

The Treason of Rules: Institutional Entrepreneurship and Representative Government

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DRAFT: INFER AND OBSERVE APPROPRIATE SOCIAL NORMS

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Abstract: Brennan and Buchanan (1985) argue that the function of constitutional rules is to constrain opportunistic behavior by political agents and enable the benefits of the productive and protective state. This essay argues that political entrepreneurs may subvert such constraints not only by ignoring or flouting such rules, but also by introducing new rules while leaving the constitutional rules in place. Drawing on the work of Vincent Ostrom (1997), we argue that rules are nested inside a structure of other rules of higher and lower orders, and lay out a taxonomy of pre-constitutional, constitutional, and post-constitutional rules. Political entrepreneurs can agitate for changes in post-constitutional rules that interact with constitutional rules so as to undermine their constraining force. Following Elinor Ostrom (1965), entrepreneurs who fail to mobilize a minimum winning coalition to achieve some policy goal may instead seek to alter the rules by which policy is made. This can potentially eliminate the binding constraint on pursuing the original policy. Rules can be used to undermine rules. We illustrate this possibility with a number of different cases. We focus on the classic debate between Kenneth Arrow and James Buchanan on the normative significance of vote cycling. Buchanan (1954) argues that the political instability brought about by vote cycling serves to undermine logrolling and thus acts as a constraint on opportunistic behavior. Building on Martin and Thomas (2013), we show that the evolution of the congressional committee system driven by political entrepreneurs pursuing particular policies gradually undermined this constraint, allowing for logrolling to re-emerge.

In 1937 Franklin Delano Roosevelt announced his “Court-Packing Plan.” The Supreme Court had roundly rejected the constitutionality of a bundle of programs signed into law by Roosevelt. FDR’s response was a threat to change the rules by appointing more Supreme Court Justices beyond the traditional nine seats. He introduced legislation that would allow him to appoint an additional Justice for each Justice over 70 years old. The new Justices would, it was understood, be selected for their friendliness to Roosevelt’s preferred policies. Though the number of seats on the Court is not formally constitutionally mandated, this would have been a stark revision to the extant rules of the political game. The threat worked, prompting the “switch in time that saved nine.” The Justices relented in this particular decision. But that they took the threat seriously illustrates an important point: changing the rules governing political action is a viable strategy for political entrepreneurs whose plans are frustrated under current rules.

Constitutional political economy traditionally asks whether constitutional rules can improve political outcomes by constraining political agents. Brennan and Buchanan (1985) argue that constitutional rules only make sense if we assume that political agents often have some incentive to misbehave. They utilize Elster’s (1979) metaphor of Ulysses lashing himself to the helm of his ship so that he can hear the Sirens’ song without succumbing to it. The ‘reason of rules’ is to limit the power of the state and thus curb state predation.¹

Methods for bypassing such constitutional constraints are not hard to imagine. Rulers might ignore, override, or temporarily suspend inconvenient constraints, especially those that lack a mechanism for enforcement. Another common tack is to reinterpret the language of the rule such that it ceases to constrain (Hasnas 1995). Shackling Leviathan is no simple task. These stark limitations of formal constitutions in limiting state power are widely recognized. No external agency stands ready to enforce constitutional rules. To bind effectively they must on some level—perhaps in conjunction with informal norms—be self-enforcing. And even if there is a strong constitutional culture, there is always the threat of cheating in the absence of perfect detection of corruption.

We set aside these possibilities to focus on another, underappreciated means of undermining the effectiveness of rules constraining political behavior: other rules. Rules do not exist in a vacuum, but are nested in a structure of other rules, norms, and conventions (Crawford and Ostrom 1996, Ostrom 1997, Williamson 2000). Those rules can sometimes effectively neuter the ability of other rules to constrain, even while the latter remain in force. Even if rules that are meant to constrain are perfectly enforced and interpreted as constraints, the introduction of new rules may undermine their effectiveness. Paradoxically, those new rules may have the form of constraints on political agents. But just as some rules that constrain market activity actually enable realizing the gains from exchange, so some rules that constrain political activity actually

¹Various points in the Federalist papers, if they can be read as sincere, make it clear that constraining political agents was the express purpose of a number of provisions of the United States constitution.

enable an expansion of the scale and scope of government by facilitating political exchange. Rules can empower Leviathan just as they shackle it.

In analyzing what sorts of rules are likely to expand rather than constrict state power, we focus on the genesis of the rules as much as their content. We assume that politicians would usually like to expand their authority rather than curtail it. Whatever their goals are, all politicians would like the ability to pursue their favored policies more effectively or at lower cost. But only some new rules enable them to do so. We argue that rules that expand state power arise from situations of epistemic asymmetry between political entrepreneurs and citizens at large.

The success and relevance of our analysis hinges on satisfactory answers to three questions:

1. What can a theory of entrepreneurship add to a constitutional political economy framework?
2. What types of constraints on political behavior can expand state power?
3. Under what conditions can political entrepreneurs successfully enact such rules?

We address each of these questions in turn. Section 1 explains the importance of institutional entrepreneurship in a constitutional political economy framework. Analyses of political entrepreneurship typically omit entrepreneurial efforts aimed at changing the rules of the political game. Similarly, analyses of political institutions typically omit discussions of political entrepreneurship as a source of rules. We argue that institutional entrepreneurship is a viable and important source of institutional change in politics.

Section 2 explores how the introduction of new constraints can undermine the force of existing constraints. When rules diminish the size of a minimum winning coalition, they tend to increase the discretionary power of political agents. Constraints on political agents can curb their influence, but they can also limit their ability to block one another's plans. A key principle of constitutional political economy is that a system of constitutional rules needs to ultimately be self-enforcing. Additional constraints, by limiting the ability of political agents to police one another, may expand the scale and scope of state activity.

Section 3 provides an example of this phenomenon by exploring the evolution of the congressional committee system. This system has tended over time to diminish the minimum winning coalition for a wide range of issues. Additional constraints on political agents may have the effect of moving the rules of the game further away from an unanimity criterion. Such rules often enable gains from political exchange. But in so doing they may allow for easier realization of less inclusive (and thus more extractive) political bargains.

Section 4 explores the conditions under which institutional entrepreneurship will tend to erode constraints on political agents. Entrepreneurship is distinct from other forms of market or political activity not in terms of incentives but in terms of epistemics. If we want to apply the concept of entrepreneurship to some political agents such as democratic

representatives we must also apply it to other agents such as ordinary citizens. We argue that in representative governments there are important epistemic asymmetries between most citizens and representatives that give the representatives an entrepreneurial edge, meaning that they are more likely to discover and implement power-enabling rules than citizens are power-constraining rules.

1. Entrepreneurship and Constitutional Political Economy

What does an entrepreneurial perspective add to an analysis of political institutions? What does an emphasis on political institutions add to a theory of political entrepreneurship? We seek to provide one possible answer to both these questions in this section, arbitrating between these two distinct literatures. To do so we need two components: first, a theory of political entrepreneurship that can apply to institutional change and adds something of value to a more parsimonious rational choice perspective. And second, a theory of political institutions that gives such entrepreneurs space to operate. Without both of these pieces in place there is little to be gained by bringing the two literatures together.

The concept of political entrepreneurship extends the market metaphor into the political realm. Mises (1949) identifies 'entrepreneurship' in its everyday usage as but one manifestation of a universal feature of human action: grappling with uncertainty. "The term entrepreneur as used by catallactic theory means: Acting man exclusively seen from the aspect of the uncertainty inherent in every action" (p. 254). In making this move, Mises follows Knight (1921), who argues that entrepreneurs are distinct from managers insofar as they bear fundamental uncertainty. Thus defined, entrepreneurship cuts across institutional settings in the same way that rational choice does. Kirzner (1982) extends this analysis, arguing that responding to uncertainty entails imagining or perceiving options that the agent can act upon. This theory of entrepreneurship adds to the basic rational choice model by asking: where do the options agents choose between come from?

Options, whether in individual or collective action, have to come from somewhere. The outcomes of collective action are sensitive to the options that agents face. By extension, the origins of these opportunities exert a powerful influence on the course of the political process. This is what the entrepreneurial perspective adds to the analysis of political institutions: an appreciation of why the relevant options are what they are. Understanding the origins of opportunities is important for understanding changing patterns of behavior and changing rules.

Political processes have their share of uncertainty and thus ample scope for entrepreneurial activity. Indeterminacy is a pervasive feature of collective action, including the determination of rules and conventions (Hardin 2003). Political entrepreneurs can thus exert substantial influence by determining the set of *live* options for collective action. Agenda setting is one important form of this entrepreneurial function, but political entrepreneurship need not entail such formal authority. Any agent that exerts a strong influence on the set of options for collective action is functioning as a

political entrepreneur. Among the myriad possible bundles of policies or rules that might emerge as a result of collective action, political entrepreneurs furnish focal points around which other agents can coordinate. They determine which options are ‘live options.’

Any definition of political entrepreneurship is only helpful for analyzing institutional change if there are occasions for entrepreneurship to affect political institutions. Theories of constitutional change focus on large exogenous shocks or revolutionary threats that lead to radical change (e.g., Acemoglu and Robinson 2006). Similarly, most analyses of political entrepreneurship focus on efforts to alter policy, not the rules of the political game. Neither approach sees much of a role for the political entrepreneur.

What types of rules are sufficiently malleable to make a theory of political entrepreneurship worthwhile? Martin and Thomas (2013), following Ostrom (1965) argue that when political entrepreneurs are inhibited in their ability to secure favored outcomes at the level of day-to-day politics, they become active at higher tiers of political entrepreneurship by devising new rules to help them overcome existing hurdles.² Institutional entrepreneurs in politics seek the means to strengthen their ‘political property rights.’ Such rule changes are derivative of their underlying lower-tier goals, however, and will be deemed successful only if they allow the political entrepreneur to achieve his lower-tier goals better.

Martin and Thomas (2013) identify three distinct layers of rules subject to entrepreneurial change in a constitutional context: pre-constitutional rules, such as informal linguistic and cultural institutions; constitutional rules, the traditional focus of constitutional political economy; and post-constitutional rules, which are contained within the framework established by the constitution and further constrain or direct policies enacted at the lower tier. These three levels of rules form a sort of nested game. Constitutions are adopted or changed within a broader social and cultural context. Similarly, post-constitutional rules are formed against the background of an existing constitutional structure. Policies are the outcome of collective action shaped by post-constitutional rules.

Both pre- and post-constitutional rules are subject to entrepreneurial change. Preachers, moral philosophers, and cultural critics can be thought of as pre-constitutional entrepreneurs. They seek to alter, adapt, or maintain fundamental social norms or standards of value. Our focus here on post-constitutional rules, which often include various procedural rules for various organs of the state.

Traditional constitutional political economy often ignores post-constitutional rules. This is a mistake, for two reasons. First, for many political outcomes constitutional rules’ influence on policy is first filtered through further post-constitutional rules. For instance, the number of justices on the Supreme Court is a post-constitutional rule that affects how

² This argument is an application of Boettke and Leeson’s (2009) claim that when market entrepreneurs’ ability to engage in exchange and production is abrogated by the absence of property rights, their entrepreneurial initiative is redirected to a “higher tier” that seeks ways to secure those rights.

the constitutional rules regarding checks and balances and the separation of powers operate in practice. Likewise, the congressional committee system is a set of post-constitutional rules that profoundly influences the behavior of Congress, a constitutionally defined body. Second, ignoring post-constitutional rules tends to understate the scope for institutional entrepreneurship in politics. Constitutional rules tend to change far less frequently and more dramatically than post-constitutional rules. Political entrepreneurs, we show below, often make small changes to post-constitutional rules, leading to a gradual evolution of political institutions.

Introductions of or changes to post-constitutional rules often involve some sort of collective choice. Nonetheless, as with all collective choices, the options must come from somewhere. Congress votes on its internal rules, but first members of Congress must propose such rules. Acting as political entrepreneurs, a number of Congressional leaders through the centuries have profoundly shaped the committee system and altered the way that Congress functions. Adding an institutional perspective therefore broadens the scope of the theory of political entrepreneurship and allows for a more systematic analysis of the gradual evolution of political institutions. The next section explores the idea that political entrepreneurs can bring about such a gradual evolution of the rules that otherwise constrain them, by changing the size of the minimum winning coalition required to bring about political change.

2. Double Negatives and Winning Coalitions

It is easy enough to find examples in which the rules that constrain political agents are changed or simply not enforced. But a great many constitutional rules are followed quite closely. In the United States, a presidential election reliably occurs every four years. When the two houses of Congress pass a tax increase that the President signs, the Internal Revenue Service tends to implement it. These are examples of procedural rules, which tend to be more frequently in force than substantive, explicit restrictions on the scope of state activity, such as the Tenth Amendment. These procedural rules likewise serve as constraints on political agents, and are often observed faithfully.

One important way to constrain opportunistic political behavior is to increase the size of the minimum *winning coalition* (c.f. Bueno de Mesquita et. al. 2003). The phrase ‘minimum winning coalition’ usually refers to number of individuals whose support is necessary to attain a leadership position, but here we use it more broadly to indicate the number of individuals whose support is necessary for any given collective action, including legislating. The idea that the size of the minimum winning coalition as a proportion of the total citizenry is positively correlated with good governance outcomes runs through several strands of political economy. Buchanan and Tullock (1962, Ch. 7) emphasize the unanimity criterion: when everyone agrees to a policy, by definition it imposes no external costs. Riker (1962) argues that larger minimum winning coalitions are more likely to produce public goods, while smaller minimum winning coalitions are likely to shower favors on narrow interest groups. And more recently, Acemoglu and Robinson (2012) argue that the difference between inclusive and extractive institutions

can explain a great deal of the variation in levels of economic development. This is not to say that expanding the size of the minimum winning coalition always leads to better outcomes. But the above authors produce ample theoretical and empirical support for the idea that, typically, the greatest dangers of political power arise from coalitions that are small and operate for the benefit of the few. We assume that, *in general*, expanding the size of the minimum winning coalition tends to produce political outcomes that are more beneficial and less exploitative.

Procedural rules are often designed with this goal in mind. Formally, constitutions attempt to increase the size of the minimum winning coalition by increasing the selectorate (c.f. Bueno de Mesquita et. al. 2003). The *selectorate* (again taking a broad definition) refers to the group of individuals who have any sort of legal say over a given collective action. Typically—though as we show below, not always—increases in the selectorate increase the size of the minimum winning coalition. The hallmark of a functioning democracy is a substantially larger selectorate (proportionate to the size of the population) than that of an autocratic regime. And a number of standard constitutional provisions formally expand the selectorate beyond simple majority rule: supermajority requirements, bicameral legislatures, presidential vetoes, and judicial review, among others.

Unfortunately for constitutional craftsmen, the number of selectorates required to form a minimum winning coalition is not set by any one rule but is the result of the *interaction* of different political rules acting in conjunction. New procedural rules and informal norms can constrain the behavior of some selectors in such a way as to render their opposition either unlikely or ineffectual. So without changing the formal constitutional guidelines determining who is in the selectorate, the introduction of additional rules can still shrink the size of the minimum winning coalition.

In the next section we explore how the committee system of the U.S. House of Representatives effectively reduces the size of the minimum winning coalition necessary for passing the policies preferred by committee members (and especially chairmen). It does so in two ways: First, by establishing committee jurisdiction, it limits the size of the overall selectorate at any given point in time. Second, by constraining behaviors that tend to result in ex-post opportunism when two legislators make a deal with one another, it limits the number of potential alternative winning coalitions. Rules that constrain opportunism effectively diminish the size of the minimum winning coalition by eliminating the influence of ‘future selves’ who may have different the incentive to renege on a deal. There is a temporal dimension to the size of minimum winning coalitions that such rules effectively shrink.

There is an important analogy here with contracts in markets. Many contracts, through options or non-compete clauses, prevent both future selves and future competitors from influencing the terms of a deal. By constraining behavior, such contracts enable more exchanges to take place in the present than otherwise would. Similarly, political agents can facilitate exchange by constraining their future actions. But there is an equally important disanalogy with market processes. As noted above, political exchanges offer

far more scope for imposing externalities on others. Enabling additional exchanges is not the same thing as making exchanges more inclusive. Additional political exchanges could be good, but there is a substantial danger that they are extractive. Two constraints can act as a double negative, allowing political agents to more easily engage in acts of extractive political exchange.

Before judging whether a rule binds or liberates political agents, it is important to consider how it interacts with other rules. Consider the court packing case mentioned above. Formally, FDR's plan expands the selectorate by placing more Justices on the Supreme Court. We normally expect rules that expand the selectorate to likewise increase the size of the minimum winning coalition. But, when combined with the process by which Justices are nominated, this move actually decreases the size of the minimum winning coalition. Past presidents have appointed some of the Justices still holding office during any given president's term. By packing the court with ideologically friendly appointees, FDR essentially sought to retroactively outvote previous presidents. Whether a rule serves as an effective constraint depends not on its effects on the selectorate, but its effects on the minimum winning coalition.

3. A Case Study: How the Committee System Undermines Majority Rule

Arrow (1952) demonstrates that democratic decision-making under majority rule lacks the property of transitivity. Even aside from any deeper philosophical implications, this finding highlights the possibility that majority rule decisions will be unstable due to vote cycling. Any given set of political preferences can usually accommodate multiple possible coalitions agreeing to a different bundle of policies. Any coalition's proposed policy bundle is dominated by some other potential bundle. Arrow despairs that, in the absence of coherent social preferences, dictatorship may be preferable to democracy for some spheres of government action.

For Buchanan (1954), vote cycling is a feature of majority rule rather than a bug. While accepting Arrow's analysis of the instability of majority rule decisions, he claims that it is a boon for a social order predicated on limited government. Provided that policies are revocable and electoral constraints remain in place—most importantly, that present minorities maintain their rights of political participation—cycling militates against the entrenchment of narrow interests. Collective decisions always suffer from the inability of the minority to have what they want. Shifting coalitions through time at least provides present minorities with the possibility of being in the majority coalition in a future period.

Majority rule has an important intertemporal effect on winning coalitions. This effect manifests in two ways. First, policies passed in the present may be overturned in the future. Under majority rule, the present minimum winning coalition is smaller than a supermajority. But the minimum winning coalition is likewise smaller to overturn such a policy. Majority rule policies are thus less stable than those subject to change only by a supermajority. Second, current coalitions may take into account the possibility that their political rivals will hold power in the future, and thus refrain from abuses in the present. The narrower the interests a policy serves, the more likely it is to be disfavored by future

coalitions. It is precisely its dissimilarity to dictatorship that might commend majority decision rules *in some spheres* to those who value limited government. Because their outcomes are unstable, they are provisional and allow for experimentation rather than entrenchment.

Juxtaposed with the benefits of vote cycling are the dangers of logrolling (Buchanan and Tullock 1962, Ch. 11). Logrolling undermines the romantic mental model implicit in so many discussions about democracy that democratic legislatures test for the majority approval of each policy. In reality, political agents trade votes with other agents, each voting for the other's preferred policy. Logrolling is a virtually inescapable feature of most voting bodies, but instability due to cycling helps to mitigate its dangers. Vote trading is usually non-simultaneous: John votes for George's favored bill today on the promise that George votes for John's bill tomorrow. Cycling introduces significant uncertainty into future political conditions, making it more likely that George will have an incentive to renege on his promise to John. John is thus less likely to take the deal in the first place.

Early American Congressmen in the House of Representatives were sensitive to the importance of majority rule in curtailing government power (Cooper 1970, 22ff). Originally, there were no standing congressional committees that had control over particular policy domains. Instead, legislation was initiated by the Committee of the Whole, which represented a commitment to a "Jeffersonian" vision of democracy (*ibid.*). Special committees only convened *after* the Committee of the Whole approved the broad contours of legislation in order to do the actual drafting. This had the predictable effect of making it very difficult to pass legislation that did not share relatively broad approval.

This is where institutional entrepreneurship enters the picture. Legislators share a common interest in increasing their ability to secure favored policies (Wagner 2012, Ch. 5). Cycling is a constraint on the ability of legislators to make political exchanges since it effectively expands the minimum winning coalition to include future legislators. If legislators can develop post-constitutional rules that secure cooperation with other legislators in spite of potential instability, then they can expand their ability to secure favored legislation.

The evolution of the congressional committee system is one example of an entrepreneurially driven post-constitutional system of rules that has undermined constitutional rules at the higher tier. The committee system has weakened the constitutional majority rule constraint on the growth of government by increasing the ability of congressional representatives to engage in logrolling. It has effectively removed the majority rule constraint on congressional decisions by imposing additional rules of deference and reciprocity. Martin and Thomas (2013) describe how incremental entrepreneurial efforts by individual legislators drove the evolution of the existing system. Table 1 summarizes this process.

Institutional feature	Origins
Standing committees	1809–1829: Clay Speakership establishes standing rather than special committees
Committee jurisdictions (over drafting legislation)	1809–1829: Clay Speakership establishes norm of committees drafting legislation before it is brought before the whole House 1946: Congressional Reorganization Act reduces number of committees with overlapping jurisdictions
Seniority	1829–1890: Informal seniority norm emerges after Clay Speakership 1890–1910: Seniority norm abrogated when the Speaker of the House becomes chairman of the Rules Committee 1910: Speaker of the House loses chairmanship of Rules Committee, restoring seniority system
Deference norm	1809–1829: Clay Speakership establishes a norm of deference to committee decisions, which strengthens committee jurisdictions 1903–1911: Cannon Speakership solidifies deference norm

The committee system has evolved to restrict politicians' ability to defect ex-post from a legislative bargain by constraining proposal power and the power to influence legislative content to committee members. The most basic function of the committee system is to create jurisdictions over specific issues. As with a geographic monopoly, congressional committees maintain a monopoly over a specific range of issues and they have almost complete proposal power within their jurisdiction. The move towards standing committees with established jurisdictions happened early on in the history of congress during the speakership of Henry Clay between 1809 and 1829. Restricted proposal power and the committee's agenda setting power limit the number of alternative proposals that can be brought to the attention of congress, which results in greater legislative stability (Shepsle & Weingast 1981).

Committees essentially maintain a monopoly position over their assigned policy space, which allows them to control new legislation that would affect the status quo in the respective jurisdiction. Even though individual congressmen are not legally restricted from bringing bills to the congressional floor without the responsible committee's approval, congressional deference norms ensure that such action is limited. The deference norm also emerged during Henry Clay's speakership, but it was not solidified until Joe Cannon became speaker of the House of Representatives in 1903.

The seniority principle centralizes agenda setting power within the committee itself (Weingast & Marshall 1988). The seniority system, like most of the other congressional norms, emerged early on in congressional history, but it did not become part of the official rule system until the removal of Joe Cannon from the position of speaker in 1910. Cannon partially undermined the power of committees by claiming the authority to appoint committee Chairs. The informal seniority system encourages doling out chairmanships to those who have served in Congress the longest. This principle protects individual committees from the power of the Speaker of the House and the rest of Congress, and makes the composition of committees in the future far more predictable.

As a result of these informal norms and formal rules the congressional committee system facilitates legislative exchanges that would be significantly less likely to occur under a system of majority rule unmediated by any kind of post-constitutional rule structure. It does so by substantially decreasing the minimum winning coalition for any given policy in a number of ways:

1. **Size:** A standing committee is a smaller legislative body than a Committee of the Whole. With fewer players, it is easier to monitor reputations for honoring trades and thus there is a lower incentive to renege on bargains.
2. **Membership:** Members are filtered onto committees based on the parochial interests of their own districts. The members are thus not a representative sample of the whole population. Even if individual members of the committee change, this renders members' policy preferences more predictable and stable over time.
3. **Chairs:** Since committee chairs have the power of agenda setting within a committee, they can further mitigate any instability that arises within the committee itself. The chair's interests can act as a focal point for other members to coordinate on feasible bargains.
4. **Seniority:** Since the chair position is based on seniority, the future identity of the chair is far more predictable, which further stabilizes expectations across time. This can facilitate bargains within or even between committees.
5. **Deference:** Deference norms mean that individual committees have a great deal of control over the contents of proposed legislation. This does not guarantee support or create immunity from other members of Congress proposing alternative bundles of policies, but gives committees a dominant role in determining which policy options are live.

In conjunction, these effects largely eliminate the constraints that majority rule would impose on extractive policies. Robert Higgs (1988) discussion of the manipulation of the Defense Appropriations Act for fiscal year 1973 onward is a good case in point. In 1960, the Department of Defense (DoD), in an arrangement with six senior members of congress from Pennsylvania, had agreed to use Anthracite, or Pennsylvania Hard Coal, instead of cheaper German coke at its European Posts. At this time "the [anthracite] industry was a shadow of its former self: output at 18 million tons (down 72 percent since World War I), employment at 20,000 workers (down almost 90 percent since 1914)" (Higgs 1988:87). In the late 1960's, the DoD requested budget authority to convert its "aging, inefficient, and labor-intensive anthracite furnaces in Europe" (Higgs 1988:89).

This is when the committee system rears its head. One of Pennsylvania's congressional representatives, Daniel J. Flood, who was the second-ranking Democrat on the Defense Appropriations Subcommittee, used his position to stop the DoD's efforts to convert its furnaces. In 1973 he improved the protection the agreement provided for coal producers in his district by adding a rider to the Defense Appropriation Act, which prohibited the DoD from using any funds from its budget to convert heating plants. The rider was renewed every time the Defense Appropriations Act was renewed until Flood's retirement in 1980. At that time, Representative Joe McDade, from a neighboring district and ranking Republican on the Subcommittee, took on the task of keeping the rider on the

defense budget in place. This turnover from a Democrat to a Republican illustrates the importance how committees select members to securing long-lasting legislative bargains.

When the use of anthracite in American furnaces almost caused a diplomatic crisis between Germany and the US in the late 1980's because it violated German environmental standards, the DoD was finally relieved of its obligation to use Pennsylvanian coal. Instead of shutting down production after losing European furnaces, however, the mines kept operating prosperously, because the DoD was only relieved of their obligations to use coal in Germany after agreeing to use the same amount of coal in its domestic furnaces. Owing to this strong legislative control, the Pentagon has purchased \$20 million worth of Pennsylvania coal each year since roughly 1968. Anthracite coal provisions remain part of the Defense Appropriations Bill.³

The committee system effectively circumvents the internal balance of power that majority rule was meant to impose on Congress. The success of the system helps explain the predictive force of congressional dominance models of politics (Weingast and Marshall 1989). This system, which arose through a gradual evolutionary process, is not a mere analytic curiosity. Entrepreneurship over post-constitutional rules has profoundly shaped the American constitutional order.

4. When Does Institutional Entrepreneurship Erode Constitutional Constraints?

Above we have argued (a), that there is a class of 'post-constitutional' rules that are subject to the influence of political entrepreneurs, (b) that such rules can undermine the effectiveness of constitutional constraints on extractive policies by decreasing the size of minimum winning coalitions, and (c) that the committee system of the U.S. House of Representatives exemplifies both (a) and (b). While the committee system is important in its own right, it still merits asking how much institutional entrepreneurship matters for constitutional political economy more broadly.

One potential objection to the relevance of our argument is that we have focused only on the 'downside' of institutional entrepreneurship. Institutional entrepreneurs can also identify and implement rules that curtail extractive exchanges by increasing the size of the minimum winning coalition.⁴ In order to ascertain whether institutional

³ See p. 79 of Department of Defense Appropriations Act, 2010 (H.R. 3326). In February 2010, the Defense Advanced Research Projects Agency (DARPA) awarded a research contract to investigate coal utilization as an energy source, with the intention of using domestic coal turned into liquid fuels to replace petroleum-based fuels for use by the military (DARPA solicitation for "Coal to Liquids (CTL)," solicitation number: DARPA-BAA-08-58.)

⁴ An even more radical challenge might claim that rules that constrain the behavior of political agents should not be presumed to be beneficial. The work of Buchanan and Tullock, Riker, and Acemoglu and Robinson cited above casts sufficient doubt on this objection. This is, in effect, a challenge to the entire enterprise of constitutional political economy, and in any case is too far afield for us to respond to in detail here.

entrepreneurship makes constitutional craftsmanship more or less problematic, we need to ascertain whether and under what conditions entrepreneurship will tend to erode constraints on extractive political exchanges. While it is beyond the scope of this essay to provide anything like a comprehensive or precise answer to this question, we argue here that certain general features of representative government may make constitutional erosion the rule rather than the exception.

The distinguishing feature of representative government is the distinctions between citizens and their representatives. While citizens have a say in how government is run (typically through elections) the day-to-day business of governing is carried out by a class of (usually professional) politicians and civil servants. The relationship between citizens and representatives or civil servants is often depicted in terms of a principal-agent model. The goal of constitutional rules in this framework is to constrain the extractive behavior of agents. Since we want to highlight very general features of representative government, we make use of that terminology here. However, as we aim to show, taking account of institutional entrepreneurship renders typical features of such models misleading.

Either principals or agents can act as institutional entrepreneurs. This assumption of behavioral symmetry is a cornerstone of constitutional political economy. If political agents are capable of discovering rules that erode constitutional constraints, political principals are capable of discovering rules that bolster them. But while the capacity for entrepreneurship can be regarded as fairly universal, the success of entrepreneurial endeavors depends upon the epistemic environment within which individuals act. There are important epistemic asymmetries in representative government between principal (citizen) entrepreneurs and agent (representative) entrepreneurs. These asymmetries tend to favor the erosion of constraints on political agents, giving them wider berth to engage in extractive exchanges.

We are not implying that political agents are superhuman geniuses (evil or otherwise) capable of discerning the myriad consequences of their institutional innovations while political principals stand by helplessly. Rather, their intimate daily contact with the political process arms agents with much tighter feedback on the success of their new ideas. As is the case with entrepreneurship in any setting, the discovery of political profit opportunities is rife with trial and error. Political agents might have very loose feedback about the actual effects of their favored policies. But they receive continuous and powerful feedback on whether they can get their preferred policies implemented in the first place.

The entrepreneurial development of post-constitutional rules mirrors in important respects Ostrom's (1990) analysis of self-governance. Political agents are the *end-users* of constitutional and post-constitutional rules in the same way that Ostrom's subjects are the end-users of resources. Compared to principals, agents interact in relatively small numbers. When small numbers of end-users develop their own rules, they are far more likely to overcome collective action problems and other constraints on cooperation with

other end-users. Political agents bear direct costs if post-constitutional rules do not enable them to advance their own goals.

So long as political agents develop the rules by which they operate, they will tend to evolve in such a way as to facilitate the success of those agents. Importantly, this does not even require that agents are conscious of the effects of such rules or that they always desire more power. Following Alchian (1952), in tight feedback environments, as long as there is a strong survival criterion that attaches to individual actions then a social system will behave as if the agents had both the ability and desire to maximize in accordance with that criterion. It thick markets that survival criterion corresponds with profit-maximizing behavior. For political agents, the ability to make political bargains is valuable and enables them to stay in power. As the evolution of the committee system illustrates, attempts to overcome the obstacles to particular political bargains can lead to the development of rules that enable more bargains generally.

Compared to political agents, principals lack day-to-day experience with political rules. At best they are well-informed spectators of such rules rather than end-users. More likely, their only contact with political rules is in a periodic election. This contact is very limited in scope and involves the participation of a very large number of principals. The ability of would-be principal entrepreneurs to find focal points for coordination with other principals is severely limited. They have limited scope for discovering rules to constrain agents, and the costs of failure are widely diffuse.

Three other features of political rules reinforce this epistemic asymmetry. First, the effect of rules can be subtle. Few have the capacity of a Kenneth Arrow to discover that majority outcomes are nearly intrinsically unstable. Yet Congress gradually developed a system of post-constitutional rules to mitigate that instability thanks to their daily contact with those rules. Subtlety is compounded when different sets of rules interact with each other, which is exactly how post-constitutional rules operate. Second, many political rules are informal, such as congressional reciprocity norms. Not being codified, they are more difficult for principals to observe or change. Finally, the electoral check of ousting incumbents does not dislodge the force of these post-constitutional rules. The rules stick around even when particular agents leave. Newly elected officials do not enter an institutional vacuum, but rather the same ecology of pre-existing rules and norms for dealing with colleagues inhabited by their predecessors. Extractive behavior enabled by post-constitutional rules does not disappear when new players enter the political game.

Conclusion

Constitutional rules are often designed to constrain state action; however, those rules do not exist in a vacuum. They interact with other rules at the post-constitutional level such as the rules that govern the congressional committee system. These post-constitutional rules can undermine the intended function of constitutional rules. They often arise from political entrepreneurs attempting to secure favored policies. In representative

governments, the epistemic environment of such post-constitutional entrepreneurship often favors those who stand to gain the most from an expansion in state power. Post-constitutional rules, therefore, tend to erode the intended function of constitutional rules that are aimed at constraining the state.

Our argument is most directly relevant for scholars working on questions of constitutional design. If it is worth the effort to attempt to design self-enforcing rules that constrain state predation, it is, at a minimum, worth the effort to consider how post-constitutional rules might undermine those constraints. But our analysis points to several broader implications for understanding constitutional orders as well.

First, our analysis is relevant to the debate about the nature of constitutions. Many constitutional scholars accept Brennan and Buchanan's argument that constitutions are bundles of constraints on extractive political behavior. Others, such as Hardin (1999, Ch. 3), think of constitutions as mere focal points for coordination. A constitution may have some real effects by altering the costs of various types of political activity, but it does little to directly constrain the scale or the scope of government action. Our argument carves out a middle ground of sorts between these two positions. Constitutional rules often bind, but they still often fail to achieve the goals of those that design them since they do not exist in a vacuum.

Second, the influence of political entrepreneurship on the evolution of political rules lends weight to the classic Paretian Iron Law of Oligarchy. If we are correct that there is a bias in how post-constitutional rules evolve that tends to make it easier to consummate political bargains, then the minimum winning coalition for policies will tend to track downwards throughout time. Rules will tend to evolve in such a way as to concentrate power in a few hands. We do not want to push this claim to far, as there are obviously countervailing forces in political evolution, such as the expansion of the franchise. But regardless, if our analysis holds up there is at least one systemic process pushing in the direction of Pareto's oligarchs.

Finally, integrating institutional entrepreneurship into political economy bolsters the traditional view of public choice as 'politics without romance' (Buchanan 1979). Traditional public choice models tend to argue that political principals can effectively control political agents only under certain favorable conditions (e.g., Ferejohn 1986). Contemporary work, however, has increasingly argued for the effectiveness of elections in aligning the interests of voters and politicians. Wittman (1995) argues for the efficiency of democratic politics based largely on the assumption of rational expectations. Since such an assumption rules out the possibility of profits and thus of entrepreneurship *ex hypothesi*, that our analysis suggests different conclusions comes as no great surprise (O'Driscoll and Rizzo 1985, p. 153). Besley (2006) goes so far as to argue that voting can be so effective at selecting high quality political agents that additional constraints on their actions can be welfare *reducing*. Our analysis suggests the opposite. By omitting the possibility of political entrepreneurship, standard principal-agent electoral models systematically *overestimate* the ability of voters to discipline political opportunism. The

combination of political entrepreneurship and epistemic asymmetry may imply that even class public choice had too romantic a vision of the state.

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