Constitutional Consequentialism: Bargain Democracy versus Median Democracy

*Robert Cooter**

Depending on how people respond to it, a constitution can cause suffering on a vast scale or lay the foundation for a nation's liberty, prosperity, and equality. As currently practiced, constitutional theory and interpretation especially concern the meaning, history, and philosophy of constitutional texts. These approaches cannot predict the responses of people to constitutions. Constitutional consequentialism, which I advocate, is a research program that aims to predict the effect of alternative forms and interpretations of constitutions on policy values, especially liberty, prosperity, and equality. This paper discusses two constitutional processes. "Median democracy," which empowers the median voter, is implemented by referenda and ballot initiatives, special districts (water district, school board, etc.), and winner-take-all elections. "Bargain democracy," which lubricates bargaining among factions and regions, is implemented by legislatures, comprehensive governments, and proportional representation. I show that median democracy causes stability, whereas bargain democracy ideally causes efficiency and often causes corruption or instability.

INTRODUCTION

As the highest law, the constitution is the logical beginning of the state's legal power. Above the constitution, law runs out and the traveler enters "a place where the eyes of man have never set foot."[1] Being highest, constitutional

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1   The Beatles — Magical Mystery Tour (BBC television broadcast, Dec. 26, 1967).

law evokes the best efforts of scholars and political commentators. Being located where law runs out, constitutional arguments are subtle and evasive. History, philosophy, religion, politics, sociology, and economics hover above the constitution, as depicted in Figure 1 below. Scholars disagree over how to use these sources for making and interpreting constitutions. A recent book surveying constitutional theory begins by saying, "The trouble with constitutional law is that nobody knows what counts as an argument."[2]

Figure 1: Pyramid of State Law and Its Sources

sources — history, philosophy, religion, politics, sociology, economics

pyramid of state law — constitution / statutes / orders, policies, regulations, decisions
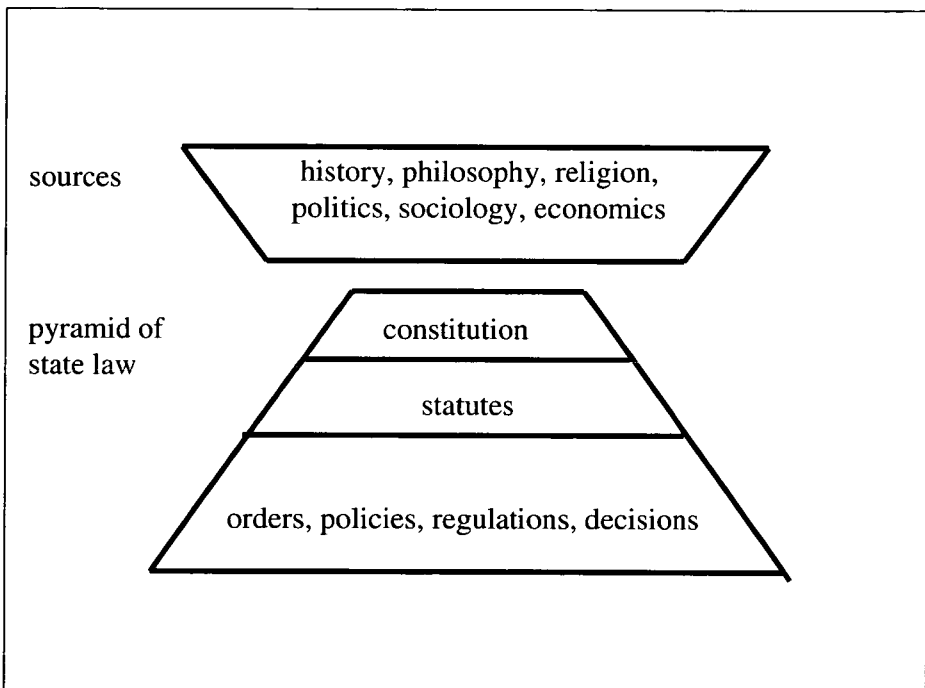
While the arguments in constitutional debates are evasive, the stakes are high. A constitution can cause suffering on a vast scale or lay the foundation for liberty, prosperity, and equality among citizens. To illustrate, majority rule sometimes ruins an economy by undermining the rule of law, and, conversely, majority rule sometimes secures the efficient supply of public goods by vigorous political competition. Similarly, proportional

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2   Thomas D. Gerhardt & Michael J. Rowe, Constitutional Theory: Arguments and Perspectives 1 (1993).

representation sometimes destabilizes representative government, and, conversely, proportional representation sometimes increases equality of power among political factions.

As currently practiced, constitutional theory and interpretation especially concern the meaning, history, and philosophy of constitutional texts. These approaches cannot predict the responses of people to constitutions. Constitutional consequentialism, which I advocate in Part I, is a research program that aims to predict the effect of alternative forms and interpretations of constitutions on values such as liberty, prosperity, and equality.

After discussing constitutional consequentialism, Part II turns to an analysis of two constitutional processes. "Median democracy," which empowers the median voter, is implemented by referenda and ballot initiatives, special districts (water district, school board, etc.), and winner-takes-all elections. "Bargain democracy," which lubricates bargaining among factions and regions, is implemented by legislatures, comprehensive governments, and proportional representation. I show why median democracy causes stability, whereas bargain democracy ideally causes efficiency and can actually cause corruption or instability. Thus, my comparison between median democracy and bargain democracy illustrates constitutional consequentialism.

I.   CONSTITUTIONAL CONSEQUENTIALISM

Liberty, prosperity, and equality are "policy values" in the sense that debates over policy invoke them. Saying that a particular policy promotes liberty, prosperity, or equality usually commends its adoption, like an honorific title commends its holder. In debates about politics, people seldom argue against consensus values, but they often argue about their interpretation. The value's meaning and application are contested far more than its desirability is.

To illustrate, consider a debate about equal outcomes versus equal opportunities. An American politician who favors equal opportunity might argue that the true measure of equality is opportunities and not outcomes. This argument has some chance of succeeding. Alternatively, this politician might concede that the true measure of equality is outcomes and then argue that equality is undesirable. This argument has no chance of succeeding. To try to win, the politician must accept the desirability of equality and argue for his preferred interpretation of it. In the U.S., people seldom contest the desirability of equality, liberty, and prosperity, and people often contest their interpretation.

"Accepted values with contested interpretations" is a useful constitutional

formula. The acceptance of a constitution's values will promote respect and obedience among citizens. Contests of interpretation will provide dynamism. Most constitutions are difficult to amend, so they change slowly. Given slow change by amendment, constitutions must change by interpretation. Interpretations are especially contested when a society changes faster than its constitution.

To illustrate, the proponents of integration in America gained ground in constitutional debates by arguing that states cannot treat citizens equally and also differentiate among them according to race. According to this view, "equal treatment" in, say, primary school refers not to the quality of education, but to the basis for sorting children into different schools. Familiar practices of segregation were relabeled discrimination.

I want to distinguish two ways to debate about constitutional interpretation: the usual way and the consequentialist way. The usual way is to debate about the true meaning of the constitution. There are various ways to determine a constitution's true meaning, and I will mention three of them.[3]

First, some scholars hold that the true meaning of any law is its plain meaning.[4] Debates about plain meaning concern the uses of words that define them. Resolving plain meaning mostly involves thinking clearly about how we speak. The plain meaning of words, however, changes with time, so discovering the plain meaning of old constitutions requires some digging into history. Unfortunately, many constitutional provisions are too abstract for the words to dictate policies. When abstract language has multiple interpretations, the constitution's meaning is not plain to officials.

Second, some scholars hold that a constitution's true meaning is its deep meaning. A constitution often embodies the vision of its makers. Some scholars think that a constitution embodies the vision of its people. The makers' or people's vision may be grounded in philosophy, religion, politics, history, or, more usually, a mixture of them. Deep meaning

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3   The idea that constitutional interpretation follows the true meaning of the constitution reminds me of the following joke. To entertain the guests, a resort held a Charlie Chaplin look-alike contest. By chance, Charlie Chaplin was at the resort. He placed third.

4   Law and economics scholars have debated whether a law should be interpreted according to its plain meaning (Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223 (1986)) or in light of its underlying political bargain (Frank Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61 (1994)).

especially concerns a constitution's normative commitments, such as a vision of individual autonomy inspiring constitutional rights or a vision of divided power inspiring federalism. Explicating a constitution's deep meaning involves examining these underpinnings.

Unlike plain meaning, deep meaning is hidden from the untrained eye. A dramatic illustration of interpretation through deep meaning occurred in 1997 when seven of America's most distinguished philosophers published an article called *Assisted Suicide: The Philosophers' Brief.*[5] This article sought to help U.S. courts decide the constitutionality of someone helping another to die when the latter is very old or terminally ill. Much of moral and political philosophy proceeds by setting concepts straight and giving them the right name. The right word can unlock conflation and set thought free.[6]

Third, constitutions often arise from a political bargain among the makers, possibly supplemented or reinforced by voting. As an alternative to plain or deep meaning, some scholars hold that the makers' intentions are a constitution's true meaning. A constitution often expresses the terms on which its makers intend to cooperate. Unlike a contract, a constitution's makers intend to bind the people whom they represent and their descendants to the cooperative scheme. The true meaning might rest in the actual intentions of the constitution's original makers. This is the approach of the "originalists" in the U.S.

A central puzzle for originalism is how people can be bound without their consent to an agreement among their forebears. A solution to this problem, which leads away from originalism and towards contractarianism, substitutes a "hypothetical contract" for the actual, historical agreement.[7]

I have explained that contests over interpretation of a constitution can proceed by debating its meaning — plain, deep, or intentional. These debates are appropriate and necessary, as well as inevitable. Now I want to turn to

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5   John Rawls, Judith Jarvis Thomson, Robert Nozick, Ronald Dworkin, Thomas M. Scanlon & Thomas Nagel, *Assisted Suicide: The Philosophers' Brief*, 44 N.Y. Rev. Books, Mar. 27, 1997, at 41.

6   Wittgenstein wrote, "Philosophical problems can be compared to locks on safes, which can be opened by dialing a certain word or number, so that no force can open the door until just this word has been hit upon, and once hit upon any child can open it." Ludwig Wittgenstein, Philosophical Occasions 175 (Alfred Nordmann ed., 1993).

7   Robert Nozick said that, "A hypothetical contract is not worth the paper that it is not written on." Christopher Kutz provides some interesting answers by developing the concept of a "participatory intention" in Christopher Kutz, Complicity: Ethics and Law for a Collective Age (2000).

another, less developed way to contest the interpretation of the constitution, a way that, I believe, is more important.

Debates over meaning occur within a range of plausible alternatives, all of which appeal to some people. Most of the plausible alternatives are also reasonable. The second approach confines itself to the set of reasonable interpretations. Instead of choosing among them by determining which one is true, the second approach chooses among them by considering which one is best. By "best" I mean "has the best consequences." More specifically, the "best" alternative is the one that, when implemented, produces the most good as measured by the constitutional value at stake.

To illustrate, after *Brown v. Board of Education*[8] was decided in 1954, federal judges assumed an increasingly active role in directing school systems to achieve integration. Instead of integrating schools, courts often provoked "white flight" to the suburbs. For example, when I began elementary school, the public schools of Washington, D.C., were legally segregated. When I began college, the public schools of Washington, D.C., were legally desegregated and almost no white children remained in them. In this case, court policies had disastrous consequences for the goal of integration that they were pursuing. It is difficult to imagine that courts would have adopted these remedies had they focused more on consequences and foreseen them.

As another example, the "Commerce Clause" in Section 8 of the U.S. Constitution gives Congress the power to "regulate Commerce ... among the several States."[9] Over many years, the proponents of federal power expanded the interpretation of "commerce" in Section 8 from *goods* in interstate commerce, to the *means* of interstate commerce (e.g., highways, railroads, canals), and finally to whatever *effects* interstate commerce, including such things as arson fires in private homes. This expansion obviously attenuates the plain meaning of "commerce" and outruns any reasonable interpretation of the founders' intentions. Furthermore, exploring the deep meaning of "commerce" seems unpromising. Perhaps the exchange of vows between lovers is richer commerce than selling soybean futures, but this possibility need not affect economic policies or paralyze cost-benefit analysis.

Consequentialism can sometimes provide convincing resolutions of Commerce Clause cases. Assume that a proposed federal regulation of an industry affecting interstate commerce might increase prosperity by facilitating competition or decrease prosperity by inhibiting competition.

8   347 U.S. 483 (1954).
9   U.S. Const. art. I, § 8, cl. 3.

If the regulation does not implicate wider constitutional values than prosperity,[10] then this prediction might provide sufficient guidance to resolve the case. A prediction about effects on prosperity apparently provides a better basis for adjudicating the regulation's constitutionality than arguing about the deep meaning of "commerce."

II. MEDIAN DEMOCRACY[11]

Now I turn to an example of constitutional consequentialism that concerns one of the deepest and least appreciated fault-lines in democracy. "Median democracy" is my term for a system where the center of the political spectrum prevails on each issue. Median democracy especially involves direct democracy, special districts for particular public goods, and the election of the executive. Through median democracy, the political center imposes stability on government.

The drawback with median democracy is that political trades are more difficult. Alternatively, "bargain democracy" is a system where the representatives of the citizens bargain for laws and public goods. Bargain democracy especially involves indirect democracy, comprehensive government, and a parliamentary system. Through bargain democracy, different groups can realize the gains from political trades. Also, bargain democracy can dissipate the nation's wealth in an unstable power struggle.

I will argue that states suffering from political instability and political corruption should promote median democracy by favoring referenda, special governments for particular public goods, and direct election of the executive.

A. Processes of Government: Electing, Bargaining, Administering

In a democracy, candidates compete for office and the votes of citizens determine the winners. To win elections and form governments, politicians must bargain with each other and agree to cooperate. Once a government forms, it implements its policies through state bureaucracies. So electing,

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10 In the U.S., the constitutionality of much federal legislation against racial discrimination rests on the interstate Commerce Clause. In these exceptional cases, "commerce" implicated wider constitutional values than usual.

11 This section of the paper draws on Part II of my book Robert Cooter, The Strategic Constitution (2000). It also draws on my paper *The Optimal Number of Governments for Economic Development*, written for IRIS Conference entitled "Market Augmenting Government", March 1999, Washington, D.C.

bargaining, and administering are three basic government processes. I will describe briefly some major conclusions about these processes.

When constitutions narrow voting to one dimension of choice, majority voting tends to settle towards the middle of the distribution of voters' preferences. Like a safe stock, one-dimensional choice has a modest, predictable yield. Alternatively, constitutions can allow voting to range freely over multiple dimensions of choice. Multiple dimensions of choice lower the transaction costs of political trades, with two possible results. First, politicians often bargain successfully and "roll logs." Just as people benefit most from trading widely in markets, so political factions benefit most from bargaining widely in politics. Second, bargaining among politicians may fail, with the consequence that majority voting spins its wheels. No one benefits from wheel-spinning. Like a risk stock, multi-dimensional choice can yield a lot or nothing, depending upon political institutions and culture.

The citizens under the jurisdiction of a government might have complementary tastes in public goods. To illustrate, consider an example with two citizens, A and B, and two public goods, X and Y. If A intensely wants X and feels indifferent about Y, whereas B intensely wants Y and feels indifferent about X, then A and B have complementary tastes for X and Y. A and B can cut a deal to help satisfy their most intense desires. B supports A's efforts to obtain X, and A supports B's efforts to obtain Y.[12] The scope of complements determines the potential gain from political bargains. When different political factions have complementary tastes for public goods, splicing lowers the transaction costs of political bargains, thus increasing the probability of a bargain and the size of the resulting surplus.

Citizens, however, may have non-complementary tastes. To illustrate, if A intensely likes X and B intensely dislikes X, then A and B have non-complementary tastes for X. The differences in preferences of A and B for X provide no basis for them to cut a deal. Given purely non-complementary preferences, politics becomes a game of pure conflict in which one player's win is another's loss.

By definition, the core of a game is the set of unblocked distributions. If every proposal is blocked by an alternative, the game has an empty core. Majority-rule games of distribution with symmetrical players generally have an empty core. To see why, assume that three voters, denoted A,

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12 Since William Riker, The Theory of Political Coalitions (1962), the economic theory of political coalition formation focuses on the "minimal winning set" or a similar idea. Another possibility is to focus on the most complementary coalition. The most complementary coalition maximizes the gains from trading votes. *See* Cooter, *supra* note 11, at 51-79.

B, and C, must distribute $100 among them by majority rule. Initially, someone proposes to divide the money equally: (A,B,C)=($33,$33,$33). A's counter-proposal is to share the surplus equally with B and give nothing to C: (A,B,C)=($50,$50,$0). A and B can implement A's counter-proposal under majority rule, and A's counter-proposal makes A and B better off than the initial proposal, so A's counter-proposal blocks the initial proposal. It is not hard to see that any proposal is blocked by another proposal. Thus A's proposal is blocked by B's counter-proposal to distribute the surplus (A,B,C)=($0,$75,$25).

When the core is empty, each player can make credible demands whose satisfaction is infeasible.[13] The contest for redistribution by majority rule destabilizes every possible coalition. Generalizing these results, Arrow proved that any democratic constitution can result in cyclical voting.[14] Voting cycles, especially provoked by a contest for redistribution, destabilize democracies, especially in developing countries.

Instead of cycling, many democracies produce stable government that

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13 Each member of a potential coalition may demand his marginal contribution to it as the price of joining. A member's marginal contribution to the coalition may be computed as the fall in the coalition's total value caused by the member quitting. Here I apply the *Shapely value* of a coalition member. *See* Duncan Luce & Howard Raiffa, Games and Decisions: Introduction and Critical Survey 249 (1967). With *increasing returns to scale* (super-additivity), however, cooperation does not create enough value for each member to receive the marginal product of membership, so paying the marginal product of membership to everyone is *infeasible*. To illustrate concretely, consider a coalition formed by A and B that distributes the surplus equally between them: (A,B,C)=($50,$50,$0). If either member of the coalition were to leave it, the payoff to the coalition would fall from $100 to $0. By this logic, the marginal product of each of the two members of the coalition equals $100, but the total product of the coalition also equals $100. Consequently, paying $100 to each member of the coalition is infeasible.

Infeasible demands may be *credible*. A threat by a member of a majority coalition is credible, according to one definition, if another coalition could satisfy the demand without worsening its own position. To illustrate by the preceding example, consider the coalition formed by A and B that distributes the surplus equally between them: (A,B,C)=($50,$50,$0). If B were to withdraw from the coalition, the coalition's payoff would fall from $100 to $0. Noting this fact, assume that B demands a payoff of $75 to remain in the coalition. The threat is credible because B could leave the coalition and form a new coalition with C, distributing the surplus (A,B,C)=($0,$75,$25), which makes B and C better off. A, however, can also make the same demand as B. So A and B can each make a credible demand for $75. Both demands cannot be satisfied, because there is only $100 to distribute. So each demand is credible and both demands are infeasible.

14 Kenneth J. Arrow, Social Choice and Individual Values (2d ed. 1963).

pursues policies near the center of the political spectrum. Under certain conditions, voting among paired alternatives along a single dimension of choice yields an equilibrium at the point most preferred by the median voter. The median rule explains why the center dominates the politics of many democracies.[15]

A problem of majority rule concerns intensity of sentiment. Democracy gives equal weight to all votes, regardless of how strongly the voter feels about the issues. From an efficiency perspective, however, more weight should be given to intensive preferences. To illustrate, assume that the chairman of a three-person committee asks each one to write his or her vote on a slip of paper concerning a certain proposal. When the slips of paper are collected, the chairman reports, "I have two slips marked 'Yes' and one marked 'No, No, oh please, please No!'" The unresponsiveness of majority rule to the intensity of feeling about issues causes its inefficiency.

Being unresponsive to intensities, the median rule is not generally efficient by the cost-benefit standard. Under a very special assumption involving symmetrical preferences, however, the median rule is cost-benefit efficient.[16]

The preceding voting and bargaining models say little about how money influences politics. Politics has a large effect on citizens, whereas each individual citizen has a small effect on politics. Since ordinary citizens gain little for themselves by participating in democracy, few citizens

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15   The crucial condition for this result is that each voter has single-peaked preferences. With single-peaked preferences, a voter's satisfaction always increases when moving towards the voter's most preferred point along the single dimension of choice. With multiple-peaked preferences, a voter's satisfaction increases at some point when moving *away* from the voter's most preferred point. To illustrate, some voters — call them YUPPIES — prefer a high level of expenditure on public schools, in which case they will send their children to public school, but if the level is not high, they will prefer it to be low, so they send their children to private school and save on taxes. The worst alternative for the YUPPIES is a moderate level of expenditure on public school. I review these results in Cooter, *supra* note 11, at 17-51.

16   Majority rule counts voters, whereas cost-benefit analysis adds individual values. Counting voters gives the same result as adding individual values under the assumption of "strong symmetry." Under strong symmetry, each non-median voter who gains from a change away the median can be matched with at least one voter who loses, and the loser loses no less than the winner wins. In notation, let $x_m{}^*$ denote the point most preferred by the median voter. Consider any alternative x^*. Let J denote the set of individuals who (strongly) prefer $x_m{}^*$ to x^*, and let K denote the set of individuals who (weakly) prefer x^* to $x_m{}^*$. By strong symmetry, for each k in K there exists a j in J such that $u_j(x_m{}^*) - u_j(x^*) \geq u_k(x^*) - u_k(x_m{}^*)$. This fact implies
$$\sum_{i \in J \cup K} u_i(x_m{}^*) \geq \sum_{i \in J \cup K} u_i(x^*)$$

invest the time and energy needed to obtain detailed information about electoral candidates and issues. When citizens invest little, politicians must invest a lot to win votes. Given the ignorance of voters, politicians trade political influence for money from lobbyists. Rational actors invest in an activity, including lobbying, when the profit equals or exceeds the return on alternative forms of investment. Since laws are general, lobbying tends to affect many people and interests. Lobbyists need to organize to overcome free-riding and solve the problem of collective action.

B. The Optimal Number of Governments

According to the usual economic formulation, corporations are hierarchies bounded by markets.[17] Just as the private sector consists of markets and hierarchies, so the public sector consists of governments and hierarchies. In a democracy, the citizens elect their government, so democratic states are hierarchies bounded by elections. Centralized states require fewer governments and more hierarchy, whereas decentralized states require more governments and less hierarchy. For example, the national assembly can direct the ministry of education to provide schools for all localities (centralized) or boards elected in each locality can provide local schools (decentralized). The relative efficiency of centralized and decentralized states depends upon the relative efficiency of hierarchies and elections. The optimal depth of hierarchy and the optimal number of governments pose the same problem.

A constitution and other fundamental laws can factor or splice the functions of government. To factor, the constitution creates many narrow governments, each with a limited purpose, such as the special governments common in the U.S. The constitution can also factor by allowing ballot initiatives and referenda, each on a single issue. Alternatively, the constitution can splice the functions of government. To splice, the constitution creates one broad government to make all laws and supply all public goods.
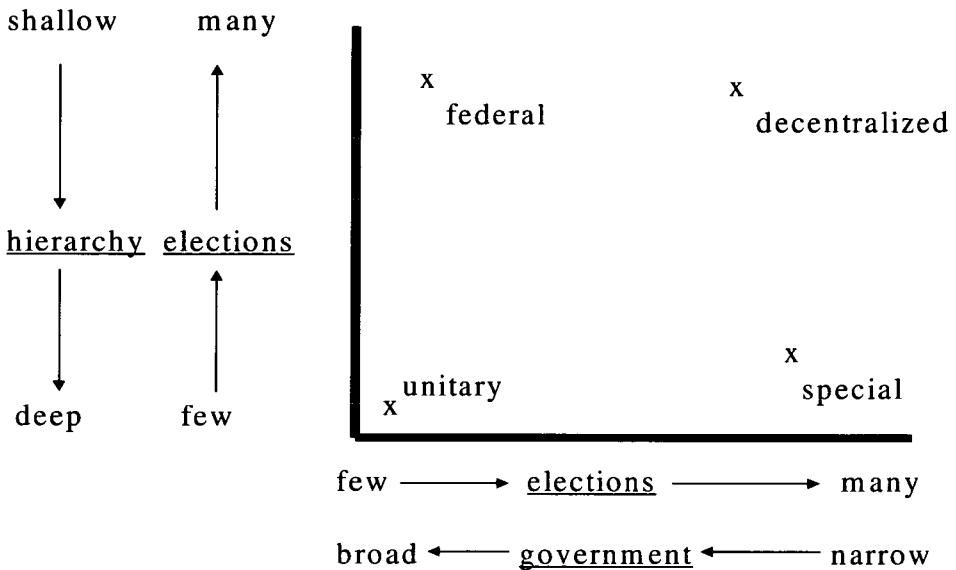
Figure 2 depicts organizational space, with the vertical dimension representing the depth of hierarchy and the horizontal dimension representing the breadth of each government.[18] A point in the organization space of Figure 2 is specified by a given depth of hierarchy and breadth of government or,

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17 Ronald A. Coase, *The Nature of the Firm*, 4 Economica 386 (1937); Oliver E. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications (1975).

18 While the feasible points are probably discrete (you cannot hold half an election), the space is continuous.

equivalently, by a given number of elections on the vertical and horizontal
dimensions.

Figure 2: Organizational Space

shallow   many

hierarchy elections

deep   few

federal   decentralized

unitary   special

few ──────▶ elections ──────────▶ many

broad ◀────── government ◀─────── narrow

Different points in the organization space of Figure 2 correspond roughly
to countries with different political subdivisions. Deep hierarchy and broad
government, as indicated by the origin of the graph, characterize unitary
states like Japan and France. Moving vertically from the origin holds the
breadth of government constant while hierarchy becomes shallow. This
move roughly depicts the change from a unitary state to a federal system
like Canada or Australia. The provinces of Canada and the states of Australia
have broad powers subordinated in some respects to the federal government.
Moving horizontally from the origin holds the depth of hierarchy constant
while governments narrow. This move depicts the multiplication of special
governments with single purposes. To illustrate, in the San Francisco area,
special district governments with separate elections provide regional parks,
public transportation, water, and other local public goods. Finally, moving
diagonally from the origin, governments narrow and hierarchies become
relatively shallow. This move depicts the simultaneous decentralization and
fragmentation of government.

The number of governments affects stability. I will explain the

circumstances under which increasing the number of elections increases political stability.

C. Splicing and Factoring

Broad jurisdiction *splices* independent issues together like the strands of a rope. By "splicing" I mean combining issues and deciding them all at once. For example, the U.S. Congress often enacts omnibus legislation with extensive logrolling. To splice indirect democracy, citizens should elect representatives to assemblies with power over many different issues. In contrast, narrow jurisdiction *factors* politics into independent issues like a mathematician dividing a large number into prime numbers. By "factoring" I mean separating issues and deciding them one at a time. For example, citizens may elect a town council to control the police and a school board to control schools. To factor indirect democracy, citizens should elect separate governments for separate issues. To factor direct democracy, citizens should decide each issue in a separate referendum. In Figure 2, factoring represents a move to the right along the horizontal axis, whereas splicing represents a move to the left.

Sometimes a constitution factors, as when the town's constitution establishes an elected council and a separately elected school board. Alternatively, a constitution may allow for factoring without requiring it. For example, the constitutions of the U.S. states prescribe procedures for establishing special governments for such activities as parks, transportation, and water. Citizens can establish or abolish special governments by following the prescribed procedures. Alternatively, the constitution may limit or forbid factoring, as when the constitution prevents a branch from delegating authority or a government from ceding authority.

D. City Council and School Board

I have explained that splicing lowers the transaction cost of bargaining across issues and that successful bargaining across issues can increase the satisfaction of voters with complementary tastes. Splicing also increases the risk of failed bargains and circular votes. When spliced voting causes intransitivity, political institutions may resolve the problem by developing dictatorial forms. Alternatively, factored voting may improve the outcome by allowing the median voter to prevail on separate dimensions of choice. Median rule on separate dimensions of choice often satisfies the preferences of voters more efficiently than an unstable contest of distribution. Intransitive preferences in multi-dimensional choice may factor into single-peaked

preferences on each single dimension of choice. In general, single-purpose government is like a safe stock with a modest yield, whereas multi-purpose government is like a risky stock that pays a lot or nothing.

To develop these points, I provide a specific example. Assume that expenditure on police and schools are the two major political issues in a small town. First consider splicing the issues of police and schools. A town council that decides both issues provides a forum for bargaining. If bargaining succeeds, council members who care intensely about police may trade votes with council members who care intensely about schools, so that each one gets what it wants most. If bargaining fails, the council members may waste resources in an unstable contest of distribution. Second consider factoring the issues. A town council that controls police and a separately elected school board that controls schools deny a forum for bargaining over the two issues. With bargaining obstructed and assuming single-peaked preferences, the median voter prevails on each dimension of choice.

Whether comprehensive government or single-purpose governments satisfy the preferences of political factions better depends on the ability of politicians to cooperate. In general, splicing increases the gains from cooperation and factoring issues decreases the losses from conflict. Finding the optimal number of governments requires balancing these considerations. These facts suggest the prescription "Splice when cooperation is likely and factor when conflict is likely."

E. Referenda versus Legislation

Most constitutions that permit referenda restrict them to a yes-or-no vote on a single issue. To illustrate, Californians might be asked to vote "yes or no" on restricting abortions and "yes or no" on capital punishment, but the law precludes Californians from being asked to vote "yes or no" on restricting-abortion-and-restricting-capital-punishment.[19] A practical reason compels restricting each ballot initiative to a single issue. Logrolling, which combines issues in a single vote, requires bargaining. Bargaining among different groups requires representation. Ballot initiatives bypass elected representatives. Thus a multiple-purpose ballot initiative invites bargaining without any framework for it.

In legislatures, the members often bargain, compromise, and draft a single bill that combines different issues. In contrast, rules restricting ballot initiatives to a single issue prevent logrolling, so different groups have

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19 Cal. Const. art. II, § 8(d)).

little incentive to bargain or vote strategically. When citizens vote their preferences on a single dimension of choice, the median usually prevails. In general, direct democracy factors the issues, so the median voter should prevail. In contrast, members of legislatures bargain, compromise, and roll logs. In general, indirect democracy splices issues, which should result in bargains or cycles.

The contrast between splicing and factoring predicts some consequences of a shift from indirect to direct democracy. A change from indirect to direct democracy often replaces cycles or bargains with the preference of the median voter on each dimension of choice.[20] Is this change better or worse? That depends on how well indirect democracy works. Given informed voters and competitive elections, indirect democracy produces effective representation of political interests. If representatives bargain successfully and cooperate with each other, then citizens get their way on their preferred issues. In these circumstances, indirect democracy satisfies the preferences of voters better than direct democracy.

Indirect democracy, however, can create a political cartel whose members conspire to blunt electoral competition. For example, the spectacular disclosure of corruption among leading Italian politicians in the 1990s suggests that citizens had little influence over deals struck by their representatives. An opaque political process and proportional representation made Italian electoral competition relatively ineffective. In these circumstances, a change to direct democracy can break the political cartel.

In addition, indirect democracy can cause an unstable contest of redistribution among interest groups. Changing to direct democracy can increase stability, which should increase the satisfaction of citizens with politics.

I have explained that direct democracy causes the median voter to prevail on each dimension of choice, which is better than a cycle or a political cartel and worse than perfect bargaining by elected representatives. This proposition summarizes the main difference in theory between direct and indirect democracy. Besides this large difference, some small differences are sometimes important.

First, direct democracy gives more weight to those citizens who actually

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20 The median rules can, however, fail when voting on a single dimension of choice when preferences are not single-peaked. Furthermore, with factoring and single-peaked preferences, non-separable utility functions in multi-dimensional space can destabilize the median rule on each separate dimension of choice.

vote, whereas indirect democracy gives more weight to the number of citizens living in a district. To illustrate, assume that poor people, who vote at relatively low rates, live in poor districts. Indirect democracy apportions representatives by population, so the number of representatives from poor districts reflects the number of poor citizens, including those who do not vote. In contrast, direct democracy responds to the citizens who actually vote. Thus, in the preceding example where rich people vote at higher rates than poor people do, direct democracy gives more weight to the opinions of rich people. This phenomenon may tilt California ballot initiatives in favor of older, conservative, white citizens.

Second, critics of direct democracy allege that the majority of citizens will vote to redistribute wealth from the few to the many. For example, if most citizens buy auto insurance, they will vote to cap its price. Or if most citizens rent houses, they will vote for rent control. More generally, critics of direct democracy allege that the majority of citizens will vote to undermine the rights of the minority.

This criticism, however, has a weak foundation in theory. From the viewpoint of theory, direct democracy factors voting, which does not necessarily harm minorities more than spliced voting. Spliced voting encourages citizens to coalesce into blocks in order to bargain with each other. A system of proportional representation can guarantee representation in political bargaining to every minority group. Two-party competition, however, contains no such guarantees. When groups coalesce, some minorities may suffer permanent exclusion from the ruling coalition.

In contrast, after factoring the issues, the minority on one dimension of choice is seldom the same group of people as the minority on another dimension of choice. Any single person with complicated political views wins on some dimensions of choice and loses on others. In general, factoring issues can dissolve large blocks of citizens and ensure that everyone wins some of the time. In addition, all the non-median voters participate in determining the median voter. Thus everyone's preferences have an effect on the voter equilibrium.

Any democratic system of politics, whether direct or indirect, requires protection of minorities, such as ethnic groups and wealthy people. Forms of protection include bicameralism and constitutional rights.[21] Thus the Bill of Rights in the U.S. Constitution constrains the states, so a federal judge would nullify a California referendum that violates the Bill of Rights. This

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21   Saul Levmore, *Bicameralism: When Are Two Decisions Better Than One?*, 12 Int'l Rev. L. & Econ. 145 (1992).

fact imposes an essential constraint on California's referenda. Furthermore, on many political issues, the bicameral U.S. Congress can preempt states by enacting federal legislation.

F. Winner-Takes-All or Proportional Representation?

In many countries like Britain and the United States, two major parties dominate important elected offices. In other countries, many parties win important offices. In addition to culture and history, the electoral procedure determines the number of parties. According to the "winner-takes-all-plurality" procedure, the candidate who receives the most votes in a single election wins the office. To illustrate, if votes were divided among three candidates in the proportions (40%, 29%, 31%), then the candidate receiving 40% would win the office. In plurality rule, there is no run-off between the two top contenders, no point voting, and no proportional representation.

Countries with the winner-takes-all-plurality rule tend to have two dominant parties. This proposition is sufficiently true to be called a "law," although it is not an iron law.[22] "Duverger's Law" asserts that the winner-takes-all-plurality rule tends to eliminate small parties and create a two-party system. Collective choice theory explains why rational voting produces this outcome. With several candidates, citizens vote strategically. To illustrate, if a voter's most preferred candidate has little chance of victory, the voter may opt for his second choice. Under the winner-takes-all-plurality rule, citizens tend to vote for candidates whom they think others will vote for,[23] and this behavior compresses the number of viable parties to two. The equilibrium share of a third-party vote must be small in an election with many voters.[24]

Coalition theory reaches the same conclusion. To see why, assume that the electorate falls into three groups of equal size called Left, Middle, and Right. If each group supports its own candidate, the probability of any one winning under the winner-takes-all-plurality rule is 1/3. However, if some Middle voters can be coaxed into the Left, then their combined strength will enable Left-Middle to win all the elections. Knowing this, Right will respond by coaxing some Middle voters into Right-Middle. At the end of this process, two large parties compete for the Middle voters. Thus the winner-takes-all-plurality rule tends to produce two dominant, evenly

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22 Canada and India are exceptions.
23 Such an election resembles the beauty contest proposed by Keynes, in which the judges receive rewards for picking the winning candidate.
24 Thomas R. Palfrey, *A Mathematical Proof of Duverger's Law, in* Models of Strategic Choice in Politics 69 (Peter C. Ordeshook ed., 1989).

matched parties located near the center of the political spectrum.[25] Once established, this situation is very stable, because a vote for a third party has no probability of influencing the outcome, whereas a vote for one of the major parties could be decisive. In single-dimension voting, two parties will occupy the space of alternatives so as to preclude the entry of a successful third party.[26]

To make this argument precise, recall that the "power" of a vote equals the probability that it will be decisive. If the Republican and Democratic parties are equally matched in a given election, then a change of one vote in either direction could tip the election. In contrast, a vote for a third party (say, the Libertarians or the Greens) has no prospect of changing the outcome. Thus, a vote for one of the major parties has power, whereas a vote for a third party has no power.

I have explained how competition in winner-takes-all elections tends to eliminate third parties. What keeps the two competing parties from merging into one grand coalition? If the parties remain separate, the winning party enjoys the spoils of power (offices, contracts, grants, etc.). If the parties merge, they must share the spoils of power with each other. Thus, the desire to concentrate the spoils of power usually prevents mergers between the two dominant parties.

In Japan, however, the desire to concentrate the spoils of power did not produce effective multi-party competition. Instead, one party (the LDP) has held power during most of the second half of the twentieth century. This hegemonic party, however, contains powerful factions within it, which compete for power. The reasons why a single party dominates Japanese democracy are uncertain. Perhaps the citizens perceive that a single party can better impose political control on an exceptionally powerful administrative bureaucracy. Or perhaps a national coalition assuaged persistent fears of communism during the Cold War. Or perhaps the explanation lies in Japan's special electoral rules.[27]

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25 My informal "proof" of Duverger's Law assumes the existence of a uniquely stable equilibrium in two-party competition. A sophisticated defense of Duverger's Law is found in *id.* A discussion of the prospects of third parties in U.S. elections is in Martin Gardner, *Mathematical Games: From Counting Votes to Making Votes Count — The Mathematics of Elections*, 1980 Sci. Am. 16.

26 Thomas R. Palfrey, *Spatial Competition with Entry*, 51 Rev. Econ. Stud. 139 (1984).

27 Until electoral changes were made in 1994, each electoral district in Japan returned several representatives to the House of Representatives, but the citizens could only vote for one of them. For example, if a district had three seats, the three candidates enjoying the most votes won, and each citizen residing in the district could only vote for one candidate. Instead of favoring a single hegemonic party, however, these rules seem to favor smaller parties. *See* Raymond V. Christensen, *The 1994*

The constitution organizes a government by distinguishing its branches and allocating powers among them. By convention, the executive, legislature, and courts form the branches of government. The executive branch forms a hierarchy whose members interact especially through orders. In contrast, the legislature forms a house whose members interact especially through bargains.

Without organization, legislative bargains often fail. Political parties organize the legislature and discipline legislators. Within a party, legislators interact relatively more by orders. Between parties, legislators interact relatively more by bargains. Government, consequently, proceeds in a state with few parties relatively more by orders, whereas government proceeds in a state with many parties relatively more by bargains. By giving more power to the executive and fostering large parties, a constitution favors government by orders. Conversely, by giving less power to the executive and fostering small parties, a constitution favors government by bargains.

In a two-party system, the party that controls the executive and legislature does not have to bargain with the other party. Rather than bargaining, the dominant party will tend to rule by orders from the executive who leads it. Given a choice between two parties, voters will tend to organize ideology into one comprehensive dimension of choice, which is often called "left-right." With left-right organization of political ideology and a two-party system, the party that appeals to the median voter tends to win. Thus, winner-takes-all elections tend to produce median democracy.

Holding the number of parties constant at two, this effect is stronger for a parliamentary system than a presidential system. In a parliamentary system, the dominant party inevitably controls the legislature and the executive, so they need not bargain with each other. In a presidential system, however, different parties can control the executive and legislature, so they will have to bargain with each other.

Under proportional representation, however, parties tend to fragment and government occurs by coalition. Coalition governments proceed by bargains, which suffer from instability. Also, the opacity of political bargains invites corruption.

CONCLUSION

Constitutional theory looks too hard at words and not hard enough at effects. The meaning of the words and the philosophy of its makers cannot, by themselves, predict the responses of people to alternative constitutional interpretations. Depending on these responses, constitutions can cause suffering on a vast scale or lay the foundations for equality, liberty, and prosperity. I advocate a research program on the consequences of alternative interpretations of constitutions. The success of constitutional consequentialism depends on creating a body of reliable predictions about the effects of alternative constitutional interpretations on constitutional values. As social science improves, constitutional consequentialism should gain in importance relative to alternative methods of interpretation, rather like metaphysics yielded ground to physics.

I advocate constitutional consequentialism as a research program in social science that aims to avoid philosophical disputes, not participate in them. Constitutional consequentialism should remain neutral with respect to those philosophies that acknowledge that consequences influence interpretations. In particular, constitutional consequentialism should not ally with utilitarianism, which is the leading form of philosophical consequentialism. Pure utilitarianism decides all matters by looking forward to future effects on happiness and pleasure, so pure utilitarianism is difficult to square with past commitments and non-hedonic values. Constitutional consequentialism, however, predicts the consequences of reasonable interpretations of a constitution, including those interpretations based on past commitments and non-hedonic values.

A political scientist who takes polls in Ecuador told me that approximately 20% of its citizens typically report that they would prefer dictatorship to democracy. The instability and corruption in Ecuador's democracy apparently prompt these views. I have argued that shifting from bargain democracy to median democracy can ameliorate instability and corruption. Referenda and ballot initiatives, special districts, and winner-takes-all elections empower the median voter. There is, however, a cost: the surplus from political trades is diminished or lost. Multiple legislatures, comprehensive governments, and proportional representation lubricate bargaining. I believe that a more thorough comparison of effects will conclude that many countries could benefit from moving towards more median rule and less bargaining.