

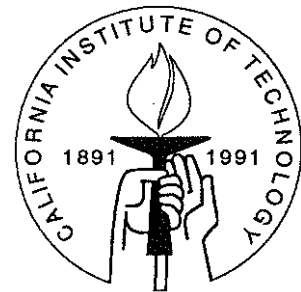
DIVISION OF THE HUMANITIES AND SOCIAL SCIENCES

# CALIFORNIA INSTITUTE OF TECHNOLOGY

PASADENA, CALIFORNIA 91125

CONSTITUTIONAL STABILITY

Peter C. Ordeshook



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## Abstract

Despite attempts to paper over the dispute, political scientists in the pluralist tradition disagree sharply with public and social choice theorists about the importance of institutions and with William Riker in particular who argues in *Liberalism against Populism* that the liberal institutions of indirect democracy ought to be preferred to those of populist democracy. This essay reconsiders this dispute in light of two ideas unavailable to Riker at the time. The first, offered by Russell Hardin, is that constitutions can more usefully be conceptualized as coordinating devices as opposed to social contracts. The importance of this idea is that it allows for a more theoretically satisfying view of the way that constitutions become self-enforcing. The second idea, which derives from the various applications of concepts such as the uncovered set, argues that although institutions such as the direct election of president are subject to the usual inabilities that concern social choice theorists, those instabilities do not imply that “anything can happen” — instead, final outcomes will be constrained, where the severity of those constraints depend on institutional details. We maintain that these ideas strengthen Riker’s argument about the importance of such constitutional devices as the separation of powers, bicameralism, the executive veto, and scheduled elections, as well as the view that federalism is an important component of the institutions that stabilize the American political system. We conclude with the proposition that the American Civil War should not be regarded as a constitutional failure, but rather as a success.

## Constitutional Stability

*To contrive some Method for the Colonies to glide insensibly, from under the old Government, into a peaceable and contented submission to new ones [is] the most difficult and dangerous Part of the Business Americans have to do in this mighty contest. (John Adams)*

*In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself. (James Madison)*

*This radical error ... as regarding the numerical as the only majority, has contributed more than any other cause to prevent the formation of popular constitutional government, and to destroy them even when they have formed. (John C. Calhoun)<sup>1</sup>*

### 1. Introduction

Although the literature on constitutions and democratic politics is voluminous, research grounded in a well developed framework of scientific discourse that serves as a practical guide to the construction of a stable constitutional democracy is virtually nonexistent. There are notable exceptions, the most important being *The Federalist* and the other parts of the debate surrounding the ratification of the United States Constitution. Insofar as the contemporary literature is concerned, perhaps the two most evident exceptions are Dahl's (1956) *Preface to Democratic Theory* and Riker's (1982) *Liberalism against Populism*. The failure of political science to offer a more extensive literature is unfortunate since we are living in a time when democratic governments have achieved unprecedented international legitimacy. And limiting our attention to Dahl and Riker further compounds the problem: Although we can find areas of agreement in their initial suppositions, they posit diametrically opposite preconditions for a stable political system and reach different conclusions about the role of constitutional structure in facilitating that stability.

Riker bases his analysis on the research of social choice theorists such as Arrow (1963), Plott (1967), Davis and Hinich (1966), McKelvey (1976), and Schofield (1978). This research reveals two

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<sup>1</sup> The quote by Adams is taken from Gordon S. Wood, *The Creation of the American Republic*, Chapel Hill: University of North Carolina Press, 1969, p. 131. All quotations from *The Federalist* are from *The Federalist Papers*, Garry Wills, ed., Toronto: Bantam Books, 1982. This particular quote is from paper #51, p. 262. All quotations from Calhoun are taken from John C. Calhoun, *A Disquisition on Government* (1853), C. Gordon Post, ed. Indianapolis: Bobbs Merrill, 1953. This particular quote is from page 24.

things. First, coherence (in the form of a well-defined social preference order over feasible policy outcomes) in majoritarian processes without impediments to direct citizen control of policy requires a nearly-impossible-to-achieve balance of citizen preferences on salient issues, sufficient uniformity of tastes and perceptions such that preferences on all issues (potential or otherwise) can be mapped to a single "ideological" dimension, or the existence of a unique salient issue. Second, democratic procedures such as two candidate elections and committee voting are arbitrary in the sense that outcomes and the identities of winners and losers depend on procedural details, including the order with which election candidates announce their campaign platforms, the order with which alternatives are considered in a legislative voting agenda, the identities of persons who have access to an agenda, and the list of feasible policy alternatives.

From these results Riker constructs the argument that not only is populist political ideology built on sand, but that populist institutions that allow citizens direct control over policy are dangerous, because they exacerbate the inherent instability of democratic processes and facilitate the rise of demagogic leaders who profess to represent a nonexistent "popular will." Rather than seeking to transform individual preferences directly into social policy, democratic institutions ought merely to give citizens the opportunity to replace one set of leaders with another, with the understanding that the relationship between individual preferences and public policy will be mediated by institutional detail and the skill of political participants. Thus, the extent to which constitutional structures limit direct citizen control of policy without wholly negating the opportunity for citizens to replace political leaders whose performance is deemed unsatisfactory determines to a significant degree whether the political system itself is stable. Echoing Calhoun's warning that

*The numerical majority, perhaps, should usually be one of the elements of a constitutional democracy; but to make it the sole element, in order to perfect the constitution and make the government more popular, is one of the greatest and most fatal of political errors (ibid: 35),*

Riker (1982) concludes that "the fundamental method to preserve liberty is to preserve ardently our traditional constitutional restraints (p. 252)."

In contrast, pluralists such as Dahl, Truman (1951), Bentley (1908), Lipset (1963), Lijphart (1977), and Schattschneider (1960), although they make little direct reference to social choice theory -- indeed, that theory did not exist when much of pluralist theory was first formulated -- evaluate differently those preferences that occasion instability and "incoherence." Stability defined in terms of the durability of political institutions requires the instability that social choice theory describes, because this latter form of instability ensures that there are no permanent winners and no permanent

losers in society. The absence of permanent winners and losers, rather than coherence in social preferences and outcomes, is the more important objective, and the ultimate source of instability in social choice -- a complex nexus of individual preferences that do not admit of wholly determinate outcomes -- is deemed necessary and perhaps even sufficient for a stable democracy.

In searching for the sources of stability in democratic systems, the pluralist is led to focus on the ability of citizens to participate in politics via a variety of organizations (parties, interest groups, trade unions, firms, industrial associations, political clubs) that are autonomous of the state but that allow for complex modes of political action and interaction (Dahl 1982). Constitutional provisions influence the form of some of these organizations (for example, the number and character of political parties), but this influence is not critical to the political system's ultimate survivability. So, in sharp contrast to Riker, Dahl (1956) asserts that "constitutional rules are not crucial, independent factors in maintaining democracy ... Constitutional rules are mainly significant because they help to determine what particular groups are to be given advantages or handicaps in the political struggle" (p. 134). Moreover, "to assume that this country remained democratic because of its Constitution seems to me an obvious reversal of the relation; it is much more plausible to suppose that the Constitution has remained because our society is essentially democratic (p. 143)."

Part of the disagreement between social choice theorists and pluralists derives from differences in definitions of stability. However, even a resolution of this definitional matter does not allow us to escape from the fact that both schools of thought evaluate "good" political systems by different criteria. Social choice theorists attach pejorative labels to the instabilities they uncover (discordant, anarchic, arbitrary, unpredictable, incoherent, inconsistent, chaotic) and devote considerable effort at learning how these instabilities can be avoided either by the construction of alternative institutional structures or by restricting individual preferences. In contrast, pluralists delight in the discovery of such instability or the preferences that occasion it.

Miller (1983), surveying this matter, concludes that the social choice theorist's desire to maximize coherence qua transitivity in social decisions ought to be set aside so as to ensure meeting the more general goal of political stability. However, merely eschewing the theorist's admittedly myopic goal does not tell us how to best ensure a stable democracy. The particular difficulty is that neither Riker nor pluralists present complete arguments. In searching for the sources of stability, Riker advocates constitutional provisions that limit citizen control of policy but that simultaneously allow replacement of political leaders through voting -- a multi-cameral versus a unicameral legislature, a separation of powers, federalism, an independent judiciary, and, of course, limited tenure and regular elections. However, there are questions that Riker fails to address satisfactorily, and three in particular concern us:

1. What is the ultimate source of stability of liberal, constitutionally mandated institutions -- what are the mechanisms for ensuring that these institutions do not merely inherit the property of instability that adhere to policy outcomes?
2. Is it inevitable that populist institutions cannot preclude wholly unpredictable outcomes?
3. What of the fact that social choice theory also tells that the identities of victorious candidates produced by liberal democratic institutions need not be any more "coherent" than those produced by populist institutions?

Pluralists, on the other hand, can be accused of giving too little attention to the role of institutions. Although stability may require that there not be any permanent losers (or at least, no "significant" number of them), denying any critical role for constitutions fails to recognize that preferences for public policy and the ways in which society divides on issues are not independent of those institutions. A preference for supply of some service at the state versus the federal level, for example, is not infrequently determined by a guess as to the distributive consequences of these two alternatives, which are determined by how state versus national bureaucracies and legislatures act, which is determined in turn by those constitutional provisions dictating the jurisdictions of state and federal courts and the structure of representation. Indeed, to the extent that constitutions allow for the definition and defense of property rights, then constitutional definitions of those rights dictate not only which groups are winning and which are losing, but also the incentives for groups to act politically. As Mueller (1991: 325) succinctly argues, "One, if not the most important, lesson public choice teaches is that institutions do matter,"

This essay argues that although social choice theorists are too preoccupied with a limited and oftentimes uninteresting forms of stability, Riker infers the correct lesson from the social choice literature -- a properly designed constitutional order that avoids populism ensures that stability is maintained in those circumstances when pluralist preferences take a form that is destructive of the political order -- most notably, when those preferences concern the redistribution of wealth and the definition of rights.

## **2. Self-Enforcing Constitutions**

Before proceeding, we must first define a constitution, its role, and the way it achieves that role. At one level of abstraction we can say that because "there are both conditions that facilitate mutually productive relationships and those that yield mutually destructive relationships," constitutions establish relationships that "facilitate the one and constrain the other by constituting order in human societies" (Ostrom 1987: 48). At another level we can say simply that a constitution is a set of rules

for political action. Although much of politics is directed by informal rules, we also require rules that identify the political state and that specify its legitimate actions.

These descriptions, though, tell us little about how a constitution is maintained and about how it differs from, say, statutory law. More abstractly, then, note that constitutions are commonly conceptualized as contracts whereby people establish authorities to guide the reallocation of wealth and to resolve those social inefficiencies occasioned by externalities and public goods (c.f., Brennan and Buchanan 1985). But there are difficulties associated with this view, the most important being that it does not specify how that contract is enforced. Indeed, if we accept the argument that sovereignty under a democratic constitution resides in the people, then it is evident that any such constitution must be *self-enforcing*. As Madison well understood,

*A mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands (ibid, #48: 254).*

or as Calhoun subsequently reaffirmed,

*it is a great mistake to suppose that the mere insertion of provisions [in a written constitution] to restrict and limit the powers of the government ... will be sufficient to prevent the major and dominant party from abusing its powers (ibid: 25).*

However, if contracts ensure that people do things that they would not otherwise do, it is difficult to isolate the source of self-enforcement. Is it enforced with yet a second contract, that is enforced with a third, and so on? Is it enforced from within, by establishing the police, the courts, and the military? Or must it be enforced by force to be administered by an oligarchy that stands removed from constitutional restrictions? The answer to the first question is obviously "No," the second question merely pushes the problem back a step so that we must ask "how are the provisions enforcing those enforcement mechanisms enforced?" and we need not answer the third question since we are concerned only with democratic constitutions.

To see this problem differently, consider the two-person Prisoners' Dilemma, which provides the simplest illustration of the state's essential role of regulating externalities and which models the problems that were foremost on the minds of the Framers of the United States Constitution -- national defense, interstate commerce, and currency reform. This dilemma, played once, can be resolved and an efficient outcome achieved only if both persons are coerced by some exogenous force

to cooperate (Olson 1965, Hardin 1982), and the essence of the "constitutional contract" is the creation of this force. If the players contract beforehand to establish a third "player" (the state) who administers selective fines for non-cooperation and if the fines are sufficiently great, then an efficient outcome prevails -- both players cooperate, no fines are collected, and the only loss is the fee that the state charges for its services. But the incentives of the third player, the state, must be designed carefully to ensure that it does not act to the detriment of one or both of the original players. Because the incentives of the two contracting players remain essentially unchanged, each must be concerned that the other does not collude with the state to "expropriate" from it. Thus, the state must be designed so that its rewards are contingent on the realization of full cooperation, and the players must monitor the state's actions and stand ready to replace it.

This traditional justification of the democratic state seems unexceptional. However, notice that what "solves" the dilemma is an abrogation of sovereignty by the original contracting players, for unless sovereignty passes to the hands of the state, one or both persons can defect from the contract and leave the dilemma unresolved. Thus, much of the debate in the United States over this contractarian view revolves around the issue of whether the Supreme Court is the ultimate enforcer - the philosopher king of American democracy or whether, as Wagner (1987: 117) argues, "within a republican system of government ... the legislature is supreme, and the constitution will, by and large, be what the legislature wants it to be."

Neither answer is descriptively or normatively satisfactory. Landes and Posner (1975) debunk the Supreme Court as philosopher king, and in response to Wagner, we can ask rhetorically why any legislator is defeated for reelection or, indeed, why they tolerate the necessity of running for reelection in the first place. And normatively, abrogating sovereignty is at odds with the democratic requirement that sovereignty reside in the citizenry. As James Wilson argued, echoing the position of others,

*In all governments, whatever their form, however they may be construed, there must be a power established from which there is no appeal, and which is therefore called absolute, supreme, and uncontrollable ... [and a democratic state, that supreme power] resides with the people .... they have not parted with it; they have only dispensed such portions of power as were conceived necessary for the public welfare.<sup>2</sup>*

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<sup>2</sup> As quotes in Wood, *passim*, 530.



Thus, as Tullock (1987: 317-8) asserts, "The view that the government can be bound by specific provisions is naive. Something must enforce those provisions, and whatever enforces them is itself unbounded... This problem of the self-enforcing constitution has so far evaded solution."

The missing element in our analysis that resolves the enforcement issue is that we have taken too narrow a view of the substantive problems with which constitutions deal. The Framers of the United States Constitution did not envision solving a defense dilemma or an interstate commerce dilemma that would exist only for a few years. They saw these dilemmas as on-going problems of indefinite duration that, unresolved, would lead to the eventual disintegration of the Union. Thus, "A constitution does not resolve a particular prisoners' dilemma interaction. It regulates a long term pattern of interaction" (Hardin 1989: 101). Constitutions are not intended to solve a single problem that may not exist in the near future; they are formed instead to solve long-term problems and, regardless of the facts surrounding constitutional durability in other states, they are designed presumably to have long half-lives.

Returning then to the Prisoners' Dilemma, suppose that instead of being played once, it is played repeatedly an indefinite number of times. We know that in this instance there are a great many equilibria that resolve the dilemma to each player's satisfaction (Taylor 1976, Axelrod 1984). That is, repetition alone and not exogenous enforcement allows us to establish efficient outcomes as equilibria.

Of course, the ease with which we arrived at this "solution" to the type of game that concerned the Founders would suggest that there was little justification for establishing a national state and abrogating the Articles of Confederation. However, there is another fact with which we must contend; although there are equilibria that yield cooperation at every stage and that give no advantage to one player or the other, there are yet other equilibria that give asymmetric rewards and there are still others that are simply inefficient.

This multiplicity of equilibria implies that unless both persons coordinate their strategies to a mutually agreeable outcome, they cannot preclude the possibility that no mutually beneficial outcome will prevail. That is, rather than erect an institution to enforce a contract, the players must instead find a mechanism that coordinates their actions in a way that is acceptable to both of them. Suppose, then, that in lieu of creating a third party to whom they abrogate their sovereignty, both persons simply discuss the matter beforehand and agree to a particular pattern of play -- to a particular strategy combination that corresponds to an mutually desired equilibrium (for example, tit-for-tat). In this instance there is no necessity for becoming concerned with the problem of defection from this temporally extended agreement -- if each believes that the other will abide by it, both persons in fact have an incentive to act accordingly. Thus, their agreement is self-enforcing.

The "constitution" in our example is not anything that necessarily appears on paper. On the other hand, imagine that both persons anticipate playing this same game with others not party to the original agreement. At this point a useful tactic is to publicize the terms of their agreement and to announce that they intend to abide by similar strategies regardless of the identities of the other players. If this proposal is deemed "fair" and profitable by all participants, it seems reasonable to suppose that these other persons will also want to affix their names to the agreement and that this mode of playing the dilemma and the associated public agreement will assume the same force that we attribute to stable and effective constitutions -- indeed, we can even label it as such. Moreover, we see here how a "piece of paper," without any abrogation of sovereignty to a monarch or a despot, can bind people's actions and solve those dilemmas that rationalize the existence of the state.

We emphasize that this argument does not depend on the supposition that our hypothetical society is concerned only with resolving a prisoners' dilemma -- we do not want to argue about the frequency with which such dilemmas arise, whether such dilemmas are resolved only by government intervention, or whether governments ought to be concerned only with such dilemmas. Rather, this example merely illustrates the fact that **countless alternative equilibria characterize nearly any ongoing social process, that nearly any outcome corresponds to an equilibrium regardless of its properties with respect to efficiency or fairness, and that unless there are mechanisms of coordination, there is no guarantee that any equilibrium will be achieved** (Fudenberg and Maskin 1986). Those mechanisms can correspond to informal norms or undescribed evolutionary processes; but if neither the imperatives of evolution nor culture apply, they must consist of those explicit agreements we call constitutions. Thus, theory compels us to concur with Hardin (1989: 119) that

*Because it is not a contract but a convention, a constitution does not depend for its enforcement on external sanctions or bootstrapping commitments founded in nothing but supposed or hypothetical agreement. Establishing a constitution is a massive act of coordination that creates a convention that depends for its maintenance on its self-generating incentives and expectations.*

and with Ostrom's (1987: 51) equivalent observation that,

*If human beings have basic confidence that the conditions of life are organized to facilitate the working out of mutually agreeable relationships, they can approach one another in quite different ways than if they have to assume that they are always exposed to threats and exploitation by others ... The task in constituting a political order is how to rig the games of life in a way that is fair and grounded in principles of respect and reciprocity ...*

### 3. Stable Expectations and Stable Constitutions

The preceding interpretation of a constitution has several advantages. First, it reveals how unwritten constitutions can function and how written ones can allow for continued ambiguity (Foley 1990). Specifically, coordination can be accomplished with both explicit and tacit agreements, whereas contracts without coordination require that nearly everything be stated explicitly. Second, this interpretation tells us why they are best written without trying to resolve all immediate political conflicts, why they ought to be kept simple, and why, once written, their adoption ought to be accompanied by a public debate that commits the citizenry to it (c.f., Riker 1976). The contractarian view, on the other hand, leads to constitutions that try to "nail down" every detail and negotiate every immediate political conflict, with the consequence that they are unlikely to secure much allegiance in public debate and cannot coordinate political action for very long.

More generally, the particular advantage of this interpretation of a constitution is that it tells us how to define an *effective constitution*. Specifically, to perform its coordinative function, a constitution must establish a set of stable and self-generating expectations about peoples' actions. The strategy of tit-for-tat "solves" the repeated Prisoners' Dilemma not only if both players intend initially to choose this strategy, but also only if each expects the other to do the same. Indeed, this expectation must be common knowledge -- each person must expect the other to choose that particular strategy, each must believe that the other holds a similar expectation, each must believe that the other believes that this is so, and so on. Without such expectations, one person or the other may soon come to believe that the interaction is headed toward some other equilibrium, in which case there is no guarantee that a mutually agreeable resolution of the dilemma will prevail.

To the extent that it is in everyone's interest to have some minimal degree of certainty about process and outcomes, a constitution that cannot provide a stable and self-fulfilling set of expectations cannot long survive. Indeed, as Madison eloquently expressed the matter

*The internal effects of a mutable policy are ... calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is to-day can guess what it will be tomorrow. Law is defined as a rule of action; but how can that be a rule, which is little known and less fixed? (ibid, #62: 317)*

The concept of a self-enforcing constitution, then, leads directly to that of a stable constitution and a stable political system. We concur, of course, with the argument that a constitution ought to be flexible so as to allow for evolutionary change (Niskanen 1990). However, a stable and effective constitution cannot be too flexible. For example, the constitution of the USSR (either its Stalinist or 1977 versions) gave the appearance of being democratic by establishing not only an "elective" legislative branch, but also by identifying a virtual shopping list of individual "rights."<sup>3</sup> Its undemocratic character flowed, however, from the constitutional authority of the Communist Party to monopolize elections and to abrogate or interpret that constitution as it saw fit, thereby maximizing "flexibility."<sup>4</sup> And what rendered that "constitution" not a constitution at all was the fact that, given this flexibility at the hands of the Party, it was irrelevant as a coordination mechanism. The true source of coordination in Soviet society was the Party, which adhered to nothing but the most abstract and meaningless definition of citizen sovereignty.<sup>5</sup>

Insofar as a constitution's stability is concerned, it is evident that if it is an effective constitution -- if it coordinates action -- then the constitution itself must be an equilibrium in the sense that no individual within the society has an incentive and the ability to defect to some other strategy. In fact, since we cannot preclude the possibility that subsets of citizens can coordinate their actions so as to act in accordance with some new agreement precluded by the constitution, a stable constitution must be a strong equilibrium.<sup>6</sup>

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<sup>3</sup> Indeed, by implementing a "popularly elected" Peoples' Congress that elected a Supreme Soviet that elected, in turn, a chief executive or executive council, the several editions of the USSR's constitution bore a remarkable resemblance to the original Virginia Plan.

<sup>4</sup> By democratic we mean that there exists some identifiable link between policy outcomes and the preferences of the entire citizenry. Of course we must be careful here since we can say that even a dictator exists at the forbearance of a citizenry that refuses to risk life and limb to rise up in arms against him. Thus, this minimal condition of democracy requires that the link not be "too lengthy" or forged by "improper" coercion. We forego forging a strict definition for obvious reasons.

<sup>5</sup> We see here, of course, why constitutions, unlike statutory laws, are best kept simple and difficult to change. Rendering a constitution difficult to change becomes itself part of its coordinating character -- if everyone believes that everyone else will act so that the constitution is difficult to change, then this degree of difficulty will in fact characterize the established political order.

<sup>6</sup> A strong equilibrium (c.f., Aumann 1959) is a set of strategies such that no subset of individuals can coordinate their actions in such a way that they all share an incentive to defect simultaneously to some other set of strategies. So restated in game-theoretic terms, a constitution is stable if, given all other constitutions that might be devised -- democratic or otherwise -- the constitution in question is a core.

This definition does not specify the requirements for a strong constitutional equilibrium, but the preceding discussion reveals three general requirements. **First**, a stable constitution must produce social outcomes that are generally regarded as efficient, otherwise all or nearly all of society will prefer a different arrangement. We appreciate, of course, the fact that any constitutional change entails uncertainty and that societies prefer "revolution" under only unusual and adverse circumstance. Thus, any notion of efficiency must take account of the costs of transforming the status quo. **Second**, the rules and procedures a stable constitution establishes must be sufficiently clear to allow for subsidiary planning and strategic maneuver. The failure to satisfy this requirement, as illustrated by the various Soviet constitutions, denies the possibility of stable expectations and the effective coordination of political activity. **Third**, because evaluations of nearly all actions are contingent on the outcomes produced by the political process, those outcomes must exhibit some minimal degree of predictability. A constitutional order must allow for stable expectations about the consequences of non-governmental as well as governmental actions.

#### 4. Social Choice Theory

To have any practical value, these abstract requirements must be translated into specific mechanisms for social coordination, which takes us to the issue of constitutional design. However, one additional matter must be attended to. Because Riker's argument for constitutions of a particular type depends on social choice theory's implications and because the pluralist view depends heavily of the nature of those instabilities that pervade society, it is important to specify the precise nature of those implications. We begin, then, with Arrow's (1963) *General Possibility Theorem* which, without resorting to yet another summary of his analysis, tells us that<sup>7</sup>

**Result 1:** *for virtually any non-dictatorial social choice rule, procedure, institution or the like, there will exist individual preferences such that the social preference as revealed by that rule is intransitive.*

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<sup>7</sup> Another result, Gibbard (1973) and Satterthwaite's (1975) *Manipulability Result*, is closely related to Arrow's and tells us that *for virtually any non-dictatorial social choice rule, procedure, institution or the like, there will exist individual preferences such that one or more persons will have an incentive to alter the preferences they report in order to bring about a more favored outcome.* Thus, there is no guarantee that any democratic institution or procedure will induce a truthful revelation of preferences. Thus result, though, is not central to our argument.

This theorem tells us, then, that there is no guarantee that individual preferences can be used to define or to identify outcomes that society ought to prefer -- indeed, there is no guarantee that a "best" social policy can be said to exist.

Arrow's Theorem is general and does not apply only to varieties of majority rule. But because majority rule plays such an important role in constitutional theory, the next result on which we must rely and which we can attribute to Plott (1967) and Davis and Hinich (1966), focuses on those circumstances in which outcomes and preferences are of the type that arise when government decisions concern the allocation of public funds over public goods (Ordeshook 1986).

**Result 2:** *if social decisions are made by majority rule and if preferences are multidimensional and spatial, then the set of preference configurations that occasion an undominated outcome -- an outcome that cannot be defeated by some other in a majority vote -- is generically empty.*

More specifically, if we require two or more issue dimensions to characterize all relevant individual preferences and feasible policies, then, in general, every feasible outcome can be defeated by some other feasible policy.

A third result established by McKelvey (1976) and Schofield (1978) shows the full consequences of Result 2:<sup>8</sup>

**Result 3:** *if social decisions are made by majority rule, if preferences are multidimensional and spatial, then if there is no undominated outcome, the social preference order is wholly intransitive over the entire set of possible policy outcomes.*

Thus, if  $x$  and  $y$  are any two feasible policies, then there exists some sequence of feasible policies  $(z_1, z_2, \dots, z_k)$  such that  $x$  defeats  $z_1$  in a majority vote,  $z_1$  defeats  $z_2$ , ..., and  $z_k$  defeats  $y$ .

Results 2 and 3 have occasioned considerable research into elections, committees, legislatures, voting procedures, and so on. We cannot review that literature here, but one result -- Black's (1958) Median Voter Theorem -- warrants special attention:

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<sup>8</sup> There are some technical conditions that must be imposed on outcomes and preferences for this result to apply; however, we prefer to avoid such matters since they detract from the main thrust of the argument.

**Result 4:** *if preferences can be characterized by a single issue (equivalently, if all preferences are single-peaked), the median ideal preference is a Condorcet winner and the social preference order under majority rule is wholly transitive.*

Thus, if two candidates compete under the circumstances described by this result, if all citizens vote for their most preferred candidate, and if each candidate seeks to win the election, both candidates should identify with the median ideal preference.

Three additional results elaborate on the properties of majority rule when preferences are not single-peaked -- when policies alternatives are multidimensional and the theorems of Plott, Davis and Hinich, McKelvey, and Schofield apply. First, for two-candidate elections (McKelvey and Ordeshook 1976, McKelvey 1986):

**Result 5:** *if preferences are spatial and multi-dimensional, then, in general, there is no equilibrium in two-candidate election contests -- there is no policy towards which the candidates must eventually converge -- but if the distribution of preferences is "sufficiently tight," the candidates will not choose policies far from the electorate's median preference on each salient election issue.*

The part of this result that warrants emphasis is that although any incumbent can be defeated by a sufficiently astute challenger, policies themselves -- the candidates' campaign platforms -- need not be subject to any great change. That is, although the Median Voter Theorem does not apply in multi-issue contests, the centralizing tendency it uncovers is a general property of two-candidate majority rule elections.<sup>9</sup>

Turning from two-candidate elections to committees (legislatures) that use some variant of majority rule, we know that (Miller 1980, Shepsle and Weingast 1981, Ordeshook and Schwartz 1987),

**Result 6:** *if a majority-rule committee uses a "typical" agenda to order the outcomes that it must consider, then in general, the final outcome will depend on the specific form of that agenda and the outcomes that are considered. Also, if there are no restrictions on agendas, then*

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<sup>9</sup> We emphasize that this result employs a variety of assumptions that may not be satisfied in reality. Candidates can diverge on the issues, then, if citizens who are dissatisfied with both candidates fail to vote and if preferences are distributed bimodally on the issues or if the candidates are not able to adjust their positions freely on the issues. Moreover, the variability in policy will increase as the size of the electorate decreases and as the variability in the electorates' preferences increases.

*a greater variety of outcomes can prevail that would prevail under a 2-candidate election format.*

A considerable body of research is directed at learning the impact of institutional structures such as bicameralism and parliamentary procedures, and this research tells us that not only can those institutions have a profound effect on final outcomes, but also that *the extent to which a particular institution or procedural detail can mitigate against disequilibrium depends not only on the character of those institutions and procedures, but also on the character of individual preferences* (c.f., Shepsle and Weingast 1981, Denzau and Mackay 1981, Hammond and Miller 1987). Specifically, although a procedure such as issue-by-issue voting can induce a stable outcome when preferences are separable -- when a person's most preferred policy on each issue is independent of whatever prevails on the remaining issues -- such a procedure need not induce stability when preferences are not separable. There is one result, though, that, as we see later, is important for constitutional design: Briefly,

**Result 7:** *if preferences are spatial and multi-dimensional and if the preference distribution is "sufficiently tight," then the status quo is stable if a majority vote quote greater than 64% is employed* (Caplan and Nalebuff 1988).

A final important result reveals the change that occurs in the nature of these equilibrium results when government policy concerns redistributive issues.

**Result 8:** *If the allocation of some fixed resource (e.g., money) is to be determined by majority rule, then even if citizens give weight to the welfare of others, there is no stable policy proposal. Moreover, short of unanimity, the size of the majority that defines winning merely effects the number of people from whom resources can be expropriated, but not the nonexistence of a stable policy.*

Although all Results but 1 pertain to majority rule institutions, we can assume on the basis of an extensive body of subsidiary research, that their general form extends to all institutions and procedures we might deem "democratic." Results 2-8 in conjunction with this subsidiary research allow us to utter some general propositions about democratic processes, however enriched those processes might be by complexity and institutional detail.



1. Barring unusual configurations of individual preferences, a cyclic social preference is virtually inescapable.
2. Although in accordance with implication 1, there cannot be any permanent winners and losers in any democratic system, institutions can mitigate against wide swings in public policy, at least insofar as those institutions do not address distributive matters.
3. Although final policy outcomes depend on procedural details and the ways in which those details are manipulated, the ability to manipulate outcomes is not unconstrained. Moreover, those limits become more severe as the preferences over which the institutions operate become more homogeneous and concentrated about some "middle" position.
5. Although the instabilities associated with majority rule can imply considerable variability in the identities of winning and losing candidates and parties, that variability does not extend necessarily to policy outcomes.

### **5. Designing Stable and Effective Constitutions**

Earlier we argue that an effective constitution is a set of rules that facilitates the coordination of political action in such a way as to induce equilibrium actions and stable expectations about political process and policy and where the constitution itself is a strong equilibrium. This statement can be reformulated to require that an effective constitution must do two things: (1) coordinate social action to an equilibrium and (2) ensure that out of the universe of possibilities, the equilibrium that is in fact achieved is deemed "reasonable" by a sufficiently large portion of society -- large enough, at least, to render the constitution a strong equilibrium. In the lexicon of principle-agent theory, the first difficulty is to ensure that the agent (the state) coordinates the principle's actions (the governed) to achieve an equilibrium -- coordination that, from time to time, may require coercion -- whereas the second difficulty is to ensure that the equilibrium is "appropriate" in the sense that the agent does not tyrannize on behalf of itself or any other faction.

The mechanism whereby a democratic state accomplishes these objectives is outlined in *The Federalist*, but there are gaps in the argument. To see them and to see how social choice theory helps fill them in, let us consider an especially simple possibility, a society that confronts, on an annual basis, only one issue that divides its members into disparate positions. Suppose this issue is of the usual sort that arises when people choose how to divide the government's budget between two alternative services -- how much to spend, for instance, on national defense versus social welfare services. Different voters will prefer different patterns of spending, but to make a final decision suppose society, informed of the virtues of majority rule, operates without any formal constitution but meets once a year so that members can submit alternative proposals (policies). Suppose two of

these alternatives are chosen at random and that the final policy is selected using a majority vote. Although this procedure is simple, direct, and democratic, everyone's optimal strategy is to submit their ideal preference so that if preferences are dispersed, there is little predictability to social policy no reasonably stable expectation about outcomes.

To secure stable expectations, suppose instead that society chooses a person at random to "run" against an incumbent, lets both persons compete by proposing alternative policies, uses a majority vote to determine a new incumbent, implements the policy advocated by that new incumbent, and compensates the winner sufficiently so that winners gain more by implementing their promises than by implementing their ideal policy -- that is, suppose the society conforms to Dahl's (1956) ideal of a polyarchy. At this point we can appeal to the Median Voter Theorem (Result 4), which tells us that a stable outcome prevails and that that outcome corresponds to society's median preference.

Of course, our society could just as easily poll its members and implement the median directly. Indeed, there are many procedures that produce identical final outcomes. For example, voters could nominate alternative policies, and subsequently vote over all nominated alternatives using some agenda. Or voters could nominate persons to nominate alternatives, and so on. Each of these procedures, though, yields the identical outcome -- the median preference (Ordeshook 1986) -- which means that there should be little disagreement over the way majority rule is implemented.

Having unanimously agreed to some variant of majority rule, there is no apparent need for a formal written constitution that proscribes the use of any particular rule. Indeed, as long as there is some agreement that no one ought to be permanently disenfranchised, this society's political stability originates as much from its internal cohesion as it does from any explicit constitutional provision.

Now let matters become more complicated and suppose society confronts an additional issue each year that requires resolution -- for example, the severity of public standards to place on air quality. Once again, people could be polled on each issue and the two medians implemented as policy. But now social choice theory alerts us to two new dilemmas. First, what a person prefers on one issue may depend on what prevails on the other, in which case a simple poll of society will not suffice and the outcome of any poll will depend on the way questions are posed. Second, even if the issues are wholly disjoint, it may soon become evident that, in accordance with Results 2 and 3, other policies are preferred by a majority to the one that corresponds to the median preference on each issue.

A third fact complicates matters further. Even though society may adhere to majoritarian principles, the way in which those principles are implemented influence outcomes. If people nominate alternatives to be placed on some agenda, the final outcome depends, among other things, on the location of the nominated alternatives in the agenda. And people are no longer indifferent

between using an agenda and using the two-candidate election format, because the outcome that an agenda yields can differ from the one that a two-candidate election produces (Result 6).<sup>10</sup>

This last fact leads to yet another problem for society -- **procedures inherit the instability of final outcomes, procedures for choosing procedures inherit this instability, and so on** (Coleman and Ferejohn 1986). When society confronts a single issue so that one outcome dominates the rest, people are indifferent as to how majority rule is implemented. But if every outcome can be upset by some other outcome and if procedures can be designed to lead to any outcome, then people will hold different preferences over procedures and any social intransitivity over outcomes will transfer to these procedures. So, just as preferences over procedures will in general be intransitive (Result 1), preferences over procedures for choosing procedures will also be intransitive, and so on ad infinitum.

Clearly, this infinite regress must be terminated by some convention or rule, for otherwise society is incapable of making any decision that establishes stable expectations about process or outcome. Fortunately, it is at this point that we can use the fact that although people may have preferences over which procedure to use in resolving contemporaneous issues, they are less likely to hold such preferences for decisions made in the future, especially if a Rawlsian (1971) veil of ignorance characterizes the situation. "Agreement on rules is much more likely to emerge than agreement on policy alternatives within rules, because of the difficulties in identifying precisely the individual's economic interests in the first setting ... [especially if] the rule to be chosen is expected to remain in existence over a whole sequence of time periods ..." (Buchanan 1987: 310). If I cannot know which procedure will most benefit me in the future and if I value the time that can be saved by avoiding incessant debate over process as each opportunity to decide something arises, then I will prefer committing to the same "fair" procedure in every circumstance. Even if issues arise in which I see temporary advantage in some alternative procedure, then just as cooperation is sustained in the repeated prisoners' dilemma despite the myopic incentive to defect to non-cooperation, I should

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<sup>10</sup> The strategic complexity of procedures also introduces the problem that unless all members of society devote the same effort at "playing the game of politics," those with greater resources will come to dominate final outcomes because they are better able to deduce the consequences of alternative actions. That is, strategic complexity places a premium on the ability to discern the strategies of others and appropriate strategic responses. Madison clearly foresees this possibility: *Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue, or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest reared not by themselves but by the toils and cares of the great body of their fellow-citizens. This is a state of things in which it may be said with some truth that the laws are made for the few, not for the many* (ibid, #62: 317). Complexity alone, then, as opposed to the content of issues establishes a new, strategic, elite.

choose to abide by the status quo procedure if deviations unlock the door to future chaos and to the regress from which society had earlier escaped.<sup>11</sup>

Now consider whether society can ensure policy stability. If society implements a two-candidate election format, it will observe two things. First, a challenger can find another policy that is preferred by a majority regardless of the incumbent's strategy (Result 5). Thus, no candidate remains in office long and policies change from election to election. However, policies will not change greatly unless preferences over policy are widely dispersed -- indeed, they may not change in a way that is deemed significant by most members of society (McKelvey and Ordeshook 1976, McKelvey 1986). We may observe instability in the identities of winning and losing candidates, but this instability need not translate into any great instability in policy.

## 6. Redistributive Politics

Thus far we have assumed that the government is concerned only with regulating the supply of public goods. There is, though, no circumstance in which the state is restricted to only this role. Providing for national defense, highways, or education, for example, necessarily confers differential private benefits and costs, because goods that are public in consumption have private consequences in production. In addition to those distributive costs associated with taxation, there is the fact that **someone** must secure the contract to build a weapons system, to lay concrete, and to print textbooks. In short, it is impossible for the state to avoid the issue of the redistribution of wealth. Redistribution, moreover, need not take a purely economic form. States with ethnic, linguistic, or religious conflicts are, in effect, constantly threatened with the salience of redistributive issues to the extent that the government's policies are perceived as necessarily conferring recognition or power to one group at the expense of another.

Adjusting our analysis of the previous section, then, suppose that society shifts its focus to the methods of generating revenues to pay for public services. Social choice theory now tells us that this change yields a radically different situation. Specifically, if redistribution becomes salient, then not only does instability traverse the entire domain of feasible policies, but even with a two-candidate election format, final outcomes can include those that reduce some maximal minority to poverty (Result 8). Thus, if public preferences concern issues of the form "the government ought to spend ... on education, national defense, urban renewal, and so on" and if the methods whereby governments raise the revenues for providing these services is somehow not salient, then a winner-take-all election

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<sup>11</sup> Perhaps a classic constitutional example of this argument is the electoral college feature of the US Constitution. Although the electoral college allows for the possibility that a candidate can win the presidency without a positive vote plurality, there is no reason to suppose that this possibility favors a Republican or a Democratic candidate, so this electoral arrangement causes no great concern.

format produces outcomes about the center of gravity of preferences. But if preferences concern "who pays" for these services or if these services confer differential benefits across society, then the system changes in a fundamental way. Indeed, even if people divide into a few "classes" or categories -- rich, poor, black, white, labor, capital, farm, non-farm, urban, rural, etc. -- not only is there no stable outcome, but candidates can jockey for electoral advantage by advocating extreme policies that pit these categories against each other and thereby threaten the rights and even the existence of minorities.

There are, then, two types of instabilities. One type, derived from different tastes over public goods, can be regulated with simple constitutional forms such as winner-take-all election procedures that yield two party systems, where by "regulated" we mean the establishment of stable expectations about policy outcomes. The second type, which arises if wealth or political power is redistributed, cannot be regulated effectively in the same way. Something other than simple populist procedures are required to dampen the extent of inherent instabilities or to keep such issues from becoming salient in the first place. Society might try to avoid political instability and extreme violation of rights by relying on norms of fairness and the like, but, quoting Madison out of context, "history has taught us that other precautions are necessary." The question, then, is: what precautions, if any, can keep such issues from threatening the fabric of the state.

Since an interest or coalition of interests that proposes to redistribute away from others in a significant way seems the very essence of a Madisonian faction -- "a number of citizens ... who are united and actuated by some common impulse or passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community" (*ibid*, #10: 43) -- it seems only reasonable to begin with Madison's solution to the problem. That solution, of course, is the expansive republic that accommodates such an extensive array of divergent interests that it becomes impossible or at least impractical for majority factions to form. For Madison, then, the solution is, like the one offered by pluralists, to be found in society's extra-constitutional construction.

It is at this point, though, that Madison's theory is weakest. For example, because of the dilution in the value of any individual vote that it implies, Madison's prescription, without countervailing institutional devices, necessarily increases the problems associated with rational ignorance and the transfer of power to an informed elite (Aranson 1990). Thus, as Calhoun argues,

*The right of suffrage, of itself, can do no more than give complete control to those who elect over the conduct of those they have elected. In doing this, it accomplishes all that it can accomplish ... The more perfectly it does this, the more perfectly it accomplishes its ends; but*

*in doing so, it only changes the seat of authority without counteracting, in the least, the tendency of the government to oppression and abuse of its powers. (ibid, pp. 12-13)<sup>12</sup>*

Aside from an ad hoc appeal to transaction costs, there is a second potential justification for Madison's argument, as is summarized by the following reasoning: "If I know that any proposed redistributive coalition is unstable and likely to be replaced in short order with another coalition, and if I am as likely to be included in a losing coalition as a winning one at any point in time, then if I am risk averse, I should prefer that redistributive issues never arise or that some equitable resolution be imposed for all time. And if everyone else feels the same as I, then surely we can coordinate to such an outcome with or without a written constitution."

This argument encapsulates pluralist political theory, and indeed, it may be correct if society is divided into innumerable crosscutting cleavages **and if there is nothing that can be used as the basis for forming a permanent winning faction.** The pluralist argument is incorrect and dangerous, then, if there are "natural" ways for winning factions to coordinate. A society divided into two racial, ethnic, or language groups will, in all likelihood, find it easier to coordinate so that one group expropriates from the other. Russians in the USSR, Serbs in Yugoslavia, English speakers in Canada, and whites nearly everywhere outside of Asia can discriminate knowing that only some minimal socialization will allow ethnicity, language, or race to be a permanent mechanism of coordination. For example, even if a pluralistic nexus of economic interdependencies and interests were to evolve, proclaiming the USSR democratic by imposing a populist constitution is unlikely to result in much political stability (and certainly we have here an opportunity for establishing a world record extended "republic"). Moreover, even if redistributive politics is ultimately unstable despite such factors, neither social choice theory nor any other theory for that matter, can preclude such coordination or tell us about the durability of such redistributive arrangements -- indeed, their durability may be just great enough.

With this concern in mind, let us consider the solution of concurrent majorities -- the rule of unanimity -- offered by Calhoun:

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<sup>12</sup> Indeed, we might even conjecture that Madison concurred with this argument: *I go on this great republican principle that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If they be none, we are in a wretched situation. No theoretical checks, no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people is a chimerical idea.* (Madison: Virginia ratifying convention, as quoted by Wills, *ibid*, p. xxi.)

*There is but one certain mode in which this result can be secured, and that is by the adoption of some restriction or limitation which shall so effectively prevent any one interest or combination of interests from obtaining excessive control of the government ... [and this] can be accomplished only in one way, and that is by such an organism of government -- and, if necessary for the purpose, of the community also -- as will, by dividing and distributing the powers of government, give to each division or interest, through its appropriate organ, either a concurrent voice in making and executing the laws or a veto on their execution (ibid, p. 20).*

There is, of course, at least one objection to Calhoun's prescription (aside from the observation that its moral legitimacy can be defended only if the status quo is one in which all members of society currently enjoy their civil liberties -- a condition that can hardly be said to have been satisfied in Calhoun's day). Specifically, if every potential interest, however small, has a veto, then the danger is that the state will be rendered immobile.<sup>13</sup> Calhoun, though, does not argue for a wholly catholic use of unanimity rule. It is of course true that moving from simple (50%) majority rule to, say,  $X$ -majority rule where  $50\% < X < 100\%$ , does not necessarily eliminate the cyclic character of redistributive matters (such a move merely shrinks the size of the subpopulation from which the majority can expropriate) and that only 100%-majority rule is guaranteed to ensure against expropriation (Result 8). But Calhoun offers this essentially mathematical counter-argument:

*yet even when, instead of the sense of each and of all, it takes that of a few great and prominent interests only, it would still, in a great measure, if not altogether, fulfill the end intended by a constitution. For in such case it would require so large a portion of the community, compared with the whole, to concur or acquiesce in the action of the government that the number to be plundered would be too few and the number to be aggrandized too many to afford adequate motives to oppression and the abuse of its powers. (ibid pp. 21-22)*

## 7. Separation of Powers

Calhoun's argument is nearly persuasive and appears to match Riker's argument. Rather than rely on the inherent difficulty of assembling a winning coalition in the face of a complex nexus of interests, the separation of powers and the associated devices of a two-chamber legislature in which

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<sup>13</sup> We suspect that it is possible to design a repeated play veto game involving redistribution in which players rarely if ever use the veto for "ephemeral" reasons owing to the threat that they will be punished subsequently for doing so by counter-vetoes (c.f., Lijphart 1977: 36-8). However, owing to the Folk Theorems of game theory that tell us about the multiplicity of equilibria in a game, it should also be possible to establish the existence of different equilibrium patterns of action.

each chamber is elected independently of the other, a popularly elected chief executive with a veto, and an independent judiciary all raise the vote quota necessary to pass any measure and increase the likelihood that there are outcomes that cannot be upset if they become the status quo (Buchanan and Tullock 1962, Hammond and Miller 1987, Miller and Hammond 1989). Notice, however, that there are simpler devices that serve the same end, including requiring that an incumbent who directs a unitary state be defeated only with an extraordinary majority, and it is important to see why such "resolutions" are unsatisfactory. First, as Hamilton and Madison express the matter

*Has it not ... invariably been found that momentary passions, and immediate interests, have a more active and imperious control over human conduct than general or remote considerations of policy, utility, or justice? (ibid: xxx)*

*A dependence on the people is no doubt the primary control on the government, but experience has taught mankind the necessity of auxiliary precautions (ibid, #51: 262).*

Merely raising a vote quota may make it difficult for people to tyrannize, but it does not make it impossible for them to do so.

There is a second and more compelling argument against such a solution, namely that it opens the door to the tyranny of the state. Recall that society is likely to care more about policy than about the fates of unsuccessful candidates or defeated incumbents, and that policy stability can coexist with candidate instability. The problem, though, is "whether rulers in a populist system can be expected to maintain the electoral arrangements for liberal democracy" (Riker 1982: 248). Although voters are not likely to care much about the fates of politicians who successively leave office, politicians are unlikely to be fond of such a system. If a person's goal is to win election, we should not be surprised to see that person exercising every effort to do precisely that, and helping them by raising the vote quota is poor insurance against those who would retain office to corrupt the system. Put differently, "when supreme authority is vested in a single center of authority, distinctions between constitutional decision making and governmental decision making can no longer be made" (Ostrom 1987: 141), and as Riker (1982: 249) elaborates,

*in populist systems both the temptation and the ability to weaken the electoral sanction are especially strong ... with a populist interpretation of voting it is easy for rulers to believe their programs are the "true" will of the people and hence more precious than the constitution and*



*free elections. Populism reinforces the normal arrogance of rulers with a built-in justification for tyranny, the contemporary version of the divine right of rulers.*

Fortunately, a separation of powers does more than merely raise vote quotas. As Madison states

*The great security against a gradual concentration of the several powers in the same department consists of giving to those who administer each department the necessary constitutional means **and personal motives** to resist the encroachments of others ... ambition must be made to counter act ambition (ibid, #51: 262).*

A separation of powers, then, seeks to initiate a natural competition among the state's branches so that only a balance of power that protects liberty prevails in equilibrium. Establishing such a balance requires two things: at least three decision makers with contradictory goals and rules that define how one subset of decision makers can thwart the goal of another subset. In international affairs, the decision makers are nation states, the goal is the maximization of wealth that manifests itself as the pursuit of power, and the rules are a majoritarian-like system in which coalitions with more power can block the ambitions of coalitions with less.

The components of this balance in international affairs arise "naturally" out of the anarchy of the competition for scarce resources (Niou and Ordeshook 1990, 1991), whereas the components of intra-state balances, including even the identities of the relevant decision makers, are the consequence of constitutional structures. In fact, in its specification of jurisdictions, the United States Constitution defines three separate balances of power. First, there is a balance among three branches that regulates the interpretation of the constitution itself -- although the Supreme Court oversees this process, the Senate and the president regulate the Court's membership. Second, there is the balance among the executive and the two houses of the legislature that regulates statutory measures. Finally, there is the balance among the two houses of the legislature and the states that regulates changes in the constitution itself.<sup>14</sup>

The specification of jurisdictions, though, merely defines the relevant decision makers -- it is one thing to say that "ambition must be made to counter act ambition," it is another thing to design a system in which this is so. Hence, the next step in constructing a balance consists of ensuring that these decision makers do not have identical goals, which is accomplished by assuring that each

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<sup>14</sup> Notice that this construction cannot be implemented with a unicameral legislature, and thus a bicameral structure allows for greater flexibility in the separation and design of these balances.

decision entity has a different relation to the ultimate sovereign, the people.<sup>15</sup> To see how this is accomplished in a presidential system and to see also the problems associated with parliamentary ones, notice that legislative or parliamentary election districts can easily become captive of an extended form of the prisoners' dilemma in which representatives from each district provide, at national public expense, particularized benefits for their constituencies that are generally economically ill-advised (Aranson and Ordeshook 1985). What keeps legislatures from resolving this social inefficiency, however, is the fact that constituents, acting in a decentralized way owing to the federal structure of representation, elect legislators who are best suited to providing those benefits -- voters are themselves trapped in a dilemma in which no constituency elects unilaterally a representative who would oppose such legislation (Fiorina and Noll 1978, Niou and Ordeshook 1985). The force working to resolve this dilemma in presidential systems is that, when voting for president, citizens can register their dissatisfaction with governmental inefficiency. This is not to say that the ensuing policy conflict between president and legislature will be resolved in favor of greater efficiency. This argument, though, illustrates how electoral imperatives can create different preferences between two branches of government, differences that do not exist necessarily in parliamentary systems.

The final step in the construction of a balance of power is to specify the rules whereby one set of decision makers can counter the actions of another. The difficulty here, of course, is that the measure of "power" must be invented and defined constitutionally, which is a task that the United States Constitution accomplishes by giving each decision maker a veto within its jurisdiction.

This American arrangement is one possibility, but recall that if a constitution is an effective coordinating device, it must provide for stable expectations with respect to each jurisdiction. Awarding a jurisdiction to a single branch of government threatens tyranny and instability, which occurs whenever a chief executive is given the power to suspend a constitution (as in many newly-formed "democracies") or to issue dictatorial decrees (as in the former Soviet Union), or when a legislature can rewrite the constitution at its own discretion (as in the Republic of China's National Assembly). On the other hand, awarding multiple jurisdictions without a veto (for example, allowing both branches of Congress, or any branch plus the president to pass and implement legislation as is the case in parliamentary systems) merely creates the potential for instability and incoherence of the type that social choice theory ascribes to majority rule. The veto, of course, is inherently conservative, but it maximizes the likelihood that a constitution can generate stable expectations.

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<sup>15</sup> With the popular election of United States Senators allowed by the Seventeenth Amendment, it is possible to argue that the incentives of Senators and members of the House of Representatives do not differ sufficiently, which in turn provides one of the pieces of the explanation for governmental growth and inefficiency that some scholars decry (Tullock 1987).

## 8. Federalism

Because the separation of powers impedes the state's ability to upset the status quo precipitously, this device accomplishes another end -- it slows the governmental process so as to move us closer to the pluralist's objective of a system "in which there is a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision" (Dahl 1956, p. 145). However, we must now consider whether constitutional balances of power sap the state's vitality. Indeed, as Madison observed,

*Energy in government is essential ... Stability in government is essential ... On comparing, however, these valuable ingredients with the vital principles of liberty, we must perceive at once ... the difficulty of mingling them together in their due proportions. (ibid., #37:177-8)*

Hamilton concurs but adds,

*the power of preventing bad laws includes that of preventing good ones ... [but] the injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones (ibid: 373-4)*

The difficulty is that each goal -- energy and stability -- complements the other and simple tradeoffs are not apparent. There is, though, an additional institution that warrants examination in this context -- *federalism* -- because it is frequently an important part of the separation of powers framework and because its design bears directly on both stability and energy.

At the outset, we should differentiate between the two forms of federalism that Aranson (1990) calls *constitutional* versus *contingent decentralization*. Contingent decentralization "locates all sovereignty in the central government. That government then decides ... how much authority to devolve to the constituent units," whereas in constitutional decentralization "the authority of the states ... is guaranteed as a matter of organic, constitutional law" (p. 20).

In choosing between these two forms it is useful to keep in mind the three common justifications for federalism. The first justification is that it acts as an agent of efficiency by providing for competition between political units in the supply of public services (Wildavsky 1990, Dye 1990a). Federalism does this by allowing people and investment to "vote with their feet" (Tiebout 1956), thereby generating a market for public goods, and by allowing for experimentation in public goods provision (Dye 1990b). The second justification also pertains to efficiency. Since people's preferences for public goods and services differ, if externality effects can be isolated geographically,

allowing for geographic decentralization in supply is efficient. The final justification is related to the second. Federalism allows states that are otherwise satisfied with local control of public services to join in order to realize various economies of scale in public goods provision. The most evident historical example of such scale economies arise in the provision of national defense, and thus Riker (1964) concludes that the existence of an external threat is a necessary condition for the formation of a federal state. It remains to be seen, however, whether increased economic competition in a world market economy will serve the same purpose when some states, most notably Japan, act as predators intent on maximizing market share.

The argument now for contingent decentralization is that it provides a fully flexible state form. However, the problem is that we do not know how to construct a constitution that guarantees anything approximating the optimal allocation of governmental responsibility -- indeed, we do not even know how to identify that optimum since presuming that we can do so is to assume that we can direct the centrally planned state.<sup>16</sup> Moreover, since contingent federalism precludes constitutionally defined barriers between levels of government, we should suppose that the most naturally powerful level -- the national -- will soon aggrandize all authority (which, of course, is not an historical process unfamiliar to most of us). Thus, the only viable federalism, if we are to have a federal structure at all, is a constitutional one (Aranson 1990, Wildavsky 1990).

Of course, constitutional decentralization is essential if a society consists of hostile ethnic or religious groups that live in distinct, geographically defined regions such as the USSR or Yugoslavia. In this instance, though, constitutional coordination may be impossible and federalism becomes little more than a treaty in which these groups agree to cooperate only on issues in which there are significant economies of scale, such as defense. What we want to consider, though, are the justifications for this form of federalism in states such as the United States and Taiwan, which do not have geographically defined ethnic, religious, or racial cleavages.

We can begin with Ostrom (1987), who rejects the idea that a simple separation of powers is sufficient to secure majority and minority rights and who accepts the view that a state designed simply to thwart ambition with ambition creates stalemate:

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<sup>16</sup> It may be true that the allocation of authority will be determined ultimately by voter preferences, but this implies that there are no constitutional guarantees against aggrandizement and thus, contingent federalism serves no purpose in terms of facilitating stability. Because contingent federalism's properties are derivative, whether it facilitates stability, efficiency or any other goal is a function of other constitutional provisions. Also, to the extent that federalisms are contingent, it will appear to play no role in determining the allocation of responsibilities since that allocation is determined by other factors. Most theoretical models of federalism assume constitutional decentralization whereas most federalisms are contingent, and this fact explains Riker's (1969) conclusion that theoretical predictions about federalism's influence fail to be borne out empirically.

*Drawing upon the principle of opposite and rival interests ... creates a potentiality for stalemate and immobility on the part of governments rather than due deliberation and a reduction of propensities to err ... Madison's conception ... will not suffice to prevent people from warring upon one another where the other is viewed as the enemy with whom one shares no potential community of interest. (pp. 162-3)*

Instead, Ostrom argues, federalism provides the final guarantee of stability by facilitating deliberation in government processes,

*Instead of relying upon a unitary arrangement inherent in the constitution of a single republic, the major remedy of **The Federalist** lay in **compounding** a republic so that self-government can operate concurrently in the government of different communities of interest (p. 104).*

That Madison saw federalism as a piece of the solution to national stability is clear:

*The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States; a religious sect, may degenerate into a political faction in a part of the Confederacy, but the variety of sects dispersed over the entire face of it, must secure the national Councils against any danger from that source; a rage for paper money, for an abolition of debts, for an equal division of property, or for any other wicked or improper project, will be less apt to pervade the whole body of the Union, than a particular member of it... (ibid: #10: 48-9) .*

It is clear from this passage that Madison assumed that it is not the pluralist nexus of interests that holds society in check, but rather the constitution boundaries that define a federal system. To see how this is done -- to see how federalism can induce stability of the sort sought by social choice theorists -- imagine that each regional issue is an issue dimension in some  $n$ -dimensional issue space. Most persons will greatly about only those dimensions that pertain to their region, although they may have preferences over the remaining issues if they believe that choices there will eventually influence choices on the issues they deem salient. This  $n$ -dimensional arrangement, of course, is fertile ground for instability (Results 2 and 3), but federalism can assign different issues to different political jurisdictions in much the same way as Shepsle and Weingast (1981) argue that congressional

committees assign jurisdictions. The result of this assignment, under certain special conditions, is to induce an equilibrium outcome that does not otherwise exist.<sup>17</sup>

Constitutional federalism can generate stability in another way. Specifically, by dividing a population into a variety of subpopulations, each subpopulation can have a more compact distribution of preferences than the whole. Thus, although institutional devices that raise the vote quota may have little effect on the population taken as a whole, such devices can generate stability at the local level (Result 7).

We also know, however, that any outcome realized either by dividing issue-jurisdictions or populations can be threatened by a relaxation of the rules -- a majority of the population will prefer different national outcomes, especially if the assignment of tax liabilities can be placed on the public agenda (Results 2, 3, and 8). Thus, barring any long-term disadvantages to doing so, there will always exist losers at the local level who will try to nationalize issues and undermine constitutional federalism. What remains unclear, then, is why "parchment barriers" might operate in this way -- why majority coalitions might continue to regard constitutional federalism as a legitimate part of a self-enforcing arrangement.

Thus, consider the issue of reapportionment and notice that in the United States at least, the Supreme Court may set general guidelines for acceptable apportionment ("one man one vote"), but the national government does not intervene otherwise in such matters -- in accordance with the constitution, congressional district boundaries are determined at the state level. That this allocation of responsibilities is stabilizing derives from the fact that reapportionment, which redistributes political power within a polity, is inherently destabilizing in the social choice theorist's definition. But by allowing only general principles to be decided at the national level, this instability is localized and does not infect national politics. Moreover, the local losers in these reapportionment decisions have no guarantee that they will fare better if the matter is nationalized -- indeed, if the winners take care not to wholly threaten the losers with "political elimination," nationalization may threaten greater losses. Federalism, then, and the threat of nationalization, moderates the actions of local winning coalitions. And thus isolated, this component of redistributive politics cannot complicate the determination of general principles of apportionment and society's general coordinative rules.

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<sup>17</sup> Bernholz (1986) shows, moreover, that there is a theoretical reason for believing that federalism removes some of the instability that social choice theory identifies. Specifically, for any preference profile in society, rights to decide between different alternative can be assigned to subsets of society in such a way that the society has no dictator or oligarchy, but social preferences are nevertheless transitive. Of course, it remains an open question as to whether federalism assigns those right in a way that achieves this end.

This is not to say that constitutional federalism absolves the national government of all redistributive matters. Without appropriate constitutional prohibitions that are difficult to circumvent or change, the size and influence of the national government will grow relative to other governmental units, thereby increasing the redistributive matters that require national resolution. This process, in turn, nationalizes "special interests" and threatens "the decline of the state" of which Olson (1982) warns.

In this context, the argument in the preceding section that electoral institutions can yield different objective among politicians competing within identical constituencies becomes especially important. Madison, *et. al.* miscalculated on one important matter -- they failed to predict the formation of national political parties and in so doing they failed to confront the danger that such parties can circumvent a separation of powers and become the basis of a coalition that is transformed into a faction. However, our discussion reveals that the members of the same party can have quite different objectives, and these differences preclude the development of such a faction. Parliamentary systems do not have this safeguard, and their only protection is electoral institutions that create incentives for multi-party systems or for parties that are loose coalitions of factions. Federalism, however, provides an additional safeguard that many unsuccessful presidential democracies failed to possess. In a constitutionally decentralized state in which political competition at governmental sublevels counts for something because those sublevels have real resources at their disposal, political parties will themselves be decentralized. Local politicians will be as much in competition with national party organizations as those sublevels are in competition with the national government. And decentralized parties are a poor basis on which to build factions that can circumvent a constitutional separation of power.

For these reasons it is unfortunate that it is probably impossible to establish a federalism that forever protects sub-units from the national government unless there are strong coordinating incentives to do so. For example, such a situation almost certainly exists in Switzerland since it is common knowledge that a unitary state would not long survive in light of that society's linguistic and cultural differences (Rabushka and Shepsle 1972). Constitutional federalism survives there because it coordinates effectively and no other arrangement is feasible -- it is the logical solution to the repeated prisoners' dilemma. In a state such as Taiwan, on the other hand, this federal form would most likely erode quickly because erosion is unlikely to be regarded as threatening overall political stability, and it would be dangerous to proceed on the assumption that federalism could provide any meaningful, long-term guarantee of political stability. Stability must be secured by other means.

## 9. 1860 - Constitutional Failure or Success?

It is generally assumed that the American Civil War illustrates constitutional instability and the singular example of chaotic American constitutional failure. Certainly a half-million battle deaths does not appear to mark a constitutional success, but those who accept this view fail to specify what would have constituted a success at that time or whether any constitutional arrangement could have afforded a better outcome.

One possibility, of course, would have been the elimination of slavery by peaceful means, presumably with the North "buying out" the South's position, using the resources that were otherwise spent on executing the war. Few persons would assert that this outcome is not a Pareto improvement over what eventually prevailed, but the contemporary theory of the causes of war tells us that such a resolution of the dispute was unavailable, regardless of constitutional provisions (see especially Blainey 1973). That the South began the war in the first place and that the North initially engaged in the conflict with such arrogance suggest that both sides believed they could win a military victory at acceptable cost. The fact that the cost subsequently proved unacceptable is not evidence of irrationality or miscalculation, for such are the frailties and limitations of human reason. In any event, these divergent perceptions about military and economic capabilities means that a peaceful, economic resolution of the conflict that maintained the Union was in all likelihood infeasible.

An alternative resolution is the peaceful secession of the Confederacy from the Union, and the continuance of slavery in the South. We cannot say how future generations might have evaluated this outcome, but if we ask today whether the eventual elimination of slavery, the passage of the Fourteenth Amendment to the United States Constitution, and subsequent interpretations of that amendment were worth the cost, the answer appears to be "yes."

A final possibility is that the constitution and the political processes it established would have been sufficiently flexible to allow for the continued existence of slavery. But if this is what we mean by a successful and stable constitution, then it is evident that we do not want our constitutions to be thus flexible and stable in all circumstances. Put simply, there are circumstances in which constitutions ought to "fail" and in which such "failures" ought to be construed as successes. If a constitution is constructed on a morally corrupt foundation, then success is the eventual destruction of that foundation and it merely remains for posterity to decide whether the method of destruction provided the most efficient feasible route to that end. That the American constitution attempted to accommodate the "peculiar" institution of slavery was its greatest vice, that it failed to do so was its singularly greatest success.

Thus, with perhaps a premonition of events to come, Hamilton uttered words that ought to be kept in mind by any modern-day architect of constitutions:



*And as to those mortal feuds, which in certain conjunctures spread a conflagration through a whole nation, or through a very large proportion of it, proceeding either from weighty causes of discontent given by government, or from the contagion of some violent popular paroxysm, they do not fall within the ordinary rules of calculation. When they happen, they commonly amount to revolutions and dismemberments of empire. No form of government can always either avoid or controul them. It is in vain to hope to guard against events too mighty for human foresight and precaution, and it would be idle to object to a government because it could not perform impossibilities (ibid #16: 79).*

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