INTRODUCTION

GOVERNMENT, THE ECONOMY, AND THE CONSTITUTION

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> If industry and labor are left to take their own course, they will generally be directed to those objects which are the most productive, and this in a more certain and direct manner than the wisdom of the most enlightened Legislature could point out. . . . [A]ll are benefited by exchange, and the less this exchange is cramped by Government, the greater are the proportions of benefit to each.
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> —James Madison[1]

Public Choice and the Constitution

The major question addressed by the Framers of the U.S. Constitution—particularly James Madison, who Robert Rutland (1987) has called "The Founding Father"—was how best to secure individual rights while providing for republican government. In choosing a *constitutional* democracy, Madison and the other Framers recognized the benefits of a rule of law. Such a rule would protect property, broadly conceived, and in so doing allow the principle of voluntary exchange, or what James Buchanan (1983, p. 8) has called the "principle of spontaneous order," to facilitate social coordination and generate mutually beneficial gains from trade.

The modern public choice school and its founding fathers, James Buchanan and Gordon Tullock, have shifted attention from the narrow economic problem of selecting the best means to attain a given end to the problem of classical political economy, namely, selecting from among alternative rules those that best set the framework for the emergence of a spontaneous market order, which will increase rather than diminish individual and social wealth.

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[1]Speech in First Congress, 9 April 1789; cited in Padover (1953, pp. 269–70).

Public choice theory rejects the organic view of the state, accepts the methodological individualism of the market paradigm, and models "politics as exchange." Individuals are assumed to be rationally self-interested both in their private and public choices. The "public choice perspective," according to Buchanan (1983), is essentially a "constitutional perspective," since it emphasizes the rules or constraints shaping individual incentives and behavior, and the process of coordination under alternative rules. In Buchanan's words (1983, pp. 10–11):

> The *constitutional* perspective . . . emerges naturally from the politics-as-exchange paradigm or research program. To improve politics, it is necessary to improve or reform the *rules*, the framework within which the game of politics is played. There is no suggestion that improvement lies in the selection of morally superior agents, who will use their powers in some "public interest." . . . [T]he public choice perspective leads directly to attention and emphasis on rules, on constitutions, on constitutional choice, on choice among rules.

The problem of public choice thus becomes one of constitutional choice, that is, of finding the set of rules that will provide mutually beneficial *political* exchanges analogous to the operation of the principle of spontaneous order in the context of private choice. The roots of the public choice perspective therefore go directly to the constitutional vision of Madison and the Framers. As Buchanan (1983, p. 14) notes:

> When persons are modelled as self-interested in politics, as in other aspects of their behavior, the constitutional challenge becomes one of constructing and designing framework institutions or rules that will, to the maximum extent possible, limit the exercise of such interest in exploitative ways and direct such interest to furtherance of the general interest. It is not surprising, therefore, to discover the roots of a public choice perspective . . . in the writings of the American Founders, and most notably in James Madison's contributions to *The Federalist Papers*.

With the 25th anniversary of *The Calculus of Consent* (1962) and the bicentennial of the U.S. Constitution, it is an opportune time to reconsider the economics and politics of constitutional choice, and the effect of that choice on individual rights and freedom. The first eight papers in this volume address the problem of constitutional choice, broadly understood, and are the product of the Third Annual Critical Issues Symposium, "Government, the Economy, and the Constitution," sponsored by the **Florida State University Policy Sciences Program**, March 5–7, 1987. By reexamining the "logical foun-

dations of constitutional democracy"—the subject of the *Calculus*—and the interrelationship of the state, the market, and the constitutional order, these papers will help shed light on what Buchanan (1987, p. 250) sees as "the continuing question of social order," namely: "How can we live together in peace, prosperity, and harmony, while retaining our liberties as autonomous individuals who can, and must, create our own values?" Moreover, by improving our understanding of what F. A. Hayek (1960) has called "the constitution of liberty," these papers will help pave the way for meaningful constitutional reform.

The Logic of Constitutional Choice

Writing over three decades ago, Rutledge Vining (1956, p. 11) emphasized that "every economic problem can be regarded as a problem of finding an optimum set of rules of action," or more fundamentally, "how different rules of action would work out" in repetitive trials. The interesting economic problem for Vining, as for Buchanan and Tullock, is not the problem of allocating scarce means to achieve a well-defined end, but rather the problem of social organization, that is, "the problem of finding a better-working system of rules" (p. 14). This is the problem of political economy, and unlike the allocative problem confronting the individual consumer or firm, Vining (p. 15) notes that the problem of rule selection is a problem of collective or constitutional choice requiring "popular understanding" and "the joint action of all the members of the society." In making a constitutional choice, or a choice among alternative systems of rules, Vining (p. 18) observes that "the members of the society must reach a consensus"; thus, "the technical problem . . . is that of facilitating the social inter-action and communication leading to a consensus." The maximization model applied to the narrow allocation problem will not easily fit here because, as Vining (p. 18) points out, "There being no end for which the society is a means, there is no defined criterion which technicians can apply to designate an 'optimum' system." Consensus itself is the only reliable guide to the value of constitutional change.

Vining's view of the economic system as "a system of legislative constraints upon individual action" (p. 14) and his insistence that the relevant problem facing policymakers is that of selecting better rules for social and economic coordination are shared by Buchanan and Tullock in the *Calculus*.[2] Moreover, like Vining (see pp. 18–20),

[2]Reflecting on Vining's influence, Buchanan and Tullock (1962, p. 210) state: "[T]he fact that policy-makers always choose among organizational rules and not among 'allo-

Buchanan and Tullock accept universal consent as the appropriate criterion for determining whether a change in the "rules of the game" will be socially beneficial. Likewise, they afford individual freedom a central role in their normative theory of constitutional choice.[3] In particular, Buchanan and Tullock advance the idea that under the condition of individual freedom and behind a "veil of uncertainty," rational, utility-maximizing individuals will agree to constrain themselves by accepting a set of rules (a "constitution") delimiting certain actions (such as the taking of private property without compensation) in order to increase long-run stability (predictability) of the economic, political, and social system. For them, "it is rational to *have a constitution*," that is, "for the individual to choose more than one decision-making rule for collective choice-making" (1962, p. 81). Indeed, Buchanan and Tullock (p. 305) expect something close to the constitutional democracy chosen by the Framers to emerge from their "economic approach" to constitutional choice. Weighing the costs of alternative rules, individuals voluntarily submit themselves to a rule of law at the level of constitutional choice because there are gains from this political exchange, just as there are gains from free trade.

The unanimity rule plays a unique role in constitutional choice and is adopted by Buchanan and Tullock as the norm for justifying constitutional change. Accordingly, they write: "Only if a specific

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cations' is often forcefully made by Professor Rutledge Vining. Our discussion of the constitutional calculus makes Vining's criticism of the orthodox or standard discussion of policy norms quite meaningful."

[3]Vining (1956, pp. 18–20) notes that individual freedom is an essential assumption of classical political economy—and hence of constitutional choice. The acceptance of this assumption implies that each individual has an implicit obligation to respect the equal freedom of others. According to Vining (pp. 18–19):

> To be free to act as one chooses and at the same time to recognize the freedom of others to do likewise can only mean that all participate equally in setting the constraints upon individual action. For no one is free unless all abide by the rules of conduct which all can be brought to accept as appropriate constraints upon individual action. . . . To require of each individual that he takes no action which impairs the freedom of any other individual is to accept the moral principle that no individual should treat another simply as a means to an end. Each individual chooses the rules and principles for the guidance of his conduct, but he does so under the general principle that no rule of action will be adopted which could not be universally adopted by all individuals. . . . Hence, when we think of a free and rational individual we do not envisage an individual unconstrained by law but rather an individual who acts in accordance with rules of conduct he has chosen. . . . [These] ideas . . . were presented as implications of the concept of individual freedom at about the time this nation was formed; and the political structure of the U.S.A. reflects this conception of freedom and rationality.

The upshot of Vining's argument is that a legitimate constitution requires consensus and hence freedom of choice (cf. Pilon 1981).

constitutional change can be shown to be in the interest of all parties shall we judge such a change to be an 'improvement.' " (p. 14). In accepting the unanimity rule as a justificatory criterion for constitutional choice, Buchanan and Tullock follow in the footsteps of their predecessor Knut Wicksell, who in looking at the narrower problem of determining tax shares for specific spending programs argued that justice requires unanimous consent. "In the final analysis," wrote Wicksell ([1896] 1958, p. 90), "unanimity and fully voluntary consent in the making of decisions provide the only certain and palpable guarantee against injustice in tax distribution."

What Buchanan and Tullock did was to extend Wicksell's "just principle of taxation" to encompass constitutional choice, and in so doing changed the way in which economists and political scientists view the relationship between economics and politics.[4] By placing the Wicksellian unanimity rule at the heart of constitutional choice, Buchanan and Tullock dethroned the majority rule, showing that it had no unique position in the logic of constitutional choice (see p. 81). Moreover, they made it clear that if majoritarian impulses were not held in check by constitutional limits on the power of government, private rights would be eroded by rent-seeking activity, a danger well understood by the Framers.

Applying their economic approach to constitutional choice, Buchanan and Tullock (p. 88) argue that in the absence of decisionmaking costs, the unanimity rule is the only rule that would minimize the external costs of collective choice to each individual. Moreover, like Wicksell, they argue that "full consensus . . . among all members of the social group seems . . . to be the only conceivable test of the 'rightness' of the choices made" (p. 250). Regarding the place of majority rule in a constitutional setting, they state: "[The] postulated unanimity rule for ultimate constitutional decisions allows us to divorce much of our analysis from the long and continuing debate concerning the validity of majority-rule as an absolute doctrine of popular sovereignty" (p. 250).

Buchanan and Tullock adhere to the unanimity rule as a normative criterion for social choice, but in introducing collective decisionmaking costs find that their "costs approach" to social choice yields a variety of rules for collective action, including majority rule. Rational individuals at the level of constitutional choice will accept less than

[4]See Buchanan's Nobel Prize lecture (1987), in which he acknowledged the strong influence Wicksell had on his general approach to economics as constitutional choice, particularly in the *Calculus*. Buchanan notes (p. 248, n. 2): "In my own retrospective interpretation, the shift of the Wicksellian construction to the constitutional stage of choice was the most important contribution in *The Calculus of Consent*."

unanimous consent for post-constitutional, operational decisions in order to minimize the present value of the expected costs of government.[5] Expediency, not principle, moves individuals to opt for less than unanimity in the post-constitutional state.[6] Rules other than unanimity "will be rationally chosen," argue Buchanan and Tullock (p. 96), "not because they will produce 'better' collective decisions (they will not), but rather because, on balance, the sheer weight of the costs involved in reaching decisions unanimously dictates some departure from the 'ideal' rule." Again, commenting on the place of majority rule, they write (p. 96):

> Many scholars seem to have overlooked the central place that the unanimity rule must occupy in any normative theory of democratic government. We have witnessed an inversion whereby . . . majority rule has been elevated to the status which the unanimity rule should occupy. At best, majority rule should be viewed as one among many practical expedients made necessary by the costs of securing widespread agreement on political issues when individual and group interests diverge.

An important implication of Buchanan and Tullock's economic theory of constitutional choice is that as individuals move away from unanimity and toward a less inclusive rule for collective choice, such as simple majority, decisionmaking costs decrease; yet, at the same time, there is an increase in the risk that individual rights will be attenuated (p. 72). Thus, Buchanan and Tullock argue that in those cases where the *external costs* to an individual from collective action are likely to be large—as in the area of personal and property rights—relative to the decisionmaking costs, the rational individual will require unanimity or near-unanimity before binding himself at the constitutional level (see pp. 71–74, 82). To wit, in cases where an

[5]When both the external costs and decisionmaking costs to the individual are taken into account, rational constitutional calculus dictates that each individual "*minimize* the present value of the expected costs that he must suffer. He will do so by minimizing the *sum* of the expected external costs and expected decision-making costs" (Buchanan and Tullock 1962, p. 70).

[6]Cf. Vining (1956, p. 19, n. 1) on the question of expediency versus principle in constitutional choice:

> Is a majority vote to be interpreted as an expression of 'consensus'? The answer to this . . . question is clearly no. The majority rule is no more than a device constituting a part of a political procedure which is accepted by the individual. There is no implication that he accepts as right and just a particular law which results from a particular application of this device. It is understood that the resulting law is only tentative, that the search for consensus continues, that the rule will be applied to proposed revisions of the law at the next opportunity, and that the joint action taken was expedient action rather than necessarily right. The individual accepts the political procedure for seeking a consensus and by implication the results which may be observed at any particular point in time.

individual recognizes that collective action may impose large external costs on him by attenuating his property rights, "he will tend to place a high value on the attainment of his consent, and he may be quite willing to undergo substantial decision-making costs in order to insure that he will, in fact, be reasonably protected against confiscation" (Buchanan and Tullock, p. 74). This implication is certainly supported by the Framers' decision to remove what they considered "natural rights"—rights to life, liberty, and property—from the democratic process so that majority rule would not undermine individual freedom.[7]

In sum, the logic of constitutional choice is at base the logic of voluntary exchange; and like private choice, the collective choices made at the constitutional level are to be judged by their consistency with the rule of universal consent. To the extent individual freedom is attenuated, constitutional choice will be nonoptimal from the viewpoint of the individuals constrained by it. In a world of positive collective decisionmaking costs, individuals are likely to adopt an array of rules for social choice. Consequently, the Framers' choice of a constitutional democracy is fully compatible with the public choice/constitutional perspective of the *Calculus of Consent*.

The logic of constitutional choice is further examined in this volume by James Buchanan, Gordon Tullock, Dwight Lee, and Thomas Dye. Buchanan and Tullock take a retrospective view of the *Calculus*, reexamining some of its major themes and its impact on constitutional theory and reform; Lee explores the relationship between constitutional democracy and capitalism; and Dye examines the political nature of constitutional choice.

Constitutional Democracy and the Calculus of Consent

In his paper, *James Buchanan* compares the public choice/constitutional perspective of the *Calculus* to the early work of social choice theorists such as Kenneth Arrow (1951), Duncan Black (1958), and Anthony Downs (1957), and to the orthodox views of political scientists and others in order to highlight the significance of his and Tullock's pioneering work. The distinctive feature of the *Calculus*,

[7]Cf. West Virginia State Board of Education v. Barnette (319 U.S. 624, 638 [1943]), where the majority held:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

according to Buchanan, is that it was the first attempt to treat politics as exchange within the framework of utility maximization at the level of individual constitutional choice; and this novel economic approach to social choice differed from prevailing models by using the "individualistic calculus" of *consent* as a justificatory criterion for evaluating alternative rules for collective action. As such, the *Calculus* shifted attention from the problems of instability and inconsistency inherent in majority rule to the problem of explaining the rationale for collective action and evaluating rules for collective decisionmaking using the unanimity rule as a benchmark, since that is the only rule consistent with individual freedom.

Buchanan notes the importance of the thought of Wicksell and Vining in shaping his ideas, especially in the use of methodological individualism, the extension of the principle of exchange to politics, and in the replacement of majority rule by unanimous consent in developing a logic of constitutional choice. In the *Calculus,* Buchanan and Tullock were interested in protecting individual rights against the state, and constructed an "economic theory of constitutions" showing why rational individuals have an incentive to move toward a constitutional democracy. It was in providing a logical foundation for constitutional choice, based on several key economic principles, that the *Calculus* established itself as a classic work in the field of constitutional economics. One other important innovation in that work was the introduction of the "veil of uncertainty" concept, which Buchanan notes is similar to John Rawls's (1971) "veil of ignorance" concept; the difference being that Buchanan and Tullock used their concept in a generalized fashion to rule out certain outcomes in the choice of collective decisionmaking rules, whereas Rawls used his concept to generate specific rules of justice (wrongly so, in Buchanan's opinion).

Although there have been some shifts to the public choice/constitutional perspective, the view of "politics as pure conflict" and "politics as the quest for truth and light," observes Buchanan, is still widely held. What is needed, he argues, is better understanding of the interconnectedness of "the institutions of voluntary exchange, the choice among constitutional rules, and the operations of ordinary politics within such rules"—and hence a return to the "social contract tradition" of the Framers.

Gordon Tullock, in his paper, points to the dearth of new research in the areas of constitutional theory and constitutional reform. In particular, he would like to see more comparative constitutional studies and additional work on how existing rules for collective

choice can be improved. The problems of rent seeking and the "self-enforcing constitution" continue to plague the United States and other constitutional democracies. In his opinion, there really has been no satisfactory explanation of the demise of the Framers' Constitution, the dramatic increase in the power of the federal government relative to the states, and the emergence of the welfare state. Tullock, however, pinpoints two likely sources: the rise of the modern civil service as a strong special interest group and the Supreme Court's increased power to change the effective constitution without the consent of either Congress or the public. The result has been a growth in the federal government's power far beyond that envisioned by the Framers.

To stem the growth of the federal government's power and the redistributive state, Tullock suggests changing the incentive structure within government so that self-interested politicians will have an incentive to limit their predatory behavior. One possibility is to move toward a greater use of super-majority voting rules and hence toward consensus in making fiscal choices. This would require amending the Constitution. However, if the logic of the *Calculus* is correct, the rising costs of government and the increasing public debt should provide strong incentives for reaching a consensus on meaningful constitutional reform, permitting the amendment process to go forward. That so little progress has occurred in the areas of constitutional theory and reform over the last 25 years is disappointing to Tullock, but this only means that Madison's work has yet to be fully done, and that the logic of constitutional choice needs to be more fully applied.[8]

Capitalism and the Constitution of Liberty

Although there is no explicit discussion of capitalism or its relation to constitutional order in the *Calculus*, whose purpose was to look at the "*political* organization of a society of free men" (1962, p. v),

[8]One recent proposal for constitutional reform, which takes the public choice/constitutional perspective into mind, is William Niskanen's (1988b) recommendation for amending the Constitution so as to constrain the growth of government. His proposed amendment would require a super-majority on bills calling for increases in the federal government's taxing and borrowing powers. The proposed amendment is clear and simple, and encompasses the following four points: (1) "Congress may not increase the limit on the public debt of the United States without the approval by two-thirds of the total members of each House of a bill addressed solely to this subject"; (2) "Congress may not levy a new tax or increase the rate or base of an existing tax without the approval by two-thirds of the total members of each House"; (3) "The provisions of this article shall be suspended during any fiscal year during which a declaration of war is in effect"; and (4) "This article is effective beginning with the second fiscal year after ratification."

Dwight Lee holds that a better appreciation of the market system can be gained from studying the logic of constitutional choice. In his paper, he brings out the close ties between politics and economics, noting that "Every economy is a political economy and it is impossible to understand an economic system without taking into consideration the political environment within which that system operates."

Since the principle of voluntary exchange (unanimous consent) rests at the core of a market system, a constitutional order based on the same principle reinforces the logic of the market. Moreover, under a stable rule of law protecting private property and freedom of contract, individuals will have the freedom of choice necessary for the smooth operation of a market price system. As such, there is a close connection between capitalism and the "constitution of liberty." Lee discusses these ideas and remarks that without effective constraints on government power, and hence on majority rule, the political stability necessary for an effective capitalist economic order will be absent. Government intervention and rent seeking will then distort relative prices and upset the process of social and economic coordination. Lee's point is simply that markets operate best when government is least intrusive and therefore assumes primarily a protective rather than a redistributive role.

For Lee, it is largely immaterial whether the Framers intended to promote a capitalist economic order.[9] What is important is that they sought to limit the coercive power of government, and in so doing set the basis for a viable market order.[10] As long as there are effective constraints on government's predatory activities, argues Lee, the free market system will flourish, regardless of the Framers' original intent concerning the market order. Conversely, Lee cautions that as the property foundations of the market economy are weakened by extralegal changes in the effective constitution (that is, changes occurring outside the formal amendment process), the capitalist order itself will languish as an engine for wealth creation. In his opinion, "We would be better served if our current crop of politicians were less involved in 'promoting' capitalism and more involved in limiting the scope of government."

[9]Whether the Framers intended a capitalist system is uncertain, though probable—given their familiarity with, and general acceptance of, classical political economy. See, for example, Madison's quote at the beginning of the paper; see also Dorn (1988, pp. 87–92).

[10]Cf. Niskanan (1988a, p. xii): "The Framers may not have shared a common vision about the economic system. There should be no doubt, however, that the Constitution was designed to provide a strong but limited federal role, free trade among the states, and the security of private property—however the intent of the Framers may have been changed by subsequent interpretation."

The Political Nature of Constitutional Choice

Thomas Dye, in his paper, expresses the view that although we have acquired an understanding of the "*logic* of collective choice," there is still much to learn about the "*politics* of collective choice." The interesting question for Dye, and one that has not in his opinion been sufficiently explored by the *Calculus,* is: What factors shape an individual's decision regarding collectivization? Although he appreciates the usefulness of Buchanan and Tullock's "cost approach to collective action" and the power of the utility maximization postulate in explaining constitutional choice, he nonetheless argues that the choice between private and collective action—that is, between organizing decisionmaking along the lines of the market or the state—is at bottom a "*political* choice" shaped by a complexity of factors, not solely individual self-interest. Among the factors that need to be examined, Dye lists the public's perception of justice, fairness, and equality as being of major importance. In particular, changes in popular conceptions of justice can affect the collective choice between market and government organization.

From a real world perspective, Dye also questions the emphasis public choice economists place on rational individual consent as the basis for constitutional choice. While he sees consent as a legitimate moral principle by which to judge collective action, Dye observes that in reality "political economies" are not the product of a consensual process. Social contract theory, says Dye, was never intended to serve as a practical guide for collective decisionmaking but rather as a moral principle to evaluate the legitimacy of government action. Thus, Dye reiterates his opinion that public choice theory can carry one only so far in understanding constitutional choice.

As a political scientist, Dye is interested in how public opinion on basic constitutional questions is shaped. Surveys show that individuals use different criteria to evaluate the market (private choice) and the government (public choice). Individuals tend to think in terms of self-interest when they judge the market, notes Dye, but in terms of the public interest when they judge government, which after all is an institution for collective choice. People's perceptions are important, observes Dye, because if individuals view the market as unjust, political choices will be made that replace the voluntary market system with increased collectivization, fueling a welfare state that is less efficient at producing wealth. This, of course, has been the experience of postwar democratic governments, and it is the dynamics of this political process and the "political foundations of market economics" that need further investigation, according to Dye.

Public choice theory, argues Dye, can help shed light on collective decisions regarding the role of the market and the state, because the assumption of rational self-interest describes a powerful force driving human action. But in his opinion, it is wrong to focus exclusively on self-interest as the prime mover in collective choice. He therefore calls for "research into the wide range of human motivations that shape societies," with the hope that this will improve our understanding of the political aspects of constitutional choice.

Constitutional Protection of Economic Liberties

Peter Aranson examines the role of the federal judiciary, especially the Supreme Court, in protecting economic liberties. He argues that the Framers provided both procedural and substantive safeguards against the erosion of economic rights. Indeed, for roughly the first 150 years following ratification, the Constitution's provisions for limiting government and protecting economic rights pertaining to property, contracts, and commerce worked reasonably well in constraining the redistributive state.[11] In the last 50 years, however, the Framers' vision of the Constitution as a "charter for limited government" has been blurred by an activist legislature and a Supreme Court unwilling to apply judicial review to cases involving attenuation of economic rights; and with the demise of substantive economic due process, members of Congress have been free to enact virtually any economic and social legislation they wish as long as it is deemed in the "public interest."[12]

Aranson traces the Court's failure to act as an effective bulwark against legislative activism in the area of economic rights to its failure to correctly interpret the economic provisions of the original Constitution and Bill of Rights, as well as to its failure to appreciate the

[11]For a discussion of the rise of the redistributive state, see Dorn (1986, and the references therein). Using *Munn v. Illinois* (94 U.S. 126 [1877]) as a watershed, Niskanen (1985, pp. 3–4) argues convincingly that "for nearly a century after the Constitution was ratified, as prescribed, by a unanimity of the states, there was relatively little controversy about the limits on federal powers and only a small amount of transfers consistent with the enumerated powers." The watershed chosen for the 150-year period is *West Coast Hotel Co. v. Parrish* (300 U.S. 379 [1937]), which marked the end of substantive economic due process (see Dorn 1987, p. 5).

[12]See, for example, Epstein (1984, 1985a), Pilon (1985), and Siegan (1980). Epstein (1984) notes:

> In economic matters too, the judicial surrender to legislative faction diverts resources from the production of wealth to the transfer of wealth. It promotes political division that threatens the economic foundations of a stable, free and democratic society. The connection between politics and markets, so well understood by the Founding Fathers, has been all but fogotten today.

perversities of the democratic process, as it is driven by majority rule and special interests. In his paper, he examines the shortcomings of the three major judicial approaches to constitutional interpretation as they relate to economic liberties and argues for a return to the principles of justice that guided the Framers, and hence to the effective Constitution that was meant to safeguard individual property rights against rampant majoritarianism as well as organized interests. His view is therefore similar to the "constitutional perspective" of Buchanan and Tullock, and to the "*principled* judicial activism" position of Richard Epstein (1985a, 1985b) and Stephen Macedo (1986).

According to Aranson, the three dominant views of the constitution—the interpretivist view, the noninterpretivist view, and the proceduralist view—have all failed to prevent the attenuation of economic rights, as understood by the Framers. The rent-seeking process has not been stemmed by any of these three approaches to constitutional interpretation: the interpretivist view places undue weight on the majoritarian process; the noninterpretivist view turns the Court into an activist policymaking body; and the proceduralist view, while it occasionally protects minorities against majorities, does nothing to protect majorities against organized interest groups. As such, Aranson finds that all three theories miss the mark: each lacks a constitutional vision that connects up directly with the procedural and substantive protections inherent in the Framers' Constitution.

In contrast to the conventional approaches to judicial interpretation of economic rights, Aranson would neither overextend majoritarianism nor bend the Constitution to create new "rights" that give special interests privileged positions vis-à-vis the majority. Instead, as a "principled interpretivist," he would have the Court look to the Framers' Constitution, which affords equal protection to economic and noneconomic rights, and thus secure the equal rights of each individual to his life, liberty, and property. Although these rights precede the state and are inherent in the "higher-law" background of the Constitution (see Dorn 1988), Aranson looks to the document itself and argues that it is clear that the Framers sought to limit government and protect the property right. The Court's duty, therefore, is to provide *substantive* protection to economic liberties and in so doing restore what Niskanen (1988a) has called the "economic constitution." Economic liberties would then be taken out of the political arena and again be afforded their status as fundamental civil rights.[13]

[13]Siegan (1985, p. 289) writes: "The most important civil rights for the framers of the

With equality under the "law of liberty," enforced by a vigilant Supreme Court, both the rights of minorities and majorities would be protected from erosion by the political branches of government. For Aranson, then, "The time has come for the Court to recognize the Constitution's full protection of economic liberties." If the Court fails in this constitutional and moral duty, either by excessive restraint or excessive (unprincipled) activism, both economic and noneconomic rights will be jeopardized with the further growth of the redistributive state.

Extending the Market Model: The Case for Federalism

It is a well-known proposition in microeconomics that under certain conditions competition is socially beneficial in directing resources to their highest-valued uses. Moreover, Hayek (1945, 1946, 1968) has shown that when viewed in terms of a process for the discovery and transmission of useful information, the competitive market process performs a coordinating function that cannot be duplicated by governmental planning. In Hayek's view, the relevant notion of competition is not the textbook ideal of perfect competition but rather the procedural view; and the test of a competitive market *process* is open entry, not the entire package of conditions required for perfect competition. With private property rights and open markets, relative prices can perform their information and incentive functions to successfully coordinate individual plans and efficiently allocate resources to satisfy the consumers' preferences. When Hayek's procedural model of market competition is transferred to the political model of federalism, interesting implications can be drawn about the federalist system as an integral part of constitutional democracy.

In his paper, *Robert Bish* uses the "logic of market economics to understand federalism," and offers proposals for improving it. He finds various similarities between the political model of federalism and the paradigm of market exchange: both accept self-interest as an important force motivating individual action; both recognize the information costs associated with exchange; both emphasize the socially beneficial role of competition in coordinating individual plans and in satisfying individual preferences; both point to the inefficiency of monopoly; and both recognize that individual rights and wealth creation will be enhanced by constraining predation

original Constitution, the Bill of Rights, and the Fourteenth Amendment were those of life, liberty, and property. Contemporary Supreme Court policy largely ignores this understanding with respect to the last item of this trilogy."

through enforcing "rules of the game." Introducing greater competition in the federalist system, as in the case of "contracting-out," argues Bish, will help promote efficiency in government by reducing the potential for collusion and help preserve the foundations of constitutional democracy.

Bish therefore sees the major benefit of a federalist system in its ability to stimulate competitive pressures within government and to provide taxpayers with greater freedom of choice than if the national government had a monopoly on the provision of all public goods. In his opinion, political self-interest, like private self-interest, is best harnessed and directed toward the well-being of taxpayers and consumers by allowing open entry. It is only when property rights are not well-defined and private transactions costs are prohibitive that the competitive market process "fails" in promoting efficient resource usage. Bish, however, recognizes that government itself operates within a common property regime and that "federal systems do not generally produce as much price information as do private markets." The problem is to change the incentive structure within government in order to encourage behavior that is consistent with individual taxpayer/voter preferences. Federalism as a form of political competition helps serve this function.[14]

Bish also discusses fiscal federalism and suggests that it can be reconciled with the market-oriented political theory of federalism once it is recognized that the theory of public goods can be applied to governmental activities as well as functions. The main point of the paper, however, is quite simple: a better understanding of market economics, especially the role of competition, will improve our ability to reform the federalist system in a socially productive way.

Freedom and Fairness: A Constitutional Perspective

Richard Stroup examines the correspondence between freedom and fairness within an institutional setting characterized by private enterprise and constitutional democracy. He argues that individual freedom is best secured when the coercive power of government is limited to the protection of persons and property; and that fairness is best achieved under a stable government by law and a competitive

[14]In thinking of devices to increase efficiency within government, it is useful to pose the following question as formulated by Roland McKean (1972, p. 177): "What do these devices do to the property rights or appropriability of rewards—and therefore to the 'incentives'—of individual officials in government?" His answer is instructive: "If a device has little impact on appropriability, one should not expect dramatic impacts on behavior and decisions." See also McKean (1965) on the relationship between political competition and market competition.

market process in which individuals are free to pursue their interests as long as they respect the equal rights of others. In particular, a free market system, in which individuals can capture the rewards of productive activities but bear the costs of unproductive activities, will spur economic growth as entrepreneurs search for new opportunities to engage in mutually beneficial exchange. In the process, lower-income households will benefit as well as higher-income households. Thus, if fairness is viewed both in terms of equality under the law and as an improvement in the well-being of lower-income households, a system of limited government and open markets, argues Stroup, can be viewed as both free and fair. Furthermore, experience shows that an economic system characterized by private property rights, freedom of contract, and widespread reliance on voluntary exchange is more likely to meet these criteria of fairness than a politically directed welfare state.

Stroup uses this line of argument, and the fact that government redistributive programs have often been directed more at those with political power than at lower-income households, to caution against overreliance on government transfers to help the poor. Indeed, he notes that massive welfare programs have not really helped the poor. The most successful weapon against poverty has been economic growth, not the tax and transfer programs that have characterized the welfare state. Thus, on grounds of both freedom and fairness, Stroup sees a system based on constitutional protection against direct and indirect takings outperforming the redistributive state.

The Public Trust and the Private Domain

The central question of a constitutional democracy is: What should be the split between the public and private domains? *Richard Epstein* addresses this question and presents a unified theory of property in his pathbreaking paper on the public trust doctrine. Having laid out an eminent domain theory of when it is justified to take private property for public use in his recent book *Takings: Private Property and the Power of Eminent Domain* (1985c), Epstein now proceeds to extend his analysis by resolving the problem of when it is justified to transfer public property to the private domain. In exploring these property rights issues, of course, Epstein is at the same time laying ground rules for state action: when the state can and cannot change the status quo; when it is legitimate to take private or public property and when it is not.

In his 1985 book, Epstein found that the vast majority of so-called regulatory takings have been illegitimate. He now establishes the

conditions under which it would be illegitimate to move property from the public to the private domain. To resolve this problem of the public trust, Epstein discusses the rules of original acquisition and the rules of transfer. With respect to the latter, the principle of voluntary exchange is of crucial importance, since free trade implies mutual gains. Yet, multi-party transactions in the *public domain* require further scrutiny. With respect to the question of acquisition, Epstein argues that in the "original position" (prior to government), there will be some mix between unowned property and property held in common. To determine this mix, Epstein applies the following rule: "Property should be subject to that form of ownership that minimizes the bargaining problems associated with moving the asset to its highest-valued use." In most cases, this rule and that of first possession will lead to private ownership, but in other cases, for example, navigable waterways, the holdout problem and prohibitive private bargaining costs will exclude first possession and lead to common property ownership. Simply stated, Epstein's rule for determining the ownership mix in the original position is to "choose that form of ownership that minimizes the expected number of bargaining breakdowns."

On the question of privatization, Epstein views the public trust doctrine as the "mirror image" of the eminent domain clause and argues, "No *public* property may be transferred to *private use*, without just compensation." The compensation test is necessary to help ensure that such transfers will move public property to higher-valued uses. To minimize the chance of a mistaken transfer, Epstein recommends public hearings and competitive auctions; and the compensation must be "payable to the public at large."

In searching for a constitutional basis for the public trust doctrine, Epstein points to Justice Field's elusive opinion in *Illinois Central Railroad v. Illinois* (146 U.S. 387 [1892]). He notes that although Justice Field's decision to rule against the railroad and in favor of the state's right to retain title to the lakebed (as common property) was consistent with his overall support of private rights and markets, his logic should have turned on the facts of the case—and he should have dealt more thoroughly with the question of just compensation for the transfer of property from public to private use. If a "constitutional home" is to be found for the public trust doctrine, argues Epstein, the two most likely candidates are the due process clause and the equal protection clause of the Fourteenth Amendment. Much work, however, remains to be done in order to secure a sound constitutional footing for the public trust doctrine.

When Epstein relaxes his assumption that state-held property was acquired in the original position and takes up cases where the state acquired property by purchase or condemnation, the implication is that there is a limit on the ability of state officials to give exclusive franchises to such property. For example, if the land used for a public highway was obtained via purchase or condemnation, it is doubtful if the state can then legitimately restrict access to the highway for the purpose of commercial transportation by issuing licenses on a selective basis, contends Epstein. The upshot of Epstein's unified theory of property is that the eminent domain clause and the public trust doctrine both operate to limit government power over a wide range of activities, regardless of the original distribution of resources between private and public property.

Constitutional Economics and Constitutional Reform

Rutledge Vining (1956, pp. 20–21) has emphasized that technical economics is narrowly concerned with "problems of choice in which ends are well-defined," but that the more policy-relevant problem is "the problem confronting a community of individuals who are jointly making a choice of conditions which they will mutually impose as constraints upon their individual actions." In Vining's opinion, the tools of modern technical economics must be carefully applied at the level of constitutional economics, that is, within the realm of political economy addressing the broad problem of social and economic organization. Buchanan and Tullock would no doubt agree. Indeed, it was their dissatisfaction with conventional economics and their desire to redirect attention to the important problems of political economy that helped motivate the *Calculus* and led to the study of public choice and constitutional economics.

With the growth of government and the erosion of economic rights over the past half century, it is of critical importance to move toward a constitutional economics, which incorporates the insights of classical political economy in studying the state and the market.[15] Unless individuals understand the institutional foundations of the competitive market system, especially the importance of constitutional protections for economic liberties in promoting overall freedom and wealth, those institutions are likely to be further eroded.

The deference of the Supreme Court to legislative activism in the area of economic rights has helped produce the modern welfare state, along with the maze of administrative rules and regulations that have

[15]For an in-depth treatment of the subject of constitutional economics, see McKenzie (1984) and Gwartney and Wagner (1988).

undermined private property rights and freedom of contract. As a result, the rent-seeking motive has come to dominate the profit motive as individuals vie for the economic empowerments of government. Predation, not wealth creation, is the hallmark of much of what passes for economic legislation. In Buchanan's words (1977, p. 296): "The present situation in the United States" is "one of 'constitutional anarchy.' The effective constitution has been allowed to erode to the extent that the predictability that should be inherent in a legal structure is seriously threatened."

Buchanan attributes the demise of limited government to the piecemeal approach to policymaking—"adjustments made to situations as they are confronted without attention to the design of the structure as a whole"—and to "intellectual error of monumental proportions" that "has destroyed our understanding of 'the constitution of freedom,' an understanding that the American founding fathers did possess" (p. 296). The current sympathy for protectionism, the lack of any effective constraints on the taxing and borrowing powers of government or on its monetary authority, the circumvention of the commerce clause, the failure of the judiciary to declare legislative takings—both direct and indirect—unconstitutional when they occur outside the strict limits of the Fifth and Fourteenth Amendments, and numerous other violations of the Framers' constitutional provisions for protecting economic rights, either explicitly stated in the document or inherent in the higher-law background, illustrate the extent to which both substantive and procedural constraints on governmental economic power have been attenuated.

The erosion of the Framers' "economic constitution" has proceeded slowly but surely. Nevertheless, the time may be ripe for what Buchanan (p. 297) has called "genuine constitutional revolution." Such a revolution, which would restore the "constitution of freedom," will require taking on a "constitutional attitude," by which Buchanan means "an appreciation and understanding of the difference between choosing basic rules and acting within those rules" (p. 298). There will be a "public-goods problem" to overcome in organizing meaningful constitutional change, says Buchanan, but just as the political economy of Adam Smith and the constitutional economics of the Framers' were instrumental in bringing about reform in England and America, it may again be possible to renew the "constitutional attitude" and restore the vision of the Founding Fathers for a free and prosperous people.[16]

[16]Buchanan (1977, pp. 298–99), in addressing the "public-goods problem," raises a number of interesting questions regarding the organization and implementation of real

By taking a public choice/constitutional perspective, the essays in this volume direct attention to the fundamental issues of political economy, those of social coordination and protection of individual rights—issues central to the American Revolution and the framing of the original Constitution and Bill of Rights. As such, they will contribute to the emerging field of constitutional economics and help pave the way for authentic constitutional reform.

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constitutional change, which need further study. Although he recognizes the difficulty of reform, he points to the experience of 18th-century England and America as evidence that future constitutional revolution is possible, especially in light of the current dissatisfaction with "big government."

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