



## Constitutional Economics—Constitutional Politics

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**Abstract.** Why does the treatment of American constitutional politics presented in *We the People* depart so radically from models of constitutional deliberation developed in the type of constitutional economics pioneered by James Buchanan and Gordon Tullock? The paper defines three premises that account for the divergence, and concludes by proposing an inquiry into constitutional design that requires insights from both traditions.

Dennis Mueller perceptively compares the standard treatment of constitutional choice presented in the pages of this Symposium with the story provided by *We the People*. On the one hand, constitutional economics elaborates the calculus of consent in cool and ever more mathematically sophisticated renderings; on the other hand, *We the People* displays the hot and incredibly messy process through which Americans have in fact hammered out the basic terms of their social contract. What, he asks, is at the root of this stark contrast?

My answer begins by emphasizing the different ways the two approaches deal with the status quo. In constitutional economics, the initial distribution of entitlements is treated as if it were sacrosanct. It is only on this premise that Mueller can describe the Wicksell/Buchanan and Tullock requirement of unanimous consent as an “ideal” (Mueller:393). If preexisting power-holders do not have a just claim to their “entitlements,” unanimity is no longer appropriate. To the contrary, it would be utterly wrong to allow the beneficiaries of injustice to veto any collective effort to stop them from enjoying the fruits of oppression.

Constitutional economics purchases its mathematical clarity only by ignoring this rather obvious point. Given its question-begging decision to sanctify the status quo, it confines itself to defining the (formidable) difficulties confronted by a constitutional assembly seeking to make government powerful enough to respond efficiently to market failure without allowing Leviathan to run out of control. This is, of course, a very difficult problem.

Nonetheless, the American constitution has confronted a yet more difficult task. It has not only aimed to protect rights but to redefine them in ways that comport with changing understandings of public morality: Is it legitimate for one human being to enslave another? Do free men and women have a fundamental right to bargain collectively with their employers over the terms of their labor? Do they have the right to a guaranteed old-age pension after they have spent their adult lives working at low pay?

These are the kinds of questions that have inspired constitutional movements over the course of American history. They do not involve the pursuit of Pareto-improvements, but the design of a different constitutional function: how to evaluate the legitimacy of a democratic challenge to the status quo on behalf of an evolving constitutional morality?

Professor Mueller provocatively asks whether it would have been “better” if the Northerners had merely compensated Southerners for the loss of their slave property, and thereby avoided the *sturm und drang* of Civil War and Reconstruction. But was it *right* for white Southerners to demand compensation for their “property” in human beings?

This is one of the questions that American constitutional politics sought to answer during Reconstruction. It was only with the enactment of the Fourteenth Amendment that Americans became committed to the proposition that compensation shall not be paid for “the emancipation of any slave” (Amendment 14, sec. 4).

Mueller is correct, of course, that sometimes it is cheaper to buy social peace by paying off wrong-doers than forcing them to stop abusing others. To take a contemporary example, perhaps some clever analyst might design an incentive scheme for bribing wife-beaters, instead of jailing them, that would reduce the number of beatings “efficiently.” Nonetheless, the result might be despicable. So too it might have been “more efficient” to bribe Southerners to desist from using the private property system to oppress their fellow human beings. For that matter, it might have been “more efficient” if the American colonists had simply collected a huge bribe for George III and purchased their public freedom without the messy business of a Revolution. But benighted creatures that they were, Americans fought a Revolution and a Civil War for the proposition that oppressive forms of property rights and governmental power were illegitimate when they offended collective ideals of human dignity and freedom.

As Americans recognized that they could *legitimately* challenge the existing distribution of public power and private rights, they took a distinctive view of their relationship to their Constitution, and one that is fundamentally different from the view expressed by constitutional economics.

For starters, the notion of citizenship plays a very different role in the two traditions. Constitutional economics takes a deeply skeptical view of the very idea of citizenship. It has notorious difficulty describing why citizens take the trouble to go to the polls, and positively rejoices in elaborating the theory of their “rational ignorance.” As Alan Hamlin suggests, it is no less puzzled by what citizens might be expressing in the ballot box assuming that they managed to stumble there in the first place. “[W]here talk is cheap and inconsequential,” he dryly remarks, “it may not be entirely reliable” (Hamlin: 371).

To put the matter more generally, constitutional economics takes a totally instrumental view of citizenship. The rational actor in this literature asks himself only one question—“what’s good for me?”—and his citizenship behavior shrivels into nothingness as he contemplates how little it pays off in contrast to the pleasures of tending his own garden. To fix ideas, I call this actor the *perfect privatist*, since he reduces all of citizenship to matters of his private advantage.

In contrast, the figure who plays a starring role in *We the People* has a more complex form of self-understanding. He is a *private citizen*, by which I mean a person who is not content to ask himself “what’s good for me,” but also insists on confronting a second question: *What is good for the country?*

The private citizen does not treat this question in a reductionist manner, as if it were merely a foggy way way of asking the question of self-interest a second time. To the contrary, he treats these questions as independent from one another: He is perfectly aware

that something may be in his self-interest, but not good for the country; or that something may be good for the country, but not serve his private interest. He is, in short, asking two questions, not one, and believes that he has a civic duty to vote his conscientious answer to the second question. For reasons familiar to constitutional economics, our private citizen often economizes on the exercise of public virtue—sloughing off his civic duties to better pursue his private interests. (For further elaboration, see Ackerman, 1991:chap. 9.) But this does not mean that he is entirely incapable of serious-minded civic action. Two centuries of history reveal that Americans have repeatedly taken these responsibilities with a seriousness that constitutional economics finds unintelligible. Generation after generation has heeded Publius' call to define and redefine "the rights of individuals and the permanent interests of the community"<sup>1</sup>—often at great personal sacrifice.

This leads to another major difference between constitutional economics and constitutional politics. As Professor Hamlin's paper suggests, the thoughtful economist is willing to entertain the possibility of moral reflection in voting, though he is skeptical as to its motivational force. Skepticism turns to cynicism, however, when economics encounters other forms of citizen action. This tendency is particularly pronounced when the subjects turn to the most important kind of civic organization—something I will call the *civic movement*. From the Revolution of the 1770's through the Civil Rights Era of the 1960's, Americans have banded together repeatedly to elaborate and further their efforts to moralize government in the name of the People. These civic movements sometimes turn themselves into political parties, as in the case of the Republicans in the 1850s; sometimes they take over an established party, as in the case of the Democrats in the 1930s; sometimes they remain relatively distinct from a party, as in the case of the Women's Movement at the turn of the twentieth century. In these, and many other cases, it is participation in the movement that is the primary locus of the private citizen's energies; voting is merely one of many practices that express this participation.

Constitutional economics is especially deficient in appreciating the significance of these movements. It has a rich vocabulary for expressing the pathologies involved in collective action—"rent-seeking," "free-riding," and the like—but it is tone-deaf when it comes to the more positive accents involved in their efforts to put government on a more moral course.

This failure of appreciation is, I suspect, related to its question-begging celebration of the pre-political distribution of entitlements. If, as supposed by the Buchanan school, there is nothing wrong with the preexisting distribution of private rights, then it is easy to discount quickly the good faith of citizen movements which proclaim that the "public interest" requires their redistribution or reorganization.

This is, however, the claim made by most citizen movements. If constitutional economics dismisses it on *a priori* grounds, its only recourse is to expose the rent-seeking activity that it supposes, reductionistically, must lie beneath the public propaganda.

But this is not the philosophy of the American Constitution. From Madison onwards, no serious student has ever supposed that constitutional politics is a pure and selfless thing. There are always two questions—what is good for me?, what is good for the country?—struggling for the mastery of the human heart and mind, and they inextricably intertwine themselves in every great citizen movement. Just as it is a silly mistake to idealize politics,

and mistake puffery for principle, it is equally wrong to adopt a pseudo-scientific cynicism, and refuse to consider seriously the possibility that a civic movement might strike a sufficient chord in a sufficient number of Americans to legitimate a fundamental transformation in the country's constitutional morality.

To be sure, this possibility should be entertained cautiously. It is a rare thing for most private citizens to take their civic responsibilities seriously; and it is rarer still for a majority to hammer out new terms in the social contract. But a basic principle of American democracy is this: when a mobilized majority of private citizens do manage to generate support for a new principle of constitutional morality, their considered judgments deserve to trump the status quo generated by the invisible hand.

Since constitutional economics privileges the status quo, trivializes the act of voting, and blinds itself to the moral aspirations of civic movements, it does not confront the master question posed by *We the People*: Under what institutional conditions do spokesmen for a mobilized private citizenry *deserve* to win the constitutional authority to hammer out a new understanding of the nation's "higher law" in the name of the People?

Of the three movements studied in *We the People*, only the New Deal managed to gain a substantial majority of Americans behind its decade-long effort to legitimate the activist welfare state—and Professor Mueller is right to suggest even this majority was not all that substantial (Mueller:394). As to Reconstruction, and despite the doubts of Professors Mueller and Higgs, a slim majority of Americans probably did support the Fourteenth Amendment, especially if the votes of enfranchised black Southerners are counted in the tally (as they certainly should be).<sup>2</sup> It is also possible, but more doubtful, that the Founders managed to gain a majority of their narrow electorate during the ratifying elections after the Philadelphia Convention made its fateful proposal (Ackerman 1998:437–39).

These narrow majorities pose an insuperable problem only if one sanctifies the status quo. After all, the status quo is simply a brute fact. If one recognizes that it may conceal many profound injustices, the political achievements of the Founding Federalists, Reconstruction Republicans, and New Deal Democrats appear in a different light. At the beginning of each movement of civic renewal, the spokesmen for revolutionary reform suffer under grievous disadvantages when compared to the defenders of the status quo. If Washington had looked into a crystal ball in 1774, or Lincoln in 1853, or Roosevelt in 1927, they would have been shocked to learn of the extent of their movement's triumph fifteen years later. At the earlier moment, the power of the status quo was overwhelming, making the ideals of republican government, or universal freedom, or a humanized capitalism, the mere pipe-dreams of philosophers. In the beginning, conservatives *always* have the overwhelming advantage in terms of economic resources and social respect—and this is true regardless of the moral merit or demerit of the political order they are seeking to conserve. Indeed, if conservatives can't convince the majority to maintain them in power, something must be very wrong indeed with the existing state of affairs. If a civic movement can maintain its forward thrust, despite the repeated efforts by conservatives to stop it dead in its tracks, this is by itself a telling indication of civic seriousness.

Of course, as Robert Higgs' essay suggests, it is always possible to retell the story of a civic triumph in a cynically reductive way—emphasizing only the elements of self-interest and coercion in the affair. But if we adopt this posture, we should remain consistent, as

Higgs is not, in his treatment of the three exercises in popular sovereignty analyzed in *We the People*. Thus, Dr. Higgs dismisses Roosevelt's electoral achievements as the result of "de facto vote-buying by means of the various New Deal give-aways" (Higgs:380). He is no less disconcerted by Reconstruction's victory over the dissent of "large majorities of the Southern white people" (Higgs:379).

But he suddenly loses critical capacities when it comes to analyzing the character of the political achievement of the Founding Federalists. By almost any criterion of political legitimacy, the Founders at Philadelphia look worse—not better—than their counterparts during Reconstruction or the New Deal. The ridiculously small body of men who met in Philadelphia could not speak for millions of slaves and women and native Americans. Many key members of the Convention did not even have the legal authority to speak for the states that sent them when they decided, after a summer of secret meetings, to rip up America's first Constitution—the Articles of Confederation of 1781. Once they announced their revolutionary proposal for a strong central government, they did not follow their legal mandate and submit it for approval to the duly constituted authorities—the existing Continental Congress, and the thirteen popularly elected legislatures of the states, which had sent them to Philadelphia in the first place. Instead, the Convention eliminated these representatives of the status quo from the process of ratification, and appealed for support to revolutionary conventions of the People meeting in each of the states (Ackerman 1998:chap. 2). Surely a sharp Higgsian critic would make mincemeat out of the legitimacy of this affair—especially when, as I suggested, the Founders' claim to winning a razor-thin majority at the ratifying conventions will forever remain suspect. Rather than pursuing his debunking tack, Dr. Higgs posits an immaculate-conception version of the Founding, so as better to lambaste the coercive manipulations of Reconstruction Republicans and New Deal Democrats.<sup>3</sup>

This gets it precisely backwards. Were it not for the successful exercises in popular sovereignty undertaken by the Radical Republicans and New Deal Democrats, the Founders' Constitution would have long since been discarded by Americans as morally bankrupt and politically unacceptable. In this cynical age, it is easy to tear down the aspirations of any civic movement for greater justice and a deeper legitimacy. The harder job is to understand the process through which a civic movement manages, despite the inevitable political compromises, to win a deep, and broadly based, sense of popular consent for its exercise in civic renewal.

Professor Onuf is right to suggest that there is something Whiggish about my project. But it is a Whiggism with a difference. First, it is a lot more realistic than the just-so stories that patriotic Americans are wont to offer up as historical scholarship. At no point do I put the Federalists or the Republicans or the Democrats on a pedestal, and treat them as demi-gods handing down the law to a grateful populace. I try instead to rub my readers' noses in all their short-cuts and illegalities, as well as the self-interested posturings and coercive manipulations. My point is a deflationary one: When all is said and done to debunk their pretensions, it would be a very bad mistake to confuse Washington and Lincoln and Roosevelt with the likes of Joseph Stalin or Adolf Hitler. How to account for the fact that these American leaders managed to gain a kind of democratic legitimacy that eluded other self-aggrandizing cliques through the ages?

Second, my Whiggism is not triumphalist. I do not suppose that, thanks to the historic struggles of past heroic generations, America stands ready to greet the new millenium with a perfect—or even a near-perfect or even a very satisfactory—Constitution. To the contrary, Professor Hamlin is perfectly right to see a certain similarity between my work and Michael Sandel's (1996). Though I am far more of a liberal individualist than Sandel, I do agree that our constitutional order cannot flourish indefinitely without on-going efforts at, and occasional successes in, civic renewal.

I therefore take a certain perverse pride in Newt Gingrich and his self-declared effort to lead a "revolution" against the welfare state. As Professor Onuf's flattering comparison with Thomas Jefferson suggests, I am Jeffersonian in my opposition to the Republican Right's effort to introduce religion into politics, but I differ from Jefferson in believing that a strong and activist liberal state is necessary to correct the corrosively inegalitarian tendencies of a modern market economy (Ackerman 1980).

Nonetheless, my Whig heart stirs at the prospect of Gingrich and his movement of self-proclaimed revolutionaries urging their fellow-citizens to rewrite their "Contract with America." As a practitioner of constitutional politics, Newt Gingrich most closely resembles another leader of the House of Representatives. During Reconstruction, the leader of the Republicans in the House was Thaddeus Stevens, whose commanding presence had a similar galvanizing effect on the Republican Party of his day.

But there is one crucial difference between the two leaders. Stevens succeeded, and Gingrich failed, in carrying a mobilized majority of the country along with his proposals for revolutionary reform. The Republicans' nineteenth century version of "The Contract With America" is now enshrined in the Constitution's Thirteenth, Fourteenth, and Fifteenth Amendments—abolishing slavery, guaranteeing all citizens "equal protection," and assuring the suffrage for blacks. The late twentieth century version is already on its way to oblivion.

As already suggested, I do not mourn the death of the Republicans' most recent proposal to rewrite the social contract. Nonetheless, I am much gratified by the skill and seriousness with which the Republicans mobilized their popular support. Whatever the merits of this particular citizen initiative, it does attest to the continued vitality of the civic spirit in America. Perhaps the next generation will find a better program, one more in tune with the requirements of social justice in a liberal state?

I have been busy of late elaborating the substance of such a reform program (Ackerman and Alstott 1999), but *We the People* focuses on more procedural concerns. How has the constitutional system actually operated to manage the tensions generated by high-energy constitutional politics—how rigorously, and in what ways, does it test the claims of rising civic movements before they are allowed to define a new constitutional path in the name of the People?

In contrast to most students of the American Constitution, I do not answer this question by a microscopic inspection of the text of the 1787 Constitution, but by an intensive study of actual historical experience. This reveals, in Professor Hamlin's words, that "the constitution has not kept pace with the increasingly national and democratic nature of American society, so that the constitution has been under more or less constant pressure to reform" (Hamlin:370). Indeed, there have been times when these pressures have become so great that the entire constitutional order threatens to unravel. Rather than mobilizing for the

next round of electoral struggle, rising reformers and embattled conservatives teeter uncertainly at the edge of more violent combat. But with the great exception of the Civil War, a sense of constitutional coherence has been sustained through a great deal of unconventional adaptation and institutional creativity—to the extent to which John Finn reasonably doubts whether the resulting government of the twentieth century bears any relation whatever to those of its predecessors. He suggests, in contrast, that the changes have been so wrenching that the American Constitution has been “transmogrified” and not merely “transformed.”

I disagree. Professor Finn is right to point out that the centuries have witnessed wrenching changes in America’s governing principles—from weak confederacy to strong republic, from slavery to freedom, from *laissez faire* to the activist welfare state. But *We the People* tries to elaborate a unifying theme that gives a coherence to the whole. For all the vast differences that separate the slaveholding Republic of the 1790s from the modern redistributive state, an overarching framework is provided by the ideology of popular sovereignty, and its associated constitutional practices.

To be sure, nothing lasts forever, and some future century will dawn on an America that will no longer be describable as a dualist democracy committed to the principle of popular sovereignty. But that day of “transmogrification” has not yet arrived, and Professor Finn’s discussion has not convinced me otherwise.

Nonetheless, Professor Whittington is surely right to observe that two centuries of ongoing constitutional adaptation have led the Americans to cultivate a distinctively pragmatic style of institutional management. As they respond time and again to the pressures of civic movements, American lawyers and statesmen begin to look a bit more like the British practitioners of an “unwritten constitution”—translating massive changes in public opinion into higher law without codifying these changes with the full formality of a “constitutional amendment.”

Whittington is right, moreover, to find aspects of this pragmatic style disturbing. All in all, it has become too easy for elites to manipulate the Constitution without an adequate foundation in constitutional politics.

This is why my book ends with a call for a revision of the formal process of writing and ratifying constitutional amendments. Though Professor Whittington detects a contradiction here (Whittington:411), I am not persuaded. It is one thing to admire the skill with which past generations have adapted the Constitution to respond to the demands of mobilized civic movements for a new constitutional morality for American government. It is quite another thing to suppose that the resulting institutional practice is ideal.

In any event, I do believe that the existing system would be greatly improved by re-injecting some more formality into the process through which citizen initiatives are proposed, considered, and—sometimes—enacted. My proposal is based on the historical transformations that have already taken place in American constitutional practice—most notably the rise of national consciousness since Reconstruction, and the rise of the Presidency since the New Deal.

Given the central place of the nation and the presidency in the political identity of modern Americans, it is no longer appropriate for Congress and the states to monopolize the process of formal amendment. I therefore recommend an alternative process through which a President, if re-elected to a second term, might propose a constitutional amendment with

the consent of two-thirds of the Congress. This proposal would then be enacted into higher law if approved by majority vote at a referendum conducted at the time of the next two Presidential elections.

Professor Mueller is absolutely correct in diagnosing the weaknesses of this proposal. It is, as he suggests, very conservative—especially in giving an undemocratic institution like the Senate such a large veto power. He persuades me that a requirement of a simple majority in the Senate might well be more appropriate.

I am less persuaded by his alternative reform proposal. Instead of giving an amendatory power to an institutional combination including the President, Congress, and the voters, he prefers a reform that would automatically convene a Constitutional Convention every 25 years to propose amendments. He suggests that such a convention would be much more ready to consider reforms that would cut down the powers of the President and Congress if they become abusively large.

I am not so sure. After all, delegates to the Convention would be among the nation's leading politicians, who would naturally aspire to the leading national offices. Unless there was a strong civic movement demanding that delegates cut back these governmental powers, I think that the Convention would be almost as reluctant as Congress or the President to contemplate such a step. At best, Mueller's point may have a very marginal impact.

But only at an unacceptable cost. As I read his proposal, Professor Mueller's constitutional conventions would meet on a fixed timetable—say, every twenty five years—without regard to political conditions prevailing at the time. I think this is a serious mistake.<sup>4</sup>

On my theory of politics, it is a rare thing for a civic movement to gain a broad appeal amongst Americans, and an even rarer thing for it to gain the considered support of a majority of private citizens. Politics is normally a much more self-interested affair—in which rent-seeking and free-riding sometimes occur with the pathological force familiar from constitutional economics.

If a constitutional convention met under these conditions, the Convention would merely serve as a forum for dominant interest groups to inscribe their will into constitutional amendments rather than using ordinary legislation. To use a familiar statistical notion, Mueller's proposal threatens to generate too many *false positives*—signaling that the People may be speaking when no civic movement is remotely close to the requisite level of public support. (For an extended treatment of these requirements, see Ackerman, 1991:272–80.) In contrast, my proposal would greatly reduce the level of false positives: If a President is popular enough to gain reelection, and can persuade Congress to go along, there is a much larger chance that his initiative reflects some serious civic support amongst the general public.

To be sure, the problem is that my proposal is so conservative that it risks, as Mueller suggests, *false negatives*: A mobilized majority of citizens may well take an initiative seriously—Mueller gives the example of gun control—and yet be incapable of pushing the proposal through my institutional obstacle course.

The problem of false negatives is made even worse by another aspect of my proposal—which is its extremely conservative ratification procedure. Under my plan, it is not enough for the voters to approve an initiative once, but twice—and the referenda are four years apart. I propose this serial feature to guard against the danger that Professor Hamlin sees in



a one-shot referendum—in which the incumbents exploit a momentary enthusiasm for their partisan advantage (Hamlin:371). The serial feature places the President and Congress in a position more like the “veil of ignorance.” It is very hard for most politicians to calculate their narrow partisan advantage over a four- or eight-year period. They are unlikely to unite in large majorities unless they believe that a serious civic movement will be around to support a constitutional proposal for a long time to come. This is, at least, my hypothesis. If it is correct, then my scheme may well keep down the number of false positives to an acceptable level.

Unfortunately, as Professor Mueller suggests, this aim is achieved only at the cost of a large number of false negatives. I do not wish to minimize this failing. It is a very serious thing for a civic movement to succeed in mobilizing sustained majority support for a new direction in constitutional morality, and to have the government proceed as if their efforts were in vain. Such an experience can lead to a shattering loss of public confidence that may destroy the foundations of civic life.

The intellectual challenge, then, is simple to state but hard to execute. How to design a higher lawmaking system that reduces both the number of false positives and the number of false negatives to tolerable levels?

I have no doubt that my proposal is very rudimentary as it stands, and that constitutional economists have much to contribute to its solution. (For a more elaborate description of the dimensions of the problem, see Ackerman 1991:chaps. 9–10.) To be sure, there can be no hope of a perfect solution. The easier it is to pass an amendment, the greater the chances of false positives; the harder, the greater the chance of false negatives. All formal systems will make mistakes. And if the mistakes are serious enough, there would be the need for Americans to display the same kind of pragmatic statesmanship they have demonstrated in the past in order to keep the ship of state on a reasonably steady keel.

Nonetheless, I believe that the present system of formal amendment is painfully deficient, and that constitutional economics has an important role to play in the sophisticated analysis of alternative proposals for reform. But this potentially fruitful form of collaboration may require some, if not all, analysts to reconsider their present tendency to sanctify the status quo, to disparage of the act of voting, and to deny the moral importance of civic movements in democratic life.

## Notes

1. The phrase is derived from the *Federalist Papers*, and is placed in a larger interpretive context in Ackerman, 1991:chap. 7.
2. The best evidence of this proposition is the results of the Presidential election of 1868. The Democrats had put the electorate on notice that they would seek to invalidate the Fourteenth Amendment if they won the election. But the Democrats lost, albeit in a close election. There is no reason to suppose that the result would have been any different if the states not yet readmitted would have cast their ballots—so long as black votes were counted as well as whites. (See Ackerman, 1998:234–38.)
3. In a few passing remarks, Professor Onuf casts doubt on my historical account of the Founding, as does Professor Whittington with regard to the New Deal. But neither undertakes a careful critique of my evidence. Other leading historians have made this effort, and have come up with rather more charitable judgments. On the Founding, see Appleby (1999) and Rakove (1999); on the New Deal Revolution, see Burnham (1999), Kalman (1999), and Leuchtenburg (1999).

4. So did James Madison, who rejected a proposal similar to Professor Mueller's in the *Federalist Paper No. 50*. (Madison 1961:343–47).

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