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Behind a Veil of Ignorance?

Power and Uncertainty in Constitutional
Design

 Springer

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Foreword

Constitutional political economy is one of the oldest fields in social science. It began in Athens during its Golden Age with careful analyses by Plato and Aristotle. Both analyzed fundamental macropolitical issues in civil and constitutional law. And, both developed categories and lines of reasoning that continue to be used today. Risk and uncertainty played a role in their designs, but mostly the risks associated with what today would be termed political agency problems. How likely would government leaders be to govern appropriately or inappropriately within the alternative designs considered, given the men who would occupy or select others for positions of authority? How can one construct a good, durable government out of persons who are not always good themselves?

The uncertainties that worried them most were those associated with mankind itself, both as government officials and as voters. They did not analyze how uncertainties might affect prospects for adopting particular institutions. Nor did they address the reasons why governments are necessary, perhaps because it seemed so obvious to them that they did not feel it necessary to articulate, or perhaps because governments were by then taken as facts of nature, rather than puzzles to be explained.

If the world were stable or predictable, a well-conceived legal system might be sufficient for most purposes, as suggested by Plato in his *Republic* and his dialog on the *Laws*. Similar conclusions seem to emerge from the contemporary law and economics literature as well. Given well-defined and tradable property rights, Pareto-efficient outcomes can be reached through exchange but for transaction costs.

Yet, there are more potential “property rights” than can be completely characterized by a static series of laws at a given point in time. As populations grow and technologies change, the matters over which rights must be defined also tend to change, as with the rights over hunting grounds, agricultural land, printed books, the electromagnetic spectrum, the bandwidth on the backbone of the Internet, and information stored on cell phones. What can be or should be owned is not always obvious, nor who should own it. Although core concepts of the civil law are remarkably robust, liability, contract, and property law are often adjusted at the margins through time and, in many cases, improved by those adjustments.

Moreover, there are problems and opportunities that emerge which can most effectively be addressed through coordinated responses of the sort that are not likely to emerge spontaneously from the uncoordinated behavior of individuals or families. An invasion may need to be blocked. Large-scale waterworks may be constructed to accommodate population pressures or environmental problems associated with greater population densities. A highway system may benefit from bridges and road signs. The production of such services may themselves be subject to surprises, technological advances, and variations in demand that require nearly constant adjustments.

Adapting to new opportunities and problems evidently requires ongoing decision-making procedures in order to modify and extend civil law, address emergencies, and provide services such as law enforcement, defense, highways, and social insurance.

Governments—in the sense of active policy making—can thus be said to be necessary because of uncertainty, because of the advantages of changing rules and policies to mitigate unanticipated problems and take advantage of new opportunities. Moreover, the same uncertainties that produce the demand for active governance also imply that governments—the standing procedures and authority to make public policies—are also likely to benefit from reform as new circumstances arise. Thus, formal and informal amendment procedures are normally included in constitutional documents.

As argued by Plato, Aristotle, and many others in the past two millennia, it is the risk that that authority will be abused that causes prudent men and women to favor vesting their governments with limited authority and for including standing procedures for replacing officeholders that ignore the constitution or poorly execute their duties, as with elections and procedures for impeachment.

Exactly what authority to delegate to government officials and deliberative bodies is, however, not entirely obvious. This is true of constitutions created “whole cloth” and those produced gradually through a series of reforms. As a consequence, responsibility for designing constitutions and reforming them are normally delegated to relatively small groups of relatively distinguished men and women who meet to negotiate the details, often in a single room. These same persons will often expect to occupy high office after a government or reform is adopted and so have pragmatic reasons to vest significant authority in the various offices created or amended. Yet which office will go to which man or woman is not always clear.

Many authors, including the editors of this volume, argue that uncertainty about who will subsequently occupy seats of authority tends to increase support for fine-grained characterizations of authority. Each constitutional committeeman may trust himself or herself to be an unconstrained president or prime minister but not all the others in the conference room or elsewhere who might come to office. Given the uncertainty about who will occupy positions of authority, a constitutional committee will tend to agree that their chief executive and parliament have a carefully limited authority, although each might prefer to have unbounded authority for himself or herself.

In this manner, some kinds of uncertainty can justify particular authorities, but others can justify bounding those authorities, while making agreements about the bounds more likely to occur. Thus it can be argued that constitutions are written and revised because of the risks and opportunities associated with uncertainty both inside and outside of government, and that such uncertainty makes formal constitutional documents more likely to be adopted.

This volume explores the dual of those direct implications of uncertainty. If uncertainty encourages constitutional reform and facilitates agreement for constrained authority, then the most detailed constitutions are adopted in situations in which uncertainty is the greatest. In that case, the specifications of political authority and civil liberties in constitutional documents can be used to determine the extent to which constitutional designers were operating behind a veil—a veil that combined uncertainty and ignorance.

To measure the opacity of that veil, a careful analysis of several important constitutions was undertaken by the contributors to this volume. They identify a surprising number of fine-grained power relationships in the constitutional documents examined, of the order of 500 power relationships are described in each case. Insofar as fine-grained details indicate uncertainty during the negotiation process, an index of the opacity of the veil can be constructed. That index, in turn, can be used to analyze the normative claims of Rawls, Buchanan, and many other contractarians—that agreements from behind relatively dense veils tend to better advance general interests and thus produce better constitutions.

The result is a very interesting research project that includes the most careful work on constitutional power and limits to authority of which I am aware. In general, the contributors find that constitutional negotiations normally took place in settings where uncertainty was considerable. They also find that the more detailed the characterization of power relationships, the more liberal and durable the democracy tends to be.

November 2014

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