Toward a General Theory of Constitutional Design

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1. Constitutions as Contracts

Benjamin Franklin spoke only infrequently in Philadelphia at the Constitutional Convention, but during the debate over the manner in which federal judges ought to be selected, he rose to offer this suggestion (as recorded in Madison's notes on the Convention):

> *Doctor Franklin observed, that the two modes of choosing Judges had been mentioned, to wit, by the Legislature and by the Executive. He wished such other modes to be suggested as might occur to other gentlemen; it being a point of great moment. He would mention one which he had understood was practised in Scotland. He then, in a brief and entertaining manner, related a Scotch mode, in which the nomination proceeded from the lawyers, who always selected the ablest of the profession, in order to get rid of him, and share his practice among themselves. It was here, he said, the interest of the electors to make the best choice, which would always be made the case if possible.*

It is tempting to treat this suggestion as an attempt to infuse a weighty discussion with a bit of humor. However, aside from noting the scarcity of his words, we should also take cognizance not merely of his many parts - patriot, statesman, publisher, inventor, etc - but also, having written what was then the seminal treatise on electricity, of Franklin as a scientist of international repute,

able to infer general principles from specific observations. Franklin's words, then, should be considered carefully, lest we make the mistake of assuming that aged geniuses can no longer provide practical advice or theoretical insight. In fact, Franklin does both. He is reminding the delegates of the ***theoretical*** nature of their enterprise, while infusing his lesson with a practical illustration of the theory of institutional design that must guide their efforts. In the jargon of contemporary economic theory, he is telling the delegates that their task is to design an *incentive compatible institution* – a political institution that takes individual motives, however self-centered, and, eschewing any attempt to modify them in their basic character, redirects them to yield a socially desirable outcome.

Franklin's lesson is itself a restatement of the one Adam Smith offers in his *Wealth of Nations* when explaining the operation of markets. And it is a lesson that reappears in various forms, most notably in the debate over ratification. *The Federalist* tells us that `the seeds of faction are sown in the nature of man' – a reminder that political institutions ought to be designed without the Marxist premise that basic self-interest can be transformed into something else – and instructs us that a viable political design is one in which`ambition counters ambition'. Thus, political institutions ought to be designed so that the potentially socially `dysfunctional' motives of greed and the quest for power, which cannot be banished from the political landscape, are made to control themselves and redirected to contribute to (or not impede) socially desirable results.

Franklin's lesson, then, stands as a theoretically general principle of institutional design. Unfortunately, that principle is too often or too easily forgotten. It is forgotten, for example, when legislation directs the state to specific policies without concerning itself with the ways in which the bureaus and agencies established to implement policy can be subverted in their purpose. More importantly, it is forgotten when constitutions are drafted assuming that individual rights will be protected merely by listing them or, as is the case with so many post-socialist documents, specific policies will be realized (e.g., housing for all, medical care for all) merely by stating them

as lofty goals indistinguishable from individual rights. And it is forgotten when constitutional structures are put in place to serve a specific interest, as when Boris Yeltsin established a super-strong presidency for Russia merely because its suits his immediate purposes.

Even when narrow purposes are not being served, design commonly proceeds in accord with other criteria. Political scientists and `experts' in comparative constitutionalism seek to generalize the experience of other states, often arguing the advantages of presidential versus parliamentary forms or of a bicameral versus unicameral parliament. Lawyers will assess the likely implications of specific words, employing their experience to assess the potential implications of each clause or phrase and the existence of unintended loopholes. Politicians, if they are not wholly self-serving, will try to gauge the likely impact of specific provisions - a veto rule, a rule on amendments, the structure of representation, the allocation of authority across levels of government - in light of the political constraints they confront or see looming on the horizon.

It is difficult, however, to see in any of this the practical application of Franklin's principle. This is not to say that we somehow know less about political institutional design than the Founding Fathers, or that progress has not been made in our understanding of democracy. The Framers were far from perfect. Having no experience with the matter, they failed to anticipate the critical role of political parties in a democracy (another faction in their thinking), and the dangers of specific ambiguities in the document they wrote (e.g, the inattention given to the structure and prerogatives of the court and their failure to explicitly permit or prohibit secession). More fundamentally, they failed to answer in a satisfactory way how a constitution taken as a whole can survive the operation of narrow self-interest. Even Franklin's lesson is incomplete. It does not tell us why anyone would consent to giving up an especially profitable practice for a judgeship, and, therefore, why the mechanism described is not ultimately replaced by something else because it fails to choose anyone who accepts the position offered. The missing piece of Franklin's story, then, is that not only must constitutions direct self-interest to specific ends; the

operation of those institutions must also give participants an interest in maintaining the structure of the document. Stated again in the jargon of economics, a fully described incentive compatible institution is one in which, given the choices it allows, the mapping it establishes between choices and outcomes, and the patterns of self-interest over which it must operate, (1) there exists at least one constellation of choices (individual strategies) that yields the socially desired outcome; (2) that outcome is an equilibrium in that there is no `critical' subset of decision makers that prefers to make different unilateral choices; and (3) there is no critical subset of decision makers that prefers to act unilaterally to abolish the institution itself, so that the institution is, like the outcomes it engenders, an equilibrium. Franklin's example illustrates the first two conditions whereas an especially evident example of the third is found in those election laws in which the authority to change the law rests exclusively with those elected under it. In this instance, the `winners' under the incumbent set of arrangements are unlikely to prefer seeking reelection under a different set, thereby giving the original set the stability we seek in constitutional provisions.

That we can restate and extend the principle Franklin illustrates using a general abstract representation for choices, preferences, and strategies, along with an appreciation of the complexity of the concept of an equilibrium, and an ability to identify the general conditions under which different equilibria exist, suggests that some progress has been made in our understanding of political institutional design. And this fact is perhaps best illustrated by our only recently revised view of constitutions and the sources of constitutional stability itself.

Briefly, if we were to attempt a general theory of constitutional design, the foremost question we must answer is "What is the fundamental mechanism whereby a constitution is rendered stable" or, equivalently, "How are constitutional provisions themselves enforced?" If, as Madison says, "a mere demarcation on parchment ... is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands (*The Federalist* #48: 254)" then it cannot be words themselves that offer the

mechanism of enforcement. But if it is not the words that enforce, then we are led to a logical conundrum. First, if the mechanism of enforcement lies outside the constitution -- if it lies in an oligarchy removed from constitutional constraint -- then either we are no longer speaking of a democracy or we have only pushed the problem back a step, and must then ask: What constrains the actions of this oligarchy and how are *those* constraints enforced? If, on the other hand, we argue, as some do, that enforcement lies in the institutions a constitution establishes -- for instance, a national court and the associated judicial structure -- then where are the things that enforce the provisions which define and limit the judiciary's authority? If those things are entities that the constitution itself establishes and constrains, such as the legislature or the executive, then we have merely provided circular reasoning: the constitution is enforced by institutions that are constrained by other entities that are constrained by the constitution -- in which case we must then identify the thing that enforces this entire edifice. We should not be surprised, then, to see scholars even two hundred years after the drafting of our own Constitution concluding that the "problem of the self-enforcing constitution has so far evaded solution" (Tullock 1987: 317-8).

The problem here lies, we would argue, with the traditional conceptualization of constitutions as contracts – as a social contract among the polity or between the polity and political elites. Put simply, if a constitution is a contract, then who enforces the terms of that contract? The classical (i.e., legal) theory of contracts leaves this question unanswered, or answers it only in the context of some over-arching authority with the power to enforce a contract's provisions. But aside from the otherwise undifferentiated `will of the people' there is no such authority in a democratic state, since even that will, without political structure, need not be anything more than incoherent noise. The problem of enforcement is perhaps best illustrated by constitutional secession clauses. The general view of such clauses is that a constitutional right to secede ``would increase the risks of ethnic and factional struggle; reduce the prospects for compromise and deliberation in government; raise dramatically the stakes of day-to-day political

decisions; introduce irrelevant and illegitimate considerations into these decisions; create dangers of blackmail, strategic behavior, and exploitation; and, most generally, endanger the prospects for long-terms self-governance" (Sunstein 1991:634). And if, as Sunstein argues further, a constitutional provision prohibiting secession is best interpreted as a contractual agreement whereby federal units pre-commit to strategies that preclude secession, what is the mechanism that in fact sets that precommitment in concrete. Defending such arguments, in fact, takes us to the core of a theory of constitutions, since it requires an answer to such questions as: If a political subunit of a federation chooses whether or not to secede strictly on the basis of self-interest, how can a constitutional clause influence that interest? If, as much of the theory of federalism suggests, people choose to form, maintain or dissolve a federation on the basis of its ability to resolve economic inefficiencies among otherwise sovereign states, then why would mere words influence economic calculations? And if a decision about secession is itself a response to beliefs about the responses of others who also act out of self-interest -- a belief about the likelihood that secession will be punished or ignored -- then why would a constitutional secession clause influence their self-interest and the likelihood that they will act in accordance with its terms (Chen and Ordeshook 1994)? Equivalently, what is the mechanism whereby a clause prohibiting secession would be enforced in the sense that it can alter the incentives of individuals to abide by its words?

Here, however, the theory upon which the notion of the incentive compatible institution rests -- game theory – provides the answer we seek, along with some practical guidance for constitutional design. This is neither the time nor the place to digress into any extensive discussion of this mathematically precise foundation upon which much of contemporary economic theory rests. All we need to know here is that that foundation tells us that there necessarily exists a vast multiplicity (if not an infinity) of alternative equilibria - of alternative sustainable outcomes- in essentially any `reasonably complex' social process. In fact, almost any feasible outcome – including those that benefit no one over the status quo – can correspond

to an equilibrium. To see the problems such a conclusion occasions, suppose two people each share the same two choices, say A and B, suppose they must make these choices day after day, and suppose that if they both choose A or if both choose B, then the corresponding outcome is a `myopic' equilibrium acceptable to both in the sense that neither person would prefer to unilaterally make a different choice on any particular day. Suppose moreover that the first person prefers the outcome, say O1, that prevails when A is the common choice whereas his counterpart prefers the outcome, say O2, that results when both choose B. Finally, suppose that if their choices do not match, then the outcome, O3, is mutually undesirable. What game theory tells us now is that the daily repetition of O1 as well as the daily repetition of O2 are both sustainable by some set of long term strategies as equilibria. This much is unremarkable. But we also know that a sequence in which outcomes alternate between O1 and O2 in nearly any pattern are also sustainable, albeit with more complex long term strategies. Moreover, not all sequences of outcomes that are sustainable as equilibria exclude the possibility that O3 will not prevail on occasion, even though the strategies that yield such a result may be complex and difficult to describe.

This multiplicity of equilibria generates any number of problems from the point of view of our two players, the most important being that absent an initial agreement as to what long term strategy (a plan of action as the situation unfolds) each will choose, there is no guarantee that any equilibrium will prevail or that the equilibrium which prevails will be beneficial for either of them. If, for instance, the long-term strategy pairs (S1, S2) and (T1, T2) are both mutually advantageous equilibria, there is no guarantee that (S1, T2) or (T1, S2) are equilibria or that, if they are equilibria, that they are advantageous to either player. Thus, to ensure a mutually advantageous outcome, or even an outcome that one player or the other finds desirable, strategies must be *coordinated*. But coordination itself need not be straightforward, as when the preferences for alternative equilibria are sharply divided or when complex monitoring is required to ensure that one player or the other will in fact choose the strategy initially agreed to. The

particular difficulty here is that effective coordination will require an appeal to things – processes, events, beliefs, etc. – that are exogenous to any abstract description of the situation, because if these `things' are somehow incorporated into our description, then we have generated a still more complex game that may yield a complex array of alternative equilibria in which coordination becomes even more imperative if disadvantageous outcomes are to be avoided.

Admittedly, this discussion might seem far removed from the more practical and complex task of drafting a constitution. Notice, though, that we have not limited the substantive content of the choices A and B, and thus we are free to give them a broad interpretation – including letting them be rules for action rather than specific actions. And in this context, that discussion suggests a profoundly different conceptualization of a constitution than is offered by the contractual perspective. First, consider the fact that it probably matters little in the life of our democracy whether the House of Representatives contains 435 or 345 members, whether executive veto overrides require a two-thirds or three-fifths vote, whether each state is represented by two or three senators, whether budgetary legislation must originate in one legislative chamber or another, and whether the Secretary of State or Defense stands highest in the order of presidential succession. We can also imagine the Republic surviving with a different rule for admitting new states, different age requirements for members of Congress, a different rule for ratifying treaties, a different system of presidential impeachment and conviction, a different method for electing a president, and even a different procedure for amending the constitution itself.

This is not to say that our history would be the same with these alternatives, but it is far easier to imagine the Republic in peril if the constitution were wholly silent or explicitly ambiguous on each of these things. The early history of the United States consists of a number of critical junctures because of what the Constitution did not say – about, for instance, the Supreme Court's authority or the rights of states to secede – rather than because of what it did say. Because the ongoing political process of any nation allows for a plethora of equally `acceptable'

equilibria of rules, what is important is that it be coordinated to the same set of rules so that whenever a rule comes into play, its precise meaning is not the subject of self-interested and self-serving debate. That is, the varied constellation of procedural options may each correspond to an equilibrium, in which case we ought to view a constitution not as a contract but as an *equilibrium selection device*– as an agent of socio-political coordination.

2. Some Rules of Design

The advantage of conceptualizing a constitution as a coordination device as opposed to a contract is that it solves two problems simultaneously. First, it answers the question as to a document's ultimate basis of enforcement. Specifically, a constitution is sustained – if it is sustained at all – because it coordinates people to an equilibrium of rules and procedures and as such it requires no exogenous agent of enforcement other than the self-interest of individuals within the polity: "a constitution does not depend for its enforcement on external sanctions ... 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" (Hardin 1989).

Second, and perhaps more importantly, this conceptualization provides some guidance as to the parameters of successful constitutional design. Admittedly, this view is relatively new and the precise nature of that guidance has yet to be worked out fully (Ordeshook 1992, 1993). But consider the following: Early drafts of a constitution for the Russian Federation offered the clause that children should care for their aged parents. Such a provision seems silly to students of Western constitutions, and fortunately this view ultimately prevailed and the clause was not incorporated into the draft presented to the Russian electorate for approval in 1993. But why is such a clause deemed `silly'? If it is legitimate for the state to constrain the actions of individuals through statutory legislation, why not do so directly through its constitution? One answer, of course, is that such clauses are unnecessary. However, if that is our argument, then those who see the necessity for them can counter by saying `it can't hurt to include them'. For another

example, we note that it is our experience that even when students wholly untrained in constitutional concepts or design are presented with a document of 300 or even 100 pages of text, their reaction is to deem the document as less than satisfactory – again, even silly. And indeed, one precept of design upon which most students of constitutional design appear to agree is `keep it simple'. But if a constitution is a contract, then what is the general theoretical principle that justifies simplicity? Isn't it better, we might ask, to close all foreseeable loopholes and anticipate all possible contingencies? Why, aside from the potential errors of drafting that length allows, isn't a constitutional document of 300 pages preferable to one of 10?

We can begin to answer such questions and provide the requisite principles by noting that every *society*, by definition, possess a great many things that facilitate social coordination in the same way we argue constitutions operate -- things we identify as norms, customs, and social conventions that also must be self-enforcing (Coleman 1987, Hardin 1989, Calvert 1995). Thus, a constitution can at best be only a part of society's fabric, and to make its provisions effective, it should parallel the `design' of those other self-enforcing mechanisms. The first thing to appreciate, then, is that social norms and customs are effective only if they are readily understood by nearly everyone. Complex rules cannot coordinate. A rule or social norm such as "give an old woman your seat on the bus if you are young and agile" may leave room for interpretation, but it is more generally effective than one which states "if you are younger than 45 and in reasonably good health as determined by a licensed physician on the basis of an exam administered no more than fourteen months earlier, and if a woman stands before you, no more than 1 meter distant from your seat, relinquish your seat if she gives evidence of being older than 55, walks with difficulty, or is carrying more than 15 kilograms in groceries; otherwise, relinquish your seat only if requested to do so, and then only if her request is in the form of ..." It may be true that the actual application of a common norm or convention will require complex contingent decisions that parallel this legalistic contractual version. But simplicity is required if the general intent of the norm is to be effectively communicated and universally accepted. The ambiguity that

accompanies simplicity can be accommodated on a case by case basis – by common sense and, if necessary, the development of additional conventions – in the same way a constitution is interpreted and reinterpreted over time by the courts and evolving social consensus.

This view of constitutional provisions, then, suggests a rule of constitutional design that answers most of the questions we ask earlier about length and complexity. Specifically:

> ***(Rule 1)*** *constitutional provisions ought to be simple and concise, unencumbered by legalistic complexity.*

And since a constitution in its ideal form ought to be a part of a social consensus that consists of all the norms and conventions that describe a society:

> ***(Rule 2)*** *If a society has a democratic tradition -- even one that lies in the distant past -- then any constitution ought to make as few changes in those traditions as possible and link itself to that past as much as possible.*

The US Constitution illustrates the application of this second rule. For example, readers of that document will search in vain for any reference to `majority rule' or `majority vote'. The only references to voting rules we find there pertain to special cases — amendment, impeachment, and the definition of a legislative quorum. The explanation for this `omission' is straightforward: It was unnecessary for the Framers to say otherwise since, once the set of eligible voters is identified, there already existed a socio-political norm that, unless otherwise stated, presumed majority rule. Aside from the supposition that an extraordinary action such as impeachment requires a `special' vote, there was no consensus on how special that vote ought to be. It is only here, then, that the constitution becomes specific, requiring a vote of two thirds in the Senate for conviction (Article 1, Section 3.7). This requirement stands in sharp contrast to Article 1, Section 2.5, which states simply that "The House of Representatives ... shall have the sole power of

impeachment." The implication here is that power of impeachment can be exercised by a simple majority, subject to the requirement that a quorum (a majority of members, as specified in Article 1, Section 5.1) exists to consider the matter.

The argument that a stable constitution is part of society's structure of norms and conventions rationalizes another rule of design that applies to the issue we discuss earlier of whether a constitution is an appropriate place to try to regulate individual behavior. Here we have in mind provisions such children being required to care for aged parents. Although we might agree that this clause expresses a worthwhile sentiment, few Western specialists in constitutional design would be sympathetic to its inclusion in any constitutional document. Lawyers, economists and political scientists alike would decry its imprecision, the infeasibility of enforcement, and its invitation to unwarranted incursions into private affairs. More generally, however, if we viewa constitution as a part of society's overall system of coordinating mechanisms, then we can infer that such a document should not try to rewrite preexisting norms and conventions that are consistent with democratic practice, since doing so jeopardizes a constitution's legitimacy and ability to coordinate. Absent a reason for believing otherwise, it is far safer to assume that social norms and customs have more permanency than any newly written document, at least in the domain of everyday social convention. A constitution may choose to restate some of those conventions, but there is always the danger that mere words open the door to a misinterpretation of things or to government meddling in matters best left to less precise social processes. In any event, our argument here is merely a restatement of the idea that a constitution should be molded to the culture it serves. But rather than try to draft a document that *explicitly* satisfies this objective, a far easier approach is to minimize the document's domain. Here, then, is the rationalization for a rule consistent with most constitutions we label Western:

(Rule 3) *Constitutions should focus on the design of those institutions and rights minimally necessary to ensure society's ability to coordinate to those policy goals identified through such mechanisms as democratic elections.*

Put differently, using a constitution as a tool of social (as opposed to political) engineering can threaten its role as a political-institutional coordinating device.

A fourth rule, closely related to the third and justified by essentially the same argument is the following:

(Rule 4) *the institutional design a constitution offers should be based on the presumption that any need for greater specificity will be attended to by the legislative and judicial institutions it establishes and by the evolutionary development of subsidiary norms and conventions.*

This rule is not an argument for wholesale ambiguity. Great skill and foresight are required when trying to assess those things that require explicit provision and those things that can be left to evolutionary development. The most evident failure of the US Constitution, for instance, occurred with respect to an issue about which it was largely silent and for which there was no social or political-economic norm that could serve as a substitute — the right of secession. A great many things can be cited as `causes' of the American Civil War, but certainly an important contributing factor was the fact that the Constitution neither explicitly allowed nor disallowed secession. The states of the Confederacy might have chosen a different path had the Constitution explicitly disallowed secession; and Lincoln might have been unable to rally the Union to war had it allowed it. We cannot, of course, test any hypothesis here, but it is evident that ambiguity, absent a consensus on the legitimacy of one action or another as supplied by some other coordinating

mechanism, left the Constitution and the country open to disruption.

One advantage of our interpretation of a constitution now is that it helps identify an *effective constitution* -- which is a document that establishes stable and self-generating expectations about peoples' political choices. Briefly, coordination, whether it be to specific actions or to institutions, requires a change in beliefs — a change in people's expectations about what others believe and how they will act. Hence, society can be trapped in a coordination dilemma in which a change in expectations requires concrete evidence of action, but the requisite action will be forthcoming only after expectations themselves change. In game-theoretic terms, coordination to a specific equilibrium requires that everyone's intent to choose appropriately must be *common knowledge*: Everyone must know that everyone else will choose an appropriate strategy; everyone must know that everyone knows this; everyone must know that everyone knows that everyone knows this, ad infinitum. Knowing that others will choose strategies appropriate to a specific equilibrium dissuades you from defecting; knowing that they know that you know what they will do, dissuades them from defecting and thereby reenforces your initial belief, and so on. Little is known, unfortunately, about expectations, their genesis and their evolution. But "it is clear that communication is critical to the ability to settle on a coordinated outcome when interests conflict" (Calvert 1995: 252) if only because the condition of common knowledge is not likely to be satisfied otherwise. Thus, a conceptualization of constitutions as a coordination device suggests the following with respect to how they ought to be written and ratified:

> ***(Rule 5)*** *The writing and ratification process of a constitution should be separate enterprises. The preparation of the document should occur outside of public view, while its subsequent ratification should involve as broad a segment of society as possible.*

This rule, of course, merely reiterates the history of the US Constitution. But its logic is wholly general. First, widespread participation in the drafting process need not coordinate society to anything. Indeed, since not everyone is likely to share the view of constitutions as coordination devices as opposed to social contracts, broad participation in drafting is more likely to reveal society's political-economic conflicts in ways that compel drafters to try to incorporate political compromises within it even if those compromises are best left to subsequent legislation or to the gradual evolution of other social conventions. However, once the document is prepared, a way must be found whereby expectations are coordinated and the realization of that coordination rendered common knowledge. And again, the American experience -- which entailed widespread discussion, debate within state legislatures and specially organized assemblies, and the writing of the *Federalist Papers*, as well as those editorials and letters of the `anti-federalists' -- is a model for other states to follow.

3. Conclusion

The six rules of constitutional design we offer are hardly original or exceptional. They largely correspond to the practical advice nearly any student of design might offer to those who would draft a document for a newly emerging democracy. And doubtlessly, exceptions can be found to the advisability of their unquestioned and universal application. Our argument here, however, is that the justification for such rules need no longer rely on intuition or ad hoc arguments. Instead, there is the promise that they can be made to follow logically from the specific conceptualization of a constitution as a socio-political coordinating device. The elaboration of this argument may, of course, lead to revisions of our rules, to limits on the conditions under which they apply, and, perhaps even to revised or additional rules. In addition to such rules, however, there is one additional implication of this conceptualization of constitutions. Specifically, it is often asked whether the Western experience with democratic constitutionalism (and the United States in particular) has any relevance to the design of such documents elsewhere – to societies with little

or no experience in democracy, with cultures that differ markedly from ours, and which confront economic circumstances far more daunting than what we find in Europe or North America. Indeed, it is not uncommon for those who would advise on the design of such documents to encounter the objection that a society's religion, history, culture, or whatever renders past experience irrelevant.

Absent a general theory of democratic constitutional design it is difficult to offer a definitive answer to such queries or to counter arguments that assert irrelevance. But just as there is no such thing as `Western chemistry' or `Caucasian physics', there also cannot be any wholly satisfactory theory of constitutional design that applies only to a particular culture, era, or society. Theories – at least scientific ones – are wholly general and offer particular substantive meaning only after the parameters within them are assigned specific values. Hopefully, the view offered here of constitutions as coordination devices, with the foundation of that view formulated in terms of abstract and general concepts as strategy, preference, perception, equilibrium, and beliefs, can yield such a theory. And in that case we can assert the universal relevance of our experience with democratic constitutions, if only as examples of the successes and failures to coordinate to particular ends and particular institutional arrangements.

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