MAKING CONSTITUTIONS WORK: CONDITIONS FOR MAINTAINING THE RULE OF LAW

Stefan Voigt

> The idea never entered into my head to consider as identical the characteristics of two peoples as different as the Anglo-American and the Spanish-American. Would it not be very difficult to apply to Spain the English system of political, civil, and religious liberty? It is even more difficult to adopt the laws of the United States to Venezuela.
>
> —Simón Bolívar
> *Address to the Congress at Angostura in 1819*

For a long time, the empirical evidence that individual liberty is conducive to economic growth was rather shaky (for a survey see Przeworski and Limongi 1993). Most of that evidence was gained using democracy as a proxy for individual liberty. More recently, studies measuring liberty directly have shown a significant correlation between economic liberty and economic growth. The results of the study by James Gwartney, Robert Lawson, and Walter Block (1996) have been widely published. The policy implications of these findings seem obvious: in order to enhance economic growth, a country's government needs to promise more individual freedom. The credibility problems associated with such promises have been discussed by Barry Weingast (1993). Constitutional economists would point at the necessity to anchor devices that secure individual liberty within the constitution that is considered the most basic document of society. The credibility problem is, however, also relevant on the constitutional level.

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Many societies have enacted constitutions that are formally in congruence with the concepts of constitutionalism and the rule of law and should thus be able to safeguard individual liberty. However, constitutional provisions are enforced to varying degrees in different states. In this paper, factors affecting to what degree a constitution is enforced will be dealt with. It is hypothesized that the constitution is part of a larger framework and should therefore not be considered a society's most basic institution. I shall try to identify some of these pre- or extra-constitutional factors that enable societies to enforce their constitutional provisions effectively.

Special emphasis will be put on the Americas because many Latin American societies used the U.S. Constitution as a model for their own constitutions (see, e.g., James 1923, Vanossi 1976, Safford 1987, and Rosenn 1991). Yet to this day, many Latin American states do not have a stable rule of law, are not stable democracies, and per capita income lags far behind U.S. income levels. This should come as a surprise for those who argue that a society's formal institutions—its constitution included—are the most important source for growth and stability. The differential performance of many Latin American states despite the formal similarity of their constitutions can therefore be considered as an interesting test case for identifying preconstitutional factors relevant for the degree of enforcement.

This paper is organized as follows: In the next section, I briefly survey some institutional approaches that seek to explain the low per capita income of Latin American societies and less developed countries more generally. The paper's third section presents my notion of the rule of law as well as that of constitutionalism and then goes on to develop my main argument. I argue that the enforceability of rule-of-law constitutions depends on the existence of a sufficiently large number of interest groups with heterogeneous interests and a credible threat potential at their disposal. Interest groups, however, can also endanger the rule of law which creates a paradox. The paper closes with open questions and an outlook.

Explaining the Low Per Capita Income of Most Latin American States

Various institutional approaches have been advanced in recent years to explain the poor economic performance of many less developed countries. More traditional approaches tend to focus on aspects like macroeconomic stabilization, capital formation, and the relative size of the sectors of an economy. Those explanations will not be discussed

here. Rather, the focus will be on approaches that take institutions explicitly into account.

Institutions are here defined as rules or norms that are subject to an enforcement mechanism. And, following Elinor Ostrom (1986: 5), rules

> refer to prescriptions commonly known and used by a set of participants to order repetitive, interdependent relationships. Prescriptions refer to which actions (or states of the world) are *required, prohibited*, or *permitted*. Rules are the result of implicit or explicit efforts by a set of individuals to achieve order and predictability within defined situations.

Institutions can be further classified with regard to the kind of enforcement mechanism used. Those institutions backed by the coercive monopoly of the state are called external institutions while institutions relying on private enforcement, or enforcement internal to society, are called internal institutions. Internal institutions can, but need not, arise spontaneously.

Many of the approaches focusing on institutions have concentrated on external institutions. After having checked some of the more conventional explanations for the differences in per capita income, even among neighboring states, Mancur Olson (1996: 19) concludes: ''The only remaining plausible explanation is that the great differences in the wealth of nations are mainly due to differences in the quality of their institutions and economic policies.'' It is, then, tempting to arrive at the policy recommendation that one should strengthen property rights and economic freedom in general. Many approaches, such as legal centralism, assume that external institutions can be set up and modified at will, that any society is in principle capable of setting up the ''right'' institutions. These are, from the point of view of the economist, those institutions that are most conducive to economic growth. It is, of course, the main goal of this paper to inquire into the possibilities and restrictions of intentionally setting up those external institutions identified as being conducive to economic growth. The main question to be dealt with is: Under what circumstances will they be effectively protected? Before presenting our own hypothesis, some of the approaches that focus on external institutions to explain the low degree of enforcement of constitutional provisions and, subsequently, also the low income levels, will be highlighted.

Many constitutional economists seek to explain the unsatisfactory development of a society by arguing that its constitutional provisions are inadequate. Cass Sunstein (1991, 1993), for instance, argues that the constitutional provisions of a society should be directed to protect a society against the weaknesses of its own customs or political culture.

In our terminology, a nation's customs and political culture are part of its internal institutions. Sunstein's proposal would thus mean that the most dangerous of the internal institutions of a given society should be made ineffectual by setting adequate counterbalancing external institutions. The (implicit) hypothesis is that an adequately drafted constitution enables a society to coordinate activities on radically different equilibria compared with what would be the case in the absence of a written or a properly drafted constitution.

Dennis Mueller (1996: 35) also names the structure of the Latin American constitutions as a possible explanation for the problems encountered there:

> All Latin American countries have tended to adopt political structures that combine an independent presidency as in the United States with a legislature that is elected under rules that produce multiparty structures. The result is that, as in the United States today, neither the president nor the legislature can carry out an effective program.

Mueller thus believes the relationship between the legislature and the executive and especially the modus under which they are elected to be the cause of political instability in Latin America and ultimately for the ineffectiveness of its constitutions.

Recently, U.S. economic historians Stanley Engerman and Kenneth Sokoloff (1997) have advanced the hypothesis that the role of factor endowments—including climate, soil, and the density of native populations—has been underestimated in previous research whereas the development of institutions, independent from factor endowments, has been overestimated. They argue that in early colonial times the factor endowment is crucial for explaining the degree of inequality of wealth, income, human capital, political power, and the kind of institutions protecting the elite. Highly unequal distributions of wealth will lead to lower rates of economic growth. From their point of view, the New World can be divided into three types of colonies. The first type possesses a climate favorable for producing sugar and other crops in which economies of scale are important and in which slaves are therefore highly useful. Examples are Barbados, Brazil, Cuba, and Jamaica. The second type is characterized by native populations who survived contact with Europeans in substantial numbers, a privileged few (the *encomenderos*) own enormous plots of land and native labor. Similar to the first type of colonies, a very unequal distribution of wealth also resulted here but for different reasons. Mexico and Peru are examples. The third type is characterized by the absence of large native populations and economies of scale are negligible. Relatively small farm sizes and fairly equal distributions of wealth would be the

consequence. Examples include the northern part of what became the United States as well as Canada and Argentina. In other words: the exogeneously given factor endowments including climate and soil largely determined the fate of the various countries. The possibility to deliberately introduce and enforce institutions was thus severely limited.

But that is not their entire story. Engerman and Sokoloff further argue that the original factor endowment was reinforced by the institutions set by the respective mother countries. According to them, crucial variables were (a) land policy, (b) policy regarding immigration, and (c) regulation of trading arrangements between colonies. In other words: there was some room for institutional choice. The British, for example, encouraged immigration whereas the Spanish tightly controlled it. Here considerations of political economy might set in: those settlers first endowed with land holdings by the Spanish crown had an interest in slaves rather than more settlers because their slaves could be used to increase farm size and thus to realize economies of scale. Moreover, the early institutional choices might have constrained the possibility to choose other institutions later—that is, institutional path dependency might have been relevant. Engerman and Sokoloff thus point to a potentially relevant restriction to institutional choice, namely the exogeneously given factor endowment. At the same time, the authors stress the relevance of early decisions concerning institutions. Insofar as their approach is based on the relevance of institutions and the possibly limited degree of freedom to establish and enforce institutions at will at any point in time, it is entirely compatible with the one advanced here. However, what I disagree with is their characterization of the channels through which these restrictions on choice come to be relevant. In their approach, culture is not an important variable; in my approach it is. In order to appreciate the relative merits of the competing channels, more empirical work will be necessary.

Most of these approaches implicitly assume that constitutional rules can be effectively enforced. In contrast, I would argue that even if a society's external institutions—its constitution included—are formally conducive to political stability and economic growth, those results might not materialize because necessary preconditions that are pre-constitutional are not given and a society might therefore be unable to enforce the rules it has formally given itself. In order to formulate this hypothesis more precisely, some central concepts will be explicitly introduced at the beginning of the next section.

A Theory of the Necessary Conditions for Implementing Effective Constitutions

On the Rule of Law and Constitutionalism

It has already been mentioned that there is good evidence for supposing that individual liberty in the sense of negative rights protecting citizens from government impositions is conducive to economic growth. Here it will be argued that individual liberty is impossible without the rule of law. It will further be argued that the concepts of the rule of law and constitutionalism are so closely related to each other that they can almost be used interchangeably. The most important trait of the rule of law is that the law is to be applied equally to all persons (*isonomia*), government leaders included. It is therefore also called government under the law. No power used by government is arbitrary; all power is limited. Drawing on Immanuel Kant (1797), laws should fulfill the criteria of universalizability, which has been interpreted to mean that the law should be *general* (i.e., applicable to an unforeseeable number of persons and circumstances), *abstract* (i.e., not prescribing a certain behavior but simply proscribing a finite number of actions), *certain* (i.e., anyone interested in discovering whether a certain behavior will be legal can do so with a fairly high chance of being correct and can furthermore expect that today's rules will also be tomorrow's rules), and *justifiable* (i.e., subject to rational discourse).

There are a number of institutional provisions regularly used in order to maintain the rule of law. The most important ones are the separation of powers and the closely connected judicial review, the prohibition of retroactive legislation, the prohibition of expropriation without just compensation, *habeas corpus*, trial by jury, and other procedural devices such as protection of confidence, the principle of the least possible intervention, and the principle of proportionality. Empirically, a perfect or complete rule of law has probably never been realized: men and women have been treated differently just as members of different races have been. Successful rent seeking that leads to tax exemptions or the payment of subsidies is not in conformity with a perfect rule of law either because it is equivalent to treating people differently. The rule of law, therefore, should rather be understood as an ideal type in the sense of Max Weber (1922)—that is, as a type that abstracts from many characteristics found in reality. In order to make realized types (i.e., those found in reality) comparable, ideal types provide the criteria for comparison.

By necessity, the rule of law implies a market economy since decisions by government about production, pricing, and investment cannot

be subsumed under general rules but imply the arbitrary discrimination between persons (Hayek 1960: 227). Individual liberty will only be exempt from arbitrary interference by government, or other powerful groups, if it is secured by an effectively enforced rule of law. Closely related to the rule of law is the concept of constitutionalism that has primarily been developed by settlers in the British colonies of North America. It links the rule of law with the notion of a written constitution in which the basic procedures that government is to use are laid down. Constitutionalism is thus a normative concept not to be confused with the de facto constitution used by any society which has achieved a minimum amount of order to produce and finance public goods. A constitution will be called ''effective'' if the provisions that are laid down in the constitutional document are effectively enforced.

Logically, a rule-of-law constitution does not imply that the political system be democratic. Since we are here interested in identifying preconditions for maintaining the rule of law, no particular assumption concerning the political system will be made.

The Problem in Economic Terminology

Douglass North (1981: 22) defines a state as ''an organization with a comparative advantage in violence, extending over a geographic area whose boundaries are determined by its power to tax constituents.'' If constitutions are to enable as well as to constrain government, the question arises why governments, at least in some cases, remain within the constraints laid down in the constitutional document *although* they have a comparative advantage in violence. Under what conditions is a society capable of effectively enforcing a constitution compatible with the rule of law? In economic terminology: Which conditions have to be satisfied so that those in power cannot make themselves better off by ignoring the restrictions laid down in the constitution? Suppose that the probability that government will be ousted increases with the proportion of citizens that oppose it. In case government tries to renege upon the constraints laid down in the constitution, citizens will thus need to oppose government in a coordinated way. It has been argued (Hardin 1989, Ordeshook 1992, Weingast 1995) that the constitution itself is a coordinating device that helps citizens to police state behavior. The ability to coordinate behavior is a necessary but not sufficient condition for actually opposing the government. Opposing it is costly and opposition is furthermore a public good. Therefore, it must be demonstrated that it can be rational to voluntarily participate in the production of opposition as a public good. It is argued that a constitution will only be enforced effectively if government is

confronted with a credible threat by a sufficiently large number of citizens in case it tries to cross the constraints of the constitution.

The Relevance of Individual Attitudes

Before the problem of spontaneously producing opposition can even become an issue, the population would have to solve the problem of identifying unconstitutional government action in the first place. Constitutions will rarely be so clear-cut that they allow a simple determination of whether an action lies within their confines or not. The problem will be especially severe if one is dealing with a newly enacted document that does not come with a long history of interpretation. But suppose a large majority of the population believes that government does not comply with the restrictions laid down in the constitution. Since opposition is a public good, the free-rider problem looms large. It seems therefore very likely that opposition will not emerge spontaneously and government will get away with its unconstitutional action.

Intuitively, it seems much more likely that opposition can be produced by organized groups who have already managed to solve the problem of collective action (Olson 1965), possibly for reasons entirely unrelated to making a government stay within the confines of the constitution. The role of organized groups is discussed in the next section of the paper, but I now turn to the possible relevance of individual attitudes and subsequent actions for constitutions to become effective. Collective action is only one specific form of individual action. It will be argued that the compatibility of individual attitudes with the rule of law is a necessary condition for the production of opposition that can, under certain circumstances, lead to effective constitutions.

Suppose a constitution formally compatible with the rule of law has been established. If decisive parts of the population view the government as having a purpose that goes beyond the provision of public goods demanded by individual members of society, the rule of law will be difficult to maintain, since it would not make sense to bind representatives to the same rules that the other members of society are bound to because the representatives are seen as pursuing "higher" ends and thus need adequate means. If large parts of the population think of the state as an organization that is responsible for identifying some "truth," it is, at least *ex ante*, by no means certain that every individual should be treated equally. In such a situation, it seems unlikely that the rule of law would be instituted—unless foreign organizations make their support conditional on constitutional rules formally in accordance with the rule of law.

Whether the conception of the state's higher role is the consequence of rational rulers being able to legitimize their rule (e.g., on religious grounds) need not concern us here. Societies in which Caesaro-papal regimes acquire legitimacy without a rule-of-law constitution will hardly be able to produce opposition in sufficient quantity to make the ruler stick to the constraints of a written constitution. Islamic societies might be a case in point.

Moreover, relevant parts of the population need to be convinced that it is not fate that is responsible for their lot but (at least to some degree) their individual actions. If that is not the case, no relevant opposition can be expected when autocrats try to seize power and try to rule arbitrarily rather than under general rules. The autocrat's seizure of power will then be interpreted as fate and the production of opposition as pointless. Furthermore, individuals need to be valued as individuals and not because they fulfill certain functions. If that is not the case, it would not make any sense to endow individuals with negative rights vis-à-vis the state.

Economists usually do not feel at ease with concepts such as values, norms, or attitudes. Their relevance for individual action has been disputed frequently. The argument advanced here is a hypothetical one: If individual attitudes channel individual behavior and if individual action leads to consequences on the societal level, then attitudes incompatible with the rule of law will make it less likely for a constitution based on the rule of law to be enforced effectively. It has often been claimed that constitutionalism is part of Western civilization and not easily transferable to other cultures. Most economists would negate such statements based on the argument that outcomes depend on the relevant restrictions and thus on incentives. If individual attitudes are relevant in the ways just outlined, it might simply be the case that societies are incapable of setting those restrictions necessary for the rule of law. This would mean that behavior is indeed explainable by focusing on the relevant restrictions but that, depending on the specific civilization, not any set of restrictions can be brought about.[1]

The next section discusses the conditions under which the production of opposition as a public good seems likely. Notice that there is a direct link between individual attitudes and abilities to resolve the problem of collective action: In order to become active, individuals need to be convinced that their action can make a difference. Suitable

[1] In Voigt (1993), values, norms, and attitudes conducive to the rule of law and economic growth are spelled out. It is asked to what degrees they can be found among the populations of Central and Eastern Europe. Based solely on differences in attitudes, predictions concerning the growth potential of the various countries are made.

individual attitudes are thus a necessary condition for collective action and the production of opposition.

Opposition Based on Organized Collective Action

As has been mentioned, it seems plausible to suppose that it is easier for organized groups than for unorganized individuals to oppose government in case it reneges on the contents of the constitution, because organized groups have already solved the problem of collective action. However, the production of opposition remains a public good and the conditions under which it can be beneficial for an organized group to participate in its provision must be specified. Before turning to these issues, I shall briefly discuss the competing hypotheses of two scholars concerning the relevance of organized groups for political as well as for economic development.

Mancur Olson (1965) has shown that many potential interest groups never manage to become effective interest groups because they are unable to solve the problem of collective action, which is basically a free-rider problem. In his *Rise and Decline of Nations*, Olson (1982) argues that within stable regimes, ever more latent interest groups will manage to become manifest interest groups. Over time, more interest groups will be successful in their rent-seeking endeavors, which will lead to stagflation, rigidities, and reduced economic growth. Olson is not directly concerned with the rule of law but his analysis has an important implication for our topic: the larger the number of organized interest groups, the higher the probability that the rule of law will suffer due to privileges granted to specific groups. As long as interest groups are not inclusive of the interests of all citizens (or "super-encompassing," as Olson later wrote [McGuire and Olson 1996]), their existence has to be evaluated negatively. By focusing on the intended consequences of collective action, Olson arrives at the conclusion that interest groups are a threat to the rule of law.

Robert Putnam (1993) argues that the performance of democratic institutions not only hinges on their formal set-up but also on civic traditions. His argument could be read as being in direct opposition to Olson's: The larger the number of voluntary associations, the higher the degree of civility and thus the higher the performance of democratic institutions. Not every organization will have such beneficial effects, however. Only horizontally organized associations will foster cooperation and trust. Putnam's argument is based on the concept of civil society which can be traced back to Adam Ferguson (1767) and Alexis de Tocqueville (1840). Its adherents claim that a balance of power between government on the one side and a number of voluntary associations on the other would be possible (for an overview, see

Gellner 1994). Although Putnam does not deal with the consequences of civil associations' activities on the possibility to sustain a rule-of-law constitution, a causal relationship can easily be established: the larger the number of associations, the higher the chance that a relevant number will protest if government tries to renege upon the constitution.

Stephen Knack and Philip Keefer (1997) distinguish between ''Olson-groups,'' which are expected to be harmful for economic growth, and ''Putnam-groups,'' which are expected to be beneficial for maintaining effective constitutions. Trade unions, political parties, and professional associations are classified as ''O-groups,'' whereas religious organizations, education, arts, musical or cultural associations as well as youth groups are classified as ''P-groups.'' The available data does not enable the authors to distinguish convincingly between ''beneficial'' and ''maleficial'' membership.

I shall argue that a sufficiently large number of O-groups is necessary for sustaining the rule of law and that they can thus be beneficial to a nation's development. Thus, neither Olson nor Putnam are entirely convincing at least with regard to the question addressed in this paper. The existence of P-groups alone would be insufficient because a large number of choirs or sports clubs might still not command the threat potential necessary for an effective opposition. The chances are higher that a rule-of-law constitution will be effectively enforced if there exists a sufficiently large number of manifest interest groups with sufficiently heterogeneous interests commanding a considerable threat potential. Contrary to Olson, the existence of O-groups is thus considered a necessary condition for making constitutions effective.

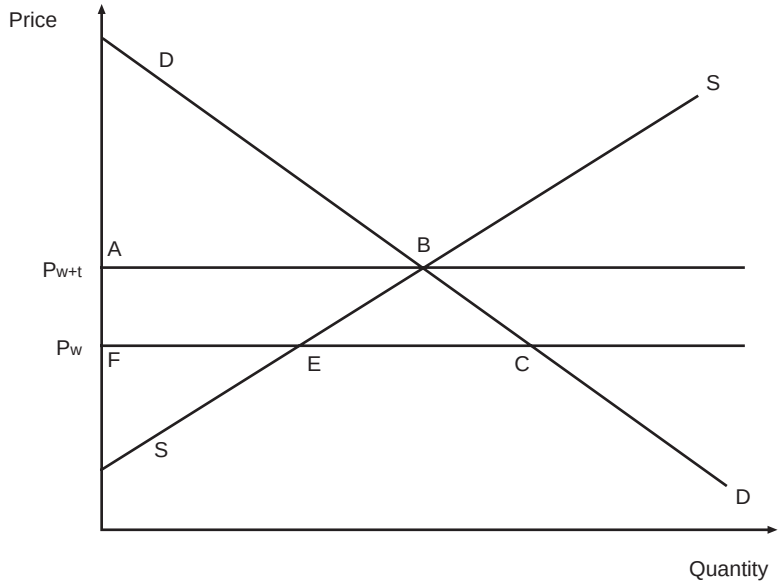
Assume that there is a situation in which the attitudes of the members of most organized groups do not flatly contradict those attitudes necessary for the maintenance of the rule of law. Further, assume that a large number of latent interest groups have managed to solve the problem of collective action and thus to form manifest interest groups. Finally, suppose that they all seek privileges from the government which, if granted, would reduce the degree to which the rule of law is effectively enforced, and that the privileges sought by one group negatively affect another group. Granting an import tariff to one group means that an industry that has hitherto used imported goods as inputs would need to pay higher prices. If that industry is already organized as an interest group, it will oppose the privilege sought by the first interest group. The condition that interest groups need to be sufficiently heterogeneous thus means that groups which would be negatively affected by certain privileges are also organized. They have an obvious incentive to oppose the granting of certain

privileges. Opposition will, however, only be successful if the opposing group(s) count—that is, if their opposition reduces the net benefit for government of granting some preferential treatment below the net benefit of not granting preferential treatment (see Becker 1983 for a similar argument).

A very simple example might help elucidate this argument. Suppose the domestic steel producers have managed to overcome the problem of collective action and founded an interest group that now demands a tariff for imported steel. Their supply curve is SS in Figure 1 and the world market price for steel is p_w. If the steel producers get a tariff (t) granted, imported steel would thus cost p_{w+t}. The demand curve of the domestic steel consumers who use steel as an input is given by DD. If a tariff is introduced, the losses accruing to the steel consumers (ABCF) are larger than the gains of the steel producers (ABEF), which means that the deadweight loss is presented by the triangle BCE. If one assumes that both interest groups use the same technology for lobbying government and that success is a function of the amount of resources spent, then the steel consumers are able to spend up to BCE more to prevent the tariff from being enacted than the steel producers would maximally spend in order to get it passed.

FIGURE 1

WELFARE EFFECTS OF A TARIFF ON PRODUCERS AND CONSUMERS



Several conditions need to be fulfilled. Most importantly, the steel consumers need to be organized in such a way that they would be able to spend up to ABEF to prevent the tariff from being passed. In case the steel producers believe the consumers capable of so doing, their best bet would be not to spend anything on lobbying the tariff. Secondly, if there is a number of different associations presenting different steel consumers, they face a free-rider problem. These associations would only be able to prevent the tariff from being enacted if they could muster at least ABEF resources for a campaign against the tariff. The chances that the rule of law will be maintained do not monotonically increase as the number of interest groups increase. Rather, they increase with the symmetry of one interest group demanding a favor and another one exactly opposing it.

A second argument concerning the maintenance of the rule of law focuses on the legislature. In parliamentary systems, a balance that safeguards its maintenance can be secured if legislators represent heterogeneous interests. Having to convince (or to buy) many parliamentarians can be more costly than having to buy a single autocrat (Baysinger, Ekelund, and Tollison 1980). In the borderline case, net benefits of rent seeking in parliamentary systems will fall to zero so that less resources will optimally be spent on it.[2]

Assuming the continued existence of a parliamentary system might be premature: Can we count on heterogeneous interest groups if a would-be autocrat tries to dissolve parliament? As in the argument just made, the threat potential of the opposing interest groups is also relevant in this case. Suppose there are many interest groups that prefer nonautocratic over autocratic systems. If the would-be autocrat does not depend on their cooperation, then the days of the rule of law will be numbered. But if the interest groups have at their disposal a large and credible threat potential, the rule of law might be sustainable. The threat potential of a group is determined by its ability and willingness to inflict costs on others and thereby reduce the net social product and the benefits ensuing to the various groups. Often, the threat potential of a group relates to the amounts of resources it commands. But that does not always have to be the case: Suppose the clergy do not contribute anything directly to the net social product

[2]Rasmusen and Ramseyer (1994) demonstrate that as the size of legislatures increases, so does the probability that legislators will accept cheap bribes in order to vote for private interest statutes. This is attributed to more acute coordination problems connected with the larger size of the legislature. This result thus directly contradicts the transaction cost argument advanced by Baysinger, Ekelund, and Tollison (1980). However, since the legislators cannot improve their own utility substantially by accepting bribes, they might just as well ban them altogether and devote funds for enforcing such a ban.

themselves and, furthermore, do not own substantial amounts of resources but exert a great influence on their followers. In this case, one can assume that they would surely command some threat potential. In situations in which government is considering to disregard the constraints laid down in the constitution, interest groups will only be able to prevent government from doing so if they can credibly threaten some sort of retaliation.

But assume that government does not depend on the cooperation of an interest group that would be negatively affected by some special interest legislation. If no other group is ready to join the opposition, the rule of law will suffer. Since the other groups will not be worse off if the government succeeds in granting special treatment and thus in deviating from the rule of law, they do not have a direct reason to oppose the government and to declare their solidarity with the group targeted by government. Suppose that the government will not carry through its discriminatory legislation if some of the not directly affected groups oppose it because that would make it worse off. Not directly affected interest groups might voice opposition today although they are not negatively affected today because they could be the target of discriminatory treatment tomorrow. Considerations of reciprocity can thus lead to the emergence of norms to cooperate in producing opposition as a public good.[3]

In sum, a necessary condition for keeping government within the constraints laid down in the constitution is the existence of opposition groups that can contest the public-goods provider. Although a written constitution may help specify the legitimate range of government actions, it can never ensure that opposition will be produced whenever government oversteps its constitutional limits. A sufficiently large number of groups representing heterogeneous interests and having at their disposal some relevant threat potential can help sustain the rule of law. This result is due to an invisible-hand argument: If groups successfully organize and gain special privileges, they will undermine the rule of law and harm everybody else. The rent-seeking literature shows that the resources spent on lobbying efforts are unproductive. But, contrary to the orthodox discussion, my argument does not stop here: If interest groups are successful in preventing government and other groups from agreeing on exemptions from universalizable rules, they can become the unintended watchdogs of the rule of law. In other words, they become a safeguard for the rule of law *although* they are motivated solely by their own utility.

[3]The conditions under which such a norm of reciprocity may arise are more formally developed in Voigt (forthcoming: chap. 5).

Conventionally, it is argued that the beneficial functioning of the invisible hand depends on adequate rules set and enforced by the state—that is, on the visible hand of legislation. The existence of the state, as well as its ability and willingness to set and enforce adequate institutions, however, cannot be taken for granted. I have argued that, if a constitution is compatible with the rule of law, then its chances of being enforced will depend on the interplay of interest groups and government. The question of why and how such a constitution was brought about in the first place has not been dealt with here. Elsewhere, I argue that rule-of-law societies are the result of bargaining processes between a large group of diverging interests who have learned that compromise between their competing interests is only possible if they agree on universalizable rules. These are, in turn, the most important traits of the rule of law. The rule of law can even be interpreted as the unintended result of an ever growing number of interest groups trying to secure a share of the cooperation rent that the existence of the state brings about (see Voigt, forthcoming: chap. 6). Under certain circumstances, the invisible hand can thus also lead to those institutions that are prerequisite for the beneficial functioning of classical goods markets (on the difference between political and classical goods markets, see Brennan and Lomasky 1993, Wohlgemuth 1995).

If the argument concerning the action of interest groups is correct, their role for the maintenance of the rule of law is somewhat paradoxical. Although a sufficiently heterogeneous and powerful number of groups is needed, their existence threatens the maintenance of the rule of law to the extent they are successful in their rent-seeking endeavors.[4]

On the Relevance of Constitutional Culture

If a society enacts a constitution that closely resembles the U.S. Constitution but the government, in the absence of interest-group opposition, ignores some of the constraints laid down in the constitution, the constitution will soon become a dead letter. In the future, if that same society enacts a new rule-of-law constitution, its chance of success will be lowered by the initial failure—even if potentially helpful interest groups have formed in the meantime.

In the long run, the experience that the constitution does not effectively constrain government can have consequences on how the

[4]This argument resembles a paradox described by Douglass North (1981: 20), who observed that the existence of the state is a necessary condition for economic growth and at the same time the source for economic decay.

constitution is perceived by large parts of society. It might be interpreted not as an enforceable set of rights but rather as a set of *desiderata* largely irrelevant for actual government behavior. In such an environment, it will become ever more difficult for a rule-of-law society to evolve. In other words, constitutional development is path dependent.[5]

The way in which the majority of a society interprets its constitution may be the most important aspect of constitutional culture. If most people perceive the constitution as a "book of hopes" without any relation to reality, the rule of law will be weak and the written constitution will fail to constrain the redistributive state. Incorporating positive rights, such as the right to paid work and the right to adequate housing, into the constitution strengthens the book-of-hopes view of the constitution and reduces the chances of its becoming effective. (Resource scarcity implies that all hopes cannot be satisfied.)

Further Questions

The argument developed here—that a society's ability to enact and enforce a rule-of-law constitution is severely restricted—has far-reaching implications for the way we think of constitutions. That is particularly true for the concept of the constitution as an instrument for collective self-binding (see Holmes 1988). Much work remains, especially with regard to the relevance of time and sequencing. Future research should address the following questions: Is it possible—and are there empirical cases—in which a rule-of-law constitution was established first and the interest groups relevant for its maintenance only emerged later? If Latin American constitutions claim to be compatible with the rule of law but constantly fail to meet that ideal, what are the implicit deals between the relevant interest groups? What makes it so attractive to have a constitution formally compatible with the rule of law? Do constitutions mainly serve to appease a country's population or do they appease international organizations? How can one explain why the populations of many Latin American countries apparently trust in the constraining force of constitutions although there is strong evidence proving the opposite?

References

Baysinger, B.; Ekelund, R.; and Tollison, R. (1980) "Mercantilism as a Rent-Seeking Society." In J. Buchanan, R. Tollison, and G. Tullock (eds.) *Toward a Theory of the Rent-Seeking Society*, 235–68. College Station: Texas A&M University Press.

[5]The pros and cons of conceptualizing institutional change within the framework of path dependency are discussed in Kiwit (1996).

Becker, G.S. (1983) "A Theory of Competition Among Pressure Groups for Political Influence." *Quarterly Journal of Economics* 98(3):371–400.

Brennan, G., and Lomasky, L. (1993) *Democracy and Decision: The Pure Theory of Electoral Preference*. Cambridge: Cambridge University Press.

Engerman, S., and Sokoloff, K. (1997) "Factor Endowments, Institutions, and Differential Paths of Growth Among New World Economies: A View From Economic Historians of the United States." In S. Haber (ed.) *How Latin America Fell Behind: Essays on the Economic Histories of Brazil and Mexico, 1800–1914*, 260–306. Stanford, Calif.: Stanford University Press.

Ferguson, A. ([1767] 1988) *Versuch über die Geschichte der bürgerlichen Gesellschaft*. Frankfurt: Suhrkamp.

Gellner, E. (1994) *Conditions of Liberty: Civil Society and Its Rivals*. Harmondsworth: Penguin.

Gwartney, J.; Lawson, R.; and Block, W. (1996) *Economic Freedom of the World: 1975–1995*. Vancouver, B.C.: Fraser Institute.

Hardin, R. (1989) "Why a Constitution?" In B. Grofman and D. Wittman (eds.) *The Federalist Papers and the New Institutionalism*, 100–20. New York: Agathon Press.

Hayek, F. (1960) *The Constitution of Liberty*. Chicago: University of Chicago Press.

Holmes, S. (1988) "Precommitment and the Paradox of Democracy." In J. Elster and R. Slagstad (eds.) *Constitutionalism and Democracy*, 195–240. Cambridge: Cambridge University Press.

James, H. (1923) *The Constitutional System of Brazil*. Washington, D.C.: Carnegie Institution.

Kant, I. ([1797] 1995) *The Metaphysics of Morals*. Translated by Mary Gregor. Cambridge: Cambridge University Press.

Keefer, P., and Knack, S. (1997) "Why Don't Poor Countries Catch Up? A Cross-National Test of an Institutional Explanation." *Economic Inquiry* 35: 590–602.

Kiwit, D. (1996) "Path Dependence in Technological and Institutional Change: Some Criticisms and Suggestions." *Journal des Economistes et des Etudes Humaines* 7(1): 69–93.

Knack, S., and Keefer, P. (1997) "Does Social Capital Have an Economic Payoff? A Cross-Country Investigation." *Quarterly Journal of Economics* 112: 1251–88.

McGuire, M., and Olson, M. (1996) "The Economics of Autocracy and Majority Rule: The Invisible Hand and the Use of Force." *Journal of Economic Literature* 34(1): 72–96.

Mueller, D. (1996) *Constitutional Democracy*. Oxford: Oxford University Press.

North, D. (1981) *Structure and Change in Economic History*. New York: Norton.

Olson, M. (1965) *The Logic of Collective Action*. Cambridge, Mass.: Harvard University Press.

Olson, M. (1982) *The Rise and Decline of Nations*. New Haven, Conn.: Yale University Press.

Olson, M. (1996) "Big Bills Left on the Sidewalk." *Journal of Economic Perspectives* 10(2): 3–24.

Ordeshook, P.C. (1992) "Constitutional Stability." *Constitutional Political Economy* 3(2): 137–75.
Ostrom, E. (1986) "An Agenda for the Study of Institutions." *Public Choice* 48: 3–25.
Przeworski, A., and Limongi, F. (1993) "Political Regimes and Economic Growth." *Journal of Economic Perspectives* 7(3): 51–69.
Putnam, R. (1993) *Making Democracy Work: Civic Traditions in Modern Italy*. Princeton, N.J.: Princeton University Press.
Rasmusen, E., and Ramseyer, J.M. (1994) "Cheap Bribes and the Corruption Ban: A Coordination Game Among Rational Legislators." *Public Choice* 78: 305–27.
Rosenn, K.S. (1991) "The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation." In K.W. Thompson (ed.) *The U.S. Constitution and the Constitutions of Latin America*, 53–96. Lanham, Md.: University Press of America.
Safford, R. (1987) "Politics, Ideology, and Society." In L. Bethell (ed.) *Spanish America after Independence, c. 1820-c. 1870*, 48–122. Cambridge: Cambridge University Press.
Sunstein, C. (1991) "Constitutionalism, Prosperity, Democracy: Transition in Eastern Europe." *Constitutional Political Economy* 2(3): 371–94.
Sunstein, C. (1993) "The Negative Constitution: Transition in Latin America." In I. Stotzky (ed.) *Transition to Democracy in Latin America: The Role of the Judiciary*, 367–82. Boulder, Colo.: Westview Press.
de Tocqueville, A. ([1840] 1945) *Democracy in America*. New York: Knopf.
Vanossi, J. (1976) "La Influencia de la Constitucion de los Estados Unidos de Norteamerica en la Constitucion de Republica Argentina." *Revista Juridica de San Isidro* 10/11: 73–148.
Voigt, S. (1993) Values, Norms, Institutions, and the Prospects for Economic Growth in Central and Eastern Europe." *Journal des Economistes et des Etudes Humaines* 4(4): 495–529.
Voigt, S. (forthcoming) *Explaining Constitutional Change: Towards a Positive Economic Theory of Constitutions.*
Weber, M. ([1922] 1947) *The Theory of Social and Economic Organization.* Edited by T. Parsons. New York: The Free Press.
Weingast, B. (1993) "Constitutions as Governance Structures: The Political Foundations of Secure Markets." *Journal of Institutional and Theoretical Economics* 149(1): 286–311.
Weingast, B. (1995) "The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development." *Journal of Law, Economics & Organization* 11(1): 1–31
Wohlgemuth, M. (1995). Economic and Political Competition in Neoclassical and Evolutionary Perspective. *Constitutional Political Economy* 6: 71–96.