

CHAPTER 1

Taking Consequences Seriously: Introduction

Nothing is clear-cut around here except the forest.

—Don Costello, *tribal court judge in Oregon*

JUST AS the bishop is the highest authority in a cathedral, so the constitution is the highest law of the state. Below it lie statutes and below statutes lie regulations, policies, orders, and decisions, as depicted in figure 1-1.

The constitution is the state's highest law in several respects. First, the constitution is more *general* than most other laws. Constitutions allocate basic powers to officials and recognize fundamental rights of citizens, whereas most legislation regulates behavior or implements policies. Second, the constitution *trumps* other laws in the sense that the constitution prevails whenever it contradicts another state law.¹ Third, the constitution is usually more *entrenched* than other laws in the sense of being harder to change.

The first two traits of constitutions relate to the third trait. As a law becomes more general and powerful, changes in it cause greater disruption. To avoid disruptions, general laws should change more slowly than specific laws.² Consequently, changing a constitution usually requires more burdensome procedures than enacting a statute or making a regulation. Figure 1-2 depicts the typical relationships between the generality of laws and the transaction costs of changing them.

A recent book surveying constitutional theory begins by saying, "The trouble with constitutional law is that nobody knows what counts as an argument."³ As the highest law, the constitution is the logical beginning of the state's legal power. Law posts enough road signs for a knowledgeable traveler to find his way. Above the constitution, however, law runs out and the traveler enters "a place where the eyes of man have never set foot."⁴ Being highest, constitutional law evokes the best efforts of scholars and political commentators. Being located where law runs out, constitutional arguments are subtle and evasive. History, philosophy, religion, politics, sociology, and economics hover above the constitution as depicted in figure 1-1. Scholars and officials disagree over how to use these sources for making and interpreting constitutions.

¹ Some scholars believe that international law trumps national constitutions. Perhaps international law is above national constitutions, like the pope is above the bishop.

² The absence of constitutional stability motivated this Russian joke: "In 1992 a customer entered a bookshop and asked for a copy of the Russian constitution. The shopkeeper replied, 'Sorry, but we don't carry periodicals.'"

³ Gerhardt and Rowe 1993, p. 1.

⁴ The Beatles' *Magical Mystery Tour*.

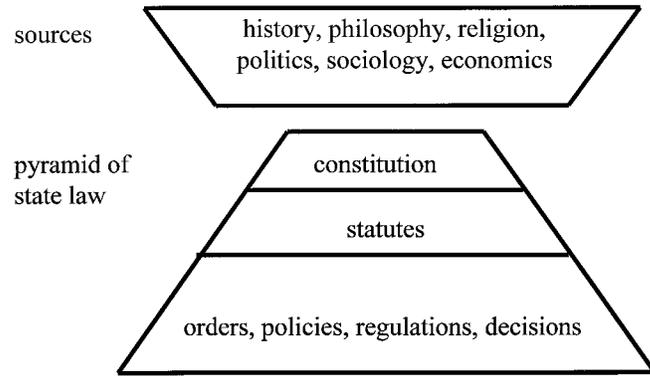


Fig. 1-1 Pyramid of State Law and Its Sources

In spite of these disagreements, some kinds of arguments should prove compelling to everyone. Political constitutions can cause suffering on a vast scale or lay the foundation for a nation's liberty and prosperity; thus, making, amending, and interpreting constitutions is a political game with high stakes. To help people win this game, theory should explain the constitutional causes of liberty and prosperity. By predicting the consequences of fundamental laws, constitutional theory can inform the public, guide politicians, and improve the decisions of courts. Predictions about the consequences for human welfare of alternative understandings of the constitution should count as arguments for everyone.

As currently practiced, constitutional theory mostly concerns the history and philosophy of constitutional texts. Some legal scholars, who find the sources of constitutional law in history, interpret a constitution by scrutinizing the original understanding of its makers. Other scholars insist on interpreting all laws

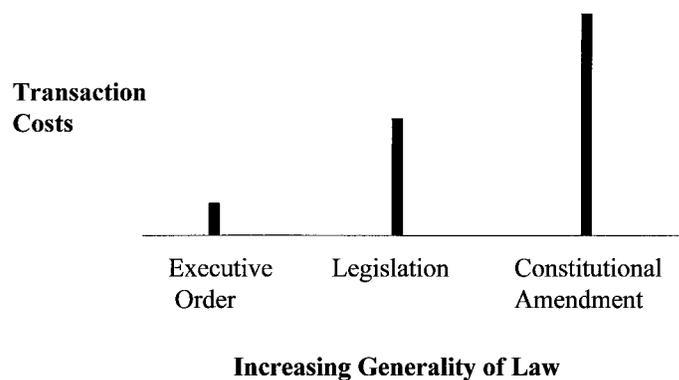


Fig. 1-2 Transaction Costs of Changing Laws

according to their plain meaning.⁵ Still others examine the philosophical, moral, or religious inspiration for a constitution. These approaches clarify a constitution's normative commitments, such as the vision of individual autonomy inspiring constitutional rights.

Wittgenstein wrote, "Philosophical problems can be compared to locks on safes, which can be opened by dialing a certain word or number, so that no force can open the door until just this word has been hit upon, and once hit upon any child can open it."⁶ Much of moral and political philosophy proceeds by searching for the right words for ideas. Like philosophy, constitutional theory devotes much of its energy to setting concepts straight. The right word can unlock conflation and set thought free.

The meaning of the words and the philosophy of its makers, however, cannot predict the response of people to a law. From the viewpoint of a person who takes consequences seriously, constitutional theorists look too hard for the right words and not hard enough for the real causes.⁷ Constitutional theory needs more models and less meaning. After preaching his Sunday sermon in nineteenth-century Boston, a liberal minister overheard a conservative congregant remark, "Beans in a bladder. No food today for hungry souls." Similarly, consequentialists leave the banquet of constitutional scholarship while still hungry for predictions.

Philosophers and economists sometimes feel an affinity for each other based on their mutual commitment to rationality. More often, however, they feel antipathy over different conceptions of rationality. By confusing economics and utilitarianism, philosophers sometimes imagine that they can identify fatal flaws in economic reasoning without troubling to learn the subject.⁸ Conversely, by confusing moral commitments with preferences, economists sometimes imagine that they can dismiss philosophical traditions far older than economics without troubling to learn the arguments for and against relativism.⁹ Although I admire moral and political theory, I also think that constitutional theory is too preoccupied with philosophical arguments and methods.

Instead of examining history or clarifying normative commitments, this book takes another tack. An individual sometimes gains an advantage in social life by making a commitment. An individual commits by arranging his affairs so that he cannot benefit from violating the commitment. To illustrate, a person commits to keeping a promise by signing a legal contract so that breach costs him more than performance. Similarly, citizens can gain an advantage when the state commits to a constitution. A state commits to a constitution by arranging

⁵ Law and economics scholars have debated whether a law should be interpreted according to its plain meaning (Macey 1986) or in light of its underlying political bargain (Easterbrook 1994).

⁶ Wittgenstein 1993, p. 175. Quoted in the conclusion to Summers 1998.

⁷ Rawls asserts (1971) that utilitarianism does not take differences between individuals seriously, and this claim apparently inspired Ronald Dworkin to title his book *Taking Rights Seriously*.

⁸ Note that the ordinalist tradition in economics explicitly rejects the tradition of Bentham.

⁹ A student once said to me, "I'm doing ok in everything except philosophy. My professor has his philosophy and I've got mine."

institutions so that each official or political faction expects to lose from violating the constitution. As depicted in figure 1-2, the constitution usually represents a society's strongest legal commitments. Once established, a constitution creates incentives for officials and citizens to do things or refrain from doing them. Although the tumult of politics and the particularities of history obscure these incentive effects, I try to uncover them by using economics and political science.

The modern state possesses many monopoly powers, including the power to make laws and collect taxes.¹⁰ In a democracy, popular elections direct state powers, either directly through referenda or indirectly through elected officials. Democracy is thus a system of popular competition for directing the state's monopoly powers. The scope and breadth of political competition distinguishes democracy from other forms of government.

Competitive elections make government respond to citizens much like competitive markets make the economy respond to consumers. I believe that electoral competition provides the best guarantee that the state will give citizens the laws and public goods that they prefer. This belief, plus the definition of democracy as popular competition for directing the state's monopoly powers, implies that democracy is the best form of government for satisfying the political preferences of citizens.

Unlike democracy, a ruling family (monarchy), a powerful individual (dictatorship), a priestly caste (theocracy), a vanguard party (communism), a dominant social class (aristocracy), or a self-perpetuating bureaucracy insulates itself from popular competition. Following the language of economics, these noncompetitive forms of government can be described as different types of monopoly. Democracy is competitive government, and the alternatives to democracy are monopoly government. Monopolies typically provide their owners with exceptional profits at the expense of other people. As the most encompassing power within its domain, the state is potentially the most profitable monopoly for anyone who can control it and the most dangerous for everyone else. Regardless of its form, political monopoly is the enemy of democracy.

In general, the public benefits from organizing competition for control of a monopoly (Demsetz 1968). Constitutions can organize political competition in different ways, as illustrated by the contrast between direct and indirect democracy, federal and unitary states, unicameral and bicameral legislatures, and president and prime minister. According to opinion polls, citizens rate the performance of their political systems differently from one country to another. This book concerns alternative democracies, not alternatives to democracy. While I assume that democracy is the best form of government for satisfying the preferences of citizens, I show that some organizational forms dominate others in particular circumstances. By "dominate" I mean "provides more satisfaction to the citizens."

To compete in politics, a person should decide what to do by anticipating how others will respond. For this reason, political competition is strategic. Economics

¹⁰ North makes the point concisely: "A state is an organization with a comparative advantage in violence, extending over a geographic area whose boundaries are determined by its power to tax constituents" (1981, p. 21, as quoted in Voigt 1997a).

provides the best models for predicting strategic behavior. This book analyzes democratic constitutions by using models of strategic behavior developed for markets and adapted to politics. I will use strategic theory and the available data to address such questions as these:

Example 1: A constitution can provide one or many elected governments. For example, Japan has a unitary state and Australia has federalism. How does the number of elected governments affect the supply of public goods? How many elected governments is optimal?

Example 2: The British prime minister can order members of her party in Parliament to enact legislation, whereas the U.S. president must bargain with the House and Senate over a bill. Does this difference explain why British courts and ministries are less daring than U.S. courts and agencies? How much judicial and administrative daring is best for the citizens?

Example 3: Imagine that a property owner applies for a building permit and, as a condition for receiving the permit, the planning authority demands the donation of ground for a public walkway. The property owner sues in court alleging an unconstitutional taking of private property. How will the court's decision influence future bargaining between developers and town planners? How much protection of private property is best for the supply of private and public goods?

In answering such questions, social science aspires to replace intuitive judgments with proofs. Unlike explicating the meaning, history, and philosophy of texts, scientific proofs require data.¹¹ Relatively few social scientists do empirical research on constitutional law, however, and the legal issues mutate quickly. When theories and events outrun data, arguments fall short of the standards of proof desired in social science.

When social scientists draw legal conclusions from limited data, many lawyers get uncomfortable. These same lawyers, however, are perfectly comfortable when traditional legal scholars draw conclusions from no data at all.¹² Lawmakers would do better to use imperfect empirical analysis than perfect nonempirical analysis. It is better to cut bread with a dull knife than a perfect spoon. By using available data to make predictions about constitutions, I cannot offer conclusive proofs, but I can improve the quality of argument.

Strategic behavior presupposes individual rationality. Unlike economists, psychologists often deny that individuals are rational, and sociologists often deny that groups aggregate the behavior of individuals. The rational, individualistic methodology used in this book remains controversial among some psychologists and sociologists. I also evaluate the state by its ability to satisfy the preferences

¹¹ Two data jokes:

“For a lawyer, one anecdote is empirical evidence, and two anecdotes are data.”

“What is the empirical method in the economic analysis of law? Torture the data until it confesses.”

¹² Joke: How does a lawyer do a longitudinal study? He asks himself the same question tomorrow.

of its citizens. Unlike economists or utilitarians, many political theorists deny that preference satisfaction measures the performance of a state. Regardless of whether the reader ultimately accepts or denies the positive methodology of individual rationality and the normative standard of preference satisfaction, I hope that the reader will appreciate my attempt to work these ideas pure as applied to constitutional democracy.

In the days of sailing ships, the crew on a long voyage included a carpenter, who sometimes repaired the hull while the ship was still at sea. Most boards could be removed one at a time and replaced, even though removing all of them at once would sink the ship. Like the ship's carpenter, economists can analyze laws one at a time and propose improvement. This approach puts every law within reach, even fundamental laws like the constitution. Eventually the economic approach can contemplate wholly new legal structures. This book analyzes constitutions one provision at a time and also contemplates wholly new legal structures.

In this introductory chapter, I will discuss the origins of strategic theory, describe some techniques of analysis, explain the policy values underlying these techniques, and finally describe the structure and contribution of this book.

ORIGINS

Several intellectual traditions inspire the strategic approach to constitutions. First, political theorists who write in the contractarian tradition typically view the constitution as a bargain among political interests, much like a business contract is a bargain among economic interests. In terms of figure 1-1, contractarian choice occurs at the level located above the constitution ("preconstitutional choice"). Contractarians typically assume the absence of any particular constitution and then explain how to choose one. This style of argument flourished in the eighteenth century when revolutions in America and France transformed politics, and it eventually became moribund by the early twentieth century. James Buchanan and Gordon Tullock revived contractarianism in their classic book, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962),¹³ which was followed by John Rawls's magisterial *A Theory of Justice* (1971) and Robert Nozick's incisive *Anarchy, State, and Utopia* (1974).

The second tradition inspiring this book is the economic analysis of law. Joseph Schumpeter distinguished between economic analysis based on formal theory and economic thought based on informal reasoning.¹⁴ As applied to law, economic thought is old, whereas economic analysis is new. Ronald Coase's 1960 article on nuisance law, "The Problem of Social Cost," marks the conventional beginning of the economic analysis of law. Guido Calabresi's *The Costs of Accidents: A Legal and Economic Analysis* (1970) extended economic analysis to torts, and Richard Posner's *Economic Analysis of Law* (1972) sketched the

¹³ J. Buchanan's subsequent writing on the logic of constitutions includes Buchanan 1975; Buchanan 1990; and J. Buchanan 1991.

¹⁴ Schumpeter 1986, pp. 38–39.

complete subject. Publications using economic analysis subsequently exploded in such fields of law as contracts, property, torts, regulation, corporations, and crimes.¹⁵ Although there are two specialty journals and a few published books,¹⁶ the economic analysis of constitutional law remains thin.

This book draws on a third tradition called “public-choice” or “collective-choice” theory. “Public choice” refers to the fact that governments ideally allocate resources to public goods, whereas private markets ideally allocate resources to private goods. “Collective choice” refers to the fact that democracy requires a group of people to decide together by voting, whereas an individual can decide on his own whether to buy toothpaste or soybean futures. (For a good survey of public choice or collective choice as applied to constitutional law, see Voigt 1996.)

Collective-choice theory uses economic models of rational behavior to explain the workings of political institutions, including majority rule and representative government. Kenneth Arrow’s brilliant and perplexing book *Social Choice and Individual Values* (1951) pioneered the modern application of economic analysis to voting. Amartya Sen explicated this book in *Collective Choice and Social Welfare* (1970). Duncan Black was another pioneer, whose insights were synthesized in *The Theory of Committees and Elections* (1958) and extended by Anthony Downs in *An Economic Theory of Democracy* (1957). William Riker’s *The Theory of Political Coalitions* (1962) took a somewhat different approach to elections by emphasizing coalitions among parties. Mancur Olson’s *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965) analyzed the influence of money on politics as a free-rider problem. Dennis Mueller summarized these various traditions in *Public Choice* (1979; revised 1989) and related them to constitutions in *Perspectives on Public Choice* (1997), as did Daniel Farber and Philip Frickey in *Law and Public Choice: A Critical Introduction* (1991). A thoughtful, recent contribution is Jerry Mashaw’s *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (1997).

American political scientists adopted another label to describe their application of economic models to politics. John Ferejohn, Matthew McCubbins, Ken Shepsle, and Barry Weingast (to name but a few) refer to themselves as “positive political theorists.” This label stresses the difference between the positive task of explaining how politics actually works and the normative task of philosophizing about how politics ought to work. Thus positive political theorists distinguish themselves from philosophers who traditionally dominated political theory in American universities. Positive political theorists have used game theory to explain specific political institutions that few economists understand. Shepsle and Mark Bonchek’s *Analyzing Politics: Rationality, Behavior, and Institutions* (1997) provides a readable overview of positive political theory.

¹⁵ For an overview of the economic analysis of law, see the two leading textbooks: Cooter and Ulen 1996 and Posner 1992. For a statistical study of its influence and success, see Landes 1993.

¹⁶ The journals are *Constitutional Political Economy* and the *Supreme Court Economic Review*. Books include Siegan 1980; J. Buchanan 1991; and Mueller 1996.

In addition to these approaches, the fourth influence on this book is comparative law and economics. In Berkeley, Berlin, and Bombay, microeconomics is the same and law is different. Economic theory can analyze different legal systems in neutral language. As Hein Koetz said, “Economic rationales do not lose their persuasive power at national boundaries.”¹⁷ Most law and economics scholars in Europe inevitably use comparative methods in their research,¹⁸ and a substantial body of comparative research now exists for several areas of law and economics,¹⁹ including some writing on comparative constitutional law and economics (Schmidtchen and Cooter 1997).

Since statistical research on constitutional law is so limited, I often use observations as evidence. Observing different constitutions in different countries provides better evidence than does observing a single country. For this reason, I join Bruce Ackerman in appealing to scholars to remedy the underdevelopment of comparative constitutional law (Ackerman 1997). (As described in the preface, I collected comparative observations by lecturing on early drafts of this book at various international meetings.)

TECHNIQUES

According to a conventional definition, law consists of obligations backed by sanctions. Lawmakers often ask how people will respond to modifying an obligation or a sanction. To illustrate, lawmakers might ask, “If the constitution requires the state to compensate the owners of land taken for public projects, will private investment in real estate increase?” Before the 1960s, lawyers answered such questions in much the same way as they would have in 60 B.C.—by consulting intuition and any available facts. After the 1960s, price theory, which is mathematically precise and econometrically confirmed, gave more exact and reliable answers. Price theory was applied to law by reinterpreting legal sanctions as prices. The application of price theory to law constitutes much of the early economic analysis of law.

Many constitutional powers and rights, however, do not have explicit sanctions attached to their misuse or infringement. For example, a constitution may prescribe how to enact a law without specifying punishments for circumventing the procedure. Or a constitution may guarantee freedom of religion to the individual without specifying how to protect its exercise. The absence of a sanction poses an obstacle to analysis by using price theory.

¹⁷ Koetz 1997.

¹⁸ For examples, see the selected papers from the annual meeting of the European Association of Law and Economics, which are published each December in the *International Review of Law and Economics*.

¹⁹ For corporations and finance, see Buxbaum 1991; for administrative law, see Rose-Ackerman 1994; for property, see Hansmann and Mattei 1994; for contracts, see Koetz 1997; in general, see Mattei 1996; for developing nations, see Bruno and Pleskovic 1997 and Buscaglia, Rotliff, and Cooter 1997.

Even without explicit sanctions, however, constitutions create incentives amenable to economic analysis. To see why, consider an analogy to the famous board game Monopoly. Its rules specify prices (e.g., the initial buying price of “Marvin Gardens”) and moves (e.g., rolling the dice determines how far a player must advance), but not sanctions for breaking the rules (e.g., no punishment is specified for advancing “seven” when the dice say “six”). Even without explicit sanctions, the fundamental rules provide the framework for competing in the game of Monopoly. Similarly, a democratic constitution provides a framework of rules for competing in the game of politics. An effective constitution constrains and channels political competition.

In interactive games, the players form strategies by anticipating the moves of other players. To illustrate, a player in American football often runs around the right side as a decoy to fool the other team while the player carrying the ball runs around the left side. In contrast, a mountain climber never starts up the south slope as a decoy to fool the mountain while the main party ascends the north slope. Football is strategic and mountain climbing is nonstrategic. Perfectly competitive markets have too many transactions for any one person to affect the price, so price theory usually assumes that actors behave nonstrategically. In contrast, game theory analyzes strategic behavior, which typically involves small numbers of competitors.²⁰

Just as perfectly competitive markets have too many transactions for any one person to affect the price, general elections have too many voters for any one voter to affect the election. In competitive markets and general elections, the large number of actors usually prevents individuals from acting strategically. In these circumstances, price theory provides an adequate analytical tool. This book adapts price theory to analyze some problems of constitutional law involving nonstrategic behavior, such as voting in general elections.

Law and politics, however, often involve small numbers of actors who behave strategically. To illustrate, litigants in court and candidates in elections form strategies by anticipating the moves of their opponents. This book adapts game theory to analyze problems of constitutional law involving strategic behavior. In moving from price theory to game theory, this book reflects a movement in the recent history of economic analysis.

Early in the development of the economic analysis of law, theorists learned to simplify games by treating strategy as one of the “transaction costs” of interacting with other people.²¹ From this perspective, the need for strategy merely raises the price of engaging in an activity. Treating strategy as a price dramatically simplifies analysis, which is especially useful at a problem’s begin-

²⁰ In general, see Baird, Gertner, and Picker 1994 and Rasmusen 1994. Note that organizing large numbers of people into hierarchies with a small number of leaders can result in strategic behavior, as when hostile generals lead large armies in war.

²¹ The technique of treating strategic behavior as a cost was developed in the most famous proposition in the economic analysis of law called the Coase Theorem. This theorem has several versions, one of which asserts that *bargaining succeeds so long as transaction costs are low*. See Coase 1960 and Cooter 1982.

ning. (Readers familiar with the Coase Theorem, which is a license to postpone strategic analysis, will recall how it simplified the early economic analysis of property and tort law [Coase 1960].) In the end, however, strategic behavior does not resemble the price of toothpaste, soybean futures, or any other good sold in a competitive market (Cooter 1982). Buyers usually treat the prices of these goods as beyond their control, whereas politicians anticipate the response of their rivals. A full explanation of interaction among small numbers of competitors, such as litigants and politicians, must model their choice of strategies. Instead of applying price theory by treating strategy as a cost, a more satisfactory analysis requires game theory.

VALUES

Many of the predictions in this book are neutral with respect to political values. To illustrate, Duverger's Law predicts that two-party competition emerges when seats in the legislature are filled by plurality voting in winner-take-all elections. This prediction does not say whether two-party competition is better or worse than many-party competition. Politicians, administrators, judges, and voters often want to go beyond neutrality and predict the effects of law on policy values. By "policy values," I mean the values that figure prominently in debates about public policy. By "policy science," I mean a body of reliable predictions about policy values. Debates about public policy often rely on false or doubtful predictions. Policy science improves the quality of public debate by supplying reliable predictions about policy values.

Economists are experts on two kinds of policy values: efficiency and distribution. More than other social scientists, economists understand how laws influence the production and distribution of income and wealth across groups of people. For example, economists in nineteenth-century England contributed to a great policy debate by predicting the effects of repealing the "Corn Laws" (tariffs on imported wheat). The predictions focused on national wealth and the distribution of income across social classes.²² Given that a policy science predicts the consequences of policy on public values, economics is the policy science that specializes in efficiency and distribution. (I distinguish several concepts of "efficiency" and "distribution" in chapter 2.)

These two values have different political foundations. Everyone concedes that pursuing good ends efficiently is better than pursuing them inefficiently. No one publicly advocates wasting money. In contrast, people of different political persuasion disagree sharply over distribution. Some people favor using the state to increase equality by redistributing income, and others object to compulsory income redistribution. Some economists take sides in this debate, either advocating equality or protesting redistribution. Other economists strive for neutrality by predicting the effects of different policies on distribution without advocating any particular goal ("parameterizing"). Still other economists confuse the

²² Classical papers on tariffs and taxes are in Musgrave and Peacock 1967.

discussion by insisting that efficiency is the only value that belongs to economics as a science.²³ These pure positivists spread confusion because predictions about redistribution are central to economics, and redistribution is a controversial value.

In this book I comment on distribution when a constitutional provision clearly affects economic equality or poverty. Constitutions drafted before the first half of the twentieth century usually say nothing about redistribution explicitly. These constitutions often limit the means of redistribution by protecting property rights explicitly. In contrast, some democratic constitutions drafted after the creation of the welfare state include welfare rights, as discussed in chapter 11. To illustrate, the constitutions of South Africa and some post-communist countries provide for “positive rights” such as housing, pensions, and education. Instead of entitlements enforceable in court, constitutional rights to welfare currently resemble aspirations. These rights provide goals without providing implementation. Regardless of the constitution, modern democracies typically follow an old tradition in economics by imposing progressive taxes on everyone and transferring income to the poorest citizens.²⁴ Since welfare states mostly pursue redistributive goals through legislation, not through constitutions, redistributive goals occupy a modest part of this book.

Liberty, which provides the individual with the freedom to choose, is another important constitutional value that connects with economic theory. Each person knows his own wants better than others do. Consequently, individuals satisfy their preferences best when given freedom to choose. For these reasons, a constitution that aims to satisfy the preferences of individuals must give them liberty. (The connection between liberty and efficiency is discussed in chapters 11 and 12.) Liberty for citizens requires limiting the powers of government. The quest for power by many politicians knows no limits. When law and ambition collide, ambition sometimes destroys law. To illustrate, Spain suffered forty-three coups d'état between 1814 and 1923.²⁵ One of the worst political possibilities occurs when officials abandon law and become tyrants. Another of the worst possibilities occurs when rivalry among factions descends into violence, as in India at independence or Rwanda in the 1990s.

The first goal of the constitution is to impose the rule of law and protect the liberty of citizens. Game theory provides a useful restatement of this goal. A player who follows the *minimax* strategy in a game minimizes the maximum harm that he can suffer.²⁶ The “minimax constitution,” to coin a phrase,²⁷

²³ The most influential version of economic positivism that expels policy values from science, with the possible exception of efficiency, is found in Robbins 1932 and Friedman 1953.

²⁴ Pigou 1950 is a classic in the economic tradition that the state should adjust the distribution of income produced by markets to alleviate poverty and increase equality. Dreze and Sen 1989 exemplifies this tradition.

²⁵ “A Survey of Spain,” *The Economist*, 25 April 1992, p. 3.

²⁶ In a zero-sum game, minimizing the maximum harm is equivalent to maximizing the minimum payoff. Thus the minimax constitution can also be described as the maximin constitution.

²⁷ I introduce this phrase in Cooter 1992.

minimizes the harm when the worst political possibilities materialize. The minimax constitution pursues the classical political goals of security, legality, and liberty.

After providing security, legality, and liberty, a constitution can look to the prosperity of its citizens. To bring prosperity, the constitution must provide the legal framework for allocating resources efficiently to public and private goods. The legal framework includes competitive markets for private goods and competitive politics for public goods.

Perhaps the most discussed value in political theory is justice. Democracy provides a framework for alternative conceptions of justice to compete for the allegiance of citizens. Scholars try to influence politics by saying why one conception of justice is better or worse than another. This kind of scholarship, which I admire,²⁸ is normative and critical. My aim in this book, however, is different. I want to explain how constitutions can organize political competition to give citizens the laws and public goods that they want.

Now I turn from policy values to individual values. Politics attracts talented people with vast egos whose ambition brings vitality and danger to government. David Hume wrote, “In constraining any system of government, and fixing the several checks and controls of the constitution, each man ought to be supposed a knave, and to have no other end, in all his actions, than private interest.”²⁹ Similarly, economists typically assume that individuals pursue their self-interest defined narrowly in terms of wealth and power.

Some models in this book assume that narrow self-interest exclusively motivates people. The facts justify this assumption insofar as political competition filters candidates for the single-minded pursuit of power. In other words, political candidates who constrain or deflect their pursuit of power by morality tend to lose elections. Conversely, the facts falsify this assumption insofar as political competition filters candidates for virtue, as some founders of the United States hoped when they envisioned voters electing a “natural aristocracy.” Furthermore, people outside of politics, who escape electoral pressures, influence democratic government. For example, a citizen who votes in secret or an independent judge who decides a case can respond to his conscience instead of competition. An accurate model of voting by citizens or adjudication by judges must allow for a variety of individual values other than wealth and power, including self-expression.

Most models of electoral competition are driven by disagreement. The source of the disagreement, which might be self-interest or rival conceptions of the public interest, makes no difference to these models. I typically assume that people disagree over public choices, and leave the source of disagreement unspecified. This approach assumes difference in individual values without explaining their causes. To illustrate, under certain conditions majority rule tends toward

²⁸ I especially appreciate the attempt by Rawls to derive a theory of justice from Kantian ethics and his subsequent attempt to ground his theory of justice in politics. See Rawls 1971 and Rawls 1993.

²⁹ Hume 1987, p. 42.

the center of the distribution of political preferences. The central tendency of majority rule operates independently of the reason why citizens disagree with each other.

STRUCTURE AND CONTRIBUTION OF BOOK

I define democracy as competitive government and I assert that competition provides the best guarantee that government will satisfy the preferences of citizens. Most of this book uses strategic theory to predict the consequences of alternative forms of democratic organization. When the state commits to a constitution, it supplies the rules of the game of normal politics. I explain how to play under different rules.

I will describe briefly the book's parts. In part 1, chapters 2, 3, and 4 develop the theory of voting, bargaining, and administering, respectively. Taken together, these chapters develop general principles that I apply in the rest of the book. Students should work through these chapters carefully, whereas advanced scholars can skim much of this material. Chapter 2 explains the central tendency in majority voting (median rule) and the tendency of majority rule to spin its wheels (intransitivity). Chapter 3 explains the minimum winning coalition in a parliamentary system and the principles that govern lobbying. Chapter 4 uses the principal-agent relationship to analyze civil service bureaucracies, especially the trade-off among delegation of power, rules, and the diversion of purpose.

Turning to part 2, chapters 5 and 6 concern intergovernmental relations. The organization of relations among governments influences their ability to cooperate with each other. Chapter 5 analyzes the difference between unanimity rule and majority rule in intergovernmental relations. Chapter 6 analyzes the competitive mechanisms that cause successful governments to expand and unsuccessful governments to shrink. Chapter 7 concerns the relationship between government and administration. I explain how the organization of government determines the discretionary power of administrators to pursue their own purposes.

The same geographic area can have many governments or few governments. In democracies, decentralization multiplies elected governments and shrinks administration, whereas centralization deepens administration and reduces elected governments. Chapters 5, 6, and 7 address the problem of the optimal number of elections, or, equivalently, the optimal depth of state administration. Too many elections drain the reservoir of civic spirit that animates voters, and, conversely, too deep administration dilutes democratic purposes and gives excessive discretion to bureaucrats.

Whereas part 2 deals with governments externally, in part 3 I turn to the internal allocation of powers. Chapter 8 analyzes the special competency of the legislature, executive, and courts. The legislature represents the nation's political factions and interests, who make laws by making bargains. By enforcing the laws that embody political bargains, the courts facilitate political cooperation. Chapter 9 explains the interaction of the branches of government according to the extent of their separation. Separating powers causes government to proceed

by bargains among the branches, not by orders from the executive. Separating powers also increases the minimum size required for a cartel to control the state.

In part 4 I turn from the powers of officials to the rights of citizens. Chapter 10 shows how to value rights by using economic theory. I contrast treating rights as commodities and treating rights as merit goods with distinctively social value. Chapter 11 relates the valuation of rights to competing traditions in political philosophy. Chapters 10 and 11 are more normative and philosophical than the rest of book, whereas chapters 12–14 return to predictive models. Chapters 12–14 concern three particular constitutional rights, specifically property, speech, and civil rights. I analyze the boundary between freedom and regulation of property, freedom and liability for speech, and discrimination and equality in competition. Finally, chapter 15 concludes the book by discussing the perspective of strategic theory on democracy.