consist of those types of sanctions that will force individuals to reorient their behavior to the dictates of predetermined rules. The rule-applying orientation of their decision-making makes them ill equipped to ask the question: is this a good policy or institution? This highlights a basic point about the effectiveness of courts: when undertaking their legitimate role, they are not reflexive in the sense that they never ask about the general validity of either institutional forms or procedural constraints. Their basic prerogatives are set either by the constitution or by legislative institutions.

This lack of reflexivity is even more apparent when considering how courts might satisfy the requirements of self-monitoring and self-assessment. The arguments against the capacity of the courts to effectively assess the consequences produced by other institutions are even more relevant to self-assessment considerations. The restrictions on their agenda and on standing to participate diminish the possibilities for questions of the effectiveness of the courts to come to

their attention, as well as restrict the range of interests that might influence such an assessment. Restrictions on remedies that follow from the emphasis on rule-application constrain the methods by which they might address problems within the judicial system. Together these institutional restrictions undermine the ability of the courts to be a self-regulating institution. Put simply, when the court is effectively performing its first-order functions, it must rely on other institutions for an adequate assessment of its own performance.

In summary, courts are appropriate for resolving particular controversies (including particular violations of institutional conditions), but are inadequate to the task of ultimately assessing the requirements of general institutional performance (the reconsideration of conditions as well as the assessment of institutional outcomes.) To the extent that courts might be remodeled to better undertake these more general tasks, they would have to be refashioned to look more like institutions of democratic decision-making.

Conclusion

In conclusion, we wish to point out that while our argument for the priority of democracy is not utopian neither is it modest.

We recognize that democratic institutions operate effectively to generate justifiable outcomes and, specifically, to enable reflection on institutional arrangements only under conditions of free and equal participation. We in no way wish to underestimate the stringency of this demand nor the indispensable role it will play in any more complete argument for democracy (e.g., Bohman 1997; Knight and Johnson 1997). It is crucial to note, however, that this demand is no more idealized or more stringent than those that sustain the effectiveness of markets or common law or other familiar institutional forms.³³ On the view we have presented,

³³ Pettit (1997, 6) notes this commonality in his description of contemporary political discourse: "I said earlier that there are many languages of legitimation present in the world of democratic politics today. One of the striking features of those languages, however, is that all of them share a common idiom of freedom or liberty. The language of economics directs us to the free market and to the freedom to make whatever contracts we will with one another; the language of rights focuses on rights of free thought, free expression, free movement, and the like; the language of welfare and fairness and equality, or of poverty and exploitation and

then, the conditions necessary to sustain the priority of democracy are not in any obvious way more utopian than those that any other institutional arrangement demands.

On the other hand, the case we defend here is immodest. We advance a distinctive rationale for the priority of democracy in any complex political economic arrangement. Our task has been made difficult by the need to displace the unwarranted presumption, pervasive among economic and political theorists, that markets enjoy priority as a means for coordinating ongoing social and political interaction. That, admittedly, is only a first step in a full argument for the priority of democracy. But it is a crucial step. And it is one that other advocates of democratic arrangements have not taken. Without doing so they cannot establish the priority of democracy. In that respect they cannot persuasively show how the normative vision they defend is institutionally possible.

subordination, claims to articulate the requirements necessary for enjoying freedom or for making freedom effective. And the language of democratic legitimation harps on the legitimacy of what a free people freely decide, and on the way in which individual persons share in that collective freedom."

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