THE *CALCULUS*: POSTSCRIPT AFTER 25 YEARS

Gordon Tullock

The Neglect of Constitutional Theory and Reform

Before I arrived at the University of Virginia to begin my postdoctoral fellowship, I had had only the slightest of personal contacts with Jim Buchanan. My formal background was not in economics and, indeed, I did not favor welfare economics. Buchanan rather quickly converted me, but I have always been unhappy with the Paretian apparatus. Although I have attempted to invent improvements or replacements for that apparatus, I cannot say that I have been entirely successful.

Because of my background, Buchanan and I had a different approach to our joint work. Specifically, my goal was to understand the government and, if possible, improve its functioning. For me, using economic tools was a way of reaching this larger goal rather than an end in itself. My interest in political exchange was only instrumental. All of this provided a genuine but not large difference in approach. The mild amount of tension between our approaches together with the similarity of our basic perspective contributed to the success of the analysis.

Unlike Buchanan, however, I have been disappointed by the subsequent history of *The Calculus of Consent.* Although it has sold well, been used in classes, and has affected the thinking of many people, there has been almost no further research along the same lines. This is not to say that research in public choice theory has not flourished, but Duncan Black's "median preference theorem" and Anthony Downs's work on information in politics have led to much more research and elaboration than the constitutional perspective of the *Calculus.* Also, my later discovery of rent-seeking (Tullock 1967)

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prompted more articles that directly attempted to apply and expand on the logic of the constitutional perspective than did the *Calculus* itself. The same could be said of Buchanan's "An Economic Theory of Clubs" (1965).

I am not claiming that no one has done any research based on the *Calculus* nor that the "simple constitutional perspective" has not had great influence.[1] But the more elaborate constitutional theory of the book has stimulated almost no research. There has been substantially no work on constitutions per se.

For example, in a recent series of papers Kenneth Shepsle and Barry Weingast (see esp. 1984) attempted to explain the functioning of the House of Representatives in terms of semiconstitutional procedural rules that the House has adopted. These rules, however, are not part of the Constitution, and the authors never really take a reformist perspective. Indeed, they seem to think that these rules are acceptable, even though they do not formally endorse them and do not suggest any improvements. Further, Shepsle and Weingast do not compare the semiconstitutional rules with the rules used by other governmental bodies such as the British legislature. From the time of the first reform act to about 1890, the British legislature used an institutional structure that was completely different from the one the authors describe (incorrectly I think) for the House of Representatives, but as far as I know, neither the authors nor modern public choice scholars have looked into the difference and attempted a comparative evaluation. The real importance of such an evaluation could be as a first step toward developing improved constitutional rules.

In undertaking comparative constitutional studies, a comparison of the Swiss and U.S. constitutions would be a useful starting point. The Swiss constitution is the strongest modern competitor with the U.S. Constitution in terms of promoting stable government by law and a prosperous economy. Although Switzerland has a concentration of public choice scholars, they have done very little work on the differences between the two constitutions. Such studies, with efforts to evaluate performance, would be particularly useful because the 1848 Swiss constitution, which was modeled on the American constitution, has many similarities and certain radical differences. Some Swiss researchers have looked into the impact of using public referenda in Switzerland, but this research is still in its infancy and has

[1]The "simple constitutional perspective," which Buchanan and I introduced in the *Calculus*, consists of explaining the behavior of government by looking at its basic institutions rather than its specific activities.

yielded no conclusive policy proposals either for Switzerland or the United States.

To consider a less significant gap, the German constitution provides for electing a lower legislative house, a compromise between the single-member constituency and proportional representation. So far as I know, no public choice scholar has analyzed its working. This is particularly impressive because the system appears to give considerably more political weight to people whose first preference is a minor party (provided it has at least 5 percent of the electorate) than to those who favor one of the two major parties.[2]

The absence of any reformist drive in the constitutional area is especially noteworthy because the *Calculus* was a reformist book. Perhaps its strongest single implicit recommendation for reform was the switch from simple majority to a reinforced majority in the legislature. In the early days, conventional political scientists regularly denounced us for this proposal. There was even some research that purported to demonstrate that a simple majority was optimal. Today, people are still critical, but they just do not talk about the issue any more.

As the author of the chapter in the book on bicameral legislatures (Chap. 16), I find it notable that it too has had no discernible effect on researchers. In essence, I argued for bicameral legislatures on efficiency grounds and urged that the two houses be elected by radically different methods. Not only has this idea vanished into the memory hole, but the actual trend has been in the opposite direction. The Supreme Court, for example, decided some years after the Constitution had been ratified that although it was all right for the federal government to have a senate that was not elected according to population, it was undemocratic for anyone else to do it. In so doing, they sharply reduced the efficiency of the state legislatures without anybody, except myself, realizing that they had done so.[3] The decision was criticized because it was a pretty cloth-headed thing to do from a constitutional standpoint, but no one mentioned that it would lower efficiency.

As a particularly extreme example, most European Public Choice Society members live in societies that have proportional representation. I prefer this system, but I would really like to see a two-chamber legislature, with one chamber elected by single-member

[2]This is my own deduction and assumes that voters behave strategically. Since I do not read German, the possibility of error is sizable.

[3]The Swedes recently abolished one of their two houses. This was succeeded by rapid governmental growth, which should have astonished no one who had read the *Calculus*.

constituencies and the other by proportional representation.[4] I expected to see a good deal of work comparing the two systems, but it does not yet exist.

But that is not all I had hoped for. There was also opportunity for a good deal of reformist activity in the sense that public choice scholars would propose new and improved ideas for government at the constitutional level and make some efforts to popularize them. The prospect of a few scholars getting a constitutional amendment adopted was unlikely, but we should have begun even if we anticipated no real effects for many years. Keynes's remarks about the role of ideas may be exaggerated, but they are not fundamentally wrong. New ideas invented in the quiet studies of scholars sometimes do change the world.

While I appear to be criticizing the development of constitutional theory since the publication of the *Calculus*, the criticism applies to my own work as well as to others'. I have devoted a good deal of attention to attempting to improve our knowledge of constitutions and somewhat less to propagandizing what we know, but I have been unsuccessful on both fronts.

It may be, then, that the basic reason we have not progressed along the lines I have outlined is that it is very difficult. Certainly I have found it to be hard. But even if the basic reason for the neglect of constitutional theory and reform is very simple, I am not prevented from being disappointed. Given my age, I am decidedly disappointed at the failure of medicine to do very much on "life extension." But I do not blame the doctors for the failure. What I am saying here is that I am disappointed with the lack of development of the ideas in the *Calculus*, but I do not blame anybody for it. I certainly do not feel that I should have devoted more effort to developing our knowledge of public choice and pressing constitutional reforms. As a matter of fact, I have done more research than my publications in this area indicate—a case of a lot of work and little result.

I am inclined to view the *Calculus* as a sport. In all fields of science, an occasional discovery is ahead of its time due to essentially accidental factors. There is apt to be little progress in that field until the rest of science has caught up with it. Steam engines, first built in Alexandria 2,000 years ago, are an example. I hope that the theory of constitutions will be caught up in a general advance with less delay.

[4]Japan actually has something that is a distant relative of this preferred system. I would like to have some Japanese members of the Public Choice Society look into it and decide if it may be one of the reasons they have been so successful.

The Problem of Self-Enforcing Constitutions

Having noted my disappointment with the absence of progress in the constitutional theory and in the reformist application of what we know, I would also say that I am unhappy with the particular reforms that are normally pressed. As originally drawn up in Philadelphia, the Constitution has built into it a short Bill of Rights. Madison was personally opposed to adding the first 10 amendments, which he was forced to sponsor for political reasons. He preferred a government so structured that it was unlikely to trample on liberty rather than devising specific restrictions on that government.

I think Madison's position is the correct one. The view that the government can be bound by specific provisions is naive. Something must enforce those provisions, and whatever it is that enforces them is itself unbound. We have a particularly strong example of this in the history of the Supreme Court since about 1950. The comparative freedom and efficiency with which Americans were governed in the first century and a half of the Constitution depended on the structural characteristics of the Constitution, not on the Bill of Rights.

This raises the basic problem of what I call the "self-enforcing constitution." Granted that we have invented a good constitution, how do we make sure that it will work the way we have written it. The history of the United States shows many deviations from the Founders' vision. The most conspicuous one today is the Supreme Court's arrogation to itself of vastly more power than the Framers intended. How could the constitutional designers have prevented this from happening?

It used to be said that enforcing the Constitution was simple; we could leave it to the Supreme Court. The Framers relied on the amendment process as a way of changing the Constitution in the event that it became out-of-step with the times. In a way, the amendment process was the cause of the Civil War. In *Dred Scott,* Justice Taney had correctly interpreted the Constitution as it was originally written. The problem for the Southern states was the high probability that a Republican abolitionist president would prevent slavery's spread to the West. The Republicans would then admit enough Western states without slavery to permit an amendment abolishing slavery.[5]

The current situation is different. A great many people, including many law professors and at least one Supreme Court justice, argue

[5]It is frequently argued that the actual cause of the Civil War was not slavery, but the economic difference between the manufacturing North and the agricultural South. The problem with this argument is that the Republican party essentially started in the agricultural West.

that it is the duty of the Supreme Court to impose on the people the Constitution as they think it should be, not the Constitution as it was written. In this view, changes in the Constitution are to take place not through the amendment process, but through a change in the views of nine old men. There is, of course, a theory of government advocating that we should be ruled by "the best" instead of by the voter. I do not wish to argue here the merits of that point of view, only that it clearly is not what the Founding Fathers had in mind.

If we design a new constitution, is there some way to guarantee that it will function according to design? For example, during the period of time in which the states were ratifying a constitutional amendment providing that everyone over the age of 18 could vote, the Supreme Court suddenly decided that the Constitution already provided for it. This problem of the self-enforcing constitution has so far evaded solution. The Founding Fathers set up a constitution that remained more or less unchanged for a long time. Indeed, it was not until this century that significant changes were made in the original design.

Changes in the Effective Constitution

There does not appear to be any obvious explanation for this long period of stability, but I believe it was the result of a very strong internal conflict having been built into the Constitution. During the 19th century, for example, the Senate usually rejected treaties negotiated by the executive. This was not a government that could impose its will strongly on any objecting group. Thus, it was generally unable to expand its power, and the states remained the dominant governments in the United States. Due to internal free trade, the states were unable to carry out much in the way of rent-seeking, although they certainly tried.

In my opinion, the basic change occurred because of a quasi-constitutional revision in the terms of employment of the federal bureaucracy. The gradual extension of the Civil Service Act throughout the government from the 1890s to the time of World War I politically changed the balance-of-power within government. This is one of the many cases in which the reform movement at the turn of the century went badly astray. In this case, there was a mix of well-intentioned, well-educated people who did not actually understand either the government or a special interest. In this case, the special interest was composed of existing government employees. The Civil Service System provided examinations for new employees (mainly on irrelevant subjects); but each time the exams were changed or the

system was extended, the existing employees were grandfathered in. The change from a situation where employees were completely subject to their political superiors to one where they could not be easily fired was a great step forward for civil servants.[6]

The results differed from those that the well-intentioned progressives probably intended. Civil servants ceased being dependent on their political superiors, who in turn were dependent on the voters. Further, politicians became partially dependent on the civil servants. They could no longer fire civil servants, but as voters the civil servants might fire the politicians. As a consequence, the politicians became partisans of their nominal employees, and civil servants became an extremely powerful special interest group.

In the early days, this new power had almost no effect on civil servants' job performance, but it did have a great effect on their political activities. The spoilsmen would have been political appointees of whatever political administration happened to be in office at the time. They would probably continue to support that party after they were grandfathered into the civil service, but they were no longer dominated by the politicians because careers were safe. At first, they found it desirable to contribute to political parties and otherwise work for them in order to protect their prospects for promotion. Indeed, it seems likely that the legal restrictions on employees engaging in political activity were largely pushed by the civil servants themselves because it prohibited this unpleasant duty.

Over time the number of civil servants increased. One explanation for this was the political power held by the civil servants, whose "unions" devoted themselves to lobbying rather than to threatening strikes.[7] This may be what has led to the somewhat odd structure of pay of what is now the government's largest single organization. In general, the lower ranking civil servants are overpaid and the people at the top are underpaid. Indeed, Congress has periodically put upper limits on salaries with the result that promotion in the upper ranks does not increase wages. The reason for this restriction is clearly that there are a lot of votes in the lower ranks and very few in the upper ranks.

Thus, I believe that the Civil Service Act was perhaps the largest single change in our "effective constitution" before the efflorescence of the Supreme Court in the 1950s. In a way, the two events are

[6]The reformers who attempted to improve the medical profession by once again grandfathering all existing doctors in and providing examinations for new entrants also greatly benefited existing members of the profession.

[7]The postal workers do both.

coterminus, because the Supreme Court does not seem to have many differences with the Civil Service. In both cases, there has been a sharp aggrandisement of the power of the federal government and a sharp reduction in the power of the states. One way of approaching a study of this matter would be to examine cross-nationally the growth of government and the expansion of the Civil Service.

The Desirability of Comparative Constitutional Study

This brings me back to the desirability of comparing other constitutions. The Founding Fathers did make some comparisons, although the information they had available was quite limited. They knew only about the Athenian Republic, the Roman Republic, their own state governments, and the English government from which they had just revolted.[8] Even though they had this knowledge, it seems likely that the basic structure that we now regard as efficient was accidental. The basic decentralization of the Constitution, that is, the reservation of most governmental activities to the states, came from the very simple straightforward fact that the states already existed and it was necessary to persuade them to voluntarily join the new federal government. The states were unlikely to voluntarily dissolve themselves in order to form a centralized state, although it is quite probable that Hamilton would have been happy with that result.

The diversely selected bicameral legislature was another compromise between the large states that wanted a population-based representation and the small states that wanted each state to be equally represented. It may have been important that a number of the state legislatures already had two chambers.[9] There were not only two houses, but they were also elected by different methods (which, if you accept the argument in the *Calculus*, was an efficiency characteristic). Dividing the government into executive, legislative, and judicial branches was an imitation of English government structure by way of Montesquieu.

The method of electing the President, making that office in many ways a third house of the legislature, is a particularly clear case of accidental constitutional provision. The system never worked in the

[8]Many of them seemed to have learned of the English government through Montesquieu, and it has sometimes been said that the American Constitution is a misunderstanding of Montesquieu's misunderstanding of the British constitution.

[9]In a number of cases the upper chamber was part of the executive branch. For example, in Virginia under the old colonial charter, it functioned rather like England's House of Lords.

way it was originally intended to, and the Constitution was amended to change the process after the 1800 presidential election. It seems likely that those who fashioned this provision of the Constitution intended that the most popular politician in the United States would be President and the second most popular to be Vice-President. If so, their draftsmanship was extremely defective.[10] It is interesting to speculate on what would have happened if the probable intent of this provision had been implemented. It is possible that the two-party system would never have developed, and certainly political partisanship would have been to some extent moderated by the existence of a Vice-President who had actually run against the President.

Although the Swiss adopted key parts of our Constitution, they specifically ruled out judicial review and provided a board rather than one person as the executive. The widespread use of direct voting and the general use of proportional representation made the Swiss constitution quite different from ours, but its basic structure remains very similar.

The main theme of this piece has been the lack of progress along the lines of the *Calculus* since it was written. The 25th anniversary of the book and the 200th anniversary of the Federal Convention in Philadelphia is a good time to both reflect on the past and resolve to do better in the future.

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[10]Providing the same arrangements for numbers of electors but having each one cast a single vote would easily achieve the objective.

COURTS, LEGISLATURES, AND CONSTITUTIONAL MAINTENANCE

Richard E. Wagner

Introduction

Gordon Tullock is certainly correct that several significant areas of research in public choice owe little or nothing to *The Calculus of Consent*. He is also correct that several areas of research suggested by the *Calculus* have attracted little interest from other scholars. Although I would support Tullock's call for more comparative research into constitutional arrangements as well as his lament about the paucity of such scholarship, I do not think his disappointment over the course of scholarly inquiry since publication of the *Calculus* should be very intense.

The *Calculus* was not an encyclopedic survey of a well-developed field of scholarship. Rather, it was a highly original foray into what was a nonexistent field, and no one should be surprised that many developments that subsequently emerged owed little or nothing to the *Calculus*. Yet, it is surely a rare book that can rival the *Calculus* in its influence over a body of scholarship. It was a seminal work in the development of public choice, and even after 25 years it still receives about 50 citations annually. Furthermore, the recent interest in bringing a constitutional focus to bear on questions of political economy can be attributed to the *Calculus*, with its concentration on constitutional principles and their implementation.

Most contemporary thought sees maintenance of a constitutional contract as an *external* process that relies on some specific enforcing agent, usually a court. By contrast, the *Calculus* articulated the logic of a self-enforcing constitution, under which constitutional maintenance is an *internal* process that depends on the incentives contained within the legislature. Tullock is right, I think, to argue that governments cannot be bound externally by specific constitutional provi-

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sions, for the constitution will then be merely what that external authority declares it to be. For this reason, and as James Madison recognized in his negative evaluation of inserting a Bill of Rights into the constitution, there is great merit in pursuing the suggestion made by Tullock and the *Calculus* to look instead to the crafting of institutional arrangements that channel the operation of self-interest within the legislature in a direction that provides automatically for constitutional maintenance.

External Enforcement of Constitutional Contract

The model of the social dilemma, elaborated by both Buchanan (1975) and Tullock (1974), explains the mutual gains from social cooperation that people can achieve by adhering to some form of constitutional contract. But how to limit the scope for post-constitutional opportunism, which would erode those gains, raises the question of how to enforce and maintain the provisions of the constitutional contract. Consider Richard Epstein's (1985) analysis of the Fifth Amendment's limitation that any governmental taking of private property must be for public use and must be accompanied by just compensation. This limit reflects the principle that government should not be an instrument that some people use to enrich themselves by infringing on the rights of others. If two people acting privately cannot legitimately take the property of a third, neither should they be able to do so just because they form a political majority. The Fifth Amendment, if enforced, would prevent people from doing this very thing by acting in the name of government.

Yet, the theory of public choice has elaborated with contemporary analytical techniques what was common knowledge among the founders of our constitutional order: majoritarian democratic processes can, without proper constitutional constraints, easily accommodate the plunder of some for the benefit of others. Some people in a city will own developed property while others will own undeveloped property. Suppose that the owners of the developed property secure a zoning ordinance that restricts the development of the undeveloped property, as illustrated by *Agins v. City of Tiburon.*[1] Not only does the zoning ordinance decrease the value of the undeveloped property, but because it restricts the supply of competitive land, it also increases the value of the developed property. The zoning ordinance enables the owners of the developed property to effectively rob the owners of the undeveloped property, just as surely as

[1]447 U.S. 255 (1980).

the owners of the developed land had forcibly prevented the owners of the undeveloped land from developing their land.

Even though a constitutional contract may be written to prevent some people from using government as a means of plundering others, the maintenance of that contract requires some process of enforcement. The predominant emphasis in constitutional dialogue has been on enforcement through some external, sovereign authority. In contemporary America, that sovereign is generally regarded as the Supreme Court, which is commonly held to be the arbiter of what is constitutional and what is not. Constitutional dialogue accordingly operates through criticism of Court rulings and suggestions for alternative rulings. It also operates through disputes over the selection of justices. Possessing the ability to make and revise the rules of the game is valuable, and the greater that value the larger the investment people will make in trying to select or block particular nominees. It is not surprising that Court nominations have acquired the essential properties of interest-group politics, in that representatives of different interests campaign for the adoption of their preferred candidates.

It is debatable whether or not the Supreme Court is truly sovereign in matters of constitutional interpretation. Although the Court may rule against executive agencies and state governments, it rarely rules against Congress. James Madison was correct in asserting in *Federalist* No. 51: "In republican government, the legislative authority necessarily predominates." Within the central features of American republicanism, the legislature controls both the jurisdiction and the budget of the Supreme Court and has the ability to eliminate all courts inferior to it. And although the President does have the ability to nominate members to the Court, those nominees must be confirmed by the Senate. Furthermore, the President and the executive branch generally cannot act without appropriations from the legislature; and the legislature can fire the President, while at most the President can force the legislature to operate with a two-thirds majority through the veto power.

Unless the Court had an independent source of revenue, and one that somehow varied directly with the degree to which it prevented constitutional erosion, it is hard to see how the suzerainty of the legislature could be disputed. To model the judiciary as an agent of the legislature falls fully within the framework of American republicanism. If the Court is an agent of the legislature, even if some weighted average of past legislatures rather than simply the present legislature, as Landes and Posner (1975) argue, the legislature becomes the principal enforcer or interpreter of the Constitution. This was recognized by James Madison, who thought that constitutional con-

trol was not so much a matter of dividing governmental authority among legislative, executive, and judicial branches as it was a matter of dividing "the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit" (*Federalist* No. 51).

Can "Interpretation" Be Distinguished from "Amendment"?

Is it possible to determine when a particular Court decision represents simply an interpretation of what the constitutional contract requires and when it represents a judicially imposed, though probably legislatively sanctioned, revision or amendment of that contract? With respect to *Agins*, for instance, is it merely a matter of interpretation whether or not the compensation was just and the taking was for a legitimate public use? Or do *Agins* and similar cases exemplify what is in effect an amendment of the Constitution, through which the "constitution" comes to allow the legislature to do whatever it chooses concerning private property unencumbered by any Fifth Amendment obligations, perhaps provided only that it asserts it has some public purpose in doing so? Relatedly, Tullock notes that the Court ruled through "interpretation" that states could not deny people the right to vote at eighteen years of age even before the Twenty-sixth Amendment had been ratified. Is there no test to distinguish acts of interpretation from acts of amendment? Must one person's reasonable interpretation be someone else's (un)constitutional amendment?

It is instructive to compare processes of constitutional enforcement with other processes of rule enforcement, such as those found in organized athletics.[2] The rules of a football game constitute its constitution, and it is the task of the referees to enforce the rules the participants have agreed upon. It is the participants and not the referees who choose the rules. Moreover, the ability to amend the rules is the province of the participants and not the referees. But how are referees, or judges, to be limited to enforcing rules and restrained from making rules, particularly when irreducible elements of judgment can always lead to some blurring through "interpretation" of the conceptually clear distinction between making and enforcing rules? The participants may agree to a rule against unnecessary

[2]Some of the argument presented here is developed more fully in Wagner (1987).

roughness, but whether or not a particular instance of a hit on a quarterback constitutes unnecessary roughness requires the referees to interpret the participants' intent.

Despite the inescapability of interpretation, referees do not make the rules; they only enforce the rules that the participants have agreed to. What maintains the distinction between interpretation and amendment is the *consensual process* by which referees are selected and maintain their positions. Not only are they chosen by the agreement of the participants, but they also are subject to periodic and consensual reaffirmation by the participants. It is the presence of a consensual test involving a periodic reaffirmation of referees that makes it possible to determine if amendment has replaced interpretation. If judges are reaffirmed consensually, it is reasonable to infer that rules are being interpreted but not amended. By contrast, the absence of consensus among the participants would mean that the rules are being amended and property rights redefined for the benefit of some of the participants at the expense of others.

Internal Enforcement of Constitutional Contract

Although the model of the social dilemma illustrates nicely the potential gain that constitutional contract offers, the parchment that constitutional contract represents does not in itself assure maintenance of that contract. The actual process of constitutional interpretation and enforcement differs substantially from the type of process that is consistent with the maintenance of constitutional contract. For one thing, the Supreme Court is not analogous to the officials who work a game. If the members of the Court were selected consensually by the participants and were subject to periodic reaffirmation by the same process, then the Court would possess an analogous position. But the Court is not subject to periodic reaffirmation, and it is certainly not subject to any consensual affirmation by the participants who are asked to abide by its decisions. Indeed, the controversy that often greets Court appointments—along with the growing interest-group campaigning that has entered into lobbying over appointments to the Court—suggests that the Court is not part of a consensual process of rule interpretation, but is a participant in a process of rule amendment via "interpretation."

Within the framework of American republicanism, the Supreme Court has no enduring ability to maintain the constitutional contract, even if its members should wish to take on that assignment. The constitution largely will be what the legislature wants it to be. Therefore, maintenance of the constitutional contract will be possible only

if the legislature is constituted so that the interests of its members are more fully advanced by maintaining that contract than by amending it through legislation, as Madison recognized in *Federalist* No. 51 and elsewhere.

Knut Wicksell developed one of the primary illustrations of a self-enforcing constitution in 1896, although his contribution remained essentially moribund until the *Calculus* was published.[3] Wicksell's point of departure was how to take seriously, and not just formally or tautologically, the injunction that government should reflect the consent of the governed. Wicksell suggested two changes in legislative organization that would work in this direction: the selection of parliament through a system of proportional representation and a requirement that approximate unanimity instead of majority rule be required for the legislature to take action. Within such a legislature the scope for a winning faction to enrich its members at the expense of everyone else would be sharply curtailed, although it could not be fully precluded so long as less than complete unanimity was required and the system of proportional representation failed to reflect fully the various preferences and interests within the population at large.

To the extent that a system of proportional representation led to a legislature that was representative of the citizenry at large, approximate unanimity among legislators would correspond to approximate unanimity among the citizenry. It is very different with a system of single-member constituencies, where it is possible to secure unanimity within a legislature with the support of only a bare majority of citizens. When the legislature requires only majority approval, legislation comes to reflect even less of a consensus among the citizenry at large. Accordingly, the constitution would not serve as a limit on government, but would be something that government continually amended via a process of constitutional interpretation. Consequently, government would not be a follower of rules, as is envisioned by the models of constitutional political economy and by the very idea of constitutional government, but would be a maker of rules, as expressed by the proposition: The legislature can do no wrong, because it is the source of rights.

Parchment may cover guns, but guns can blow away parchment. Constitutional parchment cannot enforce itself; enforcement always requires guns. Whether enforcement maintains the original constitutional contract or replaces it depends on the arrangement of guns

[3]The relationship between Wicksell and *The Calculus of Consent* is explored in Wagner (forthcoming).

or interests. The more fully institutional arrangements point guns toward the enforcement of the original contract, the more likely it is that the contract will be maintained. The idea of the self-enforcing constitution looks to the creation of institutional arrangements that make it unlikely that the constitution will be violated. The *Calculus* has done much to breathe life into the idea of a self-enforcing constitution, by redeveloping with contemporary modes of thinking some of the central insights that were pivotal to the creation of the American constitutional order.

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