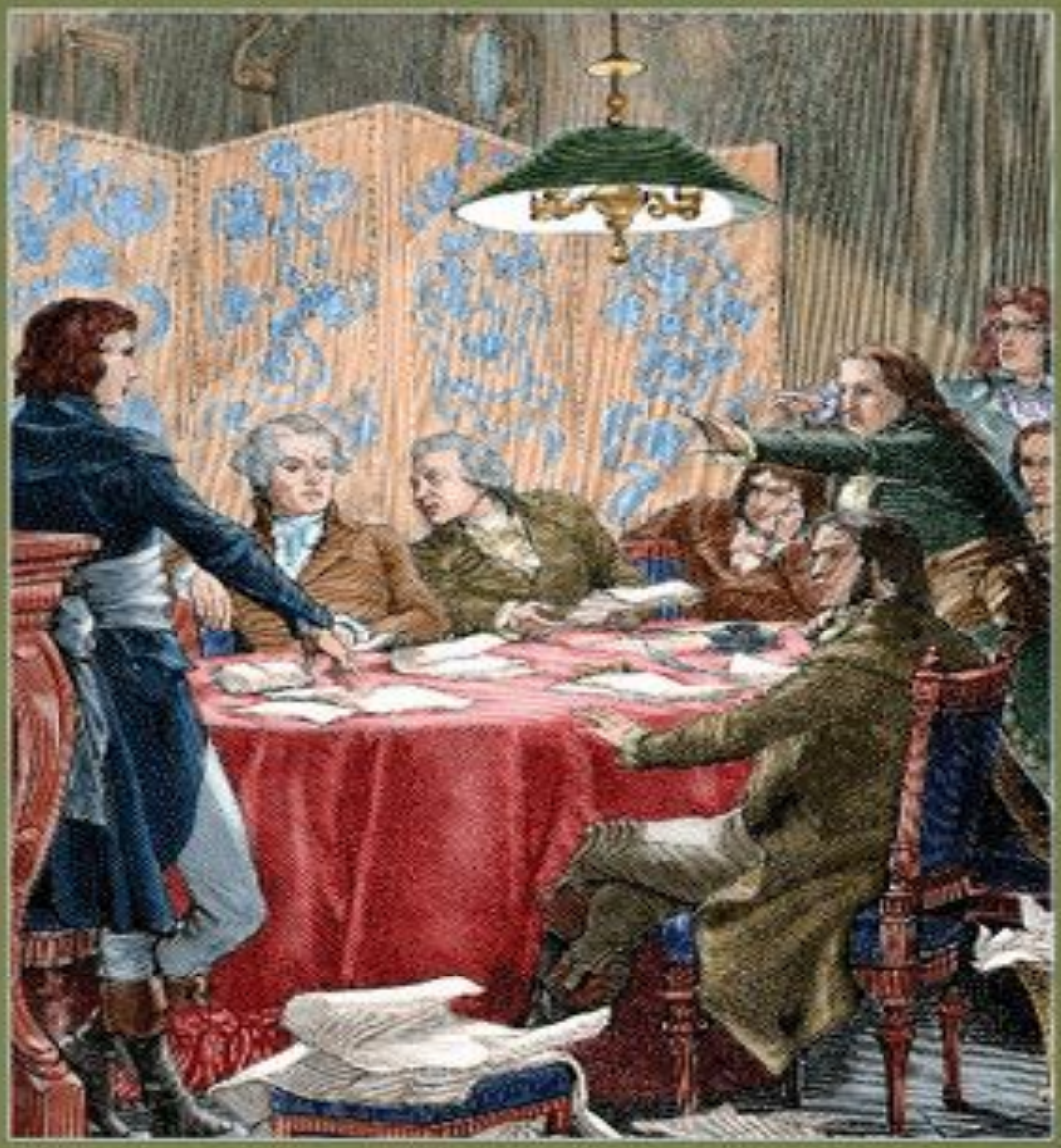
CHOOSING IN GROUPS

ANALYTICAL POLITICS REVISITED



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2 Becoming a Group: The Constitution

> There is but one law which, from its nature, needs unanimous consent. This is the social compact; for civil association is the most voluntary of all acts.... Apart from this primitive contract, the vote of the majority always binds all the rest. This follows from the contract itself. But it is asked how a man can be both free and forced to conform to wills that are not his own. How are the opponents at once free and subject to laws they have not agreed to?
>
> I retort that the question is wrongly put. The citizen gives his consent to all the laws, including those which are passed in spite of his opposition, and even those which punish him when he dares to break any of them. Rousseau, Book IV, Chapter 2, “Voting”

Three broad subjects interest political theorists: *axiology*, or the knowledge of ethics and “the good;” *ontology*, the knowledge of being and existence; and *epistemology*, the knowledge of knowledge and knowing.[1] We want to know, for example: What is the good society? What are the types or categories of human societies? How do we assess empirical evidence to understand the effects of real policies on that society?

The study of voting and collective choice most often has been conceived as a problem in epistemology. That is, given that we – the members of a group – all want something, how do we know if a particular voting system can lead us to it? If

the “right thing to do” is *known to exist*, the problem is making sure that voting processes can help *discover* it.

Recent scholarship has undermined this perspective, perhaps fatally. Imagine there are two alternatives; call them “A” and “B.” It is possible to define the parts of the following statement quite precisely:

I like A better than B

Presented with alternatives A and B, the chooser believes that she derives higher satisfaction from A. The chooser believes, subjectively and based on the information at hand, that A is preferable.

Likewise, we can carefully define what it means to say:

You like B better than A

Again, presented with two alternatives, the chooser believes you like B better. Now, imagine there is a third person involved, and we can say

She likes A better than B

Again, it is possible to be quite specific about what this means, because the nature of the comparison and the (subjective) definition of “like” are clear. But what if we put the three individuals together into a group? Since two like A better than B and one likes B better than A, can we reach any conclusion about the group?

Premise: I like A better than B
Premise: You like B better than A Premise: She likes A better than B

Conclusion: As a Group, We like A better than B

Since the group disagrees, it must be true that there is some additional premise at work in the group, something not required for any individual. For a group, there needs to be some *decision rule*, some means of aggregating or adding up preferences of individuals. All of the members of the group, unanimously, must give their consent to the decision rule, though they may ultimately disagree about the *outcome* reached by applying the decision rule to actual alternatives.

The problem is that we are trying to infer what the group wants by asking each of the group's members, one at a time, what he or she wants. Can you do that? You could fail by choosing a bad voting procedure or distributing illegible or confusing ballots, but in that case, you simply failed to discover an objective hidden fact: The group is assumed to have a preference, and our job as political scientists is to discover what that preference is.

The real problem is deeper. It is not logically possible to construct a group preference using as data the individual preferences expressed by members of the group. In fact, it is by no means clear that it is even possible for groups to exhibit "preference," and there is no particular reason we should expect groups to have preferences. Even if the group is unanimous, the concept of preference does not apply to groups, as organic entities.[2] Group preference fails as a matter of ontology. It is a category mistake, like asking, "What color is seven?"

We, however, could sensibly make the following kinds of statements:

(1) Two members of the group like A better, and one member likes B better.

(2) Since the group *unanimously* agreed beforehand to accept the outcome of majority rule, A is selected because of the application of the decision rule, "majorities choose."

The goal is to start with the *individual* chooser, and justify the (entirely different) notion of a *group* choice the individual is obliged to accept, even if she disagrees with it. A number of scholars have addressed the problem, and we will discuss it at much greater length in later chapters. All we are trying to do at this point is clarify the distinction made by Runciman and Sen (1965), who recognize the problem of adding up preferences when people have private and public motives:

> Our interpretation, by contrast, does not require us to impute to each person more than a single set of orderings. On our view, each person has (as in Rousseau) a single and consistent aim. The conflict between the will of all and the general will arises not because the individual must be required to change his preference orderings, but because of the difference between the outcome of individual strategy and of enforced collusion.
>
> (p. 557).

The approach suggested by the recognition that single citizens may fail to act in the interests of the group, even when "enforced collusion" would ensure a better final outcome for the single citizen, is "methodological individualism." Methodological individualism has many sources, and many critics.[3] We use it because it allows us to capture the conflict between what individuals do on their own, and what they want from consenting to join a group.

This notion of consented and constituted group choice need not apply only to states. Consider a law firm, a partnership. The partners in the law firm formed their contract of partnership as a means of increasing their profits, by capturing gains from cooperation and division of labor. One partner might specialize in torts, another in tax litigation, another in criminal law, and so on. All the partners share staff, access to reference materials, and office space. They are obliged to write the decision-making rules for the group, ranging from hiring new partners to choices about staff to salary matters. Each member recognizes that he or she may disagree with some of the choices the group will make, but group membership is better than private practice. If a particular member finds that the partnership contract does not serve him or her, there are provisions for exit. Exit is not costless, however, and there may be substantial penalties and costs associated with leaving the group. It is plausible that associate attorneys want to become partners, even though that means that they will be part of a constituted group and subject to coercion if they violate the rules or expenses if they try to exit.

More generally, people do not just join groups because they like company. Groups are the context in which people choose, and act. Human beings cannot do without groups, and social scientists must account for them. In politics, this problem is especially acute, because while individuals may *choose*, groups *do*. Group choices are generally unitary: A road has one speed limit, a city has one budget for public works, and a nation has one defense budget. This brings the problem of *constitutions* into sharp focus. If individuals have preferences, but groups act, and if they make one choice binding on all individuals using a consented decision process, then the way the group is constituted is fundamental.[4]

Constituting Collective Choice

When a group constitutes itself, it forms an association through an agreement or contract. The contract is inherently "political," because it requires individuals to choose as a group, and then to accept the results, even if they disagree with it. The constitution must specify the rules on how to choose, who can enter the group, how members can leave the group, and how the rules can be changed. In this sense, most groups are political, regardless of whether they are institutions of the state or voluntary private associations. As Max Weber (1921) put it:

> What is a 'political' association from the sociological point of view? What is a 'state'? Sociologically, the state cannot be defined in terms of its ends. There is scarcely any task that some political association has not taken in hand, and there is no task that one could say has always been exclusive and peculiar to those associations which are designated as political ones: today the state, or historically, those associations which have been the predecessors of the modern state. Ultimately, one can define the modern state sociologically only in terms of the specific means peculiar to it, as to every political association – namely, the use of physical force…
>
> [A] state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory. Note that 'territory' is one of the characteristics of the state. Specifically, at the present time, the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it. The state is considered the sole source of the 'right' to use violence. Hence, 'politics' for us means striving to share power or striving

> to influence the distribution of power, either among states or among groups within a state.
>
> (pp. 396–7)

Weber summarized the core issue: Citizens who have constituted a group and consented to be subject to the use of force are, in some important sense, exercising their freedom.

Though there are countless examples of groups constituting themselves, one of the most striking comes from the Old Testament. It is the story of Samuel, the last Judge of Israel. Perhaps the most interesting thing about the story is the justifications offered for the creation of a constituted group, in this case a state with a monarch. According to the text of I Samuel[5], this is what happened.

> When Samuel became old, he made his sons judges over Israel.
> The name of his firstborn son was Joel, and the name of his second, Abijah; they were judges in Beer-sheba.
> Yet his sons did not follow in his ways, but turned aside after gain; they took bribes and perverted justice.
> Then all the elders of Israel gathered together and came to Samuel at Ramah,
> and said to him, ‘You are old and your sons do not follow in your ways; appoint for us, then, a king to govern us, like other nations.’
> But the thing displeased Samuel when they said, ‘Give us a king to govern us.’ Samuel prayed to the Lord, and the Lord said to Samuel, ‘Listen to the voice of the people in all that they say to you; for they have not rejected you, but they have rejected me from being king over them.
> Just as they have done to me, from the day I brought them up out of Egypt to this day, forsaking me and

serving other gods, so also they are doing to you.
Now then, listen to their voice; only – you shall solemnly warn them, and show them the ways of the king who shall reign over them.’
So Samuel reported all the words of the Lord to the people who were asking him for a king.
He said, ‘These will be the ways of the king who will reign over you: he will take your sons and appoint them to his chariots and to be his horsemen, and to run before his chariots; and he will appoint for himself commanders of thousands and commanders of fifties, and some to plough his ground and to reap his harvest, and to make his implements of war and the equipment of his chariots.
He will take your daughters to be perfumers and cooks and bakers.
He will take the best of your fields and vineyards and olive orchards and give them to his courtiers.
He will take one-tenth of your grain and of your vineyards and give it to his officers and his courtiers.
He will take your male and female slaves, and the best of your cattle and donkeys, and put them to his work.
He will take one-tenth of your flocks, and you shall be his slaves.
And in that day you will cry out because of your king, whom you have chosen for yourselves; but the Lord will not answer you in that day.’
But the people refused to listen to the voice of Samuel; they said, ‘No! but we are determined to have a king over us, so that we also may be like other nations, and that our king may govern us and go out before us and fight our battles.’
When Samuel had heard all the words of the people, he repeated them in the ears of the Lord.
The Lord said to Samuel, ‘Listen to their voice and set a king over them.’ Samuel then said to the people of Israel, ‘Each of you return home.’

This is a story of political “constitution.” The Hebrew people constituted themselves as a political entity, with a king, not a tribe organized around a set of (more or less) shared religious beliefs and in which judges settled disputes by interpreting scripture. Montesquieu (1752, Bk I, chapter 1), referring to just this passage in I Samuel, said,

> [Man] might every instant forget his Creator; God has therefore reminded him of his duty by the laws of religion. Such a being is liable every moment to forget himself; philosophy has provided against this by the laws of morality. Formed to live in society, he might forget his fellow-creatures; legislators have therefore by political and civil laws confined him to his duty.

There are three sets of “laws” by this reasoning: religion, morality, and statutes. When we think of government, in modern terms, we are likely to focus on statutes alone. Nevertheless, how a society is constituted is likely to depend heavily on religion and morality as interpreted by judges and scholars. It is hardly surprising that in a traditional theocratic society the “will” of the people, which is really just the preference of most members of the group, carried little weight; the “law” was traditional or scriptural. As Montesquieu points out, the need for people living together in society brings laws, and the preferences of groups, to the forefront–but not until the group has been constituted as a nation, a city-state, or a tribe.

How does “constitution” take place? At this point, political theorists use an artifice, conjuring a time before the constitution. This conjectural creation myth goes by several names, including “state of nature” or “original position,” and it turns out to be very useful in conceiving the constitutive moment.

Coercion and the Constitutional Moment

Thomas Hobbes called the unconstituted group the “state of nature.”[6] John Rawls (1971) called it the “original position,” when rules and institutions were to be decided behind a “veil of ignorance” ensuring that only principles of justice influence the reason of the citizens. If citizens constituted themselves without knowing their position in the resulting society, the resulting rules would be just, because it would be “fair” in the sense that universal principles, not self-interest, would be the origin of the rules. This is the argument for “rule of law” that Socrates used to put off Crito .

Buchanan and Tullock (1962) imagine a constitutional “moment” when a group of individuals confront the problem of deciding how to decide. They impose two conditions, or qualifications, on the decision process. First, the choice must be *unanimous*.[7] This is a means of solving the infinite regress problem (how to decide, how to decide how to decide, etc.). Unanimity protects each individual, ensuring that no minority, no matter how small, is subjected to involuntary coercion. Second, the choice must be *disinterested*, or made without complete knowledge of the rules' effects on the chooser’s welfare, much like the Rawlsian “original position.”

Unanimity answers the question raised by Rousseau, in the quotation used to begin this chapter. How can a person be both free and yet bound by wills not his own? Because he consented. Anyone who voluntarily signs a contract expects to benefit.[8] However, he would benefit even more if he could cheat while other parties perform as promised. Since this is true for each potential signer, monitoring and enforcement are required, and it is in the interest of all the

signers to ensure that the contract is enforced. The “state” might be one way of enforcing contracts, but there are other mechanisms of enforcement – posting a bond or hiring a private arbitrator – that need not entail a formal state apparatus. What is necessary for people to be able to make free choices for mutual benefit is the ability to sign binding contracts. And binding contracts require a threat of enforcement if the contract is breached. [9] As Hobbes said, “Covenants, without the Sword, are but Words, and of no strength to secure a man at all.”

But is the *ex post* enforcement – force and forfeiture of property – coercive or voluntarily imposed? If I agreed to be bound, am I bound by wills not my own? There are two states of play, one before the signing of the contract and one after. Oliver Williamson (1979) claims contractual relations undergo a “fundamental transformation.” Before a contract is signed, there is no coercion in the negotiation process. Each party can exit without harm. But after the contract is signed, exit from the agreement may be expensive and reneging on the contract triggers punishment. If threats are made in the pre-contract stage, that would be coercion.

The contract would never have been signed unless the there was an *ex ante* expectation that *ex post* sanctions would be threatened and imposed. All parties to the contract are being coerced voluntarily, as a means of committing to the terms of the contract, which we assume they want to do. As the quote beginning this chapter shows, Rousseau focused on this problem of reconciling freedom and coercion.[10] Coercion is justified in three steps:

(1) Citizens agree unanimously to the rules specified in the original contract. Each consents to laws passed under these *rules*, even if one does not like the *outcomes*.

(2) This unanimity requirement applies only to those who voluntarily join the contract. I need not agree. Then I must exit the group, because membership (and the consequent enjoyment of the benefits of membership) implies consent.[11]

(3) The transcendent truth embodied in the constitution is the "general will," or the self-interest of the collective, rightly understood. It would be irrational for me to want something different from that which I *should* want; if I disagree with the general will, I am mistaken or evil.[12]

Exactly 200 years later, almost to the day, Buchanan and Tullock (1962) argued that the third step is unnecessary: A voluntary contract gets the group everything it needs. There is still the problem that "membership implies consent," because it is easy to imagine that a citizen in a state may have no real options to leave.[13] This is a problem with no good solution. Any group must balance the externality of involuntarily including someone against the costs of negotiating unanimity. Buchanan and Tullock argue that true unanimous consent rule is very expensive in terms of transactions costs, because it encourages strategizing and efforts at hold-up.

If I contract for coercion, if I voluntarily agree to have someone else punish me for violating my promise, the resulting use of force is no longer coercion, at least not in the usual sense. In Homer's *Odyssey*, Odysseus "contracted" with his men to bind him to the mast, so that he could resist the songs of the seductive Sirens.[14] The solution shows the power of enforceable contracts: Odysseus has to find a way to *order* his men to *ignore his orders*. The ropes literally bind Odysseus to do what he wants himself to want to do, rather than what he knows he will want to do later when the song of the Sirens attracts

him. Odysseus must be able to enter voluntarily into this contract to be coerced, or he would not have been truly free.

However, if you were on a passing ship, you would see Odysseus struggling with the ropes and begging to be set free. The crew (apparently) disobeys his command and busily binds him even tighter. Clearly, Odysseus wants to escape, but he is being held against his will. Should you try to help? Whom would you help? Odysseus, who involuntarily now wants to be set free? Or would you help the men trying to carry out the orders Odysseus gave back when he controlled his will, before the call of the Sirens robbed him of the power to make choices? Whose “will” would you validate if you intervene?

If a constitution is an agreement, and people become members by consenting to the contract, then the members of that group agree to be coerced because they expect to be better off as a cooperating group than they were as non-cooperating individuals. Binding Odysseus to the mast and then binding him even more tightly when he changes his mind (as he knew he would when he gave the orders to prevent his escape) is not coercion in the usual sense. This means that agreeing to suffer coercion at the hands of a group is potentially better for each individual in the group, compared to collections of individuals who cannot enforce agreements. The ability to enter into agreements, and to agree now to be punished later if the agreement is violated, is the essence of the constitution of groups.

Thomas Hobbes tried to use this logic to take an additional step, justifying not just a contract but also a state, ruled by a monarch or sovereign:

> …that a man be willing, when others are so too, as far forth as for peace and defence of himself he shall think

> it necessary, to lay down this right to all things; and be contented with so much liberty against other men as he would allow other men against himself. For as long as every man holdeth this right, of doing anything he liketh; so long are all men in the condition of war. But if other men will not lay down their right, as well as he, then there is no reason for anyone to divest himself of his...
>
> For he that performs first has no assurance the other will perform after; because the bonds of words are too weak to bridle men's ambition, avarice, anger, and other Passions, without the fear of some coercive Power. ... But in a civil estate, where there is a Power set up to constrain those that would otherwise violate their faith, that fear is no more reasonable; and for that cause, he which by the Covenant is to perform first, is obliged so to do (Chapter 14).

Hobbes was quite correct that the ability to sign binding contracts is necessary for human survival and group flourishing. However, all he really established was to justify some kind of governance, which would improve the welfare of citizens over an anarchic state of nature. He does not say how the group would select *among* all the many kinds of governance structures, some private and some involving direct state action, that might be constituted? Hobbes showed that almost *any* viable constituted group is better than his "state of nature."[15] For a given group, however, the Hobbesian argument can provide no guidance about *which* constitution to select.

The pure contractarian answer extends the Hobbesian idea, but remains agnostic about what a particular collection of individuals would, or should, choose. The "best" agreement is whatever the parties to the particular

exchange situation choose to agree on, knowing everything they know about local conditions and their own needs. The individuals constituting the group will use their moral intuitions in choosing the rules, and the rules become norms that guide moral intuitions.[16] To be free, the group has to be free to choose its contract, and then be free to enforce that contract. Maybe there is a state, maybe there is not. All that is necessary for politics to be important is that there is a group, and an enforceable contract.

After the group is constituted, of course, many people will look for ways to cheat, just as Odysseus did (and knew he would). After the agreement, people will try to escape the punishment they promised to accept. If they are caught, they will protest that the punishment is against their will, because they would prefer that everyone else be bound by the promise but that they, individually, can escape. However, the consent, the *unanimous* consent, to the original contract means that the coercion was agreed to voluntarily. One way of understanding constitutions is that they, in some circumstances, allow groups to solve collective action problems that otherwise would prevent the capture of substantial gains from cooperation.[17]

Of course, if I did not agree to the contract, even if I am the only one who did not agree, then the coercion is not voluntary because I did not consent. This is why the qualification of unanimity, even if it is hypothetical, is central to constitutive arguments.[18] If I consent, I am not bound by wills not my own, and I am still free.

As we mentioned at the start of this section, there is a second requirement for a constitution to be valid: impartiality. Like the “veil of ignorance” of Rawls (1971), it amounts to requiring that decisions about rules be made in ignorance of particular consequences. The description of this ignorance given by Buchanan and Tullock looks like this:

> Agreement seems more likely on general rules for collective choice than on the later choice to be made *within* the confines of certain agreed-on rules... Essential to the analysis is the presumption that the individual is *uncertain* as to what his own precise role will be in any one of the whole chain of later collective choices that will actually have to be made. ...[T]he individual will not find it advantageous to vote for rules that may promote sectional, class, or group interests because, by supposition, he is unable to predict the role that he will be playing in the actual collective decision-making process at any particular time in the future. He cannot predict with any degree of certainty whether he is more likely to be in a winning or losing coalition on any specific issue.…His own self-interest will lead him to choose rules that will maximize the utility of an individual in a series of collective decisions with his own preferences on the separate issues being more or less randomly distributed.
>
> (Buchanan and Tullock, 1962, p. 78; emphasis in original).

There is a striking difference between this conception of fairness and that defined by Rawls (1971: 61). The Rawlsian "distribution of primary goods" has a much more permanent and deterministic flavor. There are two steps: the liberty principle applies to choices about employment and production allocations, and then the difference principle is applied in limiting, or justifying, distributions of income, wealth, and power.

Clearly, Buchanan and Tullock are imagining a more dynamic and fluid process than what Rawls had in mind. The constitutive moment is a jumping-off point for a set of rules that will guide a society through political conflict, with

groups coalescing and dissolving over time, in both cases by voluntary consent. Buchanan and Tullock wanted to foster the capture of mutual gains from exchange and cooperation in a social, group setting, while minimizing conflict, and conferring legitimacy on outcomes even when people disagree.

Rawls is rightly credited with developing the “original position” in a way that gave him analytical purchase of the problem of justice as fairness. Nevertheless, there were important precursors. Tomasi (2012), for example, calls Rawls’s use of the idea “the unoriginal position” and points to a passage in Hayek that takes much the same logic and applies it to fairness in laws.[19] An even earlier “original position” can be found in Montesquieu.[20]

> Every day one hears it said that it would be good if there were slaves among us. But, to judge this, one must not examine whether they would be useful to the small, rich, and voluptuous part of each nation; doubtless they would be useful to it; but, taking another point of view, *I do not believe that any one of those who make it up would want to draw lots to know who was to form the part of the nation that would be free and the one that would be enslaved*. Those who most speak in favor of slavery would hold it the most in horror, and the poorest of men would likewise find it horrible. Therefore, the cry for slavery is the cry of luxury and voluptuousness, and not that of the love of public felicity. Who can doubt that each man, individually, would not be quite content to be the master of the goods, the honor, and the life of others and that all his passions would not be awakened at once at this idea? Do you want to know whether the desires of each are legitimate in these things? Examine the desires of all.

(Montesquieu, 1750 / 1989; Book XV, Chapter 9, p. 253; emphasis added).

Regardless of whether Rawls' "original position" was original with him (it appears it was not), the Rawlsian emphasis on "justice as fairness" is important. If the institutions of society, or the rules of a group, clearly are chosen to benefit some members and harm others, that constitution will not be seen as legitimate. Moreover, illegitimacy means that the contract cannot be enforced without great expense and constant turmoil. This has been recognized for thousands of years: Roman law asserted the principle that *Nemo iudex in causa sua*, or "no one can be a judge in his own case."

The Soul of the State

"the constitution is in a figure the life of the city."
Aristotle, *Politics*, Book IV, Part XI.

The Greek word that sometimes is translated to the English word "constitution" is *politeia*, but that simple translation is not correct. The meaning of *politeia* is better expressed as the self-defined identities, obligations, form of government, and rights of a citizen in a community, or *polis*. Some translators, in trying to capture the sense of the word, have claimed that the *politeia* is to a *polis* as the soul is to an organism, something that both organizes and animates the body. A town without a *politeia* is just a bunch of people and is not a community at all.

Aristotle illustrates the concept by exploring the effects of time. Is the nation the individual people, the physical space occupied by those people, or the *politeia*? What changes, and what stays the same?

> …shall we say that while the race of inhabitants, as well as their place of abode, remain the same, the city is also the same, although the citizens are always dying and being born, as we call rivers and fountains the same, although the water is always flowing away and coming again? Or shall we say that the generations of men, like the rivers, are the same, but that the state changes? For, since the state is a partnership, and is a partnership of citizens in a constitution, when the form of government changes, and becomes different, then it may be supposed that the state is no longer the same… And if this is true it is evident that the *sameness of the state consists chiefly in the sameness of the constitution* [politeia], and it may be called or not called by the same name, whether the inhabitants are the same or entirely different.
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> (*Politics*, Bk III, Part I; emphasis added).

Aristotle's proposal, that the group is the same so long as it acts and chooses according to the same *politeia*, is a useful benchmark. Nevertheless, to judge whether several constitutions are the same or different, we need a clear definition.

A *constitution* is both an agreement on principles, rules, and the structure of government, and (often) the document that records that agreement and makes it formal and visible to the world. A group can be constituted without a formal document, but a formal document without an actual agreement is never a constitution, no matter what it is called. There are five analytical problems with constitutions that we will address repeatedly. In the briefest possible terms, the key analytical problems of constitutional design are:

The fundamental transformation Agenda manipulation Revelation manipulation Constraining domain Inherited disequilibrium

We will briefly discuss each of these, as a means of illustrating the problems groups face in constituting themselves.

The fundamental transformation

Oliver Williamson (1979) first proposed this phrase in transactions costs economics, though the problem has been recognized for centuries. Starting from a situation of pure competition, both buyer and seller have many alternatives. But once the parties sign a contract, there is a “fundamental transformation” of the strategic situation. Each party to the contract is now one part of a bilateral monopoly with all the associated problems of hold-up and ex-post recontracting.

Government may fail to provide promised services, taxes may go up, and citizens may be arrested. Similarly, citizens or corporations may conceal income and assets, pollute the environment, cheat on the rules agreed on for deciding, and routinely break laws that citizens said in the constitution they wanted the government to enforce. Before the constitution was signed, there were many different arrangements possible, but after the constitution is in place, all sides may take considerable advantage of the costs of exit facing their partners.[21] That is the reason why one so often hears some version of “Well, if you don’t like it, just leave!” from groups who are forcing change within a system.

One party can threaten not to perform as agreed without some additional payment or consideration, something that is not part of the signed contract. The damaged party can object (“But that’s not what we agreed!”), of course. The

problem is that monitoring and enforcement of the "agreement" is expensive. The damaged party is free to leave, or sign a new contract with someone else, but either of these actions would be even more expensive than conceding to the first party. In any case, while the disagreement is adjudicated, or a new agreement signed, the damaged party has no means of obtaining services, which may be the most expensive outcome of all. A "good" constitution limits the incentives to engage in ex post recontracting by making dispute resolution transparent and predictable.

Agenda manipulation

As we will see in later chapters, the rules governing voting can change the outcome of voting, even with a fixed set of individual preferences. Consequently, and in certain situations (for example, if citizens all vote sincerely), choosing a chair or parliamentary officer can be tantamount to choosing a dictator. For this reason, voting procedures that look good on paper may cause a constitutional system to collapse in war and recrimination.

That is exactly what happens to many constitutional systems: The problem of design is as much engineering as ethics. Although the *politeia* must embody the ethical and normative "soul" of the people, it also must be engineered to prevent manipulation and control of the agenda. Ideally, the "best" voting system would be like Caesar's wife: above reproach.[22] The problem, as we will see in Chapters 3 and 4, is that this is literally impossible: All voting systems can be manipulated; no voting system is strategy proof.[23] The "best" voting system may simply be the one that people understand and trust.

Revelation manipulation

Voters are not helpless. When faced with agenda manipulation or even the suspicion of it, citizens can practice a deception of their own: revelation manipulation, or strategic voting. It would be naïve to expect people to vote their honest preferences when strategic voting is more likely to satisfy those preferences. When the French Academy of Sciences made Napoleon an “honorary” member, he immediately recommended a change in its voting procedure. The system they were using was based on the ideas of Jean-Charles, Chevalier de Borda (1733–1799). The “Borda Count” was much more open to revelation manipulation than most types of voting, because voters were asked to rank each candidate. Borda allegedly defended his system by sniffing, “My scheme is intended only for honest men.”[24]

Interestingly, revelation manipulation is more than simple dishonesty. It blunts the power of agenda manipulation, unless (as we shall see) the agenda controller can eliminate certain options. If choosers can vote strategically, the agenda controller can no longer reliably achieve his most preferred new outcome. However, the agenda controller may still be able to prevent change, privileging the status quo.

Constraining domain

Democracies are not simply nations with majority rule constitutions. Any democracy must balance responsiveness to the will of the majority against protection for fundamental rights of individuals. In modern terms, laws, not majorities, rule a democracy. But this is not just a modern problem. The balancing of law versus mass will has been one of the core difficulties of constitutional design for thousands of years. Consequently, morals and traditions (the “law”) and the legislative will of the people may be different, perhaps even

opposed. If the majority is always able to act on its impulses, there is no constitution at all, only a mob.

The interests of the parties to the constitutional contract are in conflict, looking across the time divide before and after the fundamental transformation. *Before* the constitution is agreed upon, each citizen tries to design a set of rules that offer general protections, because no one knows what his or her interests will be. *After* the rules are adopted, groups of citizens try to use strategies within – and possibly even outside – the rules to impose their will on others.[25]

Consider the "right" to freedom of speech. By definition, a democracy is unlikely to interfere with the rights of the majority to free speech. The protection, if there is one, also must shelter the speech rights of minorities. Interestingly, two of the first attempts to frame this right – balancing majorities and individuals – were written just a few weeks apart, in the late summer of 1789.

In August of 1789, the French were wrestling with the problem of stating the basic rights all citizens had and that no one could legitimately take away. Their version of the freedom of religion, speech, and the press (from the "Declaration of the Rights of Man"[26]), passed August 26, 1789, looked like this:

10. No one is to be disquieted because of his opinions, even religious, *provided their manifestation does not disturb the public order established by law*.
11. Free communication of ideas and opinions is one of the most precious of the rights of man. Consequently, every citizen may speak, write, and print freely *subject to responsibility for the abuse of such liberty in the cases determined by law*.

We have added italics to clarify just how odd the language is. Number 10 says that citizens can have any religious

opinion they want so long as it is not against the law. Number 11 says that citizens can say or print anything they want, again so long as it is not against the law. That does not seem like much protection, for if the right is a fundamental *individual* right, citizens should be able to exercise the right, *even if the majority wants to pass a law* against it.

The U.S. House of Representatives passed an alternative just four days earlier, on August 22, 1789. Due to distances and delays in communication, a conference committee revised and finalized the U.S. version on September 25, 1789. The U.S. version of the fundamental right is the First Amendment:

> *Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

That is an explicit protection against the majority. France said “Don’t break the law,” but the U.S. said “Don’t *make* the law.” Since this restriction was an amendment added directly to the Constitution, some individual choices about what to say or write are protected from government interference even in those in instances where the majority of people would disagree with those choices. The paradox lies in the fact that democratic constitutions must contain anti-majoritarian elements while circumscribing the domain appropriate for collective choice, preserving and protecting everything outside that domain for private choice.[27]

Inherited disequilibrium

Earlier, we noted that revelation manipulation might be an effective curb to the power of agenda manipulation. However, there is a deeper problem: A fundamental disagreement about the desirability of outcomes can be transported into fundamental disagreements about the institutions through which outcomes will be chosen.

Citizens have beliefs – right, wrong, or simply confused – about the structures of choice (presidential system versus parliament, first past the post versus proportional representation, and so on) that lead to their most desired outcomes. If there is no substantial agreement about outcomes, the debate over the institutions to place into the constitution will "inherit" this indeterminacy. Riker (1980) reached this conclusion:

> In the long run, outcomes are the consequence not only of institutions and tastes, but also of the political skill and artistry of those who manipulate agenda, formulate and reformulate questions, generate "false" issues, etc., in order to exploit the disequilibrium of tastes for their own advantage. And just what combination of institutions, tastes, and artistry will appear in any given political system is, it seems to me, as unpredictable as poetry.
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> (p. 445).

Analytical Politics

In this book, we look at how *groups* choose. For many important political processes, that means we are starting in the middle. The analysis is useful for collections of people who have already constituted themselves as a group: those who have decided to make a group choice and are now trying to decide just how to do that. For many societies, as

with Lewis and Clark, it is clear that the group must stay together and choose. But for other situations – those that have occurred throughout human history– there are other options, which include leaving the group or fighting within the group for control (Hirschman, 1970). We will not take up those questions – not because they are unimportant, but because they represent a different approach to politics.

Terms

Agenda Manipulation Amendment Process Citizenship and Citizen Obligation Collective Domain Constitutions Constitutive Moment Constraining Domain Decision Rule Epistemology